IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chen v. Dang,*
2023 BCSC 564

Date: 20230412
Docket: S222957
Registry: Vancouver

Between:

Qi Ling (Cindy) Chen and Chen (2018) Family Trust

Petitioners

And

Patrick Dang, SELC Canada Education Group Ltd., SELC English Language Center Canada Ltd., and SELC Career College Canada Ltd.

Respondents

- and -

Docket: S223388
Registry: Vancouver

Between:

Patrick Dang

Plaintiff

And

Qi Ling (Cindy) Chen and Chen (2018) Family Trust

Defendants

- and -

Docket: S223389
Registry: Vancouver

Between:

Patrick Dang

Petitioner

And

Qi Ling (Cindy) Chen and Chen (2018) Family Trust

Respondents

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Petitioners, in Action No: S222957 and for the Respondents, in Action No: S223389:	A.N. MacKay C.A. Peddle
Counsel for the Respondents, in Action No: S222957:	N. Mitha, K.C. G.A. Hooper
Place and Dates of Hearing:	Vancouver, B.C. February 27-28 and March 2, 2023
Place and Date of Judgment:	Vancouver, B.C. April 12, 2023

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I. Introduction

[1] Qi Ling (Cindy) Chen and Chen (2018) Family Trust bring three applications, one in each of the three proceedings before the court. First, they seek an order in Ms. Chen's and her Family Trust's petition (the "Chen Petition") producing the accounting records of the respondent companies. Second, they seek an order under Rule 9-5(1)(a) striking out Patrick Dang's action against Ms. Chen and the Family Trust (the "Dang Action"). Third, they seek an order in Mr. Dang's petition (the "Dang Petition") striking out Mr. Dang's claim for oppression and related remedies.

[2] The applications and the three court proceedings arise from a joint investment made by Mr. Dang and Ms. Chen to buy two educational companies in December 2020 through a holding company incorporated for that purpose. The business relationship was short-lived and had unravelled by the fall of 2020. Through the Chen Petition, Ms. Chen seeks remedies for oppression under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*Act*") relating to Mr. Dang's management of the respondent companies and his exclusion of her from the companies' governance.

[3] Mr. Dang maintains the parties agreed Ms. Chen would be a silent investor only and would leave Mr. Dang alone to run the companies without her involvement. He claims Ms. Chen and her husband, who had been employed as a vice-president of one of the companies, committed a number of wrongful acts in respect of the companies that amount to fraud and justify Ms. Chen's continued exclusion from the governance of the companies. He commenced his own oppression proceeding claiming Ms. Chen's alleged fraudulent activities and her efforts to involve herself in the management of the company are oppressive under s. 227 of the *Act*. He further claims Ms. Chen has failed to make her full required investment in the company and this is also oppressive. In addition to the oppression claim, he seeks to enforce the investment obligation through the Dang Action.

[4] In reasons for judgment dated March 10, 2023 and indexed as *Chen v. Dang*, 2023 BCSC 354 (the "March Judgment"), I gave judgment on the first application as

that matter had some urgency. I ordered pursuant to Rules 7-1 and 16-1(18) of the *Supreme Court Civil Rules* that the respondent companies produce accounting records to Ms. Chen and the Chen Family Trust.

[5] The issues that remain to be decided in these applications are whether the Dang Action and the claims of oppression in the Dang Petition should be struck as disclosing no reasonable claim. Briefly, Mr. Chen argues the Dang Action offends the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch.) because any claim to enforce the investment obligation must be brought by the company. She argues the Dang Petition, as it relates to oppression claims, is bound to fail because she has not engaged in any "corporate conduct" that could be oppressive since she has no control over the governance of the respondent companies. She also argues the Dang Petition discloses no peculiar harm to Mr. Dang that is unique to other shareholders.

II. Background

[6] SELC English Language Centre Canada Ltd. ("SELC English") and SELC Career College Canada Ltd. ("SELC Career") are private training institutions that operate under the name SELC College. SELC English provides ESL training while SELC Career provides career counselling. Both are regulated under the *Private Training Act*, S.B.C. 2015, c. 5 which is administered by the Private Training Institutions Branch of the Ministry of Advanced Education and Skills Training.

[7] In December 2020, Patrick Dang and Cindy Chen together purchased SELC English and SELC Career from Nichiigakkan Co. Ltd. They incorporated a holding company called SELC Canada Education Group Ltd. ("SELC Canada") to hold the shares in both companies. Ms. Chen and Mr. Dang are directors of SELC Canada. There are no other directors.

[8] As set out in a Shareholders Agreement dated November 27, 2020, Ms. Chen holds 51% of the shares in SELC Canada and Mr. Dang holds 49%. Ms. Chen's shares are held through the Chen Family Trust. SELC Canada holds all the shares

of both SELC Career and SELC English. The three companies are collectively referred to as the “SELC Companies”.

[9] Mr. Dang and Ms. Chen disagree over how the ownership structure of SELC Canada came to be. Mr. Dang claims he and Ms. Chen reached an agreement (the “Investment Agreement”) before SELC Canada was incorporated to buy the shares in SELC Career and SELC English (the “Subsidiaries”). According to Mr. Dang, Ms. Chen agreed to be a silent investor in the SELC Companies and would not involve herself in their management. She was to invest $500,000 and receive 51% of the shares of SELC Canada. Mr. Dang was to invest $50,000 for 49% of the shares plus he would take on the full management obligations of all three companies working at a below-market salary. Thus, his contribution was to be $50,000 plus his “sweat equity”. The alleged Investment Agreement was made verbally but Mr. Dang confirmed its terms in an email to Ms. Chen’s husband, Scot Sorensen, dated September 21, 2020. Mr. Dang says he negotiated the agreement through Mr. Sorensen while Ms. Chen was travelling, but Ms. Chen agreed to its terms.

[10] Mr. Dang alleges that Ms. Chen paid a first installment of $200,000 and another $50,000 was credited to her when the provincial regulator authorized the companies to release $100,000 from a fund held in trust. However, Ms. Chen did not make any further payment. Thus, Mr. Dang alleges there is a shortfall of $250,000 in her required investment.

[11] Ms. Chen denies the Investment Agreement as alleged by Mr. Dang. She claims she advanced the $200,000 to SELC Canada as a loan to finance the purchase of the Subsidiaries and that should now be recorded in SELC Canada’s books as a shareholder loan owing to her.

[12] The Shareholders Agreement, which is different to the alleged Investment Agreement, provides that the Shareholders – being Mr. Dang and Ms. Chen – shall vote their shares so that the board of each the three companies will be composed of two directors: one nominated by Mr. Dang and the other by Ms. Chen. At present, Mr. Dang is the only director of the Subsidiaries because there has been no annual

general meeting at which the parties could vote their shares as set out in the Shareholders Agreement. Thus, while Ms. Chen has a right under the Shareholders Agreement to be a director of the Subsidiaries, she presently is not.

[13] On January 1, 2021, shortly after the companies were purchased, Mr. Sorensen began work as the Vice President, Operations and Recruitment for the subsidiaries. However, Mr. Dang terminated his employment in October 2021 over concerns about performance. The termination was without cause and Mr. Sorensen was paid severance pursuant to his contract.

[14] Following the termination, Mr. Dang says he became aware of several concerning things about Mr. Sorensen's conduct as an employee. He initiated an investigation through which he came to believe that Mr. Sorensen and Ms. Chen had been involved in a number of concerning activities that Mr. Dang now characterizes as fraud. The alleged fraudulent activity is said to include:

- Preparing a false letter representing a person to be a student of SELC Career who was not;
- Creating a false letter and email address to represent someone to be an employee of SELC Canada who was not. Mr. Dang would later find a signed employment agreement for this individual, even though he was never an employee of any of the SELC Companies;
- Mr. Sorensen writing a letter stating that Ms. Chen was the chair of the board of SELC Career with an annual salary of $400,000, none of which was true;
- Mr. Sorensen offering friends of Ms. Chen free language lessons from SELC Language without Mr. Dang's consent or knowledge;
- Arranging a meeting with an immigration consultant to inquire how SELC College could assist persons to immigrate to Canada as investors in or employees of SELC College; and

- Engaging in WeChat discussions with several individuals about a proposed business strategy to establish the SELC Companies as vehicles for investment for persons seeking to immigrate to Canada.

[15] Mr. Dang says at no time was it ever contemplated that the SELC Companies would serve to facilitate immigration through investment in the companies and they are not in that business.

[16] Mr. Dang says he is particularly alarmed by the findings of the investigation because SELC College's business is regulated by the Private Training Institutions Branch (PTIB) of the provincial government. He states in one of his affidavits:

> I am concerned that the type of fraud Ms. Chen appears to have been involved in will jeopardize SELC College's certification with PTIB. Were this to occur, SELC College as an organization would be out of business.

[17] In a letter dated October 20, 2021 to Ms. Chen, Mr. Dang outlined the findings of the investigation. He asserted Ms. Chen's and Mr. Sorensen's conduct was "highly unethical, illegal and completely unacceptable business practice" and they were destroying the companies. He asserted she could no longer be a shareholder or a director of any of the companies. He asked for her resignation as a shareholder and director of SELC Canada and offered to fully refund her investment to date if she agreed to resign.

[18] On receiving this letter, Ms. Chen engaged legal counsel who replied on October 21, 2021 advising she would respond to the letter in due course.

[19] On December 24, 2021, counsel for Ms. Chen gave notice under the Shareholders Agreement that Ms. Chen was calling a meeting of the directors of SELC Canada for December 31, 2021. The stated purpose was to pass a resolution to set an annual general meeting (AGM). Quite clearly, Ms. Chen's intention was to hold an AGM so she could exercise her right under the Shareholders Agreement to be voted in as a director of the Subsidiaries.

[20] Counsel for Mr. Dang took issue the form of notice and maintained the directors meeting was not duly called. However, he said Mr. Dang would attend the meeting if Ms. Chen agreed to discuss the following three additional matters at the meeting:

1. The reason for Ms. Chen not paying the balance owing for her shares, pursuant to the Investment Agreement;

2. A response from Ms. Chen to the fraud allegations as set out in Mr. Dang's October 20, 2021 letter; and

3. A directors' resolution authorizing SELC Canada to sue Ms. Chen for failing to pay the amounts Mr. Dang claims she owes for her shares and over the fraud allegations.

[21] Ms. Chen did not agree to discuss these items but Mr. Dang attended the meeting anyway. So too did Mr. Dang's and Ms. Chen's respective solicitors and litigation counsel.

[22] At the meeting, Ms. Chen moved to set an AGM for January 12, 2022. Mr. Dang opposed. As there are only two directors of SELC Canada, the motion was defeated. Despite this, following the meeting Ms. Chen's solicitors emailed Mr. Dang and his counsel with a notice of general meeting of the shareholders for SELC Canada to be held on January 12, 2022. The email states the notice is being sent "further to the board of directors meeting today". It identifies the business to be conducted at the meeting as including the appointment of Ms. Chen to the board of both Subsidiaries and the appointment of MNP LLP as auditors for the ensuing year. MNP LLP are Ms. Chen's own accountants.

[23] On January 3, 2022, counsel for Mr. Dang wrote to Ms. Chen's solicitors and litigation counsel pointing out that the motion to hold an AGM did not pass at the directors meeting and thus was invalid. He also stated that Mr. Dang would be proceeding with a directors meeting on January 10, 2022 to discuss the three items

he had proposed for the December 31, 2021 meeting. He said there are “serious allegations of misconduct which urgently require Ms. Chen’s response.”

[24] Through an exchange of emails, counsel confirmed Ms. Chen would not attend a January 10, 2022 directors meeting and that meeting did not proceed. Ms. Chen also did not proceed with the AGM she had called for January 12, 2022.

[25] Over the next two months, counsel exchanged correspondence about the dispute but nothing was resolved.

[26] On April 8, 2022, Ms. Chen filed the Chen Petition seeking relief from oppression under to s. 227 of the *Act*. She alleges her reasonable expectations for the operation and management of the SELC Companies included, among other things, that the parties would vote their shares to make her a director of the Subsidiaries, that Mr. Sorensen would be part of the senior management team, any change to senior management would require unanimous approval of the directors, and Ms. Chen would participate in the management of the companies with access to all financial records. In her petition, she seeks an order appointing an interim monitor for the companies or, alternatively, an order removing Mr. Dang as director of all companies. She also seeks an order for the holding of an AGM within 10 days and an order for production of accounting records. The Chen Petition is scheduled for hearing starting April 17, 2023.

[27] On April 25, 2022, Mr. Dang commenced the Dang Action by filing a Notice of Civil Claim against Ms. Chen and the Chen Family Trust. He seeks to enforce the alleged Investment Agreement and an order that Ms. Chen compel the Chen Family Trust to invest the outstanding $250,000, plus interest, in SELC Canada.

[28] Also on April 25, 2022, Mr. Dang filed the Dang Petition against Ms. Chen and the Chen Family Trust seeking relief from oppression. He did not name any of the SELC Companies as respondents. The oppressive conduct he alleges includes the fraud allegations, Ms. Chen’s lack of substantive response to those allegations, Ms. Chen’s failure to complete her required $500,000 investment, Ms. Chen’s

alleged efforts to involve herself in the management of the company contrary to the Investment Agreement, and the events surrounding her calling of the December 31, 2021 directors meeting and the AGM.

[29] The Dang Petition also initially sought an order granting Mr. Dang leave under s. 232 the *Act* to bring a derivative action against Ms. Chen in the name of the SELC Companies for breach of contract and breach of fiduciary duty. According to the Petition, Mr. Dang proposed to add the SELC Companies as plaintiffs to the Dang Action. However, this part of the petition was later withdrawn in a February 21, 2023 amendment.

[30] On February 8, 2023, Ms. Chen amended the Chen Petition to seek an order that Mr. Dang make an offer to purchase Ms. Chen's shares in SELC Canada under a shotgun clause in the Shareholders Agreement.

[31] On February 21, 2023, Mr. Dang amended his petition also invoking the shotgun clause and similar relief under s. 237(3)(h) of the *Act*.

III. Issues for the Applications

[32] The issues that remain to be decided after the March Judgment are:

a) Should the Dang Action be stuck for offending the rule in *Foss v. Harbottle* and thus disclosing no cause of action?

b) Should the oppression claims in the Dang Petition be struck for disclosing no reasonable claim?

IV. Application to Strike the Dang Action

[33] Ms. Chen applies to strike the Dang Action under Rule 9-5(1)(a) on the basis that it discloses no reasonable claim. The well-established test for striking a claim under this rule is that it must be plain and obvious that the pleading discloses no reasonable cause of action or, put another way, has no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 ["*Imperial Tobacco*"].

[34] Ms. Chen argues the Dang Action offends the rule in *Foss v. Harbottle* in that Mr. Dang, as a shareholder, seeks to enforce a claim that must be brought by SELC Canada and not Mr. Dang. The rule in *Foss v. Harbottle* was summarized as follows in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para. 59:

> The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action.

[35] The rule's rationale lies in the fact a corporation is a separate legal entity and the principle of limited liability. A shareholder who invests in a company accepts the fact that the investment "follows the fortunes of the company" and the shareholder can only influence the company's fortunes through the exercise of the shareholder's rights, including voting at general meetings or pursuing a derivative action or an oppression remedy: *Hercules Management*, para. 27 quoting *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354, at p. 367

[36] In his Notice of Civil Claim, Mr. Dang pleads the particulars of the alleged Investment Agreement. He claims Ms. Chen agreed she would invest $500,000 in SELC Canada as a silent investor. Mr. Dang agreed to invest $50,000 plus his sweat equity by taking a management salary at a below-market rate. However, Ms. Chen invested only $250,000 and, in breach of the Investment Agreement, she has failed to invest the remaining $250,000. Mr. Dang seeks an order that Ms. Chen cause the Chen Family Trust to pay SELC Canada $250,000.

[37] For the purposes of this application to strike, I must assume these pleaded facts are true: *Imperial Tobacco*, para. 17.

[38] Ms. Chen argues that only SELC Canada has the right to the remaining $250,000 investment, not Mr. Dang, and only SELC Canada can sue for that payment. Mr. Dang concedes Ms. Chen, through the family trust, owes the money to the company and not to him but the obligation to make the investment and to do so in the specified amount lies solely in the Investment Agreement to which the

company is not a party. Thus, the company has no way of enforcing payment of the full $500,000 because there is no agreement between Ms. Chen and the company that she must invest $500,000 or that she would pay the company that amount for the shares.

[39] I find it is not plain and obvious that the Dang Action offends the rule in *Foss v. Harbottle* or that it is otherwise bound to fail. Rather, assuming the pleaded facts to be true, it appears to make a valid claim. The obligation to invest $500,000 is found only in the Investment Agreement. Since the company is not a party to that agreement, it has no standing to sue to for its enforcement: *Waugh et al v. Slavik et al.,* [1975] B.C.J. No. 1159 at para. 41.

[40] However, it is open to Mr. Dang – and only Mr. Dang – to sue Ms. Chen on the Investment Agreement to seek an order that she specifically perform her obligation under the agreement. A binding agreement between two parties to confer a benefit on a stranger to the agreement can be enforced by a party to the agreement seeking an order for specific performance: *Waugh v. Slavik*, para. 52; *Beswick v. Beswick*, [1967] 2 All E.R. 1197.

[41] Here, based on the pleaded facts, the Investment Agreement is binding on both Mr. Dang and Ms. Chen. As the only two shareholders in what would become SELC Canada, Mr. Deng was to receive the benefit of Ms. Chen's investment in SELC Canada while Ms. Chen would receive the benefit of Mr. Dang's investment plus the sweat equity he was to put into the company. Consideration flowed both ways.

[42] Contrary to Ms. Chen's submissions, I do not find it fatal that Mr. Dang did not use the precise words "specific performance" in describing the relief sought in the Dang Action. Mr. Dang seeks "an Order that Ms. Chen cause the Chen Trust to pay to SELC Canada, $250,000". That is relief in the nature of specific performance and is permitted under the principle in *Beswick*.

[43] Ms. Chen further argues the law must imply an agreement between SELC Canada and Ms. Chen that the SELC Canada would issue Ms. Chen's shares in exchange for $500,000. She says it is only on that implied agreement that the claim for a $500,000 investment can be enforced and this must be done by the company. Ms. Chen has cited no authority for this proposition and I am not persuaded by it. However, even if the law were to imply an agreement for the issuance of the shares, the law cannot imply how much Ms. Chen was to pay for those shares. That is a factual matter. The commitment to invest $500,000 is key to the Dang Action and rests solely in the terms of the alleged Investment Agreement which SELC Canada has no standing to enforce.

[44] Thus, I find the Dang Action is properly pleaded as a claim for specific performance that only Mr. Dang can pursue. It is certainly not bound to fail if the facts it alleges are true. I therefore dismiss Ms. Chen's application to strike the Notice of Civil Claim in the Dang Action.

VI. Application to Strike the Oppression Claims in the Dang Petition

[45] In her third application, Ms. Chen seeks is an order striking the oppression claims in the Dang Petition pursuant to Rule 9-5(1)(a) and (c) of the *Supreme Court Civil Rules.* She argues the alleged acts of oppression are not actions of the company or exercises of corporate power which she says are required for an oppression claim. She also argues the harms alleged are to the company and not peculiar to Mr. Dang as required for an oppression claim.

[46] Mr. Dang argues that Ms. Chen has acted in her own self interest and has done so purporting to have the authority of a director and majority shareholder of SELC Canada. He argues this is sufficient to meet a requirement for corporate conduct, or, at least, it is not plain and obvious that her actions do not amount to conducting the affairs of the company or an exercise of the powers of the directors as contemplated by s. 227 of the *Act*. He also argues Ms. Chen's conduct is contrary to his legitimate expectations that she would not involve herself in the management

of the company, including with respect to the alleged fraudulent activity, and that she would invest the full $500,000 in SELC Canada.

[47] As with the application to strike the Dang Action, I must assume the facts alleged in the Dang Petition are true for the purposes of this application.

1. The Oppression Remedy

[48] Under s. 227 of the *Act*, a shareholder may apply to the court for an order granting relief where the affairs of the company or the powers of the directors are being exercised in an oppressive or unfairly prejudicial manner as against the shareholder. Section 227(2) states:

> **227.** (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[49] If oppression or unfair prejudice is established, s. 227(3) gives the court wide discretion to grant "any interim or final order it considers appropriate" including a long list of potential remedies outlined in paragraphs (a) through (r).

[50] To be entitled to relief under s. 227, the applicant must first show that it had a reasonable expectation with respect to the conduct of the affairs of the company and secondly that the reasonable expectation was violated by oppressive or unfairly prejudicial conduct: *BCE Inc v. 1976 Debentureholders*, 2008 SCC 69 at para. 68 ["*BCE Inc.*"].

[51] In *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2016 BCCA 258 at para. 53-54 ["*CSA Building*"], Newbury J.A., writing for the court, observed that an oppression action is clearly a "personal" one and not a representative or

derivative one. The oppression or unfair prejudice must be suffered by the shareholder as a shareholder. Not every personal claim that a shareholder might assert against a corporation will constitute oppression or unfair prejudice. Where a claimant has a clear remedy in contract or tort, for example, courts are unlikely to grant an oppression remedy, although where a complainant can show that an entire course of oppressive conduct includes another cause of action, that cause may also be remedied through an oppression claim.

[52] Newbury J.A. further confirmed at paras. 72-74 that the claimant must have suffered some peculiar harm that separate and distinct to harm suffered by all shareholders. Where the harm is suffered equally by all shareholders, the claim is more likely to be a derivative one that must be brought on behalf of the company with leave of the court.

[53] In *Dubois v. Milne*, 2020 BCCA 216 at para. 108, Justice Groberman commented that a claimant having suffered some particular harm may be entitled to bring an oppression claim notwithstanding that parts of the claim might, at least theoretically, have been pursued by way of a derivative action. He also suggested at para. 110 that in the context of a closely held corporation it may not be productive to require the claimant to pursue a derivative action if an individual action for oppression is available.

[54] Each oppression claim is fact-specific and conduct found to be oppressive or unfairly prejudicial in one case might not be found to be so in others: *CSA Building*, para. 50. The size, nature, and structure of a corporation may be relevant: *CSA Building*, para. 74.

2. The Amended Dang Petition

[55] In the Dang Petition, as amended, Mr. Dang seeks remedies from oppression under s. 227 and remedies under s. 324. Section 324 permits the court, on application by the company, a shareholder, a director, or another person, to liquidate or dissolve a company if the court is satisfied that it is fair and equitable to do so. It is also open to the court under s. 324 to make any order under s. 227(3), which are the

remedies provided for oppression. Ms. Chen seeks only to strike Mr. Dang's oppression claims and not the claim and relief sought pursuant to s. 324.

[56] The oppressive conduct Mr. Dang alleges falls generally into three categories:

a) The fraud allegations, including:

- the five acts of fraud alleged by Mr. Dang; and
- Ms. Chen's refusal to respond substantively to the fraud allegations;

b) The alleged breach of the Investment Agreement, including:

- Ms. Chen's refusal to pay the $250,000 balance of the investment she committed to make under the Investment Agreement; and
- Ms. Chen seeking to become actively involved in the operation of the SELC Companies contrary to the Investment Agreement; and

c) The events concerning the December 31, 2021 directors meeting, including:

- Ms. Chen refusing to discuss the three items Mr. Dang wished to discuss at the meeting;
- Purporting to call an AGM after the directors meeting even though the motion to do so failed; and
- Seeking to have Ms. Chen's personal accountants appointed as auditors for the SELC Companies.

[57] I address each of these three categories in turn.

[58] As this is an application to strike under Rule 9-5(1), I reiterate that it must be plain and obvious that the claim as pleaded discloses no prospect for success. Before the claim can be struck, it must be "perfectly clear" that it fails to disclose a

reasonable claim: *Imperial Tobacco* at para. 17; *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.); *Madco Investments Ltd. v. Western Tank & Lining Ltd.*, 2017 BCSC 219 at paras. 20-23.

(a) The Alleged Fraud and Failure to Respond

[59] Ms. Chen argues the alleged fraudulent activities (which she denies but acknowledges I must accept as true for this application) cannot amount to oppression because they do not constitute *conduct of the company* as she says is required for an oppression claim. She says she has no control over the company and therefore has no ability to conduct its affairs in any manner – oppressive or otherwise. As demonstrated by the ill-fated December 31, 2021 directors meeting, she has no power as one of two directors of SELC Canada and she is not a director of either subsidiary, although she has a right to become one under the Shareholders Agreement. She says only Mr. Dang, as the sole director of the Subsidiaries, has any ability to exercise any powers of the companies.

[60] In my view, it is not plain and obvious that the alleged fraudulent activity cannot be the subject of an oppression claim. It is true that Ms. Chen cannot exercise the governance authority of any of the companies but I am not convinced that s. 227 must to be read so as to limit oppression claims to conduct by those in control of the management of the company: *CSA Building,* para. 52. While that will be true of most oppression claims, the language of s. 227 refers to how the "affairs of the company" have been conducted which may be broader than simply its governance. As the Supreme Court of Canada stated in *BCE Inc*. at para. 65:

> [65] … Often, the conduct complained of is the conduct of the corporation or of its directors, who are responsible for the governance of the corporation. However, the conduct of other actors, such as shareholders, may also support a claim for oppression…
>
> [Emphasis added]

[61] Ms. Chen is a director and a majority shareholder in the SELC Canada. Mr. Dang's allegations are that she has used her influence *in that capacity* to carry out the impugned activities. The allegations are that she engaged in various forms of

conduct during which she purported to act in her capacity as director or majority shareholder or in which she held herself out as exercising company authority even if she had no actual authority. It is alleged that she used her position as a majority shareholder and director to cause others to believe that she spoke for the corporation. Arguably, this may be conducting the affairs of the corporation by a person who is both a director and a majority shareholder, even though she is not in control of the company or actually exercising powers of corporate governance. In my view, on an application to strike, it is not plain and obvious that this conduct cannot fall within the scope of s. 227.

[62] I have not been referred to any authority where the impugned oppressive conduct is that of a single director with no actual authority but who is alleged to have engaged in conduct under the guise of the ostensible authority of her office. However, nor have I been directed to any authority that says this cannot be captured by an oppression claim. In the circumstances of an application to strike, I am not persuaded that it is plain and obvious that Mr. Dang's claim is bound to fail for a lack of corporate conduct.

[63] Ms. Chen further argues that any harm caused by her alleged fraudulent conduct is harm to the company and is not peculiar to Mr. Dang: *CSA Building,* paras. 72-73. She argues the claim can therefore only proceed by way of a derivative action. She says Mr. Dang merely asserts that he has suffered a peculiar loss and a bare assertion is insufficient to support the oppression claim.

[64] I am not persuaded it is plain and obvious that the alleged fraudulent activity is solely harm to the company or that Mr. Dang has not suffered a peculiar loss as a result. It is true that the effect of alleged fraudulent conduct as pleaded is harm to the company which would affect all the shareholders equally. This may suggest a derivative action is required. However, to the extent Ms. Chen enjoys some personal benefit from the alleged fraudulent conduct unique to her (which I will address in a moment), that personal benefit may offset any losses she suffers as a shareholder. Mr. Dang would suffer the same loss as a shareholder but he would not have the

offsetting personal benefit that Ms. Chen receives from the alleged fraudulent conduct. In this respect, Mr. Dang would suffer some peculiar harm by Ms. Chen's conduct. At the very least, it is not plain and obvious that he would not suffer some particular harm in those circumstances.

[65] In *Dubois,* the majority shareholder, after terminating the minority shareholder from his position as general manager, increased his own salary as president and chief financial officer and ceased declaring dividends. Technically, this impacted all the shareholders as shareholders in the same way. However, the majority shareholder received a particular benefit in his capacity as president and chief financial officer through the increased salary. This benefitted only him and offset losses he suffered as a shareholder from the suspension of dividends. This was found to be oppressive conduct against the minority shareholder, despite the fact the shareholders as shareholders were equally affected by the conduct and the company might have its own right of action in respect of the conduct.

[66] The present case is less clear in that Ms. Chen, though a majority shareholder, does not control the company. Nevertheless, it is not plain and obvious that she is not receiving some personal benefit from her alleged fraudulent conduct that offsets any loss she has in common with Mr. Dang as shareholders. As Mr. Dang has no offsetting benefit from the conduct, I find it is not plain and obvious that he has not suffered a peculiar loss.

[67] As to whether Ms. Chen received a personal benefit from the alleged acts of fraud, Mr. Dang pleads he does not know all the particulars of the fraud but Ms. Chen does. Thus, while he pleads that the conduct was done for Ms. Chen's personal benefit, he presently cannot state particulars of that benefit. But, he says, a benefit can be inferred. I agree. Assuming the allegations to be true, Ms. Chen must have had some purpose in engaging in the activity. The allegations suggest she may have been seeking to benefit her friends which I infer reflects beneficially back to her. At least for the purposes of an application to strike, I find the pleadings adequately allege that Ms. Chen received some benefit herself that is not extended

to Mr. Dang and this is contrary to his legitimate expectations as to how the majority shareholder would conduct herself in relation to the affairs of the company.

[68] For these reasons, I am not persuaded it is plain and obvious that Mr. Dang cannot proceed by way of an oppression claim in respect of the alleged fraudulent conduct and I would dismiss this aspect of Ms. Chen's application.

(b) Breach of the Investment Agreement

[69] The second category of alleged oppressive conduct is the breach of the Investment Agreement by Ms. Chen in (1) failing to make her full investment in SELC Canada and (2) seeking to involve herself in the management of the company. Ms. Chen argues these are not acts of the company or of Ms. Chen in her role as director. She also argues the claim must be pursued by way of a derivative action on behalf of the company. To the extent Mr. Dang has his own claim, it is a distinct cause of action based on a breach of the alleged Investment Agreement and cannot be pursued as an oppression claim: *CSA Building,* para. 53.

[70] Having regard to the high threshold required for an application to strike, I am not persuaded it is plain and obvious that this alleged conduct cannot fall within an oppression claim under s. 227.

[71] With regard to the Investment Agreement, assuming the pleaded facts to be true, we have a majority shareholder who committed to the only other shareholder that she would make a $500,000 investment in the company. This created both a contractual obligation (the Investment Agreement) and a reasonable expectation for Mr. Dang as a shareholder about how the affairs of the company – namely its capitalization – would be conducted. Contrary to that reasonable expectation, Ms. Chen failed to make the full investment.

[72] It is at least arguable that the manner in which the two shareholders effect the capitalization of a closely-held corporation amounts to conducing the affairs of the company within the meaning of s. 227. It may not be governing the company but an exercise of corporate governance is not essential for an oppression claim.

Capitalization is part of the company's affairs which is conducted by the shareholders. If one of the two shareholders withholds a required investment, it could have an oppressive effect on the other shareholder who has fully invested as required.

[73] Ms. Chen argues the investment issue is a shareholder dispute that rests outside the scope of corporate conduct. She relies on *CSA Building* at para. 53 where Newbury J.A., citing Kevin P. McGuinness in *Canadian Business Corporations Law* (2nd ed., 2007), notes that oppression claims will unlikely be granted where the claimant has other forms of redress:

> [53] It is clear the oppression action was intended to permit courts to remedy oppressive or unfairly prejudicial conduct not generally susceptible to correction by other forms of redress. Where the claimant already has a clear remedy – in contract, tort, or debt, for example – the court is unlikely to grant a remedy under s. 227. Thus McGuinness observes in connection with contractual claims:
>
> > Where the sole complaint is that of a breach of contract, then a contract action should be pursued. Insofar as the contract deals with a specific matter, it seems only natural to conclude that it sets out exhaustively the underlying intentions, understandings and expectations of the parties. …

[74] Ms. Chen also relies on Newbury J.A.'s recitation of McGuinness where he suggests that the oppression remedy applies where "a dispute relates to conduct by the corporation" and is "not available where the dispute is between two shareholders as such, and not the corporation". She also cites Markus Koehnen's observations in *Oppression and Related Remedies* (2004) that an oppression claim requires "corporate conduct" and "does not include purely personal disputes between shareholders": *CSA Building* paras. 50-51.

[75] However, after setting out these passages, Newbury J.A. points to Mr. Koehnen's suggestion these outlined passages may reflect too narrow a view of the oppression remedy and that "corporate conduct" ought not be a prerequisite for oppression:

> [52] The author suggests that requiring "corporate conduct" – i.e., conduct of directors or officers acting in their "corporate capacity" – as a prerequisite

> to an oppression remedy reflects too narrow a view. He emphasizes that the purpose of the remedy is to "prevent unfairness", which can come in many forms. He suggests the focus should not be on the conduct but on its effect on the complainant.

Newbury J.A. then observes that in *BCE Inc.* the Supreme Court of Canada suggested that shareholder conduct may support a claim for oppression.

[76] I do not read *CSA Building* as a full endorsement of the quoted passages in paras. 50-51 of that decision or that conducting the affairs of the company as specified in s. 227 necessarily requires "corporate conduct" in the governance sense. Rather, Newbury J.A. was exploring the potential bounds of oppression claims with reference to the writings of learned authors but she did not fully adopt those passages. In my view, that is evident in paras. 52-54 of *CSA Building*.

[77] In short, I do not read *CSA Building* as limiting oppression claims to exercises of corporate governance. Nor does *CSA Building* rule out the possibility of maintaining an oppression claim where there also exists a separate right of action over the same conduct. There is ample authority – including *CSA Building* itself – recognizing that the same conduct can support both an action for the wrong such as a tort or breach of contract claim, and an oppression claim: *CSA Building* para. 54; *Dubois*, para. 52-56; *Madco* at paras. 37-39. That may include claims based on a breach of a shareholder agreement: *Elliot v. Opticom Technologies Inc.*, 2005 BCSC 529.

[78] The obligation to invest the full $500,000 is grounded in an agreement between the two shareholders and constitutes a breach of that agreement which may be actionable. Newbury J.A. stated at para. 53 of *CSA Building* that where a claimant has a clear remedy in tort or contract, a court is *unlikely* to grant a remedy in oppression. She did not say a court *cannot* grant an oppression remedy. With that possibility left open, it cannot be plain and obvious that Mr. Dang's oppression claim based on Ms. Chen's alleged failure to complete her investment is bound to fail.

[79] Nor is it plain and obvious that Ms. Chen's alleged withholding of the full amount of her required investment does not have a peculiar impact on Mr. Dang as

a shareholder and investor in the company. He reasonably expected that Ms. Chen would invest $500,000 in the company and, based on that expectation, he invested his $50,000 and sweat equity in managing the companies at a below-market salary. While it is true that the company has suffered a loss of investment capital, Mr. Dang has arguably suffered a peculiar loss by being deprived of the benefits that may be realized from Ms. Chen fulfilling her investment obligation when he has met his commitments.

[80] I also find it is not plain and obvious that Ms. Chen's attempts to involve herself in the management of the company contrary to the Investment Agreement do not amount to conduct of the affairs of the company. Ms. Chen is a majority shareholder in a closely-held corporation. It is alleged that she is attempting to interfere with the company's management which arguably is conduct relating to the affairs of the company. While this seems somewhat less connected with the affairs of the company than does shortfall in investment, I am not persuaded at this stage that it plainly and obviously cannot fall within the scope of an oppression claim under s. 227 and is bound to fail.

[81] For these reasons, I find it is not plain and obvious that Mr. Dang's oppression claim based on Ms. Chen's alleged investment shortfall and her attempts to involve herself in the management of the company is bound to fail and I would dismiss this aspect of Ms. Chen's application to strike.

(c) The Directors Meeting and the AGM

[82] Thirdly, Mr. Dang claims that Ms. Chen acted oppressively when she:

a) refused to include the three items Mr. Dang wanted on in the agenda for the December 31, 2021 directors meeting;

b) purported to call an AGM when the motion to do so failed at the directors meeting; and

c) attempted to have her own accountants appointed as auditors for the companies.

[83] In my view, it is not plain and obvious that Ms. Chen's refusal to accede to Mr. Dang's request to discuss the three items at the December 31, 2021 directors meeting could not constitute oppressive conduct. Ms. Chen lawfully called the meeting in her capacity as director of SELC Canada. This was an exercise of a director's power falling within s. 227(2)(a). She then refused a request by the other director and shareholder to discuss items he wished to have added to the agenda.

[84] It may be that Ms. Chen was perfectly entitled to refuse to add the items to the agenda since she called the meeting for a different purpose. She might fairly say that Mr. Dang could have called another meeting of the directors to address his points if he wished. In this respect, her conduct may well be unimpeachable and not oppressive, but that is not plain and obvious. In my view, it is not plain and obvious that Ms. Chen's refusal to discuss these items in the context of a meeting she called using her lawful powers as a director is incapable of being oppressive.

[85] However, I find it is plain and obvious that Ms. Chen purporting to call an AGM even when the motion to do so failed at the directors meeting plainly and obviously will not support an oppression claim in this case because it was conduct without any effect or consequence. Ms. Chen had no authority to unilaterally call an AGM whether as a majority shareholder or as a single director. She certainly had no authority to do so when her motion to do so at the December 31, 2021 directors meeting failed. Mr. Dang knew Ms. Chen lacked this authority and refuted the notice of AGM immediately upon receiving it. The AGM never happened and thus Mr. Dang suffered nothing from Ms. Chen's actions. I find this plainly and obviously cannot support an oppression claim.

[86] I reach the same conclusion with respect to Ms. Chen's efforts to appoint her accountants as the company's auditors. That effort failed as Ms. Chen had no authority to make that appointment and the AGM where the proposed appointment was to occur never happened.

[87] Thus, I find it is plain and obvious that an oppression claim based on this conduct is bound to fail and this part of the Dang Petition ought to be struck as it relates to an oppression claim. However, I accept this conduct may be relevant or material context for Mr. Dang's claims under s. 324 and thus I will give Mr. Dang an opportunity to amend his petition rather than order that certain passages be struck.

3. Failure to Name the Companies

[88] Ms. Chen argues that the Dang Petition is fundamentally flawed because it fails to name the companies as respondents to the petition. Mr. Dang initially resisted this argument but ultimately conceded that since the relief sought would affect the companies it would be proper to name them as respondents. I therefore grant Mr. Dang leave to amend the style of cause in the Dang Petition to name the companies as respondents.

V. Summary and Conclusion

[89] In summary, I find it is not plain and obvious that the Dang Action offends the rule in *Foss v. Harbottle* and I dismiss the application to strike that action.

[90] With respect to the Dang Petition, I find it is not plain and obvious that the oppression claims based on the alleged fraudulent activity, Ms. Chen's alleged failure to complete her full investment in the company, her alleged efforts to involve herself in the management of the company, and her refusal to discuss the matters Mr. Dang wished to raise at the December 31, 2021 directors meeting are bound to fail. I therefore decline to order that those elements of the Dang Petition be struck and I would dismiss these aspects of Ms. Chen's third application.

[91] However, I find that it is plain and obvious that the claims in the Dang Petition that Ms. Chen wrongly attempted to hold an AGM for SELC Canada and that she wrongly attempted to have her accountants appointed as auditors for SELC Canada do not support a claim in oppression and are bound to fail. I would order that these aspects of the Dang Petition as they relate to the oppression claim should be struck. However, since this conduct may be material or relevant for Mr. Dang's claims under

s. 324, I order that Mr. Dang file a further amended petition to conform with these reasons for judgment within 30 days.

[92] I also grant leave for Mr. Dang to amend the style of cause in the Dang Petition to name the SELC Companies as respondents.

[93] Counsel asked for the opportunity to speak to costs following receipt of these reasons. If counsel cannot agree on costs, they may provide written submissions not exceeding five pages submitted electronically through the registry. I leave it to them to arrange a schedule to exchange any such submissions. If counsel wish to speak to the issue (in addition to the written submissions) they can submit a request to do so through Supreme Court Scheduling.

"Kirchner J."