CITATION: *Malone v. The York Downs Golf and Country Club*, 2024 ONSC 4016
COURT FILE NO.: CV-24-00715953-00CL
DATE: 2024-07-19

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: MARY MALONE, MARGARET POLLARD, JENNIFER WEST and SUZANNE BLACQUIER, Applicants

AND:

THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, THE ESTATE OF MARTHA TREVORROW, EILEEN HILL, PETER ALGER, CHRISTINE COLLINS, SUE ALGER, PATRICK ALGER, THE NATIONAL ORGANIZATION OF THE CANADIAN HEART FUND, CANADIAN CANCER SOCIETY and MUSCLAR DYSTROPHY CANADA, Respondents

BEFORE: Penny J.

COUNSEL: *Natalie Schernitzki* for the applicants in the *Malone* application and for the applicants in the *Kinnear, Nixon* and *Whittaker* applications

Fay McFarlane for the applicants in the *Park* and *Rawlins* applications

Robert Seumas Wood and *Brittany Town* for The York Downs Golf and Country Club, Ltd.

HEARD: June 19, 2024

REASONS FOR JUDGMENT

Overview

[1] York Downs is a former golf club. It is in the process of winding up. York Downs owned an extremely valuable property which it sold in 2015. York Downs proposed to distribute net assets following the sale by way of dividend to all qualifying shareholders. To do so it needed, among other things, to try to find several hundred "lost shareholders". York Downs spent almost ten years trying to track down the Lost Shareholders. It hired professional advisers who specialize in this task. It found a significant majority of the Lost Shareholders, but not all of them. In 2022, York Downs brought an application for approval of a plan of arrangement under the OBCA. The Arrangement was approved by the court. As part of the Arrangement, efforts to find Lost Shareholders continued. The Arrangement and its proposed impacts were publicized. The Arrangement required that, at 12:01 a.m. on December 31, 2023, the Shares of Lost Shareholders who had not been found and/or who had not met the criteria for validating their claims to York Downs Shares would be cancelled. The remaining net proceeds available for distribution would go to the known York Downs Shareholders.

[2] The applicants in this application (and in five other similar applications) did not validate their interests as Lost Shareholders before 12:01 a.m. on December 31, 2023. Nevertheless, they seek orders requiring York Downs to record them as registered York Downs Shareholders and to make distributions to them in accordance with the scheme of distribution contained in the approved Arrangement. In essence, the applicants maintain that the Arrangement was fatally flawed in that it produced a result in which, although they were "found" and advised of their potential rights to York Downs Shares (as beneficiaries of various estates of former York Downs Shareholders), this occurred in the late stages of the Arrangement, such that they had inadequate time and opportunity to comply with the validation criteria contained in the Arrangement and required by York Downs. The applicants argue that this was not fair and reasonable, in the context of a plan of arrangement under s. 182 of the OBCA. The applicants also argue that it defeated their reasonable expectations in a manner that was oppressive or unfairly prejudicial to, or unfairly disregarded, their legitimate interests, contrary to the oppression remedy under s. 248 of the OBCA. These applications are opposed by York Downs.

The Six Applications

[3] A list of all six applications now before the court is attached as Appendix A to these Reasons.

[4] Apart from the question of timing and the alleged lack of accommodation for those informed of their potential claims late in the day, the applicants in all six applications do not dispute the general reasonableness of the substantive criteria established by the Arrangement and by York Downs, in consultation with its professional advisors, to validate claims of Lost Shareholder entitlements. By the same token, York Downs does not dispute that the evidence now filed by the applicants in these applications appears to have been at least capable of establishing their entitlements as Lost Shareholders.

[5] While the timing of and circumstances under which the individual applicants came to have notice of their potential entitlements to York Downs Shares are different in their particulars, the common thread is that, in each case, they did not establish their entitlement in accordance with the established validation criteria before 12:01 a.m. on December 31, 2023, the cancellation date. In each case, the applicants say they were unable to do so because they were afforded insufficient time and opportunity between receiving notice of their possible claim and the cancellation date, to obtain the necessary evidence, court orders, etc., required to meet the validation criteria. Each applicant, or group of applicants, relies on the same two arguments: that the Arrangement, as applied to their situations, was not fair and reasonable, and was oppressive.

[6] Neither the applicants nor York Downs argued these applications on the basis of unique facts relevant only to one applicant or the other. Both sides argued these applications on the basis that common facts, common principles and common alleged flaws in the Arrangement were determinative of all six applications, one way or another.

[7] Most of the oral argument centred on the *Malone* application. This strikes me as appropriate. In *Malone*, the applicants were residents of Bermuda. They first found out about their potential inheritance of York Downs Shares (via the estates of Doug and Agnes MacLachlan) on

December 20, 2023. They did not validate their rights as Shareholders before the cancellation date. As a result, the York Downs Shares in respect of which they might have had a right of inheritance were cancelled on December 31, 2023 as required by the Arrangement. No other applicant presented a factual case more starkly illustrative of the conundrum faced by Lost Shareholders who first came to know of their potential claim quite late in the piece when the cancellation date was almost upon them.

[8] I have reviewed each of the applicant's records and circumstances. I accept and agree with the underlying assumption in the argument of both sides at the hearing that the particular facts of each individual claimant, while different, do not, apart from the common facts and issues outlined above, determine the outcome.

[9] Accordingly, in these Reasons, I will refer to the *Malone* applicants, using them as notional representatives for the applicants as a whole. While each applicant has his or her own story to tell, the differences between them are not, of themselves, determinative of the success or failure of the applications as a whole. Put another way, the applications stand or fall based on the common facts and arguments, not the unique, personal circumstances of each individual applicant. These Reasons, therefore, are dispositive of all six applications.

The Issues

[10] There are two issues raised by these applications. They have been described differently in various places but, in my view, they boil down to the following two questions:

(1) Did the court-approved Arrangement fail to provide adequate accommodations and a reasonable time, for Lost Shareholders who were notified of their potential claim to York Downs Shares following approval of the Arrangement, to comply with the requirements for validation of their claims before the cancellation date, and did that failure render the Arrangement unfair and unreasonable, contrary to the plan of arrangement provisions of s. 182 of the OBCA? and

(2) Did the court-approved Arrangement fail to provide adequate accommodations and reasonable time, for Lost Shareholders who were notified of their potential claim to York Downs Shares following approval of the Arrangement, to comply with the requirements for validation of their claims before the cancellation date, and did that failure defeat their reasonable expectations in a manner that was oppressive or unfairly prejudicial to, or unfairly disregarded their legitimate interests, contrary to the oppression remedy provisions of s. 248 of the OBCA?

[11] While one may have sympathy for the applicants, who appear to have lost out on an unforeseen opportunity through the vicissitudes of timing and chance, I have concluded that their legal position cannot be sustained on the undisputed facts. The applications are dismissed without costs.

Background

[12] The facts are not in dispute. I have taken this summary largely from the respondent's factum.

[13] The York Downs Golf and Country Club, Limited was created by letters patent on November 28, 1921 to operate a private golf club on a golf course in north Toronto. It was a not-for-profit corporation. In the early 1970's, the neighbourhood surrounding the original golf course changed. The Corporation decided to sell the original course. It used part of the proceeds of the sale to purchase and develop a new 27-hole golf course on a larger property on 16th Avenue in Unionville (the Course) and distributed the rest of the proceeds to the Corporation's shareholders.

[14] To become a member of the golf club an individual had to become a shareholder of the Corporation. The Corporation had two classes of shares. There was a class of non-voting shares (the "Class A Shares") which carried the right to receive a dividend, to receive copies of financial statements, and notice of any meeting called to dissolve the Corporation, but not the right to vote at meetings of shareholders. And there was a class of voting shares (the "Class B Shares") which carried the right to receive dividends, and notice of meetings of shareholders and the right to vote at such meetings. On the Corporation's dissolution, both classes of shares had the right to receive $10 per share and any unpaid dividends.

[15] Only active members of the golf club were entitled to hold Class B Shares. When a member resigned, moved away, or died, their Class B Shares were automatically converted into Class A Shares, and the member stopped paying any annual fees to the Corporation. As such, they no longer supported York Downs' ongoing operations and the management of its affairs.

[16] In July 2015, after receiving numerous offers to purchase the Course, the Corporation's board of directors decided to sell the Course to a real estate developer for $412 million. The agreement with the developer allowed York Downs to lease the Course back from the developer for five years, with an option to renew the lease for an additional year. The developer agreed to pay York Downs $160 million on closing, with the balance payable on the expiry of the lease, secured by a vendor take-back mortgage.

[17] York Downs originally contemplated using the sale proceeds to fund the purchase of a new location for the golf club. However, it could not find one that was suitable. In 2016 the Corporation decided to dissolve itself, pay all of its liabilities, and distribute all of its remaining assets to its shareholders.

[18] On March 29, 2016, the Board authorized the first of what would become a series of dividends on the Class A and Class B Shares, paying out to York Downs' shareholders a total of $150 million, payable pro rata on the Class A and Class B Shares outstanding on April 8, 2016, or $7,664.01 on each Class A or Class B Share. The Corporation shut down its golf course and stopped active business operations at the end of the 2020 golfing season.

The Lost Shareholders

[19] A significant issue York Downs faced in distributing its assets was the number of people registered as shareholders whom it was unable to locate. Given that the Corporation dated back to 1921, its membership had changed significantly over the years. Many members/shareholders neglected to keep the Corporation informed of their status and location. York Downs lost touch with many of the people registered as Shareholders. York Downs started to look for Lost Shareholders in 2013, reaching out to its known shareholders, and using internet search sites to try to locate shareholders who had not kept their contact information up to date. As of 2016, it still did not have contact information for 684 registered shareholders holding a total of 4,891 Class A or Class B Shares. That represented about 25% of the Corporation's outstanding shares.

[20] In 2016, to help it create a process that would locate as many Lost Shareholders as possible (while at the same time taking adequate measures to ensure that it only recognized legitimate claimants), York Downs retained three outside advisors: Ernst & Young Inc., Computershare Investor Services Inc., and Georgeson Shareholder Communications Canada Inc. Each advisor had different roles:

a) E&Y oversaw the maintenance of shareholder records and helped to coordinate distribution of payments. It also designed a process to ensure that those claiming to be entitled to shares of York Downs were in fact entitled to those shares.

b) Computershare oversaw payments to shareholders and acted as York Downs' transfer agent. As transfer agent, before changing the registered shareholder in York Downs' records, Computershare had to be satisfied that it was dealing with the proper person, and that that person had the legal authority to sign documents;

c) Georgeson was tasked with locating Lost Shareholders. Georgeson specializes in that type of work, having deep research capabilities in finding lost or dormant shareholders. York Downs paid Georgeson an initial fee of $15,000 and agreed to support it charging a fee of 15% of the monies payable to a Lost Shareholder or their heirs who agreed to work with Georgeson to confirm their entitlement.

[21] Once engaged, Georgeson examined York Downs' records, asked E&Y to review historical share transfer records, searched genealogical websites, searched obituary websites and the obituary sections of major newspapers, contacted local cemeteries, reviewed Ontario probate records, examined land registry records, and hired private investigators. York Downs also furthered the search for the Lost Shareholders by setting up a website listing them, publicizing that list to its known shareholders, and placing numerous advertisements about its status, the search for Lost Shareholders and the link to the Lost Shareholder website by placing advertisements in the national edition of the Globe and Mail, the Ontario edition of the Toronto Star, and the North York Mirror.

The Arrangement

[22] As of 2016, York Downs was a not-for-profit corporation governed by the Corporations Act. Amendments to the *Corporations Act* in 2017 required corporations like York Downs that had objects that were in whole or part of a "social nature" to continue under the *Not-for-Profit*

Corporations Act, the *Co-Operative Corporations Act* or the OBCA within five years of the amendments coming into force. To comply with those amendments, York Downs decided to continue under the OBCA. The Board approved the continuance on July 14, 2022 and York Downs' shareholders approved it on August 22, 2022.

[23] As of December 6, 2022 through the combined efforts of its team, York Downs had been able to locate 430 of what had risen by then to a total of 700 Lost Shareholders. An additional 162 Lost Shareholders had been contacted and were in the process of confirming payouts or had elected not to pursue the matter any further. This left a total of 108 Lost Shareholders holding a combined total of 762 Class A/Class B Shares. That number of shares represented about $14.3 million in dividends.

[24] By this point, the work to locate Lost Shareholders had been going on for almost ten years. The pace at which York Downs was locating Lost Shareholders had slowed down. The Board therefore concluded that it was reasonable and appropriate to set a deadline for the search so the Corporation could wind down and distribute its assets to its known shareholders, while ensuring that no new claims could be brought against the Corporation or the Board by Lost Shareholders who had not been located. The Board determined that it would be fair, reasonable, and equitable to distribute the Corporation's assets to those shareholders it had located as of December 31, 2023 which, at that point, was just over one year away. Once that date had passed, any Lost Shareholders who had not proven their claims would not be allowed to advance them.

[25] Among the factors the Board took into consideration in making its decision were:

a) York Downs had already spent many years trying to locate Lost Shareholders, the cost of that work, the diminishing number of new Lost Shareholders that were being located, and the cost of maintaining York Downs as an ongoing legal entity;

b) the Lost Shareholders had not been dues paying members for long periods of time and had therefore not supported the Corporation through membership fees, assessments, attending shareholder meetings or being involved in the community of the golf club;

c) York Downs no longer had any active operations;

d) the remaining proceeds of the sale of the Course needed to be distributed and the Corporation wound up; and

e) the members of the Board, all of whom were retired or semi-retired volunteers who received nominal compensation of $10,000 per year. It would be unfair for them to be stuck with potentially indeterminate ongoing exposure to personally liability for payments owed to Lost Shareholders.

[26] The Board determined that the Corporation should implement its plan leading to a wind up of the Corporation by means of a plan of arrangement under the OBCA. The Arrangement provided that at 12:01 a.m. on December 31, 2023 (the "Cancellation Date"), any shares registered in the name of any "Lost Shareholders" not located prior to the Cancellation Date would be automatically cancelled without any return of capital or any other payment in respect of those shares, and any

liabilities to any such Lost Shareholder or anyone claiming to be a shareholder directly or indirectly were released and discharged.

[27] In formulating this plan, the Board relied, among other things, on an opinion from an independent investment banking firm, Morrison Park Advisors Inc. After reviewing a number of corporate reorganization transactions, *Companies Creditors Arrangement Act* proceedings, class action proceedings and estate matters in which deadlines for the advancement of claims had been agreed to by the parties or imposed by the courts, Morrison Park's opinion concluded that the Arrangement was commercially reasonable in all of the circumstances.

[28] The Corporation followed the standard process for seeking court approval of a plan of arrangement under the OBCA, including providing notice of the application to the Director, who did not oppose the relief sought. York Downs commenced an application for court approval of the Arrangement. Justice Cavanagh heard York Downs' motion for an interim order on December 19, 2023. Cavanagh J. issued an interim order authorizing York Downs to hold and conduct a special meeting of the holders of its Class A and Class B Shares to consider and vote on the Arrangement, and setting out the process under which that meeting was to be called and conducted.

[29] York Downs called the Special Meeting for January 26, 2023. Hard copies of a notice of the Special Meeting and a management information circular in respect of it were sent to all of the shareholders York Downs had been able to locate on December 23, 2022. In addition, York Downs published notices of the meeting in the Globe and Mail, Toronto Star and North York Mirror.

[30] The Special Meeting was held as planned. The overwhelming majority of York Downs' shareholders voted in favour of implementing the Arrangement. Based on the scrutineer's report from the Special Meeting, 297 Class B and 1,006 Class A shareholders were present in person or by proxy at the Special Meeting, representing 8,492 Class A/Class B Shares. 99.97% of the votes cast at the Special Meeting were cast in favour of the resolution approving the Arrangement. There were no dissenters.

[31] Justice McEwen heard York Downs' application for final approval of the Arrangement on February 14, 2023. The record before him included two affidavits from York Downs' President, as well as an affidavit from the author of the Morrison Park opinion. After reading the affidavits and hearing submissions from York Downs' counsel, Justice McEwen issued a final judgment approving the Arrangement.

[32] Justice McEwen explained his rationale for approving the Arrangement in an endorsement. Because it is brief, I will set out the endorsement in full:

> The order shall go as per the draft filed and signed. There is no opposition. There is no dissent. The statutory requirements have been met and I am satisfied that the Application has been put forth in good faith.
>
> There has been overwhelming approval by the shareholders and the arrangement is fair and reasonable. Provisions of the Interim Order have been met.

> In particular, in reviewing the proposed Plan with counsel, I agree that the procedure to locate Lost Shareholders has been carried out in good faith and the proposal to cancel shares on Dec. 31/23 is sensible given all the circumstances noted by the Applicant. So is the protection sought by the Board and Board members.
>
> Lastly, the Director has been put on notice and does not oppose, and the Applicant has obtained an expert opinion as to the commercial reasonableness of the Plan, with which I agree.

[33] Section 3.1(a) of the Arrangement required the Corporation, "until the Cancellation Date", to "use commercially reasonable efforts consistent with past practices to locate Lost Shareholders". Section 3.1(c)(i) provides that "at the Cancellation Time the share capital of the Corporation shall be reorganized" such that "all Shares registered in the name of any Lost Shareholders not located prior to the Cancellation Date shall thereupon automatically be cancelled without any return of capital or any other payment in respect of such Lost Shares".

[34] Under section 1.1 (bb) of the Order, a "Lost Shareholder" of York Downs was not considered to have been located by York Downs until a person purporting to have a legal right to be shown on York Downs' shareholder register has completed all steps required (including submission of such documents or materials as York Downs, its transfer agent or representatives may reasonably require) to verify such person's identity and establish that such person has the legal right to be shown on York Downs' shareholder register.

[35] In order to ensure that only legitimate claims would be recognized, York Downs developed a set of requirements that claimants had to meet. The requirements focused on a claimant demonstrating a clear chain of title between the Lost Shareholder and themselves, and clear signing authority in the case of people signing on behalf of an estate. In some case, establishing a clear chain of title was relatively straightforward. For example, if the Lost Shareholder had died, leaving all their Shares to their spouse, York Downs accepted the claim if the spouse could produce a death certificate and a copy of the Lost Shareholder's probated will confirming that the Lost Shareholder had died, and that the Shares passed as a matter of law to the spouse. If the spouse had also died, York Downs accepted a probated will as authority to transfer the Lost Shareholder's Shares to the spouse's estate, or the spouse's children if they were the only beneficiaries of the estate and agreed on how the Shares were to be allocated. Computershare, as York Downs' transfer agent, made the final decision on what was and was not acceptable proof.

[36] The situation was more complicated if the Lost Shareholder had died but had not made a will before their death, or had not had their will probated, or if their heirs had died and not had their wills probated. In those situations, York Downs asked potential heirs to obtain court orders addressing how York Downs was to deal with the Lost Shareholder's Shares.

After Final Judgment Rendered

[37] After it received Justice McEwen's final judgment, York Downs continued to look for Lost Shareholders while attempting to ensure that Lost Shareholders knew about the deadline. It sent out a notice describing the final judgment and the deadline by email and registered mail to the contacts it had in respect of the Lost Shareholders, while also notifying its known shareholders. York Downs maintained its dedicated website setting out the names of the Lost Shareholders and continued to work with Georgeson and E&Y to locate Lost Shareholders and to evaluate claims advanced in respect of them.

[38] As the deadline drew closer, many of the people claiming to be entitled to the shares of Lost Shareholders commenced court applications to confirm their entitlement to the shares of a particular Lost Shareholder. Between February 14, 2023 and December 31, 2023, York Downs was named as a respondent in 21 such court applications. Thirteen of those applications were heard in December 2023 alone. In some circumstances, claimants applied for probate to confirm their ability to register the shares of a Lost Shareholder in the name of the relevant estate, but at the same time start a court application to address the possibility that the court might not grant probate before the expiry of the deadline set by the final judgment. In those cases, the applicant started the court application to confirm their entitlement but abandoned it if they obtained probate in time.

[39] Under the terms of the Arrangement as approved by the final judgment, at 12:01 a.m. on December 31, 2023 York Downs' share capital was reorganized such that all shares registered in the name of any Lost Shareholder not located prior to the Cancellation Date were automatically cancelled.

[40] The Board formally resolved to cancel shares registered in the name of any Lost Shareholder not located prior to the Cancellation Date at a meeting on February 14, 2024. Following that, the Board declared a dividend of $1,157.60 on each outstanding Class A and Class B Shares, for a total distribution of $21,477,485. York Downs continues to hold about $13 million in retained earnings to cover the Corporation's ongoing expenses (and these outstanding claims). Whatever is left at the time the Corporation is wound up will be distributed to its registered shareholders.

Efforts to Find Lost Shareholders

[41] It is important to remember that the search for Lost Shareholders did not begin when the Arrangement was first proposed or when it was approved. By the end of 2022, when the plan of arrangement process was initiated, York Downs had already been looking for Lost Shareholders for about nine years and had located hundreds of them. These efforts continued apace after the final judgment of Justice McEwen.

[42] Over the course of the approximately 13 months between the beginning of December, 2022, when York Downs started the process that led to the McEwen Final Judgment, and the Cancellation Date, an additional 128 Lost Shareholders holding 1,050.42 Class A Shares were identified and able to establish their claims through the efforts of York Downs, E&Y and Georgeson. Collectively, those shareholders were entitled to a distribution of $22,150,768. As of

the Cancellation Date, there were only 174 Lost Shareholders holding a total of 1,012 Class A Shares (representing a potential distribution of $21,339,143.25).

[43] It is worth putting those numbers in context. When York Downs started to look for Lost Shareholders in earnest in 2016, it thought that it had a total of 684 Lost Shareholders, a number that later grew to 700. Those Lost Shareholders held a total of 5,003 Class A Shares entitled to dividends of $106,499,054. From the beginning of the search process to Cancellation Date, York Downs was able to establish the entitlements to the shares registered in the name of 526 of the original 700 Lost Shareholders, or about 75.14% of them, and to distribute $85,109,911 or 79.91% of the money payable to the Lost Shareholder group. About one quarter of those totals arose between the beginning of December 2022 and the end of December 2023.

The *Malone* Applicants

[44] The applicants in the *Malone v. York Downs* application are Mary Malone, Margaret Pollard, Jennifer West and Suzanne Blacquier. They all reside in Bermuda. These applicants claim to be the ultimate beneficial owners of Shares in York Downs registered in the names of Agnes Bernice MacLachlan, Executor of the Estate of Donald D. MacLachlan, the Estate of Donald D. MacLachlan and the Estate of Agnes MacLachlan. The family tree and other evidence of the applicants' connection to the registered shareholders, all laid out in detail in the applicants' material, is not in dispute. The value of these registered shares, under the terms of the Arrangement, would have been $468,827.92.

[45] Donald MacLachlan died in 1975, predeceasing Agnes MacLachlan. For reasons unknown, Agnes did not transfer Donald's shares to herself although she held the beneficial interest. Agnes remarried in 1982. She died in 1990. Her executors administered Agnes' estate. Legacies were paid out to residuary beneficiaries, which included the applicants in this case. For reasons unknown, Agnes' executors did not administer her York Downs Shares. The two executors died in 1992 and 2000 respectively.

[46] York Downs was contacted by Agnes' step-son about the Shares. He did not, however, take any steps to claim or administer Agnes' Shares and did not respond to any of the notices sent by York Downs. Georgeson did, however, subsequently conducted further investigations through a private investigator.

[47] On December 16, 2023, Georgeson determined that the applicants were potential beneficiaries. Georgeson first contacted Ms. Blacquier sometime after December 20, 2023. Prior to this, the applicants had no knowledge or information about the Shares or their possible entitlement to them. The applicants say they were simply unable to comply with the validation procedures required before, in accordance with Section 3.1(c)(i) of the Arrangement, York Downs cancelled the Shares registered to Agnes Bernice MacLachlan, Executor of the Estate of Donald D. MacLachlan, the Estate of Donald D. MacLachlan and the Estate of Agnes MacLachlan at the end of December 2023.

Analysis

[48] The applicants advance two arguments in support of their position that, in spite of the terms of the court-approved Arrangement, York Downs should be ordered to register Agnes' Shares in their names and to make appropriate distributions to them under the terms of the Arrangement.

[49] The first argument is based on the requirement that, to be approved by the court, an arrangement must be fair and reasonable. In *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69, the Supreme Court held that, when seeking approval of an arrangement, the corporation bears the onus of satisfying the court that: (1) the statutory procedures have been met; (2) the application has been put forward in good faith; and (3) the arrangement is fair and reasonable. The first two criteria are not in doubt.

[50] With respect to the question as to whether an arrangement is fair and reasonable, the court must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.

[51] While the applicants concede that the Arrangement had a valid business purpose, they argue that the Arrangement was not fair and reasonable because it failed to resolve the rights of Lost Shareholders in a fair and balanced way. While the prejudicial effect of Section 3.1(a) of the Arrangement (requiring York Downs/Georgeson to continue with efforts to locate Lost Shareholders until the Cancellation Date) and Section 3.1(c)(i) of the Arrangement (setting the Cancellation Date as the deadline for Lost Shareholders or their heirs or executors to be located and to establish their claims to dividends) may have been inadvertent, nonetheless it resulted in the Arrangement not being fair and reasonable, by failing to provide appropriate accommodations and a reasonable amount of time to Lost Shareholders who, through no fault of their own, were given notice but insufficient time to validate their claim.

[52] Second, the applicants rely on the oppression remedy under s. 248 of the OBCA. The applicant must establish that they held a reasonable expectation worthy of recognition by the court. And, they must show that their reasonable expectation was defeated by conduct which is oppressive, unfairly prejudicial to or unfairly disregarded the applicants' legitimate interests.

[53] The applicants say they had a reasonable expectation that they would be afforded a reasonable amount of time after being located by Georgeson to establish their claim to the Shares prior to their claim being extinguished and the Shares cancelled by York Downs. They argue that their reasonable expectation was defeated by:

a) the imposition in the Arrangement of a sunset period of only nine months from the date of the order approving the Arrangement, particularly give that York Downs was aware that some situations would be quite complex and required potential heirs to obtain court orders and the like; and

b) Section 3.1(c)(i) of the Arrangement, which set the Cancellation Date as both the expiry date for ongoing efforts to locate Lost Shareholders or their heirs *and* the deadline by which the claims of Lost Shareholders had to be validated, failing which any shares registered in

the names of Lost Shareholders would be cancelled and any claims by the Lost Shareholders extinguished.

[54] The applicants argue that these actions by York Downs and its Board were oppressive, created unfair prejudice and unfairly disregarded the applicants' legitimate interests.

[55] I am unable to accept these arguments.

Was the Arrangement Fair and Reasonable?

[56] There are two fundamental problems with the applicants' arguments relating to plans of arrangement under s. 182 of the OBCA.

[57] First, Justice McEwen already approved the Arrangement in a final judgment made on February 14, 2023. In doing so, he expressly found that the Arrangement was fair and reasonable and that it balanced the potentially competing interests of the stakeholders in a fair and reasonable way. The applicants have not appealed that final judgment nor have they sought to set it aside under Rule 59.06 or on any other basis. The final judgment approving the Arrangement is *res judicata*. It is binding on York Downs and on its shareholders. The applicants' argument constitutes a clear, impermissible collateral attack on Justice McEwen's judgment.

[58] Second, even if I were prepared to entertain the application, there is no legitimate basis to question Justice McEwen's original decision. The Supreme Court of Canada made it clear in *BCE* that an arrangement is fair and reasonable if it resolves the interests of all of the persons whose rights are being arranged in a fair and balanced way. That depends on all of the circumstances of any particular case.

[59] Here, the purpose of the Arrangement is to wind-up a century old golf club which had ceased carrying on active business. Many of York Downs' Shareholders had long ago ceased to have any active involvement in the corporation. In the case of Lost Shareholders, they failed to do anything to keep the corporation informed of their status and location. York Downs had been looking for them almost ten years, including with the assistance of a professional shareholder search firm for the last six of those years.

[60] Justice McEwen:

a) concluded that it was appropriate to set a deadline for potential shareholders or heirs to come forward to prove their claims, and to fix that deadline about 13 months from the start of the arrangement process and nine months from the date of the final approval hearing; and

b) was satisfied that imposing this deadline fairly and reasonably balanced the rights of all interested parties, allowing York Downs to cease operations and to pay out its assets to the shareholders who had been located, relieving the members of the Board of their responsibilities as Board members and at the same time giving York Downs additional time to locate additional Lost Shareholders and for those shareholders to prove their claims.

> There was more than adequate evidence to support those conclusions, including the lengthy history of efforts which had already been undertaken to find Lost Shareholders and expert testimony based on a wide canvas of various similar circumstances involving searches for unknown claimants, shareholders and beneficiaries.

[61] In addition, the Director under the OBCA did not oppose the Arrangement and accepted it as filed without change.

[62] In essence, the applicants are arguing that it was unfair to require the search for Lost Shareholders to carry on until December 31, 2023 but that, if a Lost Shareholder were found at the eleventh hour, the Shares would nevertheless be cancelled without affording that Lost Shareholder adequate time to validate their rights.

[63] Justice McEwen, however, expressly addressed this issue. The potential for a Lost Shareholder to find themselves in the situation the applicants were in is expressly contemplated by the language of the Arrangement. The Arrangement balances the need for certainty and finality for York Downs, its Board and all known and located Shareholders with the interests of the remaining unlocated Lost Shareholders by requiring York Downs to keep up its efforts to locate Lost Shareholders until the bitter end while, at the same time, by establishing a hard deadline for cancellation of all un-proven claims. Could the Arrangement have been structured differently? Possibly. But, as the Supreme Court also made clear in *BCE*, "there is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case, not a perfect decision": *BCE*, at para. 155. The court should refrain from substituting its own views of what constitutes the best arrangement.

[64] Although it is unnecessary to go further, I would also add that a number of other Lost Shareholders who only found out about their potential claims toward the end of the process were nevertheless able to make urgent applications to the court in order to ensure their claims were validated before the deadline. The Estates List, for example, worked hard to accommodate these requests, thereby preserving those Lost Shareholders' rights in accordance with the terms of the Arrangement. Remedies were available, even at the last minute, to preserve a claimant's rights before the Cancellation Date.

[65] An appropriate balance was struck. The Arrangement balances the need to find as many Lost Shareholders as possible with the need for certainty and finality given the pending wind up of the Corporation. The search for Lost Shareholders continued for ten years, until the very end. Lost Shareholders who were found were advised of the terms of the Arrangement and the need to validate their claims before Cancellation Day. York Downs facilitated urgent applications to court to preserve claimants' rights. Registered Shareholders, the Corporation and the Board were equally entitled to rely on the terms of the Arrangement being followed.

[66] The Arrangement was manifestly fair and reasonable.

Was the Arrangement Oppressive?

[67] *BCE* is also the leading case on the oppression remedy. In *BCE*, the Supreme Court set out a two-step approach to oppression cases. In assessing an oppression claim, a court must first look

to the principles underlying the oppression remedy and, in particular, the concept of reasonable expectations. Reasonable expectations is the "cornerstone" of the oppression remedy. If a breach of a reasonable expectation is established, the court must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard".

[68] I agree with counsel for York Downs, who pointed out that no Canadian court has ever found a court-approved plan of arrangement to be oppressive. That makes sense, since it is difficult to envisage a situation in which a court would approve a plan of arrangement on the basis that it balanced the interests of those whose rights were being arranged in a fair and reasonable way, if the plan was also oppressive, unfairly prejudicial to, or unfairly disregarded the interests of one of those stakeholders.

[69] Indeed, the Supreme Court alluded to this potential anomaly in *BCE*. The tests in the two procedures are technically different, engaging different burdens and perspectives. Yet, the Supreme Court said, "common sense suggests … that a finding of oppression sits ill with the conclusion that the arrangement involved is fair and reasonable." The Court left this "interesting question to a case where it arises."

[70] For the reasons set out above, I find that Justice McEwen's decision and final judgment leave no room for an oppression argument or a finding of oppression. On the facts of this case, a finding by Justice McEwen that the Arrangement was "fair and reasonable" is completely inconsistent, and irreconcilable, with the suggestion that the Arrangement brings about an effect which is oppressive, unfairly prejudicial to or unfairly disregards the interests of Lost Shareholders.

[71] In any event, neither the applicants nor any of their counterparts in the other related proceedings could have any expectation beyond the expectations created by the Arrangement itself. This is so because, until Georgeson located them, they did not know they had any potential claim to be entitled to any Shares of York Downs. As such, their only reasonable expectation was the expectation that they needed to comply with the terms of the Arrangement, and to establish their claim by the Cancellation Date or the Shares they were claiming would be cancelled.

[72] Further as of December 2022, York Downs had long since sold the Course and ceased active business as a golf club. It had been trying to locate Lost Shareholders for almost ten years. It had remarkable success, in the end locating over 75% of them, but a significant number still remained. The search process was generating diminishing returns. All of this inhibited York Down' s ability to conclude a winding up and forced it to maintain the Board and some of its infrastructure, at considerable cost to the confirmed Shareholders.

[73] In these circumstances, the reasonable expectation of the Lost Shareholders as a group could only be that York Downs would take account of the interests of the Lost Shareholders as well as the interests of York Downs and its other stakeholders, which of course includes the vast majority of Shareholders who were known and whose interests had been validated. That is exactly what York Downs did. It carefully and thoughtfully created the Arrangement which set a deadline of an addition year for Lost Shareholders or persons claiming through them to come forward and establish their claims. It required York Downs to keep up its efforts to locate Lost Shareholders. It

confirmed the reasonableness of the deadline proposed by obtaining an opinion from an independent expert. It sought and obtained court approval for the Arrangement. York Downs complied with the process mandated by the Arrangement, including publishing notices in widely circulated newspapers, maintaining a website, and continuing to work with Georgeson to identify potential Lost Shareholder claimants. It even facilitated urgent court applications in the closing months and weeks to help Lost Shareholder claimants to preserve their rights before Cancellation Day.

[74] For these reasons I conclude that neither the Arrangement itself, nor the manner of its implementation defeated any Lost Shareholder's reasonable expectations. Nor did York Downs act in a manner that was oppressive, unfairly prejudicial to or which unfairly disregarded the interests of the Lost Shareholders or anyone claiming through them.

Conclusion

[75] For the forgoing reasons, the applications are dismissed.

Costs

[76] York Downs sought no costs. None are ordered.

Penny J.

Date: July 19, 2024

APPENDIX A

	Court File No.:	Re:
1.	CV-24-00715953-00CL	MARY MALONE, MARGARET POLLARD, JENNIFER WEST and SUZANNE BLACQUIER, Applicants AND THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, THE ESTATE OF MARTHA TREVORROW, EILEEN HILL, PETER ALGER, CHRISTINE COLLINS, SUE ALGER, PATRICK ALGER, THE NATIONAL ORGANIZATION OF THE CANADIAN HEART FUND, CANADIAN CANCER SOCIETY and MUSCLAR DYSTROPHY CANADA, Respondents
2.	CV-24-00718316-00CL	WILLIAM NASMITH KINNEAR and KATHRYN ANN GORDON KERNOHAN, Applicants AND THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, THE BANK OF NOVA SCOTIA TRUST COMPANY, in its capacity as Estate Trustee of the Estate of Ethel Elizabeth Eakin, the Estate of Olive Barr Kinnear and the Estate of Albert Roy Kinnear, THE CANADA TRUST COMPANY, in its capacity as Estate Trustee of the Estate of Harvey Sanderson Kinnear and the Estate of Thomas Herbert Kinnear, JAMES IAN MACDOUGALL in his capacity as Estate Trustee of the Estate of Constance Vivian MacDougall, COLIN PETER KINNEAR in his capacity as Estate Trustee of the Estate of Evan Hartley Kinnear and the Estate of Constance Vivian MacDougall and GLORIA JOAN KINNEAR in her capacity as Estate Trustee of the Estate of Evan Hartley Kinnear, Respondents
3.	CV-24-00717337-00CL	JOHNSON ROBERT NIXON, Applicant AND THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, MARY KATHLEEN ROSENBERGER, in her capacity as Estate Trustee of the Estate of Evelyn Janet Macey, MD PRIVATE TRUST COMPANY, in its capacity as Estate Trustee of the Estate of Heather Kathleen Diduch, Respondents
4.	CV-24-00718447-00CL	JOHN RAWLINS, Applicant AND

		THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, Respondent
5.	CV-24-00718449-00CL	ROSEMARY PARK, ESTATE OF, Applicant AND THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, Respondent
6.	CV-24-00715908-00CL	SANDRA WHITTAKER, JOHN WHITESIDE and GORDON WHITTAKER, Applicants AND THE YORK DOWNS GOLF AND COUNTRY CLUB, LIMITED, BRIAN RICHARD MCLELLAN, in his capacity as Estate Trustee of the Estate of George Geddes Whittaker, KELLY ANN WHITTAKER, in her capacity as Estate Trustee of the Estate of John Humphries Whittaker, Respondents