COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jahnke v. 436537 B.C. Ltd.,*
2024 BCCA 276

Date: 20240725
Docket: CA49401

Between:

Carolyn Jahnke

Appellant
(Petitioner)

And

436537 B.C. Ltd. and Donna Rhodes

Respondents
(Respondents)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2023 (*Jahnke v. 436537 B.C. Ltd.*, 2023 BCSC 2166, Vancouver Docket S214674).

Counsel for the Appellant:	G.R. Cameron K.F. Milinazzo
Counsel for the Respondent, Donna Rhodes:	L.R. LeBlanc, K.C. M.D. Wehrung
Place and Date of Hearing:	Vancouver, British Columbia June 3, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 25, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Horsman

Summary:

The appellant is a minority shareholder in a closely held family company. The respondent holds all of the preferred shares, which gives her majority voting control and the right to an annual dividend. The respondent runs the daily operations of the Company's only asset, an apartment building, and causes the Company to pay her a salary. The appellant brought a proceeding under the Business Corporations Act, seeking an oppression remedy that would require the Company or the respondent to buy her shares. The judge found that the respondent's failure to hold AGMs or obtain audited financial statements was oppressive conduct. At a second hearing to address remedy, the judge was advised that audited financial statements were being prepared but that the AGM had not been conducted professionally. The judge ordered that for the next three AGMS, the respondent could not be chairperson; an independent party would need to act as recording secretary; and the respondent would need to prepare a detailed annual report before each AGM. On appeal, the appellant challenges the remedy ordered, still seeking an order for purchase of her shares. She says the judge erred in excluding expert evidence that would support a finding that the respondent was over-paying herself management fees. Held: Appeal dismissed. The proposed expert evidence was inadmissible, although for other reasons than found by the judge. The remedy ordered was not disproportionate to the oppressive conduct found.

Reasons for Judgment of the Honourable Justice Griffin:

[1] The appellant, Carolyn Jahnke, is a minority shareholder of a closely held family company, the respondent 436537 B.C. Ltd (the "Company"). She brought a petition claiming the respondent Donna Rhodes, was exercising her powers as director in a manner oppressive and unfairly prejudicial to Ms. Jahnke's interests, and seeking relief pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[2] The judge found Ms. Rhodes had engaged in oppressive conduct, and made a declaration to that effect, in reasons issued April 14, 2023 and indexed at 2023 BCSC 614 (the "*Liability Judgment*"). The judge invited the parties to schedule a further hearing to address what remedies ought to be ordered in light of his findings, and costs.

[3] The remedies hearing took place on September 27, 2023 and the judge issued his reasons on remedy and costs on October 4, 2023, indexed at 2023 BCSC 2166 (the "*Remedy Judgment*"). In the *Remedy Judgment,* the judge ordered for the

Company's next three annual general meetings ("AGMs"), Ms. Rhodes was prohibited from acting as chairperson and the Company was to retain an independent third party to act as recording secretary. In addition, the judge ordered that Ms. Rhodes was to prepare a detailed annual report to the Company's shareholders for all future AGMs.

[4] Ms. Jahnke appeals from the *Remedy Judgment*. She submits the remedy ordered was inadequate and the only remedy that would be appropriate is a buy-out of her shares at a valuation of approximately $1.9 million. That figure is based on a liquidation value of the Company's sole asset, an apartment building in Victoria, less the value of the preferred shares and liabilities.

[5] In my view, the fundamental challenge Ms. Jahnke must overcome on this appeal is the deferential standard of review that applies to the judge's findings of fact as to the nature of the oppressive conduct, and the judge's exercise of discretion regarding the appropriate remedy. I find that Ms. Jahnke has not demonstrated a basis for this Court to interfere.

Background

[6] The apartment building came to be owned by the Company through the efforts of Ms. Rhodes' parents, Art and Hilda Chesson. The Chessons had two children (by adoption), Ms. Rhodes and Lorraine (Lori) Chesson.

[7] Art Chesson purchased the apartment building located in downtown Victoria, known as La Maison Blanche (the "Property"). The family took care of the building's operations, initially through the efforts of Art and Hilda Chesson, and then following Mr. Chesson's death, Hilda Chesson and Lori Chesson.

[8] Some time after her husband's death, in late 1992, Hilda Chesson incorporated the Company under BC law. Hilda Chesson transferred the Property to the Company in accordance with s. 85 of the *Income Tax Act,* R.S.C. 1985, c. 1, (5th Supp.) in exchange for a demand promissory note of $150,000 and the preferred

shares, which were to have a redemption amount equal to the fair market value of the Property, determined then to be $1,750,000.

[9] Hilda Chesson received 1,000 preferred shares in the Company and Lori Chesson and Ms. Rhodes each received 150 common shares. Hilda Chesson became the President; Lori Chesson the treasurer; and Ms. Rhodes the secretary.

[10] The articles of the Company provide that preferred and common shares carry one vote each. However, the preferred shares have more rights than the common shares. The owner of preferred shares is entitled to a discretionary non-cumulative dividend of 5% per annum of the redemption value of the shares, in priority to the common shares. Further, the preferred shares carry redemption rights, unlike the common shares.

[11] Lori Chesson died in 1997, predeceasing her mother Hilda Chesson and sister Ms. Rhodes. By the terms of her will, her common shares in the Company passed to her two children, David Stewart and the appellant Ms. Jahnke (a stepdaughter), in the amount of 75 common shares each.

[12] Following her sister's death, Ms. Rhodes assumed control over the Property's operations, together with Hilda Chesson.

[13] Hilda Chesson died in 2012.

[14] Under the terms of her will, all of Hilda Chesson's preferred shares passed to Ms. Rhodes. Ms. Jahnke did not contest the will. Nor had she ever received any assurances from Hilda Chesson before her death that she would receive any value for the common shares. The only offer Ms. Jahnke received for the value of her common shares was from Ms. Rhodes, who in 2013 offered her $1 per share, totalling $75.

[15] Thus, after her mother's death, Ms. Rhodes assumed voting control of the Company as well as the right to dividends and redemption rights. She holds 1,000 preferred shares and 150 common shares; Ms. Jahnke holds 75 common shares;

and Mr. Stewart holds 75 common shares. Ms. Jahnke's shares give her only 5.75% of the aggregate votes in the Company; Ms. Rhodes' has 88.5% of the aggregate votes.

[16] Under Hilda Chesson's control as holder of preferred shares, she paid herself dividends of $87,500/year for the three years prior to her death. That was based on 5% of the redemption value of $1,750,000 as provided for in the articles. The Company never paid dividends to the holders of common shares.

[17] Ms. Rhodes continued the practice of the Company paying an annual dividend of $87,500 to the holder of the preferred shares (herself); and no dividends to the holders of the common shares.

[18] During Hilda Chesson's lifetime, no shareholder had sought audited financial statements or AGMs, and waivers were signed to this effect. Without a shareholder consent resolution waiving these requirements, these annual steps are required pursuant to ss. 198 and 182 of the *BCA*.

[19] In 2013, Ms. Jahnke wrote to Ms. Rhodes asking her to purchase her shares in the Company based on the fair market value of the Property as though the common shares were equal to the residual value of the Company on a straight proportionate basis. She made no mention of the preferred shares and their features. She stated that if Ms. Rhodes did not agree to buy her shares, she would demand that the Company be run in accordance with the law and have audited financial statements and an AGM each year.

[20] Ms. Rhodes wrote back a strongly worded letter. She appeared to interpret Ms. Jahnke's letter, demanding the Company be run in accordance with the law, as questioning her ethics and failing to appreciate the family's history and the burdens of operating the Property, of which she took great umbrage. She took the position that Ms. Jahnke was not related to the family.

[21] Ms. Jahnke and Ms. Rhodes did not repair their relationship.

[22] On May 12, 2021, Ms. Jahnke brought a petition seeking relief pursuant to the *BCA* on two grounds:

a) pursuant to s. 227, that Ms. Rhodes was exercising her powers as director and officer of the Company in a manner oppressive and unfairly prejudicial, and seeking remedies of an accounting; compensation to the Company by Ms. Rhodes for sums improperly paid to her; and in the alternative, an order directing that Ms. Rhodes or the Company purchase Ms. Jahnke's shares; and,

b) pursuant to s. 324, that Ms. Jahnke had lost confidence in the administration and management of the Company, making it just to order that the Company be liquidated and dissolved.

[23] The Petition advanced complaints that can be grouped into the following categories:

a) Ms. Rhodes' failure to hold AGMs and to have audited financial statements prepared annually;

b) The suspicion that below market rents were being charged to tenants at the Property; and

c) Ms. Rhodes had engaged in self-dealing, by having the Company pay herself dividends, unwarranted salaries, and expenses.

[24] Ms. Jahnke pleaded her reasonable expectations as shareholder included the expectation she would be entitled "to the inheritance intended for her: the value of her shares in [the Company]". She gave affidavit evidence that she expected her grandparents intended her common shares to represent an inheritance. She also stated there was a deadlock "in our voting shares" because of her and her brother Mr. Stewart holding Lori Chesson's 50% share, and Ms. Rhodes having a 50% share (ignoring the preferred shares).

Liability Judgment

[25] The judge instructed himself on the relevant portions of s. 227(2) of the *BCA*. This section is known as the oppression remedy. It allows a shareholder to apply to the court for an order on the grounds that (a) the affairs of the company are being conducted in a manner oppressive to one or more of the shareholders, including the applicant; or (b) acts or threatened acts of the company or shareholders holding shares of a class are unfairly prejudicial to one or more of the shareholders, including the applicant.

[26] The judge also reviewed leading authorities, citing *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*] at para. 46 of the *Liability Judgment* for the following approach to the oppression remedy:

> [57] We preface our discussion of the twin prongs of the oppression inquiry by two preliminary observations that run throughout all the jurisprudence.
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> [58] First, oppression is an equitable remedy. It seeks to ensure fairness — what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair: *Wright v. Donald S. Montgomery Holdings Ltd.* (1998), 39 B.L.R. (2d) 266 (Ont. Ct. (Gen. Div.)), at p. 273; *Re Keho Holdings Ltd. and Noble* (1987), 38 D.L.R. (4th) 368 (Alta. C.A.), at p. 374; see, more generally, Koehnen, at pp. 78-79. It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities: *Scottish Co-operative Wholesale Society*, at p. 343.
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> [59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.
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> …
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> [68] In summary, the foregoing discussion suggests conducting two related inquiries in a claim for oppression: (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?
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> [Emphasis added.]

[27] The focus of the *Liability Judgment* then turned to the reasonable expectations of the aggrieved shareholder, Ms. Jahnke.

[28] The judge cited *BCE* at para. 70 for the proposition that the claimant has the onus of identifying her expectations and establishing that they were reasonably held: para. 47. Further, the judge noted that "[t]he assessment of a shareholder's expectations and the determination of whether they are reasonable or not can be influenced by the nature of the company in question, especially if it is a family-operated enterprise": at para. 48, citing *Gierc Jr. v. Wescon Cedar Products Ltd*., 2021 BCSC 23 at para. 80.

[29] The judge found that the evidence of the structure of the Company and the Company history did not demonstrate the other shareholders shared Ms. Jahnke's expectation she would be entitled to a financial benefit of an inheritance value for her common shares: *Liability Judgment*, paras. 49–56. Further, her expectation with respect to the value of her shares was not reasonable: paras. 57–70.

[30] Ms. Jahnke's expectation that her common shares created an entitlement to financial benefits beyond those arising from a corporate liquidation was a "purely personal aspiration" inconsistent with the rights that attached to the preferred shares and the historical practice of only paying dividends to the holder of preferred shares: *Liability Judgment* at para. 54. The judge noted there was no change in the treatment of holders of common shares for over 20 years.

[31] The judge also noted no one during Hilda Chesson's lifetime or afterwards made any representations that any holder of common shares should expect or would receive dividends: *Liability Judgment* at para. 63.

[32] As for the criticisms of self-dealing, one of those criticisms had to do with Ms. Rhodes having the Company pay dividends to the holder of preferred shares, namely herself, and not to the holders of common shares. Again, the judge found no merit to that complaint.

[33] The judge noted the payment of dividends to preferred shareholders was provided for in the articles; had started when Hilda Chesson was the preferred

shareholder for three years prior to her death; and was not contrary to the interests of the Company or unfair or prejudicial to Ms. Jahnke or her brother: paras. 82–83.

[34] The other aspect of self-dealing alleged had to do with the allegation that Ms. Rhodes charged exorbitant management fees for operating the Company, and used funds of the Company to reimburse her for personal expenses. The judge found the evidence did not support this complaint: para. 78. I will come back to this point when addressing the grounds of appeal.

[35] The judge dismissed all of Ms. Jahnke's categories of complaint, except the complaint that Ms. Rhodes failed to hold AGMs and prepare audited financial statements annually. Ms. Rhodes conceded it was a reasonable expectation for any shareholder to hold that the Company be operated in compliance with the *BCA*. The judge found Ms. Rhodes' conduct in this regard did constitute oppressive conduct contrary to s. 227 of the *BCA*: para. 98.

[36] The question of remedy was addressed somewhat in the *Liability Judgment* but was not completed.

[37] The judge rejected Ms. Jahnke's claim for "just and equitable relief" in the "draconian measure" of a liquidation of the Company, pursuant to s. 324 of the *BCA*: paras. 99–103. That section permits a court to order a company be dissolved or liquidated when the court considers it just and equitable to do so. The judge rejected the argument that Ms. Rhodes had treated the assets of the Company as her own and had misappropriated any funds.

[38] Under the heading "What remedy is Carolyn entitled to?", the judge rejected Ms. Jahnke's request for an order compelling Ms. Rhodes to return a large sum of money to the Company: para. 105. The judge repeated he was not persuaded Ms. Rhodes had misappropriated or mismanaged any funds related to the Company.

[39] Ms. Jahnke's other claimed relief was for an order that Ms. Rhodes, or the Company, purchase her common shares. The judge rejected this claimed remedy, holding as follows:

> [106] Carolyn also seeks an order directing Donna or in the alternative, 436, to purchase the common shares of 436 that Carolyn owns. I am not persuaded that Carolyn is entitled so such relief. While I have found some of Donna's conduct as a director and officer of 436 has been oppressive, I do not find the nature of that conduct justifies the order Carolyn seeks. I say this because in my opinion Carolyn's fundamental argument justifying such an order is ill-founded. She complains that Donna has received financial benefits resulting from the shares she owns in 436, when she and David have received no benefits from their shares. She also says that Donna has made it clear that Carolyn will likely never receive any financial benefit until 436 sells La Maison Blanche. The error that is fatal to Carolyn's argument is that Donna receives her financial benefits, and in particular the dividends that she does, because of the preferred shares she owns and not because of her common shares. For reasons only known to Hilda, all of the preferred shares that she owned were transferred only to Donna when Hilda died. That was Hilda's wish and intention. Carolyn has not and does not challenge this. Consequently, Carolyn is mistaken when she asserts that she and David, as owners of common shares in 436, are entitled to financial benefits comparable or equal to those that Donna receives. Carolyn's shares in 436 simply do not give her the right or ability to change the corporate structure of the company that has been in place since its creation. Carolyn is also wrong when she asserts that there is a deadlock between the shareholders that is hampering the proper management of 436. There is no deadlock. Donna has 1000 preferred shares as well as 150 common shares. With each share having one vote, Donna has 1,150 votes. Carolyn has 75 common shares, meaning she has 75 votes. Even if she were to combine her shares with David's, Carolyn would still only have 150 votes to Donna's 1,150.
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> [Emphasis added.]

[40] Because the judge found there was some oppressive conduct in Ms. Rhodes' failure to hold AGMs and have audited financial statements, but had rejected Ms. Jahnke's form of relief, the judge invited alternative submissions to discuss remedy. He noted there could be further developments, such as audited financial statements: paras. 110, 113. He also stated the parties would be at liberty to make submissions as to costs.

[41] Some time passed and the parties submitted further materials. A hearing on the appropriate remedy was held in September 2023.

Remedy Judgment

[42] At the hearing on remedy, Ms. Jahnke did not modify her claim for relief from that sought in the first hearing. She continued to insist that the only remedy was for Ms. Rhodes or the Company to buy her shares at a value based on the assessed value of the Company's sole asset, the Property: *Remedy Judgment* at para. 14.

[43] Her argument was that Ms. Rhodes continued to act in an oppressive fashion: the 2021 audited financial statement was late in arriving, and one had not yet been delivered for 2022.

[44] Further, an AGM had been held in 2022 and in 2023 but Ms. Jahnke's view was that the meetings had not been conducted appropriately.

[45] The judge was critical of the minutes of the February 2022 AGM, which were prepared by Ms. Rhodes. Ms. Rhodes' minutes did not record the specifics of questions raised by Ms. Jahnke at the meeting, nor Ms. Rhodes' responses.

[46] The judge was also critical of Ms. Rhodes' affidavit evidence at the remedy hearing, which stated, at the AGM, when Ms. Jahnke requested audited financial statements, "I was surprised by the sudden change of position from years prior". The judge found this evidence to be "disingenuous" and "troubling", given the clear evidence that Ms. Rhodes was aware since 2013 that Ms. Jahnke wanted audited financial statements and this was expressed in the *Liability Judgment*: *Remedy Judgment*, paras. 42–43. The judge found that Ms. Rhodes' hostile and uncooperative attitude towards Ms. Jahnke and her rights as a shareholder had not changed: para. 44.

[47] Despite this, the judge found that the oppressive behaviour he had identified in the *Liability Judgment* had been addressed: AGMs were held and audited financial statements were being prepared, with one such statement already delivered: *Remedy Judgment,* paras. 52–54. However, the judge found that there was still "an unhealthy amount of tension" between Ms. Rhodes and Ms. Jahnke, principally because of Ms. Rhodes' "condescending and uncooperative attitude". The

judge found Ms. Rhodes "has shown herself unable or unwilling to act as an appropriate and fair chairperson" at the AGMs: para. 54.

[48] The judge held:

> [58] Given my concerns about Donna and her disrespectful, uncooperative, and unprofessional conduct towards Carolyn as a shareholder of [the Company], and in order to ensure the corporate governance of [the Company] is managed in an appropriate manner so that all shareholders have a clear understanding of the company's annual finances and operations, I will make the following orders pursuant to s. 227 of the *BCA*:
>
> 1) For the next three annual general meetings, Donna is prohibited from acting as chairperson. This means another director, officer, or other independent third party must assume that role.
>
> 2) For the next three annual general meetings, [the Company] is to retain a third party who is unrelated in any way to any shareholder, director, or officer of the company to act as recording secretary at the meeting. This person is to prepare the minutes of the AGM and circulate them to all shareholders as soon as practicable.
>
> 3) For all future AGMs, Donna is to prepare a detailed annual report to the shareholders of [the Company] describing and explaining her actions on behalf of the company for that year, including but not limited to her actions in her role as the company's CEO and the other titles that she has adopted. This is to include identifying and explaining any expenditures she has incurred on behalf of [the Company], and identifying and explaining any remuneration she has received from the company for the year in question. The annual report from Donna is to be provided to the shareholders no later than 30 days prior to the date of the AGM. In the event Donna resigns from any or all of her managerial positions with [the Company], then her replacement or replacements are to prepare the annual report to shareholders. The need to prepare and present these annual reports can be waived if all shareholders agree in writing in advance of the AGM.
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> [59] On the issue of costs, I am satisfied that it was Donna's attitude and conduct that compelled Carolyn to come to court seeking redress. Although Carolyn did not succeed this time around in having the court order Donna or [the Company] to purchase her shares, I am satisfied that she was the successful party, in that she was correct that both Donna and [the Company] were acting in oppressive manners and breaching her rights as a shareholder of the company. For all of these reasons, I find that Carolyn is entitled to her Scale B costs and that those costs are to be paid by Donna in her capacity as the individual respondent and without any recourse to any of [the Company's] financial resources.

Issues on Appeal

[49] Ms. Jahnke's issues raised on appeal turn on one core contention: the judge erred in refusing to admit the opinion evidence of an appraiser, Katie Snell, as to what is the typical range of management fees charged to manage medium sized apartment buildings.

[50] Because of this alleged error, Ms. Jahnke contends:

a) The judge erred in failing to recognize Ms. Rhodes' oppressive conduct included over-paying herself for services to the Company; and,

b) The judge erred in imposing a disproportionate remedy, which neither party sought, without seeking further submissions.

[51] Ms. Jahnke asks the Court to allow the appeal and order that Ms. Rhodes or the Company purchase her shares for $1,937,500. Alternatively, Ms. Jahnke asks the Court to remit the matter to the trial court for a re-hearing.

[52] Ms. Rhodes disagrees the judge made the alleged errors.

[53] She submits the first issue on appeal is not properly before the Court because Ms. Jahnke did not seek to appeal the *Liability Judgment* and is out of time for doing so. In any event, Ms. Rhodes submits Ms. Jahnke is simply seeking a rehearing of the petition and has not shown any basis for interfering in the judge's findings of fact as to reasonable shareholder expectations and oppressive conduct.

[54] Ms. Rhodes also submits that the remedy the judge ordered was proportionate and matched his findings regarding the oppressive conduct.

Analysis

[55] The parties do not take issue with the judge's statement of the proper approach to determining reasonable expectations of a shareholder in the context of a claim for an oppression remedy, consistent with *BCE*.

Issue 1: Nature of the Oppressive Conduct

[56] I will first address the question of whether Ms. Jahnke is out of time for raising an issue regarding the judge's liability findings.

Timing of Appeal

[57] The *Liability Judgment* was decided April 14, 2023; the *Remedy Judgment* was decided October 4, 2023; and the notice of appeal was filed October 17, 2023. Ms. Rhodes submits that the notice of appeal was filed well beyond 30 days following the *Liability Judgment*, and therefore Ms. Jahnke does not have a right to appeal the liability findings.

[58] Rule 6(2) of the *Court of Appeal Rules* provides that the time limit for filing a notice of appeal is 30 days after the order is pronounced.

[59] Here, the order entered after the judgments was a single order stating it was made October 4, 2023. The first two terms of the order are:

> THIS COURT ORDER AND DECLARES that:
>
> (1) The affairs of [the Company] are being or have been conducted in a manner oppressive to the Petitioner contrary to s. 227 of [the *BCA*].
>
> (2) The failure of the Respondent, Donna Rhodes ("Rhodes"), to ensure annual general meetings of [the Company] are held in compliance with the *BCA* and to obtain audited financial statements for [the Company] as required by the *BCA* constitutes oppressive conduct contrary to s. 227 of the *BCA*.
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> …

[60] The parties agreed to the form of the order.

[61] Ms. Jahnke submits she is not appealing the order declaring there was oppressive conduct; she takes issue with the evidentiary ruling concerning Ms. Snell's report and findings that impacted the judge's view of the seriousness of the oppressive conduct and hence the remedy. Ms. Jahnke relies on *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2017 BCCA 287 for

the proposition that evidentiary rulings do not give rise to appealable orders until one of those rulings has an impact on the judge's disposition of the action: para. 65.

[62] In other words, Ms. Jahnke submits that had she obtained the remedy she desired, there would be no appeal. Furthermore, since there was only one order, and the appeal is taken from the order, she filed her appeal in time.

[63] In my view Ms. Jahnke's submissions are compelling, and in these circumstances I would not accede to Ms. Rhodes' argument regarding it being too late for Ms. Jahnke to advance the first ground of appeal.

Alleged Overpayment

[64] I turn to Ms. Jahnke's argument that the judge ought to have found Ms. Rhodes overpaid herself for managing the Company.

[65] Ms. Jahnke's own affidavit evidence acknowledged that after Lori Chesson passed away in 1997, Donna Rhodes "took over the day to day management of the Property, such as dealing with tenants and managing minor repairs". Her evidence appeared to acknowledge that when her mother managed the Property she was paid a salary and that it was appropriate for Ms. Rhodes to pay herself a salary.

[66] Ms. Jahnke's position on appeal, as it was before the judge at first instance, is that the base salary plus the dividends paid to Ms. Rhodes is an inordinate amount of money Ms. Rhodes is taking out of the Company.

[67] The first point to observe is the annual dividend payment to preferred shareholders is an entitlement of the preferred shareholders, and is unrelated to services. In my view Ms. Jahnke has not provided any basis for interfering with the judge's finding that there was nothing wrong with the dividend to preferred shareholders. It should therefore not be factored into the analysis of "overpayment".

[68] As for an appropriate salary for managing the Company, Ms. Jahnke submitted two pieces of evidence on the Petition, in addition to relying on Company financial statements. First, she attached to her affidavit a letter from Ms. Rhodes to

the Company accountant, in 2007, explaining why she felt justified in taking what was then a $50,000 salary. The letter appears to have been forwarded from Ms. Rhodes to Ms. Jahnke, for her information. In the letter, Ms. Rhodes goes on at length to describe her many duties, and makes the point that her responsibilities to tenants and in managing emergencies and repairs are “24/7”, and that she has to be on call which interrupts her personal time, pointing to examples when she has been called out on emergencies.

[69] It is hard to know what to make of Ms. Jahnke choosing to put in that letter as part of her own case on the petition. She did not state in her affidavit that she did not accept Ms. Rhodes’ description, in that letter, of the extent of her involvement in managing the apartment building.

[70] Additionally, Ms. Jahnke, in her response materials, did not take any issue with the content of the letter either.

[71] Thus, leaving aside the second piece of evidence (the expert opinion evidence of Ms. Snell), the evidence before the judge was that Ms. Rhodes considered her responsibilities in managing the apartment property as quite onerous.

[72] The quantum of the salary Ms. Rhodes authorized the Company to pay herself was not, in and of itself, obviously inordinately high.

[73] The judge noted that Ms. Rhodes drew a salary, including benefits, of $72,747 beginning in 2012, before Hilda Chesson’s death. Her salary remained reasonably consistent through to 2019. It dipped to $29,804 in 2020: *Liability Judgment*, paras. 77–78. The judge accepted the proposition that Ms. Rhodes was managing the operations of the Company. He found there was “no evidence of what someone performing the work [Ms. Rhodes] does for [the Company] would generally receive as a salary and benefits”: *Liability Judgment*, para. 78.

Snell Evidence

[74] Ms. Jahnke submits the judge was in error in stating there was no evidence on the point regarding the reasonableness of management fees, because she attempted to have admitted the expert opinion evidence of Ms. Snell on this very point and the judge wrongly refused to admit the evidence.

[75] Ms. Snell swore an affidavit attaching her report, which was primarily an appraisal of the underlying Property, filed as evidence in support of Ms. Jahnke's position on the petition. Her opinion is the estimated market value of the Property as of August 12, 2021 was $9,500,000.

[76] There was a second aspect to Ms. Snell's report. She also provided an answer to a request to "comment" on management costs in 2019 (my emphasis). She stated that the 2019 management salary equates to 16.96% of the reported income for that year, which "far exceeds the typical market range for management of 3% to 5% of effective gross annual income".

[77] Ms. Rhodes accepted the value of the Property was $9,500,000 in August 2021, but objected to the admissibility of Ms. Snell's report for what she said about management fees being excessive.

[78] Ms. Rhodes' counsel's objection at the hearing was technical. She said when the report was delivered, counsel did not provide written notice in accordance with *Supreme Court Civil Rule* 11-6(3). That Rule requires that before expert evidence can be admitted, it must be served in advance with written notice that the party intends to tender the expert report at trial (and does not refer to a petition proceeding). She referred the court to Rule 16-1(18) which permits the court to apply any other *Supreme Court Civil Rule* to a petition proceeding. She submitted that Ms. Jahnke had not applied under Rule 16-1(18) to introduce expert opinion evidence in the petition proceeding and so it was not otherwise admissible. Had that application been made, Ms. Rhodes' position was that fairness would have permitted her to avail herself of all of Rule 11-6, including providing responding reports or making objections to the report.

[79] It is a little difficult to discern the prejudice to Ms. Rhodes arising from any notice issue. Her counsel did concede she had received the report well in advance of the hearing. However, it appears to me from the submissions that when she received it, her counsel assumed it was only being relied upon for appraisal evidence. The cover letter providing the report referred only to it providing evidence of fair market value, not other opinion evidence. As I read the transcript of Ms. Rhodes' submissions to the judge, it appears that only once she received Ms. Jahnke's submissions in relation to the hearing of the petition did she realize Ms. Snell's report was being relied upon for an opinion as to management fees, and she then formed the view this aspect of the report needed to be challenged by way of *viva voce* evidence and it was inappropriate to proceed by summary procedure. That is why she took a technical objection to service of the report, and sought to have the whole matter referred to trial so that she could challenge the evidence.

[80] Counsel for Ms. Jahnke advised the judge that even though Rule 11 does not necessarily apply to petitions, Ms. Snell's report was "a proper Rule 11 report", that is, setting out her qualifications and certification as to her independence.

[81] The question was raised during submissions before the judge as to whether counsel for Ms. Jahnke would abandon that component of argument regarding Ms. Rhodes overpaying herself, if Ms. Snell's report related to this point was not admitted. To this question, counsel for Ms. Jahnke said he wished to proceed regardless of the report being admitted. He submitted one could determine the numbers Ms. Rhodes had been paying herself, on top of expenses to a janitor and landscaper and other maintenance people, and her reimbursed expenses, from the financial statements themselves, and could conclude this was oppressive conduct without needing Ms. Snell's report. He added that Ms. Snell's report was helpful, but "not a lynchpin", and "[a]ll the findings can be made with or without it". The judge therefore reserved his ruling on the issue, and simply included his ruling in his *Liability Judgment*.

[82] The judge dealt with the objection to Ms. Snell's report as follows in the *Liability Judgment*:

> [37] While Donna accepts that the value of La Maison Blanche was $9,500,000 in August of 2021, she objects to the admissibility of the remainder of Ms. Snell's affidavit, especially the expert opinions expressed in the report relating to the operations and expenses associated with La Maison Blanche.
>
> [38] The affidavit in question was delivered to Donna's counsel in September 2021, shortly after it was sworn. However, the note from Carolyn's counsel that accompanied the affidavit made no reference to it containing expert opinion evidence that the petitioner wished to rely on at the hearing of her petition. No formal notice pursuant to *Supreme Court Civil Rules* [*Rules*] was ever provided to Donna's counsel that Carolyn wished to rely upon the contents of Ms. Snell's affidavit as expert opinion evidence.
>
> [39] Counsel for Carolyn acknowledged that the manner in which Donna's counsel was advised of the intended use of Ms. Snell's evidence was not entirely compliant with the *Rules*. Given that fact and Carolyn's wish not to have the hearing of her petition adjourned, her counsel indicated that she was prepared to proceed with the hearing, irrespective of the Court's ruling on the objection.
>
> [40] In my opinion, Donna's objection to the admissibility of Ms. Snell's affidavit is well founded. The evidence in question is clearly expert opinion evidence and consequently if Carolyn intended to rely upon it at the hearing of her petition, then Ms. Snell's report should have been served in compliance with the *Rules*.
>
> [41] With the consent of Donna counsel, I will however accept that the value of La Maison Blanche in August of 2021 was $9,500,000. Aside from that, the balance of Ms. Snell's evidence is ruled inadmissible.

[83] Ms. Jahnke submits the judge erred at para. 39 by considering that Ms. Jahnke acknowledged the report was not served in accordance with the *Supreme Court Civil Rules*. I agree her counsel did not concede there was any problem with service.

[84] Ms. Rhodes submits at the time of the petition hearing there was no procedure for simply attaching expert opinion evidence to an affidavit and expecting it to be admissible. Counsel seeking to do so needed to either obtain: agreement to do so (and she gave her agreement but only regarding the Property value); or leave of the Court pursuant to Rule 16-1(18), presumably by way of application brought

before the hearing of the petition. I question the correctness of the latter proposition but it is not necessary to decide.

[85] This is because in my view Ms. Snell's evidence regarding management fees of rental properties was not admissible opinion evidence, for two reasons.

[86] First, the commentary in Ms. Snell's report with respect to management fees was just that: commentary. Ms. Snell did not shy away from using the word opinion to describe her conclusions as to market value; but she was more couched in the way she described her management fees conclusion. For example, in her cover letter, she described her report as the basis for her "[market] value opinion", and indeed, the bulk of her report contains standard appraisal evidence, describing the property in detail, and the different approaches to valuation. However, she described her statements in respect to management fees as being in response to a request to "comment" on the same.

[87] Second, within the body of her report, Ms. Snell provided no data or sources of management fees in respect of other apartment buildings, but simply stated in a brief conclusory way that the 2019 management fee paid to Ms. Rhodes, relative to rental income, "far exceeds" the "typical market range" of management fees for managing an apartment building. The reader has no information as to why she reached this conclusion: is there a standard industry publication that sets out norms; has she seen the management fee expense records of several other apartment buildings, and if so, how many did she consider to reach her conclusion on range? The reader does not know and cannot simply assume how many buildings similar to this one, with a similar tenant profile and age and size of building, provided management expense information to Ms. Snell in order for her to reach her conclusion as to a "typical range". There is also no basis for counsel for Ms. Jahnke's submission that this should be extrapolated to apply over the course of many years, given that Ms. Snell simply commented on 2019.

[88] Ms. Snell's qualifications set out in her report also did not explain how she was qualified to reach a conclusion as to the "typical market range" of management

fees. The judge was concerned about this and queried Ms. Jahnke's counsel whether her report discussed her qualifications in this regard, and counsel assured him it did. However, in fact the report simply set out Ms. Snell's qualifications as a real estate appraiser, and said nothing linking those qualifications to expertise in determining the reasonableness of fees charged to manage apartment buildings similar to the Property.

[89] The judge noted he had "no evidence of what someone performing the work [Ms. Rhodes] does for [the Company] would generally receive as salary and benefits": *Liability Judgment*, para. 78. This was true. Even if Ms. Snell's report was admitted, it would remain true, as Ms. Snell's report simply did not address the details of Ms. Rhodes' services and compare them to other persons who provide similar services or make any factual assumptions in this regard.

[90] While certainly it would have been preferable had Ms. Rhodes' counsel paid more attention to the body of Ms. Snell's report when it was first served and voiced her objection then, in my view, it would have been highly problematic and prejudicial to Ms. Rhodes had the judge accepted as opinion evidence Ms. Snell's conclusion on the "typical range" of management fees when there was no notice of the foundations of her opinion, even if she was qualified to give it. Expert evidence must have a proper factual foundation in order for a judge to rely on it to make findings of fact: *R. v. Gibson,* 2008 SCC 16 at para. 58, citing *R. v. Abbey,* [1982] 2 S.C.R. 24 at para. 52, 1982 CanLII 25.

[91] Even if expert evidence meets the threshold requirements of admissibility, the judge must decide whether it is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from its admission: *White Burgess Langille Inman v. Abbott and Haliburton Co.,* 2015 SCC 23 at para. 24, citing *Abbey* at para. 76.

[92] Counsel for Ms. Jahnke conceded before the judge that the expert evidence on management fees was not necessary and all the findings sought could be made with or without it, based on the financial statements alone.

[93] Given the lack of notice of any foundation for Ms. Snell's "comment" on the typical range of management fees, the fact that the probative value of the opinion was admittedly minimal, and the prejudicial effect to Ms. Rhodes had it been admitted was great, it is my view that the opinion ought not to have been admitted by the judge. Thus, while his reasoning in excluding it may have been in error, I see no basis for concluding that the judge ought to have admitted this aspect of the report.

[94] Ms. Jahnke did not in fact demonstrate, through the financial statements, Ms. Rhodes was overpaying herself from the Company for the management services she was providing. The judge's conclusion he was not persuaded Ms. Rhodes' compensation was exorbitant or that she was engaging in self-dealing to the detriment of the Company and shareholders (para. 78) is entitled to deference.

[95] I would not accede to the first issue on appeal.

Issue 2: Remedy

[96] I turn to Ms. Jahnke's complaint that the judge's remedy was disproportionate and not in keeping with submissions made by either party.

[97] I do not consider it a valid complaint that the judge decided on a remedy of his own making as opposed to choosing a remedy that matched the submissions of one of the parties.

[98] The judge had wide discretion under the *BCA* to fashion an appropriate remedy. The relief ordered should go no further than necessary to rectify the oppressive conduct: *Radford v. MacMillan*, 2018 BCCA 335 at para. 87, citing *Wilson v. Alharayeri*, 2017 SCC 39 at para. 53.

[99] In a case of this nature, a judge is not required to accept one of two proposals for a remedy as a binary choice between party A's or party B's proposed remedy. Nor is a judge required to run each permutation and combination of possible remedies by the parties before deciding what is appropriate.

[100] The overall problem with Ms. Jahnke's position is she never varied from seeking a remedy that would match what she asserted were her expectations, yet the judge found in the *Liability Judgment* that those expectations were not reasonable. The judge's conclusion was based on the evidence as to the history of the Company and its structure, and those findings were open to him. The judge was fair in inviting Ms. Jahnke to make alternative submissions on remedy, upon her learning of his findings regarding the oppressive conduct. But respectfully, having chosen to ignore the judge's request to advance alternative positions, Ms. Jahnke does not have a reasonable basis for complaining that the judge considered alternatives on his own.

[101] Ms. Jahnke submits the judge wrongly did not take into account Ms. Rhodes stated views about Ms. Jahnke not being a blood relative, her views that Ms. Jahnke's shares are worth no more than $1 each, as well as her actions in paying out disproportionate amounts to herself only.

[102] Ms. Jahnke also focuses on the judge's finding that Ms. Rhodes was "disingenuous" (para. 96 of *Liability Judgment*; para. 42 of *Remedy Judgment*), and had shown "disrespectful, uncooperative, and unprofessional conduct" towards Ms. Jahnke (para. 58, *Remedy Judgment*). Ms. Jahnke appears to submit had the judge considered all of this, he would have realized Ms. Jahnke was being treated unfairly and ordered her shares be purchased.

[103] Ms. Jahnke fails to appreciate she made all of these arguments before the judge and the judge considered them, but in the end the judge's findings as to the oppressive conduct were limited to two things: the failure to produce audited financials statements and the failure to organize and hold proper AGMs: *Liability Judgment*, paras. 91, 97, 98, 112. There is no basis for interference with the judge's refusal to find that other conduct was oppressive.

[104] The judge expressed the view that Ms. Rhodes "is now acutely aware of her obligation to ensure that the requirements of the BCA concerning AGMS be scrupulously respected and followed", unless waived: *Liability Judgment*, para. 91.

When he found out at the remedy hearing the AGM was not conducted professionally, he fashioned a remedy to address that particular problem. I see no error in that regard.

[105] The judge ordered a remedy that matched the oppressive conduct he found. Ms. Jahnke has not shown the judge erred in the exercise of his discretion.

Disposition

[106] I would dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Horsman"