IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *2059041 Alberta Ltd. v. Pacific Pro Dive (2019) Ltd.,* 2024 BCSC 1894

Date: 20241015
Docket: S220510
Registry: Victoria

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Between:

2059041 Alberta Ltd. and Ronald Frederick Nelson

Plaintiffs

And

Pacific Pro Dive (2019) Ltd., Beamer Solutions Ltd., Scott Edward Fyfe and Natalie Robyn Fyfe

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiffs:	J.C. Adams
The Defendants, appearing on their own behalf:	
Place and Date of Trial:	Victoria, B.C. December 20-22, 2023 February 9, 2024
Place and Date of Judgment:	Victoria, B.C. October 15, 2024

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Introduction

[1] In this application the plaintiffs seek judgment for damages arising from alleged oppressive acts in the operation of the defendant Pacific Pro Dive (2019) Ltd. ("Pacific").

[2] The plaintiff 2059014 Alberta Ltd. ("RonCo") is a 50% shareholder in Pacific. The plaintiff, Ronald Nelson is the owner and a director of RonCo and is a director and officer of Pacific.

[3] The defendant Beamer Solutions Ltd. ("Beamer") is a 50% shareholder in Pacific. The defendants Scott Fyfe and Natalie Fyfe are the owners and directors of Beamer, and directors and officers of Pacific.

[4] Pacific provides scuba diving instruction and related sales in Courtney, B.C. It was incorporated on February 20, 2019.

[5] The plaintiffs allege that the defendants acted oppressively in the operation of Pacific, in that the Fyfes caused Pacific to improperly redirect funds from Pacific to Beamer. The plaintiffs rely on a unanimous shareholder agreement and a share purchase agreement in support of their claims. While the plaintiffs advanced numerous other acts of oppression in support of their claim in their notice of civil claim, before me they proceeded primarily on the basis of two acts of oppression relating to the repayment of loans purportedly made by Beamer to Pacific.

[6] The plaintiffs seek repayment of RonCo's initial investment of $125,000; its shareholder loan to Pacific in the amount of $125,000; and $16,925, which Mr. Nelson advanced to Pacific on the understanding that he would be reimbursed.

[7] This application was originally scheduled for hearing in 2022. The defendants objected on the basis that additional discovery was required. At the hearing before me, following the production of new evidence, the defendants no longer oppose this matter proceeding by way of summary trial.

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Issues

[8] The issues raised in this application are:

a) Is this matter suitable for disposition under Rule 9-7 from Supreme Court Civil Rules, B.C. Reg. 168/2009?

b) Did the defendants act oppressively and in breach of s. 227 of the BC *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]?

c) What is the relevance of the conduct of Mr. Nelson to the claims in oppression?

d) Are the plaintiffs entitled to damages?

Is this matter suitable for disposition under Rule 9-7?

[9] Notwithstanding the concession of the defendants that this application is suitable for disposition pursuant to Rule 9-7, I also must be satisfied of the application's suitability.

[10] Where a court is able to find the necessary facts to support a claim, and it is not unjust to do so, a court can grant final judgment on a summary trial application. Factors to be consider include: the amount involved, the complexity of the issues, prejudice arising from any delay, the cost of a conventional trial, and whether the evidence is sufficient to decide the dispute: *Cepuran v. Carlton*, 2022 BCCA 76 at para. 149 and *Canex Investment Corporation v. 0799701 B.C. Ltd.,* 2020 BCCA 231 at paras. 63–67.

[11] I find that the transcripts and affidavit evidence before me on this application provide a sufficient evidentiary foundation to properly assess the issues raised. The issues and evidence are not so complex that a conventional trial is required. In the result, I am satisfied that the evidence before me is adequate and allows me to fairly find the facts necessary to resolve the issues in dispute. I am satisfied that this application is suitable for determination pursuant to R. 9-7.

Did the defendants act oppressively and in breach of s. 227 of the *BCA*?

Legal Principles

[12] Section 227(2) of the *BCA* sets out what is known as the oppression remedy, in providing:

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

[13] The oppression remedy is an equitable remedy, allowing the court to make appropriate orders to ensure fairness to shareholders in the operation of a corporation. As summarized by the court of appeal in *Canex*:

> [11] Conduct that is oppressive or unfairly prejudicial is conduct that violates the reasonable expectations of shareholders, causing them harm. It often has its genesis in actions taken by the company, but can also arise from actions taken by one or more of the company's directors or other actors, including shareholders: *BCE Inc. v. 1976 Debentureholders*, at para. 65 [*BCE*].
>
> [12] Oppression is a statutory remedy available to shareholders who have suffered, in their capacity as shareholders, a harm that is typically (but not necessarily) separate and distinct from a harm to the corporation: see, for example, *Dubois v. Milne*, [*Dubois*]. There is arguably an unresolved question about whether it is necessary for a claimant to show direct and special harm in their capacity as shareholder in a manner distinct from all other shareholders before an oppression remedy is available: see *Radford v. MacMillan,* at para. 61. This question relates to the relationship between the circumstances in which an oppression remedy may properly be sought, as opposed to the requirement to commence a derivative action in the name of the company: see *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, [*Jaguar*], and *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.*, [*CSA Building Sciences Western Ltd.*], leave to appeal ref'd [2016] S.C.C.A. No. 383. This issue surfaces in this appeal because the appellants assert, as I understood the argument, that the judge confused conduct that could arguably support a derivative action, based on alleged wrongs that

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> should be seen as wrongs to the Company by another company, with the claim to oppression. I will return to this issue in the course of these reasons.
>
> [13] Several observations may assist in structuring the analytical framework to be brought to bear in assessing whether a remedy is available for oppressive conduct. First, the remedy is available to address the objective and substantive reality of the manner in which the affairs of a company are conducted. It is not limited by mere formalities of corporate structure. What matters is substance, not form. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the true nature of relationships within and between related companies. Doing so does not displace the importance of legal structures and corporate law principles which inform the analysis. This is the approach the judge took in this case, and rightly so. The judge was entitled to look past corporate formalities to determine who truly controlled the Company, and who benefited from the transactions that were impugned in these proceedings: *BCE* at para. 58. The judge's finding of liability against the personal defendants was rooted in this approach, and does not reflect an error in principle.

[14] The oppression remedy considers the reasonable expectations of shareholders, including the business realities of the particular corporation, and the particular features of the corporation at issue. It gives the court broad, equitable jurisdiction to enforce what is fair, and not just what is legal: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 56-59.

[15] In *BCE*, the court held at paras. 59-60:

> [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.
>
> [60] Against this background, we turn to the first prong of the inquiry, the principles underlying the remedy of oppression. In *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360 (H.L.), at p. 379, Lord Wilberforce, interpreting s. 222 of the U.K. *Companies Act, 1948*, described the remedy of oppression in the following seminal terms:
>
>> The words ["just and equitable"] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter

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> se which are not necessarily submerged in the company structure.

[16] The modern focus of oppression claims is on the reasonable expectations of shareholders, and whether those expectations have been breached resulting in harm to the applicant. The court must determine "whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": *BCE* at para. 62.

[17] While legal structures and corporate law principles remain important in the analysis, the true substance of how a corporation is controlled and operated, the relationships between related corporations and within the corporation at issue, and the parties who benefited from the impugned conduct, are all to be considered by the court: *Canex* at para. 13.

[18] It should be noted that the oppression remedy is available not only to shareholders, but also a wide range of stakeholders, including creditors: *BCE* at para. 45; *Multiguide GmbH v. Broer*, 2022 BCSC 852 at paras. 166, 172, aff'd 2023 BCCA 134. In other words, the reasonable expectations of such stakeholders may give rise to a claim in oppression, where conduct violates those expectations causing harm to the stakeholder.

[19] The defendants argue that no liability should be found against them personally, as that would require a piercing of the corporate veil which would be inappropriate on the facts of this case. In the alternative, they submit that if any piercing of the corporate veil is allowed, liability should extend to Mr. Nelson himself as a director of Pacific.

[20] The plaintiffs submit that the law in relation to piercing the corporate veil is not relevant in this case, as their claim is in oppression and they rely on *Canex* as support for their claim against the Fyfes personally, and in asserting the claim of Mr. Nelson personally. I agree with the plaintiffs that it is not necessary to pierce the corporate veil to address the claims advanced in this action, and the law of

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oppression allows me to assess claims in relation to the personal parties without resort to a piercing of the corporate veil.

What were the reasonable expectations of the plaintiffs in relation to Pacific, and were such expectations breached?

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[21] 1198203 B.C. Ltd. was incorporated on February 20, 2019. Immediately upon incorporation, Beamer received 100 class A common shares in the company. On March 8, 2019, 1198203 B.C. Ltd. changed its name to Pacific Pro Dive (2019) Ltd., a defendant in this action. I will refer to this numbered company as Pacific throughout this decision.

[22] On February 25, 2019, Pacific purchased the assets of a company known as Pacific Pro Dive Ltd. (the “Pacific-Coltart Agreement”). The principal of Pacific Pro Dive was Bill Coltart. The purchased assets included inventory, rental gear, leasehold, equipment and vehicle, goodwill, and two websites. The purchase price was $260,000. Both Mr. and Ms. Fyfe were parties to the Pacific-Coltart Agreement, as principals of Pacific.

[23] The purchase price was paid by way of an initial payment of $160,000, with the balance due in one year. The balance carried interest at the annual rate of 7%, and was secured against the home of the Fyfes.

[24] The Pacific-Coltart Agreement included terms of a post closing relationship between Pacific Pro Dive and Mr. Coltart, and Pacific, specific sections of which would govern a period of up to five years. This included certain agreements for referrals, non-competition, defined and restricted charter services, and certain merchandise cost guarantees.

[25] On August 1, 2019, RonCo and Pacific entered into a share purchase and sale agreement (“SPA”). Pacific issued 100 class B common shares out of treasury. Pursuant to the SPA, Pacific sold the 100 Class B voting shares to RonCo. These shares represented 50% of the total common voting shares of Pacific. RonCo paid $125,000 for the shares.

[26] Before the SPA was completed, Pacific provided RonCo with a balance sheet dated July 23, 2019. This balance sheet recorded an outstanding shareholder loan owing to the class A shareholder, i.e. Beamer, in the amount of $259,521.73.

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[27] RonCo was not provided with a copy of the Pacific-Coltart Agreement and was not told that Pacific Pro Dive Ltd. held a mortgage over the Fyfes' home as security for the performance of the obligations under the Pacific-Coltart Agreement.

[28] The SPA contained the following material terms:

a) The effective date of the agreement is August 9, 2019.

b) On the effective date, RonCo (the Purchaser) would pay Pacific (the Vendor) $125,000.

c) The SPA is conditional upon Beamer, RonCo and Pacific executing a unanimous shareholder agreement ("USA"), effective as of the effective date.

d) Mr. Nelson would become a director of Pacific and an employee of Pacific at an annual salary of $65,000, subject to any salary increases as agreed to between Mr. Nelson and Pacific from and after the first anniversary of the effective date.

e) Section 4.03 provided:

> On or before the first anniversary of the Effective Date, Ron Nelson undertakes to provide written notice to the Vendor advising as to whether or not Ron Nelson wishes to remain an employee of the Vendor working primarily from Vancouver Island. In the event that Ron Nelson advises the Vendor that he wishes to remain an employee of the Vendor working primarily from Vancouver Island from and after the first anniversary of the Effective Date, **the Purchaser agrees to provide a shareholder loan to the Vendor in the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) to assist in financing the ongoing operations of the Vendor, subject to the repayment terms and conditions set forth in the USA**. In the event that Ron Nelson either (a) notifies the Vendor that he does not wish to remain an employee of the Vendor working primarily from Vancouver Island from and after the first anniversary of the Effective

> Date, or (b) fails to provide the required notice to the Vendor on or before the first anniversary of the Effective Date, **the Vendor agrees to refund to the Purchaser the sum of One Hundred Twenty-Five Thousand Dollars paid for the Purchaser's Shares pursuant to section 3.01 of this Agreement within 30 days following the first anniversary of the Effective Date**, whereupon the share certificate for the Purchaser's Shares shall be cancelled by the Vendor and Ron Nelson shall cease to be a director and officer of the Vendor and shall cease to be a director and officer of the Vendor and shall cease to be an employee by the Vendor.
> **[emphasis added]**

[29] In this decision, I will refer to the loan described in s. 4.03 of the SPA as the RonCo Loan.

[30] On August 1, 2019, Beamer, RonCo and Pacific entered into the USA. The USA had the following material terms:

a) The effective date was August 9, 2019.

b) The initial directors of Pacific would be Mr. and Ms. Fyne (nominees of Beamer) and Mr. Nelson (nominee of RonCo).

c) Mr. Fyfe would be the president, Mr. Nelson would be the vice-president, and Ms. Fyfe would be the secretary and treasurer.

d) The secretary-treasurer's primary responsibilities would include all administrative, financial and budgeting matters, subject to the provisions in s. 4.3.

e) Section 4.3 provided:

> No less than 60 days prior to the end of each financial year of the Corporation [Pacific], the Secretary-Treasurer shall prepare, or have prepared, and shall present to the directors for approval a business plan and budget for the Corporation for the ensuing financial year. The business plan and budget approved by the directors shall be the business plan and budget of the Corporation for the ensuing financial year of the Corporation, subject to any changes as may be made thereto from time to time by the directors of the Corporation.

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f) The purpose and business objective of Pacific was to "profitably provide scuba diving instruction, sales and related services from its business location in Courtney, BC" (s. 5.1).

g) Section 5.2 provided:

> Each of the Shareholders agrees to co-operate and work with all other Shareholders so as to assist or cause the Corporation to successfully carry on the business described in Section 5.1 of this Agreement promptly, efficiently and in a businesslike manner and so as to maximize the financial benefit to all Shareholders. The Shareholders further agree to work together to resolve any difficulties of differences they might have as to the proper method or manner of achieving any objective with a view to the best interests of the Corporation as a whole.

h) Pacific would not make any loans or advances to shareholders without the prior written consent of no less than 66 2/3% of the shareholders (s. 5.3(f)).

i) Pacific would prepare and circulate to the shareholders monthly and year-to-date financial statements, and annual pro forma financial statements and budgets with semi-annual update.

j) Section 6.1 provided:

> The Corporation and each of the Shareholders hereby acknowledge and agree that as at the Effective Date, the Corporation is indebted to Beamer on account of shareholder loans in the principal sum of Two Hundred Fifty-Nine Thousand Five Hundred Twenty-One Dollars and Seventy-Five Cents ($259,521.75) advanced by Beamer to the Corporation to finance the business and operations of the Corporation (the "Initial Loans"). The Corporation and the Shareholders acknowledge and agree that the Initial Loans shall not be interest-bearing and shall not be payable on the demand of Beamer except where this Agreement is terminated pursuant to any of the provisions of section 2.1 of this Agreement. The Corporation and the Shareholders acknowledge and agree that any repayment of the Initial Loan will be subject to the prior written approval of the directors of the Corporation representing no less than 66 2/3% of the issued and outstanding voting Class A Common Shares and voting Class B Common Shares at the time any such repayment is proposed.

In this decision I will refer to the loan from Beamer to Pacific, as described in s. 6.1 of the USA, as the Initial Loan.

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k) In the event RonCo and Mr. Nelson confirmed their continued roles in the company in accordance with s. 4.03 of the SPA, the requirement for the RonCo Loan was acknowledged and essentially the same repayment terms as set out for the Initial Loan were created for the RonCo Loan, namely:

> 6.2 … The Corporation and the Shareholders acknowledge and agree that the Ronco Loan shall not be interest-bearing and shall not be payable on the demand of Ronco except where this Agreement is terminated pursuant to any of the provisions of section 2.1 of this Agreement. The Corporation and the Shareholders acknowledge and agree that any repayment of the Ronco Loan will be subject to the prior written approval of the directors of the Corporation representing no less than 66 2/3% of the issued and outstanding voting Class A Common Shares and voting Class B Common Shares at the time any such repayment is proposed.

l) Importantly, the following additional terms was provided in relation to the repayment of the RonCo Loan, at s. 6.3:

> Notwithstanding the provisions of sections 6.1 and 6.2 of this Agreement, the Corporation and the Shareholders acknowledge and agree that repayment of the Ronco Loan will take priority over repayment of the Initial Loan and that the proceeds of the Ronco Loan will not be used by the Corporation to pay off any portion or all of the Initial Loan without the prior written consent of Ronco.

[31] On August 8, 2019, RonCo paid Pacific $125,000 for the class B shares, and the parties began operating Pacific together.

[32] On February 4, 2020, Mr. Nelson exercised his option under s. 4.03 of the SPA to continue working for Pacific. He agreed to advance the RonCo Loan ($125,000) to Pacific in accordance with ss. 6.2 and 6.3 of the USA, and on February 6, 2020, Pacific received the $125,000 from Mr. Nelson.

[33] Mr. Nelson and RonCo submit that their reasonable expectations are set out in the SPA and USA, namely: that funds invested by way of the share purchase would be used by Pacific in the business and in accordance with the SPA and the USA; and, in particular, that the initial shareholder loan from Beamer would not be repaid without the express consent of RonCo. The plaintiffs also submit that they

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held a reasonable expectation that Beamer had invested approximately $260,000 in Pacific, and that Pacific was not subject to any undisclosed restrictions or preferential arrangements with other operations, such as those represented by Mr. Coltart.

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[34] Beamer and the Fyfes submit that they had a reasonable expectation that Mr. Nelson would work in the best interests of Pacific, and would promote and advance the interests of Pacific.

RonCo Initial investment

[35] The SPA clearly states that Pacific is selling shares to RonCo. Mr. Nelson and the Fyfes are not parties to the SPA. The class B shares which were purchased by RonCo were issued from treasury on August 1, 2019, and were never owned by any party prior to RonCo.

[36] The SPA was conditional upon the execution of the USA, which was executed by RonCo, Beamer, and Pacific.

[37] Beamer and the Fyfes had access to counsel throughout the completion of the agreements with RonCo. Initially, the Fyfes had their lawyer prepare the agreements. The drafting was then taken over by Mr. Nelson’s lawyer. Ultimately, the Fyfes took the final version of the agreements to their own lawyer for advice, and they signed the agreements. I am not persuaded that they did not understand the import of the agreements, or did not have access to legal advice such that Mr. Nelson took advantage of them.

[38] Further, the defendants have not claimed in this action that the SPA or the USA are not enforceable instruments.

[39] I find that the USA and the SPA are enforceable, and represent the intentions of the parties when they were executed.

[40] Section 6.1 of the USA acknowledged that Beamer had lent $259,521.75 to Pacific to finance the business and operations of the company, and that this Initial

Loan, as defined in the USA, was not payable on the demand of Beamer. Rather, s. 6.1 of the USA provides that any repayment of this loan was subject to the written approval of the directors of Pacific, representing 66 2/3% of the class A and Class B shares.

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[41] Ms. Fyfe agreed that within one month of the payment by RonCo to Pacific of $125,000 for the class B shares, she caused Pacific to transfer $125,000 from Pacific to Beamer.

[42] In her affidavit sworn in support of this application, Ms. Fyfe stated that Beamer sold 50% of its shares in Pacific to RonCo for $125,000. Ms. Fyfe testified on discovery in April 2023 that Beamer sold its shares in Pacific to RonCo. She stated:

> 319 A… Well, my understanding is that Beamer purchased Pacific Pro Dive and owned Class A Shares, and then we sold out of the Pacific Pro Dive treasury shares to Ronco.

[43] Ms. Fyfe confirmed that when she referred to the "we" in her answer, she meant Beamer, i.e. Beamer sold its shares to RonCo.

[44] Ms. Fyfe then agreed that she understood that, on the sale of shares to RonCo, the purchase price of $125,000 belonged to Beamer, because Beamer was selling the shares.

[45] The documents prepared by Ms. Fyfe at the time, show that she treated the payment from RonCo as received by Pacific and paid by Pacific to Beamer as partial repayment of Beamer's shareholder loan.

[46] In communication with her accountant in February 2020, the accountant confirmed with Ms. Fyfe that RonCo did not purchase shares from Beamer – its shares were issued out of treasury, and the payment for his shares was made to Pacific, not Beamer.

[47] In January 2021, Ms. Fyfe provided Mr. Nelson with a chart that identified a repayment of Beamer's shareholder loan in the amount of $80,000 on August 19,

2020, from the RonCo proceeds of sale, and a repayment in the amount of $17,424.74 on February 12, 2020, from the RonCo proceeds of sale. It is not clear when the remainder of the $125,000 was transferred to Beamer, but I accept Ms. Fyfe's admission that $125,000 was transferred to Beamer.

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[48] The evidence of Ms. Fyfe that Beamer sold shares to RonCo is obviously incorrect. Pacific clearly issued new class B shares, which were sold by Pacific to RonCo. At the time the SPA was prepared, the issuance of the class B shares in Pacific in anticipation of the SPA was under the sole control of the Fyfes, as directors of Pacific.

[49] I cannot accept as credible the evidence of Ms. Fyfe on discovery or on this summary trial that she did not understand that it was Pacific that was selling the class B shares, or that she understood Beamer was selling its shares to RonCo.

[50] On discovery, Ms. Fyfe stated that the Initial Loan of $259,521.75, as set out in s. 6.1 of the USA, represented Beamer's initial investment in Pacific, by way of the Pacific-Coltart Agreement. This evidence is not accurate.

[51] Beamer did not purchase the assets of Pacific Pro Dive. Pacific purchased the assets. Further, Beamer did not loan all of the purchase price to Pacific to affect the purchase. Beamer advanced $160,000 to Pacific by way of a shareholder loan, which was the initial payment made under the Pacific-Coltart Agreement. The remainder, namely $100,000 plus interest, continued as an obligation owing by Pacific to Pacific Pro Dive. Beamer did not advance the remainder of the funds owing under the Pacific-Coltart Agreement.

[52] Notwithstanding the fact that Beamer only advanced the initial $160,000 for the purchase of the assets, the trial balance of Pacific on February 26, 2019, shows a loan of $258,994.24 from the class A shareholder (Beamer), and the USA states that Pacific owes Beamer the full amount of $259,521.75, and defines such loan as the Initial Loan. The repayment of the Initial Loan is governed by ss. 6.1 and 6.3 of the USA.

[53] The Fyfes submit that they were told by someone to show the asset price as the value of the shareholder loan (the Initial Loan) given that the purchase was an asset purchase, and the assets were shown with that value on the books. There is no direct evidence from anyone who purportedly told the Fyfes to show the entire asset purchase price under the Pacific-Coltart Agreement as the value of the shareholder loan, and as such this evidence is not reliable or admissible for its truth.

[54] The Fyfes argue that in fact the Initial Loan was actually $153,521.75, and not the $259,521.75 as represented in the USA. The difficulty with this position at trial is that they did not disclose the true investment of Beamer to RonCo when RonCo entered into the SPA and the USA. It appears to be true that Beamer only loaned $160,000 to Pacific. However, through Beamer, the Fyfes represented that Beamer had invested close to $260,000 in Pacific, which was clearly inaccurate.

[55] At the time of the transfer from Pacific to Beamer of the $125,000, the RonCo Loan had not been advanced. Therefore, only s. 6.1 of the USA had application with respect to this transfer.

[56] Section 6.1 required the written approval of the directors representing no less than 66 2/3% of the class A and Class B shares for any repayment of the Initial Loan. No such written approval was granted by any of the directors, let alone 66 2/3% of the directors, with respect to the transfer of $125,000 from Pacific to Beamer in the summer of 2019.

[57] I find that, based on the representations expressed in the USA and the SPA, and the balance sheet provided by Ms. Fyfe in the summer of 2019, RonCo had a reasonable expectation that Beamer had invested almost $260,000 in Pacific, as represented by Beamer’s shareholder loan, and that such loan would not be repaid to Beamer without the express consent of RonCo.

[58] I find that in transferring $125,000 from Pacific to Beamer in the summer of 2019, Ms. Fyfe caused Pacific to repay, in part, the Initial Loan, in contravention of the USA.

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[59] I find the actions of Pacific and Ms. Fyfe in issuing the transfer to Beamer, and Beamer in receiving the transfer, were oppressive to RonCo. RonCo's expectation as a shareholder was that Beamer's shareholder loan would not be repaid without the consent of RonCo. By transferring $125,000 out of RonCo, Pacific and Ms. Fyfe preferred the interests of Beamer over the interests of RonCo, resulting in harm to RonCo.

RonCo Loan in February 2020

[60] Under the SPA, Mr. Nelson had until August 2020 to decide whether to continue as an employee and advance the RonCo Loan. If he decided he did not want to continue, Pacific was obliged under the PSA to return to him the $125,000 purchase price for the class B shares, RonCo would relinquish its shares, and Mr. Nelson would no longer be an officer or director of Pacific.

[61] In effect, the combination of the USA and SPA contemplated RonCo investing $250,000 in Pacific, over the course of two years by way of an initial investment of $125,000 in exchange for the class B shares and a later loan of $125,000. RonCo had the option of choosing to pull out of Pacific within one year of its initial investment, pursuant to s. 4.03 of the SPA. If RonCo chose to complete the investment pursuant to s. 4.03 of the SPA, the $125,000 loan contemplated by s. 4.03 of the SPA would bring RonCo's investment to a rough equivalent of the purported investment by Beamer and its approximately $260,000 shareholder loan.

[62] In January 2020, the Fyfes told Mr. Nelson that they needed $106,000 as a final payment to Mr. Coltart on the purchase of the original Pacific Pro Dive. Mr. Nelson understood the funds were owing by Pacific to Pacific Pro Dive in relation to the original asset purchase, and RonCo agreed that the RonCo Loan could be used to pay this obligation. However, Mr. Nelson did not understand that the funds would be paid to Beamer on account of its shareholder loan, or agree to any repayment of the Initial Loan.

[63] On February 4, 2020, Mr. Nelson exercised his option under s. 4.03 of the SPA to continue working for Pacific. He agreed to advance the RonCo Loan

($125,000) to Pacific in accordance with ss. 6.2 and 6.3 of the USA, and on February 6, 2020, Pacific received the $125,000 from Mr. Nelson.

[64] Ms. Fyfe agreed on discovery that the $125,000 received from Mr. Nelson in February 2020 was used to pay Pacific Pro Dive $106,751.36, the final amount outstanding from the Pacific-Coltart Agreement. She stated that Beamer had originally purchased the assets of Pacific Pro Dive, and noted that the final payment under that agreement was due in February 2020. While it is true the final payment under the Pacific-Coltart Agreement was due in February 2020, it is clearly not the case that Beamer purchased the assets under the Pacific-Coltart Agreement.

[65] Following the final payment to Pacific Pro Dive, the mortgage on the Fyfes' home was discharged.

[66] On February 12, 2020, Ms. Fyfe recorded in the books of Pacific a repayment of the Beamer shareholder loan in the amount of $106,751.36.

[67] At no time before the RonCo Loan was received by Pacific had the Pacific-Coltart Agreement been disclosed to Mr. Nelson.

[68] The plaintiffs submit that, had they known about the Pacific-Coltart Agreement, Mr. Nelson would not have caused the RonCo Loan to be made to Pacific, and instead would have exercised RonCo's right to a repayment of its initial investment and return of RonCo's shares and rights to Pacific. The plaintiffs submit that the Fyfes had a direct financial interest in making the final payment under the Pacific-Coltart Agreement, because of the risk to their home evidenced by the mortgage held by Pacific Pro Dive as security for the final payment.

[69] Mr. Nelson was a director of Pacific and was entitled to know the terms of any material agreements affecting the operation of Pacific, which the Pacific-Coltart Agreement clearly was. While the Pacific-Coltart Agreement ought to have been disclosed to Mr. Nelson prior to his initial investment, it without a doubt ought to have been disclosed to him prior to him confirming RonCo's ongoing role in Pacific by way

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of the $125,000 shareholder loan made in February 2020 in accordance with s. 4.03 of the SPA.

[70] In using the RonCo Loan to make the final payment under the Pacific-Coltart Agreement, the Fyfes obtained a clear benefit – namely the discharge of the mortgage against their home. This benefit ought to have been disclosed to Mr. Nelson at the time the RonCo Loan was made in contemplation of the final payment.

[71] Finally, and perhaps more importantly, Ms. Fyfe reduced Beamer’s shareholder loan to Pacific by $106,751.36. This repayment purports to recognize that Beamer advanced all the funds needed to complete the Pacific-Coltart Agreement, which is not the case. Rather than Beamer advancing the funds to Pacific to complete the agreement, RonCo advanced the funds to complete the agreement. The $106,751.36 portion of the Beamer shareholder loan is a fabrication – it was never loaned by Beamer to Pacific. In effect, the “repayment” of the Beamer shareholder loan corrected the overstatement of the Beamer loan in the balance sheet.

[72] While the defendants led evidence regarding their efforts to build the company – the financial impact on them of their decision to defer wages for an extended period of time, the sacrifices they made to keep Pacific on a solid footing, all of which I accept they did – these efforts cannot override the clear language of the SPA and the USA. The provisions restricting the repayment of the Beamer shareholder loan were not boiler plate that they might have been missed; these provisions were drafted in response to the expectations of the parties to this specific transaction and must be upheld.

[73] The bookkeeping repayment of the Beamer shareholder loan may have made sense to Ms. Fyfe, given that Beamer did not actually advance the $106,751.36 to Pacific, or receive those funds which were in fact paid to Pacific Pro Dive under the Pacific-Coltart Agreement. Nevertheless, the transaction was in clear breach of the representations and terms of the USA. Mr. Nelson had a reasonable expectation that Beamer had in fact loaned close to $260,000 to Pacific, which was roughly equal to

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the amounts he was expected to invest. In fact, Beamer had invested $160,000 into Pacific, and RonCo invested $250,000. This is a material misrepresentation, which resulted in a breach of the reasonable expectations of RonCo and Mr. Nelson.

[74] Further, RonCo had a reasonable expectation that Beamer's shareholder loan would not be repaid without RonCo's express consent. In reducing Beamer's shareholder loan account by $106,751.36 and failing to disclose the personal benefit of the discharge of the mortgage against their home, Pacific and Ms. Fyfe acted oppressively, preferring the interests of the Fyfes personally and Beamer over the interests of RonCo.

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The $16,925 debt to Mr. Nelson

[75] Beginning in the summer of 2019, Mr. Nelson would periodically purchase goods and supplies for the business using his own resources. He would then submit receipts, to be repaid by Pacific. Mr. Nelson did not receive financial information indicating how these advances were recorded, until November 2020 when he received a balance sheet indicating that the RonCo shareholder loan account had been increased to $152,621. Ms. Fyfe was responsible for the books of Pacific. She caused Pacific to record Mr. Nelson's personal expenditures as loans from RonCo. Some, but not all, funds were repaid to Mr. Nelson from Pacific.

[76] This practice was also followed by the Fyfes and Beamer. The Beamer shareholder loan account fluctuated as the Fyfes made purchases for Pacific out of their own resources. All such contributions were recorded in the Beamer shareholder loan account, even when the contributions were made by the Fyfes personally. When amounts were repaid, the Beamer shareholder loan was reduced.

[77] There is no doubt that Mr. Nelson and the Fyfes were not shareholders in Pacific. Ms. Fyfe appeared to treat Beamer as equivalent to herself and Mr. Fyfe. Similarly, she treated Mr. Nelson as equivalent to RonCo. Had the payments to the benefit of Pacific been made by each of RonCo and Beamer, rather than by the principals of these companies, the tracking of the shareholder loan account performed by Ms. Fyfe would not be problematic.

[78] I find that the plaintiffs and the defendants had a reasonable expectation that purchases on behalf of Pacific would be made by any of Mr. Nelson, Ms. Fyfe and Mr. Fyfe personally, and these purchases would be reimbursed by Pacific.

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[79] While it may not have been correct to record purchases and reimbursements in the shareholder loan accounts, I do not agree that these transactions were oppressive. All shareholders, and principals of the shareholder companies, were treated in the same way. There was no evidence that the Fyfes or Beamer were reimbursed in preference to Mr. Nelson or RonCo.

[80] Mr. Nelson may have a complaint against Pacific in that he has not been reimbursed for all of the purchases he made on behalf of Pacific, but I am not satisfied that a delay in reimbursement is oppressive conduct within the meaning of s. 227 of the *BCA*, or the common law claim in oppression.

Conduct of Ron Nelson, performance of the agreement, and its relevance on the pleadings

[81] The defendants produced much evidence relating to the conduct of Mr. Nelson, his failure to perform his employment properly, and his failure to advance the objects of the business as set out in USA s 5. The claims are disputed by Mr. Nelson.

[82] The Fyfes submit that Mr. Nelson did not engage himself in the business as the parties had agreed. In summary, they claim that Mr. Nelson only worked half of his scheduled shifts in 2019, 2020, and 2021, yet was paid twice that of other dive instructors; sold gear at discounted rates to potential customers; and failed to advance the interests of the business in a number of other ways.

[83] It is clear that the Fyfes are of the view that Mr. Nelson was treated preferentially under the terms of the SPA and the USA, was overpaid as an employee, and failed to live up to his end of the bargain in the operations of Pacific. They also are of the opinion that Mr. Nelson has acted in bad faith against Pacific in

operating a competing business and, in their view, saying unfavourable things about them and Pacific, which has impacted their business negatively.

[84] The Fyfes are of the view that they were entitled to be paid for their work, and the partial repayment of the Initial Loan was fair because they had been without an income for many months. Similarly, they extensively renovated the physical premises and felt it was fair for themselves to be paid $31,000 for that work.

[85] The difficulty with the position advanced by the defendants, is that they acted in breach of the USA and the SPA, and they have not advanced a claim for breach of contract against Mr. Nelson. Even if they had advanced a claim for breach of contract, they did not raise concerns with Mr. Nelson prior to his advancement of the RonCo Loan. Indeed, the majority of the complaints arise out of conduct in 2020 and 2021, well after Mr. Nelson's employment was renewed in February 2020 pursuant to the USA.

[86] Further, any claims relating to Mr. Nelson's conduct in the business post date the first repayment on the Beamer shareholder loan in the summer of 2019, which I have found to be oppressive.

[87] On the basis of the material before, and the pleadings before me, Mr. Nelson's conduct in the business is not a defence to the oppressive conduct on the part of the defendants which I have found in August 2019 and February 2020.

Are the plaintiffs entitled to damages?

[88] Section 227(3) of the *BCA* permits the court to fashion a remedy appropriate to rectify the oppressive conduct suffered by a party. Remedies set out in the subsection, while not exhaustive, include orders directing a company to pay a shareholder for their shares, to purchase shares, and to compensate a person.

Damages in favour of RonCo

[89] RonCo seeks a return of its investment in Pacific and of its shareholder loan. I accept that Mr. Nelson and RonCo were not advised of the Pacific-Coltart

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Agreement in a timely way, and that the Fyfes had a personal interest in the completion of payment under that agreement which was not disclosed prior to RonCo agreeing to make the RonCo Loan. Had the Pacific-Coltart Agreement been disclosed prior to RonCo exercising its right under s. 4.03 of the SPA, and had RonCo learned that Pacific had repaid $125,000 of the Beamer shareholder loan without its knowledge or consent, RonCo would not have made the RonCo Loan and would have been entitled to a return of its entire investment.

[90] I am satisfied that RonCo is entitled to a return of its shareholder loan in the amount of $125,000. I order that, within 90 days, Pacific, Beamer and the Fyfes are liable to pay compensation to RonCo in the amount of $125,000. The obligation of Pacific is subject to the provisions of s. 227(5) and (6) of the *BCA*.

[91] I am also satisfied that RonCo is entitled to a return of its investment in Pacific. I order that, within 90 days, Pacific, Beamer and the Fyfes are liable to pay $125,000 to RonCo in respect of RonCo’s initial share purchase. The obligation of Pacific is subject to the provisions of s. 227(5) and (6) of the *BCA*. Upon receipt of the funds in relation to its shares in Pacific, RonCo shall return its share certificate to Pacific for cancelation.

Damages in favour of Mr. Nelson

[92] I am not satisfied that the plaintiffs have established any conduct which would warrant an award in favour of Mr. Nelson personally.

Punitive damages

[93] The plaintiffs seek punitive damages against the Fyfes for their oppressive conduct, and their continued attempts to justify their conduct, including advancing the proposition that they were entitled to act as they did given Mr. Nelson’s later bad conduct, and their own personal investment in the business which was not adequately recognized in the USA or in the operation of the business since February 2019.

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[94] While the Fyfes have taken positions that are inconsistent with the USA and failed to make timely disclosure of the Pacific-Coltart Agreement, I am unable to find that they did so maliciously, or with anything other than a naïve assumption that they were not bound by the express terms of the agreement when it no longer seemed fair to them. I accept that their intentions were always to work in the best interests of the business, of which RonCo was a shareholder and Mr. Nelson was an employee. They made many personal sacrifices, and were simply trying to make sure the business could survive. While their assumptions about permitted behaviours was naïve and legally incorrect, I do not accept that their actions were high handed, malicious, or intended to harm either RonCo or Mr. Nelson.

[95] I decline to award punitive damages against the defendants.

Interest

[96] The plaintiffs are entitled to pre-judgment interest on the initial investment, from the date of August 9, 2019, and on the Ronco Loan from the date of February 6, 2020.

Costs

[97] The plaintiffs are entitled to their ordinary costs.

“W.A. Baker J.”