

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Huntly Investments Limited v. Casa
Margarita Enterprises Ltd.*,
2024 BCCA 31

Date: 20240126
Docket: CA49174

Between:

**Huntly Investments Limited, The Pacific Investment Corporation Limited,
Brent Newton Wolverton, Mark Frank Wolverton, Lisa Marie Wolverton,
Kathleen May Wolverton, the DM Wolverton Trust and the
Wolverton Alter Ego Trust**

Appellants
(Defendants)

And

Casa Margarita Enterprises Ltd.

Respondent
(Plaintiff)

And

Anne Louise Wolverton

Respondent
(Defendant)

Before: The Honourable Justice MacKenzie
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated
May 30, 2023 (*Casa Margarita Enterprises Ltd. v. Huntly Investments Limited*,
2023 BCSC 907, Vancouver Docket S190278).

Counsel for the Appellants:

R.S. Anderson, K.C.
L.B. Herbst, K.C.

Counsel for the Respondent, Casa
Margarita Enterprises Ltd.:

R. Josephson

Place and Date of Hearing:

Vancouver, British Columbia
November 8, 2023

Place and Date of Judgment:

Vancouver, British Columbia
January 26, 2024

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Justice MacKenzie

The Honourable Mr. Justice Voith

Summary:

The respondent, Casa, is a minority shareholder in the appellant Huntly, a company controlled by the personal appellants. Casa's shares are owned by the estate of Margaret Cowan. When Huntly refused to purchase Casa's shares so that the estate could be wound up, Casa brought a claim in oppression under s. 227 of the Business Corporations Act against the appellants, seeking to have Casa's shares purchased by other shareholders. The judge found that Huntly's affairs had been conducted in a manner oppressive and unfairly prejudicial to Casa and ordered some of the appellants to purchase Casa's shares. The appellants appealed.

Held: Appeal largely dismissed. This appeal turns primarily on the deferential standard of review. The judge's findings that Casa had a reasonable expectation that its shares would be purchased, that it would be provided with sufficient information to determine the value of its shares, and that those expectations were violated, were findings open to her on the record. Moreover, the judge did not err in concluding that Casa established oppressive and unfairly prejudicial conduct in relation to the issuance of a special dividend. Although the judge erred in concluding that one shareholder had received an allocation of the dividend in excess of their shareholding, this error was not a material one given that other shareholders were to receive their dividends well in advance of Casa. The judge did not err in exercising her broad remedial discretion to order some of the shareholders to purchase Casa's shares, although Huntly should not have been included in that number since its articles prohibited it from purchasing its own shares.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] This appeal concerns a claim in oppression, brought by a shareholder in a closely-held family corporation, asserting a right to have their shares purchased by other shareholders.

Background

[2] The appellant, Huntly Investments Limited ("Huntly"), is a real estate holding company which owns two properties located in downtown Vancouver: the Stadacona and Beaconsfield apartment buildings. Huntly was incorporated in 1966 by two brothers, Newton and Harold Wolverton, both of whom are now deceased. The shares in Huntly are now held almost entirely by the appellants: Newton's three children, Brent, Mark and Lisa; and Harold's children, Kathleen and Anne, along with another family-controlled company and two family trusts, whose trustees are Newton's wife, Dona Marie, and their three children. (I will use first names to avoid

confusion, intending no disrespect to the parties). The only shares held outside of the Wolverton family are 23 shares owned by the respondent, Casa Margarita Enterprises Ltd. (“Casa”).

[3] Casa is the corporate vehicle used by the Cowan family to hold its Huntly shares; it has no other assets. Casa’s shares are owned by the estate of Margaret Cowan, whose family had business connections with the Wolverton family in the 1960s. Casa, through its corporate predecessors, acquired 16 Huntly shares in 1967 and seven more in 1973, giving it the 23 shares in issue in this proceeding. Those shares represent 1.82% of Huntly’s common shares.

[4] Margaret’s mother, Jane Cowan, and Margaret’s brother, Neil Cowan, provided property management services to the Huntly properties, and Margaret assisted with that work as a university student. Jane Cowan was a director of Huntly from 1980 until 1986; Neil Cowan was a director from 1986 to 1990. During his tenure as a director of Huntly, Neil acquired 100 shares in Pacific Investment Corporation Limited (“PIC”), another company owned and controlled by the Wolverton family. Its directors are Brent, Mark and Lisa. PIC is in the business of real estate holding and development, restaurants, and liquor manufacturing. Margaret eventually inherited her brother’s PIC shares, as well as all of the Casa shares, making her the indirect owner of the 23 shares in Huntly and the direct owner of the shares in PIC.

[5] Prior to June 1971, there were a number of small non-family shareholders in Huntly. In that month, all of them, except Casa, sold their shares to PIC. As a result, the Wolverton family, either personally or through PIC and various trusts they control, own just over 98% of Huntly’s shares.

[6] In summary, the current holders of Huntly’s Class A common shares are:

- Kathleen and Anne, holding 55 shares each in their own names,
- Brent, Mark and Lisa, holding 29 shares each in their own names,
- the D.M. Wolverton Trust, the trustees of which are Brent, Mark, Lisa and their mother Dona Marie, holding 69 shares,

- the Wolverton Alter Ego Trust, the trustees of which are Brent, Mark, Lisa and their mother Dona Marie, holding 343 shares,
- PIC, holding 634 shares, and
- Casa, holding 23 shares.

[7] Brent has been a director of Huntly since December 1988 and handles the company's day-to-day operations. His brother Mark is also a director of Huntly, although he is not involved in the day-to-day running of the company. Brent and Mark make significant decisions for Huntly on an informal basis and meet with their sister Lisa on a quarterly basis to discuss Huntly and other Wolverton family businesses.

[8] Margaret Cowan died on December 20, 2016. The estate administrator, Roger Killen, wanted to sell Casa's shares in Huntly in order to wind up the estate. He tried unsuccessfully to have one or more of the appellants buy those shares so that he could distribute Margaret's estate to the 17 beneficiaries under her will. Eventually Casa commenced the underlying litigation asserting a claim in oppression under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and in the alternative seeking relief under s. 324 of that *Act* which provides for the winding up of a company.

[9] In the court below, all of the Huntly shareholders other than Casa were defendants, and all were jointly represented, with the exception of Anne. The defendants are now the appellants, except for Anne, who continues to take no position other than to assert that no remedy should be awarded against her. She therefore participates in the appeal as a respondent.

At trial

[10] In reasons indexed as 2023 BCSC 907 ("RFJ"), the judge began by identifying the principles to be applied when an oppression remedy is sought. She was satisfied that Margaret Cowan had a reasonable expectation that she would be able to sell Casa's shares in Huntly to that company or to a shareholder in the Wolverton family, including PIC or one of the trusts: RFJ at para. 185. The judge

identified three circumstances that supported this conclusion: first, the long relationship between the Wolverton and Cowan families; second, the purchase of Margaret Cowan's PIC shares, which, although a separate company, was a related Wolverton family corporation; and third, the buyout of small shareholdings in Huntly by other shareholders: RFJ at para. 179.

[11] Turning first to the long relationship between the families, the judge found that Margaret Cowan was interested in the business of Huntly, and periodically contacted Brent for updates. From time to time she also asked directly about the value of the shares she owned through Casa. After she was diagnosed with ovarian cancer in 2015, Margaret met with Brent to ask him to help arrange a purchase of her shares, but Brent refused: RFJ at para. 178. The judge accepted the evidence of three friends and Mr. Killen, to whom Ms. Cowan had relayed this information. Two of her friends described Ms. Cowan as having financial difficulties during the last year of her life and one said Ms. Cowan expected Brent to accommodate her request given the long connection between the two families. All three friends and Mr. Killen described Ms. Cowan as extremely distraught over Brent's refusal to purchase Casa's Huntly shares.

[12] As to the second circumstance supporting a reasonable expectation, the judge found that Ms. Cowan had sold her shares in the other Wolverton company, PIC, in July 1993 after Brent sent a letter to PIC shareholders reminding them of PIC's "policy of purchasing back or arranging for the sale of small positions on behalf of shareholders who wish to divest themselves of their investment": RFJ at para. 162.

[13] The third circumstance, the buyout of other small Huntly shareholders, was supported by Brent's facilitation of Dona Marie's purchase of Kathleen's and Anne's shares in Huntly in July 2020: RFJ at para. 87. Brent also arranged for his mother to purchase 297 of PIC's shares in Huntly at about this time. Two weeks later, all of the shares Dona Marie had purchased from Anne, Kathleen and PIC were transferred to Dona Marie, Brent, Lisa and Mark in their capacity as trustees of the Wolverton Alter Ego Trust.

[14] Having concluded that Casa had a reasonable expectation that Huntly or another Huntly shareholder would purchase Casa's shares, the judge considered whether Huntly or its directors had acted in an oppressive or unfairly prejudicial manner in failing to meet those expectations. She concluded that they had done so, for two main reasons. First, because Brent and Huntly did not make the same offer to buy Huntly shares from Casa that they made to Anne, Kathleen and PIC; and second, because they did not provide Casa with reasonable access to information it needed to value its shares in anticipation of a sale.

[15] The judge also found that Casa had a reasonable expectation that it would be treated fairly in relation to other shareholders with respect to the issuance of a special dividend and that this expectation too had been thwarted. She observed that all shareholders were initially treated equally with respect to this dividend in May 2022, when Huntly offered shareholders a one-time tax-free dividend in the total amount of \$6,500,000 or \$5,134.28 per share. The dividend was to be paid out in the form of a non-interest-bearing promissory note payable by the company to each shareholder in ten instalments to be paid over ten years, starting on December 31, 2024 and ending on December 31, 2033: RFJ at para. 115.

[16] Casa accepted that it was to receive the same allocation per share as the other shareholders over a ten-year period. However, it argued at trial that it was not being treated fairly because, unlike the other shareholders of Huntly, the beneficiaries of Margaret's estate were elderly and might die before receiving the benefit of the dividend: RFJ at para. 117.

[17] The judge was not persuaded that the age of Margaret's beneficiaries made it oppressive for Huntly to pay the special dividend over ten years, if indeed all shareholders were to receive the dividend on the same timeline. But she found that Huntly had allowed PIC to set off a debt it owed to Huntly against the promissory note for the dividend owed by Huntly to PIC. Although that decision made sense from an accounting perspective, it meant that PIC was being paid "its share of the capital dividend ten years earlier than the other shareholders": RFJ at para. 130. She also found that PIC was allocated an amount per share of the \$6.5 million total

dividend that was “clearly in excess” of what was to be paid to the other shareholders. That conclusion was based on a calculation the judge conducted on her own initiative using incomplete information and is acknowledged by all parties to be an error. Explaining and correcting that error is the object of the appellants’ fresh evidence application. I will return to that application and the impact of the error on the judge’s order later in these reasons.

[18] Having found, then, that Huntly had not met Casa’s reasonable expectations in relation to the facilitation of a share purchase, the provision of information permitting Casa to value its shares, and an equal distribution of the benefit of the tax-free dividend, the judge concluded that the affairs of Huntly had been conducted in a manner oppressive and unfairly prejudicial to Casa under s. 227: RFJ at para. 189. She also found that Casa had established entitlement to relief under s. 324 on the basis of a “complete break down of trust and confidence between Huntly and Casa”: RFJ at para. 190. By way of remedy, the judge ordered that Casa’s shares in Huntly were to be purchased by Huntly, Brent, Mark, and/or PIC. The price was to be determined in the second phase of the action, which had been bifurcated to allow for preliminary determination of liability.

On appeal

[19] The appellants raise five grounds of appeal, contending the judge erred by:

1. Finding that Casa had a reasonable expectation that its shares would be purchased by other Huntly shareholders in an informed process which included allowing it to conduct an appraisal of Huntly’s two properties;
2. Finding in any event that those expectations had not been met by Huntly given that offers were made to Casa and sufficient valuation information was provided;
3. Finding that PIC had received a dividend allocation in excess of Casa’s and had been treated preferentially by way of the set-off of the debt PIC owed to Huntly;

4. Concluding that Casa was entitled to relief under s. 324 without first determining that the circumstances justified a winding up of the company in accordance with the requisite two-step test; and

5. Ordering Casa’s shares in Huntly to be purchased by Huntly, Brent, Mark, and/or PIC.

[20] Before turning to the specific grounds of appeal, I make two general observations. First, in my view this appeal turns largely on the standard of review. Whether Casa had a reasonable expectation is a finding of fact that can be interfered with only if the judge made a palpable and overriding error. Whether a reasonable expectation was violated by oppressive or unfairly prejudicial conduct is a finding of mixed fact and law also reviewed on a deferential standard of palpable and overriding error unless there is an extricable question of law: *Radford v. MacMillan*, 2018 BCCA 335 at para. 54.

[21] Respectfully, much of what the appellants seek on this appeal amounts to a reweighing of the evidence. As this Court observed in *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376 at paras. 22–23, the standard of review limits our authority to engage with the evidence and to reach factual conclusions different from those of the trial judge:

[23] Finality in the litigation process is important. For questions of fact and mixed fact and law in particular, this Court’s responsibility on appeal is to “review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge”: *Housen* at para. 4.

[Emphasis in original.]

[22] Second, this appeal turns on the equitable nature of the oppression remedy. The appellants’ submissions focused on the legal obligations of the company and its directors, for example, stressing that they had no legal obligation to allow a shareholder to appraise the company’s assets. But, as the Supreme Court of Canada observed in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, 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: *BCE* at para. 58.

[23] Section 227(2) provides:

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.

[24] Like many equitable remedies, oppression is fact specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the circumstances, with regard to the relationships at play: *BCE* at para. 59.

Expectations are to be assessed objectively and contextually; factors bearing on the analysis include general commercial practice, the nature of the corporation, the relationship that exists between the parties, past practice, self-protection steps the shareholder could have taken, any representations and agreements, and the fair resolution of conflicting interests among corporate stakeholders: *BCE* at para. 72; *Canex Investment Corporation v. 0799701 B.C. Ltd.*, 2020 BCCA 231 at para. 15.

[25] Oppression is established by first proving that the claimant had a reasonable expectation, and then proving that the corporation blocked that reasonable expectation through conduct “[falling] within the concepts of ‘oppression’, ‘unfair prejudice’ or ‘unfair disregard’ of the claimant’s interest”: *BCE* at para. 89. In short, it is no defence on an oppression claim to rely solely on the lawfulness of the conduct of the corporation and its directors. As this Court said in *Canex* at para. 13:

... [T]he 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. ...

[Emphasis added.]

[26] For the reasons that follow, I would largely dismiss the appeal, except for the removal of Huntly as one of the potential purchasers of Casa’s shares. I turn now to the first ground of appeal.

1. Finding that Casa held reasonable expectations

[27] The appellants contend the judge erred in finding that Casa had a reasonable expectation of a process to sell its shares to other shareholders and a reasonable expectation that it would be provided with sufficient information to enable it to value those shares. As I have already noted, this ground of appeal challenges the judge’s findings of fact.

[28] The appellants identify three reasons the judge should not have found that Casa had a reasonable expectation that Brent would facilitate a purchase of its Huntly shares. First, they say Casa could have sold its 1.82% interest in Huntly to a third party on the open market. Second, there was no shareholder agreement that Brent could invoke to compel another shareholder to purchase Casa’s shares—they say that the most that could have been expected of Brent was they he would try to arrange a sale. Third, the appellants say that it was not reasonable for Casa to expect another shareholder to come up with hundreds of thousands of dollars to buy its shares.

[29] Although this evidence was before the judge, she chose to give it less weight than the evidence supporting a finding that Casa had a reasonable expectation. The judge looked at what was actually happening in the company, and concluded that Brent controlled and arranged sales for other small shareholders without requiring them to try to sell their shares in this closely-held family company on the open market. She looked to the history between the Cowan and Wolverton families, and Margaret’s subjective expectation that Brent would arrange a purchase of her shares when she approached him in 2015. The judge considered the buyout of Margaret’s PIC shares in the 1990’s and the purchase of small shareholdings in Huntly by other

shareholders in 2020. In my view, the judge’s finding that Casa had a reasonable expectation of a buyout was open to her on the record before her.

[30] Having said that, I agree with the appellants that the judge erred by including Huntly itself as an entity that Casa could reasonably expect to “redeem or purchase” its shares. Casa acknowledges on appeal that its shares were not subject to a right of redemption, and that what it sought was the sale of its shares—although Casa admits it imprecisely referred to both terms in its trial submissions. Casa also acknowledges that Huntly’s articles prohibit it from purchasing its own shares. It follows that the reasonable expectation of a buyout could only relate to Brent, Mark, PIC or other Huntly shareholders, and that the judge was led into error in including Huntly in the order. However, in my view this error is not material because it does not affect the judge’s general finding of a reasonable expectation of a buyout by the other shareholders she listed in her order.

[31] I turn next to the judge’s finding of fact that Casa had a reasonable expectation that it would be provided with sufficient information to allow it to assess the value of its shares—specifically, the opportunity to conduct property appraisals. The appellants point out that neither Anne, nor Kathleen, nor PIC insisted on obtaining appraisals of Huntly’s two apartment buildings when they sold their shares in 2020. However, Anne and Kathleen were family members who relied on Brent and chose to accept a 2017 valuation based on tax assessments from that year. As to PIC’s 2020 sale of its Huntly shares, it acted through its directors, Mark, Brent, and Lisa, who had far greater access to information about the properties’ value than did Casa.

[32] Casa’s status as the only non-family shareholder was quite different—it had no basis on which to assess the fair market value of the apartment buildings underpinning the share value of Huntly other than by obtaining appraisals. In my view, it cannot be said that the judge made a palpable and overriding error in finding that Casa had a reasonable expectation that it would be provided with access to the information it needed to assess the value of its shares in order to determine what it could reasonably expect to sell them for.

[33] Finally, for completeness I note that the appellants did not contest the judge's finding that Casa had a reasonable expectation that it would be treated fairly in the allocation of the tax-free dividend. Indeed the appellants acknowledged that they had an obligation to treat Casa fairly and asserted that they had done so.

2. Finding that Casa's reasonable expectations had been frustrated by oppressive or unfairly prejudicial conduct

[34] The appellants submit that, even if Casa had a reasonable expectation that Brent would facilitate the purchase of Casa's shares, he made efforts to do so—but Mr. Killen rejected the offers made. The appellants say further that the expectation of a buyout could not include the buyout of its shares at any price Casa demanded. They contend that Casa's unwillingness to accept the offers makes it impossible for it to establish that the appellants' conduct caused it compensable injury: *BCE* at para. 90. In short, the appellants say the judge failed to give effect to Brent's efforts to facilitate the sale of Casa's 23 shares in Huntly, and in particular, the two offers Brent made to Casa.

[35] I would not accede to these submissions. The judge recognized that Brent made an offer in May 2022 to buy Casa itself, not Casa's 23 shares in Huntly: RFJ at para. 82. The judge set out the relevant portion of the offer letter at para. 83 of her reasons:

... assuming that I can be satisfied that Casa Margarita's only asset is its 23 shares in Huntly and that there are no material liabilities in Casa Margarita, I propose to acquire from the beneficiaries of Margaret's estate their interests in the share capital of Casa Margarita.

The purchase price I am offering for the purchase of Casa Margarita's share capital is \$374,962.10. That amount reflects a notional value of Casa Margarita's Huntly shares of \$16,302.70 each.

...

This offer is subject to due diligence on Casa Margarita, and execution of a share purchase agreement in a form satisfactory. It is open for acceptance until May 25, 2020 in order to give you time to consult with the beneficiaries of Margaret's estate. You should advise them that the offer is non-negotiable, and in the event it is not accepted, the Respondents intend to seek judgment in the lawsuit without further negotiation.

[Emphasis added.]

The judge then said:

[86] Casa did not accept the offer from Brent. Mr. Killen testified that he could not assess the offer without obtaining a valuation of the company, which required an appraisal of the underlying properties.

[36] The judge rejected the appellants' contention that they made a second offer in August 2020 to buy Casa's Huntly shares at the same price paid to Anne and Kathleen. In this regard she said:

[99] Brent stated in his affidavit sworn in August 2020 that he believed Dona Marie would purchase Casa's shares for \$18,700 per share. This was not a formal offer and was never reduced to writing. I find this statement deliberately obscures the true state of affairs, namely that Brent controlled and orchestrated the purchase of any shares. If this was a true offer, Brent had the ability to express it as such, which he did not.

[Emphasis added.]

[37] Turning to Casa's expectation of an informed process including the opportunity for appraisals, the appellants argue that the judge erred in finding that the refusal to allow Casa to do its own appraisal of the two properties amounted to oppressive or unfairly prejudicial conduct. First, the appellants say the judge failed to recognize that a real estate appraisal was not required to discern property value because Casa had access to tax assessments, an informal valuation based on an accounting by Huntly's Chief Financial Officer, and financial statements including audited ones prepared at Casa's request. They further contend that the judge's findings contradict the *Assessment Act*, R.S.B.C. 1996, c. 20, under which an assessment is required to be the "actual value", defined as the market value of the fee simple interest in land and improvements. They say the judge erred in refusing to accept the tax assessments as evidence of fair market value available to Casa which made appraisals unnecessary.

[38] I would not accede to this submission. The judge had before her evidence that the assessed values did not in this case reflect fair market value. In this regard she said:

[77] Brent was cross-examined on whether the BC Assessment values represented a market value for the properties. Brent agreed that the 2009 BC Assessment value of the Stadacona property was \$17,000,000, and agreed

that in *Huntly Investments Limited v. The Queen*, 2017 TCC 255, he testified the market value of the Stadacona in 2009 was approximately \$50,000,000. Notwithstanding the obvious discrepancy between the assessed value and his view of the market value, Brent was unwilling to concede at trial that the BC Assessment value was “not even close to the actual value as he perceived it.” He was also not willing to concede that the value of the Stadacona property had increased from 2009 to 2020.

[Emphasis added.]

[39] Next, the appellants submit that the judge erred in concluding that access to the buildings was required in order to prepare an appraisal given that real estate agents can provide estimates of value based on property location, the number of suites, comparable sales in similar areas, and by doing a drive-by of the property. They point out that Casa’s own real estate appraiser did not inspect the interior of the Stadacona property, because its value lay primarily in its redevelopment potential as bare land. Although the appraiser did inspect the interior of the Beaconsfield property when the opportunity was eventually provided, he testified that inspecting the interior was “preferable” to not doing so, implying that he could have conducted an appraisal without access.

[40] Again, the appellants are asking this Court to re-weigh the evidence—that is not this Court’s role. The judge looked at the entire history of the efforts made by Casa to obtain information, both financial (such as tax returns and financial statements) and real estate appraisals between 2017 and April 19, 2022 when the court ordered Huntly to provide Casa with what it needed to assess the share value. Even then, the “information was not segregated between the two buildings”: RFJ at para. 71. In the course of her review of Casa’s requests and Huntly’s refusal to provide information, the judge referred to a letter from Brent to counsel for Casa, written in October 2017, in which he said:

I am withdrawing my previous offer to provide anything else.

Financial statements were sent out to the shareholder of record as is proper, if they were not retained, that is unfortunate but not something we are willing to help with.

Tax returns are internal and will not be available.

As to a valuation, we are not inclined to assist with that either.

In addition, if you provide us with a letter, offering the shares for sale, we will forward it to the shareholders.

In the alternative you can attend our office of records. You will find, however that our shareholder registry contains only names. We will not be providing any additional information.

Lastly, I assume you forwarded us a certified copy of Margaret's probated will. If you have not, please do. If the will has not yet been probated then we will not be forwarding anything until it is properly processed.

[41] Finally, the appellants say the judge erred in ordering an oppression remedy because Casa had, by the time of trial—albeit as a result of a court order—been able to inspect the buildings and have appraisals prepared. Respectfully, that state of affairs occurred only after the appellants repeatedly refused to provide the requested information and opposed a court application seeking the access necessary to do the appraisals. That long record of lack of cooperation is not negated by Casa's ultimate success in gaining the information it needed through court applications in preparing for this litigation.

3. Finding that Casa was treated unfairly with respect to the dividend

[42] As I have earlier noted, the parties agree that the judge erred when she concluded that PIC had received a dividend allocation in excess of what was to be paid to other shareholders on a per share basis. That finding was contrary to a formal pre-trial admission by Casa that it had received an allocation per share equivalent to that received by all other Huntly shareholders. In fairness to the judge, she fell into error because of a poorly worded and opaque affidavit sworn by Brent on January 18, 2023. That affidavit was filed on the reopening of the trial to address Casa's discovery that PIC had received the benefit of its dividend immediately by way of a set-off of its debt to Huntly. The judge's error and its impact on her conclusion that Casa was treated differently from the other shareholders can only be understood and assessed if the parties' applications to adduce fresh evidence on appeal are considered.

[43] New evidence on appeal is subject to the test identified in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8, which outlines criteria to

be considered by the court in determining whether leave should be granted to adduce further evidence on appeal:

- a) The evidence could not by the exercise of due diligence have been obtained for the trial;
- b) The evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- c) The evidence is credible in a sense that it is reasonably capable of belief; and
- d) The evidence is such that, if believed, it could have affected the result at trial.

The overarching consideration on an application for leave to adduce further evidence is the interests of justice, regardless of when the evidence, or fact, came into existence: *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 3.

[44] Casa does not oppose the admission of the appellants' new evidence, recognizing that it is necessary in order to understand the judge's error concerning excess allocation. However, Casa submits that it should be permitted to adduce responsive new evidence demonstrating that Huntly also preferred shareholders in addition to PIC, and then failed to disclose that information as required in its financial statements and at Huntly's Annual General Meeting held in December 2022.

[45] I consider that it is in the interests of justice to admit the new evidence tendered by the appellants because it is necessary to understand and assess the impact of the error that both sides acknowledge the judge made in relation to allocation of value. I would also allow the evidence adduced by the respondent, although as will become apparent in the reasons below, I am of the view that it is not necessary for this Court to engage in an assessment of whether Huntly intentionally withheld information.

[46] The new evidence demonstrates that the trial judge's miscalculation of the dividend allocation to PIC occurred because she multiplied the per-share allocation of \$5,134.28 x PIC's 634 shares in Huntly, yielding her figure of \$3,255,000. She compared that figure to the \$5,817,141 set-off against PIC's debt to Huntly and concluded PIC had received far more than an allocation of \$5,134.28 per share. What the judge did not know when she made her calculation was that PIC had acquired the promissory notes of the Wolverton Alter Ego Trust, the DM Wolverton Trust, Mark, Lisa, and Brent. As a result, PIC held the promissory notes of all of the Huntly shareholders other than Casa, Kathleen and Anne, amounting to 1,133 shares, which, multiplied by \$5,134.28 per share, yielded in the \$5,817,141 set-off against PIC's debt to Huntly.

[47] The appellants contend that, in light of this error, the judge's finding that the dividend allocation was oppressive or unfairly prejudicial cannot stand. They note that the judge relied on two pillars to support that finding: the immediate payment to PIC of its dividend by way of a set-off against the debt it owed to Huntly and the excess allocation of the dividend to PIC as she understood it. They say that when this second pillar is removed, as it must be given the error demonstrated and acknowledged above, the judge's finding of oppressive conduct falls.

[48] I cannot accede to this submission. Although the excess allocation finding is a palpable error, in my view it is not overriding. That is so because it is offset by the new evidence establishing that Brent, Lisa, Mark and the two family trusts each received the benefit of their dividends in 2022 when their promissory notes were acquired by PIC. Although the appellants have not explained what that benefit was, describing it only as involving "non-cash transactions," at a minimum those shareholders are now shareholders of a company, PIC, with a significantly reduced debt load. Those shareholders therefore received an immediate benefit from the dividend allocation, whereas Casa must wait for payments to be made to it in equal instalments over ten years. Respectfully, it is disingenuous of the appellants to suggest that the PIC shareholders are disadvantaged because they will now no longer receive cash payments, whereas Casa will. Nor is it a sound submission to

suggest in the circumstances that Casa was not treated equally only because it did not owe a debt to Huntly.

[49] In summary, I would not interfere with the judge’s ultimate conclusion that Casa has established oppressive and unfairly prejudicial conduct in relation to the dividend.

[50] In light of that conclusion, it is not necessary for me to consider whether Casa has demonstrated, based on the new evidence it tendered on appeal, that Huntly and its directors also acted in an oppressive or unfairly prejudicial manner by failing to disclose PIC’s acquisition of the additional promissory notes.

4. Finding that a remedy is available under s. 324 of the *Business Corporations Act*

[51] The judge addressed Casa’s alternative claim under s. 324 in brief reasons finding that it too had been made out and justified the relief sought. The appellants submit that the judge failed to consider the threshold question of whether the conduct complained of justified the winding up of the corporation. In light of my conclusion that the judge’s finding of oppression under s. 227 should stand, it is not necessary to address this ground of appeal.

5. Order that some of the appellants purchase Casa’s shares

[52] I have already addressed the appellants’ contention that Huntly does not have the legal capacity under its articles to buy back its own shares. As to the remaining appellants subject to the order to purchase Casa’s shares—namely Brent, Mark and PIC— s. 227(3)(h) expressly provides for that remedy:

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

...

(h) directing a shareholder to purchase some or all of the shares of any other shareholder,

[53] The appellants submit that the judge could have made other, more limited orders such as restoring the PIC debts to the books of Huntly, or ordering Huntly to pay Casa’s dividend early. Although that may be so, s. 227(3) provides the court with a broad discretion in the remedy it orders upon a finding of oppression or unfairly prejudicial conduct. The question before us is not whether the judge could have made a different order, but whether she erred in the exercise of her discretion in making the order she did. Respectfully, I conclude that the appellants have not demonstrated such an error.

Disposition

[54] I would allow the appeal only to the extent of varying the order to remove Huntly as a potential purchaser of Casa’s shares. All other terms of the order are upheld.

[55] The respondent Anne Wolverton sought costs against the unsuccessful party on this appeal, but in my view there is no basis upon which to make such an order given that she took no position on the substantive issues raised. I would, however, make no order of costs either for or against her. Casa is entitled to its costs against the appellants.

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Justice MacKenzie”

I AGREE:

“The Honourable Mr. Justice Voith”