COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Callahan v. Ernst & Young Inc. (as Liquidator),* 2025 BCCA 11

Date: 20250116
Docket: CA49858

Between:

Edward Callahan

Appellant
(Respondent)

And

Ernst & Young Inc. (as Liquidator)

Respondent
(Petitioner)

And

Callahan AE #3 Trust, Bruce Callahan, Robert Callahan, and Douglas Callahan

Respondents
(Respondents)

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Butler
The Honourable Justice Riley

On appeal from: Orders of the Supreme Court of British Columbia, dated April 10, 2024 and July 11, 2024 (*In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2024 BCSC 586 and 2024 BCSC 1245, Vancouver Docket S232641).

Counsel for the Appellant:	P.J. Sullivan S.U. Hamilton
Counsel for the Respondent, Ernst & Young Inc. (as Liquidator):	W.L. Roberts S.B. Hannigan
Counsel for the Respondents, Callahan AE #3 Trust, Bruce Callahan, and Robert Callahan:	T-M. Young
Counsel for the Respondent, Douglas Callahan:	A.H. Sabur Y. Gao

Place and Date of Hearing:	Vancouver, British Columbia October 29, 2024
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia October 29, 2024
Place and Date of Written Reasons	Vancouver, British Columbia January 16, 2025

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Riley

Summary:

0081092 B.C. Ltd. appointed Ernst & Young Inc. as liquidator of its assets pursuant to s. 319 of the British Columbia Business Corporations Act. On the application of the liquidator, the chambers judge made an order approving a process for the sale of the company's assets. The appellant, a minority shareholder in the company, appealed the order arguing that the court lacked jurisdiction to advance the mandate of a privately appointed liquidator. Held: The appeal was dismissed with these reasons to follow. The appellant was unable to demonstrate any basis for his proposition that the court lacked jurisdiction to make the order solely because the liquidation was commenced voluntarily by the company. The decisions made by the chambers judge in crafting the terms of the order involved broad exercises of discretion and were entitled to considerable deference on appeal. The appellant was unable to show that the chambers judge acted on a wrong principle, failed to give adequate weight to relevant considerations, or made an order that was clearly wrong.

The application of three of the respondents for increased costs is dismissed. Each of the respondents is entitled to ordinary costs.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Edward ("Ted") Callahan appeals an order (the "Order") obtained by Ernst & Young Inc. in its capacity as liquidator of 0081092 B.C. Ltd. (the "Liquidator"). The Order established a process for the sale of an 18.5-acre property on Lakeshore Road in Kelowna (the "Lands") owned by 0081092 B.C. Ltd. (the "Company"). This appeal is the latest chapter in a lengthy dispute between the Callahan brothers, who own or control the shares in the Company. This Court heard and dismissed the appeal on October 29, 2024, for the reasons which now follow.

[2] As the chambers judge did below, and for the sake of convenience, we will refer to the appellant as "Ted" and to the three brothers by their first names, intending no disrespect.

Background

[3] Ted Callahan and his three brothers—Douglas, Bruce, and Robert (the "Three Brothers")—have been involved in numerous legal disputes concerning the family's considerable assets. One particular decision set the stage for the application now under appeal: *Callahan v. Callahan*, 2022 BCCA 387

[*Callahan 2022*], which allowed an appeal of the Three Brothers and dismissed Ted's oppression proceeding. The decision restored special resolutions of the Company which appointed the Liquidator and approved the private liquidation of the Company's assets and its ultimate dissolution. The reasons in *Callahan 2022* also contemplated a fair sales process, which would treat the Callahan brothers "equally as potential purchasers": at para. 52.

[4] In the application currently under appeal, the chambers judge referred to the following background information from *Callahan 2022*:

> [4] …In reasons for judgment issued November 18, 2022 (the "CA Reasons"), the Court of Appeal described the background to these legal disputes, in part, as follows:
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> > [2] The four sons of Lloyd and Marjorie Callahan—Douglas, Edward, Bruce and Robert—received from their parents what should have been a legacy of financial security that could have been expected to extend into at least the next generation. But while the enterprises they were given have been largely successful, the extreme disaffection that has plagued the relationship between Edward ("Ted") Callahan on the one hand and his three brothers on the other has overshadowed that success.
> >
> > …
> >
> > [4] The "disputes and litigation" involving Ted, his brothers, and their father had begun by the date of death of Marjorie Callahan in 2002. For the most part, the chambers judge observed, Ted was the "outlier" in these disputes, as his brothers normally aligned with their father.
> >
> > [5] Over the last twenty years, the enmity in the family has resulted in a series of long and costly proceedings of which this oppression action is only the most recent example. The past proceedings include a mediation/arbitration led by the late Mark Andrews, that lasted 14 years and finally achieved the separation of Ted's interests in several of the Callahan companies from those of Bob and Bruce; the "Hywood Proceedings", an oppression action brought by Ted which was dismissed in 2011 by Madam Justice Gerow (see 2011 BCSC 40); the "Chilkoot JV Proceeding," concerning certain properties in Yukon that were ultimately subdivided among the brothers; and in 2015, an unsuccessful application by the three brothers for the court-ordered winding-up of Shasta Properties Ltd. ("Shasta") under the "just and equitable" ground in s. 324 of the *Business Corporations Act*, *S.B.C. 2002, c. 57* (the "Act").
>
> [5] Shasta Properties Ltd., which is referred to in the passage above, is now 0081092 B.C. Ltd. That company (the "Company") is the subject of the petition herein.

See *In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2024 BCSC 586 ("RFJ").

[5] The chambers judge also described the circumstances leading to the application before him:

> [7] It is acknowledged by all of the parties that the mobile home park is not the most lucrative use of the Lands and that the Lands have significant redevelopment potential. It appears that the Lands are worth tens of millions of dollars and have sentimental value to all of the brothers. The Lands are referred to by all of them as the "Crown Jewel" of the family's properties.
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> [8] On November 6, 2020, the shareholders of the Company resolved to appoint Ernst & Young as Liquidator. Douglas, Bruce and Robert (the "Three Brothers") voted in favour of the resolutions appointing the Liquidator and Ted voted against.
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> …
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> [10] Two of the resolutions (the "Resolutions") provided:
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> > Resolved as a Special Resolution of the Shareholders that pursuant to section 319 of the Business Corporations Act (British Columbia), the Company is authorized to commence a voluntary liquidation of the Company, effective as of November 13, 2020.
> >
> > Resolved as a resolution of the Shareholders that the Company engage and appoint Ernst and Young Inc. as the Liquidator to assist in the liquidation of the Company's remaining assets while operating the Company as a going concern.
>
> [11] The Resolutions provided for what is known as a "voluntary" or "private" liquidation, as opposed to a court appointment. The Liquidator's authority flows from the Resolutions and from Part 10 of the British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*BCA*").

[6] The application giving rise to this appeal was the Liquidator's second application for approval of a process for the sale of the Company's assets. The chambers judge declined to make an order on the first application because "the material was insufficient for approval to be granted": RFJ at para. 2. However, the denial of the initial application "did not preclude the Court from approving a sales process proposed by the Liquidator…on more fulsome material" in the future: RFJ at para. 2.

The chambers judgment

[7] The Liquidator brought its second application in February 2024, before the same judge. This application proposed either an auction process for a sale of shares

in the Company, or a process for the sale of the Lands. The judge found that the former was unworkable in the absence of the parties' agreement and so the application focused on the Liquidator's proposed process for the sale of the Lands.

[8] At the hearing, Ted opposed any order approving a sale process, but argued in the alternative for a different process than that proposed by the Liquidator. The chambers judge dismissed many of Ted's arguments, but accepted some of his submissions directed towards the establishment of a fair and efficient sales process intended to maximize the price of the Company's assets. Ultimately, the Order established a process that incorporated many of the terms proposed by the Liquidator, and some of the terms proposed by Ted.

[9] The chambers judge had not approved the sales process proposed at the prior application largely because the proposal put forward was "very general in nature": RFJ at para. 26. At the second application, both sides presented additional affidavit evidence of experienced professionals. The judge addressed the conflicts in the evidence and found, generally, that the affidavits of Mr. Hancock and Mr. Pooni provided by the Liquidator reasonably addressed the evidentiary deficiencies present in the first application.

[10] In addressing the evidence, the judge noted the debate between the parties about whether Rule 11-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009—which deals with expert reports—was applicable to the proceeding. He concluded that, in general, the Rule did not apply. He found that conclusion to be "consistent with common practice: in insolvency proceedings, liquidators, receivers and monitors regularly tender affidavits from the professionals who are advising them, to give evidence, often opinion evidence, which is of assistance to the Court": RFJ at para. 30.

[11] Ultimately, the chambers judge made the Order giving directions for the sale of Lands pursuant to s. 325 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. In doing so, the chambers judge rejected Ted's challenge to the court's authority to make the order sought:

> [36] Counsel for Ted led the Court through a series of arguments regarding this Court's authority to make the orders sought. In my view, s. 325 of the *BCA* is sufficient to clothe this Court with jurisdiction in this regard. The question is whether such an order would be appropriate in all of the circumstances.
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> [Emphasis added.]

[12] Turning to the terms of the Order itself, the chambers judge noted that the parties agreed the court should be guided by the relevant principles set out in *CCM Master Qualified Fund v. blutip Power Technologies Ltd.*, 2012 ONSC 1750:

> [6] … when reviewing a sales and marketing process proposed by a receiver a court should assess:
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> (i) the fairness, transparency and integrity of the proposed process;
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> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[13] The judge then set out the two primary concerns raised by Ted (at para. 33):

> a) There is an informational asymmetry between him and his brothers which can be cured by providing Ted with the authority to manage the Lands for a period of six months or by giving Ted authority on behalf of the Company to gather information regarding, among other things, the status of the mobile home park, the plans of the mobile home owners, and discussions with various associations.
>
> b) The Lands have not been sufficiently "de-risked". By this I understand him to say that by not rezoning the Lands, or at least starting the rezoning process, including making inquiries with the City of Kelowna regarding its vision for the Lands, the Company will have failed to add value to the Lands for potential purchasers. He argues that potential purchasers want certainty about what they are buying and that greater certainty will result in a greater sales price. This argument is reminiscent of, and overlaps, the arguments made in the Prior Hearing regarding sub-division and the re-drawing of lot lines prior to sale.

[14] The chambers judge found the first argument to be unpersuasive, holding that there was "insufficient evidence" of a pronounced information asymmetry between Ted and the Three Brothers: RFJ at para. 47. He noted that this argument had been rejected at the hearing of the oppression proceeding, and that Ted was an experienced real estate developer in the Kelowna market with the same ability to

obtain information as other potential purchasers. In addition, the judge found that potential purchasers of the Lands would be sophisticated developers and would have no need for a shareholder of the Company to gather information for them, as they would make inquiries in their own best interests.

[15] The judge explained that Ted's second argument, about de-risking the Lands, was based on a concern that the process proposed by the Liquidator would not satisfy the third *CCM* criterion of obtaining the best possible price for the Lands. He noted the tension between the time and expense that would be required to take steps towards redevelopment of the Lands and the possible increase in price that might be obtained. The judge set out the evidence of the development and real estate professionals put forward by both sides, and ultimately concluded:

> [67] In my view, the evidence does not go so far as to establish that rezoning the Lands or subdividing them before sale, or managing the complicated and lengthy process of paying out and relocating the existing tenants, would be commercially efficacious within the meaning of *CCM* for the Liquidator to take on. Further, to impose a general obligation upon a liquidator to improve land before selling it goes too far, in my view.
>
> [68] There is some basis for concluding that it would be commercially efficacious for there to be dialogue between potential bidders and the City before bids are required; however, as stated above with respect to the issue of information asymmetry, it is my view that the sophisticated purchasers who will be bidding for the land in this case are capable of dealing with the City directly.

[16] Following the third day of the hearing, the chambers judge invited the parties to provide specific revised proposals for an appropriate sales process. Ted and the Liquidator provided revised proposals and all parties made submissions. The judge identified three additional issues arising from those submissions (at para. 73):

a) What is the appropriate timeline leading up to bids?

b) Should there be a two-phase bid process or a single bid?

c) Should the final bid process be a sealed bid process, a process by which the Liquidator chooses a recommended bid and presents it to the Court for approval, or an auction?

[17] Regarding the first issue, the chambers judge rejected Ted's request for a six-month period during which he would have control of the Company. Instead, the

judge set a "reasonable and adequate timeline which would fulfill the *CCM* criteria" which involved "a 30-day distribution period, a 14-day comment and revision period, a 30-day marketing period and a four-month marketing stage": RFJ at para. 77. Turning to the second issue, the judge rejected Ted's proposal of a single bid process in favour of the Liquidator's suggested two-phase bid process that would filter out unqualified bidders. The parties were most divided on the third issue: whether the final bid process should be by auction or sealed bid. The chambers judge found, contrary to the submissions of the Liquidator, that a sealed bid process would best meet the *CCM* criteria. The Liquidator had proposed that it would select the best bid and present it to the court for approval, but the chambers judge found it preferable for "all of the qualified bids to be before the Court when [counsel's] submissions are made, and not simply a single bid recommended by the Liquidator": RFJ at para. 86.

Issues on appeal

[18] On appeal, Ted alleges a single error in judgment, which he says should be reviewed on a correctness standard:

> The chambers judge erred in law by failing to interpret s. 325(3) of the [*BCA*] within the context of the [*BCA*] as a whole and harmoniously with the [*BCA*]'s object of allowing companies to privately liquidate, as distinct from liquidating through the courts. Contrary to the approach of the chambers judge, the [*BCA*] does not confer the court with a jurisdiction to advance the mandate of a privately appointed liquidator. The chambers judge's error permeated his reasoning as a whole, and his consideration of the evidence.

[19] While Ted only alleges a single ground of appeal, Ted's specific arguments give rise to two distinct issues:

a) Did the chambers judge have jurisdiction to make the Order?

b) Did the chambers judge err by acting on a wrong principle, failing to give adequate weight to relevant considerations, or making a decision that is clearly wrong?

[20] Three of the respondents also seek increased costs of this appeal, an issue on which we expressly reserved judgment until the delivery of these reasons. We will deal with this issue separately at the end of our reasons.

Ted's arguments on appeal

[21] Regarding the first issue, Ted argues that the judge incorrectly assumed jurisdiction to make the Order when no previous order had brought the liquidation under the supervision of the court. He also argues the judge erred in finding he had a mandate to advance the liquidation. He says the error arose because the judge conflated the distinction between court-ordered and voluntary liquidations. He asserts that "the liquidation was, and remains, a private liquidation where the liquidator does not need court involvement to move the process forward."

[22] At the appeal hearing, Ted's counsel frankly conceded that if this Court does not accept that there is a fundamental difference between a voluntary and court-ordered liquidation, his appeal could not succeed. He acknowledged that, had the liquidation been commenced by court order, the chambers judge could have made the Order pursuant to s. 325(3) of the *BCA*.

[23] Regarding the second issue, the specific terms of the Order, Ted argues that the chambers judge erred because he "created his own form of sales process" and in doing so, "cherry-picked elements" from his and the Liquidator's proposals. He says this is something that the judge stated he could not do on the first application. Ted further argues that by creating its own sales process, the Court was inappropriately "step[ping] into the shoes of the private liquidator".

Analysis

[24] As the analysis below demonstrates, Ted's arguments on both issues must fail. Ted's concession on the first issue was appropriate. To allow the appeal, we would have to conclude that the chambers judge lacked jurisdiction to make the Order solely because the liquidation was commenced voluntarily by the Company, rather than by court order. However, we are not aware of, and Ted has failed to

demonstrate, any basis for the proposition that the judge lacked authority to make the Order.

[25] Regarding the second issue, the decisions the chambers judge made in crafting the Order under the authority of Part 10 of the *BCA* involved broad exercises of discretion. As such, they are afforded considerable deference on appeal: *Esposito v. Esposito*, 2022 BCCA 51 at para. 17. In this case, there is no basis on which it can be shown that the judge acted on a wrong principle, failed to give adequate weight to relevant considerations, or made a decision that is clearly wrong: *Esposito* at para. 17.

Did the chambers judge have jurisdiction to make the Order?

[26] Corporations are statutory entities. The liquidation and dissolution of a company must be conducted in accordance with the relevant statutory authority. Accordingly, if there is substance to Ted's proposition that the court lacked authority to make the Order, it must be based in the legislation. However, there is no provision of the *BCA* that draws a distinction between the court's powers to make orders in respect of a liquidation based on how the liquidator was appointed, whether voluntarily or by the court.

[27] Voluntary and court-ordered liquidations are governed by the provisions of Part 10 of the *BCA*. It sets out two ways a liquidation may be commenced. First, a corporation may commence a voluntary liquidation by special resolution of its shareholders, as provided in s. 319 of the *BCA*. That is what the Company did here. Alternatively, on the application of a shareholder, director, or creditor of a company, a court may order that a company be liquidated and dissolved in accordance with s. 324(1) in certain circumstances, including where the court "considers it just and equitable to do so."

[28] Once a company is in liquidation—either by way of voluntary liquidation or court order—the provisions of s. 325 of the *BCA* apply to the liquidation. Section 325(1) lists who can make applications to the court in respect of the company in liquidation:

> An application to the court in respect of a company in liquidation may be made under this section by the company, a shareholder of the company or a beneficial owner of a share of the company, a director of the company or any other person, including a creditor or liquidator of the company, whom the court considers to be an appropriate person to make the application.

[29] Section 325(3) gives the court authority on any such application to grant a broad array of orders:

> 325(3) On an application made in respect of a company in liquidation, the court may, in respect of that company, make any order it considers appropriate, including any of the following orders:
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> …
>
> (o) an order giving directions on any matter arising in a liquidation;
>
> (p) an order to confirm, reverse or modify any act or decision of a liquidator;
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> …

[30] In this case, the Liquidator applied to the court, on both this application and the first application, for orders "in respect of the liquidation" of the Company in accordance with s. 325(1) of the *BCA*. At the first application, the chambers judge acknowledged the Liquidator's authority to make the application to approve the sale process. He also acknowledged that, although there was no requirement to do so, the Liquidator was taking the step of obtaining court approval in advance of a sale in order to avoid controversy later in the process. Given the lengthy history of litigation between the Callahan brothers, it is evident that prior court approval would have the added benefit of providing comfort to potential purchasers of the Lands:

> [16] The Liquidator has advanced this application under s. 325(3)(o) which states that this Court may give "directions on any matter arising in a liquidation" and under s. 325(3)(p) which states that the court may make orders "to confirm, reverse or modify any act or decision of the Liquidator".
>
> [17] The Liquidator was entitled to seek approval of the Sales Process but it was not required to do so. As stated, the Liquidator's authority flows from the Resolutions and from s. 319 of the *BCA.*
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> **…**
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> [19] The Liquidator's counsel advised that his client was seeking to obtain approval of the process in advance in order to avoid controversy. Counsel for Ted submitted that the Liquidator was seeking to obtain the protection of a court order while not being prepared to assume the duties and obligations of a court-appointed Liquidator.

> [20] Regardless of the Liquidator's subjective motives, the order sought by the Liquidator may have the effect of insulating it from challenge in respect of certain choices inherent in the Sales Process.

See *In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2023 BCSC 1567.

[31] It cannot be contested that on the second application of the Liquidator, the court gave directions on a matter arising in respect of the liquidation of the Company—specifically, the process to be followed for the sale of the Lands, which is the principal asset of the Company. The Order therefore appears to fall within the authority granted under s. 325(3)(o).

[32] Ted argues that if the provisions of s. 325(3) of *BCA* are read "as a whole and harmoniously with the [*BCA*]'s object of allowing companies to privately liquidate, as distinct from liquidating through the courts", this Court should conclude that the powers of a court to make orders and give directions for a voluntary liquidation should be constrained. However, he is unable to direct us to any provision in the *BCA* which provides support for this argument.

[33] Ted is also unable to direct us to any academic comment or case law that supports his position. Not surprisingly, it is difficult to find academic comment on the point because reading s. 325 of the *BCA* in its grammatical and ordinary sense indicates that it applies equally to voluntary and court-appointed liquidators. Nevertheless, the point is made in Steven McKoen & Emma Costante, *British Columbia Business Corporations Act & Commentary*, 2025 ed. (Toronto: LexisNexis, 2024) at V.B.(2) ("Voluntary Liquidation"). After citing the provisions for voluntary liquidation, the authors note that the *BCA* also authorizes liquidation through a court-ordered process and court appointment of a liquidator. The authors note:

> Under the *BCA*, the duties, procedures, and qualifications of the liquidator are substantially the same if they are appointed by a shareholders' resolution or by court order, subject to any instructions of the body appointing them.

[34] Ted advances other arguments in support of his contention that the court lacked jurisdiction to make the Order, but none stand up to scrutiny. First, Ted's suggestion that there should have been a prior order bringing the liquidation under

the supervision of the court has no support in the *BCA* or the jurisprudence. In addition, Ted decided not to raise that issue directly in either application heard by the chambers judge. In a response to petition filed on April 12, 2023, Ted stated that the court "should make" an order to have the liquidation "continued as a court ordered liquidation"; however, he never set down an application for such an order.

[35] Ted also notes that the fact the court may make orders pursuant to s. 325(3) in a voluntary liquidation does not mean the liquidation is subject to the "general supervisory jurisdiction" of the court. From that proposition, he argues that in this case the Liquidator was not required to obtain approval from the court to carry out its mandate and, further, that it should not have done so. However, the fact that the Liquidator was not required to obtain court approval does not mean that it was *prevented* from seeking court approval for its actions in respect of the liquidation.

[36] The common thread connecting Ted's arguments is that the chambers judge erred in making an order that moved the liquidation process forward. In making that argument, he refers to ss. 330 and 334 of the *BCA*, which set out the duties and powers of a liquidator. He says that it is notable that these provisions do not "make it a duty of a liquidator to move the liquidation forward on any particular timeline".

[37] With respect, this argument is specious. The essence of Ted's complaint is that the chambers judge erred in making the Order that established a process that allowed the Liquidator to do that which it was appointed to do: liquidate the assets of the Company. The duties and powers granted to a liquidator are necessarily broad and include the use of "the liquidator's own discretion in realizing the assets of the company or distributing those assets among the creditors and shareholders of the company": *BCA*, s. 330(d). A liquidator is given the "powers to manage or supervise the management of the business and affairs of the company that were, before the appointment, held by the directors and officers of the company": *BCA*, s. 334(1)(a). Nothing in the *BCA* supports Ted's position that a liquidator's discretion in a voluntary liquidation is somehow constrained such that a court cannot make an order that would move the liquidation forward.

[38] Relying on *Century Services Corp. v. LeRoy*, 2022 BCCA 239, leave to appeal to SCC ref'd, 40369 (16 March 2023), which considered the distinction between court appointed and instrument appointed receivers, Ted attempts to draw an analogy between a voluntarily appointed liquidator and a privately appointed receiver. The analogy is inappropriate and provides no support for his position. A privately appointed receiver is appointed by, and acts as an agent for, a creditor. Its primary duties are owed to the appointing creditor, unlike a court-appointed receiver whose primary duty is owed to the court. The distinction between the types of appointments flows from the difference in those duties. There is no such distinction in the primary duties owed by liquidators, whether appointed voluntarily or by the court. All liquidators are agents of the company in liquidation and do not serve the interests of a particular party. Instead, they must act to best advance the interests of the corporation and its shareholders. However, even if we accepted that the duties of a court-appointed liquidator may be broader than those of a voluntary liquidator, Ted offers no rationale for the proposition that this could limit the jurisdiction of the Court to make orders pursuant to s. 325(3), and, in particular, to make the Order in this case.

[39] In short, there is no merit to Ted's argument that the chambers judge lacked jurisdiction to make the Order. Pursuant to s. 325(3) of the *BCA*, the court has the ability to "make any order it considers appropriate" including to give "directions on any matter arising in a liquidation".

Did the chambers judge act on a wrong principle, fail to give adequate weight to relevant considerations, or make a decision that is clearly wrong?

[40] As indicated above, Ted's arguments challenging the terms of the Order are not persuasive, as he is unable to demonstrate that the judge made an error that would allow this Court to interfere on appeal with the chambers judge's exercise of discretion.

[41] The judge's statements Ted relies on in support of his argument that the judge impermissibly "cherry-picked elements" from both his and the Liquidator's

proposals to create “his own form of sales process” are taken out of context. When these statements are considered in relation to the whole of the decision, they do not provide support for his argument. Ted appears to argue that the Order would not have been objectionable if the chambers judge had simply accepted the sales process put forward by the Liquidator, and that the error occurred when the judge rejected some of the terms proposed and included other terms which were not proposed in the Order. With respect, it is difficult to see any logic or principle behind this submission. More importantly, pursuant to the provisions of s. 325(3)(o) and (p) of the *BCA*, the chambers judge was able to give directions on any liquidation matter, as well as to confirm or modify any act or decision of the Liquidator.

[42] Ted argues that the chambers judge erred in finding that the bulk of Rule 11-6 of the *Supreme Court Civil Rules*, apart from Rule 11-6(2), does not apply to petition proceedings. Ted notes that Rule 16-1(6.1) specifically provides that an expert report may be admitted in a petition proceeding only if it complies with Rule 11-6(1), or if the court orders the report admissible even though it does not conform with that Rule. He argues that the chambers judge did not make an order admitting the Liquidator’s expert reports, and therefore erred in relying on them. Additionally, Ted submits that the conclusions drawn from the expert reports are illogical or inconsistent because the chambers judge preferred the evidence of the Liquidator’s experts, despite also stating that “the affiants are experienced professionals and there is no clear basis upon which to generally prefer one set of evidence over the other”: RFJ at para. 28.

[43] Ted’s counsel did not actively pursue these arguments at the hearing of the appeal, perhaps because they do not stand up to scrutiny.

[44] While we agree that the judge was incorrect in finding that only Rule 11-6(2) applies to petition proceedings, this error does not invalidate the judge’s reasoning nor the conclusions he drew based on the evidence before him. When the reasons are considered as a whole, it is clear that the judge admitted the opinion evidence tendered by *both* Ted and the Liquidator even though neither had strictly complied

with the provisions of Rule 11-6. Pursuant to Rule 16-1(6.1)(b), the judge was entitled to do so, and the fact that he did not make a formal order noting the admission of the opinion evidence is of no consequence. It is clear from his reasons that he reviewed, considered, and weighed the evidence provided by the experts. He was correct in his observation that it is a common practice in insolvency proceedings for the court to receive evidence not tendered in a form that complies with Rule 11-6(1) in appropriate circumstances.

[45] The assessment and weighing of expert evidence falls squarely within the role of a chambers judge and considerable deference is owed to the judge's findings: *SCP 173 Realty Limited v. Costa Del Sol Holdings Ltd.*, 2023 BCCA 312 at para. 44. Ted has been unable to demonstrate any palpable or overriding error of fact or law in the conclusions the judge drew from the opinion evidence. In the absence of manifest errors, this Court should not interfere with a judge's findings and conclusions about expert evidence: *Brazinski v. Brazinski*, 2023 BCCA 359 at paras. 101–102.

[46] The judge's reasons for accepting and rejecting portions of the opinion evidence are rational and reasonably based on the evidence. The judge explained that he disregarded the hearsay opinion evidence of other individuals that was included in Mr. Bentall's report, which simply restated information Mr. Bentall had received from others. The judge also addressed the conflicts in the expert's opinions and explained why he accepted the evidence that he relied upon. He gave reasons for the conclusions he drew from the evidence, including: that it would not be commercially efficacious for the Liquidator to commit to rezoning or subdividing the lands given their high value and the fact that any prospective purchaser would be a sophisticated developer; and that there was no need for Ted to be authorized to gather information on behalf of potential purchasers, as sophisticated purchasers would be capable of doing so themselves.

[47] Ted also argued that the chambers judge "held that assisting a private liquidator…to advance a sales process was more important than optimizing the

chances of achieving the highest value for the Lands". He submits that the "evidence was clear that commercially standard representations and warranties would optimize the chances of obtaining the highest value". This argument arises from the chambers judge's supplemental reasons, which dealt with issues raised by the parties' submissions regarding settlement of the terms of the Order: *In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2024 BCSC 1245 ("Supplemental Reasons").

[48] In the Supplemental Reasons, the chambers judge considered Ted's argument that the Lands should not be sold on an "as is, where is" basis as contemplated but should include representations and warranties concerning the Company's ongoing business: at para. 7. The chambers judge rejected this argument, noting that Ted was suggesting both transactional representations regarding the company's right and ability to convey the Lands, and "trailing" representations which would survive the closing of the sale. Contrary to Ted's submissions, it was not clear from the evidence that including representations would optimize the chance of obtaining a higher price.

[49] Ultimately, the judge concluded there was no need for transactional representations. He also considered evidence, presented by the Liquidator, that it is generally not in a vendor's best interests to include trailing representations. On this point, the chambers judge concluded:

> [34] Even if representations might marginally enhance participation in the sales process or potentially assist in generating a higher price, I reiterate what I said in the April Reasons (at paras 17 and 18): "this Court's task [under *CCM*] is to assess the reasonableness and adequacy of the proposed Sales Process." In that context, I must weigh the efficacy of proposed changes to the process against further delay. If a sales process proposed by the Liquidator, or as amended, is sufficiently reasonable and adequate, it is the Court's task to advance that process so that the mandate of the Liquidator can be fulfilled.

See Supplemental Reasons.

[50] The chambers judge was tasked with making a discretionary order and his conclusions are entitled to considerable deference. Ted has not demonstrated any manifest error in the initial reasons for judgment or in the Supplemental Reasons,

and there is no basis for this Court to interfere. In that regard, the comments of the Court in *iSpan Systems LP*, 2023 ONSC 6212, although made in the context of a receivership sale, are still apposite here:

> [45] I am satisfied that the proposed process here satisfies the *CCM* factors. In my view, it is not, in most cases, necessary or desirable for the Court to micro-manage the intricacies of every step of a proposed sales process. The Court cannot and should not do that, and indeed that is why the qualified and experienced Receiver is appointed to conduct the process in the first place. The Court needs to be satisfied that the process is fair, transparent and will be conducted with integrity. The objective is to maximize recovery for stakeholders, and to do so following a process that is conducted such that all stakeholders will have confidence in the outcome which results from confidence in the process by which that outcome was achieved.

[51] In summary, the chambers judge considered the admissible evidence concerning appropriate terms to include in the Order. He exercised his discretion to arrive at a sales process that he considered to be reasonable, taking into account all of the *CCM* factors. There is no basis for this Court to intervene.

Increased costs

[52] Three respondents—Bruce, Robert and the Callahan AE #3 Trust (the "Applicant Respondents")—seek increased costs. As noted, we reserved judgment on costs at the hearing of the appeal.

[53] Pursuant to Rule 70(1) of the *Court of Appeal Rules*, B.C. Reg. 120/2022, increased costs may be ordered if the Court or a justice "determines that assessment under the ordinary cost tariff would create an unjust result." Where an increased costs order is made, costs are allowed at half, or some other proportion, of the fees that would have been allowed if an order for special costs had been made: Rule 70(2).

[54] Orders for increased costs are exceptional. The onus is on the applicant requesting increased costs to demonstrate that this award is merited. The applicant should provide a clear rationale explaining why an order for ordinary costs would be unjust: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176 at para. 10; *Pousette v. Janssen*, 2024 BCCA 274 at para. 24.

[55] In *Cobble Hill*, this Court set out relevant factors to consider when determining whether the threshold for an order of increased costs has been met:

> [10] Relevant considerations include substantive and procedural complexity and a significant disparity between actual and recoverable costs under the relevant tariff. They do not include a consideration of reprehensible conduct, but rather, are grounded in indemnity…
>
> [11] Increased costs have been awarded where the issues raised in the appeal were complex; the issues extended beyond the immediate interests of the parties; the conduct of the parties unnecessarily lengthened the proceeding by, for example, raising spurious issues; where there was significant disparity between actual costs and recoverable costs, although this alone is not determinative; and any other factor that, together with these factors, would have resulted in an injustice to the successful parties…
>
> [Emphasis added.]

[56] The standard for what constitutes a "spurious issue" in this context appears to be high. In *Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 270, at para. 5, this Court declined to order increased costs because although the grounds of appeal "were tenuous at best", they were not "frivolous".

[57] The Applicant Respondents argue for increased costs on the basis that the appeal has been advanced tactically, to delay or obstruct the liquidation process. They submit that ordinary costs would not be appropriate because Ted has lengthened the proceeding by raising spurious issues. In reply, Ted argued that increased costs were not appropriate because the allegations were not tactical and raised real issues, both in front of this Court and the court below.

[58] The Applicant Respondents' principal argument is that Ted brought the appeal solely to delay and obstruct the voluntary liquidation that had been endorsed by this Court in *Callahan 2022*. Although that endorsement was made over two years ago, the Liquidator has been unable to move beyond the initial step of establishing a process for the sale of the assets because of Ted's persistent and unreasonable opposition. They argue that this appeal was frivolous as the Order was discretionary and clearly authorized by the provisions of the *BCA*. They further note that Ted was successful in the court below in persuading the chambers judge to include a term in the Order for a sealed bid process, rather than an auction. They

submit that the fact Ted has appealed when he was successful on the most contentious issue is a clear indication that he advanced the appeal only to delay and obstruct the liquidation.

[59] Here, the relevant circumstances are:

a) There was little merit to the appeal. The Order was discretionary and the respondents successfully argued that the broad powers and duties granted to the Court under s. 325 of the *BCA* authorized the Order here.

b) Ted's arguments were based on legal principles that we would characterize as novel and, perhaps, tenuous. As noted above, we would describe at least one argument as specious. However, in our view, the balance of Ted's arguments were not so lacking in merit as to be frivolous.

c) Ted took alternative positions that were, at times, inconsistent with the positions he took in the court below. However, there was nothing improper in pursuing the alternative position that terms of the Order should be set aside or varied if his primary position (that the court lacked jurisdiction) was not accepted.

d) There is undoubtedly a substantial disparity between the respondents' legal costs and the amount that may be ordered for ordinary costs. However, the amount that the shareholders of the Company will likely receive for the sale of the assets is substantial. The legal costs incurred to date by the Callahan brothers in the various proceedings that have been pursued are very significant and this appeal is one small part of that larger dispute. The opposing sides have each had some success along the way. This is not a case where a failure to award increased costs will financially disadvantage one party.

e) Finally, the Applicant Respondents have failed to provide a clear and convincing rationale to explain why an order for ordinary costs would be unjust.

[60] In these circumstances, we conclude that an order for ordinary costs is not unjust.

Disposition

[61] The appeal is dismissed. Each of the respondents is entitled to costs assessed under the ordinary costs tariff at Scale A.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Riley"