IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1168556 B.C. Ltd. v. 1164429 B.C. Ltd.,* 2024 BCSC 1727

Date: 20240918
Docket: S236360
Registry: Vancouver

Between:

1168556 B.C. Ltd., Wenbao Zhang aka Aaron Wenbao Zhang, and Sanbao Ren Tai International Holding Investment Inc.

Petitioners

And

1164429 B.C. Ltd., 1152299 B.C. Ltd., Topley Investment Limited, 1415643 B.C. LTD, Angela Yan Hong Guo aka Yanhong Guo, Ju Li, Wenping Zhang, Wenxia Zhang and Xuelan Zheng

Respondents

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Petitioners, 1168556 B.C. Ltd., Wenbao Zhang, and Sanbao Ren Tai International Holding Investment Inc.:	C. Martin S. Fischer
Counsel for Respondents, 1152299 B.C. Ltd., Topley Investment Limited, 1415643 B.C. Ltd., Angela Yan Hong Guo Aka Yanhong Guo:	G. Gregory K. Chopra, Articled Student
Place and Dates of Hearing:	Vancouver, B.C. February 26, 2024 May 15, 2024
Place and Date of Judgment:	Vancouver, B.C. September 18, 2024

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I. OVERVIEW

[1] This litigation concerns a falling out between two business partners, Mr. Zhang and Ms. Guo. Both Mr. Zhang and Ms. Guo serve as the only two directors of 1164429 B.C. Ltd. ("429 BCL" or "the Company"). Mr. Zhang is also a director of the petitioner 1168556 B.C. Ltd. ("556 BCL") which holds 50% of the class A common (voting) shares in the Company. The other 50% voting shares in the Company are held by 1152299 B.C. Ltd. ("299 BCL"), for which Ms. Guo is the sole shareholder and director.

[2] Mr. Zhang is also the director and president of another company called Sanbao Ren Tai International Holding Investment Inc. ("Sanbao"), which owns class C common (non-voting) shares in 429 BCL. Together, Mr. Zhang, 556 BCL and Sanbao (the "Petitioners") have brought this petition pursuant to the *Business Corporation Act,* S.B.C. 2002, c. 57 [*BCA*] and the *Law and Equity Act*[1] for various declarations and orders, including: a declaration that Ms. Guo has acted in an oppressive or unfairly prejudicial manner; liquidation and dissolution of the Company; removal of Ms. Guo as director of the Company; and leave to commence a derivative action on behalf of the shareholders of 429 BCL, against Ms. Guo and her company 1415643 B.C. Ltd. ("643 BCL").

[3] At the center of this dispute are three adjacent residential properties located in South Vancouver (the "Properties"). The Properties were the subject of recent foreclosure proceedings brought by Canadian Western Bank ("CWB"). Prior to CWB obtaining an order absolute, and unbeknownst to 429 BCL or its shareholders, 643 BCL purchased the Company's indebtedness under a mortgage from CWB. Later, at a contested hearing at which some of the shareholders of 429 BCL were present, 643 BCL obtained an order absolute. The Petitioners say that when 643 BCL obtained the order absolute, Ms. Guo completely erased the equity of the investors

[1] *Business Corporation Act*, S.B.C. 2002, c. 57 as amended, the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

in 429 BCL, including Sanbao, and acted against the best interests of the Company. It is these events which ground the claim for oppression and derivative relief.

II. ISSUES

[4] The following issues are raised by the Parties:

1) Was Ms. Guo's conduct oppressive or unfairly prejudicial to the Petitioners' and 429 BCL's shareholders?

2) Should Ms. Guo be removed as a director of 429 BCL per s. 227(3)(f) of the *BCA*?

3) Should the company be liquidated and dissolved per s. 227(3)(o) or s. 324(1) of the *BCA*?

4) Should the Petitioners be permitted to commence derivative action against Ms. Guo and 643 BCL per s. 227(3)(r) or s. 233 *BCA*?

5) Should Ms. Guo and 229 BCL be barred from voting on any issues related to 429 BCL's dealings and/or litigation with Topley and 643 BCL?

6) Should 429 BCL be ordered to pay the legal costs related to the derivative action, per s. 233(3)(b) of the *BCA*?

[5] I begin first with explaining the relationships between the various parties.

III. THE PARTIES

[6] In addition to Ms. Guo, 429 BCL, 299 BCL, 643 BCL, and individuals who own shares in 429 BCL, the Petitioners have named Ms. Guo's other company, Topley Investment Limited ("Topley") as a respondent. Topley holds a second mortgage charging lands owned by 429 BCL. I refer to Ms. Guo, Topley, 299 BCL, and 643 BCL collectively as the "Guo Parties".

[7] Mr. Zhang serves as a director for both of the corporate petitioners, 556 BCL and Sanbao, in this proceeding. However, he does not hold shares in either of them.

Nevertheless, I will refer to these two corporate entities (556 BCL and Sanbao) collectively as the "Zhang Companies".

[8] The remaining respondents are all investors in 429 BCL who also hold class C common shares. These include various family members of Mr. Zhang – his sisters Wenping Zhang and Wenxia Zhang; his estranged mother-in-law Xuelan Zheng[2]; and his friend, Ju Li. Mr. Zhang's parents are also investors in 429 BCL through Sanbao. I refer to these individual investors collectively with Sanbao, as the "Zhang Investors". This defined term specifically excludes Mr. Zhang and 556 BCL, neither of whom own any equity shares in the Company.

[9] My usage of the term the "Zhang Parties" includes the Zhang Investors, as well as 556 BCL and Mr. Zhang. I have used the term "Zhang Shareholders" to refer to the Zhang Investors and 556 BCL.

[10] Only the Petitioners and the Guo Parties were represented by counsel at this hearing. They will be referred to as the "Represented Parties".

IV. PRELIMINARY MATTERS

[11] In support of the Petition, Mr. Zhang relies on his Affidavit #1 made on Sept 14, 2023 ("Zhang Affidavit"), and three previous affidavits made by Ms. Guo (First Guo Affidavit[3], Second Guo Affidavit[4], Third Guo Affidavit[5]). There is no dispute that all of this material is properly before me in this hearing.

[12] A dispute arose during the hearing about what material tendered by Ms. Guo was admissible in this proceeding. I resolved that issue during the hearing but have summarized my ruling below to provide some context as to some of my findings of fact.

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[2]Mr. Zhang separated from his wife in 2018. Xuelan Zheng is his estranged wife's mother. Mr. Zhang's divorce proceeding remains unresolved as at the date of this hearing.
[3]Guo Affidavit #1, made November 24, 2021, in Vancouver Action No 2110743 (Guo Action)
Guo Affidavit #1, made February 6, 2023, in B.C. Action No. 226656 (CWB Foreclosure Action).
[5]Guo Affidavit #2, made July 18 2023, in CWB Foreclosure Action.

[13] Ms. Guo's Petition Response indicated that she would be relying on "the Affidavit of Angela Guo to be sworn". However, no such affidavit was filed. It was not until after this hearing had commenced and the Petitioners raised issues regarding the absence of evidence from Ms. Guo, that Ms. Guo's counsel prepared her responding affidavit. This affidavit was presented to the court in May 2024, when the Parties returned to court following a two and a half month long break. At that time, Respondent's Counsel sought to rely on Ms. Guo's newly-sworn affidavit made February 28, 2024 ("Fourth Guo Affidavit")[6] as well as an affidavit from an articled student in Respondent's Counsel's office, Ms. Kriti Chopra, made February 26, 2024 ("Chopra Affidavit").

[14] The Petitioners objected to Ms. Guo's late-filed affidavit on the grounds of prejudice. On the Petitioners' consent, I agreed to admit the Fourth Guo Affidavit for the limited purpose of showing that the history between the Parties and the reasonable expectations of the petitioner or the respondent are contested issues.

[15] No objections were raised in relation to the Chopra Affidavit, which primarily attaches correspondence between the Parties.

[16] I now turn to my findings of fact.

V. FACTUAL BACKGROUND

[17] In 2018, Mr. Zhang and Ms. Guo decided to purchase the Properties to develop them into a multi-unit apartment complex (the "Project"). As Mr. Zhang did not have the money to invest in the Project himself, he agreed to find additional investors through his family and friends.

[18] The Company was incorporated in May 2018. Both Mr. Zhang and Ms. Guo were named as directors. It was understood that Mr. Zhang would represent the interests of the Zhang Shareholders while Ms. Guo would represent the interests of 299 BCL.

[6]Guo Affidavit #1, made February 28, 2024, in B.C. Action No. VLC-S-S-236360.

[19] All of the voting shares in 429 BCL were distributed equally between 556 BCL and 299 BCL; additional non-voting shares were issued to each of the investors, proportionate to their financial contribution. Consequently, of the 12,170,000 class C common shares ("equity shares") that were issued in 429 BCL, Ms. Guo held 6,570,000 (or 54%) through her company 299 BCL, while the Zhang Investors collectively held 5,600,000 (or 46%). The equity shares were purchased by each of the investors, for $1.00 each.

[20] 429 BCL purchased the Properties for $21,750,000 in July 2018, with a total purchase cost of about $23 million. Of this amount, $5.6 million came from the Zhang Investors, $6.57 million came from Ms. Guo, and the balance of approximately $11.5 million was funded by a loan from CWB (the "CWB Mortgage"). In addition to the mortgage, CWB held an assignment of rents charging title to the Properties.

[21] Things started off smoothly. Mr. Zhang and Ms. Guo actively took steps to start the Project. By 2019, they had retained architects, received architectural drawings, and made initial zoning inquiries of the City of Vancouver. However, financial issues began to arise soon thereafter. The City of Vancouver required a substantial fee for the zoning application (around $58,000). In addition, Ms. Guo (through her company) was paying approximately $25,000 per month as interest only payments on the mortgage. Although the Properties generated some rental revenue through to about 2021, it was not enough to address the mounting costs.

[22] The Parties could not agree about who should fund these ongoing costs.

[23] According to Mr. Zhang, Ms. Guo had agreed from the outset to shoulder the entire development cost of the Project on her own. Thus, the Zhang Investors would not be required to invest any further money into the Project, over and above the initial cash required to acquire the Properties. According to Ms. Guo, Mr. Zhang had agreed to be involved throughout the development of the Project, including obtaining further financing as necessary from the Zhang Investors. It is not possible for me to resolve this factual dispute on the limited record – nor have the Parties asked me to.

Suffice it to say that this different view of their agreement remained unresolved and ultimately led to the breakdown in their relationship.

[24] Around October 2019, 429 BCL received an unsolicited offer on the Properties for $18,000,000 (the “Unsolicited Offer”). Mr. Zhang wanted to sell the Properties; Ms. Guo did not. Ms. Guo ultimately agreed to counter at $24,000,000. The prospective purchaser did not respond to this counter-offer.

[25] In the meantime, CWB became concerned with the servicing of or risk to its mortgage. Things came to a head in January 2020, when CWB demanded that either the loan’s principal be reduced, or that there be a posting of a significant interest reserve account. Not surprisingly, the Parties disagreed about where this money should come from. Mr. Zhang once again suggested that they sell the Properties, but Ms. Guo would not agree.

[26] Ms. Guo eventually proposed that in order to bring the CWB Mortgage into compliance, she would lend $4,000,000 to 429 BCL through her company, Topley (the “Topley Mortgage”). In return, Ms. Guo would receive security from 429 BCL and a personal guarantee from Mr. Zhang. Mr. Zhang avers that he reluctantly agreed to these terms. Topley received the personal guarantee and mortgage. The money Topley advanced was used entirely to pay CWB’s interest reserve on the CWB Mortgage.

[27] As of August 7, 2020, the CWB Mortgage stood at $7,500,000. It was renewed with a maturity date of January 31, 2021, and an interest only payment structure. The interest payments were approximately $25,000 per month and were made out of the interest reserve account.

[28] When the CWB Mortgage matured in January 2021, the Parties again ran into difficulties. This time, Mr. Zhang refused to renew or extend the CWB Mortgage. The Parties were at loggerheads. Mr. Zhang says he wanted to sell the Properties to a third party but Ms. Guo wanted to hold onto them and complete the Project.

[29] To move forward from the impasse, Ms. Guo proposed a buyout of the Zhang Investors. In July 2021, Ms. Guo obtained a "drive-by letter of opinion" on the value of the Properties. It valued the Properties at $10,535,564 ("2021 Valuation"). Subsequent discussions were unfruitful, and the Parties were unable to come to any agreement about what to do with the Properties.

[30] In November 2021, Ms. Guo filed an oppression petition on the grounds that the Parties were in a deadlock and Mr. Zhang's refusal to renew or extend the CWB Mortgage had placed the Company in a dire situation (the "Guo Shareholder Action").

[31] After Ms. Guo commenced her shareholder action, Mr. Zhang submitted some documentation to CWB. CWB agreed to extend the mortgage to April 30, 2022, upon payment of a $75,000 extension fee and signed extension letter.

[32] In February 2022, Ms. Guo proposed a meeting of the shareholders to address the outstanding requests from CWB. Though Mr. Zhang was amenable to a shareholders' meeting, he agreed with Ms. Guo that an updated appraisal of the Properties should be obtained.

[33] Ms. Guo ordered an updated appraisal of the Properties. She also proposed to pay the renewal fee for the mortgage as a "protective payment to be resolved between the Parties at a later date".[7]

[34] Colliers provided an appraisal dated April 11, 2022, which valued the Properties at $15,400,000 (the "2022 Valuation"). On the strength of the 2022 Valuation, Ms. Guo offered to buy out the Zhang Investors at a certain price. The Parties had various settlement discussions over the ensuing months but were unable to come to an agreement. The renewal fee remained unpaid.

[35] In August 2022 the interest reserve ran out.

[7]Zhang Affidavit #1, made September 14, 2023, in B.C. Action No. 236360 ("Zhang Affidavit"), Exhibit K at 84, email dated April 13, 2022.

[36] On August 18, 2022, CWB commenced foreclosure proceedings against 429 BCL, Ms. Guo, Mr. Zhang, and their companies (the "CWB Foreclosure Action"). In her Petition Response filed October 19, 2022, Ms. Guo agreed that the Properties should be sold as there was no reasonable possibility that any of the respondents would repay or refinance CWB's mortgage. However, she asked for exclusive conduct of sale or alternatively joint conduct of sale with CWB. Mr. Zhang avers that he was in agreement with this Petition response which was sent to his counsel prior to filing.[8]

[37] On October 27, 2022, CWB obtained an order *nisi* with a six-month redemption period.

[38] On February 9, 2023, Ms. Guo, Topley and 299 BCL, filed a notice of application seeking exclusive conduct of sale of the Properties in the foreclosure proceedings (the "First Guo Application" or "Exclusive Conduct Application"). It is unclear why the applicants waited 3 months to file this application, given that this was already Ms. Guo's asserted position in the Petition Response filed on October 19, 2022.

[39] In the Second Guo Affidavit, which was made February 6, 2023, and filed in support of the Exclusive Conduct Application, Ms. Guo averred at para. 20 as follows:

> "I wish to list the Lands for sale immediately on the MLS. I do not want the liberty to make offers for the Lands, either directly or indirectly. If I obtain a reasonalbe offer to purchase the Lands, to present that offer to this Court for approval. I undertake to direct my realtor to keep the other sahreholders of the Borrower advised as to the progress of marketing the Lands."

[40] Relying on this sworn statement made by Ms. Guo, Mr. Zhang and 556 BCL filed an application response taking no position on the First Guo Application.

[8] Zhang Affidavit at para. 52.

[41] On March 5, 2023, Ms. Guo obtained a second appraisal from Colliers, this time valuing the properties at $13,200,000 (the “March 2023 Appraisal”).

[42] On March 9, 2023, Ms. Guo and Topley obtained an order for the exclusive conduct of sale of the Properties in the foreclosure proceedings.

[43] It is uncontroverted that between March 9 and May 9, 2023, Ms. Guo took no steps to market the Properties to the public.

[44] The redemption period completed on April 27, 2023.

[45] On April 4, 2023, CWB filed an application for exclusive conduct of sale (the “CWB Exclusive Conduct Application”). The CWB Exclusive Conduct Application was granted on May 9, 2023.

[46] On May 3, 2023, CWB obtained an appraisal of the Properties which valued them at $12,100,000 (the “May 2023 Appraisal”).

[47] On May 10, 2023, Topley demanded that 429 BCL repay in full the amount owing under the Topley Mortgage, which then stood at $4,435,846.97. It is unclear whether any response was received to the demand.

[48] On May 15, 2023, 643 BCL entered into an Assignment Agreement with CWB through which Ms. Guo purchased the indebtedness due under the mortgage and PPSA Security (including the personal guarantees of Mr. Zhang and Ms. Guo). Consequently, CWB assigned all of its rights, title, and interest in the mortgage, assignment of rents, PPSA Security, and foreclosure proceeding, to 643 BCL. The purchase price was $8,135,461.87 (“643 BCL’s Debt”).

[49] An amendment to the Personal Property Registry was made on May 23, 2023, to reflect 643 BCL as the new secured party. In addition, a Form C transfer of the Mortgage and Assignment of Rents was registered on title to the Properties on May 26, 2023.

[50] According to Mr. Zhang, Ms. Guo took the steps at paragraphs 48 and 49 above without notice to 429 BCL, the Zhang Shareholders, or himself.

[51] On June 8, 2023, 643 BCL applied to be substituted as petitioner in the CWB Foreclosure Action in place of CWB, for purposes of *in rem* relief in the proceeding (the "Second Guo Application" or "Substitution Application"). It was only after these materials were served on 429 BCL, that the company and its shareholders (and Mr. Zhang) received notice of the purchase of indebtedness.

[52] On June 29, 2023, associate Judge Bilawich substituted 643 BCL as a petitioner in the CWB Foreclosure Action (the "Substitution Order").

[53] On August 14, 2023, 643 BCL filed a notice of application seeking an order absolute (the "Third Guo Application" or "Order Absolute Application"). In support, Ms. Guo filed her affidavit made July 18, 2023.

[54] This Petition was filed on September 15, 2023.

[55] The Order Absolute Application was heard on October 6, 2023, by Associate Judge Robertson. Mr. Zhang and 556 BCL were granted standing at the hearing of this application. They were represented by Mr. Martin who also appears as counsel for the Petitioners in this proceeding.

[56] In opposing the Order Absolute Application, Mr. Zhang and 556 BCL alleged that if this application is successful, the Zhang Investors' equity in 429 BCL would be erased in its entirety as the Company's only assets are the Properties.

[57] Despite the Petitioners opposition to the Third Guo Application, Associate Judge Robertson granted the order absolute in favour of 643 BCL. Her reasons are indexed at *Canadian Western Bank v. 1164429 BC Ltd.,* 2023 BCSC 1952 ("*CWB Decision*").

VI. OPPRESSION

[58] The following relief is sought at Term 1 of the Orders Sought in the Petition:

> A declaration that the affairs of the corporate respondent, 1164429 B.C. Ltd. ("429")., are being conducted, or that the powers of the director Angela Yangho Guo are being or have been exercised, in a manner oppressive to the petitioners and 429's shareholders and that Ms. Guo has done or threatened to do further acts that are unfairly prejudicial to the petitioners and its shareholders, pursuant to section 227 of the Business Corporations Act. ("BCA");

[59] Section 227 of the *BCA* permits a shareholder, beneficial shareholder, or any other person whom the court believes is appropriate, to apply for an order that the affairs of the company have or are being conducted in an oppressive manner.

[60] The relevant portions of s. 227 read as follows:

> **Complaints by shareholder**
>
> 227 (1) For the purposes of this section, **"shareholder"** has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (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.

[61] The available relief for oppression is set out at s. 227(3) to (7) as follows:

> (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
>
> (a) directing or prohibiting any act,
>
> (b) regulating the conduct of the company's affairs,
>
> (c) appointing a receiver or receiver manager,
>
> (d) directing an issue or conversion or exchange of shares,
>
> (e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

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

(i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,

(j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,

(k) varying or setting aside a resolution,

(l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,

(m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,

(n) directing correction of the registers or other records of the company,

(o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

(p) directing that an investigation be made under Division 3 of this Part,

(q) requiring the trial of any issue, or

(r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

(5) If an order is made under subsection (3) (g), (i) or (m), the company must pay to a person the full amount payable under that order unless there are reasonable grounds for believing that

(a) the company is insolvent, or

(b) the payment would render the company insolvent.

> (6) If reasonable grounds exist for believing that subsection (5) (a) or (b) applies,
>
> (a) the company is prohibited from paying the person the full amount of money to which the person is entitled,
>
> (b) the company must pay to the person as much of the amount as is possible without causing a circumstance set out in subsection (5) to occur, and
>
> (c) the company must pay the balance of the amount as soon as the company is able to do so without causing a circumstance set out in subsection (5) to occur.
>
> (7) If an order is made under subsection (3) (o), Part 10 applies.

[62] The oppression remedy is an equitable remedy. It gives a court "jurisdiction to enforce not just what is legal but what is fair": *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 ("*BCE*") at para. 58.

[63] Whether particular conduct is oppressive or unfairly prejudicial is fact specific and must be determined on a case-by-case basis: *BCE* at para. 59.

[64] In considering whether oppression has occurred, the court asks: (1) whether the evidence supports the reasonable expectation asserted by the complainant; and (2) if the complainant's expectations are reasonable, whether breach of those reasonable expectations is "oppressive" or "unfairly prejudicial": *BCE* at para. 68.

A. Standing

[65] A preliminary issue arises in terms of standing of Mr. Zhang to bring a claim for oppression.

[66] Section 227(1) extends the meaning of shareholder beyond the definition in s. 1(1). Under s. 227(1), "shareholder" also includes a beneficial owner of a share and any other person whom the court considers is an "appropriate person" to make an application under the section.

[67] Both 556 BCL and Sanbao are shareholders as defined by the *BCA*. As such, by operation of s. 227(1) each of the Zhang Companies have standing to bring this Petition for oppression.

[68] Mr. Zhang's right to seek oppression relief in his own name is not as evident. There is no evidence that Mr. Zhang owns any shares in the Company or has a beneficial ownership in it, either directly or indirectly through 556 BCL or Sanbao. Consequently, s. 227(1) requires me to find that Mr. Zhang is "an appropriate person to make an application under this section".

[69] The Petitioners simply rely on Mr. Zhang's relationship as director of 429 BCL and the Zhang Companies, to argue that he is an "appropriate person" to be granted standing. However, s. 227(1) is more limited than s. 232 (the derivative action section), in that the oppression provision does not expressly include a director as a person who has a right to obtain an order.

[70] None of the Parties provided this Court with authority that would give guidance on what considerations are relevant in the exercise of the Court's discretion to permit a person that is not a shareholder (beneficial or otherwise) to bring an oppression claim. I have thus looked to the jurisprudence.

[71] In *Cote v. Milltown Marina & Boatyard Ltd*., 2015 BCSC 2033 at paras. 57-58, the Court defined an "appropriate person" as someone who has an interest in the company similar to that of a shareholder, such as the corporate parent of a corporate shareholder or partners in a limited partnership (see also *R.B.L. Management Inc. v. Royal Island Development Ltd.*, 2007 BCSC 960 at para. 14).

[72] In *Lee v. International Consort Industries Inc*., [1992] 3 W.W.R. 298, 1992 CanLII 1076 (B.C.C.A.) the petitioner was one of the company's managing directors but he did not hold any shares. The Court held he was not an appropriate person to claim the oppression remedy as he did not have a direct financial interest in the company's affairs, nor was he in an analogous situation to that of a minority shareholder. Similarly, in *Benarroch v. City Resources (Canada) Ltd*., 54 BCLR (2d) 373, 1991 CanLII 896 (B.C.C.A.), the Court held that a director who only held an option to acquire shares in the company, and also claimed to represent certain minority shareholders, was not an appropriate person.

[73] In the absence of any evidence of Mr. Zhang having a financial interest in the Company or being otherwise similar to a shareholder, I can see no basis upon which to conclude that he is an appropriate person under s. 227(1). Further, there is no prejudice to the companies for which Mr. Zhang is a director if I deny him personal standing. This is particularly so given that the Zhang Companies are already petitioners in this proceeding. No rationale has been provided as to why Mr. Zhang's participation in his personal capacity is also needed to advance the oppression claim that the Zhang Companies have brought.

[74] I conclude that Mr. Zhang does not have standing to bring an oppression claim in his personal capacity under s. 227 of the *BCA*. However, this ruling does not affect Mr. Zhang's standing to bring a claim under s. 232 for derivative relief. That issue is addressed more fully elsewhere.

B. Was the Conduct Oppressive or Unfairly Prejudicial?

[75] In the seminal decision in *BCE*, the Court set out the analytical framework for oppression claims. This framework was summarized by the Court of Appeal in *Jaguar Financial Corporation v. Alternative Earth Resources Inc.,* 2016 BCCA 193 ("*Jaguar*"), as follows:

> [112] To be entitled to relief under the oppression remedy a petitioner must show that it held a reasonable expectation with respect to the conduct of the affairs of the company, and that the reasonable expectation was disappointed by conduct that was oppressive or unfairly prejudicial. The reasonable expectation must be assessed on an objective and contextual basis: *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 at paras. 62, 68.

[76] Thus, *BCE* establishes a two-step inquiry to determine if an oppression remedy is available, as follows:

a) Does the evidence support the reasonable expectation asserted by the claimant?

b) Does the evidence establish that the reasonable expectation of the claimant was violated by conduct that was either oppressive or unfairly prejudicial to the claimant's interest?

[77] I turn to the first step of this inquiry.

1. What were the Expectations?

[78] In *Jaguar*, the Court provided the following helpful guidance for determining "reasonable expectations":

> [113] The reasonable expectations of the shareholders are assessed in a two-stage process. First, the subjective expectations of the complainant must be established. Second, an objective analysis of the complainant's expectations must be conducted to determine whether the expectations were reasonable.
>
> [114] When analysing decisions of directors, the court applies the business judgment rule: that is, deference should be accorded to business decisions of directors taken in good faith in the performance of their duties. Directors owe their duty to the corporation, not to the shareholders, and the reasonable expectation of shareholders is simply that the directors act in the best interest of the corporation.
>
> [115] In considering proof of a claimant's reasonable expectations, the Supreme Court of Canada in *BCE* distils from the cases the following factors which form its analytical framework: general commercial practice, the nature of the corporation, the relationship between the Parties, past practice, steps the claimant could have taken to protect itself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.

[79] Thus, there are two aspects to determining the "reasonable expectations" of the shareholder. These involve subjective and objective considerations, as follows:

a) *What were the expectations of the shareholder?* This is an evidentiary issue going to the subjective expectations of the complainant.

b) *Were these expectations reasonable?* This requires an objective analysis of the complainant's expectations to determine their reasonableness.

[80] In determining whether expectations are reasonable, the court should have regard to the general commercial practice; the manner of the transactions; the nature of the corporation; the relationship between parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of the conflicting shareholders interests: *Icahn Partners LP v. Lions Gate Entertainment Corp.*, 2011 BCCA 228 at para. 59 citing *BCE* at para. 72.

[81] The actual expectation of the complainant is not conclusive. In determining if the expectation is reasonably held, the court must consider the facts of the specific case, the relationships at issue, and the entire context, including whether there are conflicting claims and expectations: *BCE* at para. 62.

[82] The expectations of the shareholders of 429 BCL (i.e. the Zhang Companies) are averred to in the Zhang Affidavit. I have summarized them as follows:

1) Ms. Guo would be solely responsible for the development costs of the Properties and to the extent that further financing for the Project was needed, she would either fund or find secondary financing on her own, rather than looking to Mr. Zhang or the Zhang Investors.

2) Ms. Guo would proactively develop the Properties as she had represented in 2018.

3) Ms. Guo would market the Properties to the public once she had an exclusive order of conduct of sale to do so.

4) Ms. Guo would consider the interests of other shareholders rather than denying Mr. Zhang's efforts to sell the Properties on the open market once Ms. Guo no longer wanted to fund or find secondary financing for the development.

5) Ms. Guo would abide by her statutory and common law duties as a director to act honestly and in good faith; protect the best interests of the Company; and exercise due care, diligence and skill.

(the "Expectations")

[83] Based on Mr. Zhang's evidence, I am satisfied that the above expectations were subjectively held by the Zhang Companies. I will now consider whether they were all reasonably held.

2. Were the Expectations Reasonable?

[84] I find that Expectations (1) and (2) were not reasonably held.

[85] Absent a clear agreement that Ms. Guo would fund the entire development cost of the Project for no further consideration, or that she would "proactively develop the Properties", it is unreasonable for the Zhang Companies to have expected her to do so. There is no evidence of a clear agreement to that effect.

[86] Expectations (1) and (2) are also controverted. Ms. Guo denies that she made the representations alleged. She denies that the Parties agreed that she would be solely responsible for any further costs of the Project beyond the initial acquisition costs; or that Ms. Guo would "proactively develop the Properties". The evidence is that Ms. Guo considered the relationship a joint business venture. Further, Ms. Guo contends that Mr. Zhang had agreed to continued involvement in the Project through to its completion and that he violated her expectation by failing to do so.

[87] These factual disputes cannot be resolved on the limited record before me. However, it is not necessary to resolve them, as I am supported in my conclusion by the past conduct of the Parties and normal business practices.

[88] When Ms. Guo offered to infuse more cash into the Project, she demanded further consideration through the Topley Mortgage and a personal guarantee from Mr. Zhang. This "demand" is consistent with her assertion that she required further consideration before she would loan any additional monies to the Company. This "demand" also lends support to the finding that Ms. Guo did not view the consideration that had already been provided to her (her 54% shares in the Company through 299 BCL) to be sufficient for her to lend further money to the Company.

[89] It is also uncontroverted that the Parties were involved in a business enterprise, and not, for example, a charitable exercise. This is evidenced by the Zhang Affidavit at paras. 23-26. It can thus be reasonably inferred that normal

business practices would prevail in how the Parties conducted themselves. Ms. Guo's demand for a personal guarantee and the Topley Mortgage in exchange for the additional $4 million loan to 429 BCL is consistent with normal business practices of the exchange of valuable consideration.

[90] Further, when Ms. Guo commenced the Guo Shareholder Action in November 2021, she explicitly objected to injecting further money into the Company without any corresponding increase in shares or control of the Company: Guo Shareholder Action Petition at para. 31.

[91] I find it against the preponderance of probability that the Zhang Companies (or indeed any of the Zhang Shareholders) would have expected Ms. Guo to put more money into 429 BCL without further consideration. The shares that 299 BCL held in 429 BCL were proportionate to how much money Ms. Guo had invested in the Company to fund the acquisition of the Properties. Requiring her to infuse more money into 429 BCL to fund the development of the Project would be beneficial to the other shareholders but detrimental to Ms. Guo's interests. It would effectively mean the dilution of her shares with no further valuable consideration being provided. It would be highly unreasonable to expect any business person to do that. In addition, requiring Ms. Guo to secure further financing from third parties has the same impact as asking her to invest her own money into the Project. Unless 429 BCL or the Zhang Investors agreed to provide some form of security, the consideration for those potential loans from third parties would have to come solely from Ms. Zhang, with no additional consideration being provided to her.

[92] As such, the Zhang Companies have failed to meet their burden to show that Expectations (1) and (2), that Ms. Guo would be solely responsible for the development costs of the Properties and that she would proactively develop the Properties, were reasonable.

[93] I come to a different conclusion with respect to Expectation (3), the expectation that Ms. Guo would market the Properties to the public once she had an exclusive order of conduct of sale to do so. The creation of this expectation is

supported by Ms. Guo's own evidence. At para. 20 of the Second Guo Affidavit (see para. 39 above) Ms. Guo makes a sworn statement to the Court that if she is granted exclusive conduct of sale, she will: immediately list the Properties for sale on MLS; present any reasonable offers to the Court for approval; and, through her realtor, keep the shareholders advised of the "progress of marketing the Lands". The Zhang Companies were provided a copy of this affidavit prior to the hearing of the First Guo Application.

[94] It is reasonable to infer that based on these representations made by Ms. Guo in her affidavit, the Zhang Companies held a reasonable expectation that Ms. Guo would market the Properties to the public once she had an order for exclusive conduct of sale. Ms. Guo's explanation that she did not market the Properties because there was not enough time does not make the expectation unreasonable. To the contrary, it is reasonable to expect that Ms. Guo would only have made that commitment in a sworn court document, if she believed she could fulfil it.

[95] I turn then to Expectations (4) and (5), that Ms. Guo would consider the interests of other shareholders rather than denying Mr. Zhang's efforts to sell the Properties and that Ms. Guo would abide by her statutory and common law duties as director. These Expectations are ostensibly grounded in the statutory and common law duties of directors.

[96] The common law supports the proposition that a shareholder has a fundamental reasonable expectation of fair treatment. They are also generally entitled to expect the company to comply with its legal obligations and public statements: *International Energy and Mineral Resources Investment (Hong Kong) Company Ltd. v. Mosquito Consolidated Gold Mines Limited*, 2012 BCSC 1191 at para. 64.

[97] Shareholders are also entitled to expect that the directors of the Company will act in its best interests: *1043325 Ontario Ltd. v. Jeck,* 2014 BCSC 1197 at para. 126,

rev'd in part on other grounds 2016 BCCA 258, SCC ref'd leave to appeal (19 January 2017), No. 37186. See also s. 142(1) of the *BCA*.

[98] However, to the extent that the Zhang Companies had any expectation of a particular return on investment (or profit in general), I find that that expectation was unreasonable: *Stahlke v. Stanfield,* 2010 BCSC 142 at paras. 21, and 108, aff'd 2010 BCCA 603.

[99] I do not find Expectation (4) reasonable. Ms. Guo owed a fiduciary duty to the Company, rather than the individual stakeholders. It is true that decisions in the best interest of the Company are often also in the best interest of shareholders. However, when these interests conflict, the director's duty is to the company: *BCE* at para. 37. Indeed, the relationship between shareholders and directors rarely gives rise to a fiduciary duty independent of the duty already owed by the director to the company: *Roussy v. Savage*, 2019 BCSC 1669 at para. 296.

[100] Insofar as oppressive or unfairly prejudicial conduct is concerned, even if it is established that Ms. Guo owed a duty to the other shareholders to consider their interests, it is unreasonable to expect her to fulfil this duty to the exclusion of her own interests. Further, it appears that the complaint—that Ms. Guo effectively denied Mr. Zhang's efforts to sell the Properties on the open market—is connected to an expectation of a particular return on investment. To the extent that this is the case, such an expectation would be unreasonable.

[101] I turn then to Expectation (5). This expectation is supported by the statutory and common law duties of directors. For example:

a) Section 142(1)(a) of the *BCA* requires that when a director exercises their powers and functions, they "act honestly and in good faith with a view to the best interests of the company".

b) Section 142(1)(b) requires the director to "exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances".

c) Section 147(1) requires a director to disclose an interest in a transaction where the contract or transaction is material to the company and the director has a material interest in the transaction.

[102] I thus find that Expectation (5) was reasonable.

3. Was there Oppression or Unfair Prejudice?

[103] I now turn to considering whether any of the reasonable expectations of the Zhang Companies were violated by conduct that was either oppressive or unfairly prejudicial. The onus remains on the complainants to demonstrate this.

a) Legal Framework

[104] As the Court noted in *BCE*, not every unmet expectation leads to a finding of oppressive or unfairly prejudicial conduct:

> [67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241 oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[105] I pause here to note that the provision under consideration in *BCE* was s. 241 of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, [*CBCA*]. While the federal provision is substantively similar to s. 227 of the *BCA*, the *CBCA* includes "unfair disregard" as an additional ground to oppressive or unfairly prejudicial conduct. This ground has a lower threshold than even unfair prejudice, but it is not present in the *BCA*.

[106] Oppressive conduct includes conduct which has been described as "burdensome, harsh and wrongful"; "a visible departure from the standard of fair dealing"; and an "abuse of power": *BCE*, at para. 92.

[107] Characterizing conduct as "oppressive" requires some degree of moral culpability for taking advantage of a power position in an unfair or abusive manner: *Feng v. Bao*, 2021 BCSC 2067, at para. 26.

[108] Unfair prejudice denotes a "less culpable state of mind" which nevertheless results in unfair consequences: *BCE* at para 67.

[109] The threshold for unfairly prejudicial conduct is lower than that of oppression. Conduct that is not oppressive may nevertheless be unfairly prejudicial: *Elliott v. Opticom Technologies Inc*., 2005 BCSC 529 at para. 66.

[110] The words "unfairly prejudicial" protect a wider range of rights than those under the oppression remedy: *Safarik v. Ocean Fisheries Ltd.*, 12 B.C.L.R. (3d) 342 (C.A.), 1995 CanLII 6269 at paras. 50, 54.

[111] Unfairly prejudicial conduct is "that which is unjustly or inequitably detrimental to the legitimate interests of a shareholder, and has unfair consequences": *Jaguar* at para. 85, citing *BCE* at para. 67.

[112] Examples of unfair prejudice include "squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm": *BCE* at para. 93.

[113] Regardless of whether the conduct is alleged to be oppressive or unfairly prejudicial, the complainant must prove some kind of harm or loss.

[114] The Court in *BCE* articulated the requirement to prove a loss in this way:

> [90] In most cases, proof of a reasonable expectation will be tied up with one or more of the concepts of oppression, unfair prejudice, or unfair disregard of interests set out in s. 241, and the two prongs will in fact merge. Nevertheless, it is worth stating that **as in any action in equity, wrongful conduct, causation and compensable injury must be established in a claim for oppression**.
>
> [emphasis added]

[115] In *Feng,* the Court stated the following:

> [28] Whether the harm results from oppression or unfair prejudice, a shareholder is required to show that she suffered harm which was direct and special, peculiar or separate and distinct from that suffered by all shareholders generally (*Jaguar,* para. 179).

[116] The impugned conduct must harm the shareholder directly, and not just the corporation generally. Harm to the corporation is best addressed through a derivative action: *Feng* at para. 30, citing *Jaguar* at para. 186.

b) Analysis

[117] I have already found the following expectations to be reasonably held:

a) Expectation (3) Ms. Guo would market the Properties to the public once she had an exclusive order of conduct of sale to do so.

b) Expectation (5) Ms. Guo would abide by her statutory and common law duties as a director to act honestly and in good faith; protect the best interests of the Company; and exercise due care, diligence and skill.

[118] The Petitioners say that the above reasonable expectations held by the Zhang Companies were violated by the following conduct of the Guo Parties (Ms. Guo in her personal capacity and through the conduct of her companies), which was either oppressive or unfairly prejudicial:[9]

1) Refusing to market the Properties to the public when she had an exclusive order of conduct of sale to do so;

[9] Written Submissions of the Petitioners at para. 66.

2) Refusing to disclose to the petitioners her intent to purchase the CWB debt thereby withholding and concealing the information from 429. This was a related party transaction and as a director she was required to disclose the transaction;

3) Conducting meetings and transactions with representatives of CWB without the Petitioners' knowledge that could affect 429's interests and then concealing the meeting and transactions from the petitioners and 429; and

4) Abandoning her duties as a director of 429 and then seizing or attempting to seize the assets of 429 by bringing action against 429.

(the "Impugned Conduct")

[119] I will deal with allegation (4) of the Impugned Conduct first. It is not clear what the Petitioners are referring to when they say "by bringing action against 429". The only action brought by Ms. Guo that I am aware of is the Guo Shareholder Action, which she filed on behalf of 299 BCL in November 26, 2021. There was nothing improper in her filing of that petition. At the time, Ms. Guo asserted that the Parties were deadlocked as Mr. Zhang was refusing to provide the necessary documentation to extend the loan, thereby putting the Company's assets in jeopardy. Mr. Zhang does not deny this, and in fact only provided the necessary documents after the Guo Shareholder Action had been commenced. I do not see this as being an attempt to seize the assets of 429 BCL, nor an abandonment of her duties as director. Indeed, I find that Ms. Guo was acting in furtherance of her duties when she commenced Guo Shareholder Action as she was trying to prevent 429 BCL's only assets from going into foreclosure.

[120] There is the possibility that allegation (4) of the Impugned Conduct actually relates to the Order Absolute Application and its perceived "unfairly prejudicial" impact on the Petitioners. To that end, the Petitioners plead the following at para. 10 of the Legal Basis:

> 10. The petitioners submit that the *status quo* is oppressive to them and produces an unfairly prejudicial outcome, because the options are:
>
> a) 429's directors do nothing and 429 does not respond to the OA Application;
>
> b) 429 cannot seek funding from its shareholders as a shareholder loan must be approved unanimously by the board of directors;
>
> c) The petitioners repay 463 [sic] or Topley directly, which has the same effect as funding 429.

[121] I note that point 10(a) is moot, as 429 BCL's directors did not "do nothing". Rather, Mr. Zhang participated at the hearing of the Order Absolute application and opposed it. In relation to points 10(b) and (c), they deal with obtaining funding from the shareholders to repay 643 BCL and/or the Topley mortgage. These paragraphs appear to be directed at the ostensible offer that was made by the Petitioners in August 2023, to purchase the indebtedness of 643 BCL. That offer in turn appears to be directed at trying to avert the Order Absolute Application[10] which ultimately was heard and granted. As I have noted elsewhere in these Reasons, the offer was made late in the day and there was no obligation on Ms. Guo's part to contemplate it, let alone accept it. I therefore do not consider the actions complained of in relation to item 4 of the Impugned Conduct, to be either oppressive or unfairly prejudicial.

[122] I now turn to items 1-3 of the Impugned Conduct. There is reliable evidence that Ms. Guo: (1) failed to market the Properties when she had exclusive conduct of sale; (2) did not disclose to the petitioners or 429 BCL of her intent to purchase the CWB debt; and (3) conducted secret meetings and transactions with the representatives of CWB.

[123] However, something more must exist to raise these breaches to the level of oppression or unfairly prejudicial conduct. This includes considerations such as the degree of moral culpability; nature of impact on complainant shareholders; and the nature of harm or loss. *Feng*, at paras. 26-29

[10] See Zhang Affidavit at paras. 58-62 and Exhibit N at 3-4; Petition, Part 1: Orders Sought, at paras. 48-49.

[124] In relation to allegation (1) of the Impugned Conduct, I have no difficulty in concluding that Ms. Guo was dishonest with the Zhang Companies (and the Court) when she swore at para. 20 of her Second Affidavit that she would market the Properties if she was given exclusive conduct of sale. Ms. Guo argues that she was telling the truth when she swore her Second Affidavit, but realized only after obtaining the order that she only had two months left to market the Properties "which wasn't practical for marketing a development property"[11]. There are several problems with this assertion. First, evidence of Ms. Guo's "intentions" is only contained in her Fourth Affidavit which was not admitted except to show that certain facts were controverted.

[125] Second, even if I was to admit the Fourth Affidavit to allow Ms. Guo to rely on this evidence (which I do not), I do not find her assertion credible. Ms. Guo and Topley obtained an order for the exclusive conduct of sale of the Properties in the foreclosure proceeding on March 9, 2023. CWB obtained its order for exclusive conduct of sale on May 9, 2023. There is no evidence that Ms. Guo made any effort during this period to try to list the Properties, let alone market them. Her bald assertion that two months was simply not enough time is not backed by any objective evidence. Ms. Guo would like me to conclude that it is self evident that two months were not enough to market development properties. If that was so readily apparent, surely this would have occurred to her when she swore her Second Affidavit on Feb 6, 2023, or later when she went to court on March 9 to obtain her order.

[126] I also note that although Ms. Guo stated in her Petition Response to the foreclosure proceeding filed October 2022, that she intended to apply for exclusive or joint conduct of sale with CWB, she inexplicably delayed three months in bringing this application. In my view, if her intention was *bona fide*, she would have made an effort to file her application before February 2023, so that she would have enough time to market this "development property".

[11] Fourth Guo Affidavit at para. 11.

[127] Third, Ms. Guo's affidavit in support of the order for exclusive conduct of sale made it clear that she wanted the order so that she could try to sell the Properties for a higher price than what CWB might get. It was her position that CWB would not be motivated to obtain more than the amount of their mortgage; whereas she was motivated to protect the entire investment in which she had the largest stake. Her failure to list the Properties after obtaining the order goes directly against this position.

[128] I am satisfied that when she made the representations in her affidavit, Ms. Guo had no intention to market the Properties. Her affidavit was made with the express objective of convincing the Court to grant her exclusive conduct of sale.

[129] Nevertheless, while her conduct was dishonest, to succeed in their oppression action, the Petitioners must also show actual harm.

[130] To succeed in an oppression action, the complainant shareholder must be able to point to conduct affecting it in its capacity as a shareholder, and to harm in that capacity which is distinct from the oppressing shareholder: *Jaguar* at para. 179, *Walker et al. v. Betts et al.,* 2006 BCSC 128 at para. 81. A potential loss in share value is not sufficiently distinct to warrant an oppression action: *Khela v. Phoenix Homes Limited,* 2015 BCCA 202 at para. 45.

[131] In *Jaguar*, the Court explained it in this way:

> [179] In my view the authorities require a shareholder to show it suffered harm that is "direct and special", "peculiar", or "separate and distinct" from the harm suffered generally by all of the shareholders. In other words, a shareholder need not be the only shareholder oppressed in order to claim oppression, nor suffer a different harm than the corporation does, but it must show peculiar prejudice distinct from the alleged harm suffered by all shareholders indirectly.

[132] This raises the question of what would have happened if Ms. Guo had not been granted the exclusive conduct of sale order in March 2023. The evidence leads me to conclude that nothing different would have occurred. There is no evidence that the Petitioners would have applied for exclusive conduct of sale themselves had

Ms. Guo not done so, or that CWB would have decided not to pursue their application for exclusive conduct of sale upon expiry of the redemption period. To the contrary, the evidence reveals that throughout the dealings with CWB, the Zhang Parties did little to protect themselves or the interests of 429 BCL. Rather, they sat back and let Ms. Guo shoulder all the responsibility. As the majority shareholder in the Company, they knew that she risked losing the most. As a result, they left her with the responsibility for re-negotiating the mortgage with CWB, to the extent that Mr. Zhang refused to even sign off on the mortgage renewal documents until he was compelled to do so when Ms. Guo commenced the Shareholder Action. If the Zhang Parties wanted to sell the lands, there was nothing preventing them from going to court to obtain an order for sale, prior to the properties going into foreclosure.

[133] In relation to allegations (2) and (3) of the Impugned Conduct, I find that Ms. Guo acted improperly when she entered into discussions with CWB without the knowledge of the other shareholders and failed to disclose a related property transaction before she entered into the Assignment Agreement. However, there is no evidence that this improper action resulted in any loss or harm to the Zhang Parties. It bears repeating that to constitute oppression or unfairly prejudicial conduct the complainants must establish that they have suffered a loss by these actions taken by the Guo Parties. Such evidence is missing in this case.

[134] While the circumstances leading up to the obtaining of the Order Absolute are circumspect, the reality is that the Guo Parties did nothing that CWB could not have done had it not assigned its rights to the Guo Parties. It is uncontroverted that the Zhang Shareholders would not have had any reason to complain if CWB had obtained the Order Absolute instead of Ms. Guo. Indeed, that is the direction in which things were heading until Ms. Guo purchased the indebtedness. Distilled to its simplest form, the complaint by the Petitioners is only that Ms. Guo was the person that obtained the Order Absolute, instead of the CWB.

[135] To that end, Ms. Guo did not do anything illegal by purchasing the indebtedness of the Company nor did she cause any harm or loss to the Petitioners.

While it is clear she acted improperly by not telling the Zhang Parties of her intention to purchase the indebtedness, that failure can be addressed through an order for costs. I come to the same conclusion regarding the Guo Parties' purchase of the indebtedness. It was always open to the Zhang Companies (or any other Zhang Shareholders) to offer to purchase the debt from CWB prior to the order absolute application. They did not do that. Rather, they sat back, content with the knowledge that CWB had filed an application for exclusive conduct of sale; that CWB would obtain their order unopposed (which they did on May 9, 2023); and that CWB would likely move to obtain an order absolute. The only time that the Petitioners came forward was when Ms. Guo, through 643 BCL, applied for an order absolute. Fuelled largely by suspicion, rather than any hard evidence, the Petitioners filed the oppression petition, and opposed the Third Guo Application on the grounds that Ms. Guo would receive a windfall if she obtained the order absolute.

[136] In their Petition before this court, the Zhang Companies say they are willing to purchase the indebtedness of 643 BCL and would like to seek exclusive conduct of sale. Both of these positions have been taken after the proverbial horse has already left the barn. The offer to purchase the indebtedness was ostensibly made in August 2023, once Ms. Guo had already purchased the indebtedness, obtained the Substitution Order, and filed the Order Absolute Application. I do not see anything oppressive or unfairly prejudicial to the shareholders in Ms. Guo's refusal to entertain their late in the day offer. If the Zhang Companies wanted to purchase the indebtedness of CWB, they had ample opportunity to do that prior to the Assignment.

[137] Insofar as the Zhang Companies now wish to have exclusive conduct of sale, this too is raised too late. In the *CWB Decision*, Associate Judge Robertson granted an Order Absolute to the Guo Parties in October 2023; in the same decision, she refused Mr. Zhang's request to defer her decision pending the outcome of this oppression petition. The implications of this decision are addressed below.

c) Impact of the *CWB* Decision

[138] Ms. Guo's counsel argues that the *CWB Decision* established that the shareholders did not suffer any loss as a result of the actions of the Guo Parties, which culminated in the making of the order absolute in favour of 643 BCL. To that end, the Guo Parties say that Robertson A.J. made this and a number of other findings that are binding in this proceeding, either by virtue of the doctrines of *res judicata*, issue estoppel, or abuse of process. Specifically, they rely on paras. 32, 35, 41, 54, 56-57, 58, 59, and 61, of the *CWB Decision*.

[139] Associate Judge Robertson summarized the position of the Petitioners in the Third Guo Application as follows:

> [30] The position of the Zhang Parties is that Ms. Guo should not be able to obtain title of this property through the foreclosure process without having first marketed the property for sale. In essence, they are saying that the potential for abuse to allow a participant in a shareholders dispute to essentially do an end run around those disputes by using the foreclosure process is significant and should be considered by this Court as a reason to deny an order absolute. In addition, they argue that any application for an order absolute should be deferred pending the outcome of the shareholder oppression action that has just been filed.

[140] In granting the order absolute, Robertson A.J. relied on the well-established principles for opposing such an order, that the opposing party must establish: (1) that there is a reasonable prospect of payment; and (2) that the property has sufficient value by away of security for the amount outstanding: at paras. 32-33.

[141] Associate Judge Robertson first considered the second part of the order absolute test. She noted that just over $12 million was owed on the mortgages, such that "in order to establish any reasonable prospect of redemption, [the Zhang Parties] would need to establish a value that would enable all mortgage security to be paid out, that being over $12 million". While the most recent appraisal placed the value of the Properties at $12.1 million, Robertson A.J. found that there would likely be a shortfall to the mortgages, based on the holding costs and realtor fees: at paras. 36-37.

[142] Robertson A.J. then turned to the first part of the order absolute test. She noted the Zhang Parties' argument that the Order Absolute Application should be deferred until this Petition is resolved. She framed the question as "whether or not the ongoing shareholder litigation somehow changes the second part of the test, namely the obligation to establish that there is a 'probable' prospect of redemption": at para. 42.

[143] Roberston A.J. concluded that given the uncertainty in the outcome of litigation, it was difficult to establish a probable prospect of redemption: at para. 44.

[144] The Court found the Zhang Parties had failed to meet either part of the order absolute test: at para. 35. Consequently, the Court held that "the Zhang Parties have failed to meet the onus upon them to establish both that there is sufficient equity in the property and a reasonable prospect of redemption": at para. 62.

[145] In coming to her conclusion, Robertson A.J. considered whether there were equitable reasons to defer the order absolute. She noted the outstanding dispute in this Petition and concluded that it did not provide a defence to the mortgage claims: at para. 50.

[146] Robertson A.J. noted that the Zhang Parties had done nothing "to assert their own rights with respect to the mortgage remedies" such as redeeming the mortgage with CWB and obtaining their own assignment to enable them to seek an order absolute at para. 54. She went on to find the following:

> [55] Rather than seek conduct of sale themselves, they allowed Topley and Ms. Guo to obtain exclusive conduct, and thereafter made no inquiries as to the status, nor did they then seek conduct themselves on the basis that Ms. Guo was not marketing the property herself. If they had been active in the proceedings one would expect that they would be asking themselves about the status of the marketing during this time period, or perhaps monitoring the listing themselves by, among other things, conducting their own search on the regularly used real estate listing services to confirm that it has been listed.

[147] Associate Judge Robertson went on to discuss the impact of her decision on this Petition, as follows:

> [58] The evidence before the court today is that the value of this property and the value of the mortgages secured by it is roughly the same. There is no evidence of equity to be preserved. **To the extent the Zhang Parties have a claim with respect to their shareholder remedies as being pursued in the petition, those can be continued to be pursued, notwithstanding a transfer of the ownership of the property as a result of an order absolute.**
>
> [59] There is nothing inequitable with Ms. Guo seeking to preserve her mortgage investment as well as her own personal investment by taking the steps that she has and seeking an order absolute so that she can be put into that position.
>
> [60] In considering the equities in this respect, as noted above, **in the oppression remedy petition the Zhang Parties seek relief akin to a tracing remedy into the property such that even if there is a transfer of ownership, such as what will occur through an order absolute, they may be able to pursue their remedies against the land at the end of the day. I make no findings in this respect**, but those claims may entitle them to register a certificate of pending litigation against the property, either as the pleadings currently stand or possibly after an amendment to reflect any such change in ownership.
>
> [61] Regardless, what is evident is that the Zhang Parties have been clear that they have no personal interest in this property, other than as may be necessary to recover damages from the Guo Parties. They were content to see it sold. Their dealings are consistent with a position that damages are an appropriate remedy if they are successful in their oppression remedy action.
>
> [emphasis added]

[148] It is helpful at this point, to set out the principles related to the doctrines of *res judicata*, issue estoppel, and abuse of process.

[149] In *White v. Schultz*, 2021 BCSC 1835, aff'd 2022 BCCA 297, I noted the following regarding the doctrines of *res judicata* and issue estoppel:

> [43] The doctrine of *res judicata* prevents the re-litigation of issues already addressed by the court, and requires parties to bring forward all claims and defences with respect to the matter in the first instance: *L.M. v. British Columbia (Director of Child, Family and Community Services),* 2016 BCCA 367.
>
> [44] *Res judicata* can take two forms: (1) issue estoppel; and (2) cause of action estoppel. Issue estoppel relates to the re-litigation of issues previously decided in another court proceeding: *L.M.* at para. 41.
>
> [45] In *L.M*., the court noted that the following criteria must be met to establish issue estoppel:
>
> > a) The issues are the same as what was decided in the prior decision;

> b) The prior judicial decision was final; and
>
> c) The Parties in both proceedings were the same.
>
> [46] Thus, once a material fact has been found, the same issues cannot be re-litigated between the same Parties: *L.M.*) at para. 42.

[150] Abuse of process is described in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79,* 2003 SCC 63 at paras. 35-55. The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute: para. 37. In *Chernen v. Robertson*, 2014 BCSC 1358 at para. 29, Chief Justice Hinkson held that the categories of abuse of process are open and can include, among others, proceedings where the process of the court is not being fairly or honestly used, proceedings which are without foundation or serve no useful purpose, and multiple or successive proceedings which cause or are likely to cause vexation or oppression.

[151] The Guo Parties do not rely on cause of action estoppel.

[152] With respect to issue estoppel, there is no dispute that two of the three *L.M.* criteria are met: the order absolute was a final decision of the Court, and the parties in the *CWB Decision* and this Petition proceeding are effectively the same. However, there is disagreement as to whether the issues in this proceeding are the same as those raised in the prior decision.

[153] I do not agree with the Guo Parties that the Petitioners in this case are barred by virtue of para. 58 in the *CWB Decision* from trying to show that the actions of the respondent caused them a loss. Robertson A.J. specifically states at para. 58 that she is not making any findings regarding this Petition. This is logical, since oppressive relief entails different considerations than the issues that were before Robertson A.J. To the extent that the Zhang Companies assert in this Petition that they have suffered an economic loss, I do not agree that the doctrine of *res judicata* applies to bar this Petition generally, nor does the doctrine bar the specific position of the Zhang Parties that they have suffered a loss due to the actions of the Guo Parties.

[154] However, to the extent that this Petition raises the following questions, I agree with the Guo Parties that those have already been resolved by Robertson A.J., and are barred by the doctrine of *res judicata* and issue estoppel:

a) whether there is a reasonable prospect of redemption of the mortgage or payment; and

b) whether the Properties have sufficient value by away of security for the amount outstanding.

[155] I view the Zhang Companies' offer to purchase the indebtedness of 643 BCL as akin to the first question that was addressed by Robertson A.J. When the Parties appeared before the court on the Third Guo Application, this Petition had already been filed. The Zhang Companies relied on the same evidence that is currently before this Court, and were unsuccessful in their attempts to convince Robertson A.J. that there was a reasonable prospect of redemption of the mortgage that had been assumed by CWB. In my view, the Petitioners are not entitled to re-argue this issue. However, even if I am wrong, and *res judicata* or issue estoppel does not apply, the evidence leads me to the same conclusion as Robertson A.J.

[156] On the second question, the Parties have put the same valuations before Robertson A.J. which are before me now. After reviewing the evidence, Robertson A.J. concluded at paras. 36-40 that the properties had a value of $12.1 million, and based on the holding costs and realtor fees, there would likely be a shortfall to the mortgagees. Even if this issue was not barred by reason of *res judicata* or issue estoppel, the evidence leads me to the same conclusion as Robertson J.A.

[157] The Zhang Companies' argument that the loss they have suffered is the lost opportunity to market the properties on the open market is also not convincing. The lost opportunity is only meaningful if there is a tangibly different outcome that is expected from listing the Properties and marketing them on the open market. There is simply no evidence that this would occur. The Petitioners have provided me with no evidence that the Properties are worth more than the most recent valuation from

May 2023 of $12.1 million; or that there are buyers that would be willing to pay more if the properties were listed on the open market. To that end, I find paras. 62-63 of the Zhang Affidavit to be speculative.

[158] The sole assets of the Company were the Properties. The Company's shareholders collectively let those assets go into foreclosure by defaulting under the mortgage to CWB, and then failing to redeem the mortgage before the redemption period expired. This entitled CWB to seek an order absolute. Prior to that application, CWB sought sole conduct of sale. That order was not opposed by any of the shareholders or by the Company. Thus, the argument that Ms. Guo through her actions caused the Zhang Companies or other shareholders to lose their interest in the Properties, is wholly without merit. It was the failure of the shareholders collectively to keep the mortgage in good standing, or to redeem the mortgage when the order *nisi* was granted, that caused them to ultimately lose the assets.

[159] The evidence establishes that the Properties were vulnerable to an application for order absolute, not because of any improper conduct on the part of Ms. Guo, but because 429 BCL had failed to keep up with its mortgage payments. Ms. Guo did not put the Properties into foreclosure – rather, she took steps to protect her own interests when the Properties went into foreclosure. There is no evidence that by doing so, she harmed the interests of the Zhang Companies.

[160] I agree with the Guo Parties that despite my concerns about Ms. Guo's lack of honesty and forthrightness, there was nothing objectively inequitable with Ms. Guo seeking to preserve her mortgage investment as well as her own personal investment when she took steps to obtain the order absolute. Ms. Guo acted no differently than the other shareholders when she let the Company's only assets go into foreclosure rather than trying to save them. Neither she, nor the other shareholders, were required to put their own money into the Project and suffer a further loss, with no consideration.

[161] In my view, Ms. Guo's decision to purchase the debt of CWB and substitute herself as the petitioner in the CWB Foreclosure Action, gave her the ability to free

herself of the Petitioners and to protect her investment. There is no evidence that the Zhang Companies suffered any harm as a result.

d) Conclusion

[162] I conclude that the Petitioners have failed to establish that Ms. Guo has acted in an oppressive manner to the Zhang Companies or that she has done or threatened to do acts that are unfairly prejudicial to them.

[163] As no violation of s. 227(2) of the *BCA* has been proven, Term 1 of the Orders Sought in the Petition is dismissed.

VII. OTHER ORDERS SOUGHT

[164] The Petitioners seek a number of other orders. Some of the relief sought can also be provided even where oppression has not been proven. Other relief is only available under s. 227 of the *BCA*. I have addressed the remedies available even where oppression is not made out below.

A. Liquidation and Dissolution

[165] At Term 2 of the Orders Sought, the Petitioners seek the following relief:

> Alternatively to item 1, a declaration that the affairs and governance of 429 are "deadlocked" by the conduct of its director, Ms. Guo and the corporate respondent, 1152299 B.C. Ltd. ("299") and that it is just and equitable to liquidate and dissolve 429 pursuant to s. 324(1) of the BCA.

[166] An order for liquidation and dissolution can be made under both s. 227(3)(o) of the *BCA*, as well as s. 324(1). An order under s. 324 does not require the complainant to prove oppression or unfair prejudice. Rather, under s. 324(1)(b), the court can make such an order if it considers it "just and equitable to do so".

[167] The relevant portions of s. 324 provide as follows:

> (1) On an application made in respect of a company that is a financial institution by the superintendent, or made in respect of a company, including a company that is a financial institution, by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court

> considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if:
>
> (a) . . .
>
> (b) the court otherwise considers it just and equitable to do so.
>
> …
>
> (3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:
>
> (a) make an order that the company be liquidated and dissolved;
>
> (b) make any order under section 227 (3) it considers appropriate.
>
> (4) If the court orders under this Act that a company be liquidated and dissolved, the court must, in its order, appoint one or more liquidators.
>
> (5) An appointment of a liquidator under subsection (4) takes effect on the commencement of the liquidation.

[168] Liquidation and dissolution are considered "drastic remedies" and "remedies of last resort". The court's discretion to order this relief "must be exercised judicially, on a principled basis, and in recognition of the reluctance of the Court to interfere lightly in the internal affairs of a company": *Weisstock v. Weisstock*, 2023 BCCA 352 at para. 52, citing *Vivian v. Firth*, 2012 BCSC 517 at para. 67.

[169] Simply because the court concludes that it is just and equitable to liquidate and dissolve a company, does not automatically lead to the making of such an order. The court also has the discretion to grant the relief set out in s. 227(3) if deemed appropriate. As noted in *Weisstock*:

> [44] If the court concludes that it is just and equitable to liquidate and dissolve a company, such an order does not automatically follow. Under s. 324(3), the court may either order the company to be liquidated and dissolved or make "any order under section 227(3) it considers appropriate." Section 227(3) provides the court with the authority (and flexibility) to "make any interim or final order it considers appropriate" to remedy or end "the matters complained of." Section 227(3) also provides a non-exhaustive list of available remedial orders.

> [45] The "just and equitable" provision allows the court to impose broad and equitable considerations to the strict legal obligations that would otherwise apply to a corporation. It permits a judge to recognize that within and behind a corporation, "there are individuals, with rights, expectations and obligations" and that sometimes this "make[s] it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way": *Ebrahimi v. Westbourne Galleries Ltd*., [1972] 2 All E.R. 492 at 496, [1973] A.C. 360 (H.L.) at 500 (per Lord Wilberforce).
>
> [46] The cornerstone of the just and equitable analysis is therefore the Parties' reasonable expectations. In other words, liquidation is justified where an applicant "demonstrate[s] that the Parties regarded, or would have regarded if they had turned their minds to it at the time of formation of the business association, the particular circumstances resulting from the disharmony to constitute the termination or repudiation of the business relationship": *Animal House Investments Inc. v. Lisgar Development Ltd*., 87 O.R. (3d) 529, 2007 CanLII 82794 (S.C.J.) [*Animal House ONSC*] at para. 57, aff'd 237 O.A.C. 261, 2008 CanLII 27471 (Div. Ct.).

[170] Thus, the Parties' reasonable expectations are an integral part of the "just and equitable" analysis.

[171] In *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at paras. 120-121, the Court noted that the words "just and equitable" confer a broad discretion on the court, and that this test is at a lower threshold than the test for oppression or unfairly prejudicial conduct.

[172] No finding of wrongdoing is necessary to ground an order under s. 324: *Weisstock* at para. 50 citing *Petersen v. Hawley*, 2022 BCCA 169 at para. 28. However, the conduct of the parties may be relevant to providing context for the conflict and whether the court should exercise its discretion to grant the relief: *Weisstock* at para. 51.

[173] Circumstances in which the court has exercised jurisdiction under the just and equitable ground have included: where there is a justifiable lack of confidence among the members; the parties are in deadlock; or where a partnership analogy applies: *Weisstock* at paras. 47-48. While the court's discretion under s. 324(1) is not limited only to these categories, the Petitioners rely on these three categories to ground their claim.

1. Lack of Confidence

[174] In *Loch v. John Blackwood Ltd*., 1924 CanLII 529 (UK JCPC), [1924] 3 W.W.R. 216 at para. 4, the Privy Council explained what is meant by conduct that amounts to a "justifiable lack of confidence" which could lead to the winding up of a company's affairs on the grounds that this is just and equitable:

> …It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must be a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy, of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound-up.

[175] The reasoning in *Loch* was adopted by this court in *Re National Building Maintenance Ltd.,* 1970 CanLII 1210 (B.C.S.C.), [1971] 1 W.W.R. 8 at 26.

[176] A "justifiable lack of confidence" can exist where there is proof of dishonesty or a lack of probity in the conduct of the company's affairs by the directors or by the majority shareholders. Examples include where the majority shareholders have treated the company or its assets as their own property, or where a director has misappropriated company funds: *Dia-Kas Inc. v Virani*, 1995 CarswellBC 2907, 1995 CanLII 798 (B.C.S.C.) at para 125.

[177] The Petitioners submit that there is a justifiable lack of confidence in Ms. Guo's conduct and management of 429 BCL's business' affairs because Ms. Guo has abandoned her duties and impartiality as a director and is pursuing her own personal interests to the prejudice of 429 BCL and its remaining shareholders.

[178] I do not agree that Ms. Guo has abandoned her duties as a director, or that she has taken steps to the prejudice of 429 BCL and its remaining shareholders. However, I do agree that she has created a justifiable lack of confidence by failing to list the Properties for sale after she obtained exclusive conduct of sale, as she had

averred to do in her affidavit. This has created an understandable lack of confidence on the part of the Petitioners that Ms. Guo is acting in the Company's best interests.

2. Deadlock

[179] Shareholders' deadlock may make it just and equitable to liquidate and dissolve a company: see for example, *Cariboo Western Lumber Ltd. v. Mochizuki*, 2000 BCSC 1537 at para. 44; and *Kang v. Sachdev*, 2008 BCSC 1032 at para. 9.

[180] In *Weisstock*, the Court noted as follows:

> [82] The existence and extent of deadlock within the operations of a company is "highly relevant" to the question of whether a liquidation order should be made but it is "not dispositive". Acrimony and/or irreconcilable differences alone are not sufficient to justify such an order. The court will only exercise its discretion under s. 324(1)(b) to order a winding-up where the disharmony prevents the Parties from making decisions collectively on significant matters affecting the business: *Petersen BCSC*, at paras. 37–38, 41, 42, citing *Callahan v. Callahan*, 2011 BCSC 40 at para. 48; *Cariboo Western Lumber Ltd. v. Mochizuki et al*, 2000 BCSC 1537 at paras. 45–46; *Shasta* at para. 81; and *Animal House ONSC* at paras. 57, 59–61.

[181] The Petitioners rely on *Whistler Service Park Ltd. v. Glacier Creek Development Corp*., 2005 BCSC 1942, aff'd 2005 BCCA 472 ("*Whistler*"), to support their application under s. 324. In *Whistler*, the parties were two separate companies who entered into a joint venture corporation for the development of land. Disputes arose after the development did not go as planned. The petitioner company brought an action for specific performance and costs and the respondent company sought relief under the oppression remedy alleging that the petitioner company conducted business affairs unfairly.

[182] Justice Kelleher declined to grant the oppression remedy but concluded the relationship breakdown warranted a shotgun sale. He noted that the court will generally order the party who is in the best position to assess the fair market value of the business to make the initial offer: *Whistler* at paras. 43-45. This order was upheld on appeal.

[183] In support of an order under s. 324 on the grounds of deadlock, the Petitioners plead the following under Legal Basis:[12]

> 8. The Petitioner submits that relief under section 324 is warranted because:
>
> a) There is an equal split of voting shares and control: Each voting shareholder has "its" director, either Mr. Zhang or Ms. Guo;
>
> b) There is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation, and 429 needs the ability to respond to the OA Application;
>
> c) There is a resulting deadlock, as Mr. Zhang cannot get a substantive response from Ms. Guo, and
>
> d) The deadlock has paralyzed 429's ability to respond to the OA Application which seeks the transfer of the Properties from 429.

[184] The Petitioners submit that this voting structure has resulted in a situation where neither director can take action without the assent of the other. The Petitioners explain: "Ms. Guo's abandonment of her director duties in 429 has deadlocked 429's ability to deal with her [Order Absolute] Application to the prejudice of 429's shareholders".[13]

[185] Accordingly, the Petitioners submit that it is just and equitable that 429 BCL be wound up, liquidated, and dissolved.

[186] Inexplicably, the main issue that the Petitioners rely on to establish deadlock is the disagreement between the Parties on what to do in relation to the Order Absolute Application. That application was fully resolved by Robertson A.J., thus rendering this argument moot. Once the Order Absolute Application was determined, the deadlock on what to do in relation to it was no longer relevant.

[187] The final issue raised in support of a s. 324 relief is set out at para. 9 of the Legal Basis as follows:

> 9. The petitioners submit that their expectations are reasonable: that 429 can be run in a reasonable manner and that 429's directors can and will work

[12] "OA Application" refers to the Order Absolute Application.
[13] Written Submissions of the Petitioners at para. 83.

> together for 429 benefit. The current situation meets neither of these expectations.

[188] It is unclear what expectations the Petitioners refer to in this paragraph. If the Petitioners are arguing that they had reasonable expectations that the Company would never reach a deadlock, that proposition is not tenable. The Company appointed two decision makers (i.e. directors) and established no way of breaking a tie vote. It does not follow that the lack of mechanism to break a tie vote was premised on the expectation that Mr. Zhang and Ms. Guo would always agree. If that were the case, there would be no need to have Mr. Zhang appointed as a director "to ensure that [the Zhang Investors'] interests would be properly taken care of".[14] Even if such an expectation existed, it was not reasonable, given Mr. Zhang's own evidence that the Zhang Investors wanted him to act as a director to protect their interests, while Ms. Guo was appointed as a director to protect her own interests as a majority shareholder.

[189] There is also no evidence that there was something unique in the relationship between the Parties that led the Petitioners to believe that Ms. Guo and Mr. Zhang would always agree on how to conduct the affairs of the Company. The amount of money invested into acquiring the Properties was substantial, there were a number of shareholders involved, and the development envisioned was not small. This, combined with the lack of any personal loyalty or connection that the Parties had to each other, leads me to conclude that the only reasonable expectation was that an issue would arise which the two directors could not agree on, making it inevitable that the Company would at some point be in a deadlock.

[190] There is no doubt that there is distrust and acrimony between the Parties. But, as the court noted in *Weisstock*, the question for me is whether the disharmony prevents the Parties from making decisions collectively on significant matters affecting the business.

[14] See Zhang Affidavit at para. 17.

[191] The challenge for the Petitioners is that they have not identified what further significant matters affecting the business need to be decided on, after the Order Absolute was granted in favour of 643 BCL. The sole assets of the Company were the Properties and the shareholders no longer have any interest remaining in them by virtue of the Order Absolute.

[192] The only apparent issue that the Parties cannot agree on now is whether Ms. Guo should agree to the Petitioners' offer to purchase the indebtedness of 643 BCL or repay the Topley Mortgage, or participate in some other way to reverse the Order Absolute. This is not an issue that significantly affects the business. Rather, it is an issue that the shareholders raise to try to protect their own interests to the detriment of Ms. Guo. Their attempts to undo what has occurred through the Order Absolute are premised on their belief that the Order Absolute should never have been granted for equitable reasons. Those equitable reasons were rejected by Robertson A.J. and do not raise any live issues that the Parties must decide but cannot because they are in a deadlock.

[193] The Petitioners have failed to establish the ground of "deadlock" for granting the relief under s. 324.

3. Partnership analogy

[194] The final ground the Petitioners rely upon is the "partnership analogy". This arises when the relationship between the Parties resembles a partnership, as opposed to arm's length shareholders.

[195] In *Weisstock* at para. 87, the Court endorsed the following test set out in *Vivian* regarding the partnership analogy:

> [80] In summary, on an application under s. 324 of the *Act* for [a] winding-up order, the equitable intervention of this Court on the "partnership analogy" ground requires the satisfaction of two conditions, both of which were explained by Coultas J. in *Paulson v. Dogwood Holdings Ltd.* in this passage:
>
> > …firstly, the existence of an undertaking that is in substance a partnership in the guise of a private company, and secondly, a breakdown of the mutual trust and confidence upon which the original undertaking was founded.

[196] The Petitioners say that the relationship between the Parties is really a partnership in the guise of a private company. They submit that this characterization of the relationship is supported by the corporate structure that gave the Zhang Investors a representative on the Board of Directors of 429 BCL and equal voting rights through the issuance of shares to the Petitioners. I do not agree that the circumstances in this case meet the partnership analogy.

[197] The first element of the partnership test in *Vivian* was explained as follows in *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] All E.R. (H.L.) at 500, [1973] A.C. 360 (H.L.) at 379:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> (cited with approval in *Weisstock* at para. 94)

[198] Elements 1 and 3 are missing in this case. There is no evidence that the Parties had an association that was formed or continued on the basis of a personal relationship involving mutual confidence. Rather, the personal relationship appears to have been a very limited one. As averred to by Mr. Zhang, Ms. Guo was "an acquaintance" of his who he understood later became a close friend of his estranged wife.[15] Further, no evidence was led that there was a restriction on the transfer of the members' interest in the Company.

[199] Element 2 does appear to be present, in that it can be said that there was an understanding that all shareholders would participate in the conduct of the business through Mr. Zhang (who represented the interests of the Zhang Investors) and Ms.

[15] Zhang Affidavit at paras. 6-7.

Guo who represented the interests of the Guo Parties. However, I do not find this Element is sufficient on its own, to establish the partnership analogy in this case.

4. Conclusion

[200] The Petitioners have established that they have a justifiable lack of confidence in Ms. Guo. Consequently, it would be just and equitable to grant some relief under s. 324(1)(b). However, it does not follow that the company should be liquidated and dissolved.

[201] Pursuant to s. 324(3)(b), this Court may also grant relief under s. 227(3). I have considered the various form of relief under s. 227(3) which the Petitioners pursue, including: (a) removing Ms. Guo as a director; (b) directing liquidation and dissolution; and (c) authorizing derivative proceedings. I address items (a) and (c) later in these reasons and even with the just and equitable test that operates under s. 324, I find neither of those two forms of relief suitable or appropriate.

[202] I turn then to the request for liquidation and dissolution.

[203] It is clear that the Parties wish to end their relationship with each other. Indeed, that seems the logical course given that the sole purpose of the Company was to develop the Properties. Since the Company has lost its only assets through the Order Absolute, there is no discernable purpose for it to exist or for the Parties to remain in business together.

[204] However, without receiving further submissions from the Parties, I am not convinced that an order for liquidation and dissolution is appropriate. I consider this relief the “nuclear option”. While it may be appropriate to grant it, this should only be done after careful consideration as to the implications.

[205] For example, consideration must be had for the costs and inconvenience to the Parties if an order for liquidation and dissolution is made. This is particularly of concern where it appears that the Company does not have any assets, and the liabilities of the Company are unknown. Further, it is unclear what impact the order

for liquidation and dissolution would have on the Guo Parties who are now in possession of the Order Absolute.

[206] To that end, I find it appropriate to make the following order:

a) The Parties have 90 days from the date of this Order to try to resolve matters and come up with a solution of how best to wind up the affairs of the Company, in the most cost-effective manner.

b) In the event the Parties are not able to resolve this issue on their own, they are at liberty to make a Request to Appear before me for the purposes of a further hearing on how best to wind up the affairs of the Company.

c) In the event that a liquidation and dissolution order is sought at any further hearing, the Parties are to provide submissions on the appropriate person to appoint as a liquidator and their proposed.

[207] I now turn to the remaining issues.

B. Removal of the Director

[208] Term 3 of the Orders Sought in the Petition, asks for the following:

> An order removing Ms. Guo as a director of 429 and limiting the number of directors of 429 B.C. Ltd. to one (1);

[209] This relief is sought as part of the oppression remedy, under ss. 227(3)(e) and (f) of the *BCA*, which give the Court the explicit authority to remove and appoint directors.

[210] Where oppression is established, removal of a director may be an appropriate remedy to “alleviate the oppression”: *Moon v. Golden Bear Mining Ltd*., 2012 BCSC 829, at para. 319.

[211] The removal of a director of a corporation is an exceptional remedy. It requires the complainant to prove something more than directors “running afoul of

their obligations, more than anticipated misconduct, or more than an apprehension of bias": *Walker et al v. Betts et al*, 2006 BCSC 1096 at para. 23.

[212] In this case, the Petitioners have not proven oppression or unfairly prejudicial conduct. As such, such relief on those grounds is not available to them.

[213] However, this remedy can also be obtained as part of the relief on a finding under s. 324 that it is just and equitable to liquidate and dissolve a company. To that end, I have considered whether it is appropriate to remove Ms. Guo as a director, after having regard to all of the circumstances of this case.

[214] In my view, there is no basis to make such an order. The Company's affairs are about to come to an end. The Parties have been granted time to come up with a solution as to how to wind up the Company in the most cost-effective manner. Given that Ms. Guo is a majority shareholder in the Company, removing her as a director would have the perverse impact of the most affected party having no input in the manner in which the Company's affairs are wound up.

[215] Consequently, the relief sought at Term 3 of the Petition is dismissed.

C. Leave to Commence Derivative Action

[216] At Term 7 of the Orders Sought, the Petitioners seek the following:

> Alternatively to item 5 and 6, the petitioners be granted leave to commence a derivative action on behalf of the shareholders of 429 against Ms. Guo and 643 and that 429 be ordered to pay such reasonable costs as are incurred by counsel for the petitioners to commence and prosecute the derivative action on behalf of the shareholders of 429;

[217] The references to "items 5 and 6" relate to other relief that was sought in the Petition which was adjourned generally. Term 5 sought a declaration that certain properties are the assets of 429 BCL, and Term 6 sought a transfer of ownership of those properties back to 429 BCL. As noted, that relief is not sought in this hearing.

1. Legal Framework

[218] The derivative relief is sought under s. 227 and s. 233 of the *BCA*.

[219] This court has the authority under s. 227(3)(r) of the *BCA* to authorize or direct that legal proceedings be commenced in the name of the company against any person on the term the court directs. I have already determined that there has been no oppressive or unfairly prejudicial conduct. Thus, the relief is not available on those grounds.

[220] However, it is also open for the Petitioners to seek leave to commence a derivative action under s. 232 of the *BCA*, as follows:

> **Derivative actions**
>
> **232** (1) In this section and section 233,
>
> **"complainant"** means, in relation to a company, a shareholder or director of the company;
>
> **"shareholder"** has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.
>
> (2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company
>
> (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or
>
> (b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.
>
> (3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.
>
> (4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

[221] Section 233 sets out the circumstances under which the court's power under s. 232 can be exercised. It provides:

> 233(1) The court may grant leave under section 232(2) or (4), on terms it considers appropriate, if
>
> (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
>
> (b) notice of the application for leave has been given to the company and to any other person the court may order,
>
> (c) the complainant is acting in good faith, and

> (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[222] I turn now to considering the issues.

2. Analysis

[223] There is no dispute that as a director of the Company, Mr. Zhang has standing to seek leave to commence a derivative action against Ms. Guo and 643 BCL. However, there is disagreement as to whether the order that is sought can be made under s. 232 of the *BCA*.

[224] The petitioners ask for "leave to commence a derivative action on behalf of the shareholders of 429".

[225] Section 232 makes it clear that the legal proceeding under s. 232 must be brought in the name of the Company, and to address the wrongs done to the Company. Thus, insofar as the Petitioners are asking to commence an action on behalf of the shareholders of 429 BCL rather than the Company, that is not properly characterized as derivative relief.

[226] A derivative action commenced in the name of a company is for harms done to the company as a whole. Where harm is alleged to some of the shareholders, but not all, the proper form is for oppressive relief. However, these remedies are not mutually exclusive: *Khela* at paras. 41 to 43.

[227] I agree with the Guo Parties that if the Petitioners wish to seek redress from Ms. Guo and 643 BCL for wrongs done to them as shareholders of 429 BCL, they must do that through the oppression claim, or by commencing a separate action in their own names. To that end, I note that the allegation appears to be that Ms. Guo breached an understanding she had with the Zhang Investors. If that is the case, then the cause of action is in contract, and the correct proceeding is through a Notice of Civil Claim brought by the Zhang Investors.

[228] I conclude that s. 232 provides no basis to grant the relief sought at Term 7 of the Orders Sought. This includes the request that 429 BCL pay for the costs of any derivative litigation which is commenced by and on behalf of some the shareholders against another shareholder.

[229] For the sake of completion, and on the assumption that the relief being sought is properly characterized as derivative relief, I will address the factors under s. 233(1) of the *BCA*.

[230] Regarding criterion (a) of s. 233(1), I agree with the Petitioners that they should not be required to convene a directors' meeting to try to pass a resolution to commence a derivative action against Ms. Guo and 643 BCL. The management of 429 BCL is evenly split between Mr. Zhang and Ms. Guo, and it is unrealistic to believe that Ms. Guo would sanction a lawsuit against herself or her companies: *Drove v. Mansvelt*, 1998 CanLII 6635, [1998] B.C.J. No. 497 (B.C.S.C.) at para. 58.

[231] Where there is no reasonable possibility that directors of a company will prosecute a lawsuit, the criterion that the complainant make reasonable efforts to cause them to do so is inapplicable: *Holdyk v. Adolph*, 2012 BCCA 37, at para. 17.

[232] Criterion (b) of s. 233(1), requires the applicants to give notice of the application for leave. Counsel for the Petitioners submits that notice of this Petition has been given to all affected Parties who are also named as respondents. The Guo Parties have not suggested that there is any other party that is required to be given notice. However, what the Guo Parties do take issue with is that the Petition fails to precisely provide the derivative claims that are sought to be advanced.

[233] The Guo Parties concede that the Petitioners are not required to provide a draft Notice of Civil Claim in support of the application brought under s. 232. However, they say that the authorities require sufficient detail to satisfy the requirement for adequate notice of the claim. I pause here to note that the authorities on which the Guo Parties rely actually raise concerns about the insufficiency of the pleading under the analysis for (d) rather than (b). See for

example, *Luft v. Ball*, 2013 BCSC 574 at paras. 42-45; *Mikulic v. Peter*, 2013 BCSC 941 at paras. 12-13; and *Carr v. Cheng*, 2007 BCSC 2043 at para. 36.

[234] The Petition pleads the following with respect to the proposed derivative action:

> 56. Ms. Guo and her companies, through her intentional conduct, are attempting to or have converted assets which properly belong to 429.
>
> 57. Ms. Guo in her role as a director of 429 has conducted herself with contempt for 429 and its remaining shareholders. In particular, she has failed to act prudently as a reasonable businessperson would in the circumstances. The particulars of such recklessness are outlined above and include:
>
> a) Failure to disclose relevant information to 429, its directors and shareholders;
>
> b) Refusing to meet with the director and shareholders of 429 to discuss the redemption of 429's debts to her companies: Topley and 643;
>
> c) Mismanagement and self-dealing by Ms. Guo in pursuing her own interests when she knew or ought to have known the real estate market was in decline; and
>
> d) Such further and other acts of mismanagement committed by Ms. Guo as shall be determined at the hearing of the within Petition.
>
> 58. 429 has not taken any action against Ms. Guo because she controls 50% of the voting shares of 429. In order to initiate such action, 429, would need Ms. Guo's assent. The petitioners say that in the circumstances it is unreasonable to wait any longer to see if 429 will commence action against Ms. Guo.

[235] I find that this pleading is sufficient to meet the notice requirement under (b).

[236] Criterion (c) of s. 233(1), requires that the complainant is acting in good faith. This is a question of fact to be determined on all of the evidence and the particular circumstances of the case. The applicant bears the onus to show that they are acting in good faith: *Bennett v. Rudek,* 2008 BCSC 1278, at para. 45.

[237] The test for good faith is whether the action is primarily to pursue a claim on the company's behalf: *Bennett* at para. 46. A claimant may act out of self-interest, provided that the interest coincides with the interests of the company: *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.,*1995 CanLII 717, 13 B.C.L.R. (3d) 300 (B.C.S.C.).

[238] In *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 at para. 30, the Court held that the good faith requirement "is a separate requirement that must be established by the complainant based on evidence". Further, good faith "cannot simply be presumed even where the claim can be said to be in the best interests of the company".

[239] I am not swayed that the Petitioners are acting in good faith by seeking leave to commence a derivative claim. As noted earlier, the Petitioners have specifically sought an order that would permit them to commence an action to address harms to themselves, rather than the company. Further, the Petitioners took no steps to protect the Company from foreclosure proceedings, and only came forward when they realized that Ms. Guo was purchasing the Company's indebtedness instead of the CWB proceeding with an order absolute. It is disingenuous to suggest that they are now acting to protect the best interests of the Company.

[240] Even if I was to ignore the wording of the order sought at Term 7 of the Petition or interpret it to mean that the Petitioners' real complaint is for harms done to the Company rather than themselves, I am not convinced that it appears to be in the best interests of the Company for the legal proceeding to be prosecuted.

[241] This brings me to criterion (d) of s. 233(1). There is a requirement to show that it is "prima facie in the interests of the company that the action be brought": *Vukusic v. Sing-O-Lite Signs Ltd.,* [1983] B.C.J. No. 727 (QL) (S.C.). This has been referred to as an "arguable case" standard: *Carr v. Cheng*, 2005 BCSC 445 at para. 21.

[242] In *Luft* at para. 55, the court noted that in addition to considering the strength of the plaintiff's case, the court should also look at the merits of the defence raised and the nature of the relief sought.

[243] The "best interests" of the company has been interpreted to mean the maximization of the value of the company. This could include consideration of the interests of the shareholders, employees, and others, and not simply the best

interests of the shareholders: *Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd.,* 2009 BCSC 938; see also *G&G Education Development Corporation v. Langley Flying School, Inc.,* 2018 BCSC 1796 at para 70, citing *BCE* at para. 82.

[244] When considering the best interests of the company, the court should not attempt to try the case, but "should determine whether the proposed action has a reasonable prospect of success and is not bound to fail": *Primex Investments Ltd.* At para. 41. If it is asserted that the proposed defendants have a defence, the court must decide "whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action": *Re Marc-Jay Investments Inc. and Levy*, 1974 CanLII 786, 5 O.R. (2d) 235 (Ont. S.C.) at para. 6.

[245] This criterion is closely tied with the sufficiency of the particulars provided by the applicant. See *Vukusic*, where the Parties against whom the action was sought were unclear, the nature of the action was uncertain, and the requirement to show that the action was prima facie in the interests of the company was not met.

[246] In support of the proposed derivative action, the Petitioners argue that Ms. Guo committed the following wrongs:

1) Failure to disclose relevant information to 429 BCL, its directors and shareholders;

2) Failure to market or sell the Properties;

3) Refusing to meet with the director and shareholders of 429 BCL to discuss the redemption of 429 BCL's debts to her companies Topley and 643 BCL; and

4) Mismanagement and self-dealing by Ms. Guo in pursuing her own interests when she knew or ought to have known the real estate market was in decline.

[247] Unfortunately, no further particulars are provided that would enable this court to fairly assess this claim. Doing the best that I can with the material before me, as

to the first point (1), it is unclear what information was allegedly not disclosed. If this refers to Ms. Guo's decision to purchase the indebtedness of CWB and enter into an assignment of the mortgage, I agree that there is an arguable case that this was wrong. However, the Petitioners have not shown what actionable harm has allegedly flowed from that conduct. It bears repeating that Ms. Guo simply stepped into the shoes of CWB and did not acquire any greater rights than what CWB had under the original mortgage and PPSA security.

[248] As to point (2), if the allegation is regarding the events when the Unsolicited Offer was made, those events occurred more than four years before the Order Absolute and are well out of time. In addition, the directors disagreed about whether the Properties should be sold. There is no evidence that Ms. Guo's refusal to sell the properties during that time was improper or motivated without regard to the best interests of the Company. Further, if the Petitioners believed that they had a legitimate complaint, they could have sought an order for sale. They did not.

[249] If the concern regarding point (2) is related to the events of 2023 when Ms. Guo obtained the order for exclusive conduct of sale, it is equally unsupportable. Even if I was to accept that there is an arguable case that Ms. Guo committed wrongs against the Company by refusing to market the properties after swearing in her affidavit that she would do so, there is no reasonable prospect that the Petitioners will be able to show her conduct caused the Company harm or losses.

[250] Regarding point (3), even if I accept that the Petitioners requested a meeting with Ms. Guo and that she refused to attend, I do not see how this is an actionable wrong. Ms. Guo was not legally obliged to agree to the Petitioners redeeming the debt after she had already purchased it from CWB, just as there was no obligation on the part of CWB to meet with the Petitioners to redeem the debt.

[251] In relation to point (4), there is no evidence that the real estate market was in decline. There is also no evidence that there was a better time to sell the Properties. Given this, the Petitioners have failed to show that Ms. Guo wrongfully acted in her own self-interest by taking advantage of market conditions.

[252] Finally, I do not agree that the onus lies on Ms. Guo to establish that "converting the assets of 429 to 643 was in the best interests of 643". Rather, the onus lies on the Petitioners to show that Ms. Guo acted against the best interests of 429 BCL and that there is an arguable claim that lies against her. To establish the arguable claim, they must show a loss. They have not been able to produce any evidence of a loss, beyond speculation.

[253] Therefore, I find that the Petitioners have failed to meet criterion (d) of s. 233(1), to show that it is in the best interests of the company for the legal proceeding to be prosecuted. In my view, the proposed claim is bound to fail, thereby resulting in further costs to the Company for prosecuting an action that is without merit.

3. Conclusion

[254] After considering the whole of the evidence, I find that the Petitioners have failed to satisfy the requirements of ss. 232(2) or 233(1) of the *BCA*.

[255] Given my finding that there is no basis to grant the order seeking leave to commence a derivative action on behalf of the shareholders of 429 BCL, there is no basis to order 429 BCL to pay the legal costs related to the derivative action.

[256] Consequently, the relief sought under Term 7 of the Petition is dismissed.

D. Restricting Voting Rights

[257] At Term 4 of the Petition, the petitioners seek the following:

> An order barring 299, and Ms. Guo, from voting 299's Class A Common Shares in 429 on any issues related to 429's dealings and/or litigation with Ms. Guo's companies Topley Investment Limited ("Topley") and 1415643 B.C. Ltd. ("643");

[258] This relief is partly predicated on an order granting leave for a derivative action. As I have denied leave to commence a derivative action, there is no basis to grant this relief on this particular ground. To the extent that other grounds are advanced to support the order sought at Term 4, I do not find sufficient legal or factual basis for the same.

[259] In coming to my conclusion, I have also considered the appropriateness of granting this relief under s. 324 of the *BCA*. However, the Petitioners did not advance any grounds that would justify granting an order under this section.

[260] The request for an order per Term 4 of the Petition, is dismissed.

VIII. COSTS

[261] Ms. Guo has been substantially successful in the Petition. The usual course is that costs are awarded to the successful party. However, the court may make a different order if the circumstances warrant. In this case, there is reason to not award the Guo Parties their costs.

[262] Ms. Guo must shoulder some significant blame for the situation that led to this litigation. Ms. Guo acted improperly by misleading the court and the petitioners through her sworn affidavit; she also lacked candour and failed to disclose her decision to purchase the indemnity of the Company. These actions likely fomented the Petitioners' mistrust in her. This mistrust largely gave rise to the Petition.

[263] Nevertheless, the Petitioners were unsuccessful in their Petition. Thus, despite Ms. Guo's conduct, they should not be rewarded by an award of costs.

[264] In the circumstances, I am of the preliminary view that each side should bear its own costs of this petition proceeding, subject to the Parties apprising me of matters affecting the award of costs, of which I am not aware.

"Shergill J."