IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Vivian v. Firth,
2012 BCSC 517

Date: 20120411
Docket: S113627
Registry: Vancouver

Between:

Kerry Vivian

Petitioner

And

Gordon Firth and Sunrise Washroom Rentals Ltd.

Respondents

Before: The Honourable Mr. Justice Fitch

Reasons for Judgment

Counsel for the Petitioner:	M.K. Woodall
Counsel for the Respondents:	F.G. Potts C.D. Martin
Place and Date of Hearing:	Vancouver, B.C. January 11, 2012
Place and Date of Judgment:	Vancouver, B.C. April 11, 2012

A. Introduction

[1] The petitioner, Kerry Vivian ("Vivian") and the respondent, Gordon Firth ("Firth") are the founders of and equal shareholders in a company called Sunrise Washroom Rentals Ltd. (the "Company"). The Company is in the business of renting washroom and shower trailers for special events, including sporting events, corporate events, festivals, weddings and to the film industry.

[2] Vivian applies for relief under s. 324 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (the "*Act*"). That provision confers upon the court a broad discretionary power to order that a company be liquidated and dissolved if it is considered to be just and equitable to do so. Where this test is met, the court may, instead of making a winding-up order, make any order it considers appropriate including any one or more of the orders specifically enumerated under s. 227(3) of the *Act.* Section 227(3) provides a shareholder with a broad range of remedies where the affairs of the company are shown to have been conducted in a manner which is oppressive or unfairly prejudicial to them.

[3] Vivian does not assert, at this stage, that the affairs of the Company are being conducted in an oppressive manner or that the Company has done some act unfairly prejudicial to him. Rather, he says that it is just and equitable to grant relief under sections 324 and 227(3) of the *Act* because he and Firth are in deadlock about how to run the Company on a day-to-day basis and maximize its value. Alternatively, he says that the Company is a partnership in the guise of a company and, drawing on this partnership analogy and the principles derived from partnership law, he submits that relief under s. 324 is just and equitable.

[4] Vivian has offered to sell his shares in the Company to Firth but the two men have been unable to agree on terms. In early 2011, Vivian, with Firth's knowledge and consent, began actively soliciting offers for the Company. Discussions with prospective third party arm's length purchasers culminated in the delivery to Vivian by one of the parties of a Letter of Intent ("LOI") outlining the terms and conditions upon which they were prepared to acquire the assets of the Company. The terms of

the offer were unacceptable to Firth for a variety of reasons which I will set out, in brief, below. As Vivian and Firth were unable to agree to the sale on the terms and conditions proposed by the prospective purchaser, the LOI expired on December 23, 2011, well before the hearing of this petition.

[5] Vivian says that against this background, and in light of the strained relationship that now exists between the two men, the test set out in s. 324(1) has been satisfied on the two grounds set out above - corporate deadlock and by analogy to partnership law principles. Instead of a winding-up order, Vivian seeks an order under s. 227(3) of the *Act* that Firth be required to purchase Vivian's shares in the Company on the same terms and at the same price offered by the prospective purchaser or, should Firth choose not to do so, that he be ordered to join Vivian in selling the Company to the prospective purchaser on the terms set out in that purchaser's (now lapsed) LOI. Vivian says that the order he seeks is both just and equitable and fair to Firth. If Firth thinks that the offer undervalues the Company, it would be in his interests to purchase Vivian's shares at below fair market value. If Firth thinks the offer overvalues the Company, it is in his interests to sell to the prospective purchaser at a price above fair market value.

[6] For the reasons set out below, the petition is dismissed. I am not satisfied that it is just and equitable that the affairs of the Company be wound-up, thereby triggering access to the wide range of alternative remedies that become available under s. 227(3). Specifically, I am not satisfied that the affairs of the Company are deadlocked. Indeed, it is my view that there is no evidence before me that would justify such a conclusion. Further, I am not convinced that it is appropriate in this case to engage the partnership analogy to make the order requested.

[7] In light of the history of this matter, and the possibility that an agreement might still be reached between Vivian and Firth that would facilitate sale of the Company to a third party, I will not identify in these reasons information that would disclose the identity of the prospective purchaser or the terms outlined in its LOI except to the extent that it is necessary to do so to explain the result I have reached.

Similarly, I will not disclose in these reasons details of the discussions that have occurred between the two shareholders about the sale of Vivian's shares in the Company to Firth, except to the extent that it is necessary to do so to explain my disposition of the matter.

B. Detailed Narrative

(a) Discussions Leading to the Formation of the Company

[8] Vivian has worked in the film industry since 1985 providing trucks and trailers to film crews. He has an extensive network of contacts in the industry including with transportation and location coordinators. In 2005, Vivian was starting up a company to rent washroom and shower trailers. Firth, who was already in the business of renting washroom trailers and had the ability to secure capital, was looking for opportunities to expand his business, with a particular eye to the film industry. The two men were put in touch. According to Vivian, Firth said he could handle the financing but lacked the business and personal relationships Vivian had in the film industry that would be necessary to attract business.

[9] Vivian says that it was Firth who proposed that they form a partnership in the business of providing washroom trailers to the film industry and to special events coordinators and that Vivian agreed. Although Vivian deposes in his affidavit sworn May 31, 2011 that "when the Company was formed we *never* agreed it would be partners", I am satisfied in the context of his affidavit as a whole that this is a typographical error (emphasis added). The thrust of Vivian's evidence is that his understanding was that the joint venture would be, in substance, a partnership in the guise of a private company. Vivian says that he discussed with Firth how long he would want to be involved in such a partnership if one was formed. Vivian also says that he told Firth that his plan was to build the company up over a few years and then sell out and retire.

[10] Firth says, to the contrary, that the Company was never meant to be run as a partnership but rather as a corporate entity. He also denies that Vivian ever told him

that it was his desire to build up the company for a few years and then sell out and retire. Moreover, Firth says that the Company has been run, particularly in the time between early 2005 and July, 2011, as a corporation with Vivian taking a largely inactive role in the day-to-day operations of the Company, a role inconsistent with that which might reasonably be expected to be discharged by a partner.

[11] I do not regard the different recollections or understandings of the parties on this point as being fatal to the Court's ability to resolve fairly the issues that arise on this petition. As has been noted on more than one occasion, s. 324 contemplates a summary procedure for the determination of this type of application. That some facts are in dispute does not necessarily require referral of the matter to the trial list: *Kinzie v. Dells Holdings Ltd*., 2010 BCSC 1360 at para.13; *Kang v. Sachdev*, 2008 BCSC 1032 at para. 21. I would note, as well, that neither of the parties has suggested that the factual disputes, such as they exist in this case, prevent fair resolution of the matters that arise for determination.

(b) The Formation of the Company - December 22, 2005

[12] The Company was formed on December 22, 2005. Vivian and Firth put an equal amount of money into the business to get it going. They have different recollections now about how much each put in. Vivian deposes that he thought they both put in $120,000 to $140,000 but concedes that he is not sure of the precise amount. Firth says that the initial investment each of them made was $100,000. Nothing turns on this point. The fact is that both Vivian and Firth hold an equal number of Class "A" voting shares in the Company. Vivian's company, Pacific Film Trux Rentals Inc., and Firth's company, Sunrise Trailer Sales Ltd., each hold an equal number of Class "B" voting shares in the Company.

[13] In January, 2006, Firth, through his corporate vehicle, Sunrise Trailer Sales Ltd., purchased $500,000 worth of equipment on behalf of the Company to commence its operations. Sunrise Trailer Sales Ltd. has been repaid all of the money it spent acquiring assets for the Company in its start-up phase.

[14] While it was open to the parties to do so, no shareholder's agreement was executed addressing the means through which the shares held by one could be sold to the other or to a third party purchaser. There are no restrictions on the sale of one shareholder's interest to a third party.

(c) Vivian's Allegations that the Shareholder's Disagreed from the Outset on Important Corporate Decisions and Firth's Response

[15] For the first two years, both men worked hard, and in a hands on capacity, to develop the business.

[16] According to Firth, Vivian was concerned about the cyclical nature of the film industry and wanted the Company to grow by paying off the debt incurred to buy its assets - the washroom trailers and related equipment. Vivian explained to Firth that this approach would ensure they would be able to service the debt load when the film industry was in a downturn and the trailers were not generating income. Firth agreed that this was a sensible approach. He says that he and Vivian agreed that the primary objective of the Company would be to acquire equipment and service its debt load before paying themselves a salary or dividend. Firth says that this philosophy has governed the operation of the Company since its incorporation in 2005. Vivian does not disagree. As a result, neither Vivian nor Firth has been paid a salary by the Company. In 2010, and at Vivian's request, a $30,000 dividend payment was made to each shareholder. Firth says this was agreed to in recognition of Vivian's financial needs at the time. Vivian does not dispute this.

[17] Vivian deposes that within three months or so from the incorporation of the Company, it became clear that he and Firth did not have a productive working relationship. He says that disagreement arose on nearly every corporate decision, whether major or minor, and that Firth simply did not keep him informed about what he was doing.

[18] Vivian provides very few concrete examples in support of this contention. Moreover, it is unclear when some of the examples provided by Vivian are said to

have occurred. The examples provided, along with Firth's response, are summarized below.

[19] Vivian says that he spent a great deal of time repairing relationships with film industry personnel who were angered or annoyed by Firth's behaviour. In support of this complaint, he recounts only one disagreement between Firth and the transportation coordinator of a major film production company over a $130 repair bill. Firth does not deny that this disagreement occurred but says that it was a minor matter which arose when the Company refused to provide a jack to the production company free of charge and questioned that customer about damage it may have caused to one of the Company's trailers. Whenever this occurred, it does not appear that the matter was thought to be of great importance at the time. I say this because there is no evidence from Vivian that he raised the matter with Firth before recounting it in support of this application.

[20] Vivian also deposes that Firth failed to consult him on the acquisition of two wheelchair accessible trailers on behalf of the Company and has refused to tell Vivian how much they cost. Once again, it is unclear when this complaint arose. It may well have arisen after Vivian's move to Vancouver Island in 2007 at which time Vivian, by his own choice, became far less involved in the operations of the Company and Firth assumed almost exclusive responsibility for its day-to-day business affairs. The extent to which this acquisition actually caused friction between the two men, at the time it occurred, is also unclear. In any event, Firth recollects discussing these purchases with Vivian before they were made and notes that, as wheelchair accessibility is always required for public events, these assets were a necessary acquisition and have been an ongoing benefit to the Company. He notes that they are still in use. Vivian does not dispute this or suggest that the acquisitions were either unnecessary or that Firth overpaid for them. Vivian says that these trailers would have cost approximately $40,000 each. Firth deposes that he paid $35,000 for each trailer.

[21] Vivian also alleges that Firth bought on behalf of the Company, but without consulting with him, a Dodge 550 diesel flatbed truck to deliver the washroom trailers. He contends that Firth refused to show him the invoice showing what he paid for this vehicle but verbally told Vivian at various times that he paid different amounts for the truck ranging from $55,000-$70,000. Vivian estimates the value of such a vehicle to be around $65,000 and contends that he could have purchased a similar truck for significantly less. For his part, Firth confirms the acquisition but says that the vehicle in question was a Dodge D5500 2.5 tonne truck which was purchased in 2009 for just under $56,000. I note that this acquisition significantly post-dates Vivian's move to the Island and his much reduced involvement in the Company's daily affairs. It is unclear whether the acquisition of this vehicle operated at the time as a significant and divisive factor in the relationship between the two men. Once again, Firth deposes that he did consult with Vivian on the purchase of this truck, that it was a necessary acquisition because the Company's other truck did not have 4 wheel drive capability, had more than 100,000 kilometres on it and was in need of a new transmission. Firth notes that the Dodge D5500 truck is still used for the majority of contracts the Company services.

[22] Vivian deposes that he had great difficulty contacting Firth or getting him to return his calls. He does not, however, suggest that he was prevented in any way from attending at the Company's office or accessing its books to determine for himself the cost of these acquisitions.

[23] Finally, Vivian asserts that in April, 2011 an employee of the Company sent him an unsigned copy of a lucrative contract to provide washroom trailers to a major golf tournament. He says Firth never told him this contract was being negotiated. Vivian says that he spoke with Firth about the matter and asked him whether the contract was signed. He says that Firth responded, "Why should I tell you?" and asked Vivian what was in it for him. Firth says that Vivian's claim that he was not kept apprised of the negotiations for this contract is "simply not true". He contends that the parties had numerous discussions about this contract and the Company's affairs relating to it. Firth says that Vivian was aware of the revenue the contract

would bring into the Company and, as a result, supported the negotiations in consultation with Firth. There are no contemporaneous records before me documenting the discussions the parties had about this contract. The Company, in fact, managed to obtain this contract in 2011.

[24] In response to Vivian's contention that the parties disagreed on nearly every decision concerning the Company, Firth says:

> That has not been my experience. Over the last six years, there have been a few spirited discussions about major business decisions. However, we have reached a consensus on those decisions. When Mr. Vivian has taken an active interest in the operations of the Company he has exercised his ability to be part of the decision-making process and I have never discouraged or dissuaded him from doing so. Mr. Vivian's input is valued as he has extensive experience in the movie industry.
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> Mr. Vivian has strong opinions and is not afraid of voicing and pursuing them. We have had differences of opinion and we do have different personalities. Having said that, at no time have I allowed our personality disputes to affect my judgment in making business decisions related to the operations of the Company. It has also been my experience with Mr. Vivian that he accounts for the best interests of the Company in making decisions.

[25] Firth points out that, in addition to attending at the Company's corporate offices when he wants to inspect the books or speak with the Company's accountant, Vivian, as a director, has the opportunity each year to review the financial information of the Company and its asset inventory. In his capacity as a director, Vivian has approved the Company's operations each year.

(d) Vivian's Move to Vancouver Island in 2007

[26] In late 2007, Vivian moved to Vancouver Island where he has lived since that time. Vivian's focus, by his own admission, became much less hands on after his move to the Island, although he continued to nurture his relationships in the film industry and refer business to the Company. After Vivian's move to the Island and until July, 2011, when the relationship between the two shareholders soured largely over issues pertaining to the valuation of Vivian's shares, it was Vivian's practice to sign a number of blank cheques and leave them at the Company's corporate office

so that Firth could pay the regular run of corporate debts without the need to consult with Vivian.

[27] After Vivian's move to the Island, if not before, Firth assumed complete day-to-day control of the business affairs of the Company. Firth says that he permitted Vivian to disengage himself from the affairs of the Company and did not require his regular input or services as he would have if the Company was being run like a partnership. Vivian says that after he moved to Vancouver Island, he continued to come over to the Lower Mainland every other week and continued to be involved in the affairs of the Company by telephone. He says that Firth never complained to him about this arrangement and appeared to be happy to have complete day-to-day control over the Company without Vivian looking over his shoulder. Vivian does not contend that he was dissatisfied with this arrangement either.

[28] Vivian's complaints regarding the way in which the Company was being managed and the extent to which he was being left out of corporate decision-making in the years after his move to the Island in 2007 (some of which appear to have been made well after the fact and only in conjunction with this application) must be assessed in light of his willingness to withdraw from the operations side of the Company and let Firth assume control without him, "looking over [Firth's] shoulder." The seriousness of these complaints, and extent to which they actually undermined the trust and confidence each shareholder had in the other, must also be viewed in light of Vivian's conduct at the relevant time. On this issue, it is noteworthy that from 2006 through to and including 2010, Vivian, as a director of the Company, consented in writing to corporate resolutions waiving the production of financial statements and the appointment of an auditor.

[29] Currently, Firth oversees the negotiation and servicing of Company contracts, including the movement, assembly and removal of trailers from event sites. The Company's business is conducted out of space leased by Firth's corporate entity, Sunrise Trailer Sales Ltd. When not in use, the Company's equipment, trucks and trailers are stored at the service yards of Sunrise Trailer Sales Ltd.

[30] Vivian deposes that he and Firth have not had a productive discussion about the affairs of the Company, or what should happen with the Company moving forward, for several years. He recounts the many occasions on which Firth ignored his e-mails and phone calls and the times that Firth either failed to attend a scheduled meeting with him or showed up late without apology or explanation.

[31] There is a reality which overlays the tension that has emerged in recent years in the relationship between the parties and it is this: Vivian and Firth are at quite different stages in their lives and appear to face quite different circumstances. Vivian is 72 years of age and retired. Over the past few years, he has received very little income from his company, Pacific Film Trux Ltd. Without going into the details of Vivian's current financial situation, it is clear that he would like to monetize his investment in the Company. Firth, on the other hand, is a younger man who has a number of ongoing business interests, including his interest in the Company. This reality frames the dispute that has arisen about how to value the respective interests of the shareholders in the Company. The more recent context in which this application arises is set out below.

(e) Discussions about the Sale of Vivian's Shares to Firth or the Sale of the Company to a Third Party

[32] In May, 2010 Vivian told Firth that he needed to start getting some value out of the Company. He says that he proposed to Firth refinancing the Company so that each of them would receive $60,000 immediately and $5,000 per month. Vivian says that Firth refused to consider this proposal. While there is no documentation before me reflecting Vivian's proposal, I note that Firth does not specifically deny that the subject was broached. It is unclear whether Vivian contends that this conversation occurred before or after the payment to each shareholder of the $30,000 dividend in 2010. From all the circumstances, I can only conclude that Vivian is asserting that this conversation occurred after the initial dividend payment.

[33] Vivian also proposed to Firth that they should look for a buyer for the Company. Firth was not opposed. It was understood that Vivian would take the lead on this.

[34] Around the same time, the parties discussed the possibility of Firth buying Vivian out. Firth deposes that Vivian offered to sell to him Vivian's half interest in the Company in July, 2010. Vivian made a further written offer to sell his interest in the Company to Firth in December, 2010.

[35] In March, 2011 Firth sent an e-mail to Vivian outlining the various contributions made to the Company by Firth and Sunrise Trailer Sales Ltd. since the Company's inception. Firth pointed out that he loaned the Company $500,000 in its start-up phase at no interest for close to eight months. He reminded Vivian that the Company carried on its operations for six years using the office facilities, yard space and phones of Sunrise Trailer Sales Ltd. Firth noted that since Vivian's move to the Island, he has been responsible for negotiating contracts, location visits, logistics and some setup and service work when required. Firth also noted out that all of the accounting and daily operations of the Company have been carried out under his supervision. He asserted that, since moving to the Island, Vivian has chosen not to be involved on a day-to-day basis and put all of the responsibility on him to manage and grow the business. Firth pointed out that this included his efforts to secure contracts arising out of the Vancouver Winter Olympic Games which involved six months of full-time work. Firth acknowledged that Vivian helped create some of the success the Company has enjoyed, but invited Vivian to put a value on what he felt the contributions of Firth and Sunrise Trailer Sales Ltd. had been. He indicated to Vivian that once that figure had been determined, an accurate value could be placed on the Company.

[36] Vivian responded by detailing his own contributions to the Company and suggesting that neither Firth nor Sunrise Trailer Sales Ltd. were entitled to compensation for their services. In Vivian's view, the parties had agreed when the Company was formed to be equally entitled to corporate income and equity.

[37] A second written offer was made by Vivian to sell his shares in the Company to Firth in April, 2011. Firth made a written counter-offer to purchase Vivian's shares in December, 2011. Vivian rejected that offer. Without going into the details of these negotiations, it is sufficient for the purposes of this application to note that the parties have been unable to agree on the value of Vivian's shares.

[38] In early 2011, Vivian, again with Firth's knowledge and consent, began actively exploring opportunities to sell the Company to a third party.

[39] In February, 2011 Vivian was in preliminary discussions with an interested third party who was looking for the financial statements of the Company for the previous two years as well as its corporate tax return for 2010 and a list of assets in order to evaluate the potential for a deal. It is apparent from the material before me that Vivian sought this information from Firth over the next few months. It is also apparent that Firth did not respond, or responded in a dilatory and incomplete way, to Vivian's request for financial information. At the same time, it is apparent that Firth was concerned that corporate financial information not be supplied to a potential purchaser without a non-disclosure agreement in place. Vivian rectified this and kept Firth informed of progress in the negotiations and the ballpark figure the third party was considering in terms of a sale price.

[40] In April, 2011 Vivian informed Firth that he was dealing with a second party (whom I have called the "prospective purchaser") about acquiring the Company. Vivian advised Firth that this party had signed a non-disclosure agreement and was very interested in discussing acquisition of the Company. This prospective purchaser sought financial statements, customer lists, a list of Olympic-related revenue, an asset list, a list of revenue by category and other financial information as part of its due diligence inquiries. Again, Vivian looked to Firth to supply this information. Throughout the month of April and into May, 2011, Firth was largely, if not completely, unresponsive to Vivian's requests for information necessary to enable the prospective purchaser to perform its due diligence.

[41] Firth explains that he was extremely busy servicing contracts during this period and unable to fully respond to Vivian's requests. He points out that in his numerous conversations with Vivian during this time frame, he invited Vivian to attend the Company's office to identify and assemble the required documents. He claims that Vivian did not accept that invitation but preferred to deal with the matter by requesting that Firth obtain, or give directions to others to obtain, the required information. He again points out that Vivian, as a director of the Company, was entitled to seek and obtain any corporate information he needed from the Company's accountant.

[42] Firth's conduct in this period eventually led to an application by Vivian to this Court in June, 2011 for a declaration under s. 227 of the *Act* that the affairs of the Company were being exercised in a manner oppressive to him and an order that Firth supply such information as may reasonably be required by the prospective purchaser to complete its due diligence inquiries.

[43] Around the same time, Firth retained counsel and disclosure of the financial information Vivian was seeking to further discussions with the prospective purchaser was, in fact, made. Firth deposes that he is not opposed to Vivian providing information to third parties to solicit offers for the purchase of the Company or Vivian's interest in it. Firth deposes that he understands Vivian is entitled to all of the financial information he requested and that, moving forward, he will comply with any reasonable request from Vivian for information to facilitate any potential sale of the Company so long as a non-disclosure agreement is in place. It would appear to be uncontentious that since July, 2011, all of Vivian's requests for financial information relating to the Company have been complied with.

[44] Upon receipt of the financial information sought, Vivian abandoned pursuit of the oppression application under s. 227 of the *Act*. As noted above, that matter is not before me on this application. Having said that, I wish to record that I do not accept Firth's explanation that he was too busy to supply Vivian with the information he sought in April and May of 2011. I am reminded in this regard of the cautionary

words Farley J. used in *Lindemann v. Duguay*, [2000] O.J. No 1543 (Ont.S.C.), that "past oppression, even if remedied, should be taken into account with respect to any claims of future oppression as there is the aspect of a continuing course of action. One might expect the past offender would be very diligent in ensuring that he did not come close to the line again."

[45] In July, 2011, Vivian advised Firth, through counsel, that he was no longer prepared to sign blank cheques. The prior arrangement was characterized as one designed to facilitate payment of the ordinary business expenses of the Company. Vivian suggested that Firth had abused that arrangement by making at least two extraordinary purchases of capital equipment without informing him, much less obtaining his agreement. The specific purchases complained of were not itemized. Vivian advised that he would henceforth require Firth to send all invoices to him on Vancouver Island before he would sign off on Company cheques.

[46] Firth acknowledges in response that the Company did purchase, in the summer of 2011, two 3 station bathroom trailers from Wells Cargo for $68,000. The trailers are high-end facilities which appeal to the kind of upscale clients that attend major golf tournaments. Firth says that he did discuss the acquisition of these trailers with Vivian who agreed to the purchase. Firth expresses confidence that the trailers will continue to be revenue-generating assets in the future.

[47] Although Firth takes issue with Vivian's contention that he proceeded with this acquisition in the absence of consultation, he did accede to Vivian's request that Vivian be given the opportunity to approve Company expenditures. Since July, 2011, the Company has couriered all invoices, supporting documentation and unsigned cheques to Vivian's home on Vancouver Island. This is done about once every second week. Vivian couriers the signed cheques back to the Company's office in Abbotsford. Firth deposes that Vivian has reviewed the expenses incurred by the Company and signed off on all of the cheques that have been sent to him since July, 2011. Vivian does not take issue with this.

[48] The prospective purchaser delivered to Vivian its first LOI to acquire the assets of the Company in October, 2011.

[49] On October 31, 2011, Firth's company, Sunrise Trailer Sales Ltd., formally invoiced the Company for services rendered (storage, office space and services) and for Firth's management fees which were said to have been earned as a result of running the daily affairs of the business from 2007 onwards. As noted in paragraph 35, *infra*, Firth raised this issue with Vivian in March, 2011. The value of the services provided by Firth and Sunrise Trailer Sales Ltd. remains unresolved as between the two men and stands as the most significant impediment to the ability of the parties to come to an agreement on the value of the Company.

[50] The prospective purchaser delivered to Vivian a second LOI sweetening the offer to purchase the Company in November, 2011. What follows is a high level overview of those terms of the LOI necessary to an understanding of the positions counsel have taken on this application.

[51] As with the first LOI, the second LOI contemplated an asset purchase. The LOI also contemplated deposit of a substantial percentage of the purchase price into escrow to guarantee the accuracy of the financial status of the Company at the date of closing. In addition, the purchase price was to be subject to a number of post-closing adjustments including an adjustment, on a dollar for dollar basis, if the "working capital" of the Company (defined as prepaid expenses and accounts receivable less accounts payable and accrued liabilities) is less than a threshold amount of working capital to be determined. The LOI made clear that the operating philosophy of the prospective purchaser was to rely on management to operate the Company following its acquisition. To that end, the LOI reflected the intent of the prospective purchaser to "retain the operating management team since we are basing our offer, to a great degree, on the reputation of the business and its employees." Moreover, it was a condition of closing that employment agreements with employees deemed essential by the prospective purchaser be in place prior to closing and in a form satisfactory to the purchaser.

[52] Late in November, 2011, Vivian, Firth and their counsel met to discuss the prospective purchaser's offer. That conversation, or part of it, also involved the Chief Financial Officer of the purchaser. At the same meeting, the parties renewed discussions about Firth buying Vivian's shares. As noted above, an offer was made by Firth in December, 2011 to purchase Vivian's shares. That offer was not accepted.

[53] The prospective purchaser's second LOI expired in late December, 2011.

[54] There is no evidence before me that Vivian has attempted to sell his shares to a third party purchaser. He characterizes Firth's observation that it is open to him to do so as "ridiculous". He points out that he would have to identify a potential purchaser willing to go into business with Firth. Although unstated, given that Vivian does not own a controlling interest in the Company, it is also very likely that any prospective purchaser would discount the value of Vivian's shares accordingly.

[55] Vivian deposes, at the end of the day, that he and Firth are deadlocked on how to run the Company on a day-to-day basis and "how to maximize the value of the company for the benefit of its shareholders."

[56] For his part, Firth says that he would be happy if Vivian took a more active role in the operation of the business and has encouraged him to do so over the years. He suggests that if Vivian took a more active role in the operations of the company it would minimize his inquiries and complaints regarding the manner in which the Company is being managed. He does not agree that the affairs of the Company are deadlocked and points out that the Company continues to thrive, attract new business and fulfill its obligations. He deposes that Vivian's efforts to sell his shares have in no way hindered the operations of the Company. He also says that if Vivian's interest in the Company can be valued in a manner which takes into account what the Company owes him for services rendered, he would be prepared to consider either buying Vivian's shares, selling his shares to Vivian, or selling the Company to a third party.

C. The Positions of the Parties

(a) Vivian's Position

[57] Vivian justifies the order sought on two bases. First, he argues that the affairs of the company are in deadlock. The essential points of disagreement between the parties are said to be: 1) whether further dividend payments ought to be made by the Company to them; and 2) whether they should realize on their investment in the Company by selling to a third party. Vivian argues that the two justifications are interrelated. He submits that where there are two quasi-partners and one of them determines that he is unwilling or unable to work with the other, there is, by definition, deadlock. Further, he argues that the Company is in substance a partnership and that it is appropriate in this case to invoke the partnership analogy and fashion a remedy that permits the parties to disengage financially.

[58] Vivian argues that there is no need for a further valuation exercise because the fair market value of the Company has been determined by the offer made by the prospective purchaser. In light of the fact that Firth may have a legitimate interest in continuing to retain his interest in the Company, Vivian submits that it would be just and equitable to give him an opportunity to match the offer made by the prospective purchaser. If the prospective purchaser's offer is lower than fair market value, Firth would benefit from the purchase of Vivian's half interest. If Firth chooses not to buy Vivian's half interest in the Company at the price offered by the prospective purchaser, Vivian seeks an order that the assets of the Company be sold to the prospective purchaser on the terms set out in the last LOI. Vivan's position assumes that the prospective purchaser would make a fresh offer to acquire the assets of the Company on the same terms as were proposed in November, 2011. While Vivian takes strong issue with Firth's claim that he is entitled to compensation for services rendered, he suggests that if the Company was sold to the prospective purchaser, the proceeds could be held in escrow pending further litigation to the end of sorting out each shareholders' respective interest. He suggests that a shot-gun buyout would not be just and equitable in this case because the two parties do not have

equivalent resources or bargaining power. I should add that Firth has not suggested that a shot-gun buyout is a necessary or desirable solution in this case either.

(b) Firth's Response

[59] In response, Firth argues that Vivian has not met the "just and equitable" threshold test contemplated by s. 324 of the *Act*. He submits that a disgruntled shareholder has no general right to obtain relief of the sort Vivian seeks in this case without meeting the test set out in s. 324. He says that s. 324 is not a mechanism through which shareholders are permitted, at any time, to monetize their investment in a company and should not be utilized to casually brush aside well established company law principles in the quest for a remedy thought to be fair to the parties. He notes that Vivian is free to make whatever efforts he wants to secure a buyer for his shares in the Company.

[60] Firth argues that Vivian has not shown that the affairs of the Company are deadlocked. Further, he contends that this is not an appropriate case in which to the engage the partnership analogy or do so in a way that renders irrelevant the distinctions between partnerships and corporate entities. He argues that there is nothing about the relationship between Vivian and Firth that would justify a finding that the Company is a partnership in the guise of a corporation. The Company was not borne out of familial ties or a close friendship. It was simply a commercial arrangement whereby Vivian had an impressive network of contacts and Firth had some trailers and an ability to secure funding. Firth also argues that there is nothing about the way in which the parties have conducted themselves, or their reasonable expectations which might be said to arise therefrom, that justifies invoking the partnership analogy. He contends that Vivian is a passive investor in the Company. Further, he submits that the evidence does not demonstrate a breakdown of the mutual trust and confidence upon which the original undertaking was founded. As no grounds have been shown to warrant a conclusion that it is "just and equitable" to issue an order under s. 324 of the *Act*, he argues that the Court has no authority to grant the relief sought.

[61] In the alternative, should this Court come to the conclusion that it is just and equitable to provide relief under s. 324 of the *Act*, Firth says that it would be unjust and inappropriate to order him to acquire Vivian's shares at the price offered by the prospective purchaser or, failing that, to join Vivian in selling the Company to them on the terms and conditions offered. He contends that such an order would take no account of his outstanding claim for services rendered to the Company since 2005. Firth argues that Vivian must have known he was not managing the daily affairs of the Company on a gratuitous basis and that there would one day have to be an accounting for the work and facilities he provided to the Company while overseeing its growth. He submits that his claim for services rendered would, given the terms and conditions of the LOI, inevitably reduce the purchase price. In short, Firth argues that the offer of the prospective purchaser cannot be taken at face value but must be reduced by the amount of his claim. Finally, Firth submits that it would be particularly inappropriate to order the sale of the Company in circumstances where the offer appears to be conditional on him staying on after the sale in the capacity of an employee. If the threshold test set out in s. 324 is found by this Court to be met, Firth submits that this Court should itself undertake an evaluation of the worth of the Company and the respective interests of its two shareholders. Such a remedy would enable an assessment of the validity and extent of Firth's claim for services rendered, permit the adducing of evidence on what each shareholder would realize from the sale taking into account the tax consequences of the prospective purchaser's offer, and allow consideration to be given to any other appropriate factor, including a minority discount.

D. The Legal Framework

(a) General Principles

[62] Section 324 of the *Act* provides as follows:

> 324 (1) On an application made in respect of the company 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) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or
>
> (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.**
>
> [Emphasis added].

[63] Subsection 227(3) of the *Act* provides that:

> 227 (3) On an application under this section, the court may, with the 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,
>
> …
>
> **(h) directing any shareholder to purchase some or all of the shares of any other shareholder,**
>
> **…**
>
> (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security.
>
> [Emphasis added].

[64] The words “just and equitable” are of the widest significance and confer upon the court a broad discretion to make a winding-up order under s. 324 or any other order under s.227(3) it considers appropriate: *Re Rogers and Agincourt Holdings Ltd. et al.* (1977), 14 O.R. (2d) 489 (Ont.C.A.). It is not necessary to establish oppressive or unfairly prejudicial conduct to engage the panoply of remedies available under s. 324: *Samra v. Bel-Air Taxi Ltd*., 2009 BCSC 548 at para. 92;

Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd., 2011 BCSC 173 at para. 56. The test does not admit of a strict categorical approach. As Lacourciere J.A. observed in *Re Rogers and Agincourt Holdings Ltd.* at p. 493, "the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories, for each case depends to a large extent on its own facts."

[65] The inquiry extends beyond an examination of the legal rights of the shareholder to include a broader spectrum of equitable rights: *Walker v. B*etts, 2006 BCSC 128. As Lord Wilberforce said in *Ebrahimi v. Westbourne Galleries Ltd*., [1972] 2 All E.R. 492 at p. 500:

> The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere judicial entity, with the personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more... .

[66] The words "just and equitable" are intended to be elastic in their application to permit the court to intervene to relieve against an injustice or inequity. The test may be applied more liberally in some contexts than others as, for example, in the case of a private family company where some significant disagreement has arisen

including the exclusion of one family member from participation in the business: *Safarik v. Ocean Fisheries Ltd*. (1995), 64 BCAC 14 at paras. 98-103.

[67] This is not to say that the discretion to grant equitable relief is unbounded. It 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: *Pasnak v. Chura*, 2004 BCCA 221 at paras. 26-28; *Paulson v. Dogwood Holdings Ltd*., [1990] B.C.J. No. 2281 (S.C).

[68] Although the discretion to grant relief under s. 324 cannot be restricted to pigeon hole categories, the following grounds are commonly relied upon to justify judicial intervention: (1) where there is a loss of substratum; (2) where there exists a justifiable lack of confidence among the members; (3) where the parties are in deadlock; and (4) where the partnership analogy applies.

[69] As noted above, Vivian argues that the parties are in deadlock and that the partnership analogy applies such that it is just and equitable to grant the relief he seeks.

(b) Deadlock

[70] In *Palmieri v. A.C. Paving Co. Ltd.,* (1999) 48 B.L.R. (2d) 130 (B.C.S.C.) at para. 28, Levine J. (as she then was) summarized the types of situations in which it will be just and equitable to order a winding-up on grounds of deadlock:

> Some of the circumstances ... that will lead to a finding that it is just and equitable to wind up the company because of deadlock are: there are no other effective and appropriate remedies; there is an equal split or nearly equal split of shares and control; there is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; there is a resulting deadlock; and the deadlock paralyzes and seriously interferes with the normal operations of the corporation.

[71] *Kinzie v. Dell Holdings* was found to be a classic situation that justified, on grounds of corporate deadlock, an order under s. 324 of the *Act*. I note that the two shareholder groups in *Dell* were, in fact, agreed that there was a deadlock in the

management of the affairs of the company and no suitable mechanism for resolving it. Briefly, Dell Holdings owned and operated a shopping center. Dell's income was derived entirely from the rents collected under the various lease agreements in place with retailers in the mall. An intractable dispute arose in connection with efforts which were being made by the shareholders to sell the shopping center for redevelopment purposes. While the petitioners in *Dell* were not opposed to a sale of the shopping center to third party, they disagreed with the insistence of the respondents that any new leases contain a demolition clause. The respondents were of the view that in the absence of a demolition clause, developers would be disinclined to purchase the shopping center due to the substantial payouts that would otherwise be required to terminate a tenant's lease. As a consequence of this disagreement, the parties were unable to present a common front to prospective purchasers. This difference of opinion led to conflict between the opposing shareholder groups during negotiations with a grocery chain seeking to lease a sizable space in the mall. The disagreement was found by Bruce J. (at para. 11) to be "paralyzing the proper management of Dell's business affairs." Relief was granted in the form of a shot-gun sale.

(c) The Partnership Analogy

[72] Where the relationship between the parties resembles a partnership more than arm's length shareholders such that it can be said that the entity is, in substance, a partnership in the guise of a private company, courts have been prepared in some circumstances to liquidate a corporation on the same grounds that would justify the winding-up of a partnership: M. Koehnen, *Oppression and Related Remedies* (Thompson Carswell: Toronto, 2004), cited in *Golden Pheasant Holding Corp. v. Synergy Corporate Management*.

[73] References to "quasi-partnerships" or "in substance partnerships", while a convenient short-hand way of describing the circumstances in which it may be appropriate to apply the kind of equitable considerations that govern the dissolution of partnerships to applications to wind-up the business of a company, may be

misleading. The Court is not engaged in a labelling exercise in determining whether a partnership analogy is appropriate, but in an assessment of a constellation of factors that may, as between one person and another, make it unjust to insist on a strict application of legal rights. Lord Wilberforce put it this way in *Ebrahimi v. Westbourne Galleries Ltd*., at p. 500:

> 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.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in the company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

[74] The "partnership analogy" ground has been summarized in the following terms: in the case of a private company which is in substance a partnership the Court, in exercising its jurisdiction under the "just and equitable" rule, should apply the same principles as would be applied in a claim for dissolution of a partnership (D. Huberman, "Winding Up of Business Corporations", in Jacob Ziegel ed., *Canadian Company Law* (Toronto: Butterworths,1973) cited in *Paulson v. Dogwood Holdings Ltd.*).

[75] In support of his argument that a partnership analogy is appropriate in the circumstances of this case, Vivian's counsel draws my attention to several provisions of the *Partnership Act*, R.S.B.C. 1996, c. 338, the most significant of which are reproduced below:

> s. 29 (1) If no set term has been agreed on for the duration of the partnership, any partner may end the partnership at any time on giving notice to all the other partners of his or her intention to do so.
>
> (2) If the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, is sufficient for this purpose.
>
> …
>
> s. 35 (1) Subject to any agreement between the partners, a partnership is dissolved
>
> …
>
> (c) if entered into for an undefined time, by any partner giving notice to the other or others of his or her intention to dissolve the partnership.
>
> …
>
> s. 38 (1) On application by a partner, the court may decree of dissolution of the partnership in any of the following cases:
>
> …
>
> (f) whenever circumstances have arisen that, in the opinion of the court, render it just and equitable that the partnership be dissolved.
>
> …
>
> s. 42 (1) On the dissolution of the partnership, every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interest as partners,
>
> (a) to have the property of the partnership applied in payment of debts and liabilities of the firm, and
>
> (b) to have the surplus assets after the payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm.
>
> (2) For the purposes of subsection (1), any partner or the partner's representatives may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm.

[76] As noted above, Vivian argues that the Company is, in truth, a partnership in the guise of a corporation. He appears to suggest that if the partnership analogy is

apt, s. 29 of the *Partnership Act* may simply be imported into the analysis such that the giving of notice to terminate, without more, is sufficient to justify the winding-up order (or alternative relief) sought in this case. Relying on s. 29, the petitioner's counsel argues that, “when shareholders are in effect partners, and one [of them] decides to terminate the partnership, he is entitled to do so.” In support of this submission he relies on *Kurt v. Pryde* (2007), 160 A.C.W.S. (3d) 94 (Ont. S.C.).

[77] If the petitioner is suggesting that where it is determined to be appropriate to apply the partnership analogy, it is unnecessary for an applicant to go further and establish equitable grounds for a winding-up order, I do not agree.

[78] To paraphrase Lord Wilberforce, the common use of the words “just and equitable” in s. 348 of the *Business Corporations Act* and s. 38 of the *Partnership Act* provide a bridge between cases under s. 348 of the *Business Corporations Act* and principles of equity developed in relation to partnerships. Accordingly, if a partnership analogy is found to be apt, it is necessary to identify the circumstances which would justify intervention on equitable grounds and a winding-up order. Those circumstances have been found to encompass “a breakdown of the mutual trust and confidence upon which the original undertaking was founded” (*Paulson v. Dogwood Holdings Ltd*.) a “destruction of mutual confidence” as between the members or “a breach of the original agreement and of the good faith which underlay it”, “a justifiable lack of confidence in the conduct of the company's affairs” (*Rogers and Agincourt Holdings Ltd*. at p. 495) where that lack of confidence is “grounded on the conduct of the directors in regard to the company's business”...and reveals a “lack of probity, good faith or other improper conduct on the part of a majority of directors” (*Re R.C. Young Insurance Ltd*., [1955] O.R. 598 (C.A.) per Laidlaw J.A. at pp. 601-602, cited in *Mroz v. Shuttleworth* (1996), 30 O.R. (3d) 205 (Ont. Ct. Gen. Div.) at pp. 219-220), “a refusal to meet on matters of business, continued quarreling and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation” and a situation where it is “impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it” (M.

Koehnen, *Oppression and Related Remedies* (Toronto: Thompson Canada Ltd., 2004) at p. 407 as cited in *Golden Pheasant Holding Corp v. Synergy Corporate Management Ltd.*).

[79] *Kurt v. Pryde* does not assist Vivian. Kurt and Pryde were former spouses and equal shareholders in a trucking company. Kurt was in charge of administrative support while Pryde led the service operations of the company. Importantly, the parties agreed that they could not, following their divorce, continue to work closely together in the company. The petitioner, Kurt, wished to realize on her interest in the business, proceed on her separate way and pursue a career in real estate sales. She brought an application to wind-up the affairs of the company. Although both parties recognized that a winding-up order was not in their respective best interests, the judgment reflects an inability on their part to compromise in their respective positions. The court declined to issue a winding-up order but imposed a framework for the voluntary purchase by Pryde of Kurt's interest in the company. In my view, the judgment does not stand for the proposition that shareholders holding an equal interest in a company which is, in truth, a partnership, may obtain a winding-up order whenever one of them wishes to liquidate their investment. In *Kurt v. Pryde*, the parties agreed that, as former spouses, they could no longer work together in the operation of the company; that the mutual trust between them had been irretrievably lost. Accordingly, live issues for determination in the case at bar were conceded in *Kurt v. Pryde*. In addition, the case is one which would, in any event, warrant a more liberal approach to the “just and equitable” test given the relationship between the parties.

[80] In summary, on an application under s. 324 of the *Act* for 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.

E. Application to the Case at Bar

(a) Deadlock

[81] In my view, Vivian has not established deadlock in the management of the affairs of the Company that would justify a winding up order under s. 324 or any other relief under s. 227(3) of the *Act*.

[82] Vivian's submission that "when there are only two quasi-partners, and one of the quasi-partners determines that he is unwilling or unable to work with the other, there is by definition deadlock", inappropriately conflates the deadlock and partnership analogy grounds. It is important to keep the two conceptually distinct.

[83] As noted above, for a winding-up order to be justified on grounds of deadlock, there must be a serious and persistent disagreement on some important questions respecting the management or functioning of the corporation and a deadlock which has the effect of paralyzing or seriously interfering with its normal operations: *Palmieri v. A.C Paving Company Ltd*. at para. 28. Such circumstances are absent in the case at bar.

[84] While I accept that the relationship between Vivian and Firth has become strained in the last year, the tension that now characterizes their relationship is not sourced in any fundamental disagreement about the management or operations of the Company. In fact, the petitioner has failed to adduce any evidence showing how the operations of the Company have been affected in a material way as a result of the friction that now exists between the two shareholders. Rather, the tension between the two men is sourced in their inability to agree on the value of Vivian's shares. In my view, this disagreement does not constitute deadlock in the Company's affairs.

[85] In coming to this conclusion, I have had regard to the evidence that Firth quarreled with important customers and that he acquired significant company assets and negotiated important contracts without consulting with Vivian in advance. I have also had regard to Vivian's evidence that Firth is difficult to reach, slow to return calls

and that he has occasionally not attended prearranged meetings with Vivian or offered any explanation or apology for failing to do so.

[86] While considerations of this kind could potentially be relevant to the partnership analogy ground, they have little relevance in this case to the deadlock ground because, even accepting Vivian's version of events and taking that version at its highest, there is no evidence that these incidents have resulted in a deadlock.

[87] Although Vivian has, since July of 2011, insisted on being supplied with supporting invoices before he signs off on corporate cheques (a change to his previous practice of simply signing blank cheques and permitting Firth to manage the affairs of the Company without his involvement or daily oversight) it is common ground that there has not been a single occasion since then that the parties have disagreed on any expense incurred by the Company. The evidence is that, without exception, Vivian has, since the new practice was implemented, signed off on all corporate cheques after reviewing the supporting invoices. While this practice may be inconvenient to both shareholders, that is all it is. In fact, what has transpired since July, 2011, only provides support for the conclusion that both shareholders appear to be in essential agreement on important questions respecting the management and functioning of the Company.

[88] I wish to make these additional observations about Vivian's evidence that there have been previous occasions on which Firth has engaged in behaviour damaging to customer relations and failed to consult with him on asset acquisitions or in the negotiation of significant contracts. Even accepting Vivian's version of events (which are denied by Firth) some of the incidents recounted are minor and of the sort that can be expected to occur from time to time in providing services to clients. I refer here to Firth’s disagreement with an important customer. With respect to Vivian's complaint that Firth has failed in the past to consult with him on important Company decisions, none of them were considered to be sufficiently troubling *at the time they are alleged to have occurred* to motivate Vivian to document his concerns or request in writing that Firth consult with him on asset acquisition or contract

negotiation in the future. The reality is that Vivian, by choice, was not involved in the day-to-day operations of the company at the relevant time. He left this to Firth, particularly after his move to Vancouver Island in 2007. As Vivian puts it, “Firth never complained to me about that arrangement” and appeared to be “happy to have complete day-to-day control, without me looking over his shoulder.” I take from this that Vivian was also content to let Firth run the business operation. It is not surprising, in this context, and given the more passive role that Vivian admittedly took after moving to the Island in 2007, that Firth considered himself to have the authority to negotiate contracts and acquire assets necessary to secure such contracts. I note, as well, that Vivian does not suggest that any of the business decisions made by Firth were imprudent or not made with the best interests of the Company in mind.

[89] Against this background, it is apparent that what motivates the advancement of these grievances by Vivian now is not a history of fundamental disagreement about the way in which the Company should be run, but the conflict which has arisen between Vivian and Firth concerning the valuation of Vivian's interest in the Company.

[90] I am fortified in my conclusion that Vivian has failed to show cause for a winding-up order, on deadlock grounds, by the decision of this Court in *Paulson v. Dogwood Holdings Ltd.,* a case which has some features in common with the case at bar. The shares of Dogwood Holdings Ltd. were held equally by Paulson and Dorothy Dawson. Paulson’s application for a winding-up order was motivated by a desire to liquidate his investment in the company and satisfy his creditors. As in the case at bar, there was no question that Dogwood Holdings, which had been incorporated 27 years earlier, was a profitable endeavour. The Articles of the company provided that either shareholder had the right to sell his or her shares to a third party, subject to the right of first refusal in the other shareholder. Paulson had made unsuccessful efforts to dispose of his shares to third parties. He offered Dawson a shot-gun buyout whereby he would sell his shares to her at a fixed price or buy hers at that price if she declined his offer. She refused to do either. Paulson

also sought Dawson's concurrence in the sale of the assets of the company to an interested third party purchaser. She would not agree to the sale. Paulson's application for a winding-up order rested on a contention that the affairs of the company were in deadlock or, alternatively, on the partnership analogy ground. The application was dismissed. Coultas J. found it would not be just and equitable to wind up the affairs of Dogwood Holdings Ltd. for the following reasons:

> There is no evidence of a breakdown in trust and confidence between the shareholders. To the contrary, the twenty-seven year relationship has been remarkably unmarred by difficulty or disagreement. The only evidence of dispute is Dawson's present resistance to winding up the company and disposing of the assets. This circumstance in the absence of other evidence is not sufficient to warrant a finding of deadlock.
>
> …
>
> On this point, I draw support from the decision in *Re Welport Investments Ltd*., (1985), 31 B.L.R. 232. In that case, White J. was commenting upon the shareholders' inability to agree to a buyout price, (one of the circumstances present in the case at bar). He considered this evidence in the context of the Ontario legislative provision with similar wording to [then] s. 296 of the B.C. Company Act, at p. 255:
>
> > whether the shareholders can agree on a mutually satisfactory buy-out price does not, in itself, imply that the companies cannot carry on business properly.
>
> Similarly, I have concluded that the present disagreement between the petitioner and the respondent, Dawson, does not affect the operation of the company Dogwood so as to impair the obtaining of its economic ends.

[91] For the foregoing reasons, I would not give effect to the deadlock ground.

(b) The Partnership Analogy

[92] The first step is to determine whether it is appropriate in this case to engage the partnership analogy. Having regard to the factors set out in *Ebrahimi v. Westbourne Galleries Ltd*., and how those factors have been applied in subsequent cases, I do not think that it is appropriate in this case to invoke that analogy. My reasons for coming to this conclusion are set out below.

[93] First, the Company was not formed or continued on the basis of a personal relationship involving the mutual trust and confidence inherent in familial

relationships or long-standing friendships. Rather, the Company was the product of a purely commercial arrangement between two individuals, previously unknown to one another, who had similar business interests. Vivian had a network of personal contacts in the film industry. Firth had some washroom trailers and an ability to borrow funds to acquire additional trailers to put the Company on a competitive platform. In short, there is nothing about the relationship between the parties which would justify invocation of the partnership analogy.

[94] Second, this is not a case where a pre-existing partnership was converted into a limited company such that the incorporating parties might reasonably have assumed that pre-existing partnership obligations continued to underlie the new company structure. In determining to apply the partnership analogy in *Ebrahimi v. Westbourne Galleries Ltd*., Lord Wilberforce made clear in his judgment that it was a fact of “cardinal importance” to the determination of that case that, prior to its incorporation, the business had been carried on by the shareholders as a partnership, with each partner equally sharing the management and profits of the firm.

[95] Third, since 2007 and until July 2011, when the dispute concerning the valuation of Vivian's shares came to a head, the two shareholders were not, in fact, acting as partners with each of them actively participating in the operation of the business. For the majority of the time since the incorporation of the company, Vivian has assumed a role which more closely resembles that of a passive investor than it does a partner.

[96] Finally, the parties took no discrete steps on incorporation consistent with the view that it was their intention to run the company as a quasi-partnership. Specifically, there is no restriction on the transfer of either shareholder's interest in the company.

[97] In the result, there is nothing about the relationship between the shareholders, no pre-incorporation history and nothing about the way in which they have structured their relationship or discharged their respective roles, that would

justify invocation of the partnership analogy and the superimposition of equitable principles such as to warrant a winding-up order.

[98] But even if I am wrong in this conclusion, I am not persuaded that the evidence demonstrates a justifiable breakdown of mutual trust and confidence each shareholder has in the other in the conduct and management of the Company's affairs, nor does it establish such a state of animosity as to preclude all reasonable hope of cooperation in the attainment of the Company's financial goals. To the contrary, the evidence establishes that Vivian and Firth, despite the strains in their relationship, continue to agree and cooperate, and consistently so, on important business decisions moving forward. I would also note that Vivian has not, in support of this application, pleaded "justifiable lack of confidence" as a discrete ground upon which it is 'just and equitable' in this case to make a winding-up order. As will be recalled, "justifiable lack of confidence" has been recognized as an independent ground potentially warranting a winding-up order: *Palmieri v. A.C. Paving Co*. at para. 26.

[99] I acknowledge that Vivian and Firth are at loggerheads on the question of how Vivian's shares should be valued. I do not, however, consider this state of affairs to justify a winding-up order or alternative relief under s. 227(3) of the *Act*. I agree with the observations of Goepel J. in *Boffo Family Holdings v. Garden Construction Ltd*., 2011 BCSC 1246 at para. 156, that s. 324 of the *Act* ought not to be interpreted as a mechanism through which a shareholder, absent a breakdown of trust or justifiable lack of confidence in the conduct and management of a company's affairs, can monetize his or her investment in a company.

F. Conclusion

[100] The petitioner's application for a declaration that it is just and equitable to wind-up the affairs of the Company, and for the relief he seeks pursuant to s. 227(3) of the *Act*, is dismissed.

[101] Subject to any further submissions, the respondent is entitled to its costs on Scale B.

"Fitch J."

G. Fitch, J.