IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Walker et al. v. Betts et al.,***
2006 BCSC 128

Date: 20060126

Docket: S89073
Registry: New Westminster

Between:

Timothy C. Walker and Sunergy Holdings Ltd.

Petitioners

And

Fonda Tre-Anne Betts, Allie's Wholesale Garden Supplies Ltd., Grotek Manufacturing Inc., Agrotek Manufacturing Inc., Aggro Plastics Inc. and 584354 B.C. Ltd.

Respondents

Corrected Judgment: The front page of this judgment was corrected on September 5, 2007

Before: The Honourable Madam Justice D. Smith

Reasons for Judgment

Counsel for the Petitioners	F. Potts D. K. Magnus
Counsel for the Respondents	R. Basham, Q.C.
Date and Place of Trial/Hearing:	November 21–24, 2005 New Westminster, B.C.

I. Overview

[1] The petitioners Timothy Walker and his corporate alter ego, Sunergy Holdings Ltd. ("Sunergy"), and the respondents Fonda Betts and her corporate alter ego 584354 B.C. Ltd. ("354"), are shareholders in a group of three interdependent provincially incorporated companies, Allie's Wholesale Garden Supplies Ltd. ("Allie's"), Grotek Manufacturing Inc. ("Grotek"), and Aggro Plastics Inc. ("Aggro Plastics"), collectively referred to as "the Allies Group". The main business of the Allies Group is the manufacturing and distribution

of horticultural products. The corporate respondent, Agrotek Manufacturing Inc. ("Agrotek"), is wholly owned by Allie's but has been largely inactive since its incorporation.

[2] After an eight-year business relationship, difficulties arose between Mr. Walker and Ms Betts which resulted in Mr. Walker leaving the operation of the Allies Group in May 2004. It is common ground that Mr. Walker and Ms Betts' previous amicable relationship has irretrievably broken down and that they can no longer work together. Mr. Walker is now employed by a competitor company.

[3] Several months after his departure Mr. Walker commenced this within petition. In the petition he seeks a declaration that the affairs of the Allies Group are being operated in a manner oppressive and/or unfairly prejudicial to the petitioner shareholders. If such a finding is made, the petitioners seek one or more of the remedies ("the oppression remedies") provided for in s. 227 of the ***Business Corporations Act***, S.B.C. 2002 c. 57 (the "***BCA"***), including the purchase of the petitioners' shares in the Allies Group or the appointment of a receiver-manager and the winding up of the Allies Group. The parties agree that if the corporate respondents are ordered to purchase the petitioners' shares, the valuation of those shares will be adjourned for another hearing. Mr. Walker also seeks interim orders for an immediate lump sum payment of $100,000 and an order prohibiting the respondents from disposing of the corporate assets of the Allies Group except in the ordinary course of business. In the alternative, Mr. Walker seeks leave to commence a derivative action on behalf of the shareholders of Allie's against Ms Betts and Aggro Plastics.

[4] On September 14, 2005, the parties entered into a consent order. The order provided that the petitioners' shares shall be purchased by the corporate respondents at fair market value on terms to be agreed by the parties or as directed by the Court. It further ordered that the respondents provide the petitioners with a fair market valuation for each of the Allies Group of companies, that the petitioners have unfettered access to the valuator and the financial records of the Allies Group, and that the corporate respondents provide the petitioners with a written offer to purchase the petitioners' shares in the Allies Group by a certain date. The balance of the relief sought in the petition was adjourned to a fixed hearing date.

[5] A valuation of the Allies Group was prepared by the corporate accountants. It was an *en bloc* valuation that did not include a valuation of the petitioners' shares as distinct from the Allies Group. It was the view of the corporate accountants that such a task was not a function of their mandate.

[6] After receiving the valuation the respondents dismissed the corporate accountants and retained

another accounting firm. That firm has been asked to prepare a valuation of the petitioners' shares. Mr. Walker was not consulted about the decision to retain new corporate accountants.

[7] The corporate solicitors initially represented the corporate respondents in this action. However, Mr. Walker objected to their representation on the basis that their personal interests appeared to mirror those of Ms Betts. As a result, the corporate solicitors agreed to withdraw their representation of the corporate respondents in this action.

[8] It is acknowledged that the petitioners are owed a substantial sum of money for their shares. Mr. Walker claims his shares are worth significantly more than the respondents' estimate of $1.2 million. Ms Betts suggests the amount is considerably less in light of Mr. Walker's minority shareholder position.

[9] The respondents' offer to purchase the petitioners' shares included a minority discount. Their offer was rejected by Mr. Walker. The value of a minority shareholding is generally subjected to a minority discount. However, that discount may be reduced or eliminated where conduct by the majority shareholder, that is found to have been oppressive or unfairly prejudicial, has affected the value of a minority shareholder's interests. In the absence of a determination as to whether the Allies Group has conducted its affairs in a manner oppressive and/or unfairly prejudicial to the petitioners, the parties have been unable to reach an agreement on a buy-out of the petitioners' shares.

[10] The respondents claim that the consent order precludes the petitioners from proceeding with the within petition, because the remedy of having the petitioners' shares purchased by the corporate respondents has already been ordered, thereby excluding the availability of the alternate remedies sought and leaving the valuation of their shares as the only outstanding issue. In that regard they rely on the decision of ***Ginther v. Bain Insulation & Supply Ltd.*** (1988), 93 A.R. 71 (C.A.).

[11] In ***Ginther,*** the trial judge ordered the petitioner's shares be purchased by the respondent company at a fixed price. There was no outstanding relief to be determined and no appeal was taken from that order. The petitioner subsequently applied for and was granted an order for a further valuation of his shares based on a different method. The appellate court, in allowing an appeal from the second order, held that the granting of that order was inconsistent with the first order.

[12] The facts of this case, in my view, are distinguishable from ***Ginther***. Here, the term of the consent

order, which adjourned the balance of the relief sought in the petition for hearing, expressly permits the petitioners to pursue the alternate remedies claimed in the petition. The inclusion of that term, in my view, would be redundant if the petitioners were denied the ability to pursue those alternate remedies in the absence of a final order on the purchase of the petitioners' shares.

II. The Corporate structure

(i) Allie's

[13] Allie's is the flagship company for the Allies Group. It was incorporated in 1996 for the purpose of manufacturing and distributing garden supply products. Mr. Walker owns 25% of the common shares, Ms Betts 75% of the common shares. Mr. Walker came to the business with 25 years experience in the horticultural industry and assumed responsibility for overseeing sales, marketing and product development. Ms Betts came to the business with a background in finance and business and assumed responsibility for overseeing operations and finances.

[14] Despite the unequal shareholdings, Mr. Walker and Ms Betts operated Allie's like a partnership. The 1996 Allie's Shareholders' Agreement provided that each shareholder could nominate one director; that a quorum required two directors; that each shareholder was to devote their full business time and energies to Allie's; and, if either shareholder left Allie's he or she could not compete with the company for two years after ceasing to own shares in Allie's. Mr. Walker was appointed the Secretary and Ms Betts the President. The 1996 Shareholders' Agreement also provided that decisions by the shareholders would be unanimous and gave each of the shareholders a right of first refusal in the event that either decided to sell his or her shares.

[15] In 2000 Allie's was subject to a restructuring. The 2000 Allie's Shareholders' Agreement replaced the 1996 Allie's Shareholders' Agreement. The latter agreement contained many of the same terms as the earlier agreement, including a right of first refusal to each shareholder. It did not, however, include a provision that the decisions of the directors had to be unanimous. In the event of a tie vote the Articles of Association gave a "second" or "casting" vote to the chairman, Ms Betts.

[16] This change, along with the omission of a "shot gun" buy/sell process, has caused much of the current dispute between the parties.

[17] The financial arrangements of the individual parties also reflected their *de facto* partnership. Mr. Walker and Ms Betts were made employees of Allie's and received equal salaries. The corporate profits

were shared equally and based on their employment rather than their shareholdings. Bonuses were paid into each of their Employee Profit Sharing Plans and thereafter distributed equally to the shareholders. Mr. Walker and Ms Betts both participated in the management of the business.

[18] Allie's is funded by $1.8 million in bank loans that are secured by Grotek and Aggro Plastics, by personal guarantees from Mr. Walker and Ms Betts for up to $700,000, and by $1.6 million in shareholders loans which are subordinated to the bank's security interest.

[19] Allie's financial circumstances have changed in the last few years. By 2004, its original $700,000 line of credit had increased to $1.7 million. Currently it is over $1.9 million. Between 2002 and 2004, Allie's had loaned Aggro Plastics $900,000 with no specific terms for repayment and little security. In part, those monies were used by Aggro Plastics to purchase a plastic manufacturing machine for gardening products at a cost of $275,000. After Mr. Walker's departure, Aggro Plastics' equipment was sold for $100,000. By 2005, Allie's accounts payable to Grotek had increased from $600,000 in 2002 to $1,003,000 and many were outstanding for over 90 days. In spite of these changes Allie's profit margin has improved over the last year.

[20] Since his departure Mr. Walker has not been included in the management of the Allies Group. He disagrees with many of the management decisions that have been made and claims that many of them have been imprudent. Ms Betts states that he voluntarily left the Allies Group in order to work for a competitor's business and that the business decisions she has made since his departure have been made in the best interests of the Allies Group and have improved its profitability.

[21] The basis on which corporate profits are distributed also was changed after Mr. Walker's departure, without consultation and without his consent. Corporate profits now are distributed based on shareholdings rather than employment. Ms Betts said that the previous arrangement was based on an assumption of equal contribution and that with Mr. Walker's departure she has had to assume the burden of running the Allies Group. However, she also stated that the previous arrangement had been implemented in error, by a past comptroller who has since been dismissed, and that the corporate profits should have been paid out based on shareholdings from the outset. She claims that she had no knowledge of the error until her salary was reviewed following Mr. Walker's departure. That salary has since increased to $185,000.

[22] Mr. Walker states that under this new arrangement, his shareholder's loans, the reinvestment of his

share of the corporate profits, and his personal guarantee with the bank, continue to fund Allie's of which Ms Betts now receives 75% of the corporate profits and he receives 25%. This new arrangement, he states, is very much to his financial detriment.

(ii) Grotek

[23] Grotek was incorporated in 1997 but remained inactive and was struck from the corporate registry in 2000. It was restored on January 2, 2001, after a decision was made to restructure Allie's. Mr. Walker and Ms Betts are equal shareholders in Grotek. Both are officers and directors. Mr. Walker is the Secretary and Ms Betts the President. Both were part of Grotek's management team.

[24] Between 1996 and 2001 Allie's was the owner of Grotek's patents, trademarks and other intellectual property. It sold its products under the Grotek brand name. In 2001, the manufacturing and production arm of Allie's specialized garden products was transferred to Grotek. Thereafter, Grotek's products were sold at wholesale price to Allie's for distribution under an Exclusive Distribution Agreement. That agreement became effective on January 1, 2003, and appointed Allie's as the worldwide distributor of Grotek products for a 15-year term with an option to renew. The Distributorship Agreement also provided that Allie's would promote Grotek's products in concert with Grotek.

[25] To ensure that its products are successfully marketed, Grotek pays one-third of all marketing costs in a joint marketing campaign. About 35% of Allie's sales are Grotek products. They produce about 55% of Allie's profits. The success of Grotek is fundamental to the success of Allie's. Its profitability fuels both Allie's and Aggro Plastics' operations.

[26] Grotek is funded by its accounts receivable from Allie's and by $700,000 in shareholders loans owed to Mr. Walker and Ms Betts.

[27] The 2002 Grotek Shareholders' Agreement is similar to the Allie's 2000 Shareholders' Agreement. Profits are shared equally, paid into each shareholder's Employee Profit Sharing Plan and reinvested back into Grotek as shareholders loans.

[28] The equal division of Grotek's corporate profits has continued since Mr. Walker's departure. Mr. Walker states that they have always been paid based on their employment. Ms Betts states that they have always been paid based on their shareholdings. Both methods result in an equal sharing of the profits.

[29] After his departure Mr. Walker's name was removed as an owner on Grotek's internet web page. Ms. Betts states that change was in error.

(iii) Aggro Plastics

[30] Aggro Plastics was incorporated in October 2001 in order to manufacture and sell plastic containers for use in gardening businesses. Investment capital was to be raised through four partners. After two of those investors backed out, Mr. Walker and Ms Betts proceeded with the venture through their respective corporations. Sunergy is a minority shareholder in Aggro Plastics with 20% of the common shares; 354 is the majority shareholder with 80% of the common shares.

[31] The 2002 Aggro Plastics Shareholders' Agreement provides for two directors; one must be chosen from Sunergy and the other director from 354. Mr. Walker is the Secretary and Ms Betts the President. Ms Betts oversees the management of Aggro Plastics with the assistance of several employees. Mr. Walker has had limited involvement in its management.

[32] In 2002, Aggro Plastics purchased its main piece of equipment, a plastic manufacturing machine, at a cost of $275,000 USD. Mr. Walker claims that he did not consent to that purchase. Ms Betts states that he did. The company was funded by loans from Allie's of up to $900,000, which are secured by a general security agreement ("the GSA") over the plastic manufacturing machine. The GSA contains no specific terms of repayment. Aggro Plastics also guarantees Allie's bank loans to a maximum of $1.6 million. In 2003, Mr. Walker had expressed concern about the amount Allie's was funding Aggro Plastics. Since September 2003 no further loans have been advanced to Aggro Plastics from Allie's.

[33] After Mr. Walker's departure, Aggro Plastics sold the plastic manufacturing machine for about $100,000. Mr. Walker was not consulted about its sale. More recently, Aggro Plastics dismissed its staff, closed its office, and attempted to sublet its leasehold premises, the lease of which is personally guaranteed by both Mr. Walker and Ms Betts. Despite this, Ms Betts made those decisions without consulting Mr. Walker, and without obtaining his consent.

[34] Ms Betts claims that 354, as the majority shareholder, has control of Aggro Plastics and is entitled to make such management decisions. In her opinion the decision to shut down Aggro Plastics was in the best interests of the company. However, s. 301 of the ***BCA*** requires a special resolution of the shareholders in

order to effectively dispose of all or substantially all of an undertakings assets as such action does not fall within the ordinary course of business. Ms Betts has since reconsidered her decision to shut down Aggro Plastics.

(iv) Agrotek

[35] Agrotek was incorporated in 2002 for the purpose of manufacturing environmental monitoring and control equipment. It is wholly owned by Allie's with Ms Betts as the sole officer and director. It has remained inactive since its inception and currently sits as a shell company.

[36] Mr. Walker states that as a shareholder of Allie's he did not consent to its incorporation. Ms Betts claims that he did.

(v) The Allies Group

[37] The main business of the Allies Group is the manufacture and distribution of horticultural products.

[38] Until 2000 Allie's and Grotek operated as a single entity. Allie's was and continues to be Grotek's sole customer. Mr. Walker and Ms Betts actively participated in the running of both companies. Management decisions for both companies were made by a single management team that included Mr. Walker, Ms Betts and four employees. Allie's and Grotek report financially as a consolidated entity to their bank, even though each company keeps separate accounting records and files separate income tax returns. After Allie's restructuring in 2001, Mr. Walker spent more of his time overseeing the operations of Grotek and Ms Betts became more involved in the operations of Allie's.

[39] No formal directors meetings or annual general meetings were held for the Allies Group. Instead, management's decisions were ratified at year end through consent resolutions of the shareholders which included a waiver of the statutory requirement under s. 203 of the ***BCA*** for an audit of its financial statements.

[40] In Spring 2002, Mr. Walker and Ms Betts discussed the possibility of selling their interests in the Allies Group. Mr. Walker was approaching the age of 50 and wanted to spend more time with his family. Ms Betts was interested in pursuing other endeavours. To that end, the Allies Group enlisted the assistance of a professional to market their shares. He recommended a reorganization of the Allies Group to better market the shares. He also provided a valuation of the petitioners' shares for the purpose of this action. Ms Betts

disputes the correctness of that valuation and takes issue with the professional's qualifications to give such a valuation.

[41] Mr. Walker claims that after 2002, Ms Betts marginalized his participation in the Allies Group and assumed greater control of the operation. Ms Betts denies the allegation and claims that once Mr. Walker decided that he wanted to sell his interests in the Allies Group his contribution to its operation lessened. Ms Betts states that she no longer wishes to sell her interest in the Allies Group and she has effectively taken over its management.

[42] The Allies Group did not hold a directors meeting or an annual general meeting in 2005. Nor has it prepared its 2005 annual report. Ms Betts presented Mr. Walker with 2005 draft consent resolutions to sign, which would have ratified the decisions of the directors and waived the statutory requirement for an auditor. Mr. Walker declined to sign them. He states that since his departure he has not participated in nor been consulted about management's decisions. He disagrees with many of the decisions that have been made. He further objects to his 25% interest in Allie's continuing to fund Ms Betts' 50% interest in Grotek and 354's 80% interest in Aggro Plastics. Ms Betts responds that she is operating the Allies Group in the same manner that she did before Mr. Walker's departure. She underscores that through corporate efficiencies she has increased the Allies Group productivity and profit margin.

(vi) The shareholders' loans

[43] The Allies Group minimizes its tax liability by reducing its corporate income to the lowest small business tax rate. This is achieved by distributing the corporate income to the shareholders through their respective Employee Profit Sharing Plans with Allie's and Grotek. Allie's and Grotek pay each shareholder's personal income tax on his or her share of the profits and reinvest the balance of the profits into Allie's and Grotek by way of shareholder loans. The shareholder loans are without interest and have no specific terms of repayment.

[44] This arrangement continued in both Allie's and Grotek from 1997 through to the year ending February 29, 2004. At that time, Mr. Walker and Ms Betts together had about $1 million in shareholder loans in Allie's and $647,000 in Grotek.

[45] When needed, Mr. Walker and Ms Betts withdrew small amounts from their respective shareholders' loan accounts but left the balance of their loans largely untouched in order to ensure that the Allies Group

was adequately capitalized. This practice changed in Spring 2000 when Ms Betts urgently required $500,000 for a property settlement in her divorce action. To that end, Mr. Walker and Ms Betts agreed that she would receive $500,000 from her shareholder's loan account in 36 monthly instalments of $13,888.88 each, and upon payment in full Mr. Walker would have his shareholder's loan account similarly reduced by the same amount.

[46] Over the next three years, cheques in those amounts were paid directly to Ms Betts' ex-husband. The last payment was in May 2003. Thereafter, Mr. Walker received seven payments of $13,000, and two payments of $10,000, for a total of $111,000. He received his last payment on March 23, 2004.

[47] Mr. Walker has made repeated requests for repayment of his shareholder loans to both Allie's and Grotek, and, in particular, the balance of the $500,000 repayment agreed to between the individual parties. Ms Betts states that since Mr. Walker's departure the Allies Group has been involved in a restructuring with the objective of reducing its asset-to-debt ratio and that as a result it has had insufficient cash flow to repay any further amounts from Mr. Walker's shareholder loan account at this time. She states that cash flow is down, in part, because of Mr. Walker's failure to meet his targeted sales budget. She also states that expenses have exceeded revenues, which Mr. Walker attributes to her improvident business decisions. While Ms Betts acknowledges that the Allies Group profit margins have improved significantly in the year, she reiterates that reduction of liabilities in order to increase profits does not equate with increased cash flow. In that regard, she points to Allie's increasing line of credit which now stands at over $1.9 million.

[48] No arrangements have been made or any time frame established in which to address this issue. Ms Betts states that it is the prerogative of management as to when and how Mr. Walker's shareholder loans will be repaid.

[49] At this time, Mr. Walker's shareholder loans in Allie's and Grotek are significantly higher than Ms Betts because of the $500,000 received by Ms Betts and because of Ms Betts need to account for a number of personal expenses that she had charged to the corporate accounts but which she has since accounted for by deductions from her shareholder's loan accounts.

(vii) Mr. Walker's departure from the Allies Group

[50] In May 2004, Mr. Walker was told by his physician that he had to go on a medical leave of absence from work due to stress. His last day of work was May 19, 2004. About two weeks later he met with Ms

Betts. Mr. Walker said that Ms Betts rejected his request for time away from work. Ms Betts states that she told him that he could take as much time as he needed.

[51] On June 18, 2004, Mr. Walker was issued his last pay cheque from Grotek for the period ending June 11, 2004. On June 23, 2004, he received his vacation pay from Grotek and his Record of Employment which indicated his last day of work was June 11, 2004. He has not received any Record of Employment from the other companies in the Allies Group.

[52] Mr. Walker claims that he was constructively dismissed and that he has received no severance pay. Ms Betts states that he effectively resigned in order to go to work for a competing business.

[53] Mr. Walker received short-term disability payments from the Allies Group disability insurer until July 4, 2004. In November 2004, Ms Betts became aware that his disability payments had been terminated because he had failed to provide sufficient medical information to satisfy the policy's qualifying term that the insured be totally disabled.

[54] When Mr. Walker left he took with him a copy of Grotek's secret mixing formulas recorded on a CD. He made another copy of the CD and locked it away in Grotek's safe. He said he took those actions in order to ensure that Grotek's formulas remained secure because its chief mixer had health issues. He denied that he had made a copy of the formulas for any improper purpose. Ms Betts believes otherwise and states that such confidential information should remain with Grotek and not with Mr. Walker, who is now working for a competitor business.

[55] Mr. Walker states that since his departure Ms Betts has requested that he resign his directorships in the Allies Group. He has declined to do so. Ms Betts denies she has asked him to resign. Mr. Walker claims that Ms Betts is running the Allies Group as if it were a proprietorship and making unilateral decisions in regard to its operations. Ms Betts denies that allegation and states that Mr. Walker voluntary left the Allies Group and in his absence the management team continues to make its business decisions.

[56] Ms Betts has asked Mr. Walker to endorse a number of consent resolutions ratifying the actions of the Allies Group since his departure, including the waiver of the statutory requirement for an auditor. Mr. Walker has declined to do so as he disagrees with many of the corporate decisions involving the expenditure of funds.

[57] Mr. Walker states that a number of the management decisions made after his departure have been improvident. He points to Ms Betts salary increase to $185,000. Ms Betts responds that her salary is competitive with other salaries in her field of work. She states that it was reviewed with the Human Resources Manager and increased because her contribution is greater than Mr. Walker's. She said that Mr. Walker agreed with the increase. He said he did not.

[58] Mr. Walker takes issue with other changes including the method of distributing the corporate profits, the increase to Allie's line of credit and its accounts payable, which his personal guarantee continues to secure, and Ms Betts attempt to dispose of all or substantially all of the assets of Aggro Plastics without obtaining his consent through a special resolution. Ms Betts responds by pointing out that she has improved Allie's profitability by reducing its asset-to-debt ratio and states that as the majority shareholder in both Allie's and Aggro Plastics she is entitled to make business decisions, which she believes are in the best interest of those companies.

[59] Since the breakdown of their relationship Mr. Walker has been unable to market his shares. He claims that he has had difficulty in trying to sell his interest in the Allies Group because of Ms Betts' lack of cooperation. It is his view that in order to improve the marketability of the petitioners' shares changes must be made to the Shareholders Agreements. Ms Betts responds by stating that she is under no legal obligation to make any changes to the shareholders agreements in order to assist Mr. Walker in selling the petitioners' shares to a third party. She prefers to purchase the petitioners' shares in the Allies Group at a fair market value and claims that Mr. Walker is only pursuing an oppression claim in order to secure a more lucrative price for those shares.

III. The complaints

[60] Mr. Walker cites a number of examples of how, in his opinion, Ms Betts has conducted the affairs of the Allies Group in a manner oppressive and/or unfairly prejudicial to the petitioners' interests. His complaints include decisions that were made both while he was employed by the Allies Group and after his departure.

[61] In particular, Mr. Walker lists the following decisions as examples of acts of oppression:

(i) Before Mr. Walker's departure

(a) Agrotek was incorporated as a subsidiary of Allie's on Ms Betts sole direction;

(b) Ms Betts caused Allie's to finance the incorporation of Aggro Plastics without the consent of Mr. Walker and without proper security;

(c) Ms Betts caused Aggro Plastics to manufacture and sell product in direct competition with Grotek;

(d) Ms Betts refocused Allie's from specialized products for commercial greenhouses to indoor gardening businesses with an emphasis on the sale of hydroponic equipment;

(e) Ms Betts marginalized his role in the management of the Allies Group after the two had discussed their intention to eventually sell their shares;

(f) Ms Betts maintained secrecy in her dealings with suppliers, buyers and other corporate matters, and conducted meetings and transacted business in the absence of or without the knowledge of Mr. Walker, which business required the consent of shareholders or directors of the Allies Group;

(g) Ms Betts diverted funds and contractual benefits from the Allies Group for her own benefit to the prejudice of Mr. Walker, including charging personal expenses to the Allies Group, increasing her salary without Mr. Walker's consent, and stopping repayment of his shareholder loan in Allie's;

(h) Ms Betts approved the sale of $500,000 worth of product to Pakistan ("the Pakistani Deal") without securing payment by a letter of credit, against the advice of Mr. Walker and to the detriment of the Allies Group. The debt has not been paid and is unlikely to be paid;

(i) Ms Betts held a Strategic Planning Session in Costa Rica attended by a number of employees and the individual parties, at considerable expense and against Mr. Walker's advice;

(j) Ms Betts made additions and renovations to the Allies Group premises, including her own office and a warehouse in Toronto without his consent or input;

(k) Ms Betts effectively terminated Mr. Walker's employment with the Allies Group by constructively dismissing him.

(ii) After Mr. Walker's departure

(a) Ms Betts attempted to sell all or substantially all of Aggro Plastics without any or proper corporate authority;

(b) Ms Betts attempted to expand Allie's and Grotek's sale of products beyond its means by increasing Allie's line of credit to fund loans to Grotek and Aggro Plastics and by increasing the accounts receivable from those companies to Allie's;

(c) Ms Betts refuses to repay his shareholder loans in both Allie's and Grotek, or establish a time frame in which to repay them, even though the Allies Group's profitability had significantly improved;

(d) Ms Betts changed the method of distributing the corporate profits without Mr. Walker's

consent;

(e) Ms Betts held and concealed the Allies Group business records from Mr. Walker and refused to divulge information about their financial position to him;

(f) Ms Betts unfairly hindered or obstructed the marketing of the petitioners' shares in the Allies Group.

[62] Ms Betts strongly denies these allegations.

[63] She submits that regardless of the correctness of these management decisions, which she insists were made in the best interests of the Allies Group, it was within the discretion of Allies Group's corporate offices to make them. As such, she submits, they cannot be interfered with by the courts unless they are shown to have been patently unreasonable. She states that each of these decisions falls within the scope of generally accepted business practices and that none have negatively affected the petitioners' shares in a manner peculiar to that of the other shareholders. She further states that the decisions made before Mr. Walker's departure were all done with his consent and ratified by him in his capacity as a shareholder through year-end consent resolutions.

[64] In particular, she states that before Mr. Walker's departure, business decisions of the Allies Group were made either with Mr. Walker's consent or with his participation in the management team that made the decision. She includes in those decisions the incorporation of Agrotek, Allie's financing of Aggro Plastic, the choice of products manufactured and sold by Allie's and Aggro Plastics, the Pakistani Deal, the additions and renovations to the Allies Group premises, the increase in Allie's line of credit for the benefit of Grotek and Aggro Plastics and the increase in Allie's accounts payables to those companies.

[65] She denies there was any agreement for Mr. Walker to have an equal say in the running of the companies, a salary equal to hers, or an equal sharing of the corporate profits. She invites Mr. Walker to pursue a claim in breach of contract if he believes there was such an agreement. She states that the arrangement between them was based on an assumption of equal contribution but that when Mr. Walker's contribution began to diminish after 2002 her contribution correspondingly increased as the burden of running the Allies Group increasingly fell to her.

[66] She also claims that the equal sharing of the corporate profits through bonuses based on employment was made in error by the previous comptroller and should have been based on shareholdings. In paying Mr.

Walker a salary and bonus equal to hers, she states that she has been generous and has overlooked his entitlement to a lesser amount based on his shareholdings. She states that she did not become aware of this error until after Mr. Walker's departure.

[67] She further states that the charging of her personal expenses to the Allies Group was in error, or in the alternative falls within generally accepted business practices, so long as it is accounted for at the year-end by a corresponding reduction of those expenses from her shareholder's loan account, which, she states, she has since done. She does not provide any details of those expenses or of their accounting.

[68] She admits that she attempted to dispose of all or substantially all of Aggro Plastics' assets without Mr. Walker's consent, but said that she only did so in the best interests of the company and because she believed that as the majority shareholder she had the corporate authority to do so. She has since reconsidered her decision.

[69] She denies that she marginalized Mr. Walker's participation in the Allies Group after they discussed selling their interests in 2002, although she admits that she advised the staff of Mr. Walker's intention to leave even though Mr. Walker had not decided when that would occur.

[70] She acknowledges that her manner of dealing with staff might be perceived by some as autocratic, but states that other senior employees have attested to her effectiveness as a manager and her clear vision for the companies.

[71] She denies that she dismissed Mr. Walker from his employment and states that he effectively resigned by refusing to return to work. She points out that Mr. Walker is currently employed by a competitor company and has taken a copy of the Grotek formulas with him. She states that if he believes he was wrongfully dismissed that he should pursue such a claim.

[72] She states that while there may have been difficulties in Mr. Walker obtaining access to the business and financial records immediately after his departure that has since been rectified with Mr. Walker having full access to business records and the corporate accountants.

[73] She denies she has interfered with Mr. Walker's ability to market his shares and states that Mr. Walker has failed to employ the process provided for in Allie's and Grotek's respective Shareholder Agreements for the sale of his shares. She further states that she is under no legal obligation to accommodate Mr. Walker's

requests to improve the marketability of his shares and that his difficulties in marketing his shares are compounded by the Agreements' absence of a shot gun clause.

[74] Ms Betts acknowledges there have been no formal directors meetings or annual general meeting in 2005 but states that she has merely followed the parties' governance practice that existed when Mr. Walker was involved in the operation.

[75] In short, she states that most of Mr. Walker's complaints relate to decisions made before his departure. Those decisions were made by a management team in which he participated as a member and were ratified by him in consent resolutions that he signed as a shareholder. She further states that only two major decisions made after his departure – the sale of Aggro Plastics assets and the change in the distribution of the corporate profits – and those decisions were made by the management team acting in the best interests of the companies. She submits that regardless of Mr. Walker's view of their merits, those decisions do not constitute oppressive acts as they do not particularly affect Mr. Walker's rights as a shareholder, as distinct from hers.

IV. Discussion

(i) The *Business Corporations Act*

[76] The relief sought by the petitioners is found in s. 227 of the ***BCA***. It provides:

> 227(1) For the purposes of this section, "shareholder" has the same meaning as in s. 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.

[77] The remedies relevant for a finding under s. 227(2) in this case are listed in s. 227(3):

227(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 order 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,

…

(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,

…

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

…

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

…

(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.

[78] Section 324 of the ***BCA*** further provides:

324(1) On an application made in respect of a 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.

[79] Thus, the court may order the same remedies under s. 227(3) without finding oppressive or unfairly prejudicial conduct if it is satisfied that it would be just and equitable to do so.

(ii) Conduct that is oppressive or unfairly prejudicial

[80] Oppression is conduct which is "burdensome, harsh or wrongful". Unfairly prejudicial conduct is conduct which is unjustly or inequitably detrimental to a shareholder's interests. See ***Scottish Co-operative Wholesale Society Ltd. v. Meyer,*** [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.).

[81] In order to maintain a personal action for oppression, an applicant shareholder must establish harm to his interests as a shareholder, as distinct from his interests as a director, officer or employee. He must also establish harm peculiar to his shareholder interests as distinct from the other shareholders' interests. Moreover, the contractual force of conduct permitted by a company's articles of association cannot be ignored when determining if conduct is oppressive or unfairly prejudicial.

[82] In the absence of such a finding, an applicant shareholder still may obtain an oppression remedy by establishing under s. 324(1) (b) that it would be just and equitable to grant such relief. The "just and equitable" test permits a broader or more liberal approach to assessing conduct that may have impacted on a shareholder's rights. An inquiry into what is just and equitable extends beyond an examination of the narrow legal or proprietary rights given to a shareholder under the articles of association, as was the case in ***Diligenti v. R.W. M.D.*** (1976), 1 B.C.L.R. 36 (S.C.), to include a broader spectrum of a shareholder's equitable rights. See ***Safarik v. Ocean Fisheries Ltd.*** (1995), 12 B.C.L.R. (3d) 342 (C.A.); ***Pasnak v. Chura*** 2004 BCCA 221.

[83] In ***Safarik,*** Southin J.A. commented on the "just and equitable" test at ¶84:

> … if the acts of the other members are such that it is "just and equitable" to wind up a company under the winding-up provisions, those acts, if they are "acts of the company or resolutions of the members", are also, by their nature, "unfairly prejudicial" to the shareholders' rights as such. To put it another way, there are "equitable" rights of a shareholder as well as the legal rights given to him by the articles of association. To use or rely upon the articles of association

in a manner which "unfairly prejudices" his equitable rights may be a ground for relief.

[84] Equitable considerations include the concept of fairness. As MacFarlane J. noted in ***O'Neill v. Dunsmuir Holdings (New Westminster) Ltd.***, [1980] B.C.J. No. 47 (B.C.S.C.)(Q.L.) they also include at ¶2, "… the wider question [of] whether the majority had dealt honestly and fairly with the minority in conducting the affairs of the company, or in exercising the powers of the directors."

[85] There is no requirement for a finding of bad faith or an improper motive in order to establish oppressive or unfairly prejudicial conduct. All that must be shown is that the majority has not dealt fairly and honestly with the minority. See ***Low v. Axcot Jockey Club*** (1986), 1 B.C.L.R. (2d) 123 (S.C.).

[86] Moreover, while a single incident may not by itself constitute oppressive or unfairly prejudicial conduct, it is the combination of acts that must be examined in their totality in order to determine if the shareholder's rights have been so affected. See ***Paley v. Leduc*** (2002), 30 B.C.R. (3d) 243, 2002 BCSC 1757.

[87] The essence of oppressive and unfairly prejudicial conduct is the abrogation of the reasonable expectations of a shareholder in the position of the applicant. The "reasonable expectations" standard is also applicable to a finding that it would be "just and equitable" to grant an oppression remedy.

[88] In determining a shareholder's reasonable expectations, the court must apply a modified objective test. This test requires objectively identifiable expectations that a shareholder in the applicant's position reasonably would expect to have. Identifying these reasonable expectations is the starting point in determining if conduct was oppressive or unfairly prejudicial. See ***Urquart v. Technovision Systems Inc.*** 2002 B.C.S.C. 172, aff'd 2003 B.C.C.A. 45, ***Naneff v. Con-Crete Holdings Limited et al*** (1995), 23 O.R. (3d) 481 (C.A.).

[89] The following circumstances are examples of a shareholder's reasonable expectations giving rise to a finding of oppressive or unfairly prejudicial conduct: (i) unequal repayment of shareholder loans to the preference of one shareholder, contrary to the shareholders' agreement (***Rooke v. Rodenbush***, [1993] B.C.J. No. 628 (S.C.)(Q.L.); (ii) exclusion of a shareholder from participation and management in a business, contrary to the arrangements which previously had existed between the principals (***Naneff v. Con-Crete Holdings Limited et al***, *supra;* (iii) treating a company as a sole proprietorship by failing to account for

corporate funds in a timely manner, unauthorized use of corporate funds for personal expenses, and failure to obtain a shareholders' resolution on the principal's salary (***Brokx v. Tattoo Technology Inc.***, 2004 B.C.S.C. 1723; and, (iv) failure to follow the statutory requirements for corporate governance (***Burdeny v. K & D Gournet Baked Foods and Investments Inc.*** (1999), 48 B.L.R. (2d) 16 (S.C.)).

[90] Examples of a court having determined that it would be "just and equitable" to grant relief under s. 227(3) from conduct that was unfairly prejudicial include: (i) the loss of confidence and inability to communicate with one another, where the termination of a minority shareholder's employment was inextricably interwoven with his position as an officer and director, and the business was in fact a partnership operated under the guise of a private company (***Mroz v. Shuttleworth*** (1996), 30 O.R. (3d) 205)(Ont. Ct. Gen. Div.); (ii) unequal repayment of shareholders loans and the failure to repay shareholders loans within a reasonable period of time (***Mroz,*** *supra*); and, (iii) exclusion of a shareholder from continued participation in the management of a business, contrary to past practice (***Safarik,*** *supra* at ¶94-95.)

(iii) Seeking leave to bring a derivative action

[91] In the absence of a finding of oppressive or unfairly prejudicial conduct, an applicant shareholder may seek leave to bring a derivative action on behalf of the company in order to correct a wrong done to the company.

[92] Section 233(1) of the ***BCA*** requires that in order to bring a derivative action, the applicant shareholder must have made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceedings, given notice of the application for leave to the company and to any other person the court may order, acted in good faith in pursuing such an action, and established that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[93] Bringing an action for an oppression remedy at the same time as a derivative action is not necessarily indicative of bad faith. Dillon J. addressed this issue in ***Carr v. Cheng*** (2005), 3 B.L.R. (4th) 5, where she stated at ¶22:

> The balancing between potential relief and inconvenience to the company involves consideration of the amount of the potential claim to ascertain whether the alleged misconduct materially affects the company (*Primex* at para. 40). The "reasonable prospect" test weeds out those potential actions that are frivolous or vexatious or that are bound to fail (*Primex* at para. 39; *Drove v. Mansvelt,* [1998] B.C.J. No. 497 at para. 31 (S.C.)).

V. Application of these principles to this case

[94] Mr. Walker's allegations of misconduct in the management of the Allies Group are strongly denied by Ms Betts. Many of Mr. Walker's complaints relate to events that transpired while he was still employed by the Allies Group and which he ratified by signing consent resolutions at each year-end up to 2004. As previously noted, it is not possible in a summary trial to resolve the numerous disputed allegations of fact by both sides, including whether Mr. Walker was constructively dismissed or voluntarily resigned his employment, in the absence of cross-examination of the deponents on their affidavits. If either party is intent on pursuing those allegations, those matters must be referred to trial.

[95] Some of Mr. Walker's complaints regarding the decisions made after his departure have been resolved. For example, earlier difficulties he experienced in accessing corporate documents have since been rectified. Moreover, difficulties he may have experienced in selling his shares are exacerbated by the lack of a shot-gun clause in the shareholders agreement.

[96] However, the ongoing disputes between Mr. Walker and Ms Betts are indicative of an inability to continue in a business relationship. Both acknowledge this impasse and both agree that it would be "just and equitable" to remedy the breakdown in their relationship by ordering the respondents to purchase the petitioners' shares in the Allies Group. To that end, a valuation of the petitioners' shares is underway and will be the subject of a further hearing if the parties are unable to agree on an amount.

[97] A determination that the respondents' conduct has been oppressive or unfairly prejudicial to the petitioners' shareholders' rights could impact any agreement or adjudication of the shares' fair market value. In light of Mr. Walker's ratification of the Allies Group's conduct before his departure, in my view, the court's primary focus must necessarily be on Mr. Walker's reasonable expectations of the treatment of his shareholder's loans and on events that occurred after he left the Allies Group.

[98] Mr. Walker and Ms Betts both agreed in 2000 that each would withdraw $500,000 from their respective shareholder's loan accounts. This agreement was triggered by Ms Betts' immediate need for that amount in order to resolve the outstanding claims in her divorce action. Mr. Walker consented to her receiving the first $500,000 in 36 equal instalments provided he receive that same amount in a similar manner upon payment in full to Ms Betts. Payments were started to Mr. Walker but abruptly stopped in March 2004 as the parties'

relationship deteriorated.

[99] Ms Betts relies on a number of factors to support her decision to terminate Mr. Walker's shareholder loan repayments. First, she states that while the Allies Group profit margins have improved, cash flow has not. She further states that at this time the Allies Group, in spite of its improved profitability, has a cash flow problem as reflected in Allie's increasing line of credit. She further states that it is within management's authority to determine when it is best to repay a shareholder's loan and that she and her management team, which include senior employees under her control, have determined that now is not the time. Lastly, she submits that while her failure to complete the terms of the agreement she made with Mr. Walker may give rise to a breach of contract claim, it does not affect his rights *qua* shareholder and therefore cannot constitute oppressive conduct.

[100] In my view, however, no shareholder in Mr. Walker's position would reasonably expect such arbitrary treatment regarding his shareholder loan accounts to be fair, particularly in regard to his entitlement to the balance of the $500,000 withdrawal after Ms Betts received her money, when no efforts have been made by Ms Betts to settle on a time frame in which the agreement might be completed. Moreover, in circumstances where Mr. Walker's share of the corporate profits continue to be reinvested in order to fund what has become Ms Betts' business venture, the decision to terminate Mr. Walker's shareholder loan repayment up to $500,000 was not, in my view, "just and equitable". That decision was primarily to the benefit of Ms Betts' shareholdings given that the corporate profits, which have since increased, are now distributed based on shareholdings rather than employment.

[101] Mr. Walker's shareholder loans with Allie's and Grotek are high-risk capital in that they are unsecured and subordinated to other debt. Without his consent they continue to support and contribute to the Allies Group working capital needs. In that manner they strengthen the Allies Group share values, which accrue proportionately in Ms Betts favour.

[102] Ms Betts relies on a narrow interpretation of corporate governance procedures to legitimize her decision to cease Mr. Walker's shareholder loan repayment. However, that decision was manifestly prejudicial to Mr. Walker's interests *qua* shareholder. To suggest that his remedy for that unilateral decision must be in contract raises the question of whether such conduct, when examined as a whole, is oppressive or unfairly prejudicial.

[103] The value of Mr. Walker's shares is also affected by Ms Betts unilateral changing of the manner in which the Allies Group's corporate profits are distributed. Her claim that bonuses for employment were made in error and should have been distributed based on shareholdings from the outset, which she claims to have discovered only after Mr. Walker left the Allies Group, is both disingenuous and smacks of revisionism. Bonuses to employees, which are tax deductible to the corporation and tax payable by the employee, are not necessarily or even commonly distributed *pro rata* based on shareholdings. This is especially the case in closely-held corporations exhibiting a *de facto* partnership business model. Given Ms Betts' role as the Allies Group's financial leader and Mr. Walker's role as its marketing leader, I find it improbable that Ms Betts would not have been aware of the equal distribution of corporate profits between 2001 and 2004 before their business relationship had irrevocably broken down. It may be that Mr. Walker's departure from the Allies Group and his correspondingly diminished contribution to its operation are grounds to change the manner and percentage of the profit distribution. That, however, is a separate issue to be considered within the corporate governance procedures of the Allies Group.

[104] Ms Betts' continued reinvestment of Mr. Walker's share of the corporate profits without his consent also affects his interests as a shareholder. It is not objectively reasonable that, given the previous business model of the Allies Group, Mr. Walker now would expect his share of the corporate profits to continue to finance the Allies Group after his departure. Nor is it reasonable that Mr. Walker would expect that arrangement to continue, under no terms for interest or repayment, in order to increase the Allies Group sales and profitability, ultimately to the benefit of Ms Betts as the majority shareholder.

[105] Ms Betts claims that her "casting vote" as the board chairman under the articles of association, and the past practice of ratifying management's decisions by consent resolutions which waived the corporate governance criteria, justify her decisions. However, no board meetings or annual general meetings were held because none were called by Ms Betts. Absent meetings, her claim stands as a procedural illusion, and in my view are indicative of a failure to deal fairly and honestly with Mr. Walker.

[106] Shareholders in a corporation have two basic rights, both of which, to be exercised, require an annual general meeting. First, shareholders choose the board of directors that manages the corporation. Second, they decide whether or not to have an audit of the corporation's financial statements. By declining to call an annual general meeting, either as board chairman or as President, Ms Betts denied Mr. Walker his rights as a shareholder in the Allies Group.

[107] Ms Betts asserts that Mr. Walker should not be granted an oppression remedy based on what is "just and equitable" where he has not acted equitably. She submits that by working for a competitor business and by taking a copy of Grotek's secret mixing formulas from the corporate premises Mr. Walker does not come to court with clean hands.

[108] Whether Mr. Walker was marginalized in the management of the Allies Group and thereby squeezed out of the business, or whether he left voluntarily, cannot be determined in this forum. Similarly, Ms Betts' allegation that Mr. Walker left the Allies Group in order to work for a competitor business is also disputed by Mr. Walker and cannot be resolved in this hearing. However, in my view, it is not surprising that when his disability payments ran out Mr. Walker looked for work in his field of expertise. That search reasonably took him to a competitor business. Nor is it surprising that he would take with him a copy of Grotek's formulas, which he created. Sharing those formulas in any way with a competitor business would be actionable. There is no allegation that he has done so and he denies any such improper purpose.

[109] In looking at the cumulative effect of the respondents' undisputed conduct, I am satisfied that it has been oppressive and unfairly prejudicial to Mr. Walker's interests as a shareholder in the Allies Group. The effect of that conduct has detrimentally impacted Mr. Walker's and Sunergy's minority shareholdings to the benefit of Ms Betts and 354's shareholdings.

[110] I am also of the view that Ms Betts' failure to give Mr. Walker an opportunity to address his complaints through the corporate governance procedure mandated by the ***BCA,*** especially in light of the breakdown of their business relationship, makes it "just and equitable" to grant Mr. Walker an oppression remedy. As in ***Safarik,*** Ms Betts' use or reliance on the articles of association to avoid calling a directors and annual general meeting, "unfairly prejudices" Mr. Walker's equitable rights as a shareholder and specifically his reasonable expectation that statutory corporate governance will be complied with.

[111] In the result, there shall be a declaration pursuant to s. 227 (2) of the ***BCA*** that the affairs of the Allies Group are being conducted in a manner oppressive and unfairly prejudicial to the petitioners and for an order under s. 324 (3) (b) of the ***BCA*** that it would be just and equitable to grant an oppression remedy under s. 227(3) of the ***BCA***.

VI. The remedies

[112] I propose to adjourn the matter of the appropriate remedy or remedies for a period of six weeks. During that time I encourage the parties to make every effort to reach an agreement on a buy-out of the petitioners' shares. Failing such an agreement, I propose to seize myself of the balance of the relief claimed in the petition, including the petitioners' application for certain interim relief and the appointment of a receiver-manager to oversee the affairs of the Allies Group, until a further hearing can be held on the value of the petitioners' shares and/or any other appropriate oppression remedies.

[113] In view of the finding of oppressive and unfairly prejudicial conduct on the part of Ms Betts, I find it unnecessary to decide the petitioners' application for leave to commence a derivative action.

[114] The parties have liberty to speak to the issue of costs.

"D. Smith J."

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D. Smith J.