BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
Civil Division

No. 532 of 2008

IN THE MATTER OF TROPIC ICE UNLIMITED INC. Company No. 16319 registered in accordance with the provisions of the Companies Act, Cap 308 of the Laws of Barbados

IN THE MATTER OF THE COMPANIES ACT, CAP 308 OF THE LAWS OF BARBADOS

AND IN THE MATTER OF SECTION 373 AND SECTION 228

Between

ICEBERG INVESTMENTS INC.	**PLAINTIFF**
-AND-	
TROPIC ICE UNLIMITED INC.	**FIRST DEFENDANT**
ICE HOLDINGS INC.	**SECOND DEFENDANT**

Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2013: May 13, 14, 15 and 17;
2014: November 17;

Mr. Leslie F. Haynes Q.C., in association with Mrs. Denise Haynes for the Plaintiff

Mr. Roger C. Forde Q.C., of Messrs Carrington and Sealy for the Defendants

DECISION

[1] This application is yet another step in the continuing corporate battle between these two parties. It is an application by **Iceberg Investments Inc**. ("Iceberg") as a shareholder of Tropic Ice Unlimited ("Tropic Ice") for an "oppression remedy".

[2] The claim filed, 8th April 2008 is brought under **sec. 373 (1)(a)** of the ***Companies Act,*** **Cap 308 of the Laws of Barbados** on the grounds that:

(i) The conduct of the business and affairs of the company have been carried on or conducted in a manner which was oppressive and unfairly prejudicial or unfairly disregards the interest of the Shareholder/Applicant; and

(ii) It is just and equitable that the company be liquidated and dissolved because there is effective deadlock in the management of the company and there is loss of confidence and a lack of mutual trust and respect between the shareholders of the Company.

BACKGROUND

[3] Up to 1998, the principles of these parties each operated their own company involved primarily in the manufacture, distribution and sale of ice in this jurisdiction. Tropic Ice Limited (now Iceberg Investment), was owned and operated by Angela and Michael St. John. Ice Unlimited Company Limited was owned and controlled by Christopher McHale. The two were long-standing competitors in the ice making business, and additionally, Ice Unlimited, also produced bottled water for sale. These two then competitors, now sworn enemies, made the most unfortunate decision to merge their ice producing companies into a single entity, Tropic Ice Unlimited ("TIU"), which was incorporated in Barbados is 1998. Its main business was the manufacture and distribution of ice, and it also produced bottled water. These and the following facts are without dispute.

[4] Upon merger an equal number of shares were issued to Iceberg Investment and Ice Unlimited by a resolution of the company's directors passed at a meeting held on 21st December 1998. Pursuant to this resolution, both Iceberg and Ice subscribed for and received 5,000 common shares. The meeting in question also referred to an Agreement dated 16th December 1998 by which TIU sought to purchase equipment, machinery and other assets of its shareholding companies, although this Agreement appears not to have made it among the substantial exhibits before the Court.

[5] Four corporate directors were appointed to run the Company. Two of these, Southern Management Inc. and Iceberg Investment, were controlled by the St. Johns. The remaining two, Ice Unlimited and Woodbank Investments Ltd, were controlled by Mr. McHale. All the elements were now in place for a deadlock in the management of this venture should a dispute arise among the primary players.

[6] It was perhaps because the parties all recognized the potential for deadlock that they decided to implement a Unanimous Shareholders' Agreement aimed at ensuring the harmonious operation of the Company. This Agreement delineates their respective duties and obligations and, thus, their expectations and must therefore be considered with some care.

The Unanimous Shareholder Agreement

[7] The Unanimous Shareholder Agreement ("USA"), dated 30th December 1998, stipulated the obligations owed by the Plaintiff and the Second Defendant "with respect to the Company and each other in respect of their shareholding in the Company".

[8] The USA contained clauses divided into the following sections: (i) general provisions; (ii) capital contribution, (iii) the number and type of shares, (iv) income and expenditure; (v) conduct of the Company's affairs; (vi) management of the company; (vii) the transfer of shares; (viii) special sale provisions; (ix) acts requiring unanimous consent; (x) termination of agreement and (xi) other contractual provisions.

[9] Clause 5.01(a) listed the four directors of the company who were mentioned earlier above. Under that clause, the parties also agreed to ensure that the directors in question were elected and remained in office for the currency of the Agreement. Clause 5.01(d) stipulated that four directors present in

person constituted the quorum for a meeting of directors, while two shareholders present in person or by proxy were to be the quorum for a shareholders' meeting.

[10] Clause 6.02 and 6.03 listed the persons appointed as officers of the company. Christopher McHale was appointed to the positions of Secretary and Chairman and was also given responsibility for accounting, administration, banking, insurance and taxation. Michael St. John held the post of Managing Director and was specifically charged with overseeing production, maintenance and repairs.

[11] The parties agreed by clause 6.04 to exercise their powers in relation to the Company so as to ensure, *inter alia*, that:

(a) the Company's business was conducted in a proper and efficient manner and for its own benefit;

(b) all business was transacted on arm's length terms;

(c) the Company shall keep books of accounts and therein make true and complete entries of all its dealings and transactions of and in relation to its business;

(d) it shall also prepare its accounts in respect of each accounting reference period as required by statute and ensure that such accounts are audited as soon as practicable and in any event not later than four months after the end of the relevant accounting reference period;

(e) the Company shall keep all of its shareholders fully informed as to its financial business affairs;

(f) the parties and Directors shall use all reasonable and proper means in their power to maintain improve and extend the business of the Company and to further the reputation and interests of the Company.

[12] The agreement contained a non-competition clause which provided as follows:

> *6.05: No shareholder shall engage in any competing business while a shareholder of the Company or in the event they cease to be a shareholder for a minimum of then (10) years from the date they cease to be shareholders.*

[13] The Agreement also sets out by Clause 9.01 the acts which would require the unanimous consent of the shareholders as evidenced by a resolution in writing. These acts are as follows:

(i) increasing or decreasing the number of directors;

(ii) declaring or paying any cash or stock dividends to any shareholder;

(iii) making cash loans or advances to, investing in or giving security for or guaranteeing the debts of any shareholder or any other person;

(iv) paying salaries, fees or bonuses to any directors, officers or shareholders;

(v) borrowing any money or increasing overdraft or banking facilities;

(vi) altering, amending or repealing the by-laws of the Company;

(vii) transferring, assigning, selling, gifting, mortgaging, pledging or otherwise disposing of any shares;

(viii) issuing or allotting additional shares;

(ix) selling, buying, leasing exchanging or disposing of any equipment or other fixed assets having a value over $50,000.00;

(x) increasing, reducing, converting, redeeming, subdividing or consolidating any capital of the Company;

(xi) dissolving or winding-up the company;

(xii) delegating any of the powers held by directors;

(xiii) varying any shareholder rights;

(xiv) assigning, mortgaging, charging or pledging any shareholder loans or share;

(xv) commencing any material legal or arbitration proceedings; and

(xvi) entering, terminating or varying an employment contract with an employee earning $40,000.00 or more per annum.

[14] Finally, the agreement provided two ways to deal with deadlock. Firstly, in clause 5.01(b) it provided for the appointment by "unanimous consent" of a "non-voting consultant" who could advise the company and help to resolve disputes, should it prove necessary. Secondly the parties were required to resolve disputes that could not be resolved by alternative dispute resolution

in the form of either a single mediator or a mediator selected by each. It is only after the dispute cannot be resolved through mediation that the parties were to proceed to litigation.

The Disputes

[15] Very early on, the parties began experiencing difficulties working together. The evidence of these disputes is contained in the affidavits of the parties and further elucidated in their oral evidence.

[16] One of the central points of dispute surrounds the payment of rent by TIU to its landlord, **Madj Investments Ltd**. Matters were complicated by the decision of the shareholders to operate TIU from premises situated in Salters in the parish of St. George that were owned by Madj Investments Limited, a company owned and operated solely by the St. Johns. The reason for the decision may have been the fact that the property leased had been a new ice factory constructed by the original Tropic Ice Limited prior to the merger. In any event, by this decision, the St. Johns, as directors and shareholders in Madj, essentially became their own landlords as they were also directors and shareholders in Tropic Ice.

[17] The decision to lease from **Madj** was jointly made and effected by a lease dated 30th December 1998, although the Plaintiff through the evidence of Michael St. John alleges that McHale was the sole architect of its terms. While there was consensus on renting its business premises from Madj, there was no consensus on the interpretation of the terms of the lease by which it was to do so, particularly with respect to the operation of the rent review clause. Madj sought to increase the rent as it believed itself authorized to do, TIU disagreed and on the instructions of McHale, the increase and rent was not paid. TIU alleges that part of the reason for its lapse in payment was the unauthorized attempt of Madj to increase the rent in September, 2004 and the unwillingness of Iceberg to even consider moving to alternative premises.

[18] The payment of rent to Madj was, however, far from the only source of discord. The parties also disagreed about the value of fixed assets contributed by each shareholder to TIU, precisely what property was leased to TIU by Madj, who should be appointed General Manager, whether management fees should be paid to the Managing Director, the payment of wages to Angela St. John who was employed to assist the General Manager,

and many other matters, which were largely ventilated when the parties went to arbitration.

Arbitration

[19] The parties duly proceeded to arbitration under the USE, appointing Anthony Ellis as the sole arbiter and agreeing that the decision would be final. Mr. Ellis delivered his rather damning decision by letter dated 16th April 2007. Needless to say, it proved not to be final at all, for here we are again.

[20] After an exhaustive eighteen point examination of the disputed issues, Mr. Ellis, in commenting on the proposed divestment of McHale's interest in TIU, was clear that there was a "… complete breakdown in the relationship between the two shareholders... causing significant damage to the company." He was doubtful that mediation would work and he urged that the parties come to some agreement to buy out each other. He also recommended that a professional accounting firm be retained to value the respective interests in the company, and warned, somewhat prophetically, that the parties were well advised to separate from each other or face continuing disputes with a very negative result for the company.

[21] With regard to the specific complaints made by the parties he dealt with them at length. I shall pinpoint only the major issues.

[22] In relation to the lease between Madj and TIU and the dispute over the rent review, Mr. Ellis decided that a fair monthly rent for the property occupied by TIU was $30,000, and not $35,000 as Madj claimed.

[23] Secondly, with regard to monies that Mr. McHale had taken from the company without authorisation, on the excuse that Mr. St. John was not paying for electricity used, Mr. Ellis ordered that the monies be repaid to TIU by May 2001, failing which interest would accrue at the prime lending rate.

[24] Thirdly, Mr. Ellis found that Mr. McHale (Woodbank) was also indebted to TIU in the sum of $21,414.35 as a result of monies paid by TIU on his behalf. This sum was not disputed and was also to be repaid by 11th May 2007 or accrue interest.

[25] Fourthly, he found that it was inappropriate for either party to make claims for specific work done with regard to the company, on the basis that they each as was usual in such mergers brought different skills to running of the

company, and that further he had not been provided with any evidence of the value of the work. He also denied as inappropriate St. John's claim for against TIU of $20,000.00 monthly for management expenses and directed that these funds should be refunded. He found that balances were due by TIU to McHale and St. John but that these figures should be adjusted in light of the findings in the report.

[26] As the Court noted before, the judgment largely fell on deaf ears. The undisputed evidence reveals that Mr. McHale has paid back some of the money, Mr. St. John has paid back none. Shortly after the decision was given, Mr. St. John resigned as managing director and then refused to attend any more of the shareholders meeting. He went on to form **Glacial Ice Barbados Ltd.** in 2008, in direct competition to TIU bottled water business. A rancorous and somewhat distasteful round of correspondence between the parties followed, more, it seems to the court to give vent to personal spleen than to achieve any real settlement.

[27] The efforts that were actually made to reach a settlement by one party buying out the other were singularly unsuccessful. The parties disagreed on price and other matters and at the time of trial each shareholder retained his respective shares.

ISSUES

[28] The broad issue before the Court is whether in the circumstances of this case it is just and equitable to order the winding up or liquidation of Tropic Ice Unlimited Ltd. on the basis of conduct that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the Plaintiff as shareholder or former director.

[29] In particular the Court must address the following:

(i) Does the conduct of which the Iceberg complains amount to conduct which oppresses, unfairly prejudices or unfairly disregards Iceberg's interests as a shareholder of TIU?

(ii) Does a deadlock exist in the management of TIU and has there been a justifiable loss of confidence in its management?

(iii) Is it therefore just and equitable in the circumstances for the Court to order the dissolution of TIU or should the Court exercise its

discretion to grant alternative relief in the form sought by the Defendants?

(iv) As Iceberg accepts that his conduct has not been without fault, should the Plaintiff be denied the relief he seeks on the basis of his failure to come to the Court with clean hands?

[30] It is the case for Iceberg that all the evidence suggests that the behaviour of TIU's present management establishes that TIU's affairs have been and will continue to be carried out in a manner oppressive or unfairly prejudicial to Iceberg as shareholder to the extent that the company should be wound up.

[31] TIU, through their counsel Mr. Forde Q.C., argues that the evidence does not support anything more than personal disputes between McHale and the St. Johns. In any event, even if there was some small measure of oppression the proper order of the court would be to appoint a receiver to conduct a valuation of the assets of TIU, set up the assets and business of Tropic Ice as a going concern with each shareholder at liberty to purchase the same.

THE EVIDENCE

[32] The evidence in this case consisted of voluminous affidavits from both sides, as well as oral evidence. The summons was supported by a dozen affidavits filed on behalf of the Plaintiffs, predominantly by Michael St. John, and two by his wife, Angela. In resisting the application, the Defendants filed half as many, all but one (that filed by Clifford Nolan) filed by McHale. All parties were tendered for and cross examined. Much of the evidence was irrelevant, circulatory and confusing. The cross-examination of the St. Johns and McHale added very little. What is clear to the Court is that while the St. Johns were actively involved in the running of this company, dispute followed dispute. The parties do not deny the long history of antagonism and hostility. Much of it is set out in the arbiter’s report which is agreed and part of the record.

[33] St. John gave evidence of the following circumstances which was characterised by Mr. Haynes Q.C. as illustrating the absence of fair dealing on the part of the Defendants was evident from the following incidents, which also illustrated unfair prejudice and unfair disregard of the interests of the Plaintiff:

(i) **Withdrawal of $132,457.57 from TIU's account**: Mr. McHale withdrew it from the TIU's company account and deposited it within the account of Woodbank Investments, a company of which he was director, contrary to a unanimous resolution passed in January 2005 that no drawings were to be taken by any director.

(ii) **Using company funds to pay for the expenses of Ice Holdings:** Mr. McHale withdrew and has not yet repaid the sum of $179,588.60 from the funds of TIU on May 27, 2009 allegedly to pay for the legal representation of the First Defendant and Ice Holdings Inc. in what was a shareholder dispute. According to Mr. Haynes, this withdrawal was a clear example of oppression because the withdrawal was made while SMI and Iceberg were still directors but the withdrawal conducted by small sums was deliberately designed to evade the necessity of seeking their authorization;

(iii) **Abuse of position**: It was alleged that Mr. McHale used his position as the officer responsible for accounting, administration, banking, insurance and taxation to access and employ the funds of TIU to further the interest of ICE and to the detriment or at the expense of the other shareholder, Iceberg;

(iv) **Absence of Financial Statements:** It was further alleged that Mr. McHale used his position as the officer responsible for accounting, administration, banking, insurance and taxation not to issue financial statements for a number of years; and

(v) **Lack of Information:** It was contended that Iceberg had sought to obtain information on the whereabouts and nature of the Defendant's business following its eviction from the premises at Salters, St. George but that no information had been forthcoming in clear disregard of the Plaintiff's right as shareholder to have information on the company.

The Defendant company at no time has argued that Mr. McHale has acted without authority.

[34] The Court has been asked to consider the financial viability of the Company. In his evidence, McHale asserted that within 14 months of its operation TIU was "highly successful, profitable and became well established" as a result

of the joint efforts of McHale and St. John. He pointed out that there were cash surpluses for the years ending 2003 and 2007, and contended that the company continued to operate as a going concern and maintained during cross-examination that TIU was a viable company and for that reason should be sold as a going concern.

[35] Mr. St. John on the other hand while accepting that the company may at one time have been profitable, and agreeing that it is still functioning, gave evidence that the company is no longer able to compete effectively. In his affidavit he expressed concern that the Company was now insolvent and attached audited financial statements to establish this.

[36] Audited statements for the financial years ending 31st December 2004, 31st December 2005 and 31st December 2006 respectively were indeed provided, compiled by chartered accountant Carlyle Forde. These statements reveal that as at 31st December 2004 the company had an accumulated deficit of $1,780,638 with liabilities of exceeding these by $1,770,638.

[37] At 31st December 2005, the accumulated deficit grew to $2,030,389 and increased even further to $2,263,202 in the period ending 31st December 2006. Meanwhile the liabilities also continued to rapidly exceed the assets first from $1,770,638 in 2005 then to $2,020,389 in 2006. Mr. St. John could take no comfort in the observation of the auditor that these factors "cast doubt on the ability of the Company to continue as a going concern.

[38] In contrast, to demonstrate the current financial position of TIU, Mr. McHale provided unaudited management accounts prepared by Joanne Kinch, TIU's accountant. These accounts are of little help to the Court. Firstly, Mr. McHale expressed unfamiliarity with his very exhibits, despite his accounting background, and did not call Miss Kinch to explain them.

[39] Secondly, the accounts are not only unaudited, but not comprehensive. Mr. Haynes Q.C., in his cross examination of Mr. McHale, pointed out that the money owing to Madj had not been included although it had been mentioned. The accuracy of the statements have been challenged by Mr. Haynes, and rightly so. Mr. McHale himself admits that the company was last audited in 2007 or 2008.

[40] The financial status of the Company is critical to the Court's determination of the most appropriate remedy, and I am unable to say on the evidence before me that that the financial future of TIU was any other than grim.

[41] The Court also accepts the findings of the arbitrator that both Mr. McHale and Mr. St. John have withdrawn or misappropriated money belonging to TIU without authorization. Mr. McHale's defalcations were greater than Mr. St. John's but in principle neither can mount any moral high horse on this race. Likewise with regards to the shareholder agreement, both have breached it with impunity.

[42] The issue of deadlock also arose for determination. Mr. St. John for the Company gave evidence that there was what can only be characterised (according to his Counsel) a state of deadlock between the shareholders. The shareholders could not agree on anything. Some of these disagreements, the Court notes occupied this court to the point of litigation, in which I have issued previous orders and judgments. Mr. McHale agreed as much on cross-examination, but in re-examination went on to qualify his statement by stating that the deadlock was limited to the issue of whether the company should wind up and that it was not deadlocked in respect of management. Mr. McHale, in his evidence said that he could not accept that the shareholders could not act together. He pointed out that the present management proceeded smoothly ever since Mr. St. John resigned and started operating his new company, and indicated that Mr. St. John since that date had no further involvement in the company.

[43] It is clear from the evidence before the Court that the parties could reach no agreement on whether the company should be wound up. It is equally clear that they could not decide who should purchase the shares of the other.

[44] Given the undisputed evidence of the parties, the Court rejects Mr. McHale's definition of deadlock as limited to the winding up issue. While the company was still operational, this was only because Mr. St. John had abandoned any effort at involvement, for precisely the reasons and with the effect prophetically foreseen by Mr. Ellis in his decision. Iceberg remains a shareholder, and the Company is therefore operating in breach of its articles.

[45] I turn now to the motivation of Mr. St. John in bringing this action, which was impugned by counsel for the defendants as being self-serving and sinister. Under cross-examination, Mr. St. John admitted to forming the company, **Glacial**, in competition to TIU's bottled water business. He agreed that the liquidation or "disappearance" of TUI would be beneficial to his new company, but denied that this was the motivation behind Iceberg's

application. The Court is inclined to believe him. The dispute between these parties is far too substantial to be relegated to an attempt to gain a competitive edge. I am satisfied that he is genuinely pursuing a remedy for the reason he gives.

THE OPPRESSION REMEDY

[46] I turn now to the applicable law which delineating the parameters of my exercise of the discretion under the Companies Act. What is the nature of the remedy which Iceberg seeks, and in what circumstances is it granted?

[47] ***Section 373*** of the ***Companies Act,*** **Cap 308 of the Laws of Barbados ("the Act")** under which this action is instituted states:

(1) The court may order the liquidation and dissolution of a company or any of its affiliated companies upon the application of a shareholder:

(a) if the court is satisfied that, in respect of a company or any of its affiliates

(i) any act or omission of the company or any of its affiliates effects a result,

(ii) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interest of any shareholder, debenture holder, creditor, director or officer; or

(b) if the court is satisfied that

(i) any unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the company after the occurrence of a specified event and that event has occurred; or

(ii) it is just and equitable that the company be liquidated and dissolved.

(2) Upon an application under this section, the court may make such order under this section or section 228 as it thinks fit.
(3) Sections 229 and 230 apply to an application under this section."

[48] **Section 373** is contained within **Part IV** of the Act which is concerned solely with winding-up. Although it is contained within the segment of the Act devoted to the winding-up and dissolution of companies and not within the section entitled "Restraining Oppression", which is located within **Part I** of the ***Companies Act*** in **Division L: Civil Remedies**, it is clear from the content of **section 373** that it is connected to **section 228** of that part and thus forms part of the oppression remedy available to shareholders under the statutory scheme established by the ***Companies Act***.

[49] The court notes the following in regard to this remedy; firstly, it is a purely statutory discretionary remedy which enables shareholders to escape the rigours of the common law rule established in ***Foss v Harbottle*** **(1843) 67 ER 18**. The powers granted to this court to make orders under 228 and 373 (1) are not available under the common law. The remedy does not, of course, alter the basic principle of majority rule and the Court will not allow it to be used by the minority to manipulate or oppress the majority: See ***Mason v. Intercity Properties,*** **37 B.L.R. 6, 29 (Ont. C.A. 1987)**.

[50] Secondly, the purpose underlying the enactment of these sections was to protect shareholders from conduct that may be oppressive or that may be unfairly prejudicial to or that unfairly disregards their interests. The **Supreme Court of Canada** made this clear when it stated that the remedy "focuses on harm to the legal and equitable interests of [shareholders] affected by oppressive acts of a corporation or its directors": ***Re BCE Inc*** **(2008) 52 B.L.R. (4th) 1 (S.C.) at para 45**. The claim itself, unlike a derivative action, is instituted by a shareholder in its personal capacity: ***Goldex Mines Ltd. v. Revill*** **(1974), 7 O.R. (2d) 216 (C.A.)**.

[51] Thirdly, the remedies available to the shareholders in question are equitable in nature; the statutory regime for restraining oppression has been described as "*a broad and flexible tool, designed to protect the interests of corporate stakeholders in a variety of corporate circumstances*": *Peterson, Shareholders' Remedies in Canada (Toronto, 1989)* cited in **Burgess**, *ibid*.

[52] Like **section 248**, **section 373** also likely traces its origin to the ***Canada Business Corporations Act,* 1976**. That act has now been amended and a comparable provision is contained within **section 214** of the ***Canada Business Corporations Act,* 1985**.

Locus Standi

[53] Unlike **section 248**, however, an application under **section 373** is restricted solely to shareholders as defined in **section 448(h)** of the Act rather than the categories of persons included under the definition of complainant under **section 225**. A shareholder, as defined under the Act, includes the beneficial owner of shares, the personal representative of a deceased shareholder and the trustee in bankruptcy of a bankrupt shareholder.

[54] It should be pointed out that **section 373(1)** does not qualify the shareholders to whom the remedy is available as minority shareholders. Accordingly, the remedy is not restricted to shareholders who hold fewer shares than those who are said to have engaged in conduct which oppresses (which term is used so as to include unfairly prejudices and unfairly disregards) the interests of the complaining party. The size of shareholding has no bearing on whether a shareholder can access this remedy or, indeed, on whether a shareholder has been oppressed, although it may well affect the ability of a shareholder to demonstrate the oppression on which he relies: ***Jabaco Inc. v Real Corporate Group Ltd* [1989] O.J. No. 68 (Ont. H.C.) para 18, per Doherty J**. A shareholder holding exactly the same number of shares as the shareholder of whose conduct he complains will therefore not be denied standing on that basis.

[55] The Plaintiff in this matter is a shareholder of half of the common shares issued in TIU; no issue therefore arises or has been taken as to its standing to bring an application under **section 373**. The Court notes, however, that in order to avail itself of the relief provided by the Act, the conduct complained of must affect the applicant in the capacity in which he is entitled to complain. Accordingly, as the action is brought under **section 373** in order to succeed Iceberg must establish that the conduct of which he complains has an effect upon it in its capacity as shareholder of TIU: ***Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All E. R. 492 at p. 505, per Lord Cross**. A personal grievance against Mr. McHale will not suffice.

The Applicability of the "Clean Hands" Maxim

[56] The wording "just and equitable" that governs the Court's discretion under **section 373** of the Act suggests that the jurisdiction of the Court is equitable in nature, which in turn raises the question as to whether a person beseeching the Court to exercise its powers should come to it with clean hands and therefore be denied the remedy he seeks where he himself has acted improperly in his relationship with the Company.

[57] In this case both parties bear some degree of culpability for the issues which have arisen with regard to the Company. Mr. St. John for his part admits this freely, Mr. McHale does not. Instead, his counsel has argued that the remedy sought by the Plaintiff should be denied since "he who comes to equity must come with clean hands". Thus, he argues, the Plaintiff having admittedly contributed to at least some of the circumstances requiring its recourse to section 373 cannot succeed.

[58] The principle is well enunciated in ***Baxted v Warkentin Estate*** **23 B.R. (4th) 193, [2007] 3 W.W.R. 531**, where the Court noted:

> "24. It is well established that in interpreting the "just and equitable" rule, general rules regarding equitable remedies apply such that a person seeking relief must come to court with clean hands (**Peterson, Dennis H.**, ***Shareholder Remedies in Canada*****, (1989), LexisNexis, Butterworths**)."

[59] On analysis of the evidence adduced, the Court went on to find that the conduct of the applicants had not been exemplary while the conduct of the respondents was not as "black" as the applicants had painted it, but it nonetheless proceeded to grant the order for liquidation sought by the applicants, despite its earlier observations on the applicability of the clean hands doctrine (See para 30).

[60] In ***Cairney v Golden Holdings Ltd*** **(1988) 40 BLR 289 at 297,** the Court had to consider whether the fraud instituted by the Plaintiff disentitled him to the relief he sought by instituting an oppression action. The Court held that it "was clear that equitable principles must apply" but continued that in order for the clean hands maxim to justify denying the applicant the relief he sought, the Court had to be satisfied that there was an "'immediate and necessary relation' between the relief sought and the delinquent behaviour in question" so as to make it unjust to grant that relief.

[61] However, the observations of the Courts in ***Baxted*** and ***Cairney*** varied greatly from that of the **Quebec Supreme Court** in ***Journet c. Superchef Foods Industries Ltd* 29 B.L.R. 206, [1984] C.S. 91**. The observations made by **Gomery J** in ***Journet*** were made in relation to **section 234** of the ***Canada Business Corporations Act* (CBCA)**, the Barbadian equivalent of which is **section 248**:

> "…the Court is not convinced that the clean hands doctrine applies to the recourse provided in s. 234. The statute does not say so or even require that the applicant be in good faith, a requirement when a complainant wishes to commence a derivative action under the C.B.C.A.: see s. 232(2)(*b*). To require perfect probity from an applicant would imply that dishonest or improper management is sanctioned if no spotless complainant may be found to request the Court's intervention. That cannot have been the intention of the drafters of this legislation. Fault on the part of the complainant cannot excuse oppression and unfairness on the part of the corporation or its directors."

[62] These observations of **Gomery J** ground the suggestion of **Markus Koehnen** in his text, ***Oppression and Related Remedies* (Thomson-Carswell, 2004) p 43** that the clean hands maxim has "no formal application to oppression". This, he rightfully stresses, does not mean that the conduct of the applicant is of no relevance. The applicant's conduct may contextualize the allegedly oppressive or unfair conduct of the Defendant and thereby influence whether the court makes any findings of oppression on the part of the Defendant. It is also a relevant factor for the Court to consider when determining how to exercise its discretion in relation to the relief sought.

[63] It is clear that the conduct of the Plaintiff, whether admitted or alleged, is relevant to the determination of whether the Defendant has behaved in an oppressive or unfairly prejudicial manner or unfairly disregarded the Plaintiff's interests. It may also be relevant to determining the most appropriate relief. It will certainly not, however, impair him from making this application or necessarily lead to the denial of the relief he seeks.

<u>The Exercise of the Discretion</u>

[64] Given the origin of our ***Companies Act*** and the extensive discussion of the oppression remedy under Canadian law, it is primarily to Canadian jurisprudence that the Court will turn to determine the approach it is to take.

[65] The Court has already noted that the relief available to a shareholder under **section 373** turns not upon strict legal rights but concepts of equity, what is deemed just and equitable in all the circumstances of a case. What is just and equitable depends of course not upon a judge's "personal standards of fairness" but upon widely accepted social values as evident from precedent and the principles underlying precedent: ***Westfair Foods Ltd. v Watt*** **(1991) 5 B.L.R. (2d) 160 (Alta. C.A.) per Kerans JA**.

[66] In considering whether the Plaintiff is entitled to the statutory relief he seeks, the Court is mindful also of the observations of **Haddad JA** of the Alberta Court of Appeal in ***Keho Holdings Ltd. v. Noble*** **(1987), 38 D.L.R. (4th) 368 at 374** where, speaking about **section 241** of the **CBCA** (equivalent to **section 373** of our Act) he observed:

> "I concur, without hesitation that these sections ought to be broadly and liberally interpreted. A broad interpretation will reflect the intention of the legislation to ensure settlement of intra-corporate disputes on equitable principles as opposed to adherence to legal rights."

[67] The adoption of a broad and literal interpretation of the sections concerning the oppression remedy will not only reflect the intent of the Legislature but are necessary in order to ensure that the sections fulfil the purpose for which they were enacted: ***Re Ferguson and Imax Systems Corp*** **(1983), 150 D.L.R. (3d) 718 (Ont. C.A.)**.

[68] With these principles in mind, the Court now turns to the approach it is required to take.

[69] In this regard, it turns first to one of the apparently few Barbadian cases which dealt with oppression, ***Cox v Roberts et al (unreported) High Court of Barbados,*** **Civil Suit No. 1948 of 2003, Decision of 29th March 2007,** where **Blackman J** pointed out at para 67 that action for relief from oppression turns upon its own facts and therefore what may be oppressive or unfairly prejudicial in one case may not necessarily be so in another.

[70] **Blackman J** in ***Cox*** also held that in determining whether oppression had occurred, the Court could either examine each act individually or view the acts as part of a whole or have regard to the acts both individually and as a whole to determine whether the act or acts in question caused oppression, thereby entitling the applicant to the statutory relief he seeks. He elected, in that case, to look at all the acts as a whole rather than examining them individually. The approach adopted by the court in ***Cox*** is the approach Counsel for the Plaintiff took in his written submissions and is no doubt the approach he urges the Court to embrace.

[71] This is not, however, the only means by which courts determine whether oppression exists and whether therefore the statutory relief should be granted. An alternative method of determining whether to grant the relief intended to restrain oppression is to "look to broader, underlying principles, usually the reasonable expectations of the parties": **Koehnen (supra) at p. 80**. For example, the **Ontario Court of Appeal** stated in ***Naneff v. Con-Crete Holdings Ltd*. (1995)23 OR (3d) 481 (CA) at 487:**

> "...when [the Court's] jurisdiction [under the oppression remedy] is being exercised, the relationship between the principals should not be looked at from a technical point of view; rather the court should examine and act upon the real rights, expectations and obligations which actually exist between the principals."

[72] In ***Re BCE Inc*** **(2008) 52 B.L.R. (4th) 1 (S.C.) at paras 54-5**, the **Canadian Supreme Court** pointed out that the categorical approach used in the first method, though useful, was problematic because the terms used in the act (oppression, unfair prejudice and unfair disregard) were mere adjectives incapable of conclusive definitions. It did not, however, go on to recommend the second approach which involves examining the principles underlying and uniting these different categories of approach. Rather, the Court believed it more suitable to combine the first approach with the second and create a two-step test:

> "56. In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the

> oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*."

[73] Similarly **Professor Burgess (now Burgess JA)** in his text, on the basis of cases other than ***Re BCE Inc*** describes "protected interests" (which are essentially reasonable expectations) and actionable conduct (conduct that is oppressive) as being "the two central foci in determining entitlement to the [oppression] remedy: ***Commonwealth Caribbean Company Law*** *(Routeledge-Cavendish, 2013) at p. 391*.

The Reasonable Expectations of Shareholders

[74] Reasonable expectations have been described as the "touchstone to entitlement to compensation for oppression": ***Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board*** **[2006] O.J. No. 27 (C.A.), at para 122**. "Thwarted shareholder expectation", it has been said, "is what the oppression remedy is all about": ***Welling, Corporate Law in Canada: The Governing Principles at 533-5*** cited in ***820099 Ontario Inc. v Harold E. Ballard Ltd.*** **(1991) 3 B.L.R. (2d) 123**. Indeed, the Courts have consistently defined the oppression remedy as the protection of reasonable expectations and have held that it is where those expectations have been violated without good reason that the remedy is available.

[75] The idea that it is the reasonable expectations of shareholders that underlies their entitlement to the remedies available in an oppression action originated not from Canada, but from the widely cited decision of the **House of Lords** in ***Ebrahami v. Westbourne Galleries Limited and Others*** **[1973] A.C. 360**. The question that the Court had to consider in ***Ebrahimi*** was whether it was just and equitable to order the dissolution of a small private company pursuant to *section 222* of the **English *Companies Act* 1948** where two of three shareholders acted together so as to remove the third from a management position and prevented him from holding any other.

[76] After examining the authorities cited by respective counsel, **Lord Wilberforce** said at p. 379 of his judgment in ***Ebrahimi*** that:

> "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. **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 legal entity, with a 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."**

[77] **Lord Wilberforce** accepted that the structure of the company was determined by the Act and the company's articles of association to which the shareholders had agreed to be bound and the 'just and equitable' provision in the Act neither entitled a party to disregard legal obligations assumed nor the Court to dispense with the same. Rather, the principal object of the court's statutory remedial discretion (again in **Lord Wilberforce's** words at p. 379) was to grant the court jurisdiction

> "…to subject the exercise of legal rights to ***equitable considerations; considerations, that is, of a personal character arising between one shareholder and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way***. **[Emphasis added]"**

[78] **Lord Wilberforce** considered it not only impossible but wholly undesirable to attempt to define the circumstances in which such considerations may arise. However, the just and equitable provision came to the assistance of the appellant in ***Ebrahimi*** because it was held that his fellow shareholders had an underlying obligation to permit in good faith and confidence his continued participation in the management of the business so long as it

functioned and this obligation was "so basic that, if broken, the conclusion must be that the association must be dissolved".

[79] It is apparent that the **House of Lords** in ***Ebrahimi*** was attempting to give the unfairness on which it found the winding-up remedy in the English Act to have been based greater substance. Indeed, the reasonable expectations of the applicant have been used to craft an objective framework by which judges can determine whether the interests of the shareholder have actually been affected by the conduct of which the applicant complained. It has in fact been stated that shareholder interests (to which the Act speaks) are inextricably intertwined with shareholder expectations so that the statutory oppression remedy has essentially become "a mechanism utilised to protect the "reasonable expectations" of shareholders, having regard to the arrangements or "compact" between them": ***Main v Delcan Group Inc.*** **(1999) 47 B.L.R. (2d) 200 at 206 (Ont. S.C.J.) at para 26, per Lederman J**.

The Source of Reasonable Expectations

[80] After a careful analysis of various cases, **Professor Burgess** concluded at p. 332 of his company law text that:

> "It is clear that the reasonable expectations of the protected category include the expectations expressly embedded in their strict legal rights, as well as the underlying expectations springing from these rights. It appears from the case law that the provisions also protect a wider range of expectations including what is sometimes called in the English cases, the 'legitimate expectations' or, more recently, the 'equitable considerations' of these persons."

[81] What exactly constituted the reasonable expectations of a particular shareholder is question of fact. The particular expectations of the specific shareholder are far from conclusive: ***Re BCE (supra)*** **at para 62**. The Court said in ***Walker v. Betts 2006),*** **15 B.L.R. (4th) 114** that:

> "…[i]n 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."

[82] Reasonable expectations will vary depending upon the context and the relationships at play: ***Re BCE (supra)* at para 59**. They may also evolve with the passage of time: ***820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991) 3 B.L.R. (2d) 113 (Ont. Div. Ct.).** Thus, in determining what these expectations may be, the Court must look at the history of the parties and what they would have reasonably expected based upon their history: ***Main v Delcan Group Inc.* (1999) 47 B.L.R. (2d) 200 (Ont. S.C.J.) at para 42**. It may therefore consider their past practice as created by either word or conduct: ***Westfair Foods Ltd. v Watt* (1991) 5 B.L. R. (2d) 160 (Alta. C.A.)**. It may also examine, with some caution, their personal relationship as it exists in relation to the corporation and outside the same where the nature of this relationship impacted upon the corporation or how it functioned or how the parties treated each other: See, for example, ***Safarik v Ocean Fisheries Ltd.* (1996) 25 B.L.R. (2d) 44 (B.C. C.A.)**.

[83] The Court may also have regard to ordinary commercial practice unless there is a specific agreement or understanding that ordinary commercial practices were not to apply. Thus, in ***Adecco Canada Inc. v J. Ward Broome Ltd* (2001) 12 B.L.R. (3d) 275 (Ont. S.C.J.) at para 24**, the **Ontario Supreme Court** took into account what, on the facts of the case, the applicant would have reasonably expected from the Defendant as an unsecured creditor. Ordinary commercial practice includes such basic expectations as issuing financial statements as required by statute, using the company's finances to pay only for expenses related to the business and not personal expenses and not treating a corporation as it were one's personal property "in complete disregard of [the] legal and contractual obligations to the other shareholders": ***Journet c. Superchef Food Industries Ltd.* (1984) 29 B.L.R. 206 (Que. S.C.) at para 48**. Shareholders are, of course, also entitled to expect that directors will act in the best interest of the company.

[84] Finally, unanimous shareholder agreements, such as the one that exists in this case, may also be viewed as reflecting their reasonable expectations: ***Main v Delcan Group Inc. (supra)***. However, shareholder agreements do not conclusively determine whether oppression exists. They are, after all, intended to operate where the company is being run properly and fairly: ***Neri v Finch Hardware (*1976) Ltd (1995) 20 B.L.R. (2d) 216 (Ont. Gen. Div.) at para 41, per Feldman J**. They can therefore only provide assistance in

determining the parties' intentions and expectations, but will not themselves be so blindly or strictly followed where to do so would be unfair and would only further oppression: ***Deluce Holdings Inc. v Air Canada*** **(1992) (Ont. Gen. Div.) 8 B.L.R. (2d) 294 at paras 49-54, per R.A. Blair J**.

[85] A share "is not an isolated piece of property... [but] a 'bundle of inter-related rights and liabilities": ***Sparling v. Québec (Caisse de dépôt& placement),*** **[1988] 2 S.C.R. 1015 (S.C.C.), at p. 1025, per La Forest J cited in *Re: BCI (supra).*** The Court finds that by virtue of its shareholding, the Applicant was entitled to reasonably expect that the first and second Defendant should not carry on the business of the company in a manner which excluded their participation. Their reasonable expectation was in fact encapsulated in 6.04 of the 'USA' set out *supra* at para [11].

<u>Oppression, Unfair Prejudice and Unfair Disregard</u>

[86] Having considered the reasonable expectations of the Plaintiff in this matter, the Court now turns to the second stage of the test established in ***Re BCE (supra)*** as even where reasonable, not every unmet expectation will amount to oppression. The Court therefore has to consider whether the impuged conduct may be categorized as "oppression", "unfair prejudice" or "unfair disregard" of relevant interests.

[87] One of the most extensively quoted descriptions of oppression comes from the judgment of **Lord Keith** in ***Elder v Elder and Watson*** **[1952] SC 49 at 60** where he says:

> "…oppression involves at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as shareholder.
>
> …oppressive…connotes to my mind an abuse of power by some person or persons controlling the company, resulting in injury to the rights of some part of its members. "

[88] Relying on the judgment of **Lord Keith** in ***Elder***, **Vancise JA** in ***Wind Ridge Farms Ltd. v Quadra Group Investments Ltd*** **(1999) 50 B.L.R. (2d) 1 at para 29** described oppression in this manner:

> "Oppressive conduct is at the lowest a visible departure from the standard of fair dealing and a violation of the conditions of

> fair play on which shareholders who entrust their money to a company are entitled to rely."

[89] Oppressive conduct overlaps with conduct that may be classified as unfairly prejudicial which itself may overlap with conduct that unfairly disregards; the three categories of conduct to which the oppression remedy applies do not fall into "watertight compartments": ***Westfair Foods Ltd. v Watt*** **(1991) 5 B.L.R. (2d) 160 per Kerans JA**. They each, however, describe ways in which the reasonable expectations of shareholders have not been met.

[90] To be oppressive, conduct must be sufficiently serious so as to be capable of being described as "burdensome, harsh or wrongful:" ***Starcom International Optics v. Macdonald*** **[1994] B.C.J. No. 548 (S.C.), per Egbert J.** "Unfair prejudice" and "unfair disregard" import a much lower threshold. It has therefore been held that "unfair prejudice" (and by extension "unfair disregard") connotes a wider scope of conduct: ***Diligenti v RWMD Operations Kelowna Ltd*** **(1977) 1 B.C.L.R. 36 (S.C.)at para 41.**

[91] In ***Diligenti v. RWMD Operations Kelowna Ltd.*** *(ibid)* at para 37 **Fulton J**, with the help of dictionary definitions of 'prejudice', 'prejudicial' and 'unfair', described unfairly prejudicial conduct to mean "acts that are unjustly or inequitably detrimental." The conduct itself must not merely be prejudicial to the interests of the shareholder, but unfairly so.

[92] It is accepted that conduct that "unfairly disregards" the interests of shareholders is even less stringent than that which is unfairly prejudicial. In ***Stech v Davies*** **[1987] 5 W.W.R. 563 (Alta. Q.B.)** the Court indicated that to unfairly disregard was "to unjustly and without cause…pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation." The interests are ignored as being of no importance contrary to the stakeholders' reasonable expectations: ***BCE*** *(supra)* ***at para. 67***.

[93] The Court accepts, as **Blackman J** found in ***Cox (supra)***, that in determining whether oppression, unfair prejudice or unfair disregard occurred, it is better to view the acts complained of as whole so as to examine them in context and obtain an overall picture, rather than scrutinizing each in isolation and with perfect hindsight. The Court is also reminded that it is the "living on-going relationship" between the parties with which the Court is concerned:

Borsook v Brader **(1994) 16 B.L.R. (2d) 265 (Ont. Gen. Div. [Commercial List]) para 4, per Farley J**.

[94] It should also be pointed out that the onus of proof is, of course, on he who alleges and the Plaintiff must therefore prove his case on a balance of probabilities. According to **Professor Burgess**:

> *"Ex facie*, the statutory juxtaposition of the words 'oppressive', 'unfairly prejudicial' and 'unfairly disregards' appears to introduce, in descending order, the stringency of the proof required to invoke the oppression remedy. Put differently, the wording of the provisions seems to suggest that oppressive conduct requires stricter proof than unfairly prejudicial conduct which, in turn, requires stricter proof than unfair disregard."

[95] It should also be noted that the language of **sections 347 and 248** centers upon the effect of the conduct complained of and not its motivation. This makes it clear that bad faith or "foul motivation" on the part of the Defendant is not a requisite element to the granting of relief under an action for oppression even where it is alleged that the impugned conduct is oppressive rather than unfairly prejudicial or unfairly disregarding: ***Ludlow v McMillan*** **(1995) 19 B.L.R. (2d) 102 (B.C. S.C.) at para 8, per Saunders J.**

THE ALLEGATIONS OF OPPRESSION:

[96] Mr. Haynes conceded that the discretionary power of the Court to order the winding up of a company was a drastic remedy, but argued on the basis of ***Re R. J. Jowsey Mining Co*** **[1969] 6 D.L.R. (3d) 97** that it was not limited to proof of actual wrongdoing but could be exercised where there was a serious condition impairing the proper conduct and management of the company.

[97] Relying on ***Baxted v Warkentin Estate*** **[2006] M. J. No. 376 at para 27**, he further submitted that the power to wind up a corporation was exercised most frequently in four situations. One of which was where there was a deadlock and such animosity that it was impossible to obtain the consensus

necessary to manage the corporation. It is on that basis that the liquidation of Tropic Ice in this case is sought.

[98] Deadlock was helpfully defined as referring to a situation where the general decision-making process within a company had deteriorated to such a degree that there was no realistic prospect of repair. According to Mr. Haynes, a complete breakdown was not necessary and the remedy was available where there was a deadlock with respect to "critical aspects of decision-making" provided that the disagreement was so serious that it was not reasonable to believe that the shareholders would resolve their differences. ***Canadian Business Corporations Law*** **(Second Edition)** and ***Kelly v Condon*** **[1986] 190 APR 196** were both used to support Mr. Hayne's submissions on this point.

[99] Mr. Haynes directed the Court's attention to ***Nieforth v Nieforth Bros. Ltd*** **[1985] N.S.J. No. 254**, which he submitted mirrored the situation in the instant case. In ***Nieforth***, not only had a deadlock between the principals existed that prevented them from even agreeing on whether to informally wind up the company, but the controlling shareholder was found to be treating the company as its personal business. In granting the order sought, the Court had considered both of these factors.

[100] It was Mr. Haynes' argument that both of these factors also existed in the instant case. Mr. McHale and his company treated Tropic Ice not in accordance with its corporate structure but as if it was solely owned by the Second Defendant, who ran the company. Additionally, it was clear from the evidenced adduced by both sides that the parties could reach little agreement about a number of issues. This was reinforced by the fact that they had no choice but to go to arbitration and even that did not resolve the situation as both sides have failed to comply with the ensuing decision. The deadlock, argued Mr. Haynes, was so severe and systematic that Mr. St. John resigned as General Manager and Southern Management Inc. and Iceberg as directors and it was only their departure that alleviated the tension and allowed the company to function at all.

[101] Mr. Haynes submitted that it has also been held to be just and equitable to order the dissolution of a company where there was a loss of confidence and a lack of mutual respect and trust among shareholders and this was another ground on which Tropic Ice should be dissolved. He referred to the case of

Reznick v Bilecki **[1986] S.J. No. 120, 49 Sask. R. 232 (C.A.)** in which winding-up was ordered on the basis of the shareholders' loss of confidence where property had been disposed of by one shareholder without the consent or knowledge of the other.

[102] It was clear and undisputable, said Mr. Haynes, that there was no mutual respect or trust between the two shareholders of Tropic Ice. He pointed out that the affidavit evidence of both revealed a spate of disputes, accusations and counter-accusations and clearly demonstrated the deponents' inability to arrive at an agreement on a variety of crucial concerns. Emphasis was specifically placed, however, on the fact that (i) Mr. McHale had withdrawn money without authorization; (ii) failed to issue financial statements since 2008; (iii) sold vehicles belonging to the First Defendant; and (iv) advertised other assets for sale. All of this, argued Mr. Haynes, demonstrated a justifiable loss of confidence in Mr. McHale as Chairman of Tropic Ice and supported the making of an order for winding up.

[103] Mr. Haynes accepted that the discretion of the Court in an application under **section 373** was sufficiently broad to permit the making of any other order deemed fit on the facts of the case. He pointed out that under this section it could even order a company to purchase the shares of a shareholder and had in fact done so in ***Wittlin v Bergman*** **[1995] O.J. No. 3095, 25 O.R. (3d) 761 (C.A.)** in which it found a buy-out to have been inappropriate as the company would benefit from the appellant's absence.

[104] Mr. Haynes nonetheless urged the Court to order the dissolution of the Company, pointing out that Iceberg had already lost a substantial portion of its investment and stood to lose more. With respect to the assertion of the Defendant that the application to liquidate was in breach of the USA, he submitted, using ***Re Cavendish Investing Ltd*** (**1996) 190 A.R. 3 (QB),** that it was open to the Court in such an application to override the strict legal rights of the parties so as to remedy unfairness and effect justice.

[105] He therefore maintained that dissolution remained the most suitable remedy but also requested the mandate of any liquidator appointed to include the preparation of an audit of the Company's financial statements for the years 2008-2012 given the absence of audited financial statements after 2007.

[106] It was the submission of learned Queen's Counsel for the Defendants, Mr. Forde that the burden of proof rested upon the Plaintiff to lead evidence that

demonstrated the existence of such unfair prejudice or oppression against a shareholder of the company that it was just and equitable to "wind up" the company in question. The Plaintiff had not, argued Mr. Forde, discharged its burden to do so.

[107] Relying on ***Korogonas v Andrew et al*** **[1992] 128 AR 381**, Mr. Forde submitted that as the remedy sought by the Plaintiff was equitable in nature and not legal, the Plaintiff had to provide a sound reason as to why the Court should exercise this jurisdiction rather than leave the parties to sort out their differences according to the principles of common law.

[108] Counsel for the Defendant also sought to define deadlock. His definition varied from that provided by the Plaintiff. Attributed to ***Anglo-Continental Produce Co. Ltd*** **[1939] 1 All ER 99,** the Defendant's definition described deadlock as a situation resulting from equal shareholding or directorship where the company is unable to conduct its daily affairs. While Counsel accepted that the court could order the winding up of a company because of the existence of a deadlock, he contended the deadlock had to exist at the date of the hearing.

[109] Mr. Forde argued that there was no deadlock in the management of the company at the date of hearing. Mr. St. John had long resigned as managing director and Iceberg and Southern Management were also no longer directors. Tropic Ice, however, had been able to continue its operations. It was able to function without requiring any input from Michael St. John. The only deadlock that persisted was the issue of whether the company should be wound up and it was his submission was that this deadlock was not sufficient to warrant winding up.

[110] Finally, Mr. Forde, like Mr. Haynes before him, noted that the Court had wide powers under **section 373(2)** to remedy oppression by other means; it was not required to wind up the company. Winding up, he stressed, was a drastic remedy, one of last resort. He directed the Court to the dictum of **Lord Millet** in ***CVC/Opportunity Equity Partners Limited and another v Luis Roberto Demarco Almeida*** **[2002] 5 LRC 632 at para 15** in which it was observed that winding up was a remedy that often did not benefit the minority shareholder the oppression remedy sought to protect and it was for this reason the Court rarely made orders directing companies to wind up, choosing instead to grant a more effective remedy.

[111] With ***Stech and Davies v Abrahim*** **[1987] 8 AR 298** as authority, he further submitted that the Court should not wind up a company which was profitable. Instead, the Court could make orders to remedy any oppression it found to exist. For example, it could order the production of financial information or the return of capital to a shareholder and this he suggested was an appropriate order to make in this case.

[112] The Defendants by their Counsel therefore urged the Court to dismiss the application for dissolution of Tropic Ice, urging the Court to make instead orders appointing a receiver who was to conduct a valuation of the assets and business of Tropic Ice and set up the assets and business of Tropic Ice as a going concern with each shareholder at liberty to purchase the same.

[113] Although the categorization of conduct as oppressive may hinge on the particular context of the conduct in question, it may nonetheless be of some use to consider whether the type of conduct pinpointed by the Plaintiff has been regarded as falling within the categories specified in **section 373**.

[114] Even a cursory examination of the law in this area reveals that courts have generally found the misappropriation of company assets and diversion of company funds to amount to oppressive conduct, regardless of how this may have occurred. For example, in ***Brokx v Tattoo Tehcnology Inc.*** **[2004] 50 B.L.R. (3d) 221 (B.C. S.C.**), the conduct of the respondent shareholder was found to be oppressive, unfairly prejudicial to and in unfair disregard of the interests of the applicant where the respondent, who had sole authority over the company account, paid himself remuneration in clear violation of the by-laws and also used the company funds to pay for personal expenses. Similarly, in ***Re: Van-Tel Television Ltd*** **(1974) 44 D.L.R. (3d) 146 (B.C. S.C.)**, the Court found, *inter alia*, that the respondent had withdrawn substantial sums belonging to the company into his own account and that this conduct was oppressive. Likewise, the unilateral decision to pay wages and bonuses and the amount to be paid was held to be oppressive where the by-laws specified that such decisions should have been made collectively: ***Beaubien v Campbell*** **(2003) 33 B.L.R. (3d) 33 (Sask. Q.B.).**

[115] Indeed, the extraction of significant amounts of money or property from a corporation for the use or benefit of a director or controlling shareholder, where the director knows or reasonably ought to know that he or she is not entitled to that money or property if not theft, is something not very

different: ***Calmont Leasing Ltd. v Kredl*** **(1985) 30 Alta. L.R. (3d) 16 (Alb. CA) at para 22**.

[116] It is undisputable that a shareholder has the right to have access to the records of the company in which he holds shares. As to whether the failure to provide financial statements constitutes oppression, this appears to turn on the context of that failure, particularly the size and operational structure of the corporation and the manner in which it habitually conducted business.

[117] In ***Envirodrive Inc. v 836442 Alberta Ltd*****. [2005] 7 B.L.R. (4th) 61 (Alb. Q.B.) Slatter J.** held at para 85 that:

> ... the failure to provide financial statements due to mismanagement, poor accounting systems, or a tradition of informal operation will not amount to oppression where there has been no disregard for the interests of the minority. In many cases the appropriate remedy will be an order for production, not an oppression action. Where, however, financial statements are produced, but they are simply not distributed, that may well amount to oppression, especially where there are numerous shareholders who are not involved in day-to-day operations. This will particularly be so when the failure to report is part of an overall climate of disregard for the interests of the minority. That is especially the case where (as with Envirodrive Inc.) the financial statements disclose otherwise secret non-arm's length transactions between management and the corporation. In this case the failure to report the financial affairs of the corporation, combined with McPeak's other conduct, did unfairly disregard the interests of the Minority Shareholders.

[118] The blatant disregard of corporate procedure by the Defendant which the Court held had occurred in ***Beaubien (supra)*** included preventing the applicant access to accounting records and limiting his access to all but the most rudimentary financial records of the company. The court concluded that the cumulative effect of this conduct was to exclude the applicant from exercising his rights as shareholder, oust him from the business and prevent him from earning a livelihood.

[119] Similarly, in ***Journet (supra),*** the court found oppression to exist where a shareholder treated the company as if it were his own personal domain by, *inter alia*, failing to prepare financial statements as required by law and operating the corporation in disregard of the rights of the other shareholders.

[120] The Court finds that in the circumstances the evidence given on behalf of the Claimant as set out above, (especially at para 33 supra) and not substantially denied or countered by the Defendant the Claimant has established that the business and affairs of TIU have been carried on or conducted in a manner which was oppressive and unfairly prejudicial or unfairly disregards the interest of the shareholder, Iceberg. The Defendant has not argued that Mr. McHale was acting in his personal capacity. He was acting on behalf of the company especially after the resignation of Mr. St. John he had the full reigns of management.

[121] I find the absolute refusal of Mr. McHale, as a Director of the company, to repay funds used to pay for the expenses of Ice Holdings to be particularly egregious. Further, the continuous refusal to give the shareholders any details of the company after its move from Salter's is also indicative of the general attitude of Tropic Ice's present management towards its shareholder.

[122] I turn now to the appropriate remedy.

The Power of the Court under Section 373

[123] While the primary remedy available under **section 373** is the winding up or dissolution of a company, it is clear that this is not the only remedy which a Court is empowered to grant when considering an application under that section. Rather, the Court may, if it thinks fit, also make any orders available to it under **section 248**, the section dealing with the general oppression remedy.

[124] **Section 248 (3)** contains a lengthy but non-exhaustive list of orders available to a Court seeking to restrain oppression, unfair prejudice and unfair disregard of protected interests including the power to (i) restrain the conduct complained of; (ii) appoint a receiver or receiver manager; (iii) direct a company or any other person to purchase shares; (iv) mandate the Company to produce to the Court or an interested party financial statements in the form required by the Act; and (v) compensate an aggrieved party.

[125] Of **section 248, Williams CJ** observed in ***Ward et al v Rum Refinery of Mount Gay Ltd et al*** **(unreported) High Court of Barbados, Suit No. 357 of 1990, Decision of October 25, 1990**:

> "It seems to me that the extensive power given to the Court by section 228 it may make any interim or final order if it thinks fit connotes a jurisdiction in which the Court's hands would not be tied in seeking to do justice [sic]."

[126] In essence, **section 248**, and by extension **section 373**, confers upon the court a discretion of considerable breadth by which to fashion the remedy most appropriate for the particular circumstances with which it is faced. The aim of any remedy granted is to apply a measure of "corrective justice" and rectify the "wrong" in question; it is therefore crafted with the aim of putting an end to the oppression, unfair prejudice or unfair disregard found by the Court to exist: ***Naneff v Con-Crete Holdings Ltd*** **(1995),23 O.R. (3d) 481 (C.A.) at pp. 489-490 per Galligan JA**.

[127] The Court has a great deal of flexibility in determining appropriate relief. **Baynton J** of the Saskatchewan Court urged courts to be creative and proactive in selecting or crafting a remedy so that the remedy ultimately granted is not merely illusory; the considerable effort and expense of seeking relief under the Act should be justified: ***First Choice Capital Fund Ltd. v First Canadian Capital Corp.*** **(1997) 33 BLR (2d) 123 at para 69.**

<u>Liquidation and Dissolution</u>

[128] The liquidation of a company by the order of the Court is a drastic remedy; it is not a remedy to be invoked lightly. **Lerner J** stated in ***Re Graham and Technequip*** **(1981) 32 O.R. (2d) 297 (H.C.J.)at para 50*:***

> "Winding-up under s. 217(d) is a discretion to be exercised by the Court. Since it is a drastic procedure, it should not be granted lightly. Accordingly, a heavy burden is upon the applicant to prove that it is "just and equitable" that a winding up order be made. This burden of proof is sharply accentuated when it involves a well-operated profitable business employing a relatively large work force in addition to management and executive personnel."

[129] In urging the Court to order the dissolution of the First Defendant, Counsel for the Plaintiff directed the Court to the English decision of ***Re: R. J. Jowsey Mining Co. Ltd*** **[1969] 1 O.R 437, 1968 Ont. Rep. LEXIS 81** where winding up was sought on the basis of the **1960** ***Companies Act***, a provision in no way equivalent to **section 377** of our Act. The case therefore has limited application. Indeed, the Court notes that **Hatt J** in ***Jowsey*** bemoaned the fact that under **section 256**, as it then stood, the Court had only 2 options – dismiss the application or order the company's winding up. There was no middle ground, no authority to control the regulation of the company. The situation here with **section 377** could not be more different.

[130] The Court nonetheless is mindful that under both **section 256** and **section 377**, winding up is ordered on the basis that it is just and equitable to do so. ***Jowsey*** is therefore of some as a result of dicta on the interpretation of this phrase. **Hatt J** asserted that these words gave the Court:

> "…a very wide discretion which, needless to say, should be exercised cautiously depending upon the facts of a particular case in accordance with the realities of the business concerned."

[131] As Counsel for the Plaintiff correctly submitted, winding up on just and equitable grounds has normally been ordered by Canadian Court in the following four situations, as set out by **Fraser & Steward**, ***Company Law of Canada*** **(Sixth Edition, 1993) at p. 738:**

1. Lack of Confidence: where a considerable proportion of the shareholders have justifiably lost confidence in the management of the corporation's affairs and the directors have a preponderance of voting power;

2. Loss of Substratum: where the subject matter of the business for which the corporation was incorporated has disappeared (substratum lost);

3. Deadlock: where the affairs of a corporation are brought to a deadlock;

4. Partnership Analogy: where the corporation is analogous to a partnership and circumstances such as animosity would justify the dissolution of a partnership.

[132] However, the court in ***Safarik v Ocean Fisheries Ltd.*** *(supra)* at paras 105-107 took care to point out that the Court's discretion is not limited to the four situations enumerated above. Given the interpretation that has been accorded to "just and equitable", I find its position to be eminently reasonable.

[133] Of the situations enumerated above, Counsel for the Plaintiff has sought to place this case in the deadlock and lack of confidence categories and it is therefore to these particular grounds that the Court will pay particular attention.

[134] However, before the Court draws its attention to these specific situations, it notes the following points regarding the exercise of its discretion.

[135] Firstly, the Court is mindful of the fact that in determining whether to liquidate the company it must consider the effect of such an order on not only upon all of the company's shareholders, but also on its creditors: ***Safarik v Ocean Fisheries Ltd*** **(1995) 12 B.C.L.R. (3d) 342 at para 116, per Southin JA**.

[136] Secondly, a company will not be ordered to wind up where the Court finds that the application for winding up was made for some collateral purpose: ***Re "A" Company*** **[1917] 34 D.L.R. 396 (Man. K.B.) per Macdonald J**. Where it is clear that the aim of the shareholder in instituting the action for dissolution is not because of the conduct of which he complains but for some other reason such as extricating himself from an investment which he no longer finds to be profitable, granting dissolution will simply not be acceptable: ***Re Chetal Enterprises Ltd.*** **(1973) 39 D.L.R. (3d) 116 (Sask. Q.B.) at p. 123.**

[137] Thirdly, while the profitability of a company has to be taken into account before any application for winding up is granted, it is but one factor that a Court will take into account. In ***Rivers v Denton*** **(1992) 5 B.L.R. (2d) 212** a complainant brought an order for the winding up of a company formed with two friends where the other shareholders failed to provide the complainant with financial information on the company and excluded him from the

making of some key management decisions. The Court held at para. 22 that it was just and equitable to grant the relief sought although the company remained marginally profitable because the fundamental trust and confidence on which the company had been founded had eroded as a result of the respondents' own conduct. The complainant had justifiably lost trust and confidence in the other shareholders because of his exclusion from key management decisions that had brought the Company to the brink of insolvency.

[138] Finally, the Court is mindful of the fact that it should interfere as little as possible in the affairs of a company and only so far as necessary to redress the unfairness; it should not use a battle axe where a scalpel may suffice: ***820099 Ontario Inc. v Harold E. Ballard Ltd.*** **(1991) 3 B.L.R. (2d) 113 at 123 para 140, per Farley J**. An order dissolving the company will therefore only be granted where the Court finds that on the facts it has no other option whatsoever.

[139] Turning now to the first of the two grounds on which the Plaintiff has argued that the dissolution orders be granted. Deadlock, it is clear, refers not to some minor disagreement over an isolated issue, but to the existence of such serious and persistent disputes between shareholders on issues of importance that these disputes interfere with the normal business operations of the company: ***Prussin v Park Distributors Inc.*** **(1963) 6 C.B.R. (N.S.) 31 (Que. S.C.) at paras 11-17, per Hannen J**. To be serious enough to impair the effective functioning of the company, the deadlock need not have an impact upon the financial status of the company; a prosperous company may be wound up: ***Re***: ***Re Chetal Enterprises Ltd. (supra); Re: Yendije Tobacco Co*** **[1916] 2 Ch. 426 at 432, per Lord Cozens-Hardy MR.**

[140] Counsel for the Defendant has contended that an order for dissolution will only be granted in deadlock situations where the deadlock in question is still on-going at the time of the application. It is clear, as Counsel for the Plaintiff pointed out, that deadlock in the management of the company has only ceased to exist because Mr. St. John, seemingly frustrated about the state of affairs, elected to withdraw himself (and by extension the companies he controlled) from any involvement in the company including in its management. In truth the deadlock has not been resolved, just suspended.

[141] In considering this particular submissions, the Court has had regard to ***Re Welport Investments Ltd; Re Fifty-five Yonge St. Ltd; Zwig v. Schupack*** **(1985) 31 B.L.R. 232 (Ont. S.C.)** in which the applicant had claimed that it was just and equitable to wind up a company because of the existence of a deadlock which had allegedly impaired the conduct of the business. The Ontario Supreme Court held that the question before it was whether there was "a present deadlock" that prevented the company from carrying on its business in a proper manner rather than a mere internal domestic dispute. It pointed out that acrimony between the shareholders did not necessarily prove the existence of a deadlock as despite such sentiment it was possible for the company to nonetheless function efficiently. Additionally, the respondents had contended that any significant disagreements that had existed and to which the applicant drew attention had been resolved in a reasonably timely manner and certainly before the filing of the claim.

[142] It appears from ***Re Welport*** that deadlock giving rise to an order for dissolution should exist at the time that the order is made, for where the disagreements underlying the deadlock have been resolved such an order would certainly no longer be necessary. However, the Court accepts that in this case, the submission of the Plaintiff that there has been no resolution of the underlying disputes between the parties. Rather, to avoid outright conflict, the Plaintiff has simply elected to remove himself from the operations of the business.

[143] Like the deadlock scenario, loss of confidence in the management of a company also often arises from the failure of shareholders to work with each other. General dissatisfaction with management is not sufficient; neither is a mere disagreement over company policy or dissatisfaction with being outvoted: ***Loch v John Blackwood Ltd*****. [1924] AC 783 at 788, per Lord Shaw**. However, management that is so incompetent that its conduct appears to occlude a lack of probity or fair dealing may justify a lack of confidence: ***Singh v Moody Shingles Ltd.*** **[1947] 1 W.W.R. 480 (B.C. C.A.) per Robertson JA**. Similarly, the Court has found that a justifiable lack of confidence existed where the majority shareholder misappropriated corporate funds or treated the corporation and its assets as an extension of its property, disregarding the interests of minority shareholders: ***Reznick v Bilecki et al*** **[1986] 1986 S. J. No. 120 (Sask. C.A) at para 8, per Maher**

J. It has also held that lack of confidence is merited where a shareholder or director treats a company as if were their own in disregard of the interests of other stakeholders: ***Loch (ibid)***.

[144] If ever there was a case where there has been a loss of confidence in the management of a company by a shareholder, this must certainly be it. The relationship is fractured beyond repair. The parties have continually demonstrated that they cannot work together, even for their mutual benefit. In these circumstances, permanent separation of the shareholders is the only reasonable course to be taken. The question that preoccupies the Court is how best to effect the separation.

[145] There is no right or wrong order; the only order is that which the Court finds will be most appropriate.

[146] I find that there is deadlock in relation to the management of this company. I have taken into consideration that Mr. St. John has formed his own company and is in competition with the defendant Company, a situation not be praised. In fact, it is a factor which has troubled me somewhat, in view of the fact that if the company is dissolved, Mr. St. John would be left with the Company, Glacial which he formed in breach of the non-competition clause in the shareholders agreement, and Mr. McHale would be left, no pun intended, out in the cold. However, in accordance with **Gourney J** in ***Journet*** *(supra)* while I have taken this into consideration, I do not find, that in all the circumstances this operates to deny the Plaintiff relief.

[147] However, this does not divert from the truth of the situation. This is no mere internal dispute. If these parties could have worked together they would have paid some heed to the arbiter's decision. They have had the opportunity to salvage the Company's future, but have preferred to engage in a highly destructive legal battle. The evidence does not show that this is a company which is profitable. There is no evidence that creditors will be adversely affected, although one supposes that given the apparently parlous state of the company's finances that may be possible. The staff is not large. When weighing all the factors, I come to the conclusion that the dissolution of this Company is the only order that this Court can properly make, and that it is just and equitable to do so. I believe any order that requires one

party to buy out the shares of the other will be fraught with the same lack of cooperation which followed the arbiter's decision.

CONCLUSION

[148] In light of the foregoing findings, the Court hereby orders that first Defendant Company be wound up in accordance with the ***Companies Act***. The parties will apply within 42 days to the Court for confirmation of a liquidator to be appointed. Upon appointment, the Liquidator is ordered to prepare audited financial statements from 2007 to 2014; the costs to be borne by the first Defendant. If they cannot agree, the Court will appoint a liquidator.

[149] As the true legal battle in this case is between the shareholders and not the company, I will hear arguments as to costs.

Jacqueline A. R. Cornelius
Judge of the High Court