Indexed as:

Mahood v. High Country Holdings Inc.

Between
Bertha Mahood, Michael Aird Mahood, Ernest Anthony Mahood and Leslie Jan Mahood, petitioners, and High Country Holdings Inc., Britannia Beach Holdings., Makin Pulp and Paper Ltd., 429553 B.C. Ltd., Ernest Alwyn Mahood, Nova Corportion of Alberta, Fred Ratushny, Ashford Engineering Ltd., and Richard P. Begin, Personal Law Corporation, doing business as Begin and Company, respondents

[2000] B.C.J. No. 2433

2000 BCSC 1755

101 A.C.W.S. (3d) 505

Vancouver Registry No. A932672

British Columbia Supreme Court
Vancouver, British Columbia

Thackray J.

Heard: May 15 - 18, 23 - 26, 29 - 31,
June 1, 19 - 23, 26 - 30, September 11 and 12, 2000.
Judgment: December 5, 2000.

(202 paras.)

Company law -- Winding-up legislation -- Winding-up order -- Oppression remedy -- Actions against corporations and directors -- Action for oppressive conduct -- Oppression, prejudice or disregard of interests.

Petition by the wife and children for an order winding up the closely held companies run by the husband. The husband and wife were married for 43 years and had three children. The husband incorporated several companies during the marriage, the shares of which were held by the various family members. In 1986, the wife discovered that her husband had a mistress. In 1987, the husband arranged for all of the voting shares of one of the companies, High Country Holdings, to be transferred from the wife and children to him. The wife and children argued that this transfer of shares, along with other actions of the husband in relation to the companies, constituted oppressive conduct towards them. They

argued that the husband did not properly utilize the assets of the companies, kept improper records, improperly encumbered the assets of the companies and intimidated the family into signing over the shares to him.

HELD: Petition allowed. The credibility of the husband was questioned as a result of his failure to produce documents and his failure to provide evidence to support the financial decisions made by the companies. His actions were oppressive to the other family members.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 24(1)(a).

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 241.

Company Act, R.S.B.C. 1996, c. 62, ss. 22, 150, 200, 295, 296, 314.

Income Tax Act.

Counsel:

D.A. Hobbs, for the petitioners.
D. Ashford, as Director for 429553 B.C. Ltd.
Ernest Alwyn Mahood representing High Country Holdings Inc., Britannia Beach Holdings Ltd., Makin Pulp and Paper Ltd., 429553 B.C. Ltd., and Ernest Alwyn Mahood appeared in person.

[Quicklaw note: Corrigenda were released by the Court December 6 and 22, 2000. The corrections have been made to the text and the Corrigenda are appended to this document.]

1 **THACKRAY J.:--** This family fight has been presented as an oppression action. It will be decided on that foundation but the law on oppression stresses that each case must be decided on its own facts. In this case the facts must be drawn from evidence that would be most at home in a family relations action.

LITIGATION HISTORY

2 The litigation chronicles the family and corporate misfortunes. On February 5, 1991, in actions numbered A891536 and D071511, Madam Justice Ryan of this Court detailed the family relationships, the business history and aspirations of Mr. Mahood and the shareholdings in the various companies. She said as follows:

> This is a 43 year marriage. Mrs. Mahood is now 65. Mr. Mahood is 67. As I stated, there are three grown sons. It is a traditional marriage. Mrs. Mahood has not worked outside the home.
>
> Mr. Mahood is a businessman. For many years he was in the logging business until a number of misfortunes caused him to lose the business to U.S. Plywood. Although Mr. Mahood lost the business, his past success had apparently permitted him to build up sufficient capital to go into the grain farming business. It is unclear exactly what Mr. Mahood has done since the 1960's. The material reveals that in 1979 Mr. Mahood became interested in the pulp industry. He founded Makin Project Initiators to take on the project of building pulp and fine paper mills. As far as I can glean from the material before me, Mr. Mahood has been occupied since 1979 obtaining property and financing for his project.

> There are five closely held companies which are the subject matter of the applications before the Court. One is federally incorporated, three are Alberta incorporations and one is incorporated in B.C. Members of the Mahood family hold shares in High Country Holdings. Mr. Mahood holds all of the voting shares in High Country Holdings. The Class C equity shares are held for the benefit of the family trust. High Country Holdings in turn holds all the voting shares in Makin Pulp and Paper, Britannia Beach Holdings (the B.C. company) and Makin Air Limited. Makin Pulp and Paper holds all the voting shares in Makin Project Initiators. Mr. Mahood is Chief Executive Officer and a director of all of the companies.
>
> The only significant asset owned by any of these companies is an approximate 500 acre piece of property located near Britannia Beach. Fifty-five acres are held by Makin Pulp and Paper, ostensibly for a mill site. Four hundred and fifty five acres are owned by Britannia Beach Holdings.
>
> Mr. Mahood still clings to the notion that he will be able to develop a mill at Britannia Beach. The material reveals that between environmental controls and the lack of funding, this probably will not occur.

3 Madam Justice Ryan declined to discharge a lis pendens that had been registered against the property by Mrs. Mahood. A further application was to appoint a receiver over the assets of all of the companies. Ryan J. said that it was "difficult without business records to determine whether Mr. Mahood has squandered assets or not."

4 The issue of reluctance, and refusal, by Mr. Mahood to disclose records has continued throughout all of the litigation including the trial of this action. Similarly, the matter of Mr. Mahood wanting to build a pulp mill (now defined as a fine paper mill) has not abated and is still Mr. Mahood's ambition. Madam Justice Ryan said:

> ... Mr. Mahood's efforts have been spent in the last 11 years trying to get the pulp mill project off the ground. He has succeeded in obtaining financing through SRTC grants and overseas loans. He has spent money obtaining equipment and expert reports.

5 Ryan J. concluded that she would not appoint a receiver. She went on to note the "luxurious if not extravagant lifestyle" that the Mahoods lived after the receipt of the Scientific Research and Tax Credit money. She recorded that Mrs. Mahood left her husband [upon discovery of his mistress] and that he "coincidentally declared that he could not afford to pay her maintenance."

6 Madam Justice Ryan said that she did not accept that Mr. Mahood was without funds to support his wife and that he had "not been entirely candid with the Court with respect to many things." Ryan J. ordered maintenance to be paid of $3,500 a month.

7 On August 20, 1993, Mr. Justice Preston ordered that Makin Pulp and Paper Ltd. ("MPP") and Britannia Beach Holdings Ltd. ("BBH") were restrained from altering their share structure or from selling or otherwise encumbering any of their property.

8 On December 3, 1993, Mr. Justice Holmes, in response to a motion by the companies to have the petition struck on the basis of it being frivolous and vexatious. He referred to the reasons of Ryan J. He noted that there was an action in Alberta and another action in British Columbia and found that the petition was not "abusive of the court process, nor is it vexatious." He then heard submissions that a receiver-manager should be appointed.

9 Holmes J. issued extensive reasons on September 2, 1994, in which he appointed a receiver-manager for High Country Holdings Inc. ("HCH"), BBH and MPP. As with Madam Justice Ryan, he traced much of the family and

corporate history. He noted that all of the voting shares in HCH "vested in Mr. Mahood" as of 1987 and that the petitioners were alleging that "their personal loss of an equity and voting role in High Country occurred wrongfully when their Class D shares were acquired by Mr. Mahood."

10 Mr. Justice Holmes thought that it was "of interest" that the petitioners had never taken any legal action regarding that allegation. However, the petitioners now ground their case upon s. 224 (now s. 200) of the Company Act, being the oppression section. The 1987 share transfer is alleged as a foundation for a finding of oppression and unfairly prejudicial conduct.

11 Mr. Justice Holmes referred to the s. 224 requirement that an applicant must be a "member" of the company against whom relief is sought. This requirement remains in the case at bar but Holmes J. held that Bertha Mahood and Leslie Jan Mahood were members and that Michael Aird Mahood and Ernest Anthony Mahood qualified as "proper persons to make an application."

12 It was held that Campbell Saunders Ltd. be appointed "to preserve the companies and their assets, bring some order to the affairs of the companies, and to aid in the resolution of the issues to be tried." Holmes J. denied to the receiver-manager the authority to sell any property owned by the companies. That order was obviously directed to the acreage at Britannia Beach.

13 Holmes J. noted that the petition required amendment in order to proceed to what he thought to be the ultimate result desired by the petitioners. That is, a winding up of the companies. It was ordered that an amended petition and answer thereto would act as pleadings and that all pre-trial procedures were available to the parties.

14 On November 4, 1994, I issued a series of orders. These added some new respondents and enjoined the respondents from transferring, disposing of or encumbering any real property. The receiver-manager was authorized to work towards obtaining an appraisal of the Britannia land and was authorized to investigate the validity of obligations granted by the companies.

15 On January 26, 1995, Mr. Justice Macdonald confirmed the order regarding production of documents to allow the receiver-manager to investigate the authenticity of recorded financial obligations. He added an obligation on the respondents to supply a list of documents.

16 On February 9, 1995, Macdonald J. issued a series of orders respecting the Britannia lands and the duties of the receiver-manager. He also heard an application on February 24, 1995, to discharge Campbell Saunders as receiver-manager. He refused that application, [1995] B.C.J. No. 3032. On that same date he discharged the lis pendens that had been lodged against the Britannia lands.

17 Mr. Justice Macdonald adjourned an application by the receiver-manager to list the Britannia lands for sale but said that "a sale somewhere down the road is inevitable." He added that this "may be the only way to bring to a head the issues between the protagonists." He said that adjournment was "in order to provide yet a further opportunity to the secured creditors and the companies to satisfy me that this project is realistic."

18 Sinclair Prowse J. on March 17, 1995, heard an application by the respondents to have Sands and Associates Inc. appointed as a second receiver-manager. She delivered reasons on March 27 in which she dismissed the application, [1995] B.C.J. No. 623.

19 She noted that 429553 B.C. Ltd. held an assignment of mortgages from the secured creditors of BBH and MPP with a value of between $4 million and $5.9 million. The variation was due to a challenge by the petitioners as to the validity and quantum of the "transactions." The position of 429553 was that there may not have been sufficient equity in the property to cover the mortgages and that the property should be developed "along the lines envisaged by the respondent Ernest Alwyn Mahood." That is, an "industrial/commercial/residential development composed of a pulp mill with port facility, adjacent commercial premises and a townhouse residential area."

20 Madam Justice Sinclair Prowse said that there was evidence of Mr. Mahood having arranged with an Austrian company, Andriz Sprout-Bauer, to supply the necessary equipment and to supply financing of up to 85% thereof. The mill was to be in Alberta and the Alberta government was to guarantee the loan. She noted that when the government did not "support the projects as originally anticipated the project was moved to British Columbia and the present properties [Britannia Beach] were purchased."

21 Sinclair Prowse J. concluded that "little seems to have been done with respect to the development of this project." She reviewed matters pertaining to rezoning of the property and the costs thereof. She noted that an appraisal of the property in January, 1995, arrived at a value of $7.5 million. There was evidence that the cost of the development would approximate $500 million. She said that the evidence did not establish that "there was a firm commitment" with respect to financing. Nor was there evidence to support the Andriz requirement "that it have available 35% of the total project cost as equity."

22 There was a "grandfathering" application designed to further a re-zoning application. It was contended that re-zoning would increase the value of the property thus enabling BBH and MPP to increase their borrowing capacity. Madam Justice Sinclair Prowse said that "there is no evidence to support the conclusion that the success of the grandfathering application will accomplish this end."

23 On December 21 and 28, 1995, and on March 22, 1996, I heard submissions on an application to list the Britannia lands for sale. I was asked to not deliver judgment pending a settlement conference to be held by Mr. Justice Brenner. In June, 1996, I was informed that no settlement had been accomplished. On June 7 I held that the property was to be listed for sale.

24 Details of the sale were approved by Mr. Justice Henderson on September 12, 1996. On that same date the receiver-manager listed the property with Macaulay Nicolls. As well on that date there were assignments into bankruptcy on behalf of HCH, BBH and MPP. This was pursuant to motions passed at directors' meetings at which Mr. Mahood was the only attendee.

25 On November 6 and 22, 1996, I heard applications in the bankruptcy cases of MPP and HCH. The applications were brought by the receiver-manager for orders annulling the assignments into bankruptcy. Reasons were delivered on November 29, 1996, [1996] B.C.J. No. 2408. Those reasons contain a comprehensive summary of the history to that date. Much of it parallels what I have included in these reasons. I will only add that I noted that on two occasions counsel for Mr. Mahood had contended that financing for the "pulp mill was all but in place." I said that "once a 'contract' of financing was waved in front of me. However, it was never tendered for inspection."

26 I held that Mr. Mahood and his companies "are in breach of the Court orders. They have abused the process of the Court. On this basis the assignments in bankruptcy are annulled."

27 On June 13, 1997, in the family relations action, Bertha Mahood applied for an order that Mr. Mahood pay maintenance arrears and for a charging order over lands and shares. Mr. Mahood conceded that he had not made the maintenance payments as ordered. His defence was that he was not receiving income from his companies. I granted the relief sought by the Mrs. Mahood, [1997] B.C.J. No. 1495. I adjourned the application of Mr. Mahood to vary the maintenance order and to cancel arrears.

28 On September 25, 1997, the respondents applied to suspend the sale of the Britannia lands on the basis that the mortgages exceeded the proposed sale price. I dismissed the application. In September a bidding process took place in Court and on September 30 I approved a sale to 519661 B.C. Ltd. for $7.5 million, subject to many conditions.

29 The order for sale was appealed to the Court of Appeal of British Columbia. Madam Justice Newbury gave oral reasons on January 16, 1998, [1998] B.C.J. No. 246, dismissing the appeal.

30 On March 6, 1998, I heard an application in an action that Mr. Mahood commenced out of the Kelowna registry of

this Court. That action seemed to be that the petition in the case at bar be dismissed because it had dragged on for too long. The pleadings, signed by a solicitor, were a sham. They called for "specific damages in the amount of $15.8 million." I struck out the statement of claim and the writ of summons.

31 At hearings on November 30 and December 3, 1998, the receiver-manager applied for an order approving amendments to the offer of purchase of the Britannia lands. Coupled with this was an application by Mr. Mahood to dismiss Campbell Saunders as the receiver-manager. Mr. Mahood contended that Campbell Saunders was in contempt of the order of Mr. Justice Holmes by listing the property for sale. I rejected that contention and pointed out that a challenge to the listing was heard by the Court of Appeal and dismissed. I allowed the amendments to the purchase agreement.

32 On December 15, 1998, I issued reasons stating that no evidence had come before the Court of collusion between the petitioners and Campbell Saunders, of less than arm's length dealing between Campbell Saunders and the accountants, or of any deceit, fraud, mismanagement or neglect by Campbell Saunders.

33 On July 9, 1999, Mr. Mahood applied, in this action, for leave to apply on behalf of MPP and BBH to have action No. 891536, the matrimonial action, dismissed. In reasons filed on July 29, 1999, [1999] B.C.J. No. 1794, I traced the history of the matrimonial action and how it intertwined with the case at bar. Mr. Mahood's contention was that the receiver-manager had "neglected, ignored and effectively refused to address the matters of the LP's and the FRA action."

34 I stated that there was an intertwining of the oppression and matrimonial actions, but that any lack of activity in the matrimonial action was understandable. The motion to strike out the matrimonial action was dismissed but I said that the matrimonial action should either move along quickly or be resolved upon the conclusion of the oppression action.

35 On November 4, 1999, Madam Justice Proudfoot, of the British Columbia Court of Appeal, heard five applications for leave to appeal. She allowed two and adjourned the rest. On December 15, 1999, the Court of Appeal heard the three that were adjourned. In reasons delivered on January 12, 2000, [2000] B.C.J. No. 38, the Court said that what was being appealed were my orders empowering the receiver-manager to list the property for sale. Leave to appeal was denied.

36 The trial of this action commenced on May 15, 2000, but on May 16 the respondents applied to have me "step down" as the trial judge. I followed the reasoning in Middlekamp v. Fraser Valley Real Estate Board, [1993] B.C.J. No. 1846, July 20, 1993, Vancouver Registry, CA017316 (B.C.C.A). I held that the fact that Mr. Mahood had "not found favour in this Court or in the Court of Appeal is not a proper foundation for a reasonable apprehension of bias."

THE PLEADINGS

37 The original petition was filed on July 21, 1993. Amended petitions were filed, pursuant to an order of Holmes J., on September 2, 1994, and August 1, 1995. A further amended petition was filed pursuant to Rule 24(1)(a) and a second amended petition was filed in accordance with the order of Brenner J. dated March 29, 1996.

38 The petition deals with the appointment of a receiver-manager and with other matters relevant to the receiver-manager. It also alleges that the affairs of the respondent companies have been conducted "in a manner oppressive to the petitioners or that acts have been carried out that are unfairly prejudicial to the petitioners, pursuant to s. 200 of the Company Act, R.S.B.C. 1996, c. 62 or pursuant to s. 241 of the Canada Business Corporations Act, R.S.C. 1985, c. c-44."

39 The oppression alleged against the "respondent companies" [High Country Holdings Inc., Britannia Beach Holdings Ltd. and Makin Pulp and Paper Ltd.] is, in digest, as follows:

1. The assets of the companies have not been utilized for proper business purposes;
2. Improper or inadequate financial records;
3. Assets of the companies transferred or encumbered for improper purposes unrelated to company business;
4. Granting charges over real and personal assets of the companies for improper purposes and for amounts not owed by the companies;
5. Not generating business revenues or conducting business operations and not generating dividends;
6. Failing to comply with the provisions of company articles or with the Company Act or the Canada Business Corporations Act with respect to disclosure, record keeping, passing of resolutions or holding meetings;
7. Improperly issuing, allotting, transferring or redeeming shares; and
8. Entering into management or employment contracts on behalf of the companies without adequate consideration and for improper purposes

40 The petitioners ask for an order winding up the respondent companies pursuant to s. 295 of the Company Act.

41 There are also what the petitioners describe as "other claims." These include allegations that the respondent companies have breached their articles of association, that they have breached sections 22 and 150 of the Company Act, and that as a result they are liable in damages pursuant to sections 296 and 314 of the Act.

SUBMISSIONS OF THE PARTIES AND COURT COMMENT THEREON

42 Section A of the written submissions of the respondents sets forth a readable and interesting family and corporate history. Unfortunately, it is replete with material not part of the trial evidence. Section B is a response to the petitioners' brief.

43 The submission of the petitioners outlines the family and corporate history. I will make reference to some portions while noting that the respondents branded much of the petitioners' submissions as "false, malicious, not correct, not factual, fallacious, subjective, vexatious or specious."

44 All parties agree that the Mahoods had three sons, Michael, Jan and Tony. Further, that they all lived in British Columbia and that business difficulties caused the family to move to Alberta.

45 The petitioners submitted that HCH owned land in Alberta and that HCH's original sole shareholder was Bertha Mahood. In 1979 HCH became the sole shareholder of Makin Project Initiators ("MPI"). Mr. Mahood said that this is "false" and he then proceeds in his submission to give "evidence" to the contrary.

46 In 1982 HCH issued shares to Bertha Mahood and the Mahood children. They were the sole shareholders of HCH. Mr. Mahood agrees with this assertion. All parties also agree that: "With the success of raising money through the SRTC program, Bertha and Ernest moved to Calgary in 1984 and all three sons returned to work in the newly financed pulp and paper project. The company pursuing the project was named "Makin Project Initiators Ltd."

47 By 1985 MPI had sold $96 million in tax credits for $36 million. Out of the $36 million MPI paid $14 million as a deposit on equipment and a further $7.5 million under the Income Tax Act. This was refundable on the basis of 50% of every dollar of scientific research and development expenditures incurred. There remained a tax liability by MPI to Revenue Canada of $47 million.

48 MPP was incorporated in 1984. HCH owned all of the issued shares of MPP. In 1985 MPP entered an agreement to buy the Britannia lands for $4.5 million. MPP borrowed the necessary funds from MPI. In 1985 the capital of HCH was reorganized resulting in all the shares being held by Mrs. Mahood, the Mahood children and a family trust.

49 MPP announced an intention to build a $235 million paper mill in the Caribou. MPI and MPP also entered into a contract with Mr. Ernest Mahood to employ him for five years at an "annual reimbursement" of $200,000 with a termination clause of $1 million. From time to time Mr. Mahood extended this contract. At a meeting attended only by Mr. Mahood on June 16, 1992, he extended the agreement to 1994 and made BBH jointly and severally liable for the whole amount alleged to be due.

50 In 1993 MPP and MPI recorded, for the first time, a liability to Mr. Mahood under this contract.

51 In 1986 Mrs. Mahood learned that Mr. Mahood had a mistress. Mrs. Mahood had been living in Vancouver in a home purchased on October 13, 1986, with funds from Canada Trust. The source of the funds was unknown to Mrs. Mahood. Commencing in 1986 Canada Trust was considering a financial involvement in the Britannia project.

52 On January 12, 1987, a meeting was held at which, according to the petitioners, they were "pressured" into transferring their shares in HCH to Mr. Mahood. The petitioners' submission details this meeting as follows:

> Present were Bertha, Jan, Tony, Ernest, Dale Harder and Mr. De Graaf. Bertha and Ernest described the meeting as confrontational. Ernest wanted all of the Class "D" voting shares of High Country transferred from Bertha, Jan, Tony, Michael and the Mahood Family Trust to his name. Prior to this time Ernest had not held any shares in High Country. Bertha, Tony and Jan testified that they were pressured into agreeing to the share transfer. They testified Ernest threatened to destroy the companies. Dale Harder, an acquaintance of Jan's but also the lawyer for MPP and Ernest, spoke with Jan and Tony encouraging them to agree. Bertha testified she called Mr. Buan, Ernest's lawyer, for his advice. Bertha, Jan and Tony agreed under pressure and influence of Ernest, MPP's lawyer Dale Harder and the accountant to transfer the Class "D" voting shares. It is unclear whether documents were signed at the meeting or later. Michael testified he was called by telephone and signed the documents at a later date. Ernest testified at trial under cross examination that he should not have taken Bertha's Class "D" voting shares and he wanted his sons' shares because they were behaving irresponsibly. There was no cogent evidence at trial of irresponsible behaviour on their part to January, 1987. Bertha, Tony, Michael and Jan did not receive any independent legal advice before signing the documents. The documents were prepared by Ernest's lawyers. No consideration was paid for the transfer. The documents included voting proxies in favour of Ernest from all other shareholders of all classes of shares. Ernest testified at trial that the testimony given at trial by Tony was truthful. Tony, in particular, was not a sophisticated shareholder such that he might appreciate the consequences of Ernest's demand or a need to be independently advised.

53 The respondents' reply to this was to say that Mr. Mahood "did not wish to state a litany of examples of the situation." I take this to mean that while he disagreed with the petitioners' trial evidence, he "did not wish" to make an issue of it in a public forum. However, in his written reply to the petitioners' submissions he does just that. He gave "evidence" in his submission of a series of problems caused by his family.

54 Mr. Mahood's conclusion, in his reply, is that it was "with the full approval of the petitioners, [that] the voting shares were transferred to Ernest Mahood." The petitioners concede that they did sign corporate documents including resolutions. However, in my opinion, the bald statement of Mr. Mahood that the petitioners approved the transfer of shares is but an assertion of his position that his family signed documents agreeing to the transfer. This is not in dispute and begs the question as to whether it was oppressive conduct that resulted in the transfer.

55 Makin Holdings Ltd. ("MHL") was incorporated on April 28, 1987, with the sole director and officer being Mr. Ernest Mahood. On April 27, 1987, Canada Trust advised that it was prepared to lead a syndication to advance funds to complete the Britannia project. It was to loan $50 million of a $150 million loan with the guarantor being MHL.

56 The total project financing being sought was $400 million. The petitioners submitted that MPP continued to pursue this funding from June to August 1989. The reply of Mr. Mahood to this is that this submission is "vexatious and stupid." I do not find this response to be helpful.

57 This financing continued to be pursued but never came to pass. On June 9, 1989, Mrs. Mahood commenced a family relations proceeding and placed a lis pendens on the Britannia lands. The respondents submitted that this is the cause of the failure to secure financing. They point to trial evidence suggesting that the existence of legal actions against the companies are "considered a detrimental risk assessment" by potential investors.

58 The petitioners submitted that Mrs. Mahood had informed Mr. Mahood "that she was prepared to lift her lis pendens to permit sale of the [land] or [for] interim financing." This was her trial evidence and to my recollection has been her position throughout this lengthy litigation.

59 In response Mr. Mahood submitted that the lifting of the charge in order to allow financing was not good enough, that the litigation had to come to an end. That position is not of any assistance to the respondents as it suggests that the Court should find that the litigation was ill-founded and the sole responsibility of the petitioners.

60 On September 1, 1989, the Britannia lands were listed for sale at a price of $14 million. A sale of the Britannia lands was concluded in June 1990 for $12.75 million but the sale fell through

61 Mr. Ashford became involved with the project in 1990. He became the Project Manager and the offices of his company, Ashford Engineering Ltd., eventually moved into the same premises as MPP and BBH in False Creek Mr. Mahood replied that this "eventually" was seventeen years after Mr. Ashford commenced working for the respondent companies.

62 On February 26, 1991, Mr. Mahood caused a dividend of $132,000, shown as payable to Mrs. Mahood, to be cancelled. This increased HCH's retained earning and resulted in Mrs. Mahood being liable to HCH for over $125,000 in loans. Revenue Canada thereby assessed income tax on Mrs. Mahood for this amount but she successfully defended the claim.

63 Mr. Mahood says that this "is not true." He says that $125,000 was advanced to Mrs. Mahood, that it "remains as an outstanding advance" and that it is "reflected" in the HCH general ledger.

64 On June 26 and 28, 1992, Mr. Mahood, acting as the board of directors of HCH and for all of the shareholders of BBH and MPP, reorganized MPP's share capital by issuing nine million shares of MPP to MHL thereby diluting HCH shareholdings by 9 to 1. Mr. Mahood replied to this by stating that "the share structure of MPP was not reorganized." He said that the issuance of shares was "in accordance to the long standing authority provided by corporate resolutions."

65 The petitioners submitted that on September 20, 1992, Mr. Mahood, acting for all the directors of MPP, passed resolutions authorizing the creation of preferred shares in exchange for $4.8 million of debt owed to MPI by MPP. Further, that MPI was dissolved on December 1, 1991, and "no demand was made on MPP to September 20, 1992."

66 Mr. Mahood replied that this is all "falacious." He said that this matter "falls within the responsibility of the companies and the president" and that what he did was "under the authority given him by the HCH directors." Once again, I do not find this response to be helpful but rather simply argumentative.

67 The petitioners, in their submissions, brought to the Court's attention that on December 31, 1992, Mr. Mahood caused a series of resolutions to be passed that changed obligations on loan accounts and created charges between MPP and HCH. Further, that Mr. Mahood passed resolutions redesignating BBH's shares to be non-voting, increased share capital, exchanged common shares of BBH for preferred shares and allocated Class A common shares of BBH to HCH and MHL.

68 The petitioners submit that none of the obligations or charges were recorded in the books of either MPP or HCH prior to December 31, 1992. Furthermore, that there was an outstanding Court order dated November 3, 1992, restraining HCH from "altering its present share capital structure, selling or encumbering its assets, and paying out dividends to shareholders or income."

69 Mr. Mahood characterized these submissions as "vexatious." He said that "the family were not insolvent or in bankruptcy when they received these benefits and they will, some time in the future, be out of bankruptcy and they can then make arrangements to serve all interests." I have no understanding as to what is meant by this response.

70 On February 3, 1993, Mr. Mahood entered into a promissory note on behalf of BBH in favour of the numbered company for $525,000 and granted it a mortgage over the remainder of the land for the benefit of certain creditors These creditors do not show in the company records as being creditors as of December 31, 1992. The petitioners submit that there was no consideration for the mortgage.

71 On August 19 and 20, 1993, Mr. Mahood caused MPP to grant him a mortgage for $1,792 million and also a mortgage to Ashford Engineering Ltd. from BBH in the amount of $178,828. The petitioners submit that as of December 31, 1993, the financial records of MPP did not show any debt to Mr. Mahood nor to Ashford Engineering Ltd. ("AEL").

72 At trial Mr. Mahood produced invoices from AEL for approximately $182,000. Mr. Ashford testified that he authored the invoices in 1995. The petitioners claim that Mr. Mahood "was aware that [they] would agree to an adjournment [of the petition] only if a suitable restraining order was granted preserving the status quo of MPP's and BBH's assets." The mortgages were registered on August 19 and 20 and on August 20 Mr. Justice Preston granted the restraining order.

73 In response Mr. Mahood said that he "considered it appropriate for management to do so [grant the mortgages] and the companies had acted under legal advice." I can only reflect that while Mr. Mahood thought it appropriate "to do so" that does not address the issues in this trial.

74 The receiver-manager's reports and an opinion from Mr. J. Grieve, counsel for the receiver-manager, were admitted as evidence at the trial. Mr. Mahood now submits that their "reports are not acceptable as evidence at trial as they have no validity. They were not accepted as expert testimony or opinion evidence."

75 This may be the opinion of Mr. Mahood but it is my opinion that the reports have validity and are acceptable trial evidence

FAILURE OF THE RESPONDENT COMPANIES AND MR. MAHOOD TO PRODUCE ACCOUNTS AND RECORDS

76 The issue of production of documents has been outstanding as long as there has been litigation between the parties. On February 5, 1991, Ryan J. said that "Mr. Mahood has not been completely co-operative in supplying business records even when ordered."

77 Holmes J. on September 2, 1994, noted that there were allegations of lack of financial disclosure, lack of proper accounting and failure to supply information, [1994] B.C.J. No. 1956. He held that he was "satisfied that there is substantial merit to this form of complaint." Nevertheless, he said that whether the petitioners can prove oppression or unfairly prejudicial conduct can only be determined at trial, not from competing affidavits.

78 On February 9, 1995, Mr. Justice Macdonald said that documents "should have been in the hands of the receiver/manager many months ago and indeed should perhaps have been disclosed in other proceedings years ago."

79 In the bankruptcy hearings in November, 1996, the receiver-manager's reports were received into evidence They

included opinions that Mr. Mahood had continued to refuse co-operation in producing the required financial documentation. Consequently, the financial reports in the hands of Campbell Saunders represented, to them, no more than the "rationale of Mr. Mahood, about which the receiver had reservations."

80 In the family relations action on June 13, 1997, I referred to the reasons of Holmes J. and of Macdonald J. and to the evidence of the receiver-manager that corporate financial records were not being disclosed by Mr. Mahood. As a consequence I held that it was not possible to weigh the veracity of the position taken by Mr. Mahood.

81 Mr. Schroeder, an accountant retained by the petitioners, testified that he was unable to do a "complete review engagement." He said that the records were incomplete, many charges appeared to be of a personal nature and no bank statements or source documents were provided.

82 The petitioners submitted that Mr. Mahood testified that all the business records of HCH, MPP, BBH, MPI and Makin Air had been lost in 1998. Mr. Mahood denies that he so testified. He submits now that "all financial documents of HCH resided with the corporate accountants Dale, Carr-Hilton" and that the financial records of MHL "reside with the company and with the corporate accountants."

83 My trial notes record that at the opening of Mr. Mahood's evidence he made a statement that in 1998 he could not afford to pay storage charges for documents therefore documents were destroyed. He added that "these [I believe he referred to exhibit 54] are the only surviving documents."

84 The receiver-manager was appointed in 1994 but was never informed of the records that were said to be lost in 1998.

85 In cross-examination, with respect to money from Trinkhaus and Burkhardt (International S.A. ("T&B"), Mr. Mahood testified that "I have documents - not here - they are in Europe." He added that while "all the records are in the books of the companies, the Trinkhaus and Burkhardt records are only in Europe - the records never came to the companies lawyers."

86 Further in cross-examination Mr. Mahood was challenged again as to why he did not produce source documents. He said that the allegations about failure to produce records were untrue and referred to an affidavit of Mr. Carr-Hilton. Mr. Hobbs suggested to him that there are no source documents in that affidavit. Mr. Mahood replied that "records were stolen by the petitioners."

87 The petitioners submitted that in cross-examination Mr. Mahood was asked to explain what happened to amounts of $109,793 and $266,271 shown in a Wood Gundy account as of October 31, 1988. They say that Mr. Mahood testified when questioned by defence counsel and by the trial judge, that he had an MPP bank statement at home that would show where the funds went and that he would bring in the statement the next day. They say that he failed to produce it.

88 In response Mr. Mahood says that these assertions are "vexatious." After giving a lengthy explanation as to how certain books of account detail certain transfers of money, he said that he "did not testify that MPP bank accounts would be produced." He submitted that those records have been in the hands of the receiver for six years.

89 My trial notes record Mr. Hobbs asking where the above-noted amounts went. Mr. Mahood answered that they went to MPP, to a bank account in Calgary. He was asked as to the whereabouts of documentation and he answered that they were in the company documents "not here - I took them home." He was asked to produce them and he replied "O.K., tomorrow - a bank statement."

90 These trial notes are entirely in keeping with the petitioners' submissions. Mr. Mahood's response to this issue is that it "is false." He alleges, by way of a submission, that Michael Mahood "stole and removed almost all of the business records from the offices in Calgary" and that "MPP miscellaneous documents were lost from storage."

91 This issue of production of documents must be decided in favour of the petitioners. It not only undermines the respondents' case, particularly the failure to produce source documents, but it reflects adversely upon the credibility of Mr. Mahood.

TRIAL EVIDENCE AND COURT COMMENT THEREON

92 I do not intend to produce a transcript of the evidence in these reasons. Rather, while I will repeat portions taken from my notes, I will for the most part simply indicate the type of evidence and my conclusions.

93 Mrs. Mahood testified as to the family history and the troubled commercial life of her husband. A Mr. Aird Flavelle obtained a judgment against Mr. Mahood resulting in family assets being put in the name of others than Mr. Mahood. For example, a farm that was put in the name of Sierra Holdings Ltd. This company's name was changed to High Country Farms Ltd. in 1973 and later to High Country Holdings Ltd.

94 The family moved from British Columbia to Alberta and eventually settled in Red Deer. However, their house in Red Deer was foreclosed and the family became renters. Life had not been easy for many years. It was not until the SRTC money materialized that the Mahoods experienced financial relief. The family moved to Calgary and Mr. Mahood began his European trips. Mrs. Mahood testified that they reached a frequency of once a month. She occasionally accompanied him.

95 The Mahoods "located" a muse in Cardiff in which Mr. Mahood was to live and attend the University of Wales. Mrs. Mahood said that her husband purchased a house in London that would be his office. Mrs. Mahood testified that it was found out to be for his mistress.

96 A series of dollar figures were put to Mrs. Mahood. She testified that she never received $462,149. or $247,025. or $32,514. She said that she does "not remember" receiving $292,315.11, a figure appearing in corporate records in 1985. A further series of documents showing money received by her were said by Mrs. Mahood to represent amounts that she did not receive. As well, she said that she knew nothing about a shareholders loan of $266,456.

97 Mrs. Mahood denied that she performed management services for HCH and said that the figure of $19,443 shown in the corporate books was her maintenance payments. Mr. Mahood testified that he "is being blamed for paying the maintenance" from the company but, according to him, it "was paid because of an agreement between lawyers."

98 In an earlier segment of these reasons I set forth in some detail the submissions regarding a meeting on January 12, 1987, at which shares were transferred to Mr. Mahood. Mrs. Mahood testified that she was given the option of signing over the shares to Mr. Mahood or "he would destroy the company." She said that "the boys objected."

99 Mrs. Mahood phoned Mr. Buan, trustee of the family trust, and was told that she "might as well sign them over." She did so and "so did the boys." It is significant, in my opinion, that there is a promissory note dated February 9, 1987, from Mustard Seed Capital Management Ltd. and guaranteed by Mr. Buan in favour of HCH for $100,000. Mr. Mahood testified that he approved this loan with no security. He said that "in hindsight this was not appropriate in that Mr. Buan was the trustee of the family trust."

100 Mr. Mahood testified that the reason for the share transfer was "the conduct of the family members." He said that he had a confrontation with his sons about taking certain equipment and selling "things." He testified that he told them that they "had to act according to corporate principles" and not with the "utter disregard" that they had shown.

101 He said that he "had to make a choice, them or me" and that "all of the family agreed to the transfer of the shares." Mr. Mahood testified that the family had the opportunity to obtain independent legal advice. According to Mr. Mahood, he "never intended to deprive them of money meant to be theirs ... the family got $2.8 million during those years."

102 Mr. Mahood testified that he had "no discord with Mrs. Mahood" and that "in retrospect I do not think that Bertha should have signed her shares over."

103 In cross-examination by Mr. Ashford, Mrs. Mahood said that her husband "was the brains behind the project ... he was the only person who made decisions ... he made all the decisions about the business." Mr. Ashford then ventured into the subject of the lis pendens to which Mrs. Mahood said that it "stopped nothing ... a fallacy to say so ... it would have been removed if any sale had come up."

104 There was little cross-examination of Mrs. Mahood and what there was rebounded favourably for the petitioners. Nothing in cross-examination undermined the credibility of Mrs. Mahood. Consequently, her evidence remained intact and her observations as to the inaccuracy of the companies records and that she was intimidated into signing over the shares is unchallenged and must be accepted by the Court.

105 Mr. Mahood testified that "Tony is the only one in this case who spoke the truth." Mr. Tony Mahood testified that he was hired by MPP about 1984 and worked with it until 1987. He said that he found out about a shareholders loan after this litigation commenced. He received $100,000 and he understood that the accountant for HCH "would look after the income tax." He received a demand from Revenue Canada for "over $100,000" and eventually received a demand dated June 14, 1989, for $22,657,196. He went into bankruptcy in 1992.

106 Mr. Tony Mahood denied the suggestions that he was in some way stealing equipment or gravel. He said that he bought a gravel truck and that he received "no money from the sale of equipment."

107 Regarding the January, 1997, meeting he said that he was called to the meeting "to smooth over the waters." He testified that there was "resistance" to the transfer of the shares but he "wasn't sure what was taking place."

108 Mr. Mahood commenced his cross-examination of Tony Mahood by saying that "your evidence is fairly accurate." Cross-examination by both Mr. Mahood and Mr. Ashford neither added or subtracted anything significant from his evidence.

109 Michael Mahood became involved with the pulp project in 1979 while living in Red Deer. He was 20 years of age. He said that the project "died through lack of funds" but was revived in 1984 with the receipt of SRTC money. He then returned to work on the project and so continued until 1989.

110 As with Tony, he testified that he did not borrow $8,250 from one of the companies, that he did not borrow $55,000 from Mr. Mahood and that he never received the recorded amount of $130,000 from any of the companies. He said that whatever amount he received, and this may have included an amount of $130,000, was given to him as a loan by his father.

111 The January, 1987, meeting came "out of the blue" to Michael. Mr. Mahood telephoned him and said that he wanted the shares. Mr. Harder, a lawyer for Mr. Mahood, told Michael that he "had to do it." Mr. Harder informed Michael that Mr. Mahood was getting nothing and that he was upset and "would walk away if he did not get the shares." Michael took the position that he would have to clear things up with Revenue Canada which was demanding tax on money that he had not received. Mr. Michael Mahood testified that "the scene was fictitious ... documents had been prepared just to cover some money of HCH's."

112 According to Michael Mahood, his father met with him later in Calgary and said that he would provide documents to clear up the problem with Revenue Canada. However, Revenue Canada assessed Mr. Michael Mahood $40,000, apparently on the $130,000 allegedly earned from the companies, and he went into bankruptcy.

113 He said that he supports Mrs. Mahood in this action and that he is knowledgeable as to why this action is being pursued. He testified that this action was taken to save assets and to get someone to take over the companies. He said that the dilution of shares is one of the reasons why rectification is being sought.

114 Mr. Leslie Jan Mahood started working for his father in 1980 in Red Deer. However, money ran out and it was not until 1984 that his parents said the project was "back on." He moved to Calgary and worked on the project for three years. In 1985 he received $103,000 and in 1989 Revenue Canada assessed him $189,000. He testified that he "had no idea what it was for." He denied that he had a shareholders loan of $207,818. He also denied that he received a "benefit" of $191,838.

115 Entered as an exhibit was a document in handwriting dated June 6, 1998. Mr. Jan Mahood testified that he signed the "paper" but "never in my life saw the letter." He said that there was no writing on the paper when he signed it. He testified that this was "a common occurrence ... I trusted my father."

116 I did not sense any credibility problem with the evidence of the Mahood sons. Cross-examination did not seem to be directed to undermine their credibility. It was never suggested to them, or to Mrs. Mahood, that company shares were in their names as trustees only. As I noted earlier in these reasons, counsel for the petitioners submitted that the petitioners were the shareholders and "equity arises in their favour."

117 Mr. R. Schroeder is a chartered accountant retained by the receiver-manager to review the respondent companies' records and to prepare a review engagement report. A review engagement report is a complete financial report certified by the accountant. He testified that he could not complete such a report for any of the companies. He explained that documents such as bank statements were not available, that required information was not available, that he could "not be satisfied regarding Makin Air" and that there was no consistency between the financial records and the companies' statements.

118 Mr. Schroeder said that even after he sent the above noted report he went to the office of Mr. Trower, former counsel for Mr. Mahood, and looked at documents. He said that accounts between the companies were "mixed" and this included a mixing of legal fees for matrimonial work with fees for corporate work. Mr. Schroeder said, as recorded in my notes, that when he "did go behind the documents the backup documents did not support the financial statements. If we went further it came to nought and we eventually gave up." He decided that "at best" he could produce a qualified report. This report was filed as an exhibit.

119 Mr. Schroeder was led through many documents in giving his evidence. For instance, a corporate record showing $1.79 million owing to Mr. Mahood. He said that such an indebtedness "would ordinarily" show in the MPP records but there was no such document verifying such an indebtedness.

120 Mr. Schroeder was also referred to the agreement dated January 1, 1986, wherein MPP sold "the remainder" of the Britannia lands to BBH for $1.5 million. The agreement provided that BBH was liable for "all taxes and other levies" on the land. On March 31, 1990, Mr. Mahood caused BBH to grant MPP a mortgage of $1.5 million over this "remainder", payable on demand. The petitioners submit that BBH was not indebted to MPP on March 31, 1990. Mr. Schroeder testified that there are "no backup documents" for this transaction and that there is "no explanation" for it. He said that he could find no document showing any consideration for the mortgage.

121 Mr. Mahood testified that BBH was in default in that it had not paid the taxes as required and was therefore in default under paragraph 9 of the sale agreement.

122 On May 28, 1992, MPP, BBH and T&B signed documents stating that MPP had assigned its "mortgage of mortgage" to T&B. On January 22, 1993, the mortgage, now payable on demand for $1.5 million, was assigned by both MPP and T&B to the respondent 429553 B.C. Ltd.

123 With respect to the assignment to 429553 B.C. Ltd., the petitioners submit that there was no consideration "though there is a list of creditors who are seeking to benefit from the assignment." The petitioners say that neither T&B nor a list of creditors advanced by the respondent companies were actually creditors of MPP. They say, relying on Mr Schroeder's evidence, that none of them show as creditors in the working papers or financial statements of that company.

124 Mr. Mahood's reply to this is that the mortgage of a mortgage "was security taken to secure under the debenture the arranged directed funds of Trinkaus and Burkhardt to HCH." This, it seems to me, misses the point but I can do no more than cite it as Mr. Mahood's response.

125 Further, he alleged that "Ellis Foster or Mr. Schroeder has no standing and no credibility to confirm any matter of the companies." The credibility of Mr. Schroeder is not for Mr. Mahood to assess in this trial. I found him to be a credible witness. As to his standing to testify, I accorded that to Mr. Schroeder.

126 Mr. Schroeder cited innumerable other examples of where the corporate records could not be verified. He said that there were trial balances available but that these are but a starting point. In order to verify them, backup documents are required. They were not available thus he could not verify the trial balances.

127 The limited cross-examination of Mr. Schroeder did not illustrate any misconceptions or errors in his evidence. His evidence supports the conclusion that company financial records were not verifiable and that source documentation was not available either because it was concealed, lost, destroyed or never existed.

128 Those were the witnesses in the petitioners' case.

129 Mr. Brian Robson was the first defence witness. He is a chartered accountant. His company was the accountant for the companies. He explained that there are three types of accounting engagements. There is a notice to reader, usually done for income tax purposes, a review engagement and an audit. He said that he had the necessary records to do "his job" which was simply a notice to reader. He testified that the "accounting trail" was only enough to do a notice to reader but not sufficient for either of the other more demanding types of reports.

130 In cross-examination he said that his company produced notice to reader reports. He testified that what he had to do his job was "synoptics" from Mr. Mahood. He felt "comfortable" with this.

131 It was pointed out to him that there was a $132,000 discrepancy in the retained earnings figure. After many suggestions were made to him he said that Mr. Mahood said that this amount was not owing to Mrs. Mahood "so we cancelled it." He agreed that his financial reports simply relied upon what he was told by Mr. Mahood.

132 Much the same happened regarding the figure of $1.5 million "owed" to Mr. Mahood. Mr. Robson said that Mr Mahood said it was owing so even without "working papers" to support that claim Mr. Robson recorded the debt. Mr. Robson agreed with the suggestion that this figure "just suddenly appeared" in a document and that there was "no accrual shown in earlier documents as it should have." Mr. Robson then added the comment that "maybe it was just crystalized at that moment."

133 As for money from T&B, Mr. Robson said that he "might have" seen some documents showing money coming in to "one of the companies." He added that he "knew just what Mr. Mahood told" him.

134 If Mr. Robson was meant to bolster the respondents' case his evidence was a resounding defeat.

135 Mr. J.F. Carr-Hilton was the author of an affidavit that I referred to earlier in these reasons. Mr. Robson was the accountant in charge but he was away so he asked Mr. Carr-Hilton to swear an affidavit. The affidavit was designed "to comfort Mr. Mahood." He testified that "Mr. Mahood would tell us that certain bank deposits related to certain mortgages." He then referred to the mortgage given to Mr. Ashford and said that the invoices from Mr. Ashford support the mortgage. That was about the extent of his evidence in chief.

136 Mr. Carr-Hilton's affidavit states that he spoke to Mr. Robson and "reviewed documents and working paper files from our records as well as documents provided by Mr. Mahood." From this he concluded that he had "personal knowledge of the matters contained" in his affidavit. He deposed that the "accounting and bookkeeping structure of the group of companies is somewhat complex." He said that the expenditures of the companies had been "allocated by Mr.

Mahood" by way of "journal vouchers with support invoices or other source documentation attached." However, he identified the "source documents" as the journal vouchers.

137 Mr. Carr-Hilton went on to depose that it was by "representations from Mr. Mahood" and from "our knowledge" that the documents "comprise the accounting records" for the companies. He added that they "are the basis for and form the underlying support for the annual unaudited financial statements." He said that the "the record keeping by way of allocation is somewhat unorthodox" but that there existed "orderly and methodical documentation in support of the mortgages" with "some minor exceptions."

138 Mr. Carr-Hilton testified that his affidavit was true. He said that his deposition as to the legitimacy of creditors on a mortgage could not be verified as to which of Mr. Mahood's companies owed the money and that "we had to take Mr. Mahood's word as to allocation." He testified that he was not giving any opinion that the mortgages were appropriate but that it was "simply" Mr. Mahood's allocation thereof.

139 In cross-examination he acknowledged that the accounts payable ledger did not show the amounts payable to Mr. Ashford. He agreed that he could not say if the work done by Mr. Ashford was properly billed to BBH. He said that it is but a matter of "allocation" and that the documents did not allow the accountants to "tie one bill to any specific mortgage."

140 Not only did Mr. Carr-Hilton "simply" rely upon what he was told by Mr. Mahood but he acknowledged that he "relied upon what Mr. Robson told [him], i.e. that Mr. Mahood kept good records." He conceded that he "had concerns about the legality of the $1.7 million mortgage to Mr. Mahood." He said that Mr. Mahood wanted a large penalty if he was terminated and told Mr. Carr-Hilton that "this was the decision of the companies."

141 Mr. Carr-Hilton's evidence was a weakly based and speculative series of opinions based upon little other than loyalty to his company's client. His affidavit was ill advised and reflected poorly upon him. His evidence detracted from rather than supported the respondents' case.

142 Mr. Victor P. Boname, the president of Urbanics Consultants, testified that the lis pendens was not the reason that his company declined to become involved in the project. He said that they were "simply too busy." He had not been advised that the lis pendens could be lifted if financing was arranged.

143 Dr. S. Behie, a science graduate, joined MPP in 1984. He was a director of both MPP and MPI. He was the vice-president and chief operating officer and "was in charge of the technical side." He testified that his "small engineering group acted as the co-ordinator for the European groups and for local contractors."

144 He explained the concept of the project, how it had to be amended to meet financial goals and how the financing was undertaken. Dr. Behie explained some of the difficulties with the project as it was envisioned in Alberta. He said that it could not "get ahead with a plant for research and development only." Consequently, a commercial segment had to be added in order to "get to a comfort level in order to raise money." He said that the project had to raise $60 million in order to "deal with its $47 million tax liability."

145 Dr. Behie always recognized that "secondary financing" would be required. He saw possible sources in Richardson's, Canada Trust and Kidler Peabody (New York). Richardson's showed early potential but "did not follow through. Canada Trust was committed to putting together a $150 million mortgage. It would put up $50 million but only after the first $100 million was secured." He understood that Kidler Peabody did due diligence but never got to the point of an "iron clad deal."

146 Credit Anstel, an Austrian bank, became involved in the financing but "it did not follow through on its anticipated position." Dr. Behie testified that it never informed the respondent companies as to why it chose not to participate. However, he thinks that some incident at a dinner "might have caused them some problems."

147 The Bank of Austria became involved in financing equipment. Dr. Behie testified that its commitments were "firmly in place but when the rest of the financing failed to come together it all collapsed like a house of cards." In Dr. Behie's words, "none of the possible sources of financing ever came to fruition. There were commitments but like a house of cards it all fell apart by 1989." He said that the project's "best position" was in 1987 when all but the $100 million residual financing was in place.

148 Dr. Behie testified that the project was able to meet the SRTC requirements. It was his understanding that expenditures had been achieved to release the full SRTC grant. However, on August 2, 1988, Revenue Canada declared that $88 million of expenditures did not qualify. Dr. Behie testified that he did not "know of" the letter but that he "generally knew of the $88 million liability." Dr. Behie left his employment on August 15, 1988.

149 To this point in his evidence Dr. Behie was forthcoming and articulate. However, when he was cross-examined as to the internal financial picture of the companies he became a most reluctant witness. I noted in my bench book that "it was like pulling teeth" to get him to answer certain questions. He said that he did not know of any "concoctions" in the financial records and that he was told by Mr. Mahood that the statements were correct and that he "trusted him and signed."

150 Dr. Behie was referred to a letter dated April 24, 1987, from Canada Trust to Mr. Mahood. It is a lengthy letter in which the trust company confirms that it "is prepared to lead a syndication and advance funds" for the project. Dr. Behie knew that this letter was shown to prospective investors and that a requirement of the trust company was that MHI guarantee the loan. Dr. Behie testified that "Mr. Mahood told me that MHI could stand behind such a guarantee. I did not look into MHI. I don't recall knowing much about MHI ... just that the Mahood family was bringing MHI to the table."

151 During this exchange a series of documents were put to Dr. Behie. He agreed that a corporate balance sheet of June 28, 1997, indicated that Makin Holdings Inc. (that he said was synonymous with HCH) had a $47,381,822 equity.

152 He conceded that the balance sheet as drafted assumed that there had been compliance with the SRTC requirements. Further, that there was nothing in the balance sheet warning readers of a contingent liability if the qualified expense requirement was not met. He said that "we had every expectation that all expenses would stay in the qualified category."

153 Dr. Behie further conceded that the balance sheet did not mention any indebtedness to Mr. Mahood for such as salary. He said that he "did not know" of Mr. Mahood's termination allowance of $1 million.

154 Dr. Behie was cross-examined on an affidavit that he had sworn in 1994. It was authored in support of the respondents' position that a receiver-manager was not required. He deposed that the lis pendens denied "interim financing" and constrained the corporate business and prevents progress on the projects.

155 Dr. Behie testified that he had not seen the lis pendens and that he did not know that Mrs. Mahood was willing to lift the lis pendens.

156 With specific reference to two paragraphs in his affidavit, he conceded that Mr. Mahood discussed with him what to say and that what he said was based upon what he had been told by Mr. Mahood. He further conceded that some of the statements to which he deposed "could be wrong." When asked how he could say what he did in reference to one paragraph in his affidavit, Dr. Behie answered, "I believed in the project." However, he concluded his evidence by saying that he "lost faith when Credit Anstel pulled out."

157 I do not think for a moment that Dr. Behie lacks credibility as a person or that he in any way fabricated evidence. However, his unquestioning acceptance of whatever he was told by Mr. Mahood makes much of his evidence susceptible to the credibility of Mr. Mahood.

158 On the other hand, his belief in the project buttresses the vision of Mr. Mahood and, as later evidence revealed, there was and still may be reason to think that this project is not just a pipe dream. However, that is not the gist of this lawsuit and Dr. Behie's evidence was only relevant in an oblique way to the issues in this trial.

159 Mr. K.W. Wünsche is an employee of Andritz Ag, the supplier of pulp and paper mill equipment that is mentioned earlier in these reasons. It is a major company with annual sales of $1.5 billion and 4,500 employees.

160 Mr. Wünsche met Mr. Mahood in 1984 and became involved with the project that was then destined for Alberta. Mr. Wünsche met with many of the parties who had an interest in the project. He found Dr. Behie to be intelligent with "bright ideas". He testified that Mr. Mahood had new ideas and Mr. Wünsche had a high regard for his opinions.

161 He explained that the project failed in 1987 when the guarantees required from the Alberta government did not materialize. In 1988 Andritz financed a trip to Europe for Mr. Mahood. The company was still interested in the project continuing.

162 He testified that the project still has viability. He said that no one in Canada is producing the type of paper that Mr. Mahood wants to produce. He painted a picture of a mill that is not only environmentally friendly, but a positive addition to any area. A modern mill will have a completely closed water circuit. Mr. Wünsche said that the expelled water will be cleaner than when it enters the mill. As well, there is no air pollution.

163 Mr. Wünsche testified as to how modern mills in Europe have become the centrepiece for the development of new communities. In his words, "no noise, no waste, no conflict with the community. Rather, jobs." He said that in 95% of the world people initially object to a mill in their area but that with proper information they "come around." Mr Wünsche testified that "this plant [Britannia] would have been a showcase for the world ... not even yet matched."

164 Mr. Wünsche testified before me in July, 1996. Since that time his company has continued to investigate the project but "there are hindering circumstances still in place." He said that Andritz has looked into doing the project on its own and to that end has entered into a contract with the shareholders of MPP to buy its shares and proceed with the project. He testified that this contract is in writing and is dated in March, 2000.

165 Mr. Wünsche said that Andritz was unaware of injunctions against dealing with the shares. It was also unaware that Mrs. Mahood was prepared to lift the lis pendens if financing was arranged.

166 Mr. Wünsche was a most impressive witness. I had hopes at the conclusion of his evidence that a solution had been found to this litigation. That did not prove to be the case. As with Dr. Behie, Mr. Wünsche's evidence is helpful in understanding the project but adds little to the issues before the Court. Indeed, the fact that Mr. Mahood did not advise him of the injunction against dealing with MPP and BBH shares is further evidence of Mr. Mahood's less than forthright conduct.

167 Mr. Derek Ashford testified as to his introduction to the project and his visualization thereof. He said that he had his wife invest in the project. He detailed his work on the project. In cross-examination it was suggested to him that he was "caught up in the dream ... you were excited." He agreed and said that it was "a potential career change." He testified that as his role developed he "started to understand the dream ... it was a development that made sense."

168 Mr. Ashford said that he invoiced for his work, that he typically underbills clients, and that is "why I am not rich." He said that his fees to the project were "reasonable". However, Mr. Ashford admitted that when he was granted the $178,000 mortgage only $78,000 of it was for services rendered. The balance was for "future work." He agreed that he was given the mortgage on the same day as there was a restraining order issued but he had "no knowledge of the order." He said that "Mr. Mahood suggested that I should have security and I jumped at it."

169 Mr. Ashford volunteered that "Mr. Mahood gave me just enough information to do the job at hand ... I got most of my information from consultants." On Mr. Ashford's own admissions it is clear that he did not have intimate

knowledge of the financial picture including the SRTC involvement. He testified that he had little knowledge of the $1.5 million mortgage or of T&B's involvement. Indeed, he did not even know the identity of the European financier.

170 As with Dr. Behie, Mr. Ashford authored an affidavit in which he "based statements on what [he] heard at a management meeting." He said that he "believed what [he] was told."

171 One of the common themes that runs throughout this trial is how people relied, almost without question, upon what they were told by Mr. Mahood. The case therefore comes down to a great extent on Mr. Mahood's credibility

172 Mr. Mahood's testimony was given without the guidance of counsel. Consequently, it tended to ramble and to break into submissions rather than evidence. In the portion of these reasons dealing with the submissions I referred to many of Mr. Mahood's replies to the petitioners' submissions. Those replies are, in effect, a reiteration of much of his trial evidence in chief.

173 The cross-examination of Mr. Mahood was mainly directed at attempting to illustrate that his evidence was not credible and that his dealings with his family were equally distorted

174 For instance, defence counsel directed Mr. Mahood to a demand notice to Mrs. Mahood dated November 6, 1991, that claimed she owed $342,583.08 to MPI. This money was said to be connected to the purchase of the West Vancouver home in 1986. However, this notice contradicted Mr. Mahood's discovery testimony that both he and Mrs. Mahood purchased the home and the further testimony that the money came as a gift to Mrs. Mahood from a Mrs. Kollmar.

175 Mr. Mahood admitted that "the money did not come from MPI" and that "everything in the notice was not true ... I was annoyed." He said that he was "fed up and angry over untrue allegations by Bertha."

176 Another defence challenge to Mr. Mahood was his testimony in chief that the account with T&B was "personal." His discovery evidence was that the T&B account was corporate In his written submission Mr. Mahood said that T&B "did not at any time have contractual arrangements with MPP or BBH " He repeated his trial evidence that the "arrangements made with T&B were personal."

177 My trial notes of Mr. Mahood's evidence read as follows:

> "I borrowed money from T&B starting in 1987 - $1.5 million - I have documents - not here - in Europe - done by Pushor Mitchell - security I gave was mortgage of debenture - $640,000 came from T&B - Belmer paid $1.6 million into MPI - MPI use the money - came from European meetings
>
> Q. Where are the documents re T&B?
> A. There are letters from Pushor. I don't want to reveal the loan agreement.
>
> "I personally borrowed $1.5 million from T&B - not a one time loan - started with an organized line of credit - by the end of 1988 $36 million completely spent - earnings to companies by way of interest - all spent - $7.5 million in trust for R&D project - interest of about $4 million earned - therefore $33 million spent - about 1988 - arranged loan from T&B - had been dealing with them for years - we needed money to keep going - needed Belmer to provide a guarantee - in 1987 arranged a line of credit with T&B - met with two principles -signed documents - Euroloan - $810,000 maximum and $750,000 later."

178 On November 21, 1989, Mr. Mahood "took a mortgage of High Country's September 7, 1988, $810,000

mortgage from MPP." The mortgage of a mortgage recites that HCH had borrowed $632,430 from Mr. Mahood. The debenture itself says that MPP is indebted to HCC for $709,528.14 and "has asked the Lender to advance further monies to it up to a total of $810,000."

179 The petitioners' submitted that there is no "source documentation" of such an advance and that the financial statements for HCH for 1989 do not show such an indebtedness to Mr. Mahood.

180 Mr. Schroeder's draft report, prepared while he was attempting to do a full financial report, says that in 1988 MPP placed a charge on the property in the amount of $810,000 with HCH being the holder and that the charge has been assigned to Mr. Mahood and subsequently to T&B.

181 Mr. Hobbs, with respect to the $709,000, asked Mr. Mahood if he had cheques or other source documents. Mr Mahood replied: "Look in the books of account."

182 This testimony, confusing as it is, is further evidence as to the reluctance, if not outright failure, of Mr. Mahood to produce documentation. It is also evidence as to the state of the financial records of the companies. It is as though they were designed to confuse, not illuminate.

183 Mr. Mahood's credibility has been a major issue throughout all of the litigation. As early as February 5, 1991, Madam Justice Ryan, then of this Court, said that Mr. Mahood had "not been entirely candid with the Court with respect to many things." I must reluctantly come to the same conclusion. I say reluctantly because I have sympathy for Mr. Mahood's dream. There is reality to it and much more in its favour than has been generally acknowledged. Comments such as Mr. John Reynolds that "the chances of there ever being a mill at Britannia are somewhere between zero and nil" are not based upon knowledge. What Mr. Wünsche had to say put an entirely new and positive light on the project.

184 However, that evidence and my sympathy for the dream cannot overcome the hard evidence that Mr. Mahood has not acted personally or in his corporate capacities with veracity or with the best interests of the petitioners in mind. Unfortunately, I must further conclude that Mr. Mahood will say and do whatever is necessary to further his own interests.

185 While I have taken care to produce reasons that attempt to give a flavour of the trial, the most telling admissions come in the respondents' written submission, wherein they say:

> These Defendants owe no duty to account to the Petitioners or any trustee, as alleged or at all.

This astonishing position unfortunately reflects the attitude of Mr. Mahood and is entirely in keeping with the petitioners' claim that they were oppressed.

The respondents also said:

> ... the petitioners have no proprietary or equitable interest in the shares and the assets of these defendants and therefore no status or entitlement to seek any relief under s. 224 of the Company Act.

186 The petitioners submitted that "equity arises in favour of the petitioners because they were the sole shareholders of HCH from early days and HCH owned MPP and BBH." I agree with this. There is no evidence or even submission that the shares were held in trust for Mr. Mahood.

THE LAW

187 Statutory oppression remedies as a ground for relief originated in the United Kingdom in its Companies Act, 1948. They first appeared in Canada in 1960 in British Columbia's Companies Act. Such relief was generally not available in the rest of Canada until the proclamation of the Canada Business Corporations Act in 1975.

188 Most provincial corporate statutes now provide for an oppression remedy that is similar to that found in the above-noted statutes.

189 Section 200 of the B.C. Company Act reads as follows:

> (1) A member of a company may apply to the court for an order on the ground
> (a) that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including the applicant, or
> (b) that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including the applicant.

190 Section 241 of the Canada Business Corporations Act provides for a court application for a determination if a company has acted in a manner "that is oppressive or unfairly prejudicial to or that unfairly disregards the interests" of a complainant.

191 I have no hesitation in finding that there has been, in common parlance, oppressive and unfairly prejudicial conduct by Mr. Mahood and, through him, by his companies. The remaining question is whether in legal terms the conduct can be so defined.

192 In Scottish Co-operative Wholesale Society Ltd. v. Meyer, [1959] A.C. 324 (H.L.), Lord Keith of Avonholm said that oppression, in a statutory sense, "suggests ... a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members." He adopted the dictionary meanings of "burdensome, harsh and wrongful" in defining oppression.

193 The term "unfairly prejudicial" was commented upon by Fulton J. in Diligenti v. RWMD Operations Kelowna Ltd. (1976), 1 B.C.L.R. 36 at 46 (S.C.). He said that he found it significant that the dictionary definitions "support the instinctive reactions that what is unjust and inequitable is obviously also unfairly prejudicial."

194 In Cairney v. Golden Key Holdings Ltd. et al. (1987), 40 B.L.R. 263 (S.C.) His Honour Judge Macdonald, sitting as a local judge of this Court, reviewed a significant number of British Columbia cases that defined oppression. Therein he gave a series of examples of oppressive conduct. He concluded that none of the British Columbia cases had "added anything significant" to the definitions articulated in Scottish Co-operative, supra.

195 Another definition that Judge Macdonald referred to from that case was by Lord Keith:

> ... oppression ... may take various forms, implying that the concept is fairly open-ended. At a minimum, however, it seems there must be an element of lack of probity (adherence to the highest principles and ideals) or fair dealing to a shareholder in the matter of his proprietary rights as a shareholder

196 In Re Little Billy's Restaurant (1977) Ltd. (1983), 45 B.C.L.R. 388 (S.C.) Mr. Justice Wallace reflected upon personal and legal duties of directors, members and officers of corporations. He held that even where the conflicts arise from the duties of a person as a director contrasted with his duties as a member, the principles applicable to conflicts between legal and personal obligations apply. He said:

> The court will subject the exercise of the member's legal rights to equitable considerations where they are in conflict with his duties as a director and their exercise would be oppressive or unjustly prejudicial to one or more members.

197 Early in these reasons I referred to the principle that oppression cases fall to be determined upon their own facts. The following quotation is from Chief Justice Moore in Westfair Foods Ltd. v. Watt (1990), 48 B.L.R. 43 (Alta. Q.B.)

at 63:

> Therefore, the addition of "unfairly prejudicial" and "unfair disregard" to "oppression" in the context of [the statute], provides the court with broad discretionary powers to determine whether the act or conduct of the directors or majority, are equitable or fair with respect to the interests of minority shareholders. However, as the provision confers a broad discretion on the courts, each case will be decided on its facts.

198 The Chief Justice went on to hold that the oppression sections of the statute "makes it clear that [it] applies where the impugned conduct is wrongful, but not actually unlawful." He said that the legislature intended courts "to look beyond those legal rights to which complainants might have and to consider questions of equity."

199 I am therefore taking into account, in coming to a final decision in this case, the legal rights of the petitioners, including those that are equitable, and applying the accepted definitions of "oppressive" and "unfairly prejudicial" conduct as set out above. The case precedents make it clear that a "liberal interpretation" should be applied to those definitions to personal and corporate conduct. However, in the case at bar that is not necessary.

200 The petitioners, in their submission, have set out innumerable examples of what they submit amounts to oppressive and unfairly prejudicial conduct. I have included several of those examples in these reasons for judgment. Even applying an ultra-conservative definition takes the conduct of Mr. Mahood, and through him his companies, into the legal definitions of oppressive and unfairly prejudicial conduct

201 The petitioners' action is therefore allowed and the counterclaim dismissed.

202 There remains the matter of remedies. I want to hear further from the parties in this regard and ask them to make the necessary arrangements to appear.

THACKRAY J.

* * * * *

CORRIGENDA

Released: December 6, 2000

[1] I refer you to my Reasons for Judgment dated December 5, 2000:

> Line 7 of paragraph 25 should read: "I will only add that I noted ..."
>
> Line 5 of paragraph 141 should read: "... the respondents' case."
>
> The company mentioned in Lines 2 and 5 of paragraph 85 should read "Trinkhaus and Burkhardt" not "Trinkhous and Burkhardt".

THACKRAY J.

* * * * *

Released: December 22, 2000

[1] In my Reasons for Judgment handed down December 5, 2000, two errors appear.

[2] On page one, D. Ashford appeared as Director of 429553 B.C. Ltd. and not, as stated, as counsel for Ashford Engineering Ltd.

[3] On page 55, paragraph 171, line 3, I said "... they were told by Mr. Ashford." This should read: "... they were told by Mr. Mahood."

[4] The judgment is amended accordingly.

THACKRAY J.

cp/i/qldrk/qltlm/qljjt