CITATION: Macreanu v. Godino, 2020 ONSC 535
COURT FILE NOS.: CV-19-4813 and CV-19-4814
CV-19-4815 and CV-19-4816
CV-19-5018 and CV-19-5019
DATE: 2020 01 27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Liliana Macreanu, Applicant/Respondent to Cross-Applications

AND:

Lidio Godino, Respondent/Applicant on Cross-Applications

BEFORE: Doi J.

COUNSEL: Sabrina Saltmarsh and Mahdi Hussein, Counsel for the Applicant/Respondent to Cross-Applications

Ruzbeh Hosseini and Sakina Babwani, Counsel for the Respondent/Applicant on Cross-Applications

HEARD: December 19 and 23, 2019

ENDORSEMENT

Overview

[1] The parties jointly operated successful houseware liquidation companies for over 15 years. Unfortunately, they now find themselves unable to work together following a breakdown in their business relationship.

[2] Liliana Macreanu claims that Lidio Godino engaged in self-dealing and marginalized her from the companies in an effort to force their wind up. As such, she seeks leave under ss. 246(1) (*Derivative actions*) of the *Business Corporations Act*, RSO 1990, c.B16, as am. (the "Act") to bring derivative actions against Mr. Godino.[1] She also seeks an interlocutory injunction pursuant to ss. 246(4) (*Interim order*) and 248(3) (*Court order*) of the Act to remove Mr. Godino as a director of the companies and to restrain him from harming the companies. She has commenced

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[1] CV-19-4813-0000 and CV-19-4814-0000.

actions against Mr. Godino for oppression remedies under s. 248 (*Oppression remedy*) of the Act.[2]

[3] Mr. Godino denies that he engaged in self-dealing or improperly tried to wind up the companies. He alleges that Ms. Macreanu agreed to wind up the companies before she resiled from the agreement. He claims that the parties are deadlocked without any reasonable prospect of resolving their differences due to animosity and a lack of trust. As such, Mr. Godino has brought cross-applications to wind up the companies under s. 207 (*Winding up by court*) of the Act.[3]

Background

(i) The Companies

[4] Each party is a director and 50% shareholder in two (2) closely-held companies, Home Textiles Inc. ("Home Textiles") and Bed & Bath Warehouse Inc. ("Bed & Bath"). Since 2004, the parties have operated Home Textiles and Bed & Bath as an integrated business that distributes liquidation merchandise. Home Textiles is a wholesale liquidation importer and distributor and is Bed & Bath's primary wholesale supplier. Bed & Bath is a retail liquidation distributor that has several outlets. Both companies deal in houseware and home goods that include linens, bed and bath products, and clothing.

[5] The parties jointly operated the companies and a predecessor for over 20 years and had a close relationship. Together, they built a successful business. Unfortunately, their relationship soured and triggered acrimony that has compromised their ability to work together.

[6] The companies lack formal documents (i.e., minute books, by-laws, share certificates, shareholder agreements or share registers) setting out the parties' share ownership or their rights and duties as shareholders and directors, respectively. But at all material times, the parties understood and expected that would have equal decision-making in the companies and split the business profits equally. They also expected that their houseware liquidation business would operate solely through the companies.

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2 CV-19-4815-0000 and CV-19-4816-0000.
3 CV-19-5018-0000 and CV-19-5019-0000.

[7] Ms. Macreanu has acted as the lead manager for Home Textiles. Mr. Godino has been the lead manager for Bed & Bath's daily retail operations, and its purchasing and advertising activities. With Mr. Godino's consent, Ms. Macreanu assumed the title of "president" of the companies due to her relative seniority and experience, although this did not alter the parties' roles or business relationship. Over the years, the parties operated the companies by consulting with each other and by jointly making all major business decisions. In this way, they effectively operated their integrated houseware liquidation business as a self-described informal "partnership" within a corporate business structure.

(ii) Ms. Macreanu's Medical Condition and Procedure

[8] In November 2017, Ms. Macreanu travelled to Russia for a major medical procedure to treat the onset of a long-standing health condition. Before departing, she disclosed her health condition to Mr. Godino and advised of the risk of life-threatening complications. She also told Mr. Godino and staff how to manage Home Textiles' operational and financial affairs along with other matters in her absence. She agreed to increase Mr. Godino's remuneration to reflect the additional duties and responsibilities that he would assume during this period.

[9] On January 3, 2018, Ms. Macreanu returned to Canada and recuperated at home where she remained housebound due to her weakened immune system from the procedure. In February 2018, she began a gradual return to work, and initially wore masks and gloves to protect herself while her immune system recovered.

(iii) Breakdown in the Business Relationship

[10] According to Ms. Macreanu, Mr. Godino had stopped running the companies in good faith by the time she returned to work. She claims that he took advantage of her illness-related absences and slow recovery to justify his efforts to marginalize her and take over the companies. He is said to have engaged in self-dealing, directed verbal abuse to her, excluded her from business decisions, and sabotaged leases in order to compromise the companies' ability to carry on business.

[11] Mr. Godino denies that he engaged in self-dealing or marginalization efforts. He claims that he conducted himself in accordance with an agreement that he made with Ms. Macreanu to

wind up the companies. Ms. Macreanu acknowledges that the parties wanted to end their business relationship but denies that they agreed to terms for winding-up the companies. She claims that their inability to agree on terms for separating their business relationship led Mr. Godino to marginalize her aggressively in an effort to wind up the companies.

(iv) The "LG Home" Brand

[12] In early 2018 when Ms. Macreanu was away on medical leave, Mr. Godino decided to trademark "LG Home" as a Home Textiles brand for use in merchandising houseware through the companies. He did this without Ms. Macreanu's prior knowledge or approval. Ms. Macreanu only learned of LG Home after Mr. Godino and staff operationalized the brand with Home Textiles' trademark lawyers, who were retained with company funds. His unilateral decision to trademark LG Homes was in stark contrast to the parties' established practice of jointly agreeing upon new brands before developing them for the companies, as they did when they created the "*Bellissimo*" and "*The Canadian*" homeware brands for their business.

[13] Mr. Godino admits that Ms. Macreanu was not involved when the LG Home brand was conceived. But he claims that she concurred with the concept when she later learned of it, apparently when branded LG Home merchandise was placed in the reception area of the Home Textiles head office. Ms. Macreanu claims that she felt that she had no choice but to acquiesce at that point because the companies already had begun to stock branded merchandise. Mr. Godino purportedly confirmed that the LG Home brand was based on his initials. Ms. Macreanu feels that he created the brand to ready it for his future use in running a competing business.

(v) Allegations of Abusive and Exclusionary Conduct

[14] After she returned to work in February 2018, Ms. Macreanu claims that Mr. Godino began targeting her with recurring abuse to marginalize her from the companies. Using insults and profanity, he allegedly spoke aggressively and disrespectfully to her in front of staff and others which left her in tears. He purportedly discouraged her from coming to work and sought increased compensation for his added responsibilities during her delayed recovery. Ms. Macreanu arranged for a security guard to accompany her to prevent the disharmony.

[15] Mr. Godino denies that he was abusive to Ms. Macreanu. He describes their relationship as akin to a familial one in which they express their opinions and emotions openly and honestly, with occasional cursing or raised voices. More recently, their disagreements are said to have become more frequent and related always to business decisions or Ms. Macreanu's proclivity to smoke cigarettes at work (i.e., which had been the subject of various complaints by staff).

[16] Before leaving for her medical procedure in Russia, Ms. Macreanu and Mr. Godino agreed for Sandra Peers, an office staff member, to have signing authority for the companies' bank accounts on Ms. Macreanu's behalf so that banking transactions could be dealt with in her absence. Ms. Macreanu claims that she made this arrangement on the understanding that Ms. Peers would notify her of all cheques that she signed for her. Ms. Peers claims that she did not know that she needed to notify Ms. Macreanu. She apparently had signed cheques to pay documented invoices with only Mr. Godino's approval on the understanding that he would discuss the expenditures with Ms. Macreanu.

[17] As the parties' discord grew increasingly strained, Ms. Macreanu's unease with not being consulted on expenditures hardened. On November 25, 2019, she cancelled Ms. Peer's signing authority.

[18] Mr. Godino submits that Ms. Macreanu always had complete and unfettered access to the companies' business records (i.e., bank accounts, financial records, accountants, correspondence and contracts) and to employees and, therefore, was never excluded from any activities because she always had the ability to obtain any required information. Ms. Macreanu claims that she grew increasingly unable to fulfill her role as a director of the companies as Mr. Godino progressively and strategically excluded her from important developments or business decisions that she discovered only after the fact. She claims that her exclusion from emerging issues and decision points left her without any meaningful ability to participate in the companies' business affairs.

(vi) The Beginning of the End of the Business Relationship

[19] By early February 2019, the discord between the parties had become so acrimonious that both wanted to end their business relationship. Each believed that the growing frequency and extent of their disagreements prevented them from continuing to successfully operate the

companies. Underlying the disharmony was Ms. Macreanu's belief that Mr. Godino effectively had excluded her from the business, while Mr. Godino felt that Ms. Macreanu's pronounced absences from work had led him to take on a disproportionate share of the operational responsibilities that left him undercompensated in relation to her salary. To initiate discussions to end their business relationship, Ms. Macreanu purportedly told Mr. Godino of her intention to wind up the companies and use her share of the proceeds to start another business venture. As a result of their discussion, Mr. Godino claims that he agreed to devise a plan to end their business relationship within a year.

[20] On February 15, 2019, Ms. Macreanu sent an email message to some staff and third parties to advise that the parties had decided to end their business relationship:

> hi to everyone,
> After 23 years, we decided that the time has come to end our partnership. We will start separating proceedings on Tuesday after the long weekend.
> I would like to personally thank everyone for their hard work over the years.
> While the separation will not be an easy task, we will try our best to finalize as soon as possible.

Notably, her message advised that the parties would "*start separating proceedings"* shortly and try their best to finalize the separation as soon as possible.

[21] According to Mr. Godino, the parties initially agreed that Ms. Macreanu would buy out his interest in the companies. When that did not happen, he claims that they agreed to dissolve the companies. Ms. Macreanu states that she had wanted to end their business relationship but claims that the parties did not agree upon terms for doing so, either by agreeing to have one party acquire the other's interest or by agreeing to dissolve or wind up the companies.

[22] The parties engaged in many conversations, consulted with friends and professionals for advice, and attended mediation. In September 2019, Mr. Godino left several draft documents for Ms. Macreanu to review and sign. The draft documents contemplated that the parties would end their business relationship by dissolving the companies and by mutually releasing each other from claims arising from their business relationship. Ms. Macreanu refused to sign the documents.

(vii) Problems with Lease Arrangements

[23] In or around April 2018, Mr. Godino unilaterally entered into an unwritten month-to-month lease arrangement for a warehouse at 75 Westmore Dr. in Etobicoke, purportedly on behalf of Home Textiles. He did this without Ms. Macreanu's prior knowledge or approval. Initially, the lease was only for a portion of the warehouse premises. Later, in January 2019, Mr. Godino expanded the lease to take up the entire warehouse premises at increased cost, and again acted without Ms. Macreanu's knowledge or agreement. This was the most expensive location that either company had leased. Upon learning of this lease, Ms. Macrenau formed serious reservations because: a) the warehouse is not located conveniently to the companies' other business locations, including the most profitable Bed & Bath location at 35 Coventry Road in Brampton; and b) the lack of a written lease placed business risk on the companies as the landlord may require vacant possession without notice which would trigger significant inventory transfer and relocation costs.

[24] On September 30, 2019, the lease expired for Home Textile's location at 35 Coventry Road in Brampton where the companies have operated since 2004. This is the most profitable Bed & Bath location, which was heavily advertised and became well known to customers. When Mr. Godino did not renew this lease, Ms. Macreanu sent an email to the landlord on November 8, 2019 to arrange for a lease extension. The landlord did not respond to her email or to any of her follow-up requests to discuss the lease, including efforts made through her realtor. Ms. Macreanu claims that Mr. Godino subsequently told her that he had spoken with the landlord to ensure that neither Home Textile nor Bed & Bath could renew the lease. Mr. Godino denies that he made any such statement and claims that he refused to renew the lease to avoid incurring significant liabilities because the parties had agreed to wind up the companies.

[25] On December 9, 2019, the parties consented to an interim without prejudice order by which Mr. Godino undertook to not compete with the companies, to abide by his fiduciary duties owed to each company and to act in their best interests at all material times, and to permit Ms. Macreanu to fulfill her duties as a director to the companies with full and unfettered access to their assets and records. The parties also agreed to conduct all business of the corporations in writing and to include each other in all business communications. The consent order further set out a case management timetable for Ms. Macreanu's leave and interim injunction applications

as well as for Mr. Godino's wind up cross-applications, which were heard on December 19 and 23, 2019.

[26] On December 10, 2019, Mr. Godino apparently spoke with the landlord for 35 Coventry Road who confirmed orally that the companies could continue to occupy the property on a month-to-month basis until these court proceedings are finally determined, subject to a rent increase from March 1, 2020 in accordance with market rates. Surprisingly, this oral lease extension arrangement was followed by a letter from the landlord's lawyer dated December 12, 2019 which gave notice of the landlord's intention to not extend or renew the expired lease and directed the business to vacate by February 1, 2020. Since then, the parties have confirmed that this lease is continuing on an interim monthly basis.

[27] Home Textiles also leases an outlet for Bed & Bath at 637 Queenston Road in Hamilton. Since 2004, the companies successfully have operated at this location which has been advertised heavily and is well-known to consumers. On February 4, 2015, Home Textiles renewed this lease until February 4, 2020. After Mr. Godino purportedly said that he would not renew any business leases, Ms. Macreanu undertook negotiations in November 2019 with the 637 Queenston Road landlord, who was open to renewing the lease. When Ms. Macreanu informed Mr. Godino, he purportedly refused to sign any lease renewals because of his stated-intention that the companies not continue to operate. Mr. Godino claims that he took this position because the parties had agreed to wind up the companies. Later, on December 10, 2019, Mr. Godino consulted with the 637 Queenston Road landlord who confirmed orally that the companies could continue to occupy the property on a month-to-month arrangement until these proceedings are finally determined.[4]

(viii) The Macy's Clothing Lot

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[4] On August 9, 2019, the main landlord for the Home Textiles distribution centre at 390 Chrysler Drive in Brampton advised that it required vacant possession of the premises by December 31, 2019 because it had a prospective purchaser for the location. Since 2004, Home Textiles and Bed & Bath have operated at this location as under a lease that had been scheduled to expire on February 29, 2020. Although the parties came to disagree on whether to renew this lease, it appears from the inquiries made by both parties that the landlord remains unwilling to extend the lease beyond February 29, 2020.

[28] Between August 22, 2019 and October 7, 2019, Ms. Macreanu bought clothing items from a Macy's liquidation auction sale for Home Textiles in order to sell the merchandise in Bed & Bath retail outlets. She claims that it was always within her purview to purchase clothing merchandise for the companies, which always sold clothing including brand name casuals and athletic wear. However, after she bought this merchandise, Mr. Godino refused to sell it through Bed & Bath and claimed that the clothing items were too upscale and misaligned with the more modest clothing that it traditionally had stocked. He further declared that Ms. Macreanu personally owed him about $47,300.00 representing his share of the Macy's clothing lot cost, for which he claimed three (3) pillow-making machines belonging to Home Textiles (i.e., which he believed were valued in the amount owed to him) that he took and stored at the warehouse at 75 Westmore Drive in Etobicoke.

[29] Mr. Godino later proposed a deal by which Ms. Macreanu would buy the Macy's clothing using her own funds and then sell the merchandise through Bed & Bath with a 30% share of the sale profits to be given to him. Ms. Macreanu refused his proposal, paid for the clothing lots with her personal funds, and shipped the merchandise to her home garage for storage.

[30] After Mr. Godino refused to sell the Macy's items through the companies, Ms. Macreanu made inquiries to locate an outlet that could sell the merchandise. However, she reconsidered her approach after realizing that it would put her in competition with the companies and raise a conflict of interest. Notably, Bed & Bath historically sold clothing, including some that Mr. Godino had bought from a relatively up-market retailer and stocked in the Bed & Bath outlet in Hamilton.

[31] Mr. Godino submits that Ms. Macreanu's purchase of the Macy's clothing shows her intention to open a new clothing business, which he relies on to support his claim that the parties had agreed to wind up the companies. Ms. Macreanu claims that she bought the merchandise in order to acquire and place clothing inventory for the companies. She claims that Mr. Godino's appropriation of the pillow-making machines shows his intention to start a competing business.

(ix) Offer of Discounted Merchandise and Loss of a Major Retail Client

[32] On September 4, 2019, Ms. Macreanu emailed a major retail client to offer a 30% discount on the landed cost of certain surplus merchandise at Home Textiles. Mr. Godino had no

prior knowledge of her offer, which he would not have agreed to because he felt that it was excessively discounted. Conceding that Mr. Godino was unaware of her offer, Ms. Macreanu claims that it was needed to mitigate a bad business position that Mr. Godino had created when he bought a significant quantity of merchandise that left Home Textiles with considerable indebtedness to the supplier, excess inventory and costly liquidity issues. Mr. Godino states that they should continue to retain the unsold inventory and pay associated storage costs until the merchandise can be sold at a profit. Ms. Macreanu believes that the inventory should be unloaded at a reduced price given the expensive carrying costs for the excess inventory.

[33] In addition to incurring the purchase and carrying costs of the surplus inventory, Home Textiles lost a lucrative sales account with a major retail client over some of this merchandise that it had sold to the retailer. Ms. Macreanu attributes the loss of the account to Mr. Godino's unilateral decision to buy excess merchandise without preselling the inventory, as had been the company's practice. Among other problems, this decision purportedly led to quality concerns with some of the merchandise when one of the purchasers at the retailer took issue with certain product representations that Home Textiles had made. When the purchaser's concerns went unresolved, she refused to make any future product buys with Home Textiles, which lost this retail account.

[34] In email messages exchanged in November 2019, Ms. Macreanu dealt with the supplier of Mr. Godino's purchase order (i.e., valued at more than $1.5 million) as part of her ongoing effort to obtain an adjustment for Home Textile's invoice due to the quality concerns with the shipment that it had received. Mr. Godino sought to rely on the email messages to show that Ms. Macreanu had become disengaged with the business. However, the messages show that Ms. Macreanu had worked conscientiously to rectify this problem despite the uncertainty of a positive outcome with the supplier. With hindsight, Ms. Macreanu feels that she could have avoided the problems with Mr. Godino's purchase order by exercising due diligence, had he consulted with her beforehand.

(x) Business Future

[35] In an October 24, 2019 email, Allan Mathews, Vice-President of Product Development, Merchandising and Sales for Home Textiles, sought directions from the parties on sales orders

that customers had placed with Home Textiles for deliveries after February 28, 2020, as Mr. Godino previously had indicated that the companies would close by that date. Not wanting to jeopardize orders that followed this apparent closure date, Mr. Mathews asked for directions. Ms. Macreanu instructed Mr. Mathews to inform customers that Home Textiles would continue to fulfill all orders after February 28, 2020. Mr. Godino did not respond to Mr. Mathews' email.

[36] By November 4, 2019, Mr. Godino purportedly had informed Ms. Macreanu, customers, suppliers, landlords and employees that the companies would stop operating by February 28, 2020. Ms. Macreanu confronted Mr. Godino about his decision to tell customers (i.e., including those who had ordered merchandise on credit) that the companies were going out of business and warned him that doing this would detrimentally impact business operations and risk compromising their accounts receivable. Mr. Godino apparently responded with a blithe acknowledgement of the negative impact that his actions could have on the company's business interests.

[37] By letter dated November 5, 2019, Ms. Macreanu's counsel wrote to Mr. Godino to ask that he forthwith cease and desist from engaging in wrongful conduct that would harm the companies and conflict with his fiduciary duties as a director.

[38] On or about December 2, 2019, Ms. Macreanu learned that Mr. Godino had been bartering inventory (i.e., taken from Home Textiles in exchange for products given to Bed & Bath) with a customer since approximately August 2017 without any invoices and without Ms. Macreanu's prior knowledge or approval.

Issues

[39] The following four (4) central issues are before the court:

a) Did the parties agree to wind up the companies?

b) Should leave to commence a derivative action be granted?

c) Should an interlocutory injunction issue to remove Mr. Godino as a director? and

d) Should an order be made to wind up the companies?

(i) Did the parties agree to wind up the companies?

[40] The threshold question in this matter is whether the parties agreed to wind up the companies. In *Canadian Northern Shield v. 2421593 Canadian Inc.*, 2018 ONSC 3627, Pattillo J. aptly summarized (at para 72) what constitutes a legally enforceable contract:

> For a legally binding contract to exist, the parties must have agreed on all of the essential terms. An agreement is not final or binding if it is merely an agreement to agree later on essential terms, if what has been agreed to is sufficiently uncertain or where the parties intend that there is no binding agreement until a subsequent formal contract is executed: *Ward v. Ward*, 2011 ONCA 178 (CanLII), 104 O.R. (3d) 401, at paras. 53-54; *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1992), 1991 CanLII 2734 (ON CA), 79 D.L.R. (4th) 97 (Ont. C.A.) at pp. 103-104.

An original or preliminary agreement is not an enforceable contract where essential terms to govern the contractual relationship have not been agreed upon, or where the agreement is too general or uncertain to be valid and is dependent on a formal contract being made. A "*contract to make a contract*" is not a contract at all: *Bawitko Investments* at 103-104.

[41] Whether the parties intended to contract and whether the essential terms of the contract can be determined with a reasonable degree of certainty is determined from the perspective of an objective reasonable bystander in view of all material facts: *Canadian Northern Shield* at para 74. The parties' subjective intentions and beliefs are not relevant to this analysis: *Ibid*; *Olivieri v. Sherman*, 2007 ONCA 491 at para 44; *Apotex Inc. v. Allergan Inc.*, 2016 FCA 155 at paras 44-51. In determining whether the parties have reached an agreement on the essential terms, the court can consider the subsequent conduct of the parties: *Canadian Northern Shield* at para 77; G.R. Hall, *Canadian Contractual Interpretation Law* (3d, 2016) at 212-214.

[42] According to Mr. Godino, the parties agreed to wind up the companies. In support of this, he relies heavily on Ms. Macreanu's February 15, 2019 email which advised staff and others that they decided to end their business relationship. Ms. Macreanu claims that they agreed only to end their business relationship and to finalize their separation at the earliest opportunity. She denies that they agreed to wind up or dissolve the companies.

[43] Having carefully considered the evidence, I find that the parties did not agree upon terms or a plan to wind up the companies, or otherwise end their business relationship. I readily accept that Ms. Macreanu's email confirmed the parties' shared intent to end their business relationship by starting a process to separate themselves. But this preliminary agreement by the parties to go

their separate ways did not, in my view, constitute an agreement on essential terms to wind up the companies or otherwise end their business relationship. There simply was no agreement on how their business relationship would end (e.g., what would happen to the companies, how the parties would deal with the leases for their business locations, what would happen to the merchandise, how the companies would deal with employees, or how other aspects of the businesses would be concluded). I am not persuaded by Mr. Godino's submission that the decision by the parties to part ways necessarily contemplated or entailed a winding-up of the companies. It clearly was open for the parties to agree for one to buy out the other, which they tried and failed to negotiate.

[44] Although they engaged in many resolution discussions, consulted with friends and professionals for advice, and attended mediation to settle their differences, the parties simply did not agree on how to bring their business relationship to an end. In my view, the evidence objectively confirms that the parties were unable to work out an agreement on essential terms to wind up the companies and conclude their business venture together.

[45] I appreciate that both parties clearly wished to conclude their business relationship, and that each predicted or discussed potential scenarios with friends and colleagues about when or how their business relationship might conclude. Each made statements at different times to express their intention to operate a houseware liquidation business (i.e., similar in nature to the business of the companies) once the separation of their business relationship was concluded, and both apparently approached colleagues to discuss these intentions. They also agreed to withdraw substantial funds from the companies, and jointly did so in several tranches between July and December 2019. But despite all of this, there is no evidence that the parties agreed on essential terms to wind up or dissolve the companies.

[46] It is also clear that Ms. Macreanu did not agree to wind up the companies. In September 2019, Mr. Godino left a package of draft documents for her to review and sign. These documents proposed a separation for the parties based on a dissolution of the companies and mutual releases from any claims arising from their business relationship. Notably, Ms. Macreanu refused to sign the documents.

[47] Afterwards, the parties continued in their unhappy business relationship that further soured after their failed negotiations left them dissatisfied and embittered.

[48] Having agreed in February 2019 to end their business relationship, Mr. Godino claims that the parties agreed to wind up the companies by February 28, 2020 (i.e., being roughly one year from when Ms. Macreanu circulated her email announcement that their business relationship would conclude). As a result, he claims that he refused to renew or extend the leases for the companies' business locations to avoid causing the companies to incur long-term obligations that would continue after their anticipated dissolution. However, Ms. Macreanu denies that she agreed to a February 28, 2020 dissolution, or that she otherwise agreed to a winding-up. Rather, she led evidence that she tried to renew the leases to permit the companies to continue as going concerns.

[49] I find no evidence of a mutual intention by the parties to create a legally binding agreement to wind up the companies by February 28, 2020, or any other date for that matter, as the parties did not agree on essential terms for doing so. Proposed settlement documents went unsigned, the parties continued in their progressively strained business relationship, Ms. Macreanu sought to extend leases to permit the companies to carry on as going concerns, and she also directed that customers be informed that the companies would continue operating. In the circumstances, I find no agreement by the parties to wind up or dissolve the companies.

Derivative Action

[50] To obtain leave to bring a derivative action, an applicant must satisfy the court that:

(a) the applicant is a complainant within the meaning of s.245 of the Act;

(b) the directors of the corporation were provided with 14 days notice of the applicant's intention to apply to the court to seek leave, as required by s.246(2) of the Act;

(c) the directors of the corporation will not bring or diligently prosecute the action;

(d) the complainant is acting in good faith; and

(e) it "appears" to be in the best interests of the corporation that the action be brought.

LaRosa v. Brown, 2016 ONSC 407 at para 18; *Agisheva v. Petrov*, 2019 ONSC 3872 at para 22; *Rea v. Wildeboer*,2015 ONCA 373 at para 37. The last three criteria are required under ss. 246(2)(a)-(c) of the Act.

[51] The statutory requirements for leave to bring a derivative action are remedial in nature and are given a liberal interpretation in favour of the complainant: *LaRosa* at para 19, citing *Richardson Greenshields of Canada Ltd. v. Kalmacoff* (1995), 22 OR (3d) 577 (CA) at para 22, leave to appeal denied [1995] SCCA No. 260; *Agisheva* at para 30. At the leave stage, the court is not called upon to determine questions of credibility or resolve all issues in dispute, which are matters for trial. To grant leave, the court should be satisfied that a reasonable basis exists for the complaint and that the proposed action is a legitimate or arguable one; *Richardson Greenshields* at para 22; *LaRosa* at para 21; *Agisheva* at para 30.

[52] The parties agree that Ms. Macreanu is a proper complainant under s. 245 of the Act and that she has satisfied the 14-day statutory notice requirement. It is also undisputed that the directors will not bring or diligently prosecute the proposed action because Mr. Godino (i.e., who is one of two directors for each of the companies) will not agree to ratify a decision to bring proceedings against him for any wrongdoing. The real issues in dispute between the parties on the leave applications relate to the last two arms of the *LaRosa* leave test.

[53] I find that Ms. Macreanu is acting in good faith by pursuing well-founded derivative claims against Mr. Godino on behalf of the companies. From the evidence on the applications, I accept that Ms. Macreanu has shown a reasonable basis for claiming that Mr. Godino breached his fiduciary and good faith duties as a director of the companies by self-dealing and interfering with or sabotaging the companies' business interests.

[54] Ms. Macreanu has demonstrated a well-founded basis to claim that Mr. Godino acted in a self-interested manner by readying the LG Home brand for his future use in competing business endeavours once the companies stopped operating, by unilaterally deciding to enter into a lease arrangement for the Etobicoke warehouse to ready this property for his own future business use, by refusing to sell the Macy's clothing lots through the companies and by appropriating a personal ownership interest in company equipment for his own future business activities, and by

compromising lease renewals to free himself to acquire these established houseware outlet locations for his own future business interests.

[55] Ms. Macreanu also raised a well-founded claim that Mr. Godino advised staff and third parties that the companies would cease business operations by February 28, 2020 despite having no agreement with her to do so. In doing so, and in view of the above-mentioned allegations of self-dealing, I find that Ms. Macreanu has shown a well-founded basis to claim that Mr. Godino unilaterally announced this termination date out of self-interest to prompt a wind up of the companies that would free himself to run a competing business.

[56] Mr. Godino submits that leave for Ms. Macreanu's proposed derivative actions should not be granted because her claims against him essentially are in the nature of personal claims that can and should be dealt with in her oppression remedy actions. To this end, he submits that the relief sought in derivative and oppression actions often intersect and overlap, particularly in the case of closely-held corporations where a wrongful act may harm both the corporation and the personal interests of a complainant: *Rea* at para 40; *Malata Group (HK) Ltd. v. Jung* (2008), 89 OR (3d) 36 (CA) at paras 14 and 29. Specifically, Mr. Godino submits that Ms. Macreanu has recourse in her oppression action to address and remedy her claim against Mr. Godino for his alleged breach of fiduciary duty to the companies. From the content in Ms. Macreanu's proposed draft derivative claims, Mr. Godino further submits that the relief sought in her derivative actions is very similar to that claimed in her oppression actions. As a result, he submits that a separate derivative action is unnecessary and redundant, and not in the best interests of the companies: *Malata* at paras 7-8 and 38-39. To this end, he argues that permitting duplicative actions will inefficiently cause a multiplicity of actions that will increase costs and run the risk of inconsistent findings.

[57] Ms. Macreanu submits that the relief sought in her oppression claim is not identical to the remedy sought in her proposed derivative action on behalf of the companies. Her oppression action raises a personal claim for alleged wrongs because the affairs of the companies were conducted in a manner that was oppressive, unfairly prejudicial or that unfairly disregarded her personal rights as a shareholder based on the criteria under s.248 of the Act: *Rea* at para 19. In contrast, her proposed derivative action is grounded on a breach of Mr. Godino's fiduciary duty

to the companies that he owed as a director to both corporations. To this end, she relies on the well-established principle that a shareholder cannot sue for a wrong done to the corporation, as any action brought in respect of any such loss must be brought by the corporation itself or by way of a derivative action: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 SCR 165 at paras 59-60; *Rea* at para 18. A director's fiduciary duty is to the corporation, which does not directly impact the interests of an individual shareholder: *Rea* at para 44. Caselaw establishing the fiduciary obligations that directors owe to their corporations reveals a strict application of a fiduciary's duty of loyalty, good faith and avoiding a conflict of duty and self-interest: *Canadian Aero Service Ltd. v. O'Malley,* [1974] SCR 592 at para 25; *Fischer v. IG investment Management Ltd.*, 2015 ONSC 3525 at paras 95-99. As such, Ms. Macreanu submits that her proposed breach of fiduciary duty claim is properly brought as a derivative action on behalf of the companies, and not by way of a personalized claim in her oppression actions. I am persuaded by this submission.

[58] Ms. Macreanu's proposed derivative actions essentially are based on breach of fiduciary duty claims against Mr. Godino, a director of each of the companies, that is a cause of action belonging solely to the corporations: *Canadian Aero* at paras 22 and 28; *Hercules* at paras 59-60. Accordingly, the proposed derivative actions would allow Ms. Macreanu to pursue this cause of action on behalf of the companies to redress any such wrongs caused by Mr. Godino to the corporations: *Rea* at paras 35-36.

[59] I accept that the relief available in an oppression remedy is not necessarily exclusive to the relief available in a derivative action, and that both forms of relief frequently intersect or overlap when factual circumstances support both remedies. Given the broad nature of the oppression remedy under s. 248 of the Act that affords ample scope for an order to vary or set aside a transaction to which a corporation is a party, I recognize that a complainant may proceed by way of an oppression remedy in lieu of a derivative action when the factual circumstances and the relief sought permit this: *Rea* at paras 20, 23 and 26; *Malata* at paras 30-33 and 38-40. This is particularly evident in cases involving a closely-held corporation when the distinction between seeking an oppression remedy and pursuing a derivative action is less attenuated because the alleged oppressive conduct also factually supports a claim to redress harm to the company in a derivative action: *Rea* at paras 38-40. In disputes involving a closely-held corporation with few

shareholders, there is less reason to require leave to commence a derivative action because the limited number of shareholders minimizes the risk of frivolous actions which is a key rationale for requiring a derivative action to proceed with leave: *Rea* at para 25; *Malata* at paras 30 and 39.

[60] Regardless of the remedial overlap between derivative and oppression actions, I find that Ms. Macreanu has demonstrated well-founded grounds to proceed with a derivative action for the breach of fiduciary duty claim against Mr. Godino, as explained earlier. I also find that she should not be precluded from pursuing her proposed derivative action or be required to proceed only by way of her oppression action, despite arguably being able to seek relief appropriately in that proceeding: *Malata* at para 38.

[61] I accept that the requirements under s. 246 of the Act for leave to bring a derivative action are to be given a liberal interpretation in favour of the complainant because the provision is remedial and is set out in broad and permissive terms: *Richardson Greenshields* at para 22; *La Rosa* at para 19. I also find that proceeding with both the derivative and oppression actions would not entail costly inefficiencies or risk inconsistent findings that would compromise the best interests of the companies. I add that this proceeding already features some minor duplication in Ms. Macreanu's pleadings due to the complexity arising from the tandem corporate structure of the companies (i.e., despite their functional operation as an integrated business enterprise) and her decision to bring separate oppression and derivative actions in respect of each company. In my view, none of this would likely trigger significant inefficiencies, inconsistencies, or other problems with this litigation.

[62] Based on the foregoing, I find that Ms. Macreanu has satisfied the test for leave to bring her proposed derivative actions. Accordingly, leave is granted for the derivative actions to proceed as set out in the draft statements of claim in her record on the leave applications.

Interim and Interlocutory Orders

[63] Ms. Macreanu also broadly seeks interim injunctive relief to remove or restrain Mr. Godino from further acting as a director to the companies, along with other corollary injunctive relief, to allow her to operate the companies without his involvement.

[64] On an application for leave to bring a derivative action, an interim order for relief may be made under ss.246(4) (*Interim order*) of the Act, which provides:

> **Interim order**
> (4) Where a complainant on an application can establish to the satisfaction of the court that an interim order for relief should be made, the court may make such order as it thinks fit. [Emphasis added]

[65] Moreover, a complainant seeking an oppression remedy may seek an interim order under ss.248(3) (*Court order*) of the Act, which states:

> **Court order**
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> (a) an order restraining the conduct complained of;
> …
> (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
> …
> (m) an order directing an investigation under Part XIII be made;
> [Emphasis added]

[66] It is well-established that the authority under ss. 248(3) confers wide and comprehensive remedial discretion for the court to fashion an appropriate remedy, on an interim or final basis, to rectify oppressive or unfairly prejudicial conduct related to a corporation or any of its affiliates: *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 OR (3d) 288 (CA) at paras 49-50. It is also settled that ss. 248(3)(e) implicitly confers discretionary authority to remove a director or officer of a corporation: *Catalyst* at para 51. The ss.248(3)(e) discretion has been applied to remove directors but in very rare cases and only in circumstances involving misconduct rising to a level that triggered oppression remedy relief: *Catalyst* at para 53; *Stelco Inc.(Re)* (2005), 75 OR (3d) 5 (CA) at paras 47, 51 and 55-56; *Penuvchec v. Crosslink Bridge Corp.*, 2012 ONSC 1954; *Royal Bank of Canada v. Hi-Tech Tool and Die Inc.*, 2012 ONSC 6979 at para 122; *Basegmez v. Akman*, 2018 ONSC 812 (Div Ct) at paras 18-19; *Falcon Motor Xpress LTd. v. Grewal*, [2018] OJ No 405 (SCJ) at paras 144 and 146-148. A decision to apply this authority should go no further than is necessary to rectify the oppression, shall be responsive to the reasonable expectations of a corporate stakeholder, and should not be sought for a purely tactical purpose: *Wilson v. Alharayeri*, 2017 SCC 39 at paras 23-27 and 53-54; *Naneff v. Con-*

Crete Holdings Ltd. (1995), 23 OR (3d) 481 (CA) at paras 28 and 33; *Basegmez* at para 8. In my view, similar considerations should govern the granting of relief under ss. 246(4) of the Act.

[67] An oppression remedy is appropriate to order against a director or officer who has benefited personally or furthered their control over the corporation through oppressive conduct: *Budd v. Gentra Inc.*, 1998 CanLII 5811 (ONCA) at para 52. A director or officer may also be held personally liable in cases where they acquired virtually total control over the affairs of a closely-held corporation through oppressive conduct: *Ibid*.

The Test for Prohibitive Interlocutory Injunctive Relief

[68] A three-part test generally applies to an application for prohibitive interlocutory injunctive relief. The applicant must show: a) a serious issue to be tried; b) irreparable harm if the application is refused; and c) the balance of convenience favours granting the injunctive relief pending a decision on the merits: *RJR-McDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311 at para 43.[5] In this case, the parties disagree on the first arm of the test.

[69] On these applications, Mr. Godino submits that the first element of the *RJR* test is a strong *prima facie* case because the court is effectively being asked for a final determination based on a relatively complete record: *JLL Patheon Holdings v. Patheon Inc.*, [2009] OJ No 2202 (SCJ) at para 42. His submission implicates an exception to the general rule that the court hearing an application for interim relief should not engage in an extensive review of the merits because the outcome will effectively amount to a "*final determination*" of the action. This exception is a rare one that arises when the right to be protected may only be exercised immediately or not at all, or when the outcome will impose such hardship on one party as to

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[5] As set out earlier, ss. 248(3) of the Act confers upon the court a wide discretion to order interim relief as it thinks fit. Although one line of authority holds that the *RJR* test is to be satisfied for ss. 248(3) applications seeking interim injunctive relief, another line indicates that the context of a situation may warrant interim injunctive relief being granted under ss. 248(3) without necessarily having all of the traditional considerations for interlocutory injunctive relief: *Reichmann v. Reichmann*, [2015] OJ No. 4258 (SCJ) at para 28. On these interim injunction applications, both parties took the position that the *RJR* test applies although they took different positions regarding the threshold for the first arm of the *RJR* test.

remove any potential benefit of proceeding to trial: *RJR* at paras 51-54.[6] From the record on these applications, I find that this exception does not arise in this case.[7]

[70] Generally, where injunctive relief is sought in a private law matter where the factual record is largely settled, the claimant must show a strong *prima facie* case. This is because the court effectively is invited to make a final determination that triggers a rare exception from the general rule against engaging in an extensive review of the merits. But in cases where facts are in dispute, *RJR* clarifies (at para 56) that a lesser threshold will apply:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted. [Emphasis added]
>
> *RJR* at para 56, citing *Dialadex Communications Inc. v. Crammond* (1987), 34 DLR (4th) 392 (Ont HC) at 396.

[71] As the facts in this case are unsettled, I agree with Ms. Macreanu that the threshold for the first arm of the prohibitive injunction test is a serious issue to be tried: *RJR* at paras 44 and 49-50. This is a relatively low threshold by which the court is to be satisfied that the application is neither vexatious nor frivolous based on a preliminary assessment of the merits of the case: *RJR* at paras 49-50. I find this to be the proper threshold for a ss. 248(3) injunction application that is brought in the early stages of an oppression claim when the record is undeveloped or incomplete, because it avoids the need for a decision in the nature of a "final determination" before a ss. 248(3) order for interim relief can be made. The power under ss. 248(3) to make an interim order enables the court to grant relief at an interlocutory stage when a final determination may not be possible, typically because the parties are unable to prepare and argue the oppression claim fully. In such a scenario, interim relief may well be appropriate and required to preserve a

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[6] A second rare exception to the general prohibition against an extensive review of the merits at the first arm of the injunction test arises when a question of constitutionality presents as a question of law: *RJR* at para 60. This exception is not engaged in the present case.

[7] I parenthetically add that a more extensive review of the merits is undertaken for interim mandatory injunction applications (i.e., given its more intrusive nature when compared to interim prohibitory injunctions), where the serious issue to be tried factor under the first arm of the *RJR* test often gives way to a need to show a strong *prima facie* case: *Ibid*, citing Sharpe, *Injunctions and Specific Performance* (Canada Law Book, looseleaf edition, 2014) at para 2.250; *Benjamin v. Toronto-Dominion Bank* (2006), 80 OR (3d) 424 (SCJ) at para 27.

party's rights on a temporary or provisional basis. In my view, requiring a strong *prima facie* case to be shown before making an interim order under ss. 248(3) could dilute the availability of this remedy unduly.

[72] Unlike the situation in *JLL Patheon Holdings*, the parties in this case were able to file only a limited evidentiary record to support the applications that were heard on an expedited basis under a strict case-managed timetable. Ms. Macreanu brought the interim injunction applications shortly after Mr. Godino refused to renew several key leases that had expired or were nearing expiry. These were important business locations for the companies, without which their ability to continue as going concerns would have been in serious jeopardy. To permit them to continue operating, Ms. Macreanu sought interim relief on an urgent basis so that the leases could be renewed or otherwise addressed. She also sought interim relief to address Mr. Godino's efforts to exclude her from important business affairs and remedy his self-dealing activities. Given this urgency, the parties were able to compile only a fairly modest evidentiary record that has understandable limits despite the diligent efforts of counsel to prepare affidavits and conduct cross-examinations.

[73] In addition to the limited content of the evidentiary record, there are a number of serious credibility issues in several key aspects of the parties' evidence on the derivative and oppression claims. In my view, these credibility issues are not of the sort that can be resolved by referring to documentary evidence in the record. Given their nature, I find that these credibility issues may only be determined by hearing viva voce evidence from the parties and other witnesses who can provide an unfolding narrative that gives important context against the backdrop of a fulsome evidentiary record. To attempt to determine these credibility issues solely on the basis of the paper record, such as it is, would do an injustice. In the circumstances, I am unable to make the necessary factual findings to support or even approach a final determination of the underlying claims.

[74] The evidentiary record in this case clearly remains unsettled as credibility and other factual issues remain in dispute. In the circumstances, I find that a threshold lower than a strong *prima facie* case is applicable under the first arm of the *RJR* test to show that the claim is not a

frivolous one. Accordingly, I find that the serious question to be tried threshold is the proper threshold to apply under the first arm of the *RJR* analysis.

Serious Question to be Tried

[75] I find that Ms. Macreanu has satisfied the first arm of the *RJR* test.

[76] As set out earlier, I find that she has shown a well-founded claim that Mr. Godino breached his fiduciary duties as a director to the companies. I accept that Mr. Godino trademarked the LG Home brand to ready it for his competitive use, lapsed key business leases to impair the companies from continuing as going concerns, refused to sell merchandise without terms that personally benefitted himself and triggered a conflict of interest, and acquired a warehouse and appropriated manufacturing equipment for his future use in a competing business. I also find that she has adduced persuasive evidence of Mr. Godino's pattern of engaging in self-dealing and systematically excluding her from business activities. He made major business decisions without her prior knowledge or approval, did not advise her of the companies' major banking and financial affairs, and engaged in abusive conduct that marginalized her involvement and role in the companies. In the circumstances, I find that Ms. Macreanu's evidence against Mr. Godino persuasively establishes a serious issue to be tried in respect of the derivative actions and the oppression claims.

Irreparable Harm

[77] In my view, Ms. Macreanu has not demonstrated irreparable harm.

[78] At the irreparable harm stage, the sole question is whether a refusal to grant interlocutory relief would so adversely affect the applicant's interests that the harm could not be remedied if the later decision on the merits does not accord with the interim decision: *RJR* at para 58. The term "irreparable" is based on the nature of the harm suffered rather than its magnitude. It captures harm that either cannot be quantified in monetary terms or cannot be cured. Examples include one party being unable to collect damages from the other, being put out of business, or suffering permanent market loss or irrevocable damage to its business reputation: *RJR* at para 59.

[79] At this time, it seems that the companies can continue operating from almost all of its locations and is not facing an immediate existential threat of being unable to continue as going

concerns. Shortly before these applications were heard, Mr. Godino largely triaged the lease issues by contacting landlords and verbally arranging for the companies to continue renting all but one of its business locations on a monthly basis until this litigation is fully concluded. In doing so, I recognize that Mr. Godino likely has raised additional questions about his relationship and dealings with the landlords that may reinforce Ms. Macreanu's suspicions and concerns about his earlier efforts to wind up the companies to his own advantage. Nevertheless, the companies seem able to continue carrying on business at this time without suffering permanent market loss or irrevocable reputational damage until this litigation is finally determined. Given the absence of written leases, Ms. Macreanu is understandably concerned that the companies will continue to face the risk of landlords requiring them to vacate without notice, which may be disruptive and trigger relocation costs associated with moving merchandise inventory. I accept that this situation is not ideal, but the risk of eviction seems relatively low, at least in the foreseeable future. Although the earlier failure or inability to renew the leases arguably caused some measure of harm, I am not persuaded that any such harm is irreparable in the current circumstances.

[80] Ms. Macreanu led fairly compelling evidence that Mr. Godino progressively excluded her from business activities, as previously explained. I accept that Mr. Godino has made unilateral decisions by trademarking LG Home, by not disclosing substantial business expenditures, by renting the Etobicoke warehouse, and by making a significant inventory purchase, among other things, that departed from the parties' established practice of jointly consulting with each other to make significant business decisions together. I also recognize that the parties disagreed on how to deal with the Macy's clothing lots, which led to an arrangement in which Mr. Godino appropriated some pillow machines, which apparently were moved to the Etobicoke warehouse. Ms. Macreanu submits that these efforts show Mr. Godino's calculated strategy to exclude her from meaningfully fulfilling her role as a director in the companies and prompt a wind up of the companies that would free himself to operate a competing business.

[81] Mr. Godino denies that he tried to exclude Ms. Macreanu from the business affairs of the companies. He claims that she ratified the trademarking decision, that she had sufficient access to information regarding company finances and expenditures, and that she had exaggerated the extent to which she claims to have been uninformed. I also observe that during Ms. Macreanu's

medical leave, and over the course of her extended return to work, the companies came to adopt an unprecedented arrangement by which Mr. Godino unilaterally directed business activities (i.e., without engaging Ms. Macreanu as had been their practice) by necessity. While my observation does not fully address Ms. Macreanu's claim that Mr. Godino deliberately excluded her from the business affairs of the companies, I believe that it is an important consideration in deciding whether his actions gave rise to irreparable harm in the context of the derivative and oppression claims.

[82] Ms. Macreanu led evidence that it was Mr. Godino who announced to others that the companies would stop operating by February 28, 2020. She also points to evidence that he deliberately pursued a strategy to put the companies out of business. She submits that this evidence collectively shows that Mr. Godino intended to bring about a unilateral wind up of the companies despite lacking an agreement with her on the essential terms to dissolve the companies. She further claims that Mr. Godino's conduct could well cause the companies to suffer permanent market share loss, irrevocably damage their business reputations, and compromise their ability to continue as going concerns if his conduct is allowed to continue unabated.

[83] In response, Mr. Godino claims that he acted in good faith to act in accordance with what he had believed was a common understanding that he had reached with Ms. Macreanu to dissolve the companies. He maintained this position throughout these proceedings.

[84] In light of the foregoing, I am not persuaded that Ms. Macreanu has demonstrated irreparable harm. Although I accept that Mr. Godino's actions give rise to real concerns in respect of both the derivative and oppression claims, I am not persuaded that the collective harm that his actions may have caused is sufficiently serious to constitute irreparable harm to the companies or to Ms. Macreanu for which damages could not provide adequate compensation.

[85] As set out earlier, I find that the parties did not agree to wind up the companies as they did not agree upon the essential terms for doing so. To the extent that either party was uncertain of this and may have acted at some point in anticipation of a winding-up, my finding clarifies that the companies are to continue as going concerns for now. In the circumstances, any efforts previously taken by Mr. Godino to wind up the companies clearly are to discontinue until this

litigation is finally determined. Having complied with the terms of the earlier interim consent order to permit the companies to continue operating on the interim basis, I see no reason to believe that Mr. Godino will not conduct or govern himself appropriately and in accordance with the court's findings.

[86] I add that the parties' respective positions are coloured by conflicting evidence on key factual points that raise credibility issues in light of the competing accounts given by Ms. Macreanu and Mr. Godino. Due to the nature of their conflicting evidence, I find that these credibility issues cannot be determined in a fair and just manner based on a review of the paper record. To fairly determine these credibility issues and do justice, I find that the court needs *viva voce* evidence at trial from the parties and other witnesses, with the benefit of an unfolding narrative of the parties' business relationship history against a fulsome evidentiary record.

[87] For these reasons, I find that Ms. Macreanu has not demonstrated irreparable harm.

Balance of Convenience

[88] In weighing the balance of convenience, the court considers which of the parties will suffer the greater harm from the granting or refusing of an interlocutory injunction pending a decision on the merits: *RJR* at para 62.

[89] Given my finding that irreparable harm has not been shown, it is not strictly necessary for me to address the balance of convenience. However, on the facts of this case, I would observe that removing Mr. Godino as a director to these closely-held companies would be highly prejudicial.

[90] Home Textiles and Bed & Bath are established and successful companies with combined annual earnings that approached $14 million in 2018. I accept that the parties appear to disagree on several matters, and that their views have hardened as a result of the conflict. However, I find no reason to believe that the parties are unable to continue running the companies on an interim basis pursuant to the terms of the interim consent order that they previously agreed to. Pursuant to the consent order, Mr. Godino agreed to abide by his fiduciary duties to the companies, undertook to allow Ms. Macreanu full and unfettered access to the companies to enable her to fulfill her duties as a director, and further undertook to not compete with the companies or solicit

interference with any employees, customers, landlords, suppliers, manufacturers or distributors. In addition, the parties agreed as a term of the consent order to conduct all business of the companies in writing and to include each other in all future communications.

[91] I appreciate that the interim arrangement under the consent order is less than ideal for the companies or the parties, particularly over a longer or sustained period of time, given the apparent difficulties that the parties have with their business relationship. However, I accept that it affords a workable interim arrangement on a temporary basis until this matter can be finally determined. As the leases have been resolved for now, the companies no longer face an immediate risk of not being able to operate as going concerns that would lead to market share and business reputation losses, or other serious business disruption if an injunction were not granted. In light of the terms of the consent order, I also find no basis to believe that Ms. Macreanu would be unable to discharge her roles as a director in the companies in the interim until this litigation is finally determined: *Catalyst* at para 53.

[92] An order under ss. 248(3) of the Act for an interlocutory injunction to remedy oppressive conduct should be a tailored remedy that goes no further than necessary to rectify the oppressive or unfairly prejudicial conduct and be responsive to the reasonable expectations of a company's shareholder and should only be considered when other less drastic measures will not suffice: *Wilson* at paras 23-27 and 53-54; *Naneff* at paras 28 and 33; *Basegmez* at para 8. In my view, the same considerations apply equally to an interim injunction ordered under ss. 246(4) of the Act.

[93] Based on the foregoing, I am unpersuaded that an interim injunction to remove Mr. Godino as a director of the companies should be ordered at this time.

Mr. Godino's Cross-Applications to Wind Up the Companies

[94] In his cross-applications, Mr. Godino seeks an order to wind up the companies pursuant to ss. 207(1)(b)(ii) and/or (iv) (*Winding up by court*) of the Act, which provide:

> **Winding up by court**
> 207 (1) A corporation may be wound up by order of the court,
> …
> (b) where the court is satisfied that,
> …

> (ii) proceedings have been begun to wind up voluntarily and it is in the interest of contributories and creditors that the proceedings should be continued under the supervision of the court,
>
> …
>
> (iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up;
>
> …
>
> **Court order**
>
> (2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit.

It follows that the court may order a wind up under ss. 207(1)(b)(ii) if voluntary wind up proceedings have commenced, or under ss.207(1)(b)(iv) if it is just and equitable to do so, respectively. Notably, ss.207(2) of the Act also permits the court to make an order under s. 248 as it thinks fit.

[95] As previously explained, I find that the parties did not agree to terms for separating their business relationship. I do not agree with Mr. Godino's submission that the parties began proceedings to wind up the companies voluntarily. Accordingly, I decline to order a wind up of the companies under ss.207(1)(b)(ii) of the Act.

[96] Mr. Godino also submits that the court should order a wind up of the companies because the parties are deadlocked and unable to complete their earlier agreement to wind up the companies or otherwise work together in the best interests of the corporations.

[97] The just and equitable ground under ss. 207(1)(b)(iv) of the Act for winding-up a company is remedial and intended to prevent a party from disregarding the obligations it assumed by participating in the company: *Falus* at para 41; *Rogers and Agincourt Holdings* (1977), 14 OR (2d) 489 (CA) at 493; *Ebrahimi v. Westbourne Galleries Ltd.,* [1972] 2 All ER 492 (HL) at 499-500. To invoke the court's equitable winding-up power under ss. 207(1)(b)(iv), an applicant must show: 1) rights, expectations and obligations that are not submerged in the corporate structure, 2) such rights, expectations and obligations must not have been satisfied, 3) the resulting circumstances result in an unfairness or prejudice to one or more shareholders, and 4) such unfairness or prejudice is sufficiently serious that it can only be rectified by a winding-up or other oppression relief under ss.248(3) of the Act: *Animal House Investments Inc. v. Lisgar*

Development Ltd. (2007), 87 OR (3d) 529 (SCJ) at para 50, affirmed [2008] OJ No. 2240 (Div Ct) at paras 6-8.

[98] The courts have applied the ss. 207(1)(b)(iv) just and equitable ground to wind up a company when a lack of confidence and trust arises between parties: *Corber v. Henry*, 2019 ONSC 3518 at para 21; *Goft v. 1206468 Ont. Ltd.*, [2001] OJ No 126 (SCJ Commercial List) at para. 30; *Ebrahimi v. Westbourne Galleries Ltd.*, [1972] 2 All E.R. 492 (H.L.) at 500. It also has been applied when parties have reached a deadlock or where the business relationship has broken down because of incompatibility or quarreling that precludes all reasonable hope of reconciliation and friendly co-operation: *Falus* at para 43; *Clarfield* at para 34. A closely-held corporation that resembles a partnership may be the subject of a ss. 207(1)(b)(iv) wind up where partners-shareholders experience a breakdown in their business relationship that makes it impossible to continue working together as they originally contemplated: *Falus* at para 43-44, citing *Wittlin v. Bergman* (1995), 25 OR (3d) 761 (CA) at para 8.

[99] Mere disharmony, disagreement or acrimony may not be sufficient to trigger an equitable winding-up under ss. 207(1)(b)(iv). According to one line of authority, "[q]uarrelling and incompatibility, even to the point of a breakdown in the personal relationships between shareholders of a private company, are not, by themselves, sufficient grounds for an equitable winding-up of the corporation": *Animal House* (SCJ) at paras 56-57, (Div Ct) at paras 6-8. The court's equitable discretion under ss. 207(b)(iv) to order a wind up will only be exercised if the disharmony results in a sufficiently serious failure of the parties' reasonable expectations to warrant such relief. To meet this test, an applicant must show that the parties agreed, or would have agreed (i.e., when they formed their business relationship), that the particular circumstances that arose would end their business relationship: *Animal House* (S.C.J.) at para 68, (Div Ct) at para 7; *Falus* at paras 46-47.

[100] To successfully bring his ss. 207(1)(b)(iv) cross-applications under the above-mentioned caselaw, Mr. Godino must show a reasonable expectation (i.e., based on his business relationship with Ms. Macreanu) that the companies were to be wound up if the sort of irreconcilable differences described above arose between the parties. Mr. Godino led evidence that the parties regarded themselves as equal owners of the corporations by virtue of their informal partnership

that created shared business responsibilities, an equal division of profits, and a process by which all major decisions were made jointly by consensus. He did not lead any evidence that the parties expected to wind up or dissolve the corporations if an irreconcilable difference arose. Nor did he lead evidence that they agreed to buy the other's shares or sell shares to a third party upon a wind up or dissolution of the business if consensus was not reached at some point. But given their shared expectation that all major decisions would be made jointly by consensus when they formed their business relationship, Mr. Godino submits that the current level of disharmony and breakdown in their business relationship effectively makes sustained and long-term consensus unachievable and justifies a winding-up of the companies. In light of their consensus-based business arrangement, which always was a core feature of their business relationship, I am persuaded by this submission and find that Mr. Godino has satisfied the *Animal House* failed expectation test (*Ibid*) by showing a reasonable inference that the parties would not have expected their business association to continue as a long term arrangement in the face of their soured business relationship and deadlock. As such, I find that circumstances exist to invoke the ss.207(1)(b)(iv) wind up power in this case.

[101] I add that a separate line of caselaw extends the exercise of the court's equitable jurisdiction under ss. 207(1)(b)(iv) of the Act to order the wind up of a company that is deadlocked, or where the business relationship has broken down due to incompatibility or quarreling: *Hicks v. Pacific Canada Resources Inc.*, 2011 ONSC 3720 at para 42, citing *Clarfield* at para 34. This caselaw supports the application of the ss.207(1)(b)(iv) wind up power for a deadlocked company that resembles a partnership for which a breakdown of trust or confidence makes it impossible for two 50% shareholders to continue the business as equal partners, in circumstances where the corporation's value likely will deteriorate in the foreseeable future: *Falus* at paras 43-44, affirmed [2013] O.J. No. 2881 (Div Ct) at paras 6-7, citing *Wittlin v. Bergman* (1995), 25 OR (3d) 761 (CA) at para 8. Similarly, a ss. 207(1)(b)(iv) wind up may be justified to resolve a deadlocked company where the only two shareholders, who are the company's only directors, are not on speaking terms due to a state of animosity which precludes all reasonable hope of conciliation: *Tilley v. Hails* (1992), 7 OR (3d) 257 (Gen Div) at para 46, varied on other grounds (1992), 8 OR (3d) 169 (Div Ct), upheld (1992), 9 OR (3d) 255 (CA); *Falus* at para 47. Applying these principles to the present case, I find that circumstances exist to invoke the ss. 207(1)(b)(iv) wind up power. The only shareholders, Ms. Macreanu and Mr.

Godino, are the companies' only directors who are not on speaking terms despite sharing equal ownership and decision-making. Although I accept that the parties can operate the companies on a temporary or interim basis until this litigation is finally decided, I accept that they now share a heightened state of animosity after having experienced a serious rift in their business relationship that, in my view, makes it unlikely that they will be able to reach consensus on major business decisions in the context of a long-term or permanent business association. In my view, their disharmony and inability to reach consensus has the potential to seriously compromise the business integrity of the companies over time. This is quite regrettable given the companies' historic profitability and their future potential for success.

[102] That being said, a winding-up is clearly a draconian remedy that negatively impacts the affected company and its employees if ordered: *MacDonald v. Master Cartage Inc.*, [2000] OJ No. 3728 (Div Ct) at paras 17 and 25. Given its drastic nature, and particularly in cases where the company is capable of being operated profitably, the court's ss. 207(1)(b)(iv) equitable discretion to make a winding-up order should be exercised only as a last resort: *Tilley* (SCJ) at para 45; *Zanardo v Di Battista Gambin Developments Limited*, 2019 ONSC 1376 (Div Ct) at para 33.

[103] On the facts of this case, it appears that the parties clearly want to go their separate ways but are deadlocked in terms of their inability to agree on essential terms for ending their business relationship. However, instead of winding up the corporations, it seems evident from the events that have transpired and the parties' submissions that both would prefer to entertain a fair buyout arrangement, which so far has eluded them. In my view, the parties truly seek a resolution of their dispute by way of a ss. 248(3) remedy that permits one of the parties to purchase the shares owned by the other, which I find to be the most just and equitable way to fully determine this matter. To implement this remedy, the court must make a determination as to whether it would be more just and equitable to order Ms. Macreanu or Mr. Godino to be the purchaser. Should the equities be equally balanced, then the only available alternative will be the winding-up of the corporations: *Tilley* (SCJ) at para 46.

[104] When contemplating an order that one shareholder be permitted to purchase the shares of another to resolve a deadlock in a closely-held corporation that is similar to a limited partnership,

the court should be satisfied that it is impossible for one shareholder to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it: *Tilley* (SCJ) at para 47. This test applies the principle that the court should not permit a party seeking relief to rely on his own misconduct to support a finding of deadlock: *2235512 Ontario Inc. v. 2235541 Ontario Inc.*, [2016] O.J. No. 6422 (SCJ) at para 54, citing *Muscillo v. Bulk Transfer Systems Inc*., [2009] OJ No 3061 (SCJ) at para 26; *Clarfield* at para 44.

[105] The credibility and reliability of Ms. Macreanu and Mr. Godino will be central to resolving the deadlock and making a final determination of these cross-applications. To varying degrees, each party's evidence conflicts with the other's, as well as the evidence given by staff at the companies. Given the nature and extent of these credibility issues, I find that the question of which party is responsible for the deadlock and which party should be the purchaser on a buy out cannot be fairly or justly decided without *viva voce* evidence. Unlike other cases where material facts in dispute may be decided by reviewing documents or records, the disputed facts in this case will turn on the credibility of the parties and other witnesses. In the circumstances, the affidavits and cross-examination transcripts now before the court do not provide an adequate basis to sufficiently assess and determine these credibility issues. To do justice in this case, I find that the court will need to hear *viva voce* evidence in order to have necessary, important and nuanced evidence of the events at issue and the nature of the business relationship of the parties at all relevant times.

[106] I also find that a trial is required to understand properly the narrative of what occurred in this case. The parties each have competing accounts of what took place and why or how a series of events unfolded that led to their current deadlock. As such, the breakdown of their business relationship can only be fairly understood by hearing *viva voce* evidence as the parties and other witnesses testify about these events and provide an unfolding narrative along with the benefit of a complete record of supporting documents. Earlier, the parties were unable to produce a full record because of the expedited nature by which these proceedings were brought. In my view, *viva voce* evidence is required to permit a sufficiently complete, nuanced and in-depth inquiry into the background of this matter which is needed to arrive at a fair and just determination for the parties.

[107] Based on the foregoing, and given the overlapping issues and evidence, I find that it would be appropriate for these cross-applications to wind up the companies to proceed to a trial and be heard together with the derivative and oppression actions.

Outcome

[108] For the above-mentioned reasons, leave is granted for Ms. Macreanu to bring the derivative actions and the balance of the applications is dismissed. The cross-applications to wind up the companies are to be tried together with the derivative and oppression actions.

[109] Accordingly, I make the following orders:

1. Leave is granted *nunc pro tunc* effective December 9, 2019 for Liliana Macreanu to commence derivative actions on behalf of each of Home Textiles Inc. and Bed & Bath Warehouse Inc., such that Ms. Macreanu is authorized to control the conduct of these derivative actions and instruct legal representatives of the companies. Ms. Macreanu is not required to disclose information or obtain Lidio Godino's consent or approval regarding any step in the derivative actions;

2. The cross-applications brought by the Respondent to wind up Home Textiles Inc. and Bed & Bath Warehouse Inc. shall be tried together with the trial of the derivative and oppression actions, or one after the other as the trial judge may direct;

3. The terms of paragraphs 1(a)(i),(ii),(iv),(v) and (vi) and 1(b) of my Order dated December 9, 2019 are continued on an interim and without prejudice basis until such time as this matter is fully determined at trial, subject to further court order or upon the agreement of the parties; and

4. The parties shall arrange to reattend before me to address a statement of the issues to be determined at trial, a timetable for proceeding to trial, and any implementation issues arising from my order.

[110] Should the parties be unable to agree to costs, Ms. Macreanu may deliver her cost submissions not to exceed five (5) pages within 20 days of the release of these reasons, followed by Mr. Godino's cost submissions on the same terms within a further 20 days. The parties shall not deliver further reply submissions without leave.

Doi J.

Date: January 27, 2020

CITATION: Macreanu v. Godino, 2020 ONSC 535
COURT FILE NOS.: CV-19-4813 and CV-19-4814
CV-19-4815 and CV-19-4816
CV-19-5018 and CV-19-5019
DATE: 2020 01 27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Liliana Macreanu,
Applicant/Plaintiff/Respondent to Cross-Applications

v.

Lidio Godino,
Respondent/Defendant/Applicant on Cross-Applications

COUNSEL: Sabrina Saltmarsh and Mahdi Hussein, Counsel for the Applicant/Plaintiff

Ruzbeh Hosseini and Sakina Babwani, Counsel for the Respondent/Defendant

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ENDORSEMENT

Doi J.

DATE: January 27, 2020