Indexed as:

Stel-Van Homes Ltd. v. Fortini

Between
Stel-Van Homes Ltd. and John Tomasone, plaintiffs, and
Luigi Fortini, For-Bac Construction Ltd., Stella Fortini,
Letizia Homes Limited, Pasquale Baccilieri, Innisbrook
Developments Inc., BFT Fam-Flor Inc., Antonietta Baccilieri,
Wanda Tomasone, Ital-Can-Am of Pinella's Country Corp. Inc.,
and Baccilieri Corp., defendants
And between
Pasquale Baccilieri, Antonietta Baccilieri and Letizia Homes
Limited, plaintiffs, and
John Tomasone, Luigi Fortini, Stel-Van Homes Ltd. and
Innisbrook Developments Inc., defendants
And between
For-Bac Construction Ltd., plaintiff, and
Stel-Van Homes Ltd.
And between
Pasquale Baccilieri and Antonietta Baccilieri, plaintiffs, and
John Tomasone, Luigi Fortini, Wanda Tomasone, Stella Fortini,
and Ital-Can-Am of Pinella's County Corporations Inc.,
defendants

[2001] O.J. No. 2243
Court File Nos. 98-CL-3031, 98-CV-158044, 99-CV-161619 and
99-CV-166657

Ontario Superior Court of Justice
C. Campbell J.

Heard: March 26-28, 30, April 2-6 and 10-12, 2001.
Judgment: June 11, 2001.
(211 paras.)

Company law — Winding-up order — Grounds for — Contracts — Unconscionable transactions relief — Conditions for relief — What constitutes unequal bargaining positions — What constitutes an improvident or unfair agreement.

These were four actions being involving several corporations owned by six family members. The relief requested included the setting aside of agreements, an accounting of debts owed by individual companies to individual shareholders, and the winding-up of the companies. The six family members involved in the dispute were Pasquale Baccilieri and his wife, their daughters, and their husbands, Luigi and John. Pasquale incorporated Letizia Homes in 1975 and asked Luigi to join the business in 1976. They incorporated Stel-Van Homes with John in 1988. BFT Fam-Flor was incorporated in 1991 with funds advanced by Pasquale. The shares of BFT were owned by the three couples who signed an

agreement acknowledging a $500,000 debt to Pasquale. In 1997, Pasquale, Luigi and John incorporated Innisbrook Developments. Innisbrook executed two demand promissory notes payable to Letizia Homes and Pasquale. During the 1990s, Luigi and John were doing most of the work for the various corporations while Pasquale battled with heart problems and cancer. While Pasquale was agreeable to giving the profits of the businesses to Luigi and John, John wanted complete control to the exclusion of Pasquale. In May 1998, the six family members had a meeting which turned into a very heated argument. On May 29, 1998, Pasquale signed several agreements turning over his interests in Stel-Van and Innisbrook to Luigi and John. He received no consideration for the transfer of his shares. Also included in the agreements were reductions in the amounts owed under the promissory notes and the debt owed to Pasquale and Letizia Homes by the shareholders of BFT. Pasquale's evidence, which was confirmed by all of the other family members except John, was that he did not want to execute the agreements but did so to keep peace. He testified that he was not aware that the documents called for reduction in the debts and little evidence was presented which supported the reduction. The family's lawyer, who prepared the documents on John's instructions, confirmed that Pasquale only executed the agreements to keep peace in the family and that he was not sent for independent legal advice. Pasquale sought to set aside the agreements on the grounds of unconscionability, undue influence and lack of consideration. John sought orders winding-up Stel-Van, Innisbrook and BFT.

HELD: Actions allowed in part. The relief sought by Pasquale was appropriate. The major motivating factors at play when Pasquale executed the May 1998 were his health and his desire to bring peace to his family. Those concerns placed Pasquale in an unequal position with John. Pasquale did not obtain independent legal advice before executing the agreements and this added to the inequality. The results of the agreements were unfair because they resulted in Pasquale accepting substantially less than he was entitled. There was no evidence of consideration in respect of the transfer of the shares and the debts were substantially reduced without a satisfactory explanation. The agreements executed in May 1998 were set aside and Pasquale was reinstated as a shareholder of Stel-Van and Innisbrook. The promissory notes were reinstated in accordance with their terms as were the debts to the Letizia Homes and Pasquale. The claim for the winding up of the corporations was granted with respect to Stel-Van and Innisbrook. There was no doubt that the personal animosity between the shareholders had resulted in a loss of confidence so as to justify the winding-up of those companies. BFT was not to be wound up as there was not the same loss of confidence between its six shareholders.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, ss. 207(1), 248(3).

Limitations Act, ss. 47, 50(1).

Counsel:

Lawrence Zaldin, for Stel-Van Homes Ltd., John Tomasone, Wanda Tomasone and Ital-Can-Am of Pinella's County Corporations Inc.
Keith M. Landy, for Baccilieri et al. and Letizia Homes Limited.
Raymond H. Raphael, for Fortini et al., Innisbrook Developments and For-Bac Construction Ltd.

C. CAMPBELL J.:—

The Actions

¶ 1 Four actions were tried together arising from disputes between members of an extended Italian family engaged in the construction and development business.

¶ 2 The disputes include setting aside agreements to transfer shares and compromise debts, an accounting of sums owing by various companies to individual shareholders, and oppression relief under the Ontario Business Corporations Act.

The Parties and Background

¶ 3 Pasquale Baccilieri ("Pasquale"), newly married in 1952, came to Canada. He was followed in 1954 by his wife Antonietta ("Antonietta"). They have two daughters, Stella, born in 1956 and married in 1977 to Luigi Fortini ("Luigi"). The second, Wanda, born in 1963, married John Tomasone ("John") in 1984.

¶ 4 As with many immigrants before him, Pasquale, unable to speak English, commenced manual labour until such time as he could commence dairy farming in the Cookstown area in 1961. While continuing to farm, Pasquale built his first home on a severed lot in 1993, and incorporated Letizia Homes ("Letizia") in February 1975.

¶ 5 His son-in-law-to-be Luigi joined him in the business in 1976. Over the next decade Letizia Homes successfully built over 60 homes in the Bradford and Barrie areas. In 1986, Pasquale and Luigi incorporated a new company, For-Bac Construction Limited ("For-Bac") and concentrated solely on the business of construction of homes and over 30 homes were built in the Bradford area.

¶ 6 Following his marriage to Wanda in 1984, John Tomasone was invited to join the business. The first company being an equipment leasing organisation known as Essa Excavating. Subsequently Pasquale, Luigi and John incorporated Stel-Van Homes Ltd. ("Stel-Van") in 1988 at the height of the real estate boom in Ontario. The financial transactions underlying the development undertaken by For-Bac and Stel-Van in Beeton, Strand and Angus are at the heart of these actions.

¶ 7 Commencing in June of 1991, the extended Baccilieri family with funds largely advanced by Pasquale, made investments in two shopping malls in Florida. The first "Hillside Plaza" was purchased in the name of Baccilieri Corporation, a U.S. company. The second U.S. "Kash N Karry" mall was purchased in April of 1992 in the name of Ital-Can-Am, also a U.S. company. The shares of both companies are owned by BFT Fam-Flor Inc ("BFT"), an Ontario company, the shareholders of which are the three couples: Pasquale and Antonietta, Stella and Luigi, and Wanda and John.

¶ 8 On April 1, 1992, an agreement was signed by all of the shareholders, including John Tomasone, which acknowledged that Pasquale and Antonietta had over-contributed the sum of U.S. $500,000 for the purchase of Kash N Karry Plaza. This agreement called for the U.S. $500,000 loan to be re-paid in five yearly instalments, each in the sum of U.S. $100,000, commencing in 1995. John Tomasone does dispute that he signed the agreement. He simply said that he could not recall having signed the agreement. The agreement was executed in Florida by John, Wanda, Pasquale and Antonietta and later by Luigi and Stella on the return of the others to Ontario. No payments have been made under the agreement.

¶ 9 Innisbrook Developments Ltd. ("Innisbrook") was incorporated with Pasquale, Luigi and John as the shareholders. In or about December 1997, the company purchased a large parcel of raw land in the town of Innisfil, Ontario, for development and construction of homes. Pasquale, Antonietta and Letizia Homes contributed the sum of $200,000 for the purchase of the Innisbrook land. Through Stel-Van,

Pasquale and Antonietta contributed additional funds, including the $50,000 deposit on the land, which was paid by Letizia Homes. In addition, Ital-Can-Am paid out U.S. $300,000 ($420,000 Canadian), which was lent to Stel-Van and then advanced by Stel-Van to Innisbrook. The total sum of $840,000 was advanced from Stel-Van to Innisbrook to fund the purchase of land.

¶ 10 Innisbrook executed two demand promissory notes dated December 3, 1997, each in the sum of $100,000, payable to Letizia Homes and Pasquale & Antonietta respectively, bearing interest at 10%. Similar notes were executed with respect to contributions by the other shareholders or their companies.

¶ 11 During the early nineties, Luigi and John were doing more of the physical work and Pasquale was spending more time in Florida. There was a suggestion that the "boys" be entitled to more of the business. Pasquale did agree that the "boys" could have the profit in the "Beeton" lands project of Stel-Van on which homes were being constructed by Stel-Van.

¶ 12 As of 1998, John, who was more interested in "going his own way," pursued getting Pasquale to relinquish Stel-Van to the "boys" by turning over shares and "paying him back." Luigi would appear to have been willing to go along with John but clearly given his close relationship with Pasquale, did not want him upset.

¶ 13 In other words, Luigi would accept whatever Pasquale was prepared to do but did not want any bitter feelings or injury to long-term relationships. Pasquale had to make a decision on what he wanted to do and Luigi would abide. John, on the other hand, wanted his own opportunity to work free from the influence of Pasquale. The exact reason for this was not made clear but I strongly suspect that it was mainly "greed", since Pasquale would no longer share in profits.

¶ 14 For his part, Pasquale was content to relinquish the rewards (profits) not only from the Beeton lands, but perhaps the Innisbrook lands as well. However, like many people over the age of 65 with health problems, he still wanted to be kept involved. He wanted the opportunity to be able to go to the construction site and "participate." It seems this was as or more important to him than receiving the share of the profits - to feel part of the business.

¶ 15 I have no hesitation in concluding that what came to a head in May of 1998 was precisely this. It is clear from all the witnesses that what was hurtful to Pasquale was the insistence of John that Pasquale no longer participate in construction activities.

¶ 16 John for his part assumed that as soon as Pasquale agreed to permit "the boys" to have the profits from the Beeton project lands, that he would be giving up any Interest in Stel-Van and hence any interest in participating in construction on the lands owned by Innisbrook.

May 29, 1998 Agreements

¶ 17 As of May 1998, Pasquale had undergone a quadruple by-pass in 1992, had a hip replacement in 1997 and had been diagnosed with colon cancer. He was to avoid stress where possible.

¶ 18 Following the Baccilieri's return from Florida in April of 1998, John urged Pasquale to formally give up his interest in both Stel-Van and Innisbrook. Pasquale had previously indicated that John and Luigi could have the profits on the sale of the "Beeton" lots being constructed by Stel-Van, as long as he, Pasquale, received back his investment, plus interest to off-set the amount that he had to pay the bank for borrowing in the first place.

¶ 19 A heated argument took place in the kitchen at the Baccilieri home on May 19 between John and Pasquale. According to John, he was simply urging Pasquale to follow through on what had been agreed to previously, namely that Pasquale would turn over the shares in Stel-Van and Innisbrook and retire from any further involvement in construction. According to the three wives, the argument was very heated and animated, with Pasquale being most upset at the suggestion that he would be precluded from participating in further construction by the companies.

¶ 20 John wanted Pasquale out of any operational role in either Stel-Van or Innisbrook, but he now says he envisaged Pasquale continuing as an investor in Innisbrook, but the homes were to be built by, and the profit was to be made in, Stel-Van.

¶ 21 Pasquale for his part was upset, unhappy and most disappointed with any suggestion that he would no longer be involved in any operational role; he had not envisaged being deprived of participation in the building of the Innisbrook homes.

¶ 22 As for the three wives, I am satisfied that their primary concern was for the health of Pasquale and peace in the family. They were content that Pasquale, who after all, had started the business, reduce his activities and that profit opportunities be turned over to "the boys," but not to the point where Pasquale ever feel it was he who was being "kicked out" from further participation in construction, even though his contribution might be minimal.

¶ 23 What they did not want to see happen and that did in fact occur was a break between Pasquale and John. Pasquale felt to a large extent betrayed by the position John was taking. John for his part somehow felt that what he was insisting on was no more than was his due, it supposedly having been discussed at some point in time in the past.

¶ 24 I accept the evidence of Pasquale, which is in this respect corroborated by the lawyer for all concerned, Roy Gordon, that Pasquale was unhappy and did not really want to make the transfers in question. Pasquale said he did so for peace in the family and again I accept his evidence.

¶ 25 Luigi for his part did not really participate in the negotiations, even though he was a beneficiary of the transfer transaction. I accept the evidence of Luigi that he was willing to go along with whatever his father-in-law decided to do. Luigi was and still is close to Pasquale, and while he was prepared to accept change in ownership, he did not thereby want to exclude his father-in-law from participating in the construction activity. He accepted change for the sake of family peace.

¶ 26 It was suggested to Luigi in cross-examination that he did not raise with John at the relevant time a number of the criticisms he voiced at trial about John. Based on the personality of Luigi as I observed it, and while I recognise that English is his second language with less than full comprehension of the written word, nevertheless he impressed me as someone who knew what was going on.

¶ 27 Luigi had his own concerns with John, particularly with what he felt was an unequal division of income arising from Stel-Van home sales [John got both salary and real estate commission]. Luigi was willing to not voice his concerns about John in the interest of family peace, so long as Pasquale was satisfied.

¶ 28 One issue that Luigi was clear on was that after the transfer of the Innisbrook shares, he was not willing to allow John to be paid both salary and real estate commission for the construction and sale of homes, unless the precise terms were agreed to in advance. John for his part did not seem to understand Luigi's objection, since someone would get the commission and why not him? To Luigi this would be

double recovery.

¶ 29 Luigi, unlike John, appears as a man of few words. I am satisfied that he did not agree that John would be the listing agent and that what remained to be agreed was simply a matter of agreement on John's commission rate. I accept Luigi's evidence that there was no agreement. The reason that there was not was that Luigi made it clear unless he was clearly satisfied on all terms (which at no time he was), John was not to be the listing agent for Innisbrook.

¶ 30 Pasquale finally agreed to turn over his interests and signed agreements on June 5, 1998 that had been drawn up by the family lawyer, Roy Gordon, dated May 29, 1998. Pasquale and Antonietta left for a six-week vacation in Italy the following day.

¶ 31 It would appear that Pasquale received little or no consideration for the transfer of his shares in Stel-Van. In addition, the promissory note to Letizia Homes, issued in the sum of $285,000 (with no interest payable until May 29, 2000) was issued even though the actual amount outstanding for principle to Letizia was $637,104.50.

¶ 32 It would also appear that Pasquale received little, if any, consideration for the transfer of his share in Innisbrook. Promissory notes were issued replacing existing promissory notes dated December 3, 1997, which were payable on demand and bore interest at 10%. The replacement notes carried interest at 6%, with no interest payable until the maturity date of May 29, 2000. The changes to these notes was made notwithstanding that Pasquale continued to pay interest to the bank on the line of credit that he had arranged for this financing in the first place. Pasquale denied any knowledge or understanding of the change in the interest rate and considered it deceitful. He believed he was signing a transfer of shares. He knew there was a change in the principal sum of the promissory note and that the change accurately reflected what was owing.

¶ 33 Prior to May of 1992, the books of the U.S. companies reflected an over-contribution on the part of Pasquale and Antonietta in the sum of U.S. $500,000 in connection with the purchase of the Kash N Karry Plaza. An agreement dated April 1, 1992 called for a loan in that amount to be repaid in five yearly instalments in the sum of U.S. $100,000 commencing April 1, 1995. No payments were made pursuant to that agreement.

¶ 34 As of May 29, 1998, the amount of U.S. $500,000 was arbitrarily reduced to U.S. $235,000. No-one gave convincing evidence as to why this amount was chosen as opposed to any other amount. There was some evidence that the actual amount of over-contribution was approximately U.S. $431,000. There was an after-the-fact rationalization put forward on behalf of John to justify the $235,000 figure but it is not grounded in fact.

¶ 35 Both Pasquale and Antonietta testified that they were unaware that any of the documents signed related to the U.S. corporations. No evidence was given by John as to the particular circumstances that related to the reduction of the debt to Pasquale from the U.S. company/companies.

The Independent Witnesses

Sheila Visser

¶ 36 Mrs. Visser is a bookkeeper for various of the companies, with the exception of Stel-Van, and has been for a number of years. I have no hesitation in accepting her evidence and the financial documents she prepared. She had no reason to give false evidence.

¶ 37 Mrs. Visser is obviously a capable and conscientious individual who performed her task to the best of her ability, given the information she had available. I therefore have no hesitation in accepting her evidence with respect to the Stel-Van debt owed to Letizia and the recording of it, including the land inventory, reflecting the lots being built by Stel-Van. In the absence of reliable evidence from the books of Stel-Van, I accept Mrs. Visser's records from the books of Letizia as the most accurate statement of the transactions between the two companies.

Roy Gordon

¶ 38 Called on behalf of John, Mr. Gordon was the family lawyer. He had for several years prior to May of 1998 acted in a number of transactions. He recalled having been called most likely by John or perhaps Pasquale with respect to the May 1998 transactions.

¶ 39 Indeed, Mr. Gordon was not able to recall who provided much of the information contained in his notes. I accept his evidence that as this was a transaction within the family, he ensured that he informed both John and Pasquale of the contents of the various documents and had their concurrence; beyond this he did not send Pasquale for independent legal advice. Mr. Gordon was clear that Pasquale was unhappy and upset with the transaction and he undertook it only to keep peace in the family.

¶ 40 One reference in Mr. Gordon's notes is to $285,000 being owned by Stel-Van to Letizia Homes. This note is contrary to the position of John, whose response was that he could not recall Roy Gordon having brought that item to his attention. I accept that Mr. Gordon's note accurately reflects what the parties understood at the time.

John Kersey

¶ 41 Mr. Kersey is a neighbour who lives across the street from the Tomasones. They had visited in each other's homes. On May 19, 1998, Mr. Kersey testified that he was playing golf and somewhere between 10:30 and 11:30 a.m. was walking down the 18th fairway, when he heard yelling. Pasquale's home backs onto that fairway. Kersey was able to identify the voices of the individuals who were swearing at each other as John and Wanda Tomasone.

¶ 42 Mr. Kersey's evidence accords with that of Pasquale, Antonietta, Luigi, Stella and Wanda, and contradicts that of John. There was no reason advanced before me as to why Mr. Kersey would not be telling the truth. I accept the evidence of John Kersey and of his wife Laura Kersey, who remembered the bruise that Antonietta showed on that day. I accept the evidence of both John & Laura Kersey.

John Tomasone's Evidence

¶ 43 Both in his evidence in chief and in cross-examination, John contradicted the evidence in some respect of each of the other witnesses who testified. Indeed, in order to clarify his position, he was asked on several occasions whether what was said by various of the other witnesses was simply an error, a mistake or an outright lie.

¶ 44 The following is a list of the witnesses and statements which John says are outright lies or misstatements:

[1] The statements by Pasquale and Luigi that the debt owing by John as a result of the operations of Essa Excavating was mentioned from time to time.

[2] The evidence of Pasquale that he did make a request about repayment of monies paid on behalf of Essa to Star Drilling for work done after closing on a house.

[3] The evidence of Pasquale and Luigi that John committed to purchase the land for the Angus project without permission.

[4] The evidence of Pasquale and Wanda that one of the reasons a promissory note back for $500,000 U.S. was signed on the "Kash N Karry" U.S. plaza purchase was that Pasquale had, and had expressed to John, concern with some of the things John had done in the past.

[5] That Wanda and John had the note back for $500,000 typed in the office of Doug Raley and in the circumstances she described as to its execution.

[6] That Luigi was wrong when he said that his objection to John's listing of the Innisbrook property went beyond the particular rate of commission John would receive, but to John's participation at all. It became a second source of income from the project to which Luigi objected.

[7] That there had been no discussion regarding interest on the payback of Pasquale's over-contribution to the Florida property in 1992 within the family.

[8] That John first raised the issue of reducing the amount of the note back to Pasquale in May of 1998.

[9] That there was no discussion at that time (May 1998) of interest on the note from Stel-Van to Ital-Can-Am.

[10] That is was agreed at the time of the first discussion regarding transfer of Pasquale's shares in Stel-Van that he would not be involved in the construction of homes in the Innisbrook project.

[11] That everyone in the family on May 19, 1998 told Pasquale that he would not be involved at all in the construction of homes in any of the companies any longer.

[12] That at the time when Antonietta was hit and bruised during the May 19 argument, that he, John, was on the opposite side of the table and was not involved near her at all.

[13] That there was specific discussion leading to agreement between Pasquale, Luigi and John that the promissory note would be at 6% interest.

[14] That Sheila Visser prepared/did not prepare false financial statements showing amounts owing to Letizia Homes from Stel-Van, rather than investment in the lands by the three wives.

[15] That Pasquale and Luigi did not agree that John could take $9,000 out of Essa except to equalise contributions in 1988.

[16] That John did not consult with either Pasquale or Luigi about moving the Stel-Van offices to Holland Avenue.

[17] That John Kersey is telling the truth regarding the argument he heard on May 19, 1998.

[18] That Wanda left their matrimonial home one early morning in July of 1998 after an argument.

¶ 45 On each of these issues I am prepared to accept the version of events given by each of the witnesses other than John Tomasone, where they differ.

¶ 46 I do so since in the case of Sheila Visser, John Kersey and Roy Gordon, they are independent witnesses who appear to have no motivation to tell an untruth. In the case of Mrs. Visser and Mr. Gordon, their evidence is to a large extent confirmed by objective evidence of notes or financial statements made at the time.

¶ 47 John Tomasone, on the other hand, exhibited before me a significant temper when any version of events was put to him that was contrary to his position. In most cases he made an outright denial without any explanation or rationale as to why his version was preferable.

¶ 48 By way of example, John would have me believe that with respect to the promissory note for U.S. $500,000 signed in April 1992, he could neither recall having signed this document nor that whatever he signed contained any reference to interest. I conclude that John was at all times sufficiently interested in advancing his position that he would know exactly what was under consideration and being signed. I simply cannot accept his explanation on this point.

¶ 49 Another major point of disagreement concerned the title to the Beeton lands. John's version of events was that this was clearly a gift to the three women: Antonietta, Stella and Wanda. This version belies the objective evidence of how the land was recorded in the books of Letizia Homes and what happened to the proceeds of the sale of the lots, which went to Letizia Homes. It is also contrary to the evidence of all the other family members who testified that title was taken in the wives' names to avoid a Planning Act problem.

¶ 50 The evidence of Sheila Visser is consistent with the version put forward about the Planning Act. There is no objective evidence to support the position of John and I therefore reject it.

¶ 51 In his evidence, John did not comment at all on the statements made by others that on a number of occasions and in particular in May of 1998, John loudly argued in favour of a transfer of interest from Pasquale to his sons-in-law since "Pasquale was an old man and had made enough money and it was `their' turn." These were not denied by John.

¶ 52 Unfortunately, what once was by all appearances a happy, prosperous family and business relationship has fallen apart. Underlying some of the issues that are before the Court at this time, is a matrimonial dispute between Wanda and John, that is not before the Court.

¶ 53 The evidence before me pits John Tomasone against all of the other witnesses who testified. Much of what would in arm's length business transactions be reduced to writing in drafts or memoranda, is understandably absent from the oral discussions that are at issue in a family situation.

¶ 54 I conclude that Pasquale has an extremely limited ability to read in the English language. While I have no doubt that he has an acute business sense, he relies on his daughter Stella to keep track of

documents and money. She also does the banking on a day-to-day basis. Stella most often accompanies her father to the meetings with the lawyers and accountants.

¶ 55 Stella has kept detailed day-to-day records of invoices, cheques, and banking receipts. In effect, she has performed the role of a payments clerk to the various businesses, with the exception of Stel-Van for a period of time in which there were others involved.

¶ 56 I accept her evidence that the reason she did not accompany her father to Roy Gordon's office to sign documents on June 5, 1998 was simply that she did not believe anything more was going to be done on that occasion than a transfer of shares.

¶ 57 Pasquale did appear to understand that a reduction on the note owing in respect of the U.S. companies was part of the package but I accept his evidence that he did not fully appreciate or notice that the interest rate was reduced on the note.

¶ 58 I accept that this was an important issue to him, since he had an outstanding letter of credit with the bank. I also accept that, as Roy Gordon stated, Pasquale was extremely upset and was prepared to sign whatever was required to transfer the interest in Stel-Van and Innisbrook to his sons-in-law.

¶ 59 I have no doubt that with respect to the documentation, Mr. Gordon took his principal instructions from John Tomasone. I accept that while Roy Gordon undoubtedly explained to Pasquale what was involved, the latter did not have his full mind attentive to the documents. He was by all accounts upset and wanted to get the transfer over.

¶ 60 John Tomasone did not explain in his evidence why there was any urgency to the transfer and why it could not have been postponed, at least until Pasquale was less upset or unhappy with what was being pushed onto him.

¶ 61 I accept Pasquale's evidence that he left for Italy the next day and did not fully appreciate what he had signed until some time after he returned to Canada. Even after his return, I expect that Pasquale would have been prepared to accept the transactions (with the exception of the reduction of interest on the promissory note) if indeed by so doing, peace was achieved in the family and he believed them fair.

¶ 62 John Tomasone either ignored or chose not to understand his wife's concern at the manner in which her father was treated, particularly the exclusion from participation in construction activities. While there were no doubt other matters between the couple, which led to the marriage breakdown, this was certainly one of them.

¶ 63 I have examined each of the factual differences between John Tomasone and all of the other witnesses, and have concluded that in respect of those in which John Tomasone says others are lying, that his version of events simply cannot be accepted.

¶ 64 I have no doubt that John believes that the rest of the family are manipulating the particulars of events to suit their purpose and injure him. There are two basic reasons for which I accept the version of the events as related by the rest of the family and reject John's version that they are lies.

¶ 65 The first is that the various particulars as referred to by each of the family witnesses was put in the context of time, place and purpose. For example, I accept the evidence of Wanda concerning the drafting of the U.S. $500,000 note in Florida at the office of Doug Raley. John, on the other hand, not only denied the event, but could not offer any details of how the note may have come to be drafted or

indeed signed by him. Such an important matter he simply "could not recall."

¶ 66 The second reason that I reject the evidence of John is that he did not in any way deny the evidence given by others, that he pressured Pasquale to turn over the shares in Stel-Van and Innisbrook. Neither did John deny the evidence of the family and of Roy Gordon that Pasquale was unhappy and upset with the prospect of giving up not only his shares, but his future participation in construction activities.

¶ 67 John did not advance any reasonable or rational business basis for the transfer transaction. John's only explanation was simply that his brother-in-law, Luigi, was as much a beneficiary as he. I find that Luigi was a passive recipient of the gratuity of Pasquale, and did nothing to initiate the transactions.

¶ 68 The only conclusion that I can come to on the evidence is that Pasquale was pressured by John to transfer his interest to "keep peace" in the family.

¶ 69 There were several other issues raised in the course of John Tomasone's evidence on which I could not accept his version. These include that he did not intend to leave the matrimonial home, but rather was pushed out, that he had no knowledge whatsoever of the April 1992 note and could not remember signing it, that no-one expressed concern to him about his unilateral move of the Stel-Van offices to premises he rented on Holland Street, that Mr. Iaonne wasn't his choice as the Stel-Van bookkeeper or that Kathy was not engaged by him to take on the bookkeeping job for Stel-Van.

¶ 70 The resolution of the financial issues between the parties will therefore be made on the basis that I simply cannot accept the version of John Tomasone with respect to many of the transactions.

¶ 71 John made much of certain cheques that were signed by Stella on the Stel-Van account immediately following the separation of John and Wanda in early August 1988, payable to Wanda and other family members. There are many cheques that over time were signed by Stella as part of the normal and ordinary business of Stel-Van. Stella was not a sole signing officer of Stel-Van, but had with the concurrence of John, Pasquale and Luigi from time to time paid out funds when necessary with their authority based on her signature and her signing for another who agreed that she could sign his name.

¶ 72 Stella acknowledged that the particular transfers made by her in early August were not in the ordinary course of business. She did not seek authority for those transfers. In her mind they were made under a colour of right and more particularly to prevent the sums from being "scooped" by John. These sums, which have since been replaced, were admittedly wrongfully paid out. Those events speak more to what may be an appropriate remedy with respect to Stel-Van than any issue of credibility of Stella Fortini. While in no way to be condoned, one can understand the motivation involved in the transfers. I accept that, to use her words, Stella "panicked" at the thought that her sister and family might be deprived of access and entitlement to their interest in Stel-Van.

Analysis & Law

¶ 73 The plaintiffs seek a declaration with respect to funds owing from Stel-Van to each of Letizia and For-Bac. I accept that the financial records of Stel-Van are not what they should be. I have concluded that the reason for this is that John Tomasone had books and records supposedly completed by Mr. Iaonne. Iaonne was not called as a witness, so I was not given the benefit of any explanation he may have had for the lack of accurate records.

¶ 74 The only reliable information with respect to the accounts as between Stel-Van and Letizia Homes and Innisbrook and Letizia Homes, are the records of Letizia prepared by Sheila Visser.

¶ 75 The position of Pasquale and Luigi is that the various agreements, which will be detailed below, are unconscionable as they affect Pasquale, and were entered into for no valuable consideration. Tomasone, for his part, purports to rationalise each transaction in a way that maximises his financial position.

¶ 76 One of the transactions that relates to the work done by Stel-Van is the purchase of certain lands near the town of Beeton, known as Beeton "A" lands. Tomasone's position is that these lands were purchased as a gift for the three wives by Pasquale. If this were the case, there would be significantly less owing by Stel-Van to Letizia Homes, than if the transaction is characterised as a loan from Letizia to Stel-Van. The characterisation as a gift rather than a purchase is essential to John's position that there was not to be any interest payable by Stel-Van on indebtedness.

¶ 77 There is no note or record that I was referred to that would corroborate the transaction as a gift. The family members all testified that the lots were put into the names of the three women to avoid the complexities of the Planning Act. This version I accept, is in part from the testimony of Sheila Visser who had recorded in the books of Letizia that there were monies owing from Stel-Van. I found her to be an honest, forthright, conscientious witness. If there had been any question in her mind about the nature of the transaction, she would have questioned it.

¶ 78 Sheila Visser kept the books of Letizia. She made various attempts to reconcile the books of Letizia and those of Stel-Van with respect to those transactions. The Stel-Van records are less than complete, and Alex Iaonne, who was responsible for preparing the Stel-Van statements, was not called to explain the lack of accurate information in those records. For this reason, I accept the evidence of Sheila Visser and her accounting records regarding the transactions.

¶ 79 John Tomasone does not seriously suggest, subject to the above comments, that the majority of the funds for the projects in Stel-Van, or for that matter Innisbrook, came from any other source than Pasquale through Letizia Homes. What is put forward by Tomasone is that (a) there was no agreement or discussion about the payment of interest; and (b) in the absence of a specific agreement, no interest was or should be implied.

¶ 80 I conclude that it was implied as between shareholders that advances for construction would be made based on the security of the line of credit arranged for by Pasquale. Before Tomasone joined the family companies, I am satisfied that the relationship between Pasquale and Luigi was such that there was no need for writing of many of their decisions. I conclude that it was implied within their arrangement that Pasquale would be, through Letizia, compensated by interest for the cost of his line of credit.

¶ 81 One reason for coming to this conclusion is that it would explain why the question of interest became explicit, when funds from different sources were advanced for the Florida properties. John simply could not recall any discussion of interest or even signing the note in April 1992. I am satisfied that after the experience in the operation of Stel-Van that Pasquale did want to want to formalise and record his advances, which were agreed as "over-compensation" to avoid any confrontation with John in the future.

¶ 82 John took issue with the amount of the note relating to over-compensation, as compared to the actual amount on the books. I accept that the note was intended to record an approximate amount that

would always be subject to a more precise determination, particularly since interest would always be adjusted, as required to keep the company operating or to reflect changes in the cost of the line of credit obtained by Pasquale.

Amounts Owing by Stel-Van to Letizia Homes

¶ 83 Letizia claims that there is some $487,104.50 owing by Stel-Van, together with interest. The basis of the accounting for the claim is the books and records for Letizia kept by Sheila Visser. The amount is disputed by John Tomasone on the basis that a number of the transactions are not reflected in the books of Stel-Van.

¶ 84 Each side filed a forensic accounting report to support their position. Once the factual assumptions are finalised, which is a matter for my determination, there is little if any difference between the professionals. If the parties are unable to agree on the financial conclusions to be drawn from these Reasons, a further evidentiary phase of this action involving the accountants may be required.

¶ 85 From the records of Letizia, it would appear that Letizia borrowed money from the Bank of Montreal, which was advanced to Stel-Van for the purchase of lots. Further monies were then advanced for construction of homes and the advances were repaid when the homes were sold. The books of Letizia reflect an amount owing from Stel-Van of $487,104.50 as of May 29, 1998 if one takes into account a payment of $150,000, which in fact did not occur until July of that year. This calculation does not take into account the payment of any interest since that date.

¶ 86 The position of John Tomasone, advanced at trial, is that the amount owing as at May 29, 1998 is the sum of $285,000, reflected in the promissory note of the same date. The difference in the two amounts is said to be due mainly to two items. The first concerns an item of $40,094, which on the books of Letizia is alleged is an overpayment from Stel-Van. This balance appeared on the books of Letizia from October of 1991.

¶ 87 I accept the evidence of Sheila Visser, that over the years she sought an explanation from Alex Iaonne on behalf of Stel-Van, who was unable to provide an explanation. Ms. Visser, as of 1996, made an assumption, which I conclude was reasonable in the circumstances, namely that Pasquale had personally advanced funds to Stel-Van that were repaid at some time to Letizia.

¶ 88 There is no evidence before me to suggest that it was not a reasonable assumption for Ms. Visser to make, and no issue was taken with that characterisation by Tomasone until this litigation commenced. Indeed, even after the litigation commenced, Ms. Visser tried unsuccessfully to obtain from Mr. Iaonne an accounting to confirm the various inter-company accounts. Alex Iaonne was not able to provide a satisfactory response, either at the time in 1999 or even indeed up to and including this trial.

¶ 89 It would appear from the evidence before me that Alex Iaonne took direction primarily from John Tomasone with respect to books and records. Iaonne was not called as a witness, presumably because he could not be helpful on the issue of inter-company reconciliation. I am therefore left to accept the evidence of Sheila Visser, which I do.

¶ 90 The second major item that Tomasone disputes as owing between Stel-Van and Letizia is the sum of $190,000. This sum is in respect of the purchase of the Beeton "B" lands, transferred to Stel-Van in 1997. At the time of the transfer, the land was registered in the names of the three wives. The books

of Letizia record the amount for the purchase of the lands and for the transfer price as owing to it from Stel-Van.

¶ 91 John takes the position that this land was to be a gift from Pasquale to the three wives in equal shares of $95,000 each and therefore any amount that is owing is owing to the wives. All of the family witnesses, as well as Sheila Visser, testified that the transfer was in the wives' names to avoid Planning Act problems and that the books of Letizia reflect an advance to Stel-Van and an amount owing by Stel-Van to Letizia.

¶ 92 While not all of the records in the Letizia Homes books were entirely contemporaneous with the events that they purport to record, the reconciliation was made by Sheila Visser some time before the disputes in this litigation arose. Despite a number of requests after the litigation commenced to Alex Iaonne for the situation as reflected in the books and records of Stel-Van, that information has not been forthcoming. I conclude on the evidence before me that John Tomasone has not been able to establish the proposition he advanced, namely that the amounts advanced for the purchase of the Beeton "B" lands were on behalf of the three wives and to be repaid to them, and not to Letizia.

¶ 93 The attempted reconciliation of accounts as between Stel-Van and Letizia put forward by Tomasone required an arbitrary attribution of a $30,000 premium relating to Pasquale's one-third interest. There is no documentation to back this up in any way. Based on my assessment of the credibility of Tomasone, I accept that the debt as between Stel-Van and Letizia is $487,104.50 as at May 29, 1998, taking into account the later payment in July. Interest is a separate matter and will be dealt with below.

Lone Star Well Digging

¶ 94 In or about the spring of 1989, John and a partner Joe Troiano were involved in the construction of a home on Concession 2, Innisfil-Churchill, Ontario. As part of the construction, John retained the services of Lone Star Well Digging and Letizia Homes to provide labour and materials which included the following:

(a) digging of a well for which payment was due and owing to Lone Star Well Digging;
(b) installation of a septic tank paid by Letizia Homes;
(c) fill for the basement and lot paid by Letizia Homes;
(d) provision of a machine operator to grade the lot paid by Letizia Homes; and
(e) provision of a machine to grade the lot paid by Letizia Homes.

¶ 95 I accept that at the time that the above-noted services were provided, John was short of funds. I also accept that as a result, John requested that Pasquale, through Letizia Homes, pay for the services rendered by Lone Star Well Digging. Pursuant to John's request, Letizia Homes paid the account of Lone Star Well Digging, in the sum of $6,547.32 and provided services valued at the sum of $9,252.68. John promised to pay the total balance owing in the sum of $15,800.00.

¶ 96 Pasquale and Letizia Homes claim the return of this amount including interest thereon from 1989.

¶ 97 It was submitted that there were repeated demands made of John over the years and that he confirmed his obligation but never made payment. John denies that the sum is owing or that there was ever an obligation to pay the Lone Star Drilling account or that he ever agreed to reimburse Pasquale for

that sum.

¶ 98 In addition, John relies on the defence of the Limitations Act, R.S.O. 1990, c. L.15, since no action on account was commenced within 6 years of the payment pursuant to s. 47.

¶ 99 The evidence on this issue from the remaining family members is to the effect that this issue was raised from time to time and John's response was simply to avoid the issue by stating he would deal with it shortly. I accept the family's evidence that the item was raised and I also accept that John did not deal with it.

¶ 100 The question, however, is was the demand made in a way that indicated that it was the type of claim that would be pursued if not paid such to postpone the limitation period, or was there an acknowledgement or part satisfaction such as to extend the period for commencing action under s. 50(1) of the Limitations Act?

¶ 101 I have been referred to a number of cases dealing with the issue of the extension of the Limitations Act provision for claim beyond 6 years and particularly the circumstances which may estop a party from denying the validity of a debt or promise to pay.

¶ 102 In Warak v. Bond (1999), 32 C.P.C. (4th) 197 (S.C.C.), the Supreme Court of Canada dealt with the discoverability rule as it applied to a claim for medical malpractice. Mme Justice McLachlin (as she then was) for the majority emphasised for the purpose of the analysis the need to recognise the interests of the individual plaintiff. At page 230 it states:

> "The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interest and circumstances."

¶ 103 While the same type of analysis will obviously not be appropriate for every consideration of the application of a limitation period, it is appropriate to consider when the response to a limitation defence invokes the doctrine of estoppel or promissory estoppel as is the case here.

¶ 104 In Maracle v. Travellers Indemnity Co. of Canada (1990), 50 C.P.C. (2d) 213, the Supreme Court of Canada dealt with the issue of promissory estoppel in the context of a limitation defence, where the insurer had purportedly admitted liability. The basic principle of promissory estoppel involves a factual determination. Mr. Justice Sopinka stated at p. 220:

> "The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or chanced his position."

¶ 105 Applying the above principles to the evidence before me, I am not satisfied that Pasquale has established the factual basis for postponement of the limitation period.

¶ 106 I reach this conclusion for the following reasons. 1) There is some question as to whether the payments made by Pasquale were in the first place a response to legally enforceable obligations or merely debts of honour. 2) There does not appear to be any notice or claim or demand in writing to John at any time from the payment in 1989 to the commencement of this action. 3) There is no acknowledgement in writing on the part of John. 4) The issue of this amount appears to have been put forward in this litigation to justify one of the cheques written by Stella on the Stel-Van account in

August of 1998. 5) While I am satisfied that the matter was raised with John from time to time, I conclude that this was more in the context of family accounting than of the character of a legally enforceable obligation, both on the part of Pasquale and on the part of John.

¶ 107 The claim by Pasquale and Letizia Homes for reimbursement together with interest is therefore denied.

The Claims of For-Bac

¶ 108 For-Bac claims the amount of $67,349.50 as due from Stel-Van, together with prejudgment interest. The basis of the claim is a summary prepared by Sheila Visser, who kept the books and records of For-Bac and was set out in Exhibit 12 and the accompanying documents (Exhibit 13). The amount reflected on the summary from the For-Bac books was not seriously disputed. The records of Stel-Van prepared by Mr. Iaonne question that amount in some respects, but in the absence of any reliable testimony in support I accept the statements prepared by Mrs. Visser as at September 11, 1998 and find $67,349.50 owing from Stel-Van to For-Bac.

Innisbrook

¶ 109 Innisbrook, a company of which Pasquale, Luigi and John Tomasone were the initial shareholders, purchased in December of 1997 a large parcel of raw land in the town of Innisfil, Ontario for development and construction of homes.

¶ 110 Initially, Pasquale, Antonietta and Letizia Homes contributed the sum of $200,000 for the purchase of the Innisbrook land. Through Stel-Van, Pasquale and Antonietta contributed additional funds, including the $50,000 deposit on the lands, which was paid by Letizia Homes.

¶ 111 An additional Cdn $420,000 was advanced from Ital-Can-Am one the U.S. companies holding the plazas and lent to Stel-Van, which then advanced funds to Innisbrook, which totalled together with the other sums $840,000.

¶ 112 As part of that indebtedness, Innisbrook executed promissory notes in favour of Pasquale and Antonietta in the sum of $100,000 and to Letizia Homes in the sum of $100,000 dated December 3, 1997, with interest on those sums payable at 10%.

¶ 113 The principal sum of this indebtedness is not in issue; rather, what is claimed is that reduction of interest on the promissory notes from 10% as of December 1997 to 6% on the replacement notes as a result of the agreements of May 29, 1998, was unconscionable as it affected Pasquale and Antonietta and should be set aside, and the situation re-instated to what it was in December of 1997. I accept that the debt to Pasquale and Antonietta is a valid one in the sum of $100,000 each. The question of interest will be dealt with below.

¶ 114 Each side has submitted that in view of the actions of the other side and the disagreements between them, there should be either a buyout of the others interest or a wind up of Innisbrook.

Ital-Can-Am Corporation and Baccilieri Corp.

¶ 115 These Florida corporations have as their main assets the two shopping centers in Florida referred to above. The shares of Ital-Can-Am Corp. and Baccilieri Corp. are owned by an Ontario company, BFT Fam-Fla., the shares of which are owned one-sixth by each of Pasquale, Antonietta,

Luigi, Stella, Wanda and John. On April 1, 1992, as referred to earlier, each of the shareholders agreed that Pasquale and/or Antonietta was owed the sum of U.S. $500,000 for repayment of a loan made in regards to a purchase of the Florida property.

¶ 116 The agreements entered into as of May 29, 1998 reduced the sum payable to Pasquale and Antonietta to U.S. $235,000, with interest at the rate of 6% payable on or before May 29, 2001, the maturity of the note.

¶ 117 The position of John Tomasone is that the actual contribution made by Pasquale, Antonietta and Letizia Homes group was originally U.S. $402,562.68, not U.S. $500,000, as of March 30, 1992.

¶ 118 This amount was reduced to U.S. $235,000 on May 29, 1998, with the transfer of Pasquale's one-third interest to Luigi and John Tomasone. Pasquale testified that at no time did he have an understanding that there was to be any transfer of an interest in Ital-Can-Am as part of the May 29, 1998 transactions. In this respect, Pasquale was supported by all of the other family members, who testified that as far as they were concerned there was no discussion of Ital-Can-Am on May 19th or any other time prior to execution of the May 29th agreements.

¶ 119 Indeed, contrary to some of the records, it would appear that the shares of both Ital-Can-Am, which is the Florida company used for the purchase of the Kash N Karry mall, and the shares of Baccilieri Corporation, the Florida company used for the purchase of the Hillside plaza, are now owned by BFT Fam-Fla. Inc., an Ontario corporation, of which one-sixth is owned by each of the husbands and wives.

¶ 120 An issue was raised with respect to the jurisdiction this Court might have over Baccilieri Corporation and Ital-Can-Am Inc., due to the fact that they are both Florida corporations. Given the fact that the shares of both corporations are now owned by BFT, I am satisfied that I can deal with the issues raised by the parties as they ultimately affect the shareholdings of the holding company that in turn controls the Florida corporations that own the plazas.

¶ 121 Apparently Ital-Can-Am has received a judgement in Florida against Stel-Van as the receivable owing of $300,000 U.S. together with interest and fees of $73,905.55 as of October 2000 which carries post-judgement interest of 10% and remains unpaid. The principal amount is not disputed by John Tomasone, but he takes issue with certain expenses which he says were intended only to benefit the other family members excluding him.

¶ 122 In particular, John objects to the reimbursement of travel and car expenses charged by Pasquale to the Florida companies as part of his annual trip to Florida. In addition, he objects to a loan made by Baccilieri Corp. to Wanda following their separation. The basis of this objection is that he has not been able to receive similar benefits from the Florida companies. In addition, he questions the proprietor of the legal expenses in connection with the action against Stel-Van.

¶ 123 It is on this basis that John Tomasone requests that he be bought out of his interest in the Florida companies on a proper valuation basis, since not being associated with the family, he will be unable to receive similar advantages and in addition fears that the payment out of dividends from these cash-rich companies will be delayed in order to injure him.

¶ 124 On behalf of Pasquale Baccilieri it is sought to set aside the various agreements dated May 29, 1998 and reinstate Pasquale as a 1/3 shareholder in Stel-Van and Innisbrook and as well restore the indebtedness owing to him regarding Ital-Can-Am in the sum of $500,000 U.S.

¶ 125 Several grounds were put forward on his behalf for granting this relief. The three most significant of these are i) unconscionability, ii) undue influence and iii) lack of consideration.

Unconscionability

¶ 126 One prominent author has explained in his text the application of this equitable power to give relief and notes, "Not all those transactions which, originally or subsequently, may prove to be foolhardy, burdensome or otherwise undesirable and improvident" fall into that category. See Fridman, The Law of Contract, page 344.

¶ 127 As the author sets out, one aspect of the unconscionable transaction involves the knowledge of "impairment" of the other where the stronger deliberately uses his knowledge to achieve a bargain for himself. Impairment for this purpose may involve a number of conditions including, but not limited to illiteracy, lack of education or mental disadvantage. The case of Morrison v. Coast Finance Ltd. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.) has been recognized by a variety of Canadian Courts as setting out the basis for the claim of unconscionability. Davey J.A. at page 713 said,

> "A plea that a bargain is unconscionable invokes relief against an unfair advantage gained by unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable."

See also Cougle v. Maricevic, [1992] 3 W.W.R. 475 (B.C.C.A.). These cases and others which have adopted the same principle are referred to in Fridman at page 344 where the author states,

> "Where a bargain is held to be unconscionable, it is not the consent of the victim that is impugned, but the reasonableness of the bargain, the consciousness of the other party, the equitable character of the transaction. In making such decisions, a court may be concerned with the internal state of mind of the party seeking recession."

¶ 128 A very careful factual analysis is necessary before a conclusion of unconscionability is reached lest a decision appear to be nothing more than as referred to in Fridman at page 348 as unstructured distributive justice". Not unsurprisingly unconscionable contracts may arise in a family setting. In Bomek v. Bomek (1983), 146 D.L.R. (3d) 139 (Man. C.A.) an agreement by parents to secure an existing debt to a credit union of a company controlled by their son was at issue. At page 145, Matis J.A. referred to the "Comments" of Professor Bradley E. Crawford in 14 Can. Bar Rev. 142 (1966) which discussed the circumstances which may give rise to the Courts' intervention and at page 143 of that article, Professor Crawford stated,

> "In the cases now under discussion the courts' intervene to rescind the contract whenever it appears that one of the parties was incapable of adequately protecting his interest and the other has made some immoderate gain at his expense. If the bargain is fair the fact that the parties were not equally vigilant of their interest is immaterial. Likewise if one was not preyed upon by the other, an improvident or even grossly inadequate consideration is no ground upon which to set aside a contract freely entered into. It is the combination of inequality and improvidence which alone may invoke this jurisdiction. Then the onus is placed upon the party seeking to uphold the

> contract to show that his conduct throughout was scrupulously considered of the others interest."

¶ 129 The above quoted paragraph recognizes the inequality in the position of the parties as well as the unfairness of the result. Inequality as referred to in the cases may include old age and emotional distress and any situation in which the weaker party is "out matched and overreached."

¶ 130 In Harry v. Kreutziger (1978), 95 D.L.R. (3d) 231 (B.C.C.A) the B.C. Court of Appeal recognized the same principle. In that case an inarticulate retiring native person was persuaded to sell his boat for a price which was on its face reasonable, but worth a great deal more because of the fishing licence attached to it. McIntyre J.A. stated,

> "Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable."

¶ 131 Closely aligned to the concept of unconscionability and included within the concept by some authors is the principle of "undue influence". It is here that the validity of the consent given by one party who may be said to be subject to an influence of some kind is at issue.

¶ 132 In the Law of Contract, Waddams 4th ed. supra at page 375, the author cites two kinds of cases, the first being where the relationship between the contracting parties falls into an established category where undue influence is said to be presumed and a transaction is set aside unless the presumption of influence is rebutted. The second kind of undue influence arises from "actual pressure relating to a particular transaction." At page 376-7, Waddams states "It is plain that the undue influence umbrella covers two quite separate concerns, the first akin to duress-abuse of adversary power, the second akin to fiduciary duty-the abuse of trust."

¶ 133 This theme was adopted by the Supreme Court of Canada in Geffen v. Goodman Estate (1991), 81 D.L.R. (4th) 211 (S.C.C.) where in summary Wilson J. and Cory J. concurring for the majority stated,

> "In order to trigger the presumption of undue influence the plaintiff must show that the relationship between the parties had an inherent potential for domination. If the impugned transaction be commercial, the plaintiff must also show that he or she was unduly disadvantaged by it, or that the defendant was unduly benefited by it. The onus then shifts to the defendant to rebut the presumption."

Wilson J. elaborated at page 228,

> "The plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.

¶ 134 More recently the Court of Appeal for Ontario in Bank of Montreal v. Dugid (2000), 47 O.R. (3d) 737 dealt with an undue influence defence where a wife who became liable on her husband's business loan alleged that the bank was under a duty to disclose its concerns about the transaction and should have insisted that she obtain independent legal advice. Osborne A.C.J.O. at page 740 distinguished between those cases of "actual undue influence" and the various classes of "presumed undue influence." While Feldman J.A. dissented in the result, her statement of the principle of actual undue influence accords with the majority. She stated at paragraph 44,

> "In the case of actual undue influence, the claimant must prove affirmatively that the wrongdoer exerted undue influence to induce the transaction. In the case of presumed undue influence, the claimant must show only that there existed a relationship of trust and confidence such that it is fair to presume that the wrongdoer abused that relationship to procure the transaction. The onus then shifts to the wrongdoer to prove that the complainant in fact entered into the transaction freely. One way to rebut the presumption is to demonstrate that the complainant received independent legal advice."

¶ 135 One of the presumed undue influence situations titled Class 2A referred to in Dugid arises if a complainant proves the "de facto" existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer where the existence of such relationship may raise the presumption of undue influence.

¶ 136 Pasquale Baccilieri and Antonietta Baccilieri submit that the relationship between Pasquale and his daughters and their husbands was such that the transaction by which Pasquale was persuaded to part with his share interest in Stel-Van and Innisbrook and accept less for his investment then was his entitlement was both unconscionable and based on the undue influence of John Tomasone. I accept that Pasquale could succeed on either branch of the undue influence test.

¶ 137 The third ground by which it is sought to nullify the share transfer to John Tomasone is a lack of consideration in the legal sense. It is urged on behalf of Pasquale that he received nothing of value in exchange for the transfer by him of his shares in Stel-Van and Innisbrook. The concept of "consideration" has long been considered a necessary key ingredient along with offer and acceptance to an enforceable agreement.

¶ 138 Professor Waddams in his text, The Law of Contracts, supra, at page 85 discusses "consideration" in the context of an exchange element in a bargain transaction. At paragraph 119, the author states "A bargain is not formed merely by mutual assent. There must be some exchange of values. Something must be given or promised in exchange for the promise sought to be enforced." At paragraph 122, he states "The notion of exchange is an element of bargain further requires that what is exchanged for the promise sought to be enforced must be of some substance. The exchanged act or promise need not, however, be of benefit to the promissor."

¶ 139 Paragraph 123 completes the thought,

> "It is inherent in the notion of enforceability of bargains that the exchange of values need not be an exchange of equivalence. In other words, the parties are free to make good bargains and bad bargains, and the transaction does not cease to be a bargain because it is very profitable to one of the parties. In some cases a very slight benefit has been held to constitute consideration ... It will be shown in the discussion of unconscionability that unequal exchanges are very frequently set aside when the are procured by the use or abuse of superior bargaining power. Nevertheless such

transactions are bargains, and so prima facie enforceable until shown to be unconscionable."

¶ 140 I am satisfied that the relief sought by Pasquale Baccilieri in these actions is appropriate in the circumstances and that each of the concepts of unconscionability, undue influence and lack of consideration supports that relief.

¶ 141 There would appear to be two major motivating factors at play in the transfers made by Pasquale as of May 28, 1998. In the first place, Pasquale with his health situation and in particular, his heart condition and more recently, colon cancer and hip replacement, recognised that he could no longer be as active or as vital in the construction business as he had been.

¶ 142 Secondly, as a strong family man Pasquale was anxious to see that his daughters and their families would be participants in the fruits of the ongoing activities of the construction business that he had started. As part of this process, Pasquale wanted to ensure to the extent that he could both peace and harmony in the family.

¶ 143 I conclude on the evidence that there had been friction between John Tomasone, on the one hand and Pasquale and Luigi Fortini on the other in their business activities over time. This friction increased following the statement of Pasquale that in effect he was prepared to turn over major participation in the business activities to his sons-in-law.

¶ 144 As often the case in closely held family companies there is virtually nothing in writing to reflect either the negotiations, the drafts of agreements or indeed the agreements themselves beyond simple transfer of shares. It is not surprising then that the contracting parties may have a different understanding of the basis premise of the transaction.

¶ 145 The difficulty faced by Pasquale in May of 1998 was that he had previously agreed in principle to a transfer of his share interest in Stel-Van. The underlying premise of his undertaking was that by doing so he would facilitate peace and harmony in the family relationship for the future. What brought matters to a head on May 19th at the acrimonious meeting in the kitchen of his house was the insistence of John Tomasone that Pasquale play no further part in the day-to-day construction activities of the business.

¶ 146 The women all seemed to recognise that Pasquale's health would be risked by an ongoing day-to-day involvement. The women all knew, however, how important it was to Pasquale to have a sense of involvement and participation that could only come from a recognition of his right to visit the various sites and offer advice.

¶ 147 It was the insistence of John Tomasone that Pasquale be formally excluded from any involvement, active or passive, that so upset and affected Pasquale. All the parties including the lawyer, Roy Gordon and even John Tomasone recognised how upset and unhappy Pasquale was with the prospect of exclusion.

¶ 148 I, therefore, conclude that it was age, emotional and physical health as well as a desire for family peace that placed Pasquale in an unequal position with his son-in-law, John Tomasone.

¶ 149 John's position is that there was no inequality since there was no term in their agreement regarding family peace. John testified that there was no hint on his part of marital separation until August of 1998 and even then it was not at his initiation. John also urges that there is no inequality

since Luigi Fortini was to receive what John Tomasone did equally.

¶ 150 The difficulty with that position is that there was no evidence before me of any need on the part of Pasquale to achieve family peace insofar as Luigi Fortini was concerned. They had been partners for years even before John Tomasone was involved with no discord between them. While Luigi was prepared to accept the gratuity of the transfer, I conclude it was only to accommodate his father-in-law's wishes insofar as John Tomasone was concerned. There is little doubt that there was marital discord between John and Wanda Tomasone prior to the May transaction, but the extent of it was likely unknown to Pasquale.

¶ 151 There was nothing in the evidence to suggest in any way that Luigi Fortini wanted to preclude his father-in-law from a passive participation in the business. I, therefore, conclude that there was an inequality of position as between John Tomasone and Pasquale Baccilieri.

¶ 152 There was, as well, an unfairness of result in the transactions. Not only did Pasquale agree to accept substantially less than he was entitled, namely, $235,000 rather than $500,000 on the over contribution to the Florida properties, as well as other items, he was particularly upset with the unilateral change of interest rate from 10% to 6%. In his evidence, John Tomasone did not give any explanation that satisfied me that there had been a true understanding between he and Pasquale about this issue or the need for it.

¶ 153 One of the criteria noted in the cases above to be considered for the assessment of both unconscionability and undue influence is whether the person complaining had independent legal advice. Based on the evidence of Roy Gordon as well as the parties themselves, I am satisfied that Mr. Gordon neither was asked for nor did he give what might be regarded as independent legal advice. As the solicitor for the companies as well as the members of the family, he acted merely as legal facilitator to ensure that the transactions were completed in an appropriate form. He took his instructions largely from John Tomasone, but to a certain extent from Pasquale as to what was to be accomplished in the transactions. The limited nature of his retainer is clearly evident in his disclaimer of any ability to provide an opinion with respect to the Florida companies which held the plazas. Mr. Gordon did not suggest that he was asked for legal advice by either Pasquale or John and I am satisfied that he simply carried out what he understood to be the wishes of John Tomasone and Pasquale Baccilieri even though he knew Pasquale was unhappy and upset with the transaction.

¶ 154 I am, therefore, satisfied based on the legal principles above that the transactions by which Pasquale parted with his shares in Stel-Van and Innisbrook and accepted less for the indebtedness due to him represented both unconscionability in terms of the result and the exercise of undue influence on the part of John Tomasone who was able to exercise actual undue influence as that term is referred to in the cases.

¶ 155 The third ground for setting aside the transactions, namely, the lack of consideration for the transfers should also succeed. Counsel for Mr. Tomasone conceded in argument that there was no objective evidence of consideration in respect of the transfer of the shares of Innisbrook. It was submitted that consideration for the transfer of the Stel-Van shares could be found in the benefit to Pasquale of the change of terms in the promissory note which would see him paid earlier than originally contemplated even though the amount and interest rate were less. I am satisfied that relying on the legal analysis set out in Professor Waddams' text, The Law of Contract, supra that the facts here do not substantiate an exchange between the parties of anything that may be called being of "substance". While there certainly are circumstances in which gifts may be enforceable bargains, they will not be enforced if procured by the use or abuse of superior bargaining power. The unconscionability that I have found negatives any suggestion of enforceability with respect to a gift.

¶ 156 It is not necessary for me to deal with additional grounds urged on behalf of Pasquale to set aside the May 29, 1998 agreements. In summary, the additional grounds include misrepresentation on the part of John Tomasone as to the state of his marriage and mistake of a fundamental assumption (the state of the marriage) going to the root of the contracts.

¶ 157 If the grounds referred to above based on unconscionability, undue influence and lack of consideration did not succeed, I do not think that the evidence would be sufficient to warrant recession on the basis of misrepresentation or mistake. Pasquale did know what he was doing when the agreements were signed. I do not think it reasonable to imply a term into those agreements that it was based on John and Wanda not separating.

¶ 158 Even if John Tomasone had the intention to leave Wanda assuming the agreements were signed, it is not appropriate, in my view, to mix the complexities of a matrimonial break-up into a contractual setting. Rather it is the constellation of circumstances that affected Pasquale that together with the unfair result under the agreements that render them unconscionable.

Interest

¶ 159 Various alternatives were put forward on behalf of the Baccilieri and Fortini groups for the awarding of interest on any amounts found to be outstanding. Interest rates were suggested on various debts, running from 6% to 10%, including claims for simple interest as well as compound interest.

¶ 160 I have reviewed the various agreements, some of which did not provide for interest and some of which did, and have concluded that the rate of 6% is appropriate to apply to all of the claims for which interest may be awarded, with the exception of one. I was not provided with Pasquale's borrowing rate from the Bank of Montreal throughout the period, nor the amounts that were borrowed.

¶ 161 I have concluded, therefore, that the most reasonable rate to apply for both sides is the pre-judgment interest rate provided for in s. 127 of the Courts of Justice Act. The fourth quarter rate in effect when John Tomasone's claim and action No. 98-CL-3031 (the first of the actions) was commenced, is 6%, and will be used throughout for the various starting dates on a simple interest basis, subject to cumulation where appropriate.

¶ 162 Until matters became acrimonious as between the parties, the question of interest was not one that was dealt with in a formal manner. The reflection of interest was intended to recognise the contribution that the borrowed funds of Pasquale made to the profitability of various ventures and to ensure that he was not out-of-pocket with respect to funds borrowed. I recognise that there are tax efficiencies and other factors that might well direct why I did not hear a more precise figure and it is for that reason that I have concluded that a simple interest rate on the basis mentioned is appropriate.

¶ 163 If one applies the 6% rate to the re-instated note between Ital-Can-Am and Pasquale and Antonietta, pursuant to the terms in Exhibit 20, interest would commence from April 1, 1996 on the sum of $100,000, on April 1, 1997 on the sum of $200,000, increasing the amounts by $100,000 per year until April of 2001. As of April 12, 2001, this sum totals U.S. $121,002.74 to be added to the principal sum of U.S. $500,000.

¶ 164 The sums found owing to For-Bac from Stel-Van will carry interest at 6% from the outstanding balances from time to time commencing in March of 1988, as set out in Exhibit 12. Applying the 6% rate to the outstanding balances as set out in Schedule 3 to the Arthur Anderson report (Exhibit 1) on a simple accumulating balance basis, the total interest as of April 12, 2001 is $53,222.23.

¶ 165 The history of the amounts owing as between Stel-Van and Letizia are as set out in Exhibit 7. Simple interest on the cumulative balance at 6% from October of 1995 to April 12, 2001 is $120,330.38. Letizia is entitled to interest in this amount.

¶ 166 There are two notes payable by Innisbrook: one to Pasquale and Antonietta in the sum of $100,000 and the other to Letizia in the sum of $100,000. By virtue of the reinstatement of those original notes, the interest rate on those notes dated December 3, 1997 should be reinstated and I see no reason for the 10% not to apply in accordance with the notes. I so order.

Oppression Claims and Remedies

Oppression Claims

¶ 167 Shortly after the separation of John and Wanda Tomasone in August of 1998, and the discovery of the funds paid out of Stel-Van, an action was started by John on behalf of himself and Stel-Van Homes Ltd. for what might be summarised as oppression remedies. By the order of Lederman J. dated March 1, 2001, a trial of the issues in the oppression claim together with the other actions herein were ordered tried together.

¶ 168 The claim of John Tomasone and Stel-Van is for a declaration that Stel-Van be wound up on the basis that Pasquale and Luigi have acted to cause the affairs of Stel-Van to be operated in a manner oppressive and unfairly prejudicial to John.

¶ 169 Similar relief is sought in respect of Innisbrook, conditional upon Pasquale being found to have an interest in that company. The request, however, is that Luigi and Pasquale sell their interest to John on such terms as may be determined by the Court or, alternatively, the land put up for auction.

¶ 170 With respect to BFT, the relief sought is a declaration that the other family members operated the company in a manner oppressive and unfairly prejudicial to the interest of John Tomasone and requests that the company be wound up or alternatively the assets sold at auction with the net proceeds payable to the shareholders, or further an order requiring the family members to purchase without minority discount the interest of John in the company for an amount to be determined by the Court on terms to be determined by the Court, following an effective evaluation.

(a) Stel-Van

¶ 171 The separate Statements of Defence filed on behalf of Pasquale, Antonietta and Letizia Homes on the one hand, and Luigi, Stella and Wanda Tomasone, as well as For-Bac on the other, do not dispute that as a practical matter, Stel-Van should be wound down. Subject to the comments below in relation to Innisbrook and BFT, and since the parties are all in agreement, an order will issue for the wind-up of Stel-Van, which order will be subject to appropriate terms and conditions to permit the orderly payment of all outstanding obligations. I have been advised that an informal arrangement has been agreed between the parties pursuant to which funds are being paid to Mr. Roy Gordon as Stel-Van's solicitor in trust, and only disbursed by him on consent of the parties.

¶ 172 If the parties cannot agree, the Court will set the appropriate terms for wind-up of Stel-Van.

(b) Innisbrook

¶ 173 Each side in this proceeding, being the Baccilieri group and the Fortini group on the one hand,

and John Tomasone on the other, allege oppressive conduct of the other in respect of the operations of Innisbrook. John, in particular, seeks a declaration which would entitle him to purchase the interests of the other shareholders in Innisbrook, failing which he requests that the company be wound down. For their parts, Luigi and Pasquale deny the allegations of oppressive conduct and seek a declaration that they be entitled to purchase John Tomasone's interest in Innisbrook.

Oppression Remedies

¶ 174 Since each side seeks various forms of oppression-type relief under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 ("OBCA"), it is appropriate to consider the Act. Section 207(1) of the OBCA provides a basis for a wide exercise of discretion to wind up a corporation:

> "(b) where the Court is satisfied that:
>
> ...
>
> (iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.
>
> ...
>
> (2) Upon an application under this section, the Court may make such order under this section or s. 248 as it thinks fit."

¶ 175 The relevant portions of section 248(3) read:

> "248(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:
>
> ...
>
> (f) an order directing a corporation, subject to sub-section (vi) or any other person, to purchase securities of a security holder.
>
> ...
>
> (1) an order winding up the corporation under section 207;"

¶ 176 The breadth of discretion that may be available when the appropriate tests for the just and equitable relief exists incorporates the wide range of remedies available, including the foregoing, under the "oppression remedy" section. See Clarfield v. Manley (1993), 14 B.L.R. (2d) 295 at p. 305.

¶ 177 The closely held family corporation has been held to be in the nature of a partnership. In Belman v. Belman (1995), 26 O.R. (3d) 56, Spence J. undertook an extensive review of the tests for the application of the just and equitable remedy for winding up a family corporation and the extent of the exercise of discretion to fashion an appropriate remedy under s. 248.

¶ 178 In particular, Spence J. considered the situation where, in the context of a marriage breakup, one spouse only had lost confidence in the other, in the context of the business of the company.

¶ 179 In particular, he referred to the applicable corporate partnership principle adopted by the Court of Appeal for Ontario in PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 15 O.R. (3d) 730, 103 D.L.R. (4th) 609 (C.A.) by Dubin C.J.O. (although he dissented on the application of the following test to the facts) at p. 744 O.R., p. 622 D.L.R.:

> "The essence of a partnership is that of mutual confidence and trust in one another, and it is of the essence of that relationship that mutual confidence be maintained. If there is lack of confidence such that the partners cannot work together in the way originally contemplated, then the relationship should be ended."

¶ 180 As well, Spence J. referred to the statement of Farley J. in Wittlin v. Bergman (1994), 19 O.R. (3d) 145 (Gen. Div.):

> "... where the one side has done ... such things as make the existing arrangement a terribly difficult one for the parties to live with, if the other party does not wish to have the relationship ended [then the just and equitable provision cannot be invoked]."

¶ 181 In the case before him, Spence J. reviewed various of the business issues that were raised and concluded that he,

> "could not find in these practices any conduct on the part of Mr. Belman that would amount to improper exclusion of Mrs. Belman or other improper conduct on his part, which would satisfy a requirement for a winding-up order if such a requirement were applicable in the present circumstances."

¶ 182 He went on to find that, with respect to the disagreements that arose in the context of the marriage:

> "None of these developments or events given rise to anything that could be regarded as a `loss of confidence' between the parties that would provide a basis for a winding-up. There is no evidence that Mr. Belman had experienced a loss of confidence in Mrs. Belman."

¶ 183 What Spence J. did conclude in the course of his reasons was that Mrs. Belman had a justifiable loss of confidence in Mr. Belman and having reviewed her conduct, concluded that:

> "Mrs. Belman is not disqualified by any lack of clean hands from claiming relief under s. 207 of the OBCA."

¶ 184 From the principles reviewed and applied by Spence J. in Belman, supra, it would appear that it is not every loss of confidence or instance of personal animosity that will justify the remedy under s. 207.

¶ 185 A party seeking the remedy does not have to establish want of probity, good faith or improper conduct on the part of the other; rather, merely actions of the other that have resulted in unfair prejudice to the interests of the party seeking the relief. See Wind Ridge Farms v. Quadra Group Investments, [1999] 12 W.W.R. 203 (Sask. C.A.) at p. 220.

¶ 186 For the party seeking the remedy in a closely-held partnership situation, to be based on a justifiable lack of confidence in the other, the applicant must satisfy the Court that he or she comes with

"clean hands". For example, the lack of confidence must be legitimately based and not induced by misconduct, on the part of the party seeking the remedy. The applicant must discharge the burden. See Hillcrest Housing Ltd. re (1998), 165 Nfld. and P.E.I.R. 181 at 221 per MacDonald C.J.T.D.

¶ 187 Personal animosity, at least in the partnership-type corporation, may be sufficient for the remedy if it leads to deadlock. In Hillcrest, supra, the winding-up order was refused in what was held to be a non-partnership situation, even where there was animosity between the shareholders. At paragraph 192, it states:

> "Animosity generally will lead to deadlock, but personal animosity alone may not mean there is deadlock. There may be much acrimony between parties, but that does not necessarily mean there is deadlock. There always must be some give-and-take."

¶ 188 I conclude from the foregoing analysis that personal animosity will likely, but need not always, lead to deadlock, even in a partnership-type corporation. More important, for the operation of an ongoing family business, is the lack of confidence that an applicant may have in the other shareholders.

¶ 189 I have no hesitation in concluding with respect to Stel-Van and Innisbrook that the required lack of confidence is met, since both sides request the same remedy, namely a winding-up in some fashion.

¶ 190 In the case of Stel-Van, I understand that it does not have much by way of an active business left and that subject to paying outstanding debts, the corporation may be easily wound up and the assets distributed to the shareholders.

¶ 191 In the case of Innisbrook, its major asset is a piece of land, which has the potential for development. The position of John Tomasone advanced at the beginning of the trial is that he sought to purchase the interest of his fellow shareholders in that company. During his evidence, he indicated that unless he could get the necessary financing to buy out his fellow shareholders, he would agree either that he be bought out or that the land be sold.

¶ 192 Once the parties have had an opportunity to consider the results of this decision, they may, if they cannot agree, make application for further specific relief with respect to Innisbrook under s. 207 of the OBCA.

¶ 193 The situation with respect to BFT is more complicated. As noted previously, this Ontario corporation holds the shares of the two companies which in turn hold the Florida shopping centres. The whole arrangement of these corporations was part of estate planning on the part of Pasquale. As such, it is essentially a passive investment company.

¶ 194 The cash receipts in the Florida companies from the leasing of the shopping plazas were used in part for investment in Innisbrook. By the very nature of the operations of the Florida companies, there is not much to be done by way of management. Doug Raley is the on-site manager, who looks to the tenant leasing and collects the rents. There has not been any serious dispute with respect to the management. It was suggested on behalf of John that the required lack of confidence in his fellow shareholders could be demonstrated by the fact that certain small expenses were paid when other family members travelled to Florida, including a car expense for Pasquale and, in addition, there was a loan advanced to Wanda when she required funds as a result of the separation. I am not satisfied that this represents financial mismanagement. John has not made a similar request for any reimbursement that has been denied.

¶ 195 While John states that he has a lack of confidence in the other family members, I conclude that this has largely been brought about by his own actions and his attitude toward his father-in-law and the other dealings that I have found unconscionable. As a result, if the issue with respect to BFT were to be dealt with solely on the basis of John Tomasone's claim for loss of confidence in the others, it would fail.

¶ 196 It has been suggested that in a family-held partnership company, there is an implied expectation on the part of an individual shareholder, particularly one in the minority, that he or she will be bought out on request or on reasonable terms on request.

¶ 197 This issue was reviewed by Spence J. in Miklos v. Thomasfield Holdings, [2001] O.J. No. 1432, where he stated:

> "This expectation [if any] to be relevant, must arise from and relate to the interests of the applicants as shareholders."

¶ 198 Spence J. went on to state:

> "Moreover, for s. 248, the question is whether the refusal to make such an offer unfair. There is no statutory or contractual right to call for such an offer. There has been no representation from the corporation that such an offer would be made. There is no action being taken by the majority shareholder to obtain liquidity for himself while not affording it to the minority. There is no offer being made to some minority shareholders and not to others. So there is nothing to suggest that the refusal is unfair to the applicant shareholders."

¶ 199 In Flatley v. Algy Corp., [2000] O.J. No. 3787, Swinton J. dealt with a claim of oppression brought by a minority shareholder entitled to share in profits, who was dismissed from her employment as a bartender in the corporation by the majority shareholder.

¶ 200 The remedy was granted by Swinton J., who concluded that the remedy was appropriate in the case before her "since she [the plaintiff] cannot realistically determine the financial affairs of the company nor have any sense of confidence in the financial statements prepared". The remedy ordered included a buyout of the minority shareholder.

¶ 201 From the above authorities I conclude that in the absence of express agreement, a minority shareholder even in a closely held family corporation does not have an expectation of being able to be bought out absent specific factual circumstances that would in themselves be regarded as oppressive.

¶ 202 In considering an allegation of oppressive conduct, a Court will have regard to the effect of that conduct on the shareholders interest as a shareholder and not another relationship, whether it be personal or as an employee. Animosity which arises from a change in personal relationships such as marriage break-up is but one fact and not in itself conclusive.

¶ 203 I recognise that there is considerable animosity that has grown up on both sides, since this litigation commenced. While it has not yet resulted in a deadlock in BFT that would justify an oppression remedy, I would anticipate that such deadlock would arise in the very near future, particularly as there is ongoing litigation arising from the matrimonial split between John and Wanda.

¶ 204 In order to bring some finalisation to the business disputes between the parties, a resolution of

John's position as a shareholder in BFT would seem to me to be in the interests of all parties. John wants his shareholding interest liquidated and this desire may or may not accord with the interests of other shareholders, who could take the opposite position simply from the point of animosity.

¶ 205 Leave will therefore be given to either party to further make an application for an orderly resolution of the interests of John Tomasone as a shareholder in BFT on terms that will be considered by the Court if they cannot reach agreement.

Conclusion

¶ 206 In summary, with respect to Stel-Van, the May 29, 1998 agreement and related note are set aside and Pasquale Baccilieri is reinstated as a one-third shareholder. Stel-Van is indebted to Letizia Homes in the sum of $487,104.50, together with pre-judgment interest at the rate of 6% and For-Bac is entitled to recover from Stel-Van $67,349.50, together with pre-judgment interest at the rate of 6%.

¶ 207 With respect to Innisbrook, the May 29, 1998 agreement and related notes are set aside and Pasquale Baccilieri reinstated as a one-third shareholder. The December 3, 1997 notes are reinstated with respect to Pasquale and Antonietta, as well as Letizia, with interest on those notes to run at 10%.

¶ 208 The May 29, 1998 agreement between John Tomasone, Luigi Fortini, Pasquale Baccilieri and Antonietta Baccilieri with respect to the note of Ital-Can-Am is set aside and the April 1, 1992 agreement is reinstated and held binding with the sum of U.S. $500.000 owing, together with pre-judgment interest at the rate of 6% as the note provided.

¶ 209 The claim against John Tomasone in the sum of $15,800 with respect to Loan Star Well Digging is dismissed.

¶ 210 There will be a winding-up order made with respect to Stel-Van and Innisbrook on terms to be set by the Court if the parties cannot agree. With respect to BFT, leave is given to either party to make an application for appropriate resolution of the shareholding of John Tomasone.

¶ 211 Counsel may make written submissions or an appointment before me to deal with the issue of costs.

C. CAMPBELL J.

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