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Tari v. Darolfi, 2025 ONSC 5104

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CITATION: Tari v. Darolfi**,** 2025 ONSC 5104
COURT FILE NO.: CV-20-640010-00CL
DATE: 20250929

ONTARIO

SUPERIOR COURT OF JUSTICE [Commercial List]

BETWEEN:	)	
	)	
MASSIMO TARI	)	*Patricia Virc*, for the Plaintiff Massimo Tari and Defendants to Counterclaim Massimo Tari, Ana Tari and Luigi Tari
	)	
Plaintiff	)	
	)	
– and –	)	
ALFREDO DAROLFI, PATRIZIA J. BIZZOTTO DAROLFI, RINALDO DAROLFI, ENRICHETTA DAROLFI, MARIA DAROLFI, DARTA ENTERPRISES INC. carrying on business as Darta Fleet Services, D&R ELECTRONICS CO. LTD., 1520365 ONTARIO INC. and 2408624 ONTARIO LTD.	)	*Richard MacGregor & Gleb Matushansky*, for the Defendants/Plaintiffs by Counterclaim
	)	
Defendants	)	

AND BETWEEN:

ALFREDO DAROLFI, PATRIZIA J. BIZZOTTO DAROLFI, RINALDO DAROLFI, ENRICHETTA DAROLFI, MARIA DAROLFI, DARTA ENTERPRISES carrying on business as DARTA FLEET SERVICES, CO. LTD., D&R ELECTRONICS CO. LTD., 1520365 ONTARIO INC. and 2408624 ONTARIO INC.

Plaintiffs by Counterclaim

- And-

MASSIMO TARI, ANA TARI and LUIGI TARI

Defendants to Counterclaim

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)
)
) **HEARD:** September 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, October 1, 2, 3, 2024, January 17, 2025, with supplemental written submissions May 22, 2025

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JUSTICE JANA STEELE

REASONS FOR DECISION

Overview

[1] This is an oppression and wrongful dismissal matter involving a closely held family company. The case involves an estranged son-in-law who was closely tied to the family's businesses. When, among other things, his marriage with his wife fell apart, he became estranged from the family. There are ongoing family law proceedings. On the corporate side, the son-in-law was terminated from his employment after the wife's family discovered a fraud.

[2] The plaintiff, Massimo Tari ("Massimo"), was fired from his employment with the Darolfi family businesses following the discovery by the Darolfis of a fraudulent invoicing scheme. Massimo was employed by one of the businesses started by Rinaldo Darolfi ("Rinaldo") for approximately 27 years before his termination.

[3] Massimo is also a shareholder of Darta Enterprises Inc., carrying on business as Darta Fleet Services ("Darta"), 1520365 Ontario Inc. ("152"), and 2408624 Ontario Limited ("240"), having effectively been gifted those shares by Rinaldo. After being fired, Massimo was promptly locked out of the businesses. Among other things, Massimo claims oppression and wrongful dismissal.

[4] Massimo is the estranged husband of Rinaldo's daughter, Maria Darolfi ("Maria").

[5] The Darolfi family businesses were started by Rinaldo, who is now 87 years old. Rinaldo was born in 1937, in Italy. Rinaldo grew up there and worked as an apprentice in the plastering trade. When he was 21, Rinaldo, who spoke no English at the time, came to Canada. He worked in plastering for a short period and studied at night to learn English, then went to college. After college, Rinaldo worked at several places until he decided to start his own company in 1976, D&R Electronics Co., Ltd. ("D&R"). D&R grew. Eventually, Rinaldo chose to split off a part of the business into another company, Darta. The two numbered companies, 152 and 240, were incorporated to hold the lands and buildings on which the operating companies operated. It was

always Rinaldo's intention that the family businesses, the product of his life's work, would remain with the family.

[6] The defendants have counterclaimed against Massimo. The Darolfis claim that Massimo's shares in the family businesses were granted to him conditionally. Their position is that there were express or implied conditions that he would forfeit his shares if he breached his fiduciary duties, which the Darolfis say he has done.

[7] By counterclaim, the defendants claim damages for deceit and civil fraud, among other things, related to the misappropriation of funds from D&R, Darta, 152, and/or 240. They also seek an order for equitable tracing and disgorgement of profits received arising from Massimo's misconduct.

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Background

[8] Massimo and Maria met in 1986 and married in 1988.

[9] The defendant, D&R, is a company that manufactures parts and other products used to outfit first responder vehicles, among other things. D&R was founded by Rinaldo in and around 1976.

[10] D&R has approximately 60 employees.

[11] Before the incorporation of Darta in 1999, D&R was also engaged in outfitting custom vehicles.

[12] In 1999, as part of his estate planning, Rinaldo decided to, among other things, hive off the outfitting part of D&R's business and transfer it to Darta.

[13] Darta now has approximately 25 employees. Darta assembles special-purpose vehicles, including police, fire, and EMS vehicles. D&R sells parts to Darta.

[14] The defendant, 152, is an Ontario corporation that owns the land and building in which D&R operates, located at 8820 George Bolton Parkway, Bolton, Ontario. 152 was incorporated as a holding company to own the land. D&R provided $411,000 to buy the land.

[15] The "rents" paid by D&R to 152 were a flow-through to pay the mortgage[1], because 152 did not earn any other revenue.

[1] Massimo had been involved in establishing the "rent" amount. The 152 mortgage was paid off after about seven years.

[16] The defendant, 240, is an Ontario corporation that owns the land and building in which Darta operates, located at 91 Simona Drive, Bolton, Ontario. 240 was also incorporated as a holding company to own the land.[2]

[17] The building in which Darta operates was completed in and around September 2016, at which time Massimo moved his office from George Bolton Parkway to 91 Simona Drive.

[18] 240, 152, Darta and D&R are collectively referred to as the Defendant Corporations.

[19] The defendants, Alfredo Darolfi, Patrizia J. Bizzotto Darolfi, Rinaldo Darolfi, Enrichetta Darolfi, and Maria Darolfi (collectively, the "Darolfis") are officers, directors and/or shareholders of the Defendant Corporations.

[20] Rinaldo is a director, the president and the secretary of D&R.

[21] Enrichetta Darolfi ("Enrichetta"), Rinaldo's spouse, is the treasurer of D&R.

[22] Rinaldo and Enrichetta control D&R through preference shares. The common shares of D&R are held by Maria and her brother, Alfredo Darolfi ("Alfredo").

[23] Alfredo is the president and a director of 240 and 152.

[24] Patrizia Bizzotto Darolfi ("Patrizia"), Alfredo's spouse, is the president and a director of Darta.

[25] Massimo was the vice-president of sales of D&R until February 26, 2020, when he was fired. That same day, Maria asked Massimo to leave the matrimonial home, which he did several days later. On that day, Massimo returned home from a business trip, and Rinaldo and Alfredo informed him that he had been terminated from his position with D&R.

[26] Massimo holds the following shares and positions with the Defendant Corporations:

a. Darta: 100 common shares, director, and secretary;

b. 152: 30 common shares, vice-president and secretary;

c. 240: 30 common shares, vice-president and secretary.

[27] Massimo owns 25% of 152. Alfredo owns 50% of 152, and Maria owns 25% of 152. Massimo and Alfredo are the officers and directors of 152.

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[2] The 240 land was purchased with cash that had been advanced from D&R and Darta.

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[28] Massimo owns 25% of 240. Alfredo owns 50% and Maria owns 25% of 240. Massimo and Alfredo are the officers and directors of 240.

[29] Darta is owned 50% by Massimo and 50% by Patrizia. Massimo and Patrizia are the only officers and directors of Darta.

[30] At the time of Massimo's termination of employment, he was the VP of Sales at D&R (and an officer/director at Darta, 240 and 152).

[31] When Massimo was terminated, he was promptly locked out of the buildings owned by 240 and 152. Further, access to his office, email and computers was denied.

[32] Massimo has not been paid anything since he was excluded from the businesses.

[33] There are no shareholders agreements in respect of any of the businesses.

[34] Massimo loaned 240 $900,000 for the construction of the building for Darta at 91 Simona. The source of the funds was Maria and Massimo's HELOC ($700,000) and a joint savings account ($200,000).

Issues

[35] I address the following issues below:

a. Were the share grants to Massimo conditional?

b. Was Massimo terminated for cause?

c. Was Massimo oppressed?

d. Did the Darolfis have after acquired cause to terminate Massimo?

e. Did Massimo breach his fiduciary duties?

f. Is Massimo liable in civil deceit and/or conversion?

g. Is Massimo entitled to repayment of the shareholder loan from 240?

h. Can Massimo compel a buy out of his shares of 240 and 152?

i. Should the court order the wind up and sale of Darta?

j. Is Massimo entitled to a buy out of his shares of Darta?

k. If so, at what price?

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Analysis

Were the share grants to Massimo conditional?

[36] The share grants to Massimo were not conditional.

[37] The Darolfis take the position that when Rinaldo gave the Darta business to Alfredo and Massimo, it was conditional that they stay in the family, stay involved in the businesses, and act in the best interests of the family businesses. The Darolfis similarly submit that when 152 and 240 were established, the grant of the shares to Alfredo, Maria and Massimo was subject to the same conditions.

[38] Although there may have been some discussions regarding the family nature of the business, there is no documentary evidence to support the Darolfi family's position that the grants of the shares of Darta, 152, and 240 were conditional. There are no deeds of gift in respect of these shares (unlike the shares issued to Maria as part of the D&R estate freeze).

[39] Rinaldo had completed an estate freeze of D&R in and around 1998. The Darolfis take the position that the share grants to Massimo of Darta, 152, and 240 were further estate planning and that the share grants to Massimo were conditional. The Darolfis note that most of the funding in respect of each of the companies came from D&R:

a. As noted above, 152 was incorporated for the purpose of owning the George Bolton land (the land on which D&R operates). A 36,000-square-foot building was constructed on the land from which D&R would operate. D&R provided $411,000 to buy the land. The initial shareholders of 152 were Massimo (25%), Maria (25%) and Alfredo (50%).

b. Darta was incorporated in March 1999. When Darta was incorporated, it did not have its own inherent business. The business of vehicle outfitting was transferred from D&R to Darta. Darta was amalgamated in 2007 for the assembly business through an amalgamation with Saunders Precision Tools Ltd. Rinaldo's evidence is that Saunders was an asset of value contributed by D&R. Initially, the Darta shares were held 50% by Massimo and 50% by Alfredo. Shortly after incorporation, Alfredo transferred his shares to Patrizia.

c. 240 was incorporated to purchase the Simona land (the land on which Darta operates). The shareholders of 240 were Massimo (25%), Maria (25%) and Alfredo

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> (50%). Massimo loaned $900,000 (from Massimo and Maria's joint funds) to 240 for the construction of the building at Simona.[3]

[40] Other than the loan from Massimo and Maria's HELOC in respect of the construction of the building on the Simona land, Massimo did not pay for the shares of Darta, 152, or 240, which were issued from Treasury.

[41] The documentary evidence supports Massimo's assertion that he owns 25% of the shares of each of 152 and 240, and 50% of the shares of Darta. Among other things, the share registers and share certificates show that Massimo is a shareholder of shares of Darta, 152, and 240.

[42] Massimo points to *Naneff v. Con-Crete Holdings Ltd.*, [1993] O.J. No. 1756 (reversed on other grounds, (1995), 23 O.R. (3d) 481 (ONCA)) as being a similar case. In *Naneff*, the father of a successful company had gifted common shares to his two sons as part of an estate freeze. Several years later, one of the sons adopted a lifestyle that his parents did not approve of, and he was subsequently ejected from the family business. The court stated, at para. 107, that the gift of the common shares to the sons was not one that "can be reversed at the whim of the father in order to discipline a disappointing son. Far too much has taken place in the interim, in a corporate and business sense regarding Alex's involvement, for that to make sense."

[43] Regarding the issue of whether the shares were a conditional gift, I find *Naneff* persuasive.

[44] Like the facts in *Naneff*, Massimo was employed in a senior position at Darta and made significant contributions to the Darolfi family's businesses over the years. There is no doubt that Massimo was a valued member of the businesses and worked hard, alongside Alfredo and Rinaldo, among others, to grow the businesses.

[45] Although Massimo did not pay consideration for the shares issued to him from Treasury (other than the loan in respect of the construction on the Simona land), he was issued the shares with no conditions attached and continued to contribute to the family businesses for years thereafter.

[46] Massimo owns the shares of Darta, 240 and 152 that were issued to him.

Was Massimo terminated with cause?

[47] I find that Massimo was terminated with cause. He used a fraudulent invoicing scheme to remove monies from the family businesses.

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[3] The source of the remaining funds for the construction of the Simona building was as follows: Darta advanced $1,880,150.50; 152 advanced $1,955,000; Rinaldo advanced $500,000; and D&R advanced $800,000.

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[48] When Massimo was terminated on or about February 26, 2020, Rinaldo and Alfredo informed him that he was terminated for cause due to the fraudulent invoices, and his access to the company was removed.

[49] An employer who alleges just cause has the onus of proof in that regard: *Webb v. Eaton Yale Ltd.* [2003] O.J. 5013, at para. 27. I am satisfied that the Darolfis have met the burden.

[50] In *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161, at para. 48, the Supreme Court of Canada set out the standard for the Court to apply in assessing whether an employee's dishonest conduct gives rise to just cause for dismissal: "the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship."

[51] In *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43693 (Ont. CA), 246 D.L.R. (4th) 65 (Ont. C.A.), at para. 49, the Court of Appeal indicated that "the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship." In addition, the Court of Appeal stated that "dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship." The Court of Appeal noted, at para. 50, that the application of the standard for the Court to apply in determining whether an employee's conduct gave rise to just cause for dismissal consists of:

a. Determining the nature and extent of the misconduct;

b. Considering the surrounding circumstances; and

c. Deciding whether dismissal is warranted (i.e., whether dismissal is a proportional response).

[52] The Darolfis terminated Massimo's employment on February 26, 2020, after discovering and investigating the fraudulent invoicing scheme.

[53] This court has held that a party was not wrongfully dismissed and that the company had just cause to terminate him because his conduct was dishonest, and he breached his fiduciary duty to the company: *2025925 Ontario Inc. v. Maramusche Holdings Inc.*, 2023 ONSC 3041, at para. 193.

[54] Maria's evidence was that she discovered Massimo's fraud when she found out that Massimo had stolen from her, which prompted a fulsome investigation.

[55] In or about April 2019, Maria was conducting online banking and checked the amount of her and Massimo's line of credit. She noticed that a bank draft of $44,250 had been withdrawn from their joint account. She asked Massimo about it, and he said not to worry about it, explaining that he had put the money he had removed from their line of credit in 240. Maria asked the company accountant, Hector Perrara, whether the funds had been provided to 240, which Hector confirmed they had not. Maria, through the bank, tracked down a copy of the bank draft, which was payable to "Silverton Aggregates Ltd." Maria spoke to Alfredo and Rinaldo about the bank

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draft to Silverton Aggregates Ltd., which sparked an internal investigation that ultimately uncovered the fraudulent invoicing scheme.

[56] Among other things, Rinaldo hired a private investigator to investigate the companies, their invoices, and cheques, and determine whether they were fraudulent. In June 2019, the investigator released its report to Rinaldo, wherein it determined that the majority of the companies involved in the suspected fraudulent invoicing scheme were fake and not in operation.

[57] On or about September 9, 2019, Rinaldo met with Massimo and confronted him about the fraudulent invoices and cheques from the family companies. Rinaldo's evidence was that Massimo admitted the cheques and invoices were fraudulent, and that Rinaldo asked Massimo where the money had gone and to devise a plan to return it. When Massimo was asked about the invoices and cheques at the meeting he had with Rinaldo, he agreed that he probably told Rinaldo that it was "none of his business" because the companies were registered in his name.

[58] Massimo did not deny the fraudulent invoicing scheme. However, Massimo claimed that he and Alfredo were both involved in the scheme and shared the cash. There was no documentary or other evidence provided to confirm Massimo's allegation that Alfredo was involved in the fraudulent invoicing scheme.

[59] The fraudulent invoicing scheme commenced around the time Darta's new building was being constructed. Massimo was overseeing the construction project.

[60] While the construction of Darta's new building was ongoing, Massimo's evidence was that a common acquaintance had approached him and Alfredo about a "cash" scheme. He said they met a guy named "George" behind the D&R factory who provided the details to them. Massimo's evidence was that George indicated that the construction project provided the opportunity to remove funds from the business without paying tax, while also creating an HST credit. Essentially, invoices would be sent to Darta or 240 for services or a product from a company established for the scheme (a "Newco"). There were several different companies involved, none of which were legitimate businesses. No services or products would be provided to Darta or 240 by the Newco. Massimo would authorize the payment of the invoice received from the Newco. Darta or 240 would pay the Newco by cheque for the services or product (that Darta or 240 had not received). Then, another person would come to the premises to hand Massimo an envelope containing cash equal to the invoice amount, minus a fee of around 10%. Massimo stated that he and Alfredo would split the cash. Massimo testified that he started this invoicing scheme in 2014.

[61] Massimo's evidence was that he would often have hundreds of thousands of dollars in cash stashed away.

[62] The Newcos involved in the scheme were Silverton Aggregates Ltd., Silverton Supply, Blue Emerald Material Inc., Roman Hardware Supply Inc., Rock and Salt Depot, BW Strada Aggregates, Stone Rock Aggregates, Infinity Fill, and Global Fill Dumping.

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[63] At trial, each discovered invoice related to the fraudulent invoicing scheme, along with the supporting cheque, was put to Massimo. With respect to most of the invoices and cheques, Massimo admitted and confirmed that his signature was on the invoices and cheques, that he authorized the payments from Darta or 240 knowing that no services were rendered, and that he used his position as officer and director to take these actions. With a few exceptions, Massimo also acknowledged that no goods were provided, or services rendered, for the invoices received from the Newcos.[4]

[64] Massimo's position is that the fact that Alfredo's initials did not appear on any of the invoices does not mean that he was not complicit. Massimo submits that, because he was tasked with the construction project, he approved payment for most of the project's invoices. Furthermore, the evidence showed that although both Massimo and Alfredo had the authority to approve invoicing in Darta, 152 and 240, in practice, it was mainly Massimo who provided the approvals.

[65] Alfredo denied any involvement in the fraudulent invoicing scheme.

[66] I found Massimo to be an evasive and defensive witness. At times, he came across as very angry. Massimo was very resentful of the Darolfis and had been for some time before his employment was terminated. In his evidence, Massimo indicated that he may have told Rinaldo that he had engaged in the fraudulent invoicing scheme because the companies owed him money. It was certainly clear that Massimo had been dissatisfied with the compensation he was receiving at work for some time, among other things. Massimo's evidence was that he wanted equity of D&R and was unhappy with Rinaldo having control of the companies.

[67] During Massimo's testimony, he provided incorrect information to the Court about one of the invoices. The invoice was from Temp Line Mechanical Systems Inc. ("Temp Line") to Darta regarding a fireplace. When asked what the invoice was for, Massimo indicated that it was not for Darta because there was no fireplace in the office. However, he went further and "pointed the finger" at Alfredo, stating that the invoice was for work done in Alfredo's home. Massimo also said that the signature on the invoice was Alfredo's. Hector Perera, the controller for the Defendant Corporations, testified later that it was his signature on the invoice.

[68] When Peter Dipietrantinio, the Temp Line witness, testified, he produced the work order for the fireplace invoice. The work on the fireplace had been done at Massimo's house. Massimo would have known that the fireplace work had been done at his house. Instead of being forthright

[4] Massimo had asked the court to draw an adverse inference because certain invoices were produced late. I have declined to do so. There was a large volume of documents, and many issues were raised during these proceedings. The plaintiff was aware of the invoices that the Darolfis alleged were involved in the fraudulent invoicing scheme, since the Integra Report was delivered in August 2020. The plaintiff had copies of the actual invoices well in advance of the trial.

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with the court, in the absence of any work order at the time of his testimony, he tried to implicate Alfredo.

[69] On the other hand, I found both Alfredo and Rinaldo to be direct and forthright witnesses.

[70] Given their conflicting evidence on the invoicing scheme, I prefer Alfredo's evidence. I also prefer Rinaldo's evidence to Massimo's, where there was a conflict.

[71] In addition, the invoices that were part of the invoicing scheme were authorized by Massimo, not Alfredo.

[72] Although Massimo claimed that both he and Alfredo had met with George to discuss the fraudulent invoicing scheme, Massimo did not call George as a witness. Massimo could have called George as a witness to verify Massimo's assertion that Alfredo was in on the invoicing scheme, but Massimo chose not to. Massimo asks the court to ignore this and focus instead on the behaviour of the Darolfis regarding disclosure and productions, among other things, and draw an adverse inference against the Darolfis regarding Alfredo's involvement in the fraud. Given the credibility findings above, the fact that Massimo did not call George as a witness, the fact that Massimo was overseeing the construction, and the fact that Massimo's signature was on all the invoicing scheme documents, I do not need to draw an adverse inference regarding the disclosure and production issues. There was sufficient evidence for the court to make factual findings on this issue.

[73] I am also not prepared to draw an adverse inference because Massimo's demand for a full production of his entire working emails was refused. The Darolfis had cogent business reasons for not providing Massimo with all of his working emails, which contained client, customer, and confidential information. Among other things, they were concerned that Massimo might approach their customers. When the request for Massimo's entire email folder was made, the Darolfis asked Massimo to identify the names of authors, subject matters of emails or other information to narrow his request. Massimo did not respond. Massimo did not pursue any motions seeking to compel the production of emails, documents, or records.

[74] The fraudulent invoicing scheme, through which Massimo took more than $500,000 from the businesses (discussed further below), gave the employer just cause to terminate Massimo.

Was Massimo Oppressed?

[75] Massimo claims that the Darolfis' conduct in excluding him from the management of Darta, 240 and 152 is oppressive, unfairly prejudicial to, and unfairly disregards his interests, considering that he owns 50% of the shares of Darta and is a director and officer of each of the companies.

[76] Massimo, as a shareholder, officer and director, applied to the court as a complainant under section 248(1) of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"). Section 248(2) of the OBCA provides that:

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> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> > (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
> >
> > (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[77] Under section 248(3) of the OBCA, the court has broad powers to make any interim or final order it thinks fit.

[78] In *BCE Inc. v. 1976 Debentureholders*, [2008] SCC 560, at para. 56, the Supreme Court of Canada made it clear that conduct will be found in breach of s. 248, where:

a. There is a breach of a reasonable expectation of the applicant; and

b. The breach amounts to "oppression", "unfair prejudice" or "unfair disregard".

[79] In *BCE*, at para. 58, citing *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (H.L.), at p. 343, the Supreme Court noted that "claims for oppression should look at business realities, not merely narrow legalities." The Supreme Court, at para. 59, in *BCE*, further noted that the oppression remedy is fact-specific and that "[c]onduct that may be oppressive in one situation may not be in another."

[80] In *Seferovic v. 285 Spadina SPV Inc.*, 2022 ONSC 2429, Kimmel J. noted, at para. 54, citing *BCE*, at paras. 61-64, that "[t]he oppression remedy protects reasonable expectations and interests, rather than legal rights, particularly in a closely held corporation."

[81] Massimo has a long list of complaints regarding how the businesses have operated, including the intercompany management fee, the rents charged by the holding companies to the operating companies, his limited access to information, and the payment of related-party expenses.

[82] As noted by the Court of Appeal in *Naneff v. Con-Crete Holdings Ltd.*, 23 O.R. (3d) 481, "[t]he law is clear that when determining whether there has been oppression of a minority shareholder, the court must determine what the reasonable expectations of that person were according to the arrangements which existed between the principals." As noted above, in *Naneff*, the court found that there had been oppression. However, unlike the instant case, where Massimo defrauded the businesses and was then rightfully excluded from them, the family member in

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Naneff was excluded from his family's business due to parental concerns about his lifestyle and girlfriend.

[83] Massimo's complaints of oppression must be considered through the "reasonable expectation" lens in the context of the agreements that were in place between Massimo and the Darolfis. The businesses at issue were never operated in strict compliance with the Articles of Incorporation, bylaws, or statutes. Massimo indicated at trial that there were never any formal shareholder, officer, or director meetings. Accordingly, to complain after he was terminated with cause that he was not provided with this information disregards the fact that the companies have operated in this manner for decades. Massimo would not have had a reasonable expectation that a formal shareholder or officer meeting would be held.

[84] Massimo also indicated that he was involved in setting the rents between the operating and holding companies, and that he approved the intercompany management fee in principle. Massimo's evidence at trial was also that family personal expenses were routinely paid through the businesses. In fact, Massimo did not have a personal credit card when he worked in the family business; he only had a corporate credit card.

[85] Having actively participated in (and benefited from) the way the family businesses were operated for many years; it is unreasonable for Massimo to claim oppression for the way the companies continue to operate. The family businesses have not altered their operating methods. All that has changed is that Massimo is no longer part of the family, because he defrauded the family businesses through the fraudulent invoicing scheme.

[86] In the circumstances, I am not satisfied that Massimo was oppressed.

Did the Darolfis have after acquired cause to terminate Massimo?

[87] The Darolfis assert that they had after acquired cause to terminate Massimo due to alleged voyeurism.

[88] The Darolfis allege that Massimo surreptitiously installed tiny cameras in the storeroom adjacent to the ladies' bathroom and used the cameras to tape female employees using the toilet in the bathroom.

[89] I considered whether the electronic video tapes that were obtained could be used as evidence. I am satisfied that the videotapes were authentic for purposes of s. 34.1(4) of the *Evidence Act*, R.S.O. 1990, c. E.23.

[90] However, I am not satisfied that the videotapes were genuine. I have given no weight to the tapes.

[91] The tapes were not "discovered" in Massimo's office until about three months after he was terminated. Maria's evidence was that, due to Massimo's requests to access his office, she became suspicious, and she and Patrizia re-attended at 91 Simona on or about May 2, 2020. She stated

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that two days later, she sorted through the contents of Massimo's office box and found certain electronic devices, including two cameras and a USB stick.

[92] Massimo was terminated for fraud. It is improbable that Massimo's employers would not have investigated his office thoroughly following his termination, if not before. The used cameras were in a drawer in Massimo's desk. In those three intervening months, any person employed in the business could have accessed Massimo's office, which was not locked. At least six other people had keys to the D&R building. Several other employees have offices upstairs proximal to Massimo's former office.

[93] Massimo did not deny using the cameras found in his office, which would explain why Massimo's voice can be overheard in certain videos and why some images of him and his office at George Bolton were captured on the cameras. He indicated that the business had obtained one-inch body cameras, and they were in inventory to be sold. Massimo's evidence was that he personally tested the body cameras both inside and outside his office. Massimo further indicated that others handled the sample body cameras in his presence.

[94] Massimo did, however, deny placing the cameras in the ladies' bathroom and videotaping female employees using the bathroom.

[95] The evidence was that someone had cut a hole in the storage room behind the women's bathroom, concealed behind a shelf storing cleaning supplies.

[96] The Darolfis did not provide any expert evidence to verify that the tapes had not been altered in any manner. Maria's evidence was that she discovered the tapes when she searched Massimo's office on May 2, 2020. Maria gave the tapes to Rinaldo on or about May 5, 2020.

[97] The tapes were turned over to the police by Rinaldo on May 8, 2020. When the Darolfis found the tapes, Rinaldo first handed them over to Stephen Gonsalves, who provides IT services to Darta and D&R, to "examine" the devices. Mr. Gonsalves was not called to testify. Further, Detective Logue's evidence also raised questions regarding the reliability of the tapes. For example, some of the videos were time-stamped, and some were not. The time stamps were not correct. Detective Logue indicated that he was not qualified to opine on the possibility that audio of other voices had been removed from the tapes or the possibility that sections of the videos had been altered. The tapes and cameras had been transferred to digital forensics on August 28, 2020. However, the police digital forensics expert did not testify at trial.

[98] I further note that the videos were not produced until the eve of trial and during trial. Accordingly, there was no ability for Massimo to test the evidence. Among other things, Massimo had no opportunity to have the cameras and footage analyzed by his own forensic expert.

[99] I am not satisfied that the Darolfis had after acquired cause.

Did Massimo breach his fiduciary duties?

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[100] At the time of his termination from employment, Massimo was a director and officer of Darta, 240, and 152. Massimo was also a Senior VP with D&R. The defendants seek a declaration that Massimo breached his fiduciary duties and confirmation that he is removed as a director and officer of the businesses.

[101] Under s. 134 of the OBCA, the fiduciary duty owed by directors and officers to the corporation is codified:

> 134(1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall,
>
> a) Act honestly and in good faith with a view to the best interests of the corporation; and
>
> b) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[102] The leading case regarding the fiduciary duty of directors and officers is *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 SCR 461. At para. 35, the Supreme Court of Canada stated the following regarding the statutory fiduciary duty of directors:

> The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K.P. McGuinness, The Law and Practice of Canadian Business Corporations (1999), at p. 715.

[103] Massimo's fraud on the companies was a breach of his fiduciary duty. He used his position (including signing authority) to embezzle more than $500,000 for his personal gain.

[104] In *Strauss et al v. Wright*, 2017 ONSC 5789, the Divisional Court upheld the application judge's decision to remove a shareholder who had voting control of the family company from the position of director and officer because of his oppressive conduct. Akbarali J. stated, at para. 25:"[i]n my view, no one who breaches his fiduciary duties to a corporation in circumstances such as these can reasonably expect to remain as an officer and director of that corporation."

[105] In *Strauss*, the party that was removed from his position as officer and director had a controlling interest in the company. Among other things, in breach of his fiduciary duty, he had emptied the company's bank account. Akbarali J. stated that his removal from the company was "consistent with the reasonable expectations of the parties."

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[106] In *2025925 Ontario Inc.*, at para. 202, Vermette J. cited *Strauss*, then further stated that if the person is not the majority shareholder of the corporation, it is especially the case that the person who commits significant breaches of fiduciary duties to the company cannot reasonably expect to remain a director and officer.

[107] In the instant case, there are similar circumstances such that Massimo cannot reasonably expect to remain as an officer and director of the companies. He used his position to defraud the companies of more than $500,000.

[108] Having found that Massimo had wrongfully taken more than $500,000 from the businesses, he was rightfully removed from the companies. Massimo could not reasonably expect to continue accessing the company's books, records, and accounts once it was determined that he had committed the fraudulent invoicing, nor could he reasonably expect to continue in a management function. I am satisfied that Massimo's exclusion from the businesses following his termination was justified.

[109] As requested by the defendants, due to Massimo's breach of fiduciary duty, the court shall grant an order confirming that he is removed as a director and officer of all the companies.

Is Massimo liable in civil deceit and/or conversion?

[110] In the counterclaim, the defendants claim that Massimo committed deceit, civil fraud and conversion. Among other things, the defendants claim that through the fraudulent invoicing scheme, Massimo wrongly took money from the companies. The defendants also point to the bank draft drawn on Maria's and Massimo's joint bank account for $44,250, payable to Silverton Aggregates Inc. (the bank draft that led Maria to make inquiries, which resulted in the discovery of the invoicing scheme).

[111] The elements of the tort of civil fraud were set out in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21:

a. A false representation made by the defendant;

b. Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

c. The false representation caused the plaintiff to act; and

d. The plaintiff's actions resulted in a loss.

[112] For the court to find that there was fraud or deceit, there must be "some aspect of impropriety, deceit, or dishonesty": *Holley v. The Northern Trust Company Canada*, 2014 ONSC 889, 10 C.B.R. (6th) 1, at para. 114, aff'd 2014 ONCA 719, 18 C.B.R. (6th) 162. In *Holley*, at para. 113, the court stated: "at the fundamental core of fraud, deceit, or fraudulent misrepresentation is the moral turpitude of the defendant."

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[113] Civil fraud must be established on a balance of probabilities: *McGee v. Samra*, 2021 ONSC 2540, at para. 54. Clear and convincing evidence is required: *Rosati v. Reggimenti,* 2018 ONSC 2, at para. 33.

[114] The party that is alleging the fraud (in this case, the Darolfis) bears the onus of proof: *Russell v. Thompson*, 2021 ONCJ 16, 52 R.F.L. (8th) 229, at para. 17.

[115] Where fraud is alleged, the defendant's knowledge and state of mind are critical considerations: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, [2012] 3 C.T.C. 132, at para. 478.

[116] As noted at para. 195 of *Canadian National Railway Company v. Holmes et al.*, 2022 ONSC 1682, 28 B.L.R. (6th) 163, "[d]eceit is made out where the defendant either knows the representations she is making are untrue or is reckless as to the truth of the representation."

[117] The tort of conversion is summarized by the Court of Appeal in *Westboro Flooring and Décor Inc. v. Bank of Nova Scotia et al*, [2004] O.J. No. 2464, at para 14:

> "The tort of conversion involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession. The tort is one of strict liability and accordingly, it is no defence that the wrongful act was committed in all innocence. Diplock LJ asserted this principle in Marfani & Co. v. Midland Bank, Ltd., [1968] [2] All E.R. 573, at pp. 577-78:
>
> > ... the moral concept of fault in the sense of either knowledge by the doer of an act it is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part...

[118] I agree with the Darolfis' submission that the fraud analysis is straightforward in respect of the fraudulent invoicing scheme. Massimo did not deny participation in the fraudulent invoicing scheme. Regarding most of the invoices/cheques, Massimo admitted to signing and authorizing payments from the companies for the fraudulent invoices, using his position as an officer/director, and knowing that no services were being performed in exchange. He did not have any legal right to possession of the funds he received, which were the property of Darta or 240.

[119] When Massimo signed the invoices and instructed payments to be made in respect of them, Massimo knowingly deceived Darta and 240 into sending over $553,549.09 in payments to the fraudulent Newcos. The funds from Darta and 240 were subsequently taken by Massimo in cash (less approximately 10% in fees).

[120] I am satisfied that Massimo is liable in civil deceit and conversion in respect of the fraudulent invoicing scheme.

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[121] Massimo also authorized payments out of D&R's accounts towards work done at his parents' house by the HVAC repair and maintenance company, Temp Line Mechanical. The evidence at trial was that Massimo authorized payment by D&R and Darta for certain Temp Line Invoices. The invoices, totaling $17,903.16, state that the work was completed at Darta. However, the work orders show that the job was done at Massimo's parents' house. The witness from Temp Line, Mr. Di Pietrantonio, indicated that he was only paid $10,000 for the work, despite Massimo having authorized payments from the companies of $17,903.16.

[122] Massimo authorized payment of these Temp Line invoices to benefit himself and his parents, to the detriment of D&R and Darta.

[123] Concerning the bank draft that Massimo drew from his and Maria's joint bank account for $44,250, this was a withdrawal from a joint bank account held by spouses. Similarly, the transactions involving payments in and out of Maria's and Massimo's joint HELOC related to rent from 240 involve their joint accounts. In addition, Massimo's allegation that Maria removed funds from their joint savings account involves their joint accounts. In my view, any dispute regarding entitlement to these funds between the spouses is properly addressed in the ongoing matrimonial proceedings.

[124] The defendants ask that an equitable tracing order be granted in respect of the funds appropriated from the family businesses by Massimo. Massimo has thus far refused to turn over his bank account statements. Among other things, the defendants are concerned that Massimo has transferred funds to his parents.

[125] Equitable tracing requires that the claimant establish a proprietary interest in the original asset, and this right must persist through to the substituted property. The process is generally supported, as is the case here, where a fiduciary relationship exists. I agree that an equitable tracing order should be granted against Massimo and his bank accounts and assets, whether held personally or indirectly in trust by others.

[126] Further, I agree with the defendants that this judgment, related to the fraud and conversion while acting in a fiduciary capacity, ought to survive bankruptcy under s. 178 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.[5]

[127] The Darolfis further seek disgorgement of any profits Massimo obtained from the fraudulently obtained funds. In *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 24, the Supreme Court of Canada described disgorgement for wrongdoing as a "gain-based remedy." In *Babstock*, the Supreme Court of Canada recognized, at para. 32, that

[5] Section 178 of the *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3) provides that an order of discharge in bankruptcy does not release the bankrupt from "(d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity, and (e) any debt or liability resulting from obtaining property or services by false pretenses or fraudulent misrepresentation."

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there are certain forms of wrongdoing, such as breach of fiduciary duties, where disgorgement is available without proof of damage.

[128] In a circumstance such as the one before me, I am satisfied that disgorgement of profits is appropriate. Massimo used his positions as officer and director to implement the fraudulent invoicing scheme, from which he extracted significant monies from the businesses. Any profits that he has obtained from these funds ought to be disgorged. As noted by the Court of Appeal in *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853, 24 B.L.R. (6th) 38, at paras. 112 and 113, in circumstances where there is a "clear nexus" between a breach of fiduciary duty and profits gained as a result of the breach, a remedy with a "deterrent impact" is appropriate. The Court of Appeal stated, at para. 113:

> [...] I agree with counsel for the Respondents that simply ordering the Appellants to pay the Respondents what they would otherwise have been entitled to receive serves as no disincentive. A party considering breaching a fiduciary duty could reasonably look at the trial judge's decision and conclude that in a worst-case scenario, they would only be forced to pay over to the aggrieved beneficiary what the beneficiary was always owed, thereby profiting from the breach of their fiduciary duties.

[129] To enable the Darolfis to enforce the tracing and disgorgement of profits, Massimo shall disclose any and all of his assets, cash or real property, or personal property worldwide.

[130] Accordingly, Massimo is liable to the defendants in damages in the amount of

a. $553,549.09 (fraudulent invoicing scheme);

b. $17,903.16 (Temp Line invoices);

plus disgorgement of profits and a tracing order related to these funds.

Is Massimo entitled to repayment of the shareholder loan to 240?

[131] Massimo claims repayment of the loan to 240.

[132] As of April 30, 2024, the value of the loan was $685,214.

[133] The corporate records indicate that the loan to 240 was due to Massimo.

[134] Hector Pererra's evidence was that the loan is recorded as a loan from Massimo. Hector recollected that the loan had a 10-year term, and an interest rate of 4%.

[135] The Darolfis submit that the lenders to 240 were both Maria and Massimo and that the terms and conditions did not permit Massimo to demand payment. Their position is that any decision to call the loan for repayment would require the joint direction of Maria and Massimo.

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The Darolfis did not produce any documents relating to the terms of the loan to 240 (other than a "continuity schedule").

[136] The "continuity schedule" for the loan listed Massimo as the lender. During the examination of Hector Perrera, the Darolfis refused to produce the printed agreement regarding the shareholder loan that Hector claimed existed. This agreement is relevant and ought to have been produced.

[137] Massimo asks the court to draw an adverse inference. Massimo submits that the agreement that ought to have been produced would have shown that the lender was Massimo, the loan had not been repaid in accordance with its terms, and he was entitled to demand payment. I agree that the document should have been produced, and it likely indicates that the lender was Massimo (despite the funds used for the loan being joint funds of Massimo and Maria) and that he was entitled to demand payment.

[138] The evidence establishes that the money for the loan was jointly owned by Maria and Massimo. However, the documentation regarding the loan, which was not produced, likely names only Massimo as the lender. Massimo conceded during cross-examination that the fair result of repaying the loan would eventually be for Maria to receive 50%. However, Massimo's position was that Maria should pursue him in the matrimonial proceedings for her 50% of the loan proceeds.

[139] I agree with Maria's submission that any repayment of the loan to 240 should be ordered 50% payable to each of her and Massimo. It is a more efficient use of court resources to address this issue now, rather than having another dispute over these proceeds in the family proceedings. It is clearly a joint loan and should be dealt with as such.

[140] Accordingly, 240 shall pay Massimo and Maria $685,214 plus interest at 4% from April 30, 2024, to the date of the judgment and the post-judgment rate thereafter.

Can Massimo compel a buy out of his shares of 240 and 152?

[141] Massimo owns 25% of the shares of 240 and 152 and asks the court to order a buy out of his shares. As noted above, there is no shareholders' agreement.

[142] The Articles of Incorporation of 240 and 152 prohibit shareholders from selling their shares without the approval of the board.

[143] 240 and 152 hold the lands upon which Darta and D&R operate. These are not liquid assets. These are shares of privately held companies, which were incorporated for the purpose of holding the real estate and premises upon which the operating companies operate.

[144] As noted by Conway J. in *Wilfred v. Dare et al.*, 2017 ONSC 1633, 137 O.R. (3d) 512, at para. 70, "the oppression remedy in s. 248 is not designed to relieve a minority shareholder from the limited liquidity attached to his or her shares or to provide a means of exiting the corporation, in the absence of any oppressive or unfair conduct."

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[145] In *Corber v. Henry et al*, 2023 ONSC 60, at para. 34, the court made it clear that in the absence of oppression, it would not order a buy-out of the minority shareholder's interest in the company. In determining whether a buy-out would be appropriate, the Court considered whether the reasonable expectations of shareholders contemplated such a buy-out. In *Corber*, the court concluded that the reasonable expectations of shareholders did not contemplate a buy-out. The court, at para. 71, cited the following from *Senyi Estate v. Conakry Holdings Ltd.* (2007), 36 B.L.R. (4th) 309 (Ont. S.C.), at para. 9:

> In the present circumstances, the applicant has inherited a minority common share position in a private company for which there is no shareholders' agreement. What are the reasonable expectations of a shareholder in such circumstances? I think they are limited to the following five general expectations: (1) that the directors and officers will conduct the affairs of the corporation in accordance with the statutory and common law duties required of them in such capacities; (2) that the shareholder will be entitled to receive annual financial statements of the corporation and to have access to the books and records of the corporation to the limited extent contemplated by the Act; (3) that the shareholder will be entitled to attend an annual meeting of the corporation for the limited purposes of receiving the annual financial statements and electing the directors and auditor of the corporation, or will participate in the approval of such matters by way of a shareholder resolution; (4) that a similar approval process will be conducted in respect of fundamental transaction involving the corporation for which such approval is required under the Act; and (5) that the shareholder will receive the shareholder's *pro rata* entitlement to dividends and other distributions payable in respect of the common shares of the corporation as and when paid to all of the shareholders.

[146] I have determined above that Massimo was not oppressed. In the circumstances, the court is not in a position to, nor inclined to, order either company or the other shareholders to buy Massimo out.

[147] As noted by the Darolfis, Massimo's shares are illiquid and have no inherent right of a buyout. There is no shareholders agreement, nor would Massimo have had a reasonable expectation that, as a minority shareholder of 152 and 240, he ought to be entitled to a buy-out. 152 and 240 were both incorporated for the purpose of holding the real estate used by the family's operating companies. Massimo remains in the same position with 152 and 240 — he is a minority shareholder of these two real estate holding companies.

[148] Although I have not ordered a buyout of 152 and 240, had I been inclined to do so, the appropriate valuation date would have been February 26, 2020 (the date Massimo's employment was terminated): *Booth v. Alliance Windsor Insurance Brokers Inc.*, 2007 ONCA 805, 40 B.L.R. (4th) 238, at para. 13. I found the experts retained by both parties to value the real properties held by 152 and 240 thorough and helpful. Neither party challenged the qualifications of the other party's experts. The only appraisal reports on 8820 George Bolton and 91 Simona, as of February 20, 2020, were prepared by Toivo Heinsaar from CHS Realty Advisors Inc. Had I been inclined

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to order a buyout of 152 and 240, I would have relied on the February 20, 2020, appraisal before the court.[6]

Should the Court order the wind up and sale of Darta?

[149] Massimo has taken the position that Darta, which continues to operate, should be wound up and liquidated.

[150] Massimo cites *Libfeld v. Libfeld*, 2021 ONSC 4670. In *Libfeld*, McEwen J. noted, at para. 15, that because of the irreconcilable differences between the four equal owners of the business, a wind-up and sale was "the only workable solution."

[151] Massimo's position is that the court should first order an investigation report, make orders to compensate him, and then a receiver should wind up and liquidate Darta. Under the OBCA, in circumstances of oppression, s. 248(3)(l) provides that the Court may make an order for the winding up of a corporation under section 207. However, because I have found that Massimo was not oppressed, this remedy is not available to him under s. 248(3) of the OBCA. Accordingly, *Basegmez v. Akman*, 2018 ONSC 812, cited by Massimo, is distinguishable. In *Akman*, the Divisional Court upheld Lederman J.'s decision (*Basegmez v. Akman*, [2017] O.J. No. 5153), in which he ordered the liquidation of the company after having found oppression (Lederman J., at para. 44). Lederman J. had noted, at para. 49, that "a winding-up order is a drastic remedy" but determined that there was no alternative in the circumstances.

[152] Under section 207 of the OBCA, the court may also order a wind up of a corporation where the court is satisfied that "it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up." As noted by Massimo, it is not necessary to find oppression to grant winding up relief under s. 207 of the OBCA. A breakdown in the relationship among shareholders may be sufficient: *Muscillo v. Bulk Transfer Systems Inc.*, [2009] OJ No 3061, per Newbould J., at para. 52.

[153] Where there is a breakdown in the relationship among shareholders, in certain cases, such as *Libfeld*, a winding up order may be appropriate. However, in other cases, such as the one before me, the more appropriate remedy may be that one shareholder is bought out of his or her interest in the company.

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[6] In the valuation of 240 and 152, I would have applied a minority discount for both 152 and 240 of 25% as recommended by Chris Nobes. A minority discount is appropriate because Massimo's 25% interest in each of 152 and 240 would not be widely marketable, given that the Darolfi family holds the other 75% of the shares of each of 240 and 152. Regarding the deduction for notional taxes, I would have applied a 50% discount for both 152 and 240 as recommended by Chris Nobes. While the Darolfis may not have a current intention to sell either of the properties, many unknowns could impact when the properties are sold.

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[154] I am not satisfied that Darta should be wound up and liquidated. As noted above, ordering the wind-up of a company is a "drastic remedy." Darta is an operating business that employs many people. As correctly pointed out by the Darolfis, the three Cs of the commercial list dictate communication, cooperation, and common sense. The proposed wind up of Darta, in my view, lacks common sense. Furthermore, unlike *Libfeld*, where dysfunction existed among the four shareholders, Massimo has been removed from the businesses due to the fraudulent invoicing scheme. The Darolfi family is well equipped to continue operating the businesses that have been in the family for many years. There is no reason for Darta to be wound up and liquidated. As discussed further below, in the circumstances of the instant case, Massimo should be bought out of Darta.

Is Massimo entitled to a buy-out of Darta?

[155] Massimo also seeks a buy-out of his 50% interest in Darta. Unlike 240 and 152, Darta is an operating company that employs approximately 25 employees. The Darolfis acknowledge that, given that Massimo was a high-ranking officer and employee of Darta, it could be reasonable to order a buyout of Massimo in Darta.

[156] Like 240 and 152, there is no shareholders agreement for Darta. Additionally, the Articles of Incorporation of Darta prohibit shareholders from selling their shares without prior board approval.

[157] Massimo owns half of Darta, which is an operating company. There is tremendous acrimony between Massimo and the Darolfis, including ongoing family litigation between Massimo and Maria.

[158] In my view, Massimo needs to be bought out of Darta. The issue is at what price?

Valuation of Darta

[159] The only valuation before the court regarding Darta was conducted by Chris Nobes, who the Darolfis retained.

[160] Massimo sought to have the Nobes' valuation (along with the 2020 valuations of 240 and 152) excluded on the basis that it was not filed in time, requiring the defendants to bring a motion for leave to file the reports.

[161] After hearing the motion, I delivered the following oral reasons at trial allowing the Darolfi's motion:

> The defendants bring a motion for an order that the time for service of the expert reports of Chris Nobes of Kroll and Toivo Heinsaar of CHS Realty Advisors Inc. be abridged and that leave be granted to call Mr. Nobes and Mr. Heinsaar as expert witnesses at the trial and to rely upon and file their reports at trial.

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Rule 53.03 specifies the timing for submitting expert reports. The defendants' expert reports were not filed in accordance with the timelines set out in *Rule* 53.03. They were filed about a week before the first pre-trial conference.

Where there is a failure to comply with the requirements of the Rules pertaining to expert reports, under *Rule* 53.08, the evidence is admissible with leave of the trial judge, which may be granted if the party responsible for the failure satisfies the judge that (a) there is a reasonable explanation for the failure; and (b) granting the leave would not, (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or (ii) cause undue delay in the conduct of the trial.

The plaintiff opposes the motion and seeks to exclude the reports at trial due to their late filing. The plaintiff is prepared, however, to consent to the filing of the 2024 valuations of 152 and 240 completed by Mr. Heinsaar, which were also filed late.

While I understand that the purpose of the change to *Rule* 53.08 was to send a clear message that expert reports are to be served in a timely manner, the trial judge continues to have the discretion to grant leave where the Court is satisfied that the test set out in *Rule* 53.08 has been met.

As noted in *Quinn et al v. Rogers et al.,* 2024 ONSC 1967, "[a] lawyer's inadvertence in meeting a deadline required by the *Rules* can constitute a "reasonable explanation" for a failure to meet the deadline". Here the defendants state that there was a misunderstanding and inadvertence on the part of counsel and a legal assistant at their office. There is no evidence to the contrary, and there is no non-compensable prejudice given that the plaintiff did not intend to file responding reports. In the context of a commercial list matter, where, among other things, the valuations of the various companies are important, and taking into account *Rule* 1.04, I am satisfied that the lawyer or legal assistant's error is a reasonable explanation for the failure.

The plaintiff referenced several cases since *Rule* 53.08 was amended in 2022, where the Court refused to grant leave. However, those cases are distinguishable. In the cases cited, either the responding party wanted to file materials to respond to the late-filed report and there would be a cascade effect, or it was a personal injury matter where the defendant sought to compel the plaintiff to attend defence medical examinations, putting an additional obligation on the plaintiff, or the pre-trials had already occurred. None of the cases cited were commercial list matters. In fact, they were all personal injury cases (all motor vehicle other than one slip-and-fall matter).

In the case before me, the plaintiff indicated that he would not be responding to the defendants' reports. As a result, the plaintiff would have no need to and did not seek an adjournment of the trial. With regard to the operating business, Darta, the plaintiff determined a couple of years ago that he would not be producing a valuation report because, among other things, the valuator would have to make too many assumptions. The plaintiff's position is that there was inadequate disclosure. With regard to 240 and 152,

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> the real estate holding companies, the plaintiff has had the necessary documents for some time and produced his report in January 2024, valuing the companies as of 2022. As noted in Mr. Nobes' affidavit, if the plaintiff wished to complete a response to the valuation for the years 2020 and/or 2024 in respect of 152 and 240, this could have been done in one to two weeks.
>
> The plaintiff had the defendants' reports in advance of both pre-trial conferences. The plaintiff was not taken by surprise, and the reports are relevant.
>
> Having reviewed the written submissions of the parties and heard the oral submissions of the parties, I have determined that leave shall be granted.
>
> As noted by the defendants, under *Rule* 1.04 of the Rules of Civil Procedure, the rules are to be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. In *Seo v. Francis*, 2024 ONSC 4341, at para. 25, Papageorgiou J. noted that Rule 53.08 "must be interpreted taking into account r. 1.04."
>
> If this evidence is excluded, evidence that is relevant and potentially material to the defence will not be before the court.
>
> I am allowing the defendants' motion.

[162] Although I granted leave for the Nobes' report to be filed late, I have determined that the report is not reliable and, therefore, have not given it any weight. The valuation of Darta is critical because Massimo's entitlement, as a 50% shareholder of Darta, is directly tied to Darta's value. The lack of reliability is not because of Mr. Nobes' expertise or any defect in his production of the report. The lack of reliability stems from the inputs (or lack thereof) that the Darolfis provided to Mr. Nobes to use in producing the report. The court cannot rely on the report because Mr. Nobes was not supplied with the information and data necessary for him to value Darta.

[163] The expert retained by Massimo, Marnie Silver, was directed by Massimo not to respond to Chris Nobes' report, nor did Massimo retain another expert to complete a report. The primary issue from Massimo's perspective was a lack of information.

[164] Massimo's position was that his expert could not have done a meaningful valuation of Darta because the Darolfis did not provide the data and information requested in Ms. Silver's disclosure request, among other things. Ms. Silver had requested information, including a schedule of personal and discretionary expenses for non-arm's length parties, monthly credit card statements for credit cards used by non-arm's length parties and paid for by the business, description of related party transactions, and certain details of remuneration, none of which was provided to her.

[165] The lack of information is certainly a concern. The evidence before the court indicated that the companies did not pay dividends, but instead provided compensation to the family member shareholders in alternative forms. The Darolfi family members took modest salaries and paid

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"intangible compensation" to Massimo, among others. This intangible compensation included private ski memberships, private golf memberships, payment of certain personal expenses, and vacations. Further, the evidence was that both Massimo and Alfredo engaged in income splitting with their spouses, who did not work in the business. Massimo's evidence was also that his and Maria's sons did not work in the family businesses, but were paid salaries from Darta or D&R. While working for the Darolfi businesses, Massimo did not have any personal credit cards; he only used business credit cards. There was other evidence of related party dealings, such as the payment of the Lewis Valuation by Darta, and the payment by Darta of a costs award against Maria. There was also evidence of other methods used to remove profits from the businesses on a cash basis. Massimo's position is that the Darta valuation that Chris Nobes completed failed to consider the value of this other compensation, among other things.

[166] I also note the evidence of Victor Pierantoni ("Victor"), Rinaldo's grandson. Victor's mother passed away when he was young, and Maria held his D&R shares[7] in trust for several years. During that period, Victor did not receive any dividends or financial information. When it was time for the trust to be terminated, Victor wanted to be bought out. Like the stance the Darolfis have taken in the instant case, Rinaldo and Alfredo named the price at which they were prepared to buy out Victor but would not provide Victor with the financial information of D&R that Victor required to inform his decision. Ultimately, Victor, who lacked the resources to litigate, sold his D&R shares on the terms offered by Rinaldo.

[167] Massimo asserts that the Nobes valuation of Darta failed to consider certain issues that, according to Massimo, would affect the value of Darta. One issue is the quantum/fairness of the inter-company management fee charged by D&R to Darta starting in and around 2019. Massimo agreed that it was reasonable for Darta to pay a portion of the shared accounting staff costs, but there are other components of the inter-company management fee that Massimo disputes.[8] Mr. Nobes relied on the information provided by the Darolfis in his valuation of Darta, including the inter-company management fees. There was also evidence regarding inter-company transfer pricing decisions on sales between D&R and Darta that ought to have been considered.

[168] Massimo further argues that Mr. Nobes failed to consider the contingent value, if any, of an ongoing breach of contract claim (*Darta Enterprises Inc. v. The Queen* CV-18-00609731-000) in his valuation. Massimo attempted to obtain information on this proceeding. In his endorsement, dated April 23, 2021, Koehnen J. noted that the parties had agreed to produce certain items, including details of *Darta v. OPP*. The response provided by the Darolfis was "[t]he matter is pending, and no resolution as of today's date." Massimo's counsel wrote to the Darolfis' counsel

[7] Victor previously owned 33% of the common shares of D&R that he had inherited from his mother, Diana.
[8] Although Massimo had received a copy of the financial statements for the year ended April 30, 2019, he had not agreed to the quantum of the management fee through such receipt.

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on October 14, 2021, stating that their response on the details of the litigation was "wholly inadequate" and that the $10,000,000 claim "represents a significant contingent asset of Darta."

[169] By not providing Massimo's expert with the requested information, and by not providing Chris Nobes with the necessary information, the Darolfis have deprived the court of key evidence necessary to value Darta.

[170] Massimo requests the appointment of a receiver-manager to value and report to the court the value of Darta as of February 26, 2020. He sets out a suggested approach in his closing submissions.

[171] In May 2025, having considered the closing submissions of the parties, and faced with the issue of the valuation of Darta, I asked the parties to provide the court with supplemental written submissions on whether the court may on its own initiative use Rule 52.03 of the *Rules of Civil Procedure* to appoint an independent expert to value Darta and, if so, the appropriate processes. I requested these submissions to determine if there was another option to obtain a valuation of Darta.

[172] Neither party was of the view that the court appointment of an independent expert was appropriate. The Darolfis' position is that the court should rely on the Nobes' report, which as I explained above, I cannot do. Massimo's position is that because *Rule* 52.03 would only permit an expert to consider the evidence adduced at trial and assist the court in understanding the evidence (*Sosnov et al. v. J&H Freiberg Developments et al*, 2021 ONSC 1081, 154 O.R. (3d) 476, at para. 16), this would not assist in the valuation of Darta.

[173] Massimo asked the court to consider appointing a receiver to investigate and value Darta.

[174] Accordingly, I consider next whether the appointment of a receiver under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, is "just or convenient."

[175] The appointment of a receiver is an extraordinary order. As noted in *Murphy v. Cahill*, 2012 ABQB 446, at para. 40, the appointment of a receiver-manager "is a remedy that should be used sparingly, having regard to all of the circumstances." In *Murphy*, the court was asked to appoint an inspector and an interim receiver-manager. The court appointed the inspector but declined to appoint the receiver-manager.

[176] Massimo relies on *V.M. Koury Investments Ltd. v. Bolton Steel Tube Co. Ltd. et al.*, 2021 ONSC 3408, 154 O.R. (3d) 538. Like *Koury*, I have determined that the valuator retained by the Darolfis was unable to do an accurate valuation of Darta because the Darolfis did not provide key information to Mr. Nobes and kept the financial dealings of the family businesses opaque. In *Koury*, at paras. 54 to 62, Koehnen J. did a rough calculation based on the available information and gave the parties the option of doing a buy-out at the court's valuation amount or having the buy-out price determined by a receiver. In *Koury* Koehnen J. had found oppression and had determined that the appointment of a receiver was warranted because he had found wrongdoing. The remedy that Koehnen J. ordered relied on the receiver that was appointed for other reasons. That is, the receiver was not appointed solely for the purposes of valuing the company in question.

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In the instant case, I have not found oppression. Accordingly, I question whether the appointment of a receiver in such case could be considered "just or convenient."

[177] In the instant case, due to circumstances including the routine extraction of cash from the businesses, related party transactions, and uncertainty regarding the *Darta v. The Queen* litigation, among other factors, I am not in a position to perform a rough calculation of the value of Darta.

[178] The Darolfis submit that the appointment of a receiver to investigate and value Darta is disproportionate. I agree. In fact, I cannot see how a receiver would be appropriate in this case. There has not been any suggestion that the business has been improperly managed or that it should be taken out of the Darolfis' hands. There has been a breakdown in the relationship between Massimo and the Darolfis because of Massimo's fraudulent invoicing scheme. Massimo needs to be bought out of Darta, but Darta does not require new management. It is a question of determining the value of Darta. Further, other than *Koury*, which is distinguishable because the court there found oppression and wrongdoings and accordingly appointed a receiver, I have not been directed to any cases where a receiver was appointed (or the court considered appointing a receiver) for the sole purpose of valuing a business.

[179] Accordingly, I am of the view that it is not just or convenient under section 101 of the *Courts of Justice Act* to appoint a receiver-manager on an interim basis to value Darta.

[180] Darta still needs to be valued. This should be done by a qualified valuator.

[181] Accordingly, I have determined that the parties shall jointly retain a neutral valuator to value Darta. The parties shall retain a qualified valuator within sixty days (the "Valuator").

[182] The Darolfis shall be required to provide the Valuator with all the information necessary to value Darta, including all the information and documents that had been requested by Ms. Silver.

[183] The Valuator shall be provided with a copy of this decision.

[184] I have determined that the cost of the Valuator shall be borne by Massimo and the Darolfis. While the Darolfis failed to provide certain documents or did not disclose information promptly, Massimo withdrew funds from the businesses using the fraudulent invoicing scheme. Neither party here has clean hands.

[185] The Darolfis state that if a buyout of Darta is ordered, they seek that the purchase price deduct all of Massimo's fraud damages from that purchase price. The Darolfis further state that if an order is to be made for a buyout, terms must be applied to discount the buyout given Massimo's misconduct.

[186] I am not satisfied that the purchase price ultimately determined for Darta should be reduced to account for Massimo's fraud damages. I have ordered an equitable tracing order and an order for disgorgement of profits, as above. The court was not provided with any details regarding any potential tax implications, among other things, related to this request. Further, the fraudulent invoicing scheme involved both Darta and 240.

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[187] I am not satisfied that there ought to be a discount on Darta's value because of Massimo's misconduct. He owns half the company and is entitled to receive his half.

Disposition and Costs

[188] Order to go as follows:

a. Massimo's claim for wrongful dismissal is dismissed;

b. Massimo's employment with any of 152, 240, Darta and D&R was terminated as of February 26, 2020, and he was terminated for cause;

c. Massimo's claim for oppression is dismissed;

d. Massimo's claim for the shareholders of 152 to buy out his interest is dismissed;

e. Massimo's claim for the shareholders of 240 to buy out his interest is dismissed;

f. The Darolfi's counterclaim for a declaration that the share grants to Massimo were conditional gifts is dismissed.

g. Massimo is liable to the defendants in damages in the amount of
   i. $553,549.09 (fraudulent invoicing scheme);
   ii. $17,903.16 (Temp Line invoices);

   This judgment shall survive bankruptcy under s. 178 of the *Bankruptcy and Insolvency Act.* Massimo's profits gained from g(i) and g(ii) shall be disgorged. Massimo's bank accounts, portfolios and worldwide assets shall be opened for inspection and tracing of these funds.

h. Massimo shall disclose in a sworn affidavit any and all of his assets, cash or real property, or personal property worldwide within 45 days, and shall make himself available for an examination in aid of execution at a mutually convenient date and time.

i. The removal of Massimo as a director and officer of 152, 240 and Darta is confirmed. The corporate records and minute books of these companies may be updated accordingly without Massimo's consent.

j. 240 shall pay Massimo and Maria $685,214 plus interest at 4% from April 30, 2024, to the date of the judgment and the post-judgment rate thereafter in respect of the loan that was made to 240.

k. With respect to Darta,

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1. The parties shall jointly retain a neutral qualified valuator within sixty days (the "Valuator"). The Valuator shall be retained by the parties to value Darta as of February 26, 2020;

2. The Darolfis shall provide the Valuator with all documents, corporate books and records (including general ledgers, bank statements and records, checks), and information required by the Valuator to value Darta. Among other things, the Darolfis shall, within 30 days of the retainer of the Valuator, provide the Valuator with all the documents and information that had been previously requested by Ms. Silver. The Darolfis shall provide all necessary documents and information to the Valuator needed by the Valuator to investigate personal expenses, related party transactions, intercompany management fees and intercompany pricing and adjust for their value, and to investigate the merits of *Darta Enterprises Inc. v. The Queen* CV-18-00609731-000, and, if appropriate, adjust for its value;

3. The Darolfis shall respond promptly to any and all requests for information from the Valuator;

4. If there are any issues relating to the conduct of the valuation pursuant to these reasons, the parties may attend a Case Conference before me;

5. Once the Valuator has made its determination, Patrizia or another entity of her choosing, provided that the choice of entity does not have tax consequences to Massimo any more adverse than a purchase by Patrizia would have, shall buy Massimo's shares at the determined value, plus interest from February 26, 2020, to the date of this order calculated in accordance with the *Courts of Justice Act*. Massimo shall be paid interest on the value at the post-judgment rate from the date of this order until he is paid for his shares;

6. The cost of the Valuator shall be borne equally by Massimo and the Darolfis.

[189] I would encourage the parties to resolve the issue of costs between them. If they are unable to do so within 45 days, they may request a case conference with me to establish a schedule for written submissions.

J. Steele J.

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Released: September 29, 2025

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CITATION: Tari v. Darolfi**,** 2025 ONSC 5104
COURT FILE NO.: CV-20-640010-00CL
DATE: 20250929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

MASSIMO TARI

Plaintiff

– and –

ALFREDO DAROLFI, PATRIZIA J. BIZZOTTO DAROLFI, RINALDO DAROLFI, ENRICHETTA DAROLFI, MARIA DAROLFI, DARTA ENTERPRISES INC. carrying on business as Darta Fleet Services, D&R ELECTRONICS CO. LTD., 1520365 ONTARIO INC. and 2408624 ONTARIO LTD.

Defendants

AND BETWEEN:

ALFREDO DAROLFI, PATRIZIA J. BIZZOTTO DAROLFI, RINALDO DAROLFI, ENRICHETTA DAROLFI, MARIA DAROLFI, DARTA ENTERPRISES carrying on business as DARTA FLEET SERVICES, CO. LTD., D&R ELECTRONICS CO. LTD., 1520365 ONTARIO INC. and 2408624 ONTARIO INC.

Plaintiffs by Counterclaim

- and-

MASSIMO TARI, ANA TARI and LUIGI TARI

Defendants to Counterclaim

REASONS FOR DECISION

J. Steele J.

Released: September 29, 2025

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