

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Walker v. Betts***,
2006 BCSC 612

Date: 20060419

Docket: S89073
Registry: New Westminster

Between:

Timothy C. Walker and Sunergy Holdings Ltd.

Petitioners

And

Fonda Tre-Anne Betts, Allie's Wholesale Garden Supplies Ltd., Grotek Manufacturing Inc., Agrotek Manufacturing Inc., Aggro Plastics Inc. and 584354 B.C. Ltd.

Respondents

**Corrected Judgment: The front page of this judgment
was corrected on September 5, 2007**

Before: The Honourable Madam Justice D. Smith

Supplemental Reasons for Judgment

Counsel for the Petitioners:

F. Potts
D. K. Magnus
S. Goheen

Counsel for the Respondents:

R. Basham, Q.C.

Date and Place of Trial/Hearing:

Written Submissions
New Westminster, B.C.

[1] On January 26, 2006, the petitioners, Timothy Walker and his corporate alter-ego Sunergy Holdings Ltd. obtained a declaration pursuant to s. 227(2) of the ***Business Corporations Act***, S.B.C. 2002 c. 57 (the "***BCA***"). The declaration stated that the affairs of the three interdependent provincially-incorporated respondents, Allie's Wholesale Garden Supplies Ltd. ("Allie's"), Grotek Manufacturing Inc. ("Grotek"), and

Aggro Plastics Inc. (“Aggro Plastics”), collectively referred to as the “Allies Group”, were being conducted by the controlling shareholder, Fonda Betts, and her corporate alter-ego 584354 B.C. Ltd. (“584”), in a manner oppressive and unfairly prejudicial to the petitioners. That conduct has continued since Mr. Walker’s May 2004 departure from the Allies Group’s horticultural business, and continues to this date. See *Walker v. Betts* 2006 BCSC 128.

[2] The finding of oppressive and unfairly prejudicial conduct included the following conduct by Ms Betts:

- (a) Unequal repayment of the shareholders loans (¶100);
- (b) Continued and ongoing use of the petitioners’ capital to fund the activities of the Allie’s Group without proposed terms of repayment despite demand; (¶101,104);
- (c) Unilaterally changing the manner in which profits and bonuses for Allie’s were distributed; (¶103); and
- (d) Lack of proper corporate governance including lack of directors or shareholders meetings. (¶105,106).

[3] The parties agree that one of the resolutions to their current impasse is for Ms Betts to purchase the petitioners’ shares in the Allies Group. Unfortunately, they have been unable to agree on a value for those shares. At issue is whether the shares are subject to a minority discount. The hearing to determine that issue is scheduled for October 10, 2006.

[4] In the meantime, the oppressive conduct continues. The petitioners continue to be denied timely access to financial and corporate documents. The basic tenets of corporate governance, including the calling of a shareholders meeting (with the exception of a directors meeting called for the limited purpose of transitioning the Allies Group into the provisions of the new **BCA**), continue to be ignored. Ms Betts has made no proposal to Mr. Walker for repayment of the petitioners’ shareholders loans. At the same time, the Allies Group continues to use the petitioners’ capital, without compensation, to fund its ongoing operations.

[5] In the face of this conduct, the petitioners apply for interim relief by an order appointing a receiver manager to conduct the affairs of the Allies Group until agreement can be reached or a determination made on a buy-out of the petitioners’ shares. An agreement appears unlikely.

[6] Ms Betts has instructed the corporate solicitors to commence an action on behalf of Allie’s and Grotek

against Mr. Walker and his current employer for the alleged theft of Grotek's secret mixing formula (the "Fertilizer Action"). The plaintiffs seek damages for breach of fiduciary duty, breach of confidence and breach of contract. Mr. Walker has denied the allegation and received no notice of a directors meeting to authorize the Fertilizer Action. Nor have the corporate solicitors responded to his concern that while representing the corporate entities they have chosen to act on one shareholder's instructions against another shareholder thereby placing themselves in a conflict of interest.

[7] There is also evidence that legal, accounting and consulting fees have significantly increased since Mr. Walker's departure, creating an inference that the cost of this shareholder's dispute is being paid for with corporate funds. Requests by Mr. Walker for an explanation about these increased expenses have gone unanswered.

[8] Recently, Mr. Walker received from Ms Betts an offer to settle the action. The offer included a term that he contribute to the cost of the valuation of the petitioners' shares. Ms Betts quoted the cost as \$105,000. The valuator advised Mr. Walker the account was settled with Ms Betts for \$33,437.50.

[9] In short, Ms Betts has done nothing to purge the Court's finding of oppressive and unfairly prejudicial conduct and continues to operate the Allies Group for the benefit of herself and 584. The misrepresentation of a material fact cloaked within an offer to settle impacts significantly on her credibility and claims of *bona fides* in the operation of the Allies Group.

[10] The financial circumstances of Allie's Group have also been impacted by the shareholders' dispute. Ms Betts owns 75% of the shares in Allies and 50% of the shares in Grotek. Mr. Walker owns 25% of the shares in Allies and 50% of the shares in Grotek. Allies owes Grotek over \$1 million but Grotek has taken no steps to recover those monies. 584 holds 80% of the shares in Aggro and Sunergy holds 20%. Aggro's trade accounts are listed at approximately \$1.5 million. It owes Allies \$1.7 million but has disposed of most of its capital and is essentially inoperative. It has provided no security for its indebtedness to Allies and has made no assignment to Allies of its book debts.

[11] On February 24, 2006, the bank called in its loans of \$1.5 million to Allies and Grotek and demanded repayment by March 7, 2006. By reducing their loans to \$975,000, freezing their capital loans and credit card limits, committing to reduce their credit facility by \$25,000 per week, and rescinding their ability to do incoming Lines of Credit, the companies were able to negotiate a Forbearance Agreement that gives them

until May 15, 2006, to secure alternate financing.

[12] Ms Betts submits that the appointment of an interim receiver in these circumstances would likely cause serious adverse consequences for the continued operation of the Allies Group. She states that less intrusive measures can address the concerns raised by Mr. Walker. She claims that Mr. Walker has presented no evidence that management is deadlocked, is disposing of assets, is undermining the value of the Allies Group, or is putting repayment of the shareholders loans in peril. She submits that the orders requested by the petitioners, including the granting of judgment for the petitioners' shareholders loans against Allie's and Grotek, the repayment of the shareholders' loans to the petitioners, and the reinstatement of the equal bonus payments requires further evidence of the Allies Group corporate governance and cannot be decided on an interim application. She further submits that the petitioners' interim claim for special costs or costs on an increased scale payable forthwith be dismissed until the conclusion of the proceedings.

[13] In these escalating adverse conditions, I am not satisfied the assets of the Allies Group are secure, that its continued operation is being managed prudently, and that the interests of the Allies Group are being served before those of Ms Betts. The classic reasons for court intervention through the appointment of a receiver manager appear to exist in this case: waste, the improper disposition of property, improper management, a lack of proper accounting, and improper profiting personally.

[14] On the evidence before me I am persuaded it is just and equitable that a receiver manager for the Allie's Group be appointed on an interim basis. Due to Ms Betts' continuing conduct and failure to respond to the declaration of oppressive conduct, the Court can only obtain an accurate picture of the Allies Group operation through an independent third party. Her proposal for piecemeal orders to rectify only those concerns that might reach the surface would not provide sufficient protection for the corporate assets. In my view, it is self-serving for Ms Betts to say that she is managing the Allies Group effectively when she continues to manage its affairs in an oppressive and unfairly prejudicial manner.

[15] I am advised the parties have agreed to the appointment of Roger Burgon of Grant Thornton LLP, who has consented to act as a receiver manager for the Allies Group in the event such an order is made. Pursuant to s. 227(3)(c) of the **BCA** that order is made and is effective immediately. The terms of the appointment shall include those set out in the attached draft order at Schedule "A" to the petitioners' written submissions dated March 13, 2006, which are appended to these reasons. The receiver manager is further

authorized, in his absolute discretion, to draw upon Ms Betts management expertise and if so exercised to pay her fair value for her services up to the amount of her current annual salary. There shall be a freeze on the payment of any bonuses to the shareholders until further order of the Court.

[16] Within 30 days of the making of this order the receiver manager shall provide to the court a written report that addresses the following matters:

- (a) An accounting of what, if any, corporate resources have been expended for the personal benefit of any individual shareholder since May 2004, including salaries and bonuses;
- (b) An accounting of what, if any, corporate resources have been expended on legal, accounting, consulting and/or valuation costs since May 2004, in relation to this shareholders dispute;
- (c) Confirmation of Deloitte and Touche's account for the valuation of the petitioners' shares in the Allies Group and what corporate resources, if any, have been expended on the payment of that account;
- (d) Obtain an independent legal opinion on the likelihood of the success of the Fertilizer Action and whether it should be pursued;
- (e) Provide an opinion as to what amount of corporate funds, up to \$389,000, can be made available for payment to Mr. Walker, or in the alternative, what periodic amounts totalling \$389,000, can be made available to Mr. Walker over a fixed period of time;

[17] The petitioners are also entitled to their costs, for the declaration of oppressive and unfairly prejudicial conduct, and for the order appointing an interim receiver manager. At this time, the orders will be at Scale 3, payable forthwith, with liberty to apply for an increased scale or special costs upon receipt of the report from the receiver manager.

[18] The petitioners shall have liberty to apply for further interim orders upon the court's receipt of the receiver manager's report.

"D. Smith J."

NO.
NEW WESTMINSTER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TIMOTHY C. WALKER and SUNERGY HOLDINGS LTD.

PETITIONERS

AND:

FONDA TRE-ANNE BETTS, ALLIE'S WHOLESALE GARDEN SUPPLIES LTD., GROTEK MANUFACTURING INC., AGROTEK MANUFACTURING INC., AGGRO PLASTICS INC. and 584354 B.C. LTD.

RESPONDENTS

ORDER APPOINTING RECEIVER AND MANAGER

BEFORE)
) OF THE DAY
) , 2006

UPON the application of the Petitioners in respect of the Respondents; and Upon reading the material filed and the consent of Grant Thornton Limited to act as Receiver and Manager; and Upon hearing counsel for the Petitioners and the Respondents:

THIS COURT ORDERS that:

1. GRANT THORNTON LIMITED be appointed Receiver-Manager, without bond or security, of all property, assets and undertaking of the Respondents Allie's Wholesale Garden Supplies Ltd. ("Allie's"), Grotek Manufacturing Inc. ("Grotek"), Agrotek Manufacturing Inc. ("Agrotek") and Aggro Plastics Inc. ("Aggro") (collectively hereinafter referred to as "ALLIE'S GROUP OF COMPANIES") with power to manage the business, business works and undertaking of ALLIE'S GROUP OF COMPANIES and with power to act at once until further Order of this Court with full authority to the Receiver-Manager to enter into possession of all property, assets and undertaking of ALLIE'S GROUP OF COMPANIES ("Allie's

Property”) and to carry on or concur in carrying on the business of ALLIE’S GROUP OF COMPANIES and to sell or concur in selling any of such property, assets and undertaking of ALLIE’S GROUP OF COMPANIES in the ordinary course of ALLIE’S GROUP OF COMPANIES business as the Receiver-Manager deems appropriate; the power of the directors and officers of ALLIE’S GROUP OF COMPANIES cease with respect to the Charged Property until the Receiver-Manager is discharged;

2. The Respondents and their officers, directors, employees, servants, agents, shareholders and representatives are restrained from, directly or indirectly, disposing of, selling, transferring, encumbering or dealing in any way with or removing from this jurisdiction the assets, books and records, papers or documents of the Allie’s Group of Companies or any part thereof;
3. The liability of the Receiver-Manager that it may incur as a result of its appointment or the exercise by it of its powers pursuant to this order, save and except for gross negligence or wilful misconduct, be limited in the aggregate to the cash proceeds realized by the Receiver-Manager from the disposition of the assets, after deducting the Receiver-Manager’s remuneration and expenditures, and after any monies borrowed by the Receiver-Manager pursuant to this order are repaid;
4. The Respondents and their officers, directors, employees, servants, agents, shareholders and representatives are hereby restrained and enjoined from disturbing or interfering with the occupation, use or possession by the Receiver-Manager of any premises owned or leased by the Allie’s Group of Companies except with leave of this Court first being obtained and on at least seven days prior notice to the Receiver-Manager;
5. ALLIE’S GROUP OF COMPANIES, Fonda Tre-Anne Betts (“Betts”) and any other person having notice of this Order forthwith deliver over to GRANT THORNTON LIMITED, as Receiver-Manager, all the property, assets and undertaking of ALLIE’S GROUP OF COMPANIES and all books, documents, papers and records of every kind related thereto, wherever situate and allow the Receiver-Manager immediate, continuous and unrestricted access to the books, documents, papers and records and upon request by the Receiver-Manager, make all books, documents, papers and records of every kind related thereto available for inspection and forthwith provide copies without charge to the Receiver;
6. If any information concerning the property, books or records of the Allie’s Group of Companies, or any part or parts thereof is stored or otherwise contained on a computer or other electronic system of information storage, whether maintained by the Allie’s Group of

Companies or any other person, the Receiver-Manager is entitled to unfettered access thereto for the purpose of allowing the Receiver-Manager to obtain a full copy of any such information whether by way of printing onto paper or making copies of computer disks or such other manner of retrieving and copying such information as the Receiver-Manager, in its discretion, deems expedient. For the purposes of this paragraph, the Receiver-Manager shall be entitled to all such assistance in gaining access to any such information as the Receiver-Manager may, in its discretion, require including, without limiting the generality of the foregoing, provision to the Receiver-Manager of instructions on the use of any computer or other system and provision to the Receiver-Manager of any and all access codes as may be required to gain access to such information;

7. The Receiver-Manager is authorized and empowered to do all or any of the following acts and things with respect to Allie's Property, forthwith from time to time, until further order of this court:
- (a) carry on all aspects of the business and affairs of ALLIE'S GROUP OF COMPANIES in relation to Allie's Property, to perform any agreement made by ALLIE'S GROUP OF COMPANIES and to enter into any new agreements that the Receiver-Manager deems necessary or desirable for the protection of, preservation of, or dealing with Allie's Property;
 - (b) execute, assign, issue, or endorse such deeds, bills of sale, cheques, bills of lading or exchange, or other documents that the Receiver-Manager deems necessary or convenient for any purpose connected with its appointment as Receiver-Manager or this order;
 - (c) affix the seal of ALLIE'S GROUP OF COMPANIES to such documents as may be necessary for protecting the assets and undertaking of ALLIE'S GROUP OF COMPANIES, or for completing any sale of the property, assets, and undertaking of ALLIE'S GROUP OF COMPANIES as may be authorized by an order of this court;
 - (d) pay such debts of ALLIE'S GROUP OF COMPANIES as the Receiver-Manager deems necessary or advisable to pay in order to properly operate or maintain the business and affairs of ALLIE'S GROUP OF COMPANIES relation to Allie's Property, which payment shall constitute a charge on Allie's Property ranking in accordance with the priority granted below;
 - (e) settle and pay any claims that may be made or brought against ALLIE'S GROUP OF COMPANIES on such terms and in such manner as the Receiver-Manager deems necessary or desirable;
 - (f) apply for any permits, licences, approvals or permissions as may be required by any governmental or regulatory authority;

- (g) employ and retain such agents, assistants, employees, solicitors, and auditors (the "Advisors") as the Receiver-Manager deems necessary or advisable for the purposes of protecting, preserving, and dealing with Allie's Property or exercising the powers granted hereunder and enter into agreements with any person, firm, or corporation respecting such purposes, and any expenditures or charge that shall be properly made or incurred by the Receiver-Manager in so doing shall constitute a charge on Allie's Property ranking in accordance with the priority granted below;
 - (h) take such steps as in the opinion of the Receiver-Manager are necessary or appropriate to establish and maintain control over Allie's Property or any part or parts thereof, including without limitation, carrying out such registrations and recordings as may be necessary or appropriate: the changing of locks and security codes, the relocation of assets to dispose or safeguard them, the engaging of independent security personnel, the taking of physical inventories, and the placement of such insurance coverages as it may consider necessary or desirable;
 - (i) collect, realize, or otherwise deal with all debts, accounts, claims, monies, and choses in action due to or owing to or owed by ALLIE'S GROUP OF COMPANIES in such manner and at such time or times as the Receiver-Manager deems necessary or desirable, and grant releases and discharges and otherwise deal with the debtors of ALLIE'S GROUP OF COMPANIES in relation to Allie's Property and the aforementioned debts, accounts, claims, monies, choses in action, and other documents held or owned by ALLIE'S GROUP OF COMPANIES in connection therewith in such manner as the Receiver-Manager deems necessary or desirable;
 - (j) execute and prosecute all suits, proceedings, and actions at law and equity as may, in its judgment, be necessary to properly receive, protect, preserve, and realize upon Allie's Property, and likewise defend all suits, proceedings, and actions instituted against it as such Receiver-Manager, and appear in the conduct the prosecution and defence of any such proceedings and actions now pending in any court by or against ALLIE'S GROUP OF COMPANIES, prosecution or defence of which the Receiver-Manager deems necessary or desirable for the proper protection of Allie's Property, and the authority hereby conferred shall extend to such appeals as the Receiver-Manager shall deem proper and advisable in respect of any order or judgment pronounced in any suit or action;
8. The Receiver-Manager be empowered and authorized to commence such legal proceedings as it deems necessary on behalf and in the name of ALLIE'S GROUP OF COMPANIES to resolve any disputed contracts entered into, monies paid, security granted, debts incurred, shares issued, allotted or transferred by or on behalf of ALLIE'S GROUP OF COMPANIES which the said

Receiver-Manager deems appropriate, with liberty to apply for further directions from this Honourable Court with respect to the conduct of any such legal proceedings contemplated or commenced;

9. Pursuant to s.59(17) of the *Personal Property Security Act* R.S.B.C. 1996, c. 359, the Receiver-Manager is authorized to sell Allie's Property or any part whereof without complying with the notice provisions set forth in s.59(10) of the *Personal Property Security Act*.
10. No action at law or other proceedings shall be taken or be continued against the Receiver-Manager and no action or proceeding shall be taken or continued against the property, assets and undertaking of ALLIE'S GROUP OF COMPANIES in the control of the Receiver-Manager without leave of this Court first being obtained. For the purposes of this paragraph, action or proceeding shall include but not be limited to any application or proceeding pursuant to the *Labour Code* (British Columbia) or other legislation of like or similar import;
11. The Receiver-Manager shall be at liberty to employ such assistants as it may consider necessary for the purpose of preserving the property, assets and undertaking of ALLIE'S GROUP OF COMPANIES or to carry on the business and undertaking of ALLIE'S GROUP OF COMPANIES.
12. Any expenditure made and any indebtedness incurred by the Receiver-Manager, which shall be properly made or incurred by the Receiver-Manager, shall form a charge on the property, assets and undertaking of ALLIE'S GROUP OF COMPANIES ranking in priority to all charges, liens, encumbrances and claims;
13. The Receiver-Manager from time to time shall pass its accounts before the District Registrar who shall certify the results of the passing thereof and at the time of the passing of such accounts the District Registrar shall, if requested, certify the remuneration of the Receiver-Manager, based on the applicable hourly rates that are in force from time to time, of the appropriate partners and staff utilized by the Receiver-Manager, or otherwise, and the Receiver-Manager shall be at liberty before passing its accounts, to pay itself or its firm in respect of its services as Receiver-Manager a reasonable amount either monthly or at such longer intervals as it deems appropriate, which amount shall constitute an advance against remuneration when certified, and which remuneration shall form a charge on the property, assets and undertaking of ALLIE'S GROUP OF COMPANIES ranking in priority to all charges, liens, encumbrances and claims;

14. The terms of this order set out the only requirements of the Receiver-Manager with respect to compliance with, and liabilities arising under environmental regulations, such that, except s expressly provided to the contrary herein, the making of this order in an of itself shall not vest in the Receiver-Manager, the ownership, control, possession, or management of the assets or any part thereof on which there may be a pollutant or contaminant, or which may be a pollutant or contaminant, or cause or contribute to a discharge, release, or deposit of a substance contrary to any environmental regulations that may have application in any jurisdiction in which any of the assets is situate;
15. The Receiver-Manager be and it is hereby authorized and empowered to summon and examine under oath any person reasonably thought to have knowledge of the affairs of ALLIE'S GROUP OF COMPANIES, and any person who is or has been a shareholder, officer, director, auditor, accountant, solicitor, attorney, contractor, agent, or employee of corporations owned by ALLIE'S GROUP OF COMPANIES or of their respective subsidiaries, or any person acting on their behalf, respecting material transactions involving any of the said corporations subsequent to (*year*) or Allie's Property or dealings relating to Allie's Property or any part or parts thereof and to report to this court in connection therewith in accordance with the court's directions.
16. Without limiting the generality of any of the provisions of this order, no one claiming an interest in the assets shall be at liberty to exercise any rights in respect of such interest, including, without limitation, any right to possession of the assets or any part or parts thereof, except with the prior written consent of the Receiver-Manager or with leave of this court first being obtained and on at least seven days' prior notice to the Receiver-Manager.
17. Without limiting the generality of any of the provisions of this order, all persons are hereby restrained and enjoined from disturbing or interfering with the occupation, use, or possession by the Receiver-Manager of any premises owned or leased by ALLIE'S GROUP OF COMPANIES except with leave of this court first being obtained, and on at least seven days' prior notice to the Receiver-Manager.
18. The Receiver-Manager be empowered to review the books and records of ALLIE'S GROUP OF COMPANIES to determine if those books and records establish that monies or other property and assets of ALLIE'S GROUP OF COMPANIES are properly accounted for, and whether there are any claims or potential claims against ALLIE'S GROUP OF COMPANIES or any other person who may have received such monies, property or assets, and, if so, to determine the

nature and extend of such claims or potential claims and report with respect thereto to this court.

19. The Receiver-Manager shall not be nor be deemed to be a successor employer pursuant to common law or statute, including the *Labour Relations Code*, or any similar provincial or federal statute or otherwise.

All employees of ALLIE'S GROUP OF COMPANIES shall remain employees of their current employer until such time as the Receiver-Manager, on behalf of ALLIE'S GROUP OF COMPANIES or any member of ALLIE'S GROUP OF COMPANIES may terminate the employment of such employee. The Receiver-Manager shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay and pension or benefit amounts, other than such amounts that the Receiver-Manager may specifically agree in writing to pay, or such amounts as may be determined in a proceeding before a court or tribunal of competent jurisdiction.

20. The Receiver-Manager report to this court on its administration annually, or as may be otherwise required.
21. The Receiver-Manager may enter into or make such arrangements and compromises with such other persons or parties as in its discretion may be necessary;
22. The Receiver-Manager may borrow monies from time to time as it considers necessary or desirable, such borrowing not exceeding the sum of \$100,000, for the purpose of carrying out its duties hereunder, and that:
- (a) the monies authorized to be borrowed may be in the nature of a revolving credit, and the Receiver-Manager may pay off and re-borrow within the limits of the authority hereby conferred so long as the maximum amounts of any such borrowing at any one time do not exceed the amount hereby authorized, plus interest; and
 - (b) the Receiver-Manager may give or issue receipts or certificates for any sums borrowed by it pursuant to this order, which shall form part of this order;
 - (c) the Receiver-Manager does not undertake and is not under any personal liability to pay any sum in respect of which it may borrow in relation to Allie's Group of Companies and the receivership thereof;
 - (d) the Receiver-Manager be at liberty to apply to Court to increase this amount allowed to be borrowed as the Receiver-Manager considers necessary.
23. The Receiver-Manager may from time to time apply to this Court for directions and guidance in the discharge of its duties hereunder;

24. the Receiver-Manager to be at liberty to offer for sale all the real and personal property, assets, and undertaking of ALLIE'S GROUP OF COMPANIES, and to canvas purchasers by advertisement or otherwise and to sell by public or private sale all or any part of the said property, assets and undertaking of ALLIE'S GROUP OF COMPANIES, provided that any contracts for sales, other than in the ordinary course of business, be subject to the approval of this Honourable Court;

25. With respect to the sale of the property, assets and undertaking of ALLIE'S GROUP OF COMPANIES, the Receiver-Manager be authorized and empowered to enter general, exclusive or multiple listing agreements as it deems appropriate with any licensed real estate agents, agents or firms, the price and terms of the sale and the distribution of the proceeds thereof to be subject to approval of this Honourable Court;

BY THE COURT
