IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Runnalls v. Regent Holdings Ltd. ,***
2008 BCSC 1073

Date: 20080807
Docket: S081934
Registry: Vancouver

Between:

Mary Anne Runnalls & Neeva Gayle Hix

Petitioners

And

Regent Holdings Ltd. & A. Theodore Ewachniuk

Respondents

Before: The Honourable Mr. Justice Nathan H. Smith

Reasons for Judgment

(In Chambers)

Counsel for the Petitioners	Georges E. Sourisseau
Counsel for the Respondents	James Vilvang, Q.C.
Date and Place of Hearing:	June 30 and July 2, 2008 Vancouver, B.C.

[1] The respondent Regent Holdings Ltd. ("Regent") is a family company in which the petitioners Mary Ann Runnalls and Neeva Gayle Hix are minority shareholders. The majority shareholder is their brother, the respondent A. Theodore Ewachniuk.

[2] The petitioners say Mr. Ewachniuk has for many years treated the company as his personal property without regard to their rights as shareholders. They seek a declaration under s. 227 of the ***Business Corporations Act***, S.B.C. 2002, c. 57 (the "***Act***") that the company has been operated in an oppressive and unfairly prejudicial manner. Among the remedies they seek for that alleged oppression is an order requiring Mr. Ewachniuk or the company to buy their shares or, failing such a purchase, liquidation of the company.

[3] Mr. Ewachniuk denies oppressive conduct, but agrees that he has treated the company as his own in the sense that he has always been solely responsible for its management, without any contribution of money or labour from his sisters. He has agreed to the appointment of an inspector and a valuator and agrees that their reports may determine a price at which he can buy out his sisters' shares. However, he opposes any declaration of oppression or any order for relief, saying those matters can only be dealt with after the inspection and valuation are

complete.

Background

[4] Regent is a family company that was originally incorporated by the present parties' grandfather, uncle and parents. It owns waterfront property in Richmond which has for many years been used as a marina. Part of a building on the property is leased to a restaurant, while the upper floor of the building housed Mr. Ewachniuk's former law office.

[5] Mr. Ewachniuk currently owns 62 per cent of the shares in Regent, while Ms. Runnalls and Ms. Hix each own 19 per cent. The petitioners obtained their shares as inheritances from the estates of their grandfather and their uncle. Mr. Ewachniuk received shares from the same sources and from the purchase of shares previously owned by the parties' parents.

[6] Ms. Runnalls and Ms. Hix are now aged 64 and 63, respectively. Mr. Ewachniuk is 69.

[7] This application is only the latest chapter in the dispute between these siblings. Following the death of their mother, Ms. Runnalls and Ms. Hix successfully challenged her will, which would have made their inheritance conditional on them giving their Regent shares to Mr. Ewachniuk. In reasons for judgment delivered on June 23, 2008, Hinkson J. found the will to have been procured by the undue influence of Mr. Ewachniuk and declared it to be void.

[8] On March 18, 2008, Loo J. made an interim order in this proceeding enjoining all payments from Regent to Mr. Ewachniuk and any disposition of Regent property.

[9] The alleged incidents of oppression took place over a period of almost four decades and include the following:

a) In the years 2002 through 2006, Mr. Ewachniuk caused Regent to pay to himself management fees and director's fees totaling more than $1.5 million, while also paying a salary of $60,000 a year to his wife. During the same period, no dividends or other funds were paid to the petitioners. In fact, the petitioners say they have never received any money from Regent other than small dividend payments (totaling less than $30,000 between them) in the early 1980s;

b) The money paid to Mr. Ewachniuk included a "management fee to a director" of $540,000 in 2004, which Mr. Ewachniuk used to pay a civil judgment unrelated to Regent;

c) Regent has made large, unsecured, interest-free advances to Mr. Ewachniuk;

d) The corporate minute book for Regent includes annual shareholders' resolutions approving financial statements, electing directors, waiving the appointment of auditors and waiving the need for an annual meeting. These resolutions are signed by Mr. Ewachniuk, but are not signed by Ms. Runnalls or Ms. Hix, who say they were never asked to sign any of them and did not receive copies;

e) The marina owned by Regent is leased to another company, Vancouver Marina (1971) Ltd., which is owned 50 per cent by Regent and 50 per cent by Richmond Boat and Yacht sales Ltd., a company owned by Mr. Ewachniuk and a Mr. Short. Vancouver Marina pays management fees, which in recent years have exceeded $200,000 per year, to Richmond Boat and Yacht;

f) Regent at one time owned all the shares of Westside Heights Real Estate, which owned development property in Westbank, B.C., but Mr. Ewachniuk caused those shares to be transferred to him personally. At some point, a partnership was created among Westside, Regent and Mr. Ewachniuk personally.

[10] Mr. Ewachniuk acknowledges that he was wrong to use Regent funds to pay the personal judgment, but defends the other transactions at issue as being for the benefit of Regent. He says that, as a result of his management over more than 40 years, Regent is a profitable company with valuable assets and will soon be free of debt. He also says that, for most of that time, he took no reimbursement from Regent and subsidized the company with income from his law practice. He says he only began to take management and director's fees in 2002, when

he stopped practicing law.

The Oppression Remedy

[11] The oppression remedy is contained in s. 227(2) of the ***Business Corporations Act***:

> **227** (2) A shareholder may apply to the court for an order under this section on the ground
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> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[12] The specific relief the that the Court may order is set out in s. 227(3), which provides a wide range of interim options or final orders that are appropriate for an individual case. These include:

> **227** (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
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> (a) directing or prohibiting any act,
>
> (b) regulating the conduct of the company's affairs,
>
> (c) appointing a receiver or receiver manager,
>
> …
>
> (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
>
> (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
>
> (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
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> …
>
> (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security.
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> (p) directing that an investigation be made under Division 3 of this Part,
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> …
>
> (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[13] One of those remedies, the order that a company be liquidated, is also available under s. 324, which also incorporates the alternative remedies in s. 227:

> **324** (1) On an application made in respect of a company by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

(a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or

(b) the court otherwise considers it just and equitable to do so.

(2) Nothing in subsection (1) prevents the court from requiring that security for costs be provided by a person bringing an application under that subsection.

(3) If the court considers that an applicant for an order referred to in subsection (1)(b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:

(a) make an order that the company be liquidated and dissolved;

(b) make an order under section 227(3) it considers appropriate.

[14] The nature of the oppression remedy and the interaction between ss. 227 and 324 was summarized in ***Walker v. Betts***, 2006 BSC 128, 15 B.L.R. (4th) 114:

> 79. Thus, the court may order the same remedies under s. 227(3) without finding oppressive or unfairly prejudicial conduct if it is satisfied that it would be just and equitable to do so.
>
> … (omission of heading)
>
> 80. Oppression is conduct which is "burdensome, harsh or wrongful". Unfairly prejudicial conduct is conduct which is unjustly or inequitably detrimental to a shareholder's interest. See ***Scottish Co-operative Wholesale Society Ltd. v. Meyer,*** [1959] A.C. 324, [1958] 3 All E.R. 66 (H.L.).
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> 81. In order to maintain a personal action for oppression, an applicant shareholder must establish harm to his interests as a shareholder, as distinct from his interests as a director, officer or employee. He must also establish harm peculiar to his shareholder interests as distinct from the other shareholders' interests. Moreover, the contractual force of conduct permitted by a company's articles of association cannot be ignored when determining if conduct is oppressive or unfairly prejudicial.

[15] Conduct does not have to be malicious, intentionally harmful or based on improper motive in order to be oppressive. What is at issue is the effect of the conduct. (***Low v. Ascott Jockey Club*** (1986), 1 B.C.L.R. (2d) 123, (B.C.S.C.), and ***Starcom International Optics Corp. v. McDonald Re: Starcom International Optics Corporation,*** [1994] B.C.J. No. 548 (B.C.S.C.)).

[16] In determining whether to grant relief under the "just and equitable test" in s. 324, different considerations may apply in the case of a family company than in the case of a company in which the petitioner has simply purchased shares. (***Safarik v. Ocean Fisheries*** (1995), 64 B.C.A.C. 14, 12 B.C.L.R. (3d) 342.

Analysis

[17] Counsel for the respondents says that until the inspector and valuator have completed a detailed review of the company's affairs, the Court does not have sufficient evidence to determine whether there has been oppressive or unfairly prejudicial conduct within the meaning of the ***Business Corporations Act***. Further, counsel says that even if some conduct is found to be oppressive, the Court will have to weigh the effect of those actions against the value of the development of Regent's assets and the elimination of its debt.

[18] I agree that further evidence that may come to light from the work of the inspector and/or the valuator and that such further evidence may be relevant to issues of whether certain transactions were for the benefit of the company or had valid business purposes. It may also be relevant to issues of whether the company received value for any payments made to Mr. Ewachniuk or anyone else.

[19] However, to suggest that the application for a declaration of oppression is premature for that reason is to

ignore the important distinction between the claim for relief from oppression under s. 227 and a derivative action under s. 232 of the ***Act***. The derivative action is a remedy for breach of duties owed to the company. For example, if the directors of a company cause the company to enter into transactions that benefit their own interest at the expense of the company, or if they wrongfully divert company funds or assets to themselves, that may be the subject of a derivative action. The oppression remedy, by contrast, relates to breach of duties owed to an individual shareholder in his or her capacity as a shareholder.

[20] In some cases, the conduct of a company's directors may justify both remedies, but that is not necessarily the case, and actions that benefit the company may still be oppressive of an individual shareholder. In ***Starcom***, *supra,* Newbury J. said at para. 48:

> … I am not aware of any case in which conduct that would otherwise be found to be oppressive or unfairly prejudicial to one or more shareholders has nevertheless been held to be justified by virtue of some financial benefit realized by the Company. I do not say that as a matter of law this may never happen, but I do suggest that the case would have to be an exceptional one on its facts.

[21] Whether or not any of the specific transactions at issue were for the benefit of Regent (and Mr. Ewachniuk has admitted that one was not), there is clear evidence of oppression in matters of basic corporate governance. While I agree that the mere fact that the petitioners were shareholders did not give them any right to be involved in or regularly consulted about the management of the company, they still had certain limited but important and irreducible rights as minority shareholders. As was said in ***Walker v. Betts***, *supra,* at para. 106:

> Shareholders in a corporation have two basic rights, both of which, to be exercised, require an annual general meeting. First, shareholders choose the board of directors that manages the corporation. Second, they decide whether or not to have an audit of the corporation's financial statements. By declining to call an annual general meeting, either as board chairman or as President, Ms. Betts denied Mr. Walker his rights as a shareholder in the Allies Group.

[22] Under s. 182 of the ***Business Corporation Act***, the statutory requirement to hold and annual meeting can only be waived by the unanimous consent of all shareholders eligible to vote at the meeting. Similarly, s. 203 requires a company to have an auditor unless shareholders unanimously decide otherwise. The unanimity requirement in those sections is obviously for the protection of minority shareholders.

[23] In this case, the corporate records show that for many years (from at least 1979 through at least 2004) there were no annual meetings. The consent resolutions purporting to waive the holding of the annual meeting, waive the appointment of auditors and appoint directors were signed by Mr. Ewachniuk but not by the petitioners. Both petitioners say they were never asked to sign those resolutions. Nothing in Mr. Ewachniuk's affidavit specifically refutes that allegation, although he makes a general statement that he believes he has complied with the ***Act***.

[24] An annual meeting was held in 2007 and was attended by the petitioner Ms. Runnalls, who also held a proxy from Ms. Hix. Mr. Ewachniuk, as chair of the meeting, ruled the proxy invalid because it was not delivered within 48 hours in advance of the meeting, as required by the company's articles of incorporation. The meeting proceeded with Mr. Ewachniuk and Ms. Runnalls disagreeing on all matters and Mr. Ewachniuk, as the majority shareholder, winning the votes on all those contested issues.

[25] The facts of this case are similar to those in ***Jackman v. Jackets Ltd.*** (1977), 4 B.C.L.R. 358, 2 B.L.R. where Fulton J. found at 359 that the majority shareholder had run the company "as though it were his own company without consultation, and in breach of the ***Companies Act*** requirements as to annual general meetings and consent to dispense with the appointment of auditors." Although the minority shareholder in that case was not entitled to participate in or be consulted in the management of the company

> nevertheless, she is entitled to be informed, as a shareholder, to attend annual general meetings and to be advised and consent, or consent in lieu thereof. I hold that in this respect there has been conduct coming within the ambit of Section 221 [now section 227]….

[26] ***Jackman*** was relied upon by Levine J. when faced with a similar set of facts in ***Burdeny v K & D Gourmet***

Baked Foods and Investments Inc. (1999) 48 B.L.R. (2d) 16:

> … He was prevented from reviewing the company's financial records, he had not been given any financial statements, the company's finances had never been audited, the company had not held annual general meetings as required by the Company Act. There is no evidence that Donald had consented to waiving the statutory requirements concerning annual general meetings or the appointment of an auditor. In my view a shareholder who is put in such a situation is dealt with unfairly "in the matter of his proprietary rights as a shareholder".

[27] The fact the company has now held one annual meeting is not sufficient to remedy a decades-long pattern of ignoring the few rights the petitioners had as minority shareholders. In any event, it was clear from that annual meeting that there is a conflict between Mr. Ewachniuk and his sisters and that all issues between them concerning the affairs of the company will be resolved in Mr. Ewachniuk's favour because he holds the majority of voting shares. It is also clear from this and other litigation that the petitioners have lost confidence in Mr. Ewachniuk and are unlikely to ever believe that anything he causes Regent to do will accrue to their benefit as shareholders. Therefore, even if it could be said that the oppressive conduct had in some way been remedied, I find this is still a case to apply the "just and equitable" consideration under s. 324.

[28] In many companies, the remedy for a shareholder in the position of these respondents is simply to sell his or her shares to any buyer who can be found. That is not an option for these petitioners, who are shareholders in what has always been a family company. And, as Southin J.A. said in ***Safarik v. Ocean Fisheries***, *supra,* "in a company with no history of paying dividends, shares are in reality worthless unless they can be realized." (at para. 99.)

[29] In the off-cited case of ***Ebrahimi v. Westbourne Galleries Ltd.***, [1973] A.C. 360 (H.L.), the House of Lords considered at 379 the application of the "just and equitable" provision in the English statute:

> … The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the ***Companies Act*** and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations: considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[30] The equitable considerations in this case arise from the fact that this is a family company and the dealings and relationships between the shareholders can not be entirely separated from the family dynamics. In ***Safarik***, *supra,* Southin J. said:

> **100** Family companies are very different from non-family companies. They are different because, usually when a young man joins his father in the business, he does so trusting his father to do right by him and the father intends to do right. Thus no contracts are drawn up. It is not unusual for differences to arise as they did here, not because either father or son is dishonourable but because each sees the world through different eyes.
>
> **101** If this were not a family company, but a company in which the respondent had simply bought his common shares and in buying them had decided not to be a director for whatever reason, there would be no case for an order under s. 295(3).
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> **102** But, in my opinion, it is not erroneous to take a more liberal approach to the words "just and equitable" in the case of a family company in which one of the family after many years of service is no longer permitted to participate in the business.

[31] The position of the petitioners in this case is different from that of the petitioner in ***Safarik*** in that neither Ms. Runnalls nor Ms. Hix has ever been actively involved in the management or the operations of Regent. However, they had a reasonable expectation that their shares would ultimately allow them to benefit from the family wealth and would provide them with financial security. These considerations become more important as the petitioners get older. The relationships within the family have clearly reached the point where Ms. Runnalls and Ms. Hix, rightly or wrongly, do not believe they can trust Mr. Ewachniuk to manage an interest that, for them, is part of their inheritance. In the circumstances, just an equitable considerations entitle them to extricate themselves from the situation and invest their assets elsewhere.

[32] I therefore find that the petitioners are entitled to a declaration that there has been shareholder oppression within the meaning of s. 227 and a declaration that they are entitled to relief under s. 324. Having said that, however, I think it is premature to order any specific relief. In ***Safarik***, the Court of Appeal stated that in excercising its discretion under these sections, the court must consider the effect a particular order would have upon other shareholders and creditors of the company.

[33] The obvious solution would be for Mr. Ewachniuk to purchase his sisters' shares. However, I do not think it is appropriate for the Court to make an order to that effect when neither the parties nor the Court have any idea of what a proper price would be. One hopes that it will be possible to fix a price based on the report to be prepared by the valuator, but one side or the other may have objections to the valuator's report that the Court may have to consider.

[34] If Mr. Ewachniuk is unable or unwilling to purchase the petitioners' shares at whatever price is ultimately determined to be proper, the Court will have to consider the alternate remedy of liquidating the company. However, depending on the report of the inspector, it may become necessary to first make other orders under s. 227(3). It may, for example, become necessary to appoint a receiver manager under subparagraph (c), to make orders in regard to specific transactions under subpragraph (j) or order further legal proceedings to recover assets or collect debts under subparagraph (r).

Dispostion

[35] Accordingly, there will be a declaration that the affairs of Regent Holdings Ltd. have been conducted in a manner that is oppressive and unfairly prejudicial to the petitioners and a declaration that it would be just and equitable to provide a remedy under s. 227(3). There will be a further order, by consent, for the appointment of an inspector and valuator. The petitioners' application for specific relief is adjourned pending the reports of the inspector and valuator.

[36] Mr. Ewachniuk has applied for a variation of the order of Loo J. to allow him to be paid a salary for his ongoing management services. While I have some sympathy for that application, I do not have sufficient evidence before me to determine what a fair amount would be. Further, Mr. Ewachniuk still apparently owes Regent $540,000 for what he admits to have been an improper use of company funds to pay a personal judgment. The order of Loo J. will therefore remain in place unamended. When the Court makes further orders with the benefit of evidence from the inspector and valuator, it will also be in a position to consider any application Mr. Ewachniuk might wish to make for retroactive payment for services.

[37] The petitioners will have costs of this application.

Nathan H. Smith J.