

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mudaliar v. Mudaliar*,
2015 BCSC 1476

Date: 20150821
Docket: S138616
Registry: Vancouver

Between:

Sagran Mudaliar

Petitioner

And

Adil Mudaliar and Andy Sorensen Autobody & Frame Ltd.

Respondent

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Petitioner:

D.A. Hunter

Counsel for the Respondents:

P.G. Kent-Snowsell

Place and Date of Trial/Hearing:

Vancouver, B.C.
July 15, 2015

Place and Date of Judgment:

Vancouver, B.C.
August 21, 2015

[1] The petitioner, Sagraan Mudaliar (“Sagraan”) seeks leave to commence an action in this court in the name of Andy Sorensen Autobody & Frame Ltd. (the “Company”) against Adil Mudaliar (“Adil”) for breach of fiduciary duty, conversion and ancillary relief. This is commonly called a derivative action.

[2] The leave is sought pursuant to s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA].

[3] This petition was filed November 20, 2013. At the same time, Sagraan started an oppression action.

Background

[4] Sagraan is the father of Adil. Adil manages the Company. Up until sometime in 2012, Sagraan mainly lived in the United States and did not participate in the operation of the Company. Adil resides in Surrey, British Columbia.

[5] The Company operates an Insurance Corporation of British Columbia (“ICBC”) accredited auto body repair business located in Surrey. Most of its business arises from ICBC insurance claims. Adil states that it is about 90% insurance claims. The Company also provides auto body repair for those whose claims are not covered by ICBC.

[6] The Company shares were purchased by Sagraan and Adil (he is also known as Ed) in January of 2006, from the owner, Andy Sorensen, and his wife. Sagraan gifted to Adil, \$150,000 US towards the purchase of the shares of the Company.

[7] Adil received 60 shares in the Company; Sagraan received 40 shares. Adil swears the following:

5. At all material times, the Petitioner, [Sagraan] Mudaliar gave authority to myself, Adil Mudaliar, to act as his attorney by signing all documentation regarding the corporate dealings of Andy Sorensen Autobody & Frame Ltd. (the “Company”) and signing all documents for the Petitioner, [Sagraan] Mudaliar with his full knowledge, authority and consent.

[8] Prior to the purchase of the shares, Adil was an employee of the Company.

[9] Adil is the sole director and officer of the Company.

[10] Despite Sagan not participating in the day-to-day operation of the Company, he received from the Company \$3,000 per month from January of 2007 to January of 2013 for which he received Canada Revenue Agency T4s each year from the Company.

[11] Mr. Khan Shahein, also known as Jimmy Khan, is a former employee of the Company. He was employed by the Company from May of 2007 to September of 2013 as general manager. He was responsible for overseeing all auto repair work in the shop. Until Sagan spoke to Mr. Khan, he was not aware of Adil’s activities of conducting repairs in cash and not reporting them on the Company’s books.

[12] Sagan alleges in his petition, confirmed by his affidavit, that based on the information provided to him by Mr. Khan and the documents he reviewed, Adil had conducted cash transactions actions as follows:

2010	\$37,476.68
2012	\$67,803.87
2013	\$22,454.25

[13] In addition, Sagan alleges that Adil purchased damaged vehicles which were repaired by the Company at its expense and for the benefit of Adil.

[14] It is these activities, as alleged by Sagan, that are the basis of the derivative action sought by him on behalf of the Company.

[15] In 2012, Adil helped Sagan leave California so as to extricate himself from debt and his matrimonial problems with his wife.

[16] On June 24, 2013, Adil received unsolicited documents from Sagan’s lawyers for his signature. The documents effectively, in consideration of \$10, were transferring to Sagan all Adil’s shares for the Company. The letter asked Adil to resign as a director, president and secretary of the Company.

Statutory Framework

[17] The following section from the *BCA* relate to derivative actions:

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

- (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
- (b) notice of the application for leave has been given to the company and to any other person the court may order,
- (c) the complainant is acting in good faith, and
- (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[18] There is no issue whether the petitioner has satisfied s. 233(1)(a) and (b).

Positions

[19] Sagan's position is that Mr. Khan's evidence confirms that cash transactions were conducted by Adil through the Company for which he received cash, which should have been paid to the Company. There were vehicles repaired at the Company's expense and Adil received their sale proceeds.

[20] Adil argues that Sagan was well aware of the operation in the Company while living in the United States and only became interested in the Company when Sagan asked Adil to help him come to Canada so as to extricate himself from debt and a matrimonial dispute with his wife. Adil argues that Sagan is not acting in good faith and that is not in the best interests of the Company for legal proceedings to be prosecuted.

Issues

1. Has Sagan acted in good faith in bringing this petition?
2. Does it appear, based on the evidence before the court, that it is in the best interest of the Company that legal proceedings be prosecuted?

Discussion

Has Sagraan acted in good faith in bringing this petition?

[21] In establishing good faith, there is a substantial onus on Sagraan to establish good faith. In *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1995] B.C.J. No. 2262 (1995), 13 B.C.L.R. (3d) 300 (S.C.), Mr. Justice Tysoe relied on the following passages from *Tremblett v. S.C.B. Fisheries Ltd.* (1993), 116 Nfld. & P.E.I.R. 139 (Nfld. T.D.) which defines the complainant's onus to establish good faith:

... it is necessary that an applicant bring cogent evidence establishing clearly on a preponderance of evidence that the application is in fact brought in good faith. (p. 151)

.....

... in an application such as this there is a substantial onus on an applicant-complainant himself to positively establish "good faith" ... it seems to me that this is a logical and appropriate requirement where the remedy sought is to place in the control of an applicant who is potentially, and indeed perhaps usually, a minority shareholder or single director, the authority to cause the resources of the corporation to be directed towards pursuing a court proceeding which is not willingly pursued by the majority of shareholders of the board. Even though this matter is assessed on an application, as opposed to a trial, in my view there is a substantial onus to be met by any applicant, including the applicant here, with respect to the establishment of good faith. (pp. 157-8)

[22] In assessing good faith, the court is entitled to determine whether the purpose of the action is to recover from Adil money that is alleged to belong to the Company.

[23] In considering Sagraan's motive, the court may look at existing disputes between Sagraan and Adil and any ulterior motives: *Discovery Enterprises Ltd. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 and *Discovery Enterprises Ltd. v. Ebco Industries Ltd.* (1998), 109 B.C.A.C. 255.

[24] In *Primex*, Tysoe J. was aware that the complainant did not like Mr. Griffiths, who was one of the directors that the complainant proposed to sue. The claimant was very vocal about his dislike of Mr. Griffiths.

[25] The complainant was a shareholder whose shares would be affected by the activities of Mr. Griffiths and the other directors that the complainant proposed to sue. Mr. Justice Tysoe in *Primex* said this about the complainant's self-interest:

[34] I have no doubt that the Petitioner is acting out of self-interest in wanting to prosecute the derivative action. The self-interest is to maximize the value of its shares in Northwest by pursuing causes of action which it may have against Mr. Griffiths and the other directors. The Petitioner's self-interest coincides with the interests of Northwest. This does not mean the Petitioner is acting in bad faith: see Richardson *Greenshields v. Kalmacoff*. Anything that benefits a company will indirectly benefit its shareholders by increasing the share value and it is hard to imagine a situation where a shareholder will not have a self-interest in wanting the company to prosecute an action which is in its interests to prosecute.

[26] There is no history of bad blood between Sagan and Adil. In fact, Sagan gifted money to Adil to purchase the Company. Sagan permitted his son to be the majority shareholder.

[27] Sagan was quite content to allow his son to run the Company and make all the day-to-day decisions on behalf of the Company from 2006 to 2013. It was only in 2013, when reviewing financial records and speaking to Mr. Kahn that Sagan learned of his son's alleged self-benefiting schemes.

[28] I have concluded that Sagan has met the burden of good faith as imposed upon him.

Does it appear, based on the evidence before the court, that it is in the best interest of the Company that legal proceedings be prosecuted?

[29] In considering this factor in s. 233(1)(d), the court must not try the case. The court is required to determine whether the proposed action has a reasonable prospect of success: *Primex*.

[30] In considering whether the action has a reasonable prospect of success or whether there is a defence to the action, Tysoe J. wrote in *Primex*:

[49] A cause of action based on the taking of a corporate opportunity is founded on the fiduciary relationship between the corporation and its directors and officers. The leading statement in Canadian jurisprudence with

respect to the consequences of the fiduciary relationship is found in *Canadian Aero Service Ltd. v. O'Malley*:

It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company. (pp. 381-2 of 40 D.L.R. (3d))

[31] Mr. Khan confirms under oath the information he provided Sagan, which is: Adil pocketed the money from cash jobs that emanated from private customers of the Company who did not have ICBC claims and who would pay cash resulting in receiving a discount. Mr. Kahn described the documents that were produced for the two different customers. Mr. Kahn gave examples; exhibit A was the estimate and the only document that the Company would produce for a customer who was to pay a cash repair. Exhibit B is an example of a work order for non-cash repairs. Finally, exhibit C is an example and identified as a cash repair.

[32] Mr. Kahn swears that he and other employees were instructed by Adil to encourage customers who were described as private customers to pay cash. Mr. Kahn states that the money was put in the register each day (I am aware that Adil says that there is no cash register on the premises). Adil took the money each day. Mr. Kahn swears that he observed these activities.

[33] Mr. Kahn swears that Adil told him how he was spending the cash and Adil sought Mr. Kahn's advice concerning cash he had accumulated and considered using to pay down the mortgage on his home.

[34] These sworn statements of Mr. Kahn were not responded to by Adil. Rather, Adil chose to show the examples of exhibit A and B, as presented by Mr. Kahn, as jobs for which the Company was paid. Adil took the example of the cash job for the blue Audi, which was in the name of Greg Smith on the estimate. Adil claims that

ICBC paid the repair work for the blue Audi. However, the customer's name was not Greg Smith for whom ICBC paid the repair bill, rather it was Donald Wyker. Adil provides no explanation.

[35] Mr. Kahn also states that the Company purchased salvaged vehicles to repair for purposes of resale. Mr. Kahn alleges that the Company's supplies, materials and labour were used for their restoration. According to Mr. Kahn, Adil received the cash when the vehicles were sold.

[36] Adil has reviewed the automobiles identified by Mr. Kahn. I will not go into the details of Adil's explanation for each automobile. However, Adil demonstrates that the Company did receive the sale proceeds of some of the vehicles. In other sales, when he received the proceeds, these sales were credited to Adil's shareholders loan (money that the Company owed Adil). More documents and accounting records would have to be produced before this could be a defence bound to be accepted.

[37] I cannot conclude that this proposed derivative action does not have a reasonable prospect of success.

[38] Sagram is granted leave to bring the proposed action as set out in the proposed notice of civil claim exhibited in these proceedings.

[39] The costs of this application shall become costs in cause of the proposed action.

"H.C. Hyslop J."

HYSLOP J.