

CANADA / JUDGMENT

1247415 B.C. Ltd. v. 0763974 B.C. Ltd.

2020 BCSC 1283

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Supreme Court of British Columbia

DECIDED

4 August 2020

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2020 BCSC 1283 1247415 B.C. Ltd. v. 0763974 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1247415 B.C. Ltd. v. 0763974 B.C. Ltd.,

2020 BCSC 1283

Date: 20200804

Docket: S205922

Registry: Vancouver

Between:

1247415 B.C. Ltd., as General Partner of the Anmore-Atti Limited Partnership

Petitioner

And

0763974 B.C. Ltd., 1720 East Road Inc. and Arman Tehrani

Respondents

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

B. La Borie

J.D. Christie

Counsel for the Respondents:

A. Soliman

Place and Date of Hearing:

Vancouver, B.C.

August 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 4, 2020

- [1] These are reasons for judgment on the preliminary application to adjourn the hearing of this petition, order cross-examinations on affidavits, or refer it to the trial list. I gave these reasons in chambers the same day as having heard this application. I have edited the reasons without changing the substance.

Overview

- [2] The petitioner, the Anmore-Atti Limited Partnership, was formed to develop lands owned by the limited partnership in Anmore, British Columbia. In April 2020, one of the limited partners, 1247415 B.C. Ltd. to which I will refer to as the Takeover General Partner, sought to remove the then general partner, 1720 East Road Inc., to which I refer to as the Incumbent General Partner. The Takeover General Partner moved an extraordinary resolution in writing, calling for the removal of the Incumbent General Partner and replacing the Incumbent General Partner with itself. This extraordinary resolution received the support of limited partner unitholders holding 85% of the units of the limited partnership.
- [3] The Incumbent General Partner did not receive notice of this extraordinary resolution but received enough information to move to amend the limited partnership agreement to require a meeting of the limited partners and a poll of them on the extraordinary resolution.
- [4] The Takeover General Partner brings this petition for a declaration that the extraordinary resolution was valid, and to require the Incumbent General Partner and a related company to take the steps necessary to transfer the general partnership property to it, including the land beneficially owned by the limited partnership but held by a numbered company, the respondent, 0763974 B.C. Ltd., to which I will refer to as the Nominee.
- [5] The petition seeks the title to the land be transferred, but the Takeover General Partner advised, during the hearing of this application, that it seeks the shares of the Nominee to be transferred to it so that the cost of transferring title to the land is avoided.

- [6] The Incumbent General Partner and the Nominee seek an adjournment of the petition to allow for cross-examination on affidavits of what they asserted are key disputed facts. In the alternative, they seek that I declare the matter not suitable to be determined by petition and to place it on the trial list.
- [7] Both alternative reliefs sought on the application are based on three matters. First, the parties dispute whether the extraordinary resolution was made before the Incumbent General Partner amended the limited partnership agreement and whether the amendment to the limited partnership agreement was validly made in any event. If the extraordinary resolution was made before the amendment to the limited partnership agreement, or if the amendment is invalid in any event, the amendment does not affect the validity of the extraordinary resolution.
- [8] Second, the parties dispute whether one of the limited partners, a corporate entity controlled by the same person who controls the Takeover General Partner, was in default and so not entitled to vote on the extraordinary resolution, thereby invalidating the results.
- [9] Third, and rather late in the day, the Takeover General Partner asserts that the relief it seeks must include transfer of the shares of the Nominee to it rather than transfer of the title of the property.
- [10] These disputed matters form the issues in this case and, in particular, whether the matter is suitable to be determined as is, whether cross-examination on affidavits should be ordered, or whether the matter should be converted to an action and put on the trial list.
- [11] The Takeover General Partner asserts that these issues do not require cross-examination, but rather can be resolved on the documentary evidence. For these reasons, the Takeover General Partner says there is no need for cross-examination and no bona fide triable issues calling for the petition to be converted to a notice of civil claim.
- [12] With regard to the relief it seeks, it argues that the fiduciary duties owed by the general partner are such that the Incumbent General Partner must turn over the shares of its Nominee to effect the transfer and that does not raise a complex legal issue requiring a trial.
- [13] I conclude that the disputes in the evidence and the nature of the disputes are such that there is a bona fide triable issue which may not be resolved by cross-examination alone. As a result of these conclusions, the proceeding should be converted to a notice of civil claim and placed on the trial list.

Issue 1 - Does the timing of the extraordinary resolution and the amendment to the limited partnership agreement raise conflicts that require cross-examination or bona fide triable issues requiring conversion to an action?

- [14] The legal principles applicable to whether cross-examination is appropriate and whether the form of proceeding is appropriate are not in dispute.

- [15] Rule 22-1(4)(a) of the Supreme Court Civil Rules provides that the court may order cross-examination on affidavits of an affiant or the examination of a party or witness. This is a discretionary rule. It and its antecedents have been interpreted such that cross-examination is ordered where there are facts in issue, unless the presiding judge is of the view that there is no conflicting evidence or the issues can be resolved on the affidavits or other evidence on the record: *Brown v. Garrison* (1967), 63 W.W.R. 248 (B.C.C.A.) at 250 to 251.
- [16] The issues of whether the facts are in conflict or whether there is other evidence to resolve the facts are not to be overly stringently examined. Where a party challenges an issue and it is not in a position to lead conflicting evidence, the challenge may in some circumstances be enough to put the matter in issue and call for cross-examination: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at paras. 62 to 70.
- [17] With regard to whether the proceeding is appropriately brought through a petition or an action, the parties agree that the petitioners fit within Rule 2-1(2)(c), which reads, starting with Rule 2-2(2):
- (2) To start a proceeding in the following circumstances, a person must file a petition or, if Rule 17-1 applies, a requisition:
- (c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract or other document.
- [18] However, the parties also agree that even if appropriately commenced as a petition, the court has discretion under Rule 22-1(7) to convert it to an action and refer it to the trial list either generally or on an issue.
- [19] Where there are disputed facts or law, proceedings brought by petition should be referred to the trial list unless the party requesting the trial is bound to lose: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P.*, 2017 BCCA 247 at para. 43 and cases cited therein. If there is a triable issue, the case should not proceed by petition.
- [20] The parties agree that para. 10 of *Three Stars Investments Ltd. v. Narod Developments Ltd.* (1981), 33 B.C.L.R. 164 (S.C.) sets out the test where the petition relates to a contract between the parties. The petition should be converted to an action and placed on the trial list if the issues involve:
- a) a serious question of law or fact;
- b) a decision will not end the matter, but require further proceedings to be pursued; or
- c) the application involves enforcement of an agreement as opposed to the mere interpretation of the agreement.

- [21] In this case, the Incumbent General Partner asserts there is conflicting evidence in some instances and the other evidence of the Takeover General Partner consists of allegations not supported by evidence. For this reason, he seeks cross-examination on affidavits and that the matter be converted to an action and put on the trial list.
- [22] In addition, he asserts that each of components of the Three Stars Investments Ltd. test is made out because there are serious questions of law or fact; a decision will not end the matter but require further proceedings to be pursued, and the application involves enforcement of the agreement as opposed to the mere interpretation of the agreement.
- [23] The conflicting evidence asserted by the Incumbent General Partner includes whether the extraordinary resolution was signed before the Incumbent Partner amended the limited partnership agreement to require steps that would result in the extraordinary resolution as asserted to have been passed to be invalid.
- [24] The chronology is as follows. On April 16, 2020, the Takeover General Partner sent the extraordinary resolution calling for the removal of the Incumbent General Partner and the replacement of the Incumbent General Partner with the Takeover General Partner to unitholders of the limited partnership but not to the general partner.
- [25] The evidence demonstrates that unitholders holding 85% of the units of the limited partnership consented to that extraordinary resolution in writing, but the evidence does not show when they did so.
- [26] Counsel for the Takeover General Partner acknowledges that some signatures on the extraordinary resolution came after April 16, 2020, and that there is no evidence as to when the signatures necessary to reach the 75% majority required were completed.
- [27] The Takeover General Partner argues that the gap in the evidence does not matter because the amendment to the limited partnership agreement is undated and the amendment was not validly made because it is not supported by evidence of counsel for the limited partnership, a matter to which I will return.
- [28] The Incumbent General Partner asserts that the amendments were necessitated by the ambiguity in the limited partnership agreement as to the process for an extraordinary resolution to remove a general partner.
- [29] These submissions depend on the provisions of the limited partnership agreement pertaining to the process for extraordinary resolutions as they were prior to April 16, 2020.
- [30] Article 1.1 of the limited partnership agreement contains definitions including the following definition of extraordinary resolution. It says:

'Extraordinary Resolution' means:

- a) A resolution passed by not less than 2/3 of the aggregate number of votes cast by those partners who, being entitled to do so at that time, vote in person or by proxy at a duly convened meeting of Partners, or any adjournment thereof, called in accordance with this agreement; or
 - b) a written resolution in one or more counterparts consented to in writing by Partners holding, in the aggregate, not less than 2/3 of the aggregate number of votes attaching to units held by those Partners entitled to vote at that time.
- [31] Sections 7.3 and 7.4 of the limited partnership agreement provide for amendments and notice amendments to the partnership agreement. They read as follows:

7.3 Amendment by General Partner

The General Partner may, without notice to or consent of any Partner, amend this Agreement:

- a) to add any covenant, restriction or provision which, in the opinion of counsel for the Partnership, is for the protection of the Limited Partners; or
- b) to change the name of the Partnership or the address for the office of the Partnership; or
- c) to cure any ambiguity or to correct or supplement any provision contained herein which, in the opinion of counsel for the Partnership, may be defective or inconsistent with any other provision hereof if, in the opinion of such counsel, such amendment does not and will not in any way adversely affect the rights of any Limited Partner.

7.4 Notification

All Partners will be notified of the full details of any amendment to this Agreement under section 7.3 within 30 days after the effective date of such amendment.

[32] Section 14.6 provides for a quorum at a meeting and reads as follows:

14.6 Quorum

Except for the selection of a chairman, for which no quorum is required, a quorum at a meeting of Partners will consist of one or more persons present in person who collectively hold or represent by proxy not less than fifty percent (50%) of the outstanding Units or the Units outstanding.

[33] Section 14.16 reads:

14.16 Poll on Extraordinary Resolution

Every question submitted to a meeting of Partners which requires an Extraordinary Resolution will be decided by a poll.

[34] Section 15.4 reads as follows:

15.4 Removal of General Partner

The General Partner may be removed as the General Partner by:

- a) an Extraordinary Resolution if the resolution is consented to by, or receives affirmative votes cast by, the holder or holders of 75 percent or more of the outstanding Units; or
- b) an ordinary resolution if the General Partner is in default in fulfilling its covenant under section 3.1;

and the resolution admits a new General Partner to the Partnership as a replacement to the General Partner being removed.

- [35] The Incumbent General Partner has given evidence that, while he did not receive notice of the extraordinary resolution, he was aware of confusion among the limited partners. For that reason, he made the amendments to require that an extraordinary resolution to remove a general partner be the subject of a meeting on notice of all unitholders at which 75% consent to remove the general partner after a poll. He says this is necessary because the definition of extraordinary resolution allows for it to carry with a two-thirds majority, but the other provisions as set out above require a 75% majority and also require a poll of questions submitted to a meeting of partners. Hence, the amendments were intended to resolve what he says are ambiguities in these provisions by clarifying that to remove a general partner, a meeting is required. It must include a poll and a majority vote of 75%.
- [36] The amendments made by the Incumbent General Partner were sent to the limited partners on April 19, 2020. The amendment document is dated, for reference, April 19, 2020. The document itself does not indicate when it was signed by the Incumbent General Partner and, for this reason, the Takeover General Partner refers to it as "undated" and asserts that it cannot stand as evidence that it was made at around the time the extraordinary resolution was circulating and possibly before the extraordinary resolution received the required 75% support to remove and replace the general partner.
- [37] The Incumbent General Partner refers to emails sent by a limited general partner by the name of Mr. Ashkan Tehrani. He shares the same last name as the principal of the Incumbent General Partner, but this is merely a coincidence. Mr. Ashkan Tehrani sent emails to limited partners which the principal of the Incumbent General Partnership has put into evidence.
- [38] Those emails include an email dated April 19, 2020, in which Mr. Ashkan Tehrani asserts that he has signed the "document", but he is in support of a poll in a meeting and has felt a considerable amount of "personal pressure". He states that he signed the document, which I understand to be the extraordinary resolution, to stop the phone calls, but his signature was just to remove himself from the equation and to let the partnership decide. Mr. Ashkan Tehrani states that his signature is not evidence of his agreement with the process of removing the general partner over emails, nor is it a disagreement of the final goal, which is to replace the general partner. He goes on to state that he rescinds his signature until a meeting of the limited partnership has been conducted.

- [39] On April 18, 2020, Mr. Ashkan Tehrani circulated an email asking questions about the process and procedure for the new general partner, including who the new general partner is, as it appears that he has simply been advised of the name of the numbered company and is making certain assumptions about it. He requests the articles of incorporation for the numbered company, as well as the share structure. He questions why they are being asked to sign off on a legal document over email without actually knowing or understanding the consequences. He requests a meeting of the partners.
- [40] Mr. Ashkan Tehrani then sent a third email on April 20, 2020 in which he advised that he was signing on to the extraordinary resolution and appears to rescind his earlier rescission.
- [41] The Takeover General Partner says the issue of the timing of the amendment to the limited partnership agreement and Mr. Ashkan Tehrani's emails raise small factual disputes that do not matter. The reason for this is that Mr. Ashkan Tehrani's back-and-forth on whether he signed the extraordinary resolution, for what purpose, and whether he rescinded it, are irrelevant because Mr. Ashkan Tehrani only held 4.9% of the units. If his vote is not counted, the extraordinary resolution still passed because partners holding 85% of units voted in favour and the required threshold was 75%.
- [42] The Incumbent General Partner says that Mr. Ashkan Tehrani's evidence shows that people, including Mr. Ashkan Tehrani himself or partners other than Mr. Ashkan Tehrani, were signing the extraordinary resolution in circumstances of confusion and pressure which justified his action to amend the limited partnership agreement.
- [43] The principal of the Incumbent General Partner asserts that it was not until the response to his application to adjourn that the Takeover General Partner raised the issue of the lack of evidence from counsel for the partnership to attack the validity of the amendment.
- [44] In my view, the lack of evidence of counsel for the limited partnership is a matter that weighs in favour of referring the matter to the trial list. It is a gap in evidence that may or may not be addressed by cross-examination on affidavits and may need to be addressed through evidence of the limited partners' counsel. As a result, I cannot conclude that the amendment was invalid on the evidence before me. It is not appropriate for me to infer that there was no such opinion or what the evidence would be about that if it were advanced.
- [45] With regard to the evidence about the dates of the amendment compared to the date the extraordinary resolution reached the required 75% support threshold, there is enough uncertainty to require clarification. The principal of the Takeover General Partner has known since the petition was filed that the Incumbent General Partner asserted that the extraordinary resolution did not receive the required 75% support before the amendment to the limited partnership agreement was passed and so was not valid when it received the 75% support. Even though the evidence pertaining to Mr. Ashkan Tehrani's back-and-forth may not have affected the count of the vote, his evidence as to why he was changing his mind shows evidence of confusion, including that he asserts to have rescinded his vote and then reinstated it.

- [46] The Incumbent General Partner submits that the other unitholders were confused and there was pressure to sign being applied to them. The tenor of Mr. Ashkan Tehrani's flip-flop emails demonstrates this.
- [47] In my view, cross-examination on affidavits will not completely assist in clarifying or reconciling the evidence relevant to the validity of either the amendment or the extraordinary resolution. Mr. Ashkan Tehrani is neither an affiant nor a party, and he has not been given notice of this application in which the order that he be cross examined is sought. I make no comment on whether he should be cross examined, but an application to cross-examine him when he has not given evidence is misplaced. Other unitholders are neither affiants nor parties, but they may also have relevant evidence on these issues.
- [48] The principal of the Takeover General Partner is present in court and is prepared to testify about the date the unitholders signed the extraordinary resolution. However, when the Incumbent General Partner suggested cross-examination several weeks ago, the Takeover General Partner refused to be cross-examined. His evidence may not be definitive on when other unitholders signed and whether they signed for limited purposes, rescinded, or changed their minds similar to the indecision and actions displayed in Mr. Ashkan Tehrani's emails.
- [49] It is my view that getting to the bottom of the factual issues pertaining to the validity of the amendment and the timing of the extraordinary resolution in relation to the amendments requires documentary and oral discovery as well as possibly other tools available in an action, such as pre-trial examination of witnesses or subpoenas to testify at trial. For clarity, I make no comment on whether those other steps should be made available. I am simply observing that an action with trial procedures is an appropriate method of finding facts in this case.

Issue 2 - Does the question of whether the Unitholder BST was in default raise conflicts that require cross-examination or bona fide triable issues requiring conversion to an action?

- [50] Given my conclusion on the first issue and the third issue (below), I do not need to address this in detail, but I will briefly set out the conflicting evidence on this.
- [51] BST is a unitholder controlled by the same person who controls the Takeover General Partner. BST holds over 23% of the units in the limited partnership. In April 2019, the limited partnership issued a voluntary cash call. BST responded to make a cash contribution in exchange for additional units. He sent a cheque but asked the general partner to not cash it. This cheque was not cashed. In October 2019 BST tendered a cheque in the same amount. The Takeover General Partner asserts that the second cheque was in satisfaction of the cash call and that cash call is noted on the subject line of the cheque.

[52] The evidence of the principal of the Incumbent General Partner is that the second cheque was not in satisfaction of the cash call, but rather was a loan, and the cash call is still outstanding. The outstanding cash call places BST in default and disentitled it to vote on the extraordinary resolution in the submission of the Incumbent General Partner.

[53] The relevant provisions of the limited partnership agreement that pertain to partners in default are ss. 17.1 and 17.5. They read as follows:

17.1 Default by Limited Partner

If any Limited Partner fails to pay the Partnership any amount agreed to be paid by such Limited Partner pursuant to any cheque, promissory note, loan document or other instrument in respect of the Subscription Price for a Unit within 15 days of such payment becoming due, fails to make any adjustment as required pursuant to a notice on the day such adjustment is required to be made pursuant to section 11.4 or becomes a Defaulting Limited Partner pursuant to section 3.14, the General Partner shall be entitled, without further authorization and upon ten days' written notice to Defaulting Limited Partner, in addition to any steps taken under the provisions of this Agreement and any other legal remedies available to it, to sell the Unit held by the Defaulting Limited Partner on such terms and conditions as it deems reasonable in order to provide the funds to remedy such default, unless such default is remedied by the Defaulting Limited Partner prior to the expiry of such ten day notice period.

...

17.5 Voting Rights

The General Partner shall, while a Limited Partner is a Defaulting Limited Partner, exercise as the duly authorized attorney and agent of such Defaulting Limited Partner and such manner as the General Partner in its sole discretion shall determine, all voting rights attached to such Defaulting Limited Partner's unit.

[54] The Takeover General Partner says that I can rely on the evidence of the second cheque noted to be a cash call to resolve this conflict. It also asserts that there has never been any notice by the Incumbent General Partner that BST was in default, from which I should infer that BST was not in default.

[55] The Incumbent General Partner asserts that s.17.1 of the limited partnership agreement did not require it to give notice of default to BST unless it was seeking to sell BST's units. It did not seek to sell BST's units before the April 16, 2020 extraordinary resolution.

[56] The Incumbent General Partner asserts that other evidence will show that the second cheque was a loan, including the limited partner's financial documents. It says that under s. 17.5 of the limited partnership agreement, it was mandatory that the Incumbent General Partner vote BST's units on the extraordinary resolution given BST's state of default, and BST had no right to vote them, rendering the results of the extraordinary resolution invalid.

- [57] The resolution of this issue requires more evidence than has been led. In particular, more evidence is required on the two cheques, why there was a delay between the cash call and the second cheque, what the second cheque was for, and how to interpret the limited partnership provisions on default.
- [58] The interpretation issue might be appropriate for the resolution through a petition if the evidence was not in conflict, but the evidence does conflict in a manner consistent with what the Court of Appeal described in H.M.B. Holdings. These issues are appropriately the subject of discovery and possibly evidence and cross-examination at trial if the factual conflicts remain after discovery.

Issue 3 - Does the relief that the Takeover General Partner seeks, including transfer of the Incumbent General Party's shares in the Nominee, raise a triable issue?

- [59] The petition sets out the relief that the Takeover General Partner seeks to effectuate the extraordinary resolution. It includes transfer of the title of land held by the Nominee under a bare trust. The Takeover General Partner asserts that the other broad relief it seeks also encompasses an order that the Incumbent General Party's shares in the Nominee be transferred to it.
- [60] The relief sought in the petition is set out in para. 1(a) through (g) as follows:
1. A declaration and order that:
 - a. The Extraordinary Resolution passed on April 16, 2020 by 85% of the limited partners of the Anmore - Atti Limited Partnership (the "LP") is valid;
 - b. The Respondent, 1720 East Road Inc. ("1720"), has ceased to be the General Partner of the LP effective April 16, 2020;
 - c. The Petitioner, 1247415 B.C. Ltd. ("124"), is the General Partner of the LP effective April 16, 2020;
 - d. The Respondents will immediately do all things necessary to transfer the administration, management, control, and operation of the business of the LP and transfer the books, records, and accounts of the LP to the Petitioner, and will execute and deliver all deeds, certificates, declarations and other documents necessary or desirable to effect such transfer in a timely fashion;
 - e. The Respondents will immediately do all things and take all steps necessary to transfer title of the LP's property held by the Respondent, 0763947 B.C. Ltd. ("076"), to the Petitioner, and the Respondents will execute and deliver all deeds, certificates, declarations and other documents necessary or desirable to effect such transfer in a timely fashion;
 - f. Counsel for the Respondents, Adam Soliman ("Mr. Soliman") will immediately transfer all funds and other property or assets he currently holds of the Respondents, in trust or otherwise to the Petitioner; and

- g. The Respondents are permanently enjoined from any dealing with the assets of the LP except for the purpose of effecting the transfer of the assets and documents to the Petitioner in accordance with the terms of the order sought.
- [61] I do not agree that the relief sought in the petition encompasses the transfer of shares that the Incumbent General Partner holds in its Nominee to the Takeover General Partner. Nothing is said in the petition about fiduciary duty or how it could support the relief sought.
- [62] The Incumbent General Party says it is not complicated and it is obvious because the cost of transferring title, the relief it expressly seeks, is prohibitively expensive and the best interests of the limited partnership are served by a share transfer of the Nominee.
- [63] The Takeover General Partner asserts that because the Incumbent General Partner owes fiduciary duties to the limited partnership, such a transfer is appropriate to avoid the costs of title transfer. I repeat that nothing is said in the petition about the fiduciary duties of the general partner or how that supports the relief the Takeover General Partner now is claiming.
- [64] The argument supporting share transfer is complicated and should be supported by appropriate pleadings with particulars and legal authority. It should not be raised in the manner it has been raised before me.
- [65] In addition, I agree with the Incumbent General Partner that this form of relief involves enforcement of a contract, rather than simply interpretation of it, such that it is more appropriately dealt with through an action than a petition.
- [66] I conclude that the relief sought, including share transfer, weighs in favour of converting the position to an action and placing it on the trial list.

Conclusion

- [67] I allow the application of the respondents and order this proceeding to be placed on the trial list and converted to an action.
- [68] The submissions I have heard today persuade me that in the rush to have this matter heard and decided, none of the parties or their counsel have had a full opportunity to reflect on what the real issues are and how to resolve them. To put it another way, the nature of the disputes have not fully matured. For that reason, and because no party has asked for directions on the process of the action, I will not make any case management orders or directions ancillary to my order that the matter is to be converted to an action and be placed on the trial list. The parties should consider seeking a case planning conference once the notice of civil claim and response have been filed.

Costs

[69] Costs of this application are to the respondents in the cause of the action I have ordered to proceed.

"Matthews J."

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