

CANADA / JUDGMENT

Axion Ventures Inc. v. Bonner

2023 BCSC 204

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 204 Axion Ventures Inc. v. Bonner IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: Axion Ventures Inc. v. Bonner, 2023 BCSC 204 Date: 20230207 Docket: S210438 Registry:
Vancouver Between: Axion Ventures Inc. and Axion Interactive Inc. Plaintiffs And John Todd
Bonner, Nithinan Boonyawattanapisut, Monaker Group, Inc., William Kerby, Cern One Limited,
Red Anchor Trading Corp., CC Asia Pacific Ventures Ltd., Jonathan Chen, HotPlay Enterprise
Limited, HotPlay (Thailand) Ltd., Christopher Bagguley, Mark Henry Saft, Longroot, Inc., Jane
Doe and ABC Corp. Defendants Before: The Honourable Justice Walker Oral Reasons for
Judgment Counsel for the Plaintiffs: P.J. Sullivan J. Romanoski S.R. Shuchat Counsel for the
Defendants: S.J. Marescaux C. Thompson, Articled Student Place and Dates of Hearing:
Vancouver, B.C. January 26-27, 2023 Place and Date of Judgment: Vancouver, B.C. February 7, 2023
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Officio.. 6 Determination.. 7 Variation.. 7 Nunc Pro Tunc. 15 Functus Officio. 15 Summary.. 16

Introduction

- [1] The defendants apply to vary terms of an order I made on November 9, 2022, which provide: THIS COURT ORDERS that:
1. The shares of Longroot Limited that are held and/or controlled by or on behalf of any one or more of the Defendants, the shares of Longroot Holding (Thailand) Co., Ltd. and Longroot (Thailand) Co., Limited, shall be placed in escrow or in trust (the "Escrow") in Vancouver, British Columbia, pending determination of the Action, or upon further order of this Court.
 2. The Escrow in paragraph 1 above must be completed as soon as reasonably practicable, and in any event within thirty (30) days of this Order, or as otherwise agreed to in writing between the parties to this Action or by further court order.
- [2] The defendants seek to vary the order to remove those two terms entirely from the order, and to have the order varied nunc pro tunc.
- [3] The November 9 order has been entered with the registry.

- [4] Those terms were proposed by the defendants in an effort to overcome what they described as a mistake made in an order I made on August 24, 2022, concerning the parent company of Longroot Limited, which is a company based in Delaware that, prior to its name change, was known as Longroot Inc. The company changed its name to Next FinTech Holdings Inc. For convenience, I will refer to the company as "Longroot Delaware". The corporate parent of Longroot Delaware is a company known as NextPlay Technologies Inc., a Nevada-based company ("NextPlay").
- [5] Factual context in respect of the defendants' position concerning that mistake, the nature of the claims and defences in this action, and the circumstances in which they proposed that the shares of Longroot Limited and its two corporate subsidiaries based in Thailand be incorporated in an order are found in my reasons for judgment indexed at 2023 BCSC 149.
- [6] The defendants previously applied to vary other terms of the November 9 Order, *nunc pro tunc*, and my decision in respect of that application is under reserve. In the latter part of January, they advised of their intention to apply to vary the first two terms of the November 9 Order which I read at the outset of these reasons.
- [7] The defendants contend that if the November 9 Order is not varied, they will be in breach of their contractual obligations with an American-based lender named Streeterville, who has and, I am told continues to provide financing to NextPlay.
- [8] The plaintiffs oppose the application on the basis that the defendants have not satisfied the legal tests required to obtain a variation order, let alone one that is ordered *nunc pro tunc*, both of which are discretionary orders. In any event, the plaintiffs submit that I am *functus officio* and cannot order any variation of the entered order.
- [9] The parties agree on the legal tests applicable to variation and *nunc pro tunc* orders. Legal Tests for Variation and Nunc Pro Tunc Orders
- [10] The legal test to be applied in deciding whether or not to vary the order is clear. To warrant variation of an order, the applicant must establish that the basic facts underlying the order must have changed in a "material way". The Court should not set aside or vary a term of an earlier order "unless the basic facts underlying the granting of the original order have changed, as otherwise the matter is considered to be *res judicata*": *L-2176 Holdings Ltd. v. 273925 B.C. Ltd.*, 2001 BCSC 1370 at paras. 11-14; *The Wilkie Garment Co. v. Interlock Holding Ltd.*, 1994 CanLII 886 (B.C.S.C), 53 C.P.R. (3d) 55 at para. 16; *Cox v. Seymour Village Management Inc.*, 2016 BCSC 2390 at para. 19.
- [11] An apt discussion of the test for variation is found in the reasons in *The Wilkie Garment Co.*: 15 In my view, this position does not accurately reflect the law. Rather, although the plaintiff cannot set up a new and different case for the relief granted, there is no rule of law that prevents them from augmenting their original submission. In my view, none of the material filed by the plaintiffs offends this rule. That is, the material presented augments rather than changes the case originally presented. 16 There is no dispute that pursuant to Rule 45(5) and

Rule 44(8), the court has the power to vary a term of this injunction if it was improperly made or if there has been a change in the facts or in the law that makes a variation of the injunction appropriate. That is, the court should not set aside or vary a term of an earlier order unless the basic facts underlying the granting of the original order have changed as otherwise the matter is considered to be *res judicata*. [Emphasis added; citations omitted]

- [12] In *British Columbia (Director of Civil Forfeiture) v. Hells Angels Motorcycle Corporation*, 2014 BCSC 1488, a case relied upon by the defendants, material change was established. In the *Hells Angels Motorcycle* case, the defendants applied to vary an order for document disclosure on the basis that the pleadings, which made the documents that were subject of that order relevant, were struck. The Court held that given the circumstances underlying the making of an entered interlocutory order have materially changed, the judge who made the order can reconsider and vary that order. Specifically, the Court noted at para. 38 that "it is difficult to comprehend a more material change in the circumstances which existed at the time of the making of an interlocutory document disclosure order than the striking of those pleadings upon which the relevance of those documents was assessed."
- [13] Assuming a material change has been established, to vary an order *nunc pro tunc*, the applicant must go further, and demonstrate that the circumstances warrant that a further discretionary order should be issued.
- [14] The test to refuse or grant a *nunc pro tunc* order is one of fairness; the court assesses the overall fairness of granting a backdated order by considering the diligence of the party seeking it, and the potential prejudice to the opposing party if the order is granted: *Craven v. Osidacz*, 2021 ONSC 4917 at para. 49; *Messari et al. v. Alberelli et al.*, 2017 ONSC 5304 at para. 15.
- [15] In assessing whether a variation order *nunc pro tunc* should be issued, per *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at para. 90, the court will consider the following list of non-exhaustive factors:
- a) the opposing party will not be prejudiced by the order;
 - b) the order would have been granted had it been sought at the appropriate time;
 - c) the irregularity is not intentional;
 - d) the order will effectively achieve the relief sought or cure the irregularity;
 - e) the delay has been created by an act of the court; and
 - f) the order would facilitate access to justice.
- [16] None of these factors are determinative and, as I have said, the decision to refuse or grant a *nunc pro tunc* order is discretionary: *Green* at paras. 90, 95. *Functus Officio*

- [17] The doctrine of *functus officio* applies to prevent an aggrieved party from applying to court to revisit its decision. The doctrine, discussed in the excerpt below from the reasons of the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, is narrow in its scope:
- [33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered. After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits.
- [34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure, for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole. More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court. The appeal record would be written on "shifting sand", ultimately inhibiting effective review.
- [35] That said, *functus officio* is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of *functus officio* as narrow in scope. So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality. [Emphasis added; citations omitted]

Determination

Variation

- [18] The defendants point to certain provisions in their loan transaction documents with Streeterville ("Loan Transaction Documents") to support their argument that if they move the shares of Longroot Limited into British Columbia to be held by a court-ordered escrow agent, they will be in breach of their agreements with Streeterville, giving the lender the right to pursue remedies such as foreclosure and seizure of some or all of NextPlay's assets.
- [19] I find it is not clear that compliance with the November 9 Order would, in fact, result in a breach of NextPlay's contractual arrangements with Streeterville, and for the reasons discussed below, I am unable to make that finding on a balance of probabilities.

- [20] I agree with the plaintiffs' submission that it is not clear that the Longroot Limited shares fall within the ambit of the Loan Transaction Documents as those documents refer to "Longroot Ltd." and not "Longroot Limited" and further, Longroot Limited is not a subsidiary of NextPlay. There is an ambiguity on the face of the documents that has not been resolved on the available evidence.
- [21] Assuming that those shares do fall within the ambit of Streeterville's security, I turn to consider the key provisions of the Loan Transaction Documents pointed to by the defendants. They are:
4. Defaults and Remedies 4.1 Defaults. The following are events of default under this Note (each, and "Event of Default"): (b) a receiver, trustee or other similar official shall be appointed over Borrower [i.e., NextPlay] or a material part of its assets and such appointment shall remain uncontested for twenty (20) days or shall not be dismissed or discharged within sixty (60) days; (g) Borrower or any pledgor, trustor, or guarantor of this Note defaults or otherwise fails to observe or perform any covenant, obligation, condition or agreement of Borrower or such pledgor, trustor, or guarantor contained herein or in any other Transaction Document (as defined in the Purchase Agreement), other than those specifically set forth in this Section 4.1 and Section 4 of the Purchase Agreement;
 5. Additional Covenants, Debtor hereby agrees: 5.1 to perform all acts that may be necessary to maintain, preserve, protect and perfect in the Collateral, the Lien granted to Secured Party therein [i.e., Streeterville], and the perfection and priority of such Lien; 5.5 to the extent the Collateral is not delivered to Secured Party pursuant to this Agreement, to keep the Collateral at the principal office of Debtor (unless otherwise agreed to by Secured Party in writing) and not to relocate the Collateral to any other locations without the prior written consent of Secured Party; [Bold and underlining in original]
- [22] In respect of the Defaults and Remedies clause 4.1, concerning the appointment of a receiver or trustee, I do not see how placing the shares in the hands of an escrow agent who must hold the shares subject to an order of the Court is akin to a receiver or trustee being appointed over the borrower, i.e., NextPlay. Even if it could, the defendants have not addressed in their submissions or in the evidence on this application whether the shares of Longroot Limited fall within the meaning of "material part of assets" as found in that clause.
- [23] In terms of clause 5.1, concerning the defendants' covenant to preserve and protect the assets, the defendants have not established that having the shares placed in the hands of an escrow agent subject to an order of the court, as a matter of fact, impairs Streeterville's security interest in the shares. Even if it could, in seeking the variation, NextPlay could be said to have taken those very steps in attempting to protect Streeterville's security.

- [24] Lastly, in terms of clause 5.5, regarding moving the assets, there is no evidence to show where the debtor's principal office is located, whether the Longroot Limited shares are currently at that office or elsewhere (and if the latter, then NextPlay may already be in breach), or whether NextPlay has sought Streeterville's consent to move the assets to British Columbia as required by the November 9 Order.
- [25] Assuming the defendants could demonstrate that compliance with the November 9 Order would put them in breach, they have failed to show a material change in circumstances.
- [26] As I mentioned at the outset, the impugned terms of the November 9 Order were proposed by the defendants, both in submissions of their counsel and by one of the defendants, Nithinan Boonyawattanapisut, who is an officer and director of NextPlay and Next FinTech, in her affidavit sworn November 7, 2022, in response to a contempt application brought by the plaintiffs. She (as do the parties) refers to herself as "Jess" in this litigation, and for convenience, and without meaning any disrespect, I will do so as well.
- [27] In her November 7 affidavit, Jess deposed that NextPlay and Next Fintech desperately need investment capital to come from a stock purchase agreement (from an unidentified investor) that was the subject of the plaintiffs' extant contempt application. To overcome issues related to the defendants' failure to give notice of their intention to enter into the stock purchase agreement, Jess deposed:
51. In summary, any impediment caused by the Plaintiffs to then Investment closing as planned would thus have catastrophic repercussions for Nextplay, Next Fintech, and Longroot Cayman [i.e., Longroot Limited], which would be starved of the financing necessary for the maintenance and growth of their ongoing business operations.
52. To reassure the Court that the Crypto Asset is in no way put at risk by the Investment, Nextplay and Next Fintech would agree to place Next Fintech's shareholding in Longroot Cayman [Longroot Limited] in trust, with appropriate orders of the Court to be determined by the Court and the parties.
53. In addition to the two discussions referred to above, and to make it clear that the Crypto Asset is adequately protected pending litigation, on November 5, 2022, my husband advised the Purchasers that Next Fintech planned "to agree with Axion not to transfer the Longroot (crypto portal) assets or to put them into Trust pending the outcome of the disclosed litigation". Attached hereto and marked as Exhibit G is a true copy of the email dated November 5, 2022 wherein the name of the Purchasers was redacted. [Bold and italics in original]
- [28] The defendants' counsel echoed her evidence, for example, in these submissions of defence counsel on November 7, 2022: (p. 22) 6 SUBMISSIONS OF THE DEFENDANTS BONNER AND 7 BOONYAWATTANAPISUT BY CNSL A. McCOOMB: 14 But I'm going to 15 leave the discussion of the particulars to 16 Mr. Forget. 17 Before I do that, I do want to just comment 18 on what I think is probably the business end of 19 this discussion, which is around the

interim 20 interim and the point that you just wound up on 21 vis-à-vis Next Fintech and the idea of putting 22 shares in the trust. So at the end of the day, 23 as we said last time, Mr. Justice Walker, our 24 client's position is that -- I understand what 25 Mr. Sullivan is saying today, which is that what 26 he was always seeking is relief in respect of 27 Longroot, Inc., and so tying up, for example, 28 Longroot (Cayman) in trust doesn't get him what 29 he is seeking in the first place. But I would 30 suggest that what the court heard before and what 31 was telling in what Mr. Sullivan just noted for 32 you from his amended materials is that what we've 33 always been talking about and concerned about is 34 the crypto asset. And the word asset is 35 important. And I say that in particular because 36 once upon a time when the issues and events that 37 Mr. Sullivan's claim -- his client's claim and 38 concerns took place the only thing that Longroot, 39 Inc. owned was Longroot (Cayman). It was very 40 simple that way. It was this vertical chain of 41 the Delaware company and then a Cayman company 42 and then a Thailand company. And now that I say 43 it out loud it doesn't sound simple at all. But, 44 at least, the only thing it owned was the crypto 45 asset. And what Jess's affidavit evidence before 46 you today in part demonstrates is that simplicity 47 is no longer the case 'cause there are now other (p. 23) 1 business interests that are tied up in what 2 formerly was Longroot, Inc., which is in part why 3 it's not called Longroot, Inc. anymore. It's 4 called Next Fintech 'cause it's carrying on more 5 business than just the crypto asset. 6 And, so, with that in mind, what we offered 7 last time and what we're still instructed to 8 offer to the court is that the shares of Longroot 9 (Cayman) can be placed into trust so that they 10 cannot be interfered with and that the court's 11 ability to issue orders and judgments directing 12 that whatever happens happens and that those 13 judgments are ordered at -- at -- at the end of 14 the day, let's say, that that, too, can be 15 preserved, be preserved by putting the shares, in 16 our submission, into trust. 17 Now, the question was raised by Mr. Sullivan 18 last time around what if other people take issue 19 with that. And what we can tell the court is 20 that the investor in this case has been put on 21 notice of that intention. As you noted in Jess's 22 affidavit, an email was sent to them advising of 23 that. That's my understanding. I'm not giving 24 evidence. But it is my understanding that no 25 response to that notice has been given, no 26 objection has been taken. No consent has been 27 given, but no objection either. 28 So the point I'm trying to communicate is 29 that to the extent that what we're really 30 concerned about here is preserving an asset so 31 that they can form part of a meaningful judgment 32 in this case, if we ever get there, in this case 33 our clients are prepared not only to put that 34 asset itself into trust, not even on a temporary 35 basis, but until this case is resolved. That's 36 what they have communicated and that's what they 37 communicated to the plaintiffs. So I'm sorry for 38 the coughing. And so -- so that's -- that's what 39 we're prepared to do. And in view of the fact 40 that, as I say, the landscape of what Next 41 Fintech is and does has changed since November of 42 2020 and the issues that Mr. Sullivan's client is 43 concerned about have changed in view of that 44 fact, I say that's a sensible approach to interim 45 relief, and let's just get on to our hearing in 46 December, whenever we're going to have it 47 scheduled, with the knowledge that the crypto (p. 24) 1 asset isn't going anywhere. It's here for the 2 court to act on. (p. 26) 6 SUBMISSIONS OF THE DEFENDANTS KERBY, LONGROOT AND 7 MONAKER BY CNSL J.

FORGET: 22 CNSL J. FORGET: Yeah, okay. That was my 23 understanding as well. Yeah, one day. And so -- 24 so, frankly, today I came prepared to -- to argue 25 the interim interim relief. All of that being 26 said, as Mr. McCoomb alluded to, our client has 27 offered to essentially put in trust the Longroot 28 (Cayman) shares, which we say is the entity 29 through which the crypto asset is effectively 30 controlled. (p. 32) THE COURT: But your point is they were focused on 7 Longroot Limited, the Cayman Island company. 8 CNSL J. FORGET: That is my point. And the only 9 reason why I'm telling you this today is because 10 of the offer that was put on the table to put 11 those Longroot Limited (Cayman) shares in trust 12 pending the resolution of this litigation, right. 13 That is the vehicle through which control is 14 exercised. (p. 40) 22 CNSL J. FORGET: Okay. So the Longroot (Cayman) 23 shares we've offered on Wednesday and now we're 24 offering it again, they would be placed in trust. 25 So, obviously, those are the shares of 75 per 26 cent ownership of Longroot (Cayman) that Next 27 Fintech owns. If you go back to the org chart, 28 those are the shares that would be placed in 29 trust pending resolution of the litigation or 30 agreement between the parties. So that 31 specifically takes care of what happens with the 32 effective control of the crypto asset. (p. 68) 15 CNSL A. McCOOMB: You're asking the right questions to 16 get to the bottom of how this would work. And at 17 the end of the day our proposal means that no 18 matter what happens with the Next Fintech shares, 19 that the asset itself is still in the court's 20 jurisdiction in terms of being dealt with on 21 those terms. And I like the suggestion of 22 including the sub-co assets as well in trust so 23 that they, too, are put -- because there's a 24 reality that we've alluded to before. The 25 economic reality of the orders that we have 26 before us is that potentially those lower assets, 27 under the orders that we have they could be 28 dissipated. So we're taking those options off 29 the table and putting it somewhere where these 30 assets are segregated essentially for purposes of 31 the court's determination. [Bold in original; underlining added]

[29] The Loan Transaction Documents were entered into with Streeterville well before that evidence was adduced and those submissions were made, and after this action had been commenced. No evidence has been adduced on this application to establish, let alone suggest, that the defendants were unaware of the requirements they now point to in the Loan Transaction Documents that, they say, they would breach if the shares of Longroot Limited were placed with an escrow agent in Vancouver.

[30] To the contrary, Jess' evidence in her affidavit sworn July 28, 2022, shows that she was aware of the prospect that transferring shares of Longroot Limited "may" result in a breach of NextPlay's contractual arrangements with Streeterville. In reviewing those contractual arrangements and borrowings with Streeterville, Jess deposed:

25. Contrary to what is speculated or suggested by the Plaintiffs in the Notice of Application, as of this date, NextPlay is not in default under any of its financing or security agreements. To the contrary, NextPlay had maintained a consistent relationship with its lender, who has continued to finance NextPlay, in the normal course. However, if an injunction is granted restraining NextPlay from transferring, conveying, assigning, charging, encumbering or

otherwise dealing with one of its assets, being its equity in Longroot Ltd., this may result in a default under its financing agreements, which would result in a [sic] irreparable and unnecessary harm to NextPlay. [Italics in original; underlining added]

- [31] Thus, the defendants have failed to meet the test required to vary an order. There is no basis to vary the November 9 Order. *Nunc Pro Tunc*
- [32] The defendants have also not established any basis for a nunc pro tunc order. The purpose of the impugned terms was to preserve and bring into this jurisdiction what the defendants described as the key assets involved in their dispute with the plaintiffs.
- [33] The defendants have not established that compliance with the November 9 Order will put them in breach of their contractual obligations with Streeterville. Nor have they adduced any evidence to show that their lender will hold them in breach and if they did, that they would proceed to exercise their rights under the Loan Transaction Documents.
- [34] For that matter, the defendants have continually declined to adduce evidence showing that Streeterville has been put on notice of the plaintiffs' claims in this action.
- [35] Any potential consequences arising from compliance with the November 9 Order are solely attributable to the defendants in the circumstances. The order is not the outcome or consequence of an irregularity. The financial circumstances of NextPlay, as outlined in my reasons at 2023 BCSC 149, support the plaintiffs' concerns that if NextPlay is unable to meet its obligations to Streeterville, then that lender could proceed to foreclose in any event, resulting in a loss of the very shares to be preserved pending the outcome of this litigation. This would be to the prejudice of the plaintiffs. Varying the order would not promote access to justice. *Functus Officio*
- [36] I need not address whether *functus officio* is engaged in these circumstances, particularly where there appears to be a dispute over whether the November 9 Order was, as the plaintiffs contend, proposed by the defendants to be a final order, or an interlocutory order, as opposed to a final judgment, and capable of variation. *Summary*
- [37] To conclude, the defendants have not satisfied the legal test for variation of an order. Their application to vary the first two terms of the order of November 9, 2022 is dismissed. "Walker J."

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