
CANADA / JUDGMENT

Barron v. International Gemstone Registry Inc.

2009 BCSC 1517

COURT

Supreme Court of British Columbia

DECIDED

6 November 2009

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2009 BCSC 1517 Barron v. International Gemstone Registry Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barron v. International Gemstone Registry Inc.,

2009 BCSC 1517

Date: 20091106

Docket: 42391

Registry: Kamloops

Between:

Wesley I. Barron, doing business as: Adduce Research and B&W Remote Sensing Ltd. (doing business as R.S.L.).

Plaintiffs

And

International Gemstone Registry Inc.

Defendant

SUBJECT TO RULE 66

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

The Plaintiff, Wesley I. Barron

On his own behalf

Counsel for the Defendant

D.H. Clarke

Place and Date of Trial:

Kamloops, B.C.

September 22 - 23, 2009

Place and Date of Judgment:

November 6, 2009

Kamloops, B.C.

- [1] This is an action by the plaintiff, Wesley Barron, against the defendant company, International Gemstone Registry Inc. ("IGR"), for payment of fees for services and for repayment of shareholders loans.
- [2] The plaintiff was not represented by counsel. The representative of the defendant testified only briefly and was not cross-examined, although Mr. Barron was urged by the court to do so. Therefore, the evidentiary basis before the court is scant and there are many gaps in the basic facts and in the chronology of events.
- [3] On June 8, 2009, the plaintiff obtained an order for production of the defendant company's financial documents - some up to December 2008 and some to February 2009 - but by the time of trial, the defendant had only partially complied with the order. According to the defendant's counsel, he asked Mr. Barron at the examination for discovery to tell him what was missing, but has received no reply.
- [4] Mr. Barron says the order is perfectly clear and no further information from him is necessary in order for the defendant to comply. He takes the position that if he had up-to-date records he might be able to show that the company is solvent and thus able to pay his claims. I declined to strike the pleadings on the basis that the order had not been fully complied with, and heard the evidence so that I might be in a better position to determine the relevance of the documents that have not been produced.
- [5] It should be noted, however, despite the order, that Mr. Barron, as a director of the company, and even as a former director, has rights of inspection of the company records under s. 46 of the Business Corporations Act, (R.S.B.C., 2002, c. 57) which he has apparently chosen not to exercise.

- [6] I turn now to the substance of the action. The plaintiff, Mr. Barron, is a director and major shareholder in the defendant company, IGR. Mr. Barron invented a process by which gemstones could be implanted with a lasered serial number, detectable only by his equipment. Mr. LaFave ran a business that gave him access to wealthy clients. The two men formed the defendant company in 2004. Both were directors: Mr. LaFave was President and Mr. Barron was Secretary/Treasurer and bookkeeper.
- [7] At the suggestion of their accountants, KPMG, Mr. Barron and Mr. LaFave entered into agreements with IGR. Mr. Barron's agreement stated that he would be paid a minimum of \$10,000 per month plus expenses until he began to receive a royalty of 2.5% based on gross sales of IGR. In return, he assigned the rights to the patent to the company, agreed to continue to work on commercializing and production, and to act as bookkeeper. He agreed to act as director of IGR for no fee for three years.
- [8] Mr. LaFave testified that the company needed marketing professionals. He approached Mr. Paulidis, an American. Mr. Barron brought in Mr. Zurkowski to do a sales study. Shares were issued, with Mr. Barron and Mr. LaFave (with his wife) each taking 14 million, Mr. Paulidis taking 3.12 million, and Mr. Zurkowski taking 1 million.
- [9] According to Mr. Barron, he was compelled to give up the royalty agreement in order to complete a new management contract with some Americans in June 2005, which he did, although apparently the new managers quit in October of that year. This was never further clarified. Later in 2005, Mr. Barron agreed to a reduction in the monthly compensation from \$10,000 to \$7,500.
- [10] The company attracted shareholders and raised \$4 million to begin development through a Quebec company, INO, which specializes in lasers.
- [11] Mr. Barron obtained a patent for the laser process in the United States. There are outstanding patent applications in many other countries. Mr. Barron asserts that the patent was his personal property, obtained through his own efforts, which he then assigned to the company. Mr. LaFave testified that the patent was obtained because the industry people they approached would not deal with them unless they had a patent and the company itself guided the process of obtaining the patent. Not much turns on this, although Mr. Barron's sense of the injustice of his present position is enhanced because he feels the whole company depends on the development and use of his invention, from which he is, in his view, now excluded.
- [12] Mr. Barron received remuneration in accordance with his contract until July 2005, as did Mr. LaFave. According to Mr. LaFave, no one in the company has been paid anything since then and Mr. Barron did not contest this.
- [13] According to Mr. LaFave, Mr. Barron, together with Mr. Zurkowski and another man, Mr. Amiot (phonetic), whose role was not clarified, took control of the company in 2006 and ran it into a deficit position of \$700,000 by spending money they did not have, particularly with

regard to INO. They also incurred a bill of \$90,000 for unspecified purposes or services for another person who accompanied them during this time. Mr. LaFave said Mr. Barron and Mr. Zurkowski insisted that Mr. LaFave terminate Mr. Paulidis' connection with the company, which Mr. LaFave did, although Mr. Paulidis is still owed over \$100,000.

- [14] Mr. Barron testified that in April of 2006, the company was in need of money. Over the next year and a half, Mr. Barron lent the company approximately \$75,000 in the form of shareholders loans. According to his evidence, he is the only shareholder who has lent the company money.
- [15] There are no documents relating to these loans, but in the financial statements of the company they are stated to be "advances from a director...unsecured, due on demand," and earning interest at 19.45% [2006] and 7.3% [2007] per annum.
- [16] In October 2007, Mr. Barron's brother, who was married to Mr. LaFave's sister, required money and the two partners agreed to put up \$30,000 each. The company had recently received an injection of capital from new investors in the amount of \$400,000. Mr. Barron therefore decided to take his part of the money from the company, which was now solvent, and characterized it as part repayment of his loans. He arranged to have it recorded only after the company's fiscal year end of October 31, 2007 in order to preserve the appearance of the company's positive financial situation. Over the next several months, Mr. Barron, on notice to Mr. LaFave and with Mr. LaFave's approval, took other repayments of an additional \$29,000, for a total of \$59,000. Those moneys are the subject of a counterclaim by the defendant, who takes the position that Mr. Barron, in repaying himself for a portion of his loans, was not fulfilling his statutory duties to the company as a director, given the outstanding unpaid accounts to creditors of the company.
- [17] In early 2008, Mr. LaFave and Mr. Barron decided to increase the Board of Directors from the original two members to seven members. Mr. LaFave decided to step down as CEO in favour of a new appointment, Robert Boyd. However, according to Mr. Barron, he and Mr. LaFave decided to draw up a new management contract before the new Board of Directors came in. The significance of this new contract to the present claim was not apparent in the evidence.
- [18] Mr. Barron testified that in May of 2008, there was no money coming in so he went to work in the Northwest Territories until November 2008. He said he was in sporadic communication during that time, but managed to stay in weekly contact with their main creditor, INO.
- [19] While Mr. Barron was in the Northwest Territories, Mr. LaFave became aware of a Fed Ex letter for Mr. Barron, awaiting pickup at the office of IGR in Kamloops. Mr. LaFave was not able to pick up the letter, as it was not addressed to him, but he did manage to have INO fax a copy to him. He discovered it to be a demand for payment for a large account which Mr. Barron had allowed to accrue.

- [20] Mr. Barron testified that he did the bookkeeping and wrote all the cheques for the company, although they were approved by Mr. LaFave. Mr. Barron agreed that he had full financial control of the company from early 2004 until Mr. LaFave insisted he forward the company chequebook to Mr. LaFave in August of 2008.
- [21] Mr. Barron testified that Mr. LaFave was becoming angry with him because he would not agree to sell his shares to Robert Boyd, the person who was supposed to become CEO of the company. On one of his trips out of the bush in June 2007, Mr. Barron sent Mr. LaFave an email saying, in effect, that he did not trust Mr. Boyd.
- [22] According to an angry email sent by Mr. LaFave to Mr. Barron on October 7, 2008, Mr. Barron was president of the company throughout this period. There was no evidence adduced to explain when or how this position came to be occupied by Mr. Barron. In the email, Mr. LaFave expressed his displeasure at the large bill Mr. Barron had incurred with INO for which they now had a demand for payment, and with Mr. Barron being out of communication with the company for four months. He was also upset because Mr. Barron had not dealt with Mr. Boyd. He suggested Mr. Barron resign as director and president, and that the company reorganize before INO pushed for payment and they lost everything.
- [23] Mr. LaFave testified that their auditors, lawyers, and patent attorney had not been paid either, and all were refusing to do any work for the company.
- [24] In August of 2008, IGR's patent lawyer advised the company that he required money to keep the outstanding patent applications alive. Mr. Barron no longer had access to the company chequebook and wrote a cheque for his portion, \$2,960, on one of his own companies and recorded it as a shareholders loan against IGR. The defendant says that Mr. Barron's payment indicates that he knew the company had no money in its account; Mr. Barron denies this claim and contends that he thought the company did have money, although he was unsure as to the amount because he no longer had access to the books. He did testify, however, that he knew the company was short of funds.
- [25] On October 16, 2008, the Board met. Mr. Barron was notified of the meeting and invited to attend but did not respond. According to the reporting letter Mr. LaFave sent to Mr. Barron, the Board decided to remove Mr. Barron as an officer of the company and to remove his signing authority, but maintain his existing contract, assuming that he would continue to work with the company as a consultant, director, and major shareholder. According to Mr. LaFave's testimony, Mr. Barron remains a director. Mr. Barron says technically he is no longer a director because he was not re-elected at the last Annual General Meeting in January of 2008 which he did not attend. There was no documentation on this issue put before the court.

- [26] Mr. LaFave testified that he has paid for everything since Mr. Barron left, has kept the patent applications alive, and recently put a small sum, \$650, into the bank account. The inference is that the \$650 is the balance in the account, but Mr. Barron says without documentation, he will not accept that the company has no money. However, he refused to cross-examine Mr. LaFave on the present state of the finances.
- [27] According to Mr. LaFave, there are many creditors seeking money from the company. In addition to the \$100,000 owing to Mr. Paulidis and the \$90,000 owing to the person who accompanied Mr. Barron in 2006, Mr. LaFave testified he has received an invoice from Mr. Zurkowski for \$10,000, who is threatening legal action. Another director, Mr. Wake Walker, is owed \$25,000. Mr. LaFave himself is owed \$400,000. Mr. LaFave testified that the recession has stalemated the company, but there is over \$5 million invested in it, and they hope to continue. Future plans would require investment of another \$60 million.
- [28] Mr. LaFave agrees that Mr. Barron will eventually be owed the money he claims, but it is his position that everyone agreed and operated under the assumption that they would all be paid when the company began to make money.

POSITIONS OF THE PARTIES

- [29] Mr. Barron takes the position that he has been fired. On November 19, 2008, he demanded payment of fees and repayment of the outstanding loans. On February 4, 2009, he commenced this action for judgment for payment of \$290,773, that is \$271,125 for services rendered since July 2005, and \$19,648.00 for unpaid loans. He says he must be paid within a reasonable time, not when the company has sufficient funds, which is too vague and leaves him at the mercy of Mr. LaFave who would prefer never to pay him.
- [30] Mr. Barron agreed on discovery that all the founders understood their compensation was deferred until some money came in. However, he says now that he has been removed from management, he is entitled to be paid out in full immediately. Despite his answer on discovery, Mr. Barron says he did not agree to defer the service fees, he simply agreed not to ask for them for the time being. He argues that the company should have expected such a demand when his management position was terminated. Mr. Barron claims that Mr. LaFave always agreed he would be paid first, and that this discretion, for some reason, rests with Mr. LaFave alone, although this was not put to Mr. LaFave because Mr. Barron refused to cross-examine him. Mr. Barron says the company will ensure he is paid only after the other creditors are paid. Mr. Barron contends that the company has a duty to pay him in a timely manner. He says the company is not in bankruptcy: although it may be low on cash, it is not insolvent.
- [31] As to his claim for the shareholders loans, Mr. Barron says the financial statements show that the money he supplied as shareholders loans is payable on demand, and he demands immediate payment.

- [32] The defendant company says Mr. Barron has not been fired. Although he no longer has a management position, he is still a director. The defendant maintains that payment under the agreement for compensation for services is deferred until the company has sufficient venture capital to pay the sums. Everyone involved on this project agreed to this deferment. Not only did Mr. Barron admit this on discovery, but no one has received any payments since 2005. Mr. Barron, who controlled the finances, was therefore obviously a party to the notion of deferred compensation.
- [33] As for the shareholders loans, the defendant argues that they are not debts. Mr. Barron, as a shareholder, advanced money to the company in which he has an interest, hoping for profit. There is no agreement regarding repayment on demand, and nothing recorded contemporaneously with the transaction; there is only the notation on the financial statements. The defendant relies on *LaRonge Realty Ltd. v. Golconda Investments Ltd. et al* (1986) 7 B.C.L.R. 90 (C.A.), where the court found that advances made by a shareholder to a business carried on for the joint benefit of the shareholders and the company could fairly be described as a supply of capital for that business rather than loans, despite the advances being shown as loans on the company's books.
- [34] The defendant contends that in the present circumstances, where the venture is completely speculative, a shareholder does not lend money in the expectation that it will be repaid on demand. The shareholder can only expect to be repaid when the enterprise meets its potential, or not at all.
- [35] On the counterclaim respecting Mr. Barron's repayments to himself for his shareholders loans while the creditors were owed money, the defendant says this was a breach of his duties as a director, but acknowledges the damages are nominal, given the company's substantial deficit of over \$4 million.
- [36] Mr. Barron denies any impropriety in withdrawing money from the company in 2007 to repay himself, as it was all done with Mr. LaFave's concurrence.
- [37] During submissions, the court asked Mr. Barron whether he thought the company should be wound up or should go into bankruptcy. Mr. Barron said Mr. LaFave is pursuing other investors. He noted that the directors could decide to sell the patent rather than wind the company up, but then somewhat inconsistently, asked for an order restraining the company from dealing with the patent and the patent applications until he is paid.

DISCUSSION

- [38] Bearing in mind the limitations in the evidence, it is difficult to make findings of fact. However, what appears from the information before the court is that the company is heavily in debt. With Mr. Barron's full concurrence, it has used over \$4 million of investment funds, although there is no evidence that the investors have any concerns. It owes large amounts to a number of creditors. Mr. Barron and Mr. LaFave took monthly sums from the company until mid 2005; at that point there was no more money left to pay anyone. Mr. Barron then

lent the company some money. Mr. LaFave raised more money. Mr. Barron retrieved most of his loans from the company using the funds raised by Mr. LaFave and then spent more, running up the company's accounts with creditors. Mr. Barron was in full financial control of the company until Mr. LaFave insisted on having the company chequebook sent to him in the summer of 2008.

- [39] When Mr. Barron went to the Northwest Territories for most of 2008, making himself available only for sporadic communications and leaving Mr. LaFave to deal with the creditors, he was removed from his position as president. Now he claims immediate repayment of all of the money owing to him under his contract of services and under the shareholders loans, leaving the other directors, former and present, owed money, and the creditors unsatisfied.
- [40] Mr. Barron's claim to be paid at this time cannot succeed. The agreement with IGR under which Mr. Barron seeks to claim immediate compensation for fees of \$10,000, later reduced to \$7,500 per month, has been amended by mutual agreement. Mr. Barron and Mr. LaFave are the original founders of IGR and the signatories to the agreements. According to Mr. LaFave's evidence and Mr. Barron's answer on examination for discovery, they both operated under the assumption that the agreement was amended to defer payment until the company began to make money, which it has not yet done. I am satisfied that this is the present agreement. The removal of Mr. Barron from the position of president does not serve to create a new agreement upon which all of the money becomes due and owing to Mr. Barron upon demand.
- [41] As for the shareholders loans, Mr. Barron testified that the company needed money, which is why he made the loans. He was keeping this speculative venture afloat. He has already recovered most of the loans. He cannot now claim repayment of the balance of his loans in preference to other creditors.
- [42] There may well be other reasons why a director or shareholder cannot demand money in the present circumstances where the company is almost insolvent and where there are many creditors unpaid, but without proper argument and an evidentiary foundation, I am unable to deal with the issues further. There may also be other types of actions available to Mr. Barron as a shareholder if he is of the view that he has been subject to oppression by the other directors.
- [43] Suffice it to say that the plaintiff has not proven entitlement to the money at this time and the claim is dismissed.
- [44] In my view, the counterclaim should also fail. The claim was initially advanced in breach of fiduciary duty and conversion, but was amended during argument to reflect only a statutory claim under s. 142 of the Business Corporations Act for failing to act honestly and in good faith in the best interests of the company. It may be that Mr. Barron should not have repaid himself in preference to other creditors, but I have only vague references to other amounts owing in that general timeframe. According to the emails presented by Mr. Barron, all the

repayment moneys were withdrawn with Mr. LaFave's concurrence, so I am not prepared to find a breach of Mr. Barron's duties as a director on the basis of the material presently before me. The articles and memorandum of the company are not in evidence, and no breach of them was alleged.

- [45] Costs in this action are subject to Rule 66. The trial of the claim and counterclaim took place over one and a half days. The plaintiff obviously took the counterclaim seriously, and was at pains to rebut the allegation contained therein that he had breached his fiduciary duties to the company, only to have that claim amended during argument. As well, the statement of defence mistakenly alleged a new agreement, and several paragraphs were struck at trial, changing the nature of the defence at the last minute.
- [46] Neither claim has succeeded. In all these circumstances, including the failure of the defendant to fully comply with the order of this court requiring production of documents, and the failure of Mr. Barron to simply attend at the company office and look at the records, it is my view that the parties should bear their own costs.
- [47] I have made several references to the unsatisfactory manner in which this case was presented. Should these parties ever embark upon litigation again, nothing in this judgment should be taken as finally determining any rights under the agreements or any amounts owing to any party or creditor, except the limited issue of whether the present claims should succeed at this time.

"M.A. Humphries J."

The Honourable Madam Justice M.A. Humphries

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Prepared on 28 October 2026 · Esheria