

CANADA / JUDGMENT

Bhuthal v. Sahsi

2022 BCSC 2504

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2504 Bhuthal v. Sahsi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bhuthal v. Sahsi,

2022 BCSC 2504

Date: 20221118

Docket: S199400

Registry: Vancouver

Between:

Bahadur Bhuthal, Jasdip Bhuthal and Sonu Bhuthal

Plaintiffs

And

Harminder Sahsi, J&S Cabinet Doors Ltd. and 1061155 B.C. Ltd.

Defendants

Before: The Honourable Justice J. Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

R.S. Fleming

Counsel for the Defendant, Harminder Sahsi:

J.K. McEwan, K.C.

E.A. Kirkpatrick

S. Sodhi

Place and Dates of Hearing:

Vancouver, B.C.

October 31 and November 15, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2022

- [1] THE COURT: These are my oral reasons for judgment being provided on an urgent basis as I understand the parties have applications scheduled next week which may be affected by my decision on this application. If a transcript is ordered, I reserve the right to edit these reasons for style, grammar, readability, and to add citations. The substance of my decision will not change. Following the approach adopted by the parties in their submissions, I will refer to them by their first names and in doing so, I mean no disrespect.

Overview

- [2] This is an application by the individual defendant, Harminder Sahsi, for an order that a person independent of himself or the plaintiffs be granted conduct of this litigation on behalf of the two corporate defendants, J&S Cabinet Doors Ltd. ("J&S") and 1061155 B.C. Ltd. ("106"). Harminder initially sought an order permitting him to appoint and instruct counsel. However, at the outset of the hearing, Harminder advised that he would only be pursuing the alternative relief, namely, appointment of a special director to retain and instruct counsel for the corporate defendants.
- [3] In reply, counsel for Harminder provided further clarification that the order sought is not necessarily for a special director, as a matter of corporate law, but simply someone who can properly consider the interests of the corporate defendants independent of the shareholder parties and retain and instruct counsel.
- [4] The application is opposed by the plaintiffs, who say that Harminder is already defending the corporate defendants' interests and that as such, the procedural difficulties that will arise from appointing counsel along with the associated cost and resulting delay are unnecessary.

Facts

- [5] There is a lengthy history of dealings between the parties such that the factual background to this litigation is complex and involves multiple proceedings. I will only summarize the background that is material, in my view, to this application.
- [6] The plaintiff, Bahadur Bhuthal, and the defendant Harminder Sahsi, are currently the sole directors of the corporate defendants. Each hold a 50-percent interest through their respective holding companies. The plaintiffs Jasdip and Sonu Bhuthal are sons of Bahadur and are employees of J&S.
- [7] For a period of time from approximately November 2001 to sometime in 2014, Harminder's sister Pardeep Sahsi and her husband Sukhwant Sumbal also held a one-third shareholding in J&S. They were ultimately bought out in 2014 after a dispute arose between the families, and litigation ensued.
- [8] This action was commenced in August 2019. The plaintiffs plead a contractual claim to two-thirds of the profits of the corporate defendants and seek declaratory relief as to their entitlement to the companies' profits under an alleged profit-sharing agreement, and orders directing the distribution of the companies' profits in accordance with that profit-sharing agreement. Alternatively, they advance a claim in unjust enrichment. No relief is sought by Bahadur. The plaintiffs say he was named because of his role as a shareholder in the companies, and because if Jasdip and Sonu succeed in their claims, Bahadur's interest will be affected in the same way as Harminder's.
- [9] The corporate defendants have not been and are not currently represented in this proceeding. Counsel for Harminder does not represent the corporate defendants and rightly concedes that he cannot do so given the potential conflict of interest arising from the plaintiff's proposed amendments.
- [10] Counsel for the plaintiffs also accepts that he cannot represent the corporate defendants and does not seek to do so. The plaintiffs do, however, assert that "management" of the companies, who they say comprise the three plaintiffs and Bahadur's wife, Kuldeep, can retain and instruct counsel pursuant to a director's resolution they assert was passed at a meeting in September 2022.
- [11] The profit-sharing agreement that is central to the plaintiffs' claim was initially alleged to have been made February 2015 between the plaintiffs and Harminder. The plaintiffs subsequently amended their pleadings to assert that the profit-sharing agreement was modified at an October 2015 meeting. The plaintiffs say that no profits have been distributed from the companies since February 2015 other than a partial distribution in April 2016.

- [12] Jasdeep gave evidence on discovery regarding the April 2016 partial distribution of profits under the alleged profit-sharing agreement, which Harminder says suggests that such payments were made as bonuses to preclude pay-outs to Pardeep and Sukhwant, who were at the time still one-third shareholders in J&S.
- [13] Harminder has also commenced a separate oppression proceeding in which he alleges that he has been the subject of oppression and that the management of the companies is deadlocked such that relief is warranted under s. 328 of the Business Corporations Act, S.B.C. 2002, c. 57. That petition has not yet been set for hearing.
- [14] Harminder initially advised the plaintiffs of his position that the corporate defendants ought to have counsel in June 2021. However, given that the companies were not alleged to have been party to the profit-sharing agreement at that time, he concluded counsel was not necessary and elected to proceed and subsequently filed a motion to strike certain of the plaintiffs' pleadings instead.
- [15] The matter was set for trial in July 2021, but did not proceed as there was no judge available. The trial is now scheduled for 18 days commencing October 10, 2023. The parties agree that if the relief sought on this application is granted, it is unlikely to jeopardize the current trial dates.
- [16] On September 6, 2022, Harminder called a meeting of the directors--himself and Bahadur--to consider a resolution appointing counsel for the corporate defendants. That meeting was held on September 19, 2022, at which Harminder put forward a resolution that would have permitted him to retain and instruct counsel for the corporate defendants. As noted earlier, that was also the initial relief sought on this application, but Harminder now concedes that as a result of the amendments presently sought by the plaintiffs, he may also be conflicted and abandoned that aspect of the relief sought on this application, pursuing only the alternative relief.
- [17] Harminder says that at the shareholders' meeting on September 19, 2022, he and Bahadur agreed in principle to the appointment of counsel for the companies but no resolutions were passed. Bahadur takes a different position. Two weeks after the meeting, he provided minutes which purported to record the unanimous passing of a resolution to allow management of the companies to retain and instruct counsel to defend the corporate defendants in this litigation. Harminder denies this and says that no resolutions were passed at the September 19, 2022 meeting.
- [18] Back in March 2022, Harminder filed an application seeking to strike the plaintiffs' claim on the basis that the profit-sharing agreement pleaded was deficient because such an agreement could not be made without the companies being parties to it. On September 27, 2022, the plaintiffs brought an application to further amend their claim to plead, for the first time and in the alternative, that the corporate defendants are parties to the alleged agreement.

- [19] This amendment is sought in response to Harminder's application to strike and in his submission is an attempt to overcome patent deficiencies in the claim as presently pleaded to survive the strike application. As I understand it, it is the plaintiffs' proposed amendment, considered along with Jasdip's evidence on discovery about the bonus payments, that Harminder says creates the need for the corporate defendants to have independent counsel to represent them in this action, because they give rise to the potential for claims to be brought by the companies against their directors, namely Harminder and Bahadur.
- [20] Harminder says that the proposed amendments are effectively seeking to plead that the directors had J&S enter into an agreement that the company's profits would be distributed other than in accordance with their articles and to the detriment of the shareholders Pardeep and Sukhwant, which gives rise to the potential for the company to bring a counterclaim or issue third-party notices against the directors. Harminder says that the plaintiff's amendments create the potential for both him and Bahadur, as directors of J&S, to face exposure to claims from the company.
- [21] In these circumstances, Harminder says the corporate defendants ought to have independent counsel to consider the implications of the amendments now sought by the plaintiffs as they relate to the corporations' interests separate and apart from the interests of their directors. Harminder also notes that this proposed amendment may give rise to potential limitations issues, and a pre-incorporation contract issue for 106 since it was not in existence at the time the profit-sharing agreement was alleged to have been made.
- [22] Harminder's position is that but for the amendments the plaintiffs now seek, granting conduct of the litigation to an independent person on behalf of the corporate defendants would be unnecessary. Put differently, Harminder says this application arises solely because of the amendments the plaintiffs now seek to make. The plaintiffs in response say the claim has always included relief against the companies, and the new amendments do not change the fact that Harminder is already advancing all of the arguments in his defence that the companies would make.

Issues

[23] As I see it, there are two issues before me today:

- 1) Does the court have jurisdiction to make the order sought?
- 2) If so, is an order that conduct of the matter be granted to someone independent of the directors to represent the corporate defendants, warranted in the circumstances of this case?

Legal Analysis

Jurisdiction

- [24] The applicant says the court has jurisdiction to grant the order he seeks from R. 20-3(15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] and the court's inherent jurisdiction to control its process. R. 20-3(15) provides that the court may give the conduct of the proceeding to any person the court considers appropriate.
- [25] As to the meaning of granting conduct of the matter, this Court noted in *MacLean Estate v. Trianon Holdings Ltd.*, [1990] B.C.J. No. 2134 (S.C.), interpreting the predecessor R. 5(23) that the phrase ought to be interpreted as conferring the ability to "control the matter as a party".
- [26] The plaintiffs initially took the position that this rule has application only in the context of representative proceedings, but conceded in reply that it does have broader application. That concession is well-founded:
- a) Rule 1-1(3) of the Rules is clear that title and headings are for convenience only and not intended as a guide to interpretation;
 - b) The predecessor rule was R. 5(23) and was found under the heading "Multiple Claims and Parties," and the similar provision of the Supreme Court Rules, 1961 was found under Order XVI: Parties at MR 161; and.
 - c) R. 20-3(6), which pertains to representation of interested persons who cannot be ascertained, shows that the rule has applicability beyond representative proceedings in the nature of those contemplated in subsections (1) and (2), or akin to class proceedings.
- [27] There is, however, little jurisprudence interpreting R. 20-3(15). The only case directly on point having been identified by the parties is *Wray et al. v. Taylor et al.*, 2003 BCSC 1627. The parties agree that this decision is the closest factually to that before me.
- [28] *Wray* was a petition seeking to wind up the business of a law corporation operating as a law firm. The petitioners were individuals and personal law corporations who were some of the shareholders in the law corporation and who had given notice of their departure from the law firm and sought to have the law firm, which was the law corporation that was the subject of the proceeding, wound up. The respondents were the remaining lawyer at the firm and his personal corporation and the law corporation that was the subject of the winding up. The respondents brought an application seeking an order that the individual respondents be permitted to instruct counsel to conduct the defence of the law corporation.
- [29] That application was brought on the basis of R. 5(23) and sections of the then Company Act, R.S.B.C. 1996, c. 62. Notably here, *Harinder* clarified in reply that on this application he relies on R. 20-3(15) and the court's inherent jurisdiction, not the Business Corporations Act. In this case, the application respondents say that *Wray* is of little assistance on jurisdictional issues because jurisdiction was conferred by consent. That is not, in my view, an accurate interpretation of the decision. The petitioners in that case did not contest jurisdiction, but the Court nonetheless considered the issue and concluded that it had the necessary

jurisdiction under R. 5(23) at para. 14. Justice Garson (as she then was) framed the test as follows at para. 25:

- [25] In my view, whether this court ought to exercise its jurisdiction to give conduct of this proceeding to any person turns on an examination of whether there are arguments which only the Law Corporation is likely to advance, and therefore which the company ought to have counsel to advance at the hearing of the winding-up petition.
- [30] Rule 5(23) is identical to Rule 20-3(15), and no subsequent authority was provided suggesting a different interpretation is now warranted under the new rules.
- [31] Decisions of the same court should be followed as a matter of judicial comity. That is *R. v. Sullivan*, 2022 SCC 19. A decision may not be binding if it is distinguishable on its facts or the court has no practical way of knowing it existed, but if it is binding, then I may only depart from it in one of three narrow circumstances, none of which arise here.
- [32] There is no suggestion that *Wray* is not binding on me or that any of the circumstances that would permit me to depart from it arise. Following *Wray*, I conclude the court has jurisdiction to make an order appointing a person to have conduct of this proceeding on behalf of the corporate defendants under R. 20-3(15) and accept the test as set out therein.
- [33] Interpreting R. 20-3(15) in this regard is also consistent with the court's inherent jurisdiction to control its own process and procedure. As I.H. Jacob noted in his seminal paper, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23, inherent jurisdiction is a residual source of powers, which the court may draw upon "as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties, and to secure a fair trial between them".
- [34] It is also notable that inherent jurisdiction has been used in appropriate circumstances to appoint counsel to represent impecunious litigants and to appoint *amicus curiae*: *R. v. Caron*, 2011 SCC 5, and *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43.

Analysis

- [35] In accordance with *Wray*, in determining whether to exercise my jurisdiction under R. 20-3(15), I will consider whether there are arguments that only the corporate defendants are likely to advance such that they ought to have independent representation in this litigation.
- [36] The plaintiffs here advance many of the same arguments as to why counsel ought not to be appointed for the defendant corporations that were made in *Wray*. First, they say that the defendant corporations have no position that is not otherwise currently represented by *Harminder*. The current claims against the corporations are framed in unjust enrichment, and the plaintiffs point to the individual defendant's pleadings suggesting that the claim is being defended by *Harminder*.

- [37] It is true that Harminder's response denies that there has been any unjust enrichment, but in his submission, which I accept, he is not defending that claim on behalf of the corporate defendants. He is defending it on his own behalf. Nonetheless, there remains somewhat of an entity of interest on the existing pleadings in respect of that claim.
- [38] That is not, however, the end of the inquiry. It is the plaintiffs' application to amend their claim to add the corporate defendants as parties to the alleged profit-sharing agreement, which is brought in response to the individual defendant's strike application, that creates the need for counsel at this juncture. In light of that proposed amendment, it is no longer clearly the case that Harminder's position will remain aligned with the corporate defendants or that the submissions to be made by the corporate defendants on the amendment application or, if the amendment allowed at the trial in the main, would be duplicative of Harminder's position or submissions.
- [39] In my view, the plaintiff's proposed amendments give rise to arguments that only the corporate defendants may have an interest in and be capable of making. Additionally, the proposed amendments give rise to the potential for fresh claims by way of counterclaim or third-party notice that likewise will only be capable of being brought by the corporate defendants. As such, I am not satisfied that the corporate defendants' interests in defending the amendment application, or the claim if the amendments are permitted, will be adequately represented by Harminder's ongoing defence of the claims brought against him in his personal capacity.
- [40] Second, the plaintiffs raise cost, expense, and potential delay, and they say that none of that is warranted in the circumstances. They say funds ought not to be expended on counsel who would simply be duplicating the work of existing counsel for Harminder. With respect to whether the work would be duplicative, I disagree and find that in light of the proposed amendment, Harminder and the corporate defendants no longer share a complete identity of interests that such submissions would be wholly duplicative.
- [41] As to cost and expense, in my view those considerations do not outweigh the right of a party to have counsel represent its interests and make a full answer defence in this proceeding. The fact that the corporate defendants have not had counsel to date is not persuasive. The nature and scope of claim often changes over the course of litigation, as is the case here in light of the plaintiffs' proposed amendments, which I accept gives rise to a host of new issues and potential implications for the corporate defendants' interests, which may now require them to have counsel represent them.
- [42] Third, the plaintiffs submit that this application is unnecessary because the directors Bahadur and Harminder passed a resolution at the September 2022 directors' meeting where they agreed that counsel should be appointed and management, namely the plaintiffs and Kuldeep, would instruct counsel. I disagree. The evidence before me of what transpired at that meeting is, in my view, far from clear that an agreement was reached or even if one was, what was agreed to. In my view, Harminder's characterization of the transcripts of that

meeting as showing him and Bahadur talking at cross purposes is apt.

- [43] The plaintiffs' reliance on some provisions of the Business Corporations Act to attempt to give greater force to minutes from the directors' meeting prepared by Bahadur is not persuasive, and in my view, does not assist them here. Further, given the proposed amendment and its implications as outlined by Harminder and as in Wray at para. 24, it is possible that both Bahadur and Harminder will be putting themselves in positions of conflicts with the duties they owe to the corporations as directors if they were to pass a resolution authorizing the plaintiffs to have conduct of the company's defence of the action they brought against it. In such circumstances, it is difficult to see how it would be possible for them to separate what is in the best interests of the company from their own personal interests as plaintiffs vis-à-vis this litigation.
- [44] Further, I do not accept the plaintiffs' contention that a deadlock between shareholders or directors is required as a prerequisite to the court's exercise of discretion under R. 20-3(15). Regardless, the evidence before me establishes that Harminder and Bahadur have been unable to reach agreement on a form of resolution appointing counsel for the company independent of themselves.
- [45] Harminder brought forward one form of resolution for consideration, but Bahadur's meeting minutes purportedly record a different resolution being reached than that proposed by Harminder. Harminder denies agreeing to the resolution set out in the minutes, which Bahadur does not contradict. Instead, Jasdip provides evidence of questionable admissibility purporting to opine on the intention and effect of the resolution purportedly made at the meeting. Whether these circumstances are framed as a deadlock or not, counsel has not been appointed, and while Harminder no longer seeks to have himself appointed to instruct counsel, the plaintiffs maintain that some combination of themselves or Kuldeep could do so despite the fact that they are directly adverse in interest to the corporate defendants in this litigation.
- [46] In the result and consistent with Wray and *Alles v. Maurice*, [1992] O.J. No. 331, I am not satisfied that either the plaintiff Bahadur or the defendant Harminder can instruct counsel for the corporate defendants. There being no application for a receivership or leave to bring a derivative action before me, those are not options that need to be considered at this time. Nor do I see a reason at present to impose the additional cost of a receiver on the corporate defendants, particularly in light of the plaintiffs' submissions regarding the amount in issue and the corporations' financial situations.
- [47] Finally, as to the appointment of a special director, Harminder does not rely on and has not identified any provision of the Business Corporations Act that would authorize me to interfere in the corporate governance of the defendant companies to appoint special directors in the circumstances before me.

- [48] Nonetheless, I am satisfied that the plaintiffs' proposed amendments to their pleadings have resulted in a change in the nature of the new contractual claim sought to be advanced against the corporate defendants such that it can no longer be said that defences the corporations may wish to raise will be duplicative of those already being made by Harminder in his defence of the claims brought against him personally. The plaintiffs' proposed amendment to plead that the corporations were a party to the profit-sharing agreement, and the implications that flow from that pleading, have created here what had not yet arisen in Wray, namely, a divergence of interests and potential adversity of interests between Harminder as defendant and the corporations as defendants. Put differently, it can no longer be said that on the plaintiffs' proposed pleadings, Harminder's interests as a shareholder and director of the corporations are aligned with the corporations as defendants.
- [49] The corporations are also existing parties. The plaintiffs have not identified any persuasive reason why, given the amendments they seek to make, conduct of the matter on behalf of the corporate defendants ought not to be granted to a person independent of the plaintiffs and Harminder. Though of course this may be revisited if the amendments sought by the plaintiffs are denied.
- [50] The plaintiffs' proposed amendments have potential to impact the corporate defendants' interests in a matter that is divergent from the individual defendant. The interests of justice thus militate in favour of someone independent of the party being granted conduct of this proceeding on behalf of the corporate defendants. In my view, this is required given the pre-existing adversity of interest between Bahadur as plaintiff and the corporations as defendants and now potential for adversity of interest with Harminder resulting from the plaintiffs' proposed amendments.
- [51] In my view, appointment of an independent person to have conduct of this proceeding, including the plaintiffs' application to amend their pleadings on behalf of the corporate defendants, is necessary in order to do justice between the parties to this litigation and ensure a fair trial and proper adjudication of the underlying litigation and its merits. Rule 20-3(15) contemplates a person being granted conduct of a proceeding. Harminder initially sought to have himself be that person, but now accepts that this is no longer feasible given the potential implications of the proposed amendments on his position vis-à-vis, at a minimum, J&S. There is, however, no other person presently proposed by Harminder to be granted conduct of this proceeding on behalf of the corporate defendants.
- [52] As such, I order that within 30 days the directors agree on a mechanism to appoint and instruct counsel for the corporate defendants. Both the plaintiffs and Harminder are represented by experienced counsel and should be able to come to some form of agreeable procedure. Counsel for Harminder had suggested proposing a list of names from which the parties may choose someone mutually agreeable. That appears to be an efficient way of proceeding, but I will leave the parties with the flexibility to move forward in the manner that is most expeditious and best suited to their needs.

- [53] If the parties are unable to agree on a process to have counsel appointed, they have leave to apply for me for directions as needed.
- [54] The applicant is entitled to his costs of this application, in the cause.
- [55] CNSL S. SODHI: Thank you, Justice.
- [56] THE COURT: Anything further?
- [57] CNSL R.S. FLEMING: I do have one thing, Justice, please.
- [58] THE COURT: Yes.
- [59] CNSL R.S. FLEMING: The -- I understand the order to be conduct of these proceedings -- I just want to clarify, if you do not mind, that there was reference you may remember in the submissions from the applicant that there be counsel investigating potential claims against directors related to matters that are not -- may not be directly related to the proceedings. But I just want to make sure that the appointment that you're raising is only in relation to these proceedings.
- [60] THE COURT: Yes. As I understand it, the application was to have someone independent take charge of the conduct of these proceedings on behalf of the defendants J&S Cabinet Doors Ltd. and 1061155 B.C. Ltd. in this action, S199400. I am not intending to make an order that goes beyond this action.
- [61] CNSL R.S. FLEMING: Very good, thank you. And then it raises one related issue, though, which you may have missed in one of my submissions, because they were -- there was quite a bit there, but one of the concerns that is left is what impact the positions that the company takes under the care of this newly appointed person, whether those positions can be used as admissions against the company in the related oppression proceedings in which that counsel is not appointed.
- [62] THE COURT: That is not a matter that I am in any way able to deal with at this point, Mr. Fleming. That proverbial bridge will need to be crossed when you get there.
- [63] CNSL R.S. FLEMING: Very good. Thank you, Justice.
- [64] THE COURT: All right. Thank you, counsel.

"Hughes J."

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