

CANADA / JUDGMENT

Dais v. Virvilis

2020 BCSC 35

COURT

Supreme Court of British Columbia

DECIDED

14 January 2020

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2020 BCSC 35 Dais v. Virvilis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dais v. Virvilis,

2020 BCSC 35

Date: 20200114

Docket: S168555

Registry: Vancouver

Between:

Helen Dais

Petitioner

And

Peter Virvilis, Dennis Virvilis, John Virvilis, Virvilis Holdings Ltd.,

PHD Properties Ltd., Belesarius Holdings Ltd.,

Broadway Towers Holdings Ltd., 537699 B.C. Ltd.,

Walnut Gate BT Holding Limited, PHD Property Management Ltd.,

and PHD Terwillegar Park Ltd.

Respondents

Before: The Honourable Mr. Justice Marchand

Reasons for Judgment

Counsel for the Petitioner:

S.T.C. Warnett

M. Maniago

Counsel for the Respondents, Peter Virvilis and Dennis Virvilis:

P.A. Spencer, Q.C.

J.R. Facchin

Counsel for the Respondents, John Virvilis and Virvilis Holdings Ltd.

J.A. Rost

A. Girou

Place and Date of Trial:

Vancouver, B.C.

December 17, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 14, 2020

Introduction

- [1] John Virvilis is a self-made man. He has been an excellent provider for his wife, Tassia Virvilis, and his children, Peter Virvilis, Helen Dais and Dennis Virvilis.
- [2] To distinguish various family members from one another, I will refer to them by their first names. In doing so, I intend no disrespect.
- [3] Sadly, conflict within the Virvilis family has resulted in protracted litigation. By way of written reasons for judgment released on March 21, 2018, I made a number of orders requiring that Helen be bought out of various family companies. My earlier reasons for judgment are indexed at 2018 BCSC 459. Though Peter and Dennis have a significant interest in the outcome, the current application relates only to a dispute between Helen on the one hand and John, Virvilis Holdings Ltd. ("Virvilis Holdings") and Broadway Towers Holdings Ltd. ("Broadway Towers") on the other.

- [4] During the initial hearing of Helen's petition in 2018, the parties adduced extensive evidence about their family history as well as their ownership of various corporate entities, their varied contributions to the acquisition and operation of those entities, and the conflict that had resulted in irreconcilable differences between Helen and other family members in the operation of those entities. They did not provide any evidence regarding the value of their shareholdings.
- [5] On the evidence before me, I found that it was just and equitable to dissolve and liquidate the companies under s. 324(1)(b) of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. Having made that finding, all of the so-called "oppression remedies" under s. 227(3) of the BCA were available to me.
- [6] None of the parties wanted the family companies to be dissolved and liquidated. Rather, they sought to have Helen removed by different means. With respect to Broadway Towers, I concluded that it was most appropriate to make the following orders:
4. Broadway Towers, or its nominee, is ordered to purchase Helen's shares in Broadway Towers at their fair market value determined as of the date of this order by an independent business valuator who is satisfactory to each of Helen and John discounted by 40%. The terms of payment are to be determined by Helen and John.
 5. In the event of disagreement between Helen and John regarding the valuation of Broadway Towers or terms of payment, each has leave to apply for directions.
- [7] Helen and John were able to agree on a business valuator, Greg Williamson of Williamson Valuation and Litigation Support Ltd. They were unable to agree on the appropriate method to determine the fair market value of Helen's shares in Broadway Towers or payment terms. They seek direction.
- [8] Helen and John also ask that I address the costs of the previous application.

Position of the Parties

- [9] Helen seeks to have her shares in Broadway Towers valued using a market value approach based on the highest and best use of the commercial property owned by Broadway Towers with no additional minority or marketability discount applied. Based on Mr. Williamson's work and an application of the 40% discount I ordered, this would result in Helen receiving \$6,041,734 for her shares.
- [10] John seeks to have Helen's shares valued at \$2,000,000, which is all that he says Broadway Towers can afford without unduly disrupting his and Tassia's retirement income from Broadway Towers. This amount is based roughly on the value of Helen's shares in Broadway Towers using an income approach after applying the 40% discount I ordered, with no additional minority or marketability discount applied. In the alternative, if a market value approach is used, John submits that minority and marketability discounts ought to be applied on top of the 40% discount I ordered.

- [11] Regarding costs, as half of the previous application related to Helen's dispute with her father and half related to her dispute with her brothers, she seeks one-half of her costs against her father and Virvilis Holdings. She has resolved the issue of costs in relation to her dispute with her brothers directly with them.
- [12] John submits that success was divided and that he and Helen should therefore bear their own costs in relation to the previous application. He notes that Helen withdrew her oppression and unfair prejudice claims against him at the last minute and that she sought the fair market value of her shares with no discount applied.

Background

- [13] The relevant background is set out in some detail in my earlier reasons for judgment. In these reasons, I will simply summarize the most salient points.
- [14] John emigrated from Greece to Canada in 1954 with nothing more than his work ethic and business acumen. He married Tassia in 1960. Peter was born in 1961, Helen in 1963 and Dennis in 1968. John is 91. Tassia is 81.
- [15] John has been very successful in business. Relatively soon after arriving in Canada, he opened a restaurant in Vancouver. As a result of the success of the restaurant, he incorporated a company which became Broadway Towers. In the 1970s and 1980s, Broadway Towers owned a number of apartment buildings. In the 1980s, Broadway Towers sold the last of these buildings and purchased a retail centre, Lougheed Village, in Coquitlam.
- [16] In 2004, John and Tassia effected an "estate freeze" in connection with Broadway Towers for estate planning purposes. As a result, on January 30, 2004, John and Tassia's shares in the company were sold to the company in exchange for new Class D preferred non-voting redeemable shares. The Class D shares were valued at \$2,292,000, which reflected the value of Lougheed Village at that time. John was issued 49 Class A voting shares and Tassia was issued one Class A voting share. Each of Peter, Helen and Dennis were issued 100 Class B common non-voting shares valued at \$0.01 each.
- [17] In 2014, the preferred Class D voting shares of Broadway Towers were transferred to Virvilis Holdings, a company which is controlled by John. Currently, John is the sole director of Broadway Towers.

Valuation Approach

- [18] The parties focussed much of their submissions on what I had "obviously" intended in my previous reasons for judgment. The trouble is that the parties disagreed on what was so obvious about my reasons.
- [19] Given the focus of the parties' submissions on my earlier reasons, I will set out in full my critical conclusions regarding the appropriate remedy at paras. 156-166:

The Appropriate Remedy

- [156] In considering the appropriate remedy as between Helen and John, it bears repeating that determining a fit remedy is so fact-dependant that little guidance can be taken from comparing one case to another: Wilson at para. 56.
- [157] In the circumstances of Helen's claim against John and Broadway Towers, there is no evidence concerning what would happen to the shares of Peter, Helen and Dennis in the event of family discord and the prospect of future deadlock. Because of the conflicting affidavit evidence, I am not in a position to lay "blame" on any party for Helen's departure. I am determining the appropriate remedy in the context of irreconcilable family differences, not in the context of any wrongdoing. I cannot treat this as a case where Helen has been involuntarily ousted from Broadway Towers nor as a case where she is departing voluntarily. I also cannot take into account the stress experienced by John and Tassia any more than I can take into account how Helen feels about her experiences within the family and Broadway Towers.
- [158] There are, however, a number of factors which favour an earlier valuation date and/or greater discount.
- [159] For starters, right or wrong, Helen has had very little to do with the success of Broadway Towers. Even on her evidence, Helen's contributions are dated and minimal in relation to her father's contributions. Further, Helen's shares were issued as part of an estate freeze for estate planning purposes. She could never have expected to extract any value for her shares while her parents were alive.
- [160] On the other hand, a number of factors favour a current valuation date and/or no discount.
- [161] Helen's position with Broadway Towers has not changed. She was not expected to make a contribution to Broadway Towers in return for her shares. If not for the breakdown in family relationships, Helen would, in time, have derived substantial benefit from her shares in Broadway Towers, without any effort on her part whatsoever.
- [162] After having considered all of the circumstances, I consider the most appropriate and fair remedy to be that Broadway Towers or its nominee repurchase Helen's shares at their current fair market value discounted by 40%.
- [163] In my view, this valuation date and discount best meets the reasonable expectations of the parties in a way which is fair and least intrusive. Helen will still receive substantial value for her shares, with the discount reflecting that she will receive that value much earlier than she could reasonably have expected. At the same time, John will maintain control of Broadway Towers and, given Helen's willingness to receive payment over time, there is no reason for me to think that Loughheed Village would have to be sold or that John and Tassia's retirement income stream significantly impaired.

- [164] I have chosen a current valuation date because I expect that it will be easier and less expensive to complete than a historic one. Had I determined that an earlier valuation date would have been appropriate, I would have applied a lesser discount. In addition to ease of determination, from the perspective of fairness, I should add that, if land values had decreased rather than increased, I would have imposed the same remedy.
- [165] Accordingly, I order that Broadway Towers, or its nominee, purchase Helen's shares in Broadway Towers at their fair market value determined as of the date of this order by an independent business valuator who is satisfactory to each of Helen and John, discounted by 40%. The terms of payment are to be determined by Helen and John, failing which they can apply for directions.
- [166] John raised an issue at the hearing regarding the most appropriate valuation method but I received no evidence on the alternatives. If Helen and John are unable to agree on the valuation method, they can apply for directions.
- [20] Regrettably, imperfections in my reasons have caused the parties consternation. More regrettably, they did not simply ask me to clarify my reasons at a much earlier stage.
- [21] At this point, the only intellectually honest thing I can do is to provide the clarity that the parties could have and, with all due respect, should have sought much sooner. I consider it completely inappropriate for me to interpret my own reasons for judgment or to allow the parties to reargue their cases. While I do not consider it appropriate to bolster my previous reasons for judgment in any way, I do consider it necessary to add a few words of explanation.
- [22] In rendering my decision, I was fully aware that Helen's shareholdings in Broadway Towers would be very difficult to sell on the open market for a variety of reasons. They represented a minority shareholding within a closely held family company. They would not offer a theoretical third party purchaser control now or in the future. Further, they offered no dividend and would not offer a dividend for an unknown period of time. The circle of theoretical third party purchasers would be small and any theoretical sale would only be completed if the value of the shares was discounted.
- [23] When I awarded Helen the fair market value of her shares in Broadway Towers discounted by 40%, I intended for that to convey that I considered it "fair" to determine the fair market value of Broadway Towers and then apply a 40% discount to Helen's interest in Broadway Towers. I did not intend for any minority and/or marketability discount to be applied in addition to the 40% discount. Had I intended for any additional discount to be applied, I would have said so.

- [24] Further, when I awarded fair market value discounted at 40%, I intended for the fair market value of Broadway Towers to be determined based on what a willing buyer would pay a willing seller for all of the shares in Broadway Towers on the open market. I did not intend for the estimate of the fair market value of Broadway Towers' shares to be limited in any way by hypothetical conditions, such as an assumption that the commercial property owned by Broadway Towers would be subject to a non-existent restriction on development.
- [25] In this case, the income value approach to the valuation of Broadway Towers' shares does not reflect what I ordered. It is based on the assumption that the commercial property owned by Broadway Towers does not have re-development potential such that a theoretical third party purchaser would only be acquiring the current stream of income generated by Broadway Towers into the future. This is a false assumption. Broadway Towers does have re-development potential. A willing seller would never sell Broadway Towers to a willing purchaser based on the income value approach for \$13,510,000 rather than on the highest and best use of the commercial property owned by Broadway Towers for \$32,415,000.[1]
- [26] Even though John does not intend to re-develop the commercial property owned by Broadway Towers, for these reasons, Broadway Towers or its nominee must purchase Helen's shares based on the market value approach employed by Mr. Williamson discounted by 40%. According to Mr. Williamson's report, after making certain necessary and appropriate deductions from the market value of Broadway Towers, the purchase price for Helen's shares is \$6,041,734.

Payment Terms

- [27] In rendering my original decision, I was somewhat handicapped by the extent of the evidence adduced by the parties. I endeavoured to be sensitive to John's desire that he not be forced to sell Broadway Towers and that his and Tassia's retirement income from Broadway Towers not be unduly limited. Given Helen's flexibility regarding payment terms, I had no reason to think my order would produce either of these outcomes. I continue to have that view.
- [28] John has now adduced evidence regarding Broadway Towers' income, how much money he and Tassia require in their retirements and how much debt Broadway Towers can carry without impairing his and Tassia's retirement income. This information was not helpful to me in clarifying my original order regarding the valuation of Helen's shares in Broadway Towers but is helpful to me in setting out how Broadway Towers or its nominee can complete the purchase of Helen's shares.

- [29] Helen has very thoughtfully proposed that Broadway Towers or its nominee pay her \$2,000,000 on the closing of the purchase of her shares. Helen would then have judgment against Broadway Towers for the balance of the purchase price, namely \$4,041,734, with interest on the outstanding amount at the registrar's rate for post-judgment interest. Helen would be free to register her judgment against the title to property owned by Broadway Towers but enforcement of her judgment would otherwise be stayed pending certain events.
- [30] Subject to some relatively minor tweaking, mostly regarding the lifting of the stay, I will make the order sought by Helen.

Costs of the Previous Application

- [31] In the previous application, John sought to defeat Helen's claims in relation to Broadway Towers in their entirety. He argued that her shares in Broadway Towers had not been validly issued or, in the alternative, if they had been validly issued that they were subject to a resulting trust in favour of John and Tassia. I rejected these arguments which resulted in a judgment in favour of Helen. While the remedy was only 60% of what Helen was seeking, she received a very significant award. I consider her to have been the substantially successful party.
- [32] Had Helen not advanced then abandoned oppression and unfair prejudice claims, I would have awarded her one-half of her costs of the previous application at Scale B. To recognize the time spent by John preparing for the claims that were abandoned at the last minute, I consider it appropriate to order John and Virvilis Holdings to pay her one-third of her costs of the previous application at Scale B.

Order

[33] I make the following order:

1. Helen's shares in Broadway Towers shall be purchased by Broadway Towers or its nominee for \$6,041,734, with \$2,000,000 to be paid on closing and the remainder to be paid over time.
2. The closing of the sale of Helen's shares in Broadway Towers shall occur on or before February 28, 2020, or such later date as agreed by the parties.
3. Helen shall transfer all of her shares in Broadway Towers on the closing date.
4. Helen shall have judgment against Broadway Towers for the balance of the purchase price in the amount of \$4,041,734 (the "Money Judgment"), with interest to be paid on the outstanding amount of the Money Judgment on and after March 1, 2020 at the registrar's rate for post-judgment interest that is in force from time to time.
5. On or after March 1, 2020, Helen may register the Money Judgment against the title to any real property owned by Broadway Towers.

6. Subject to paragraph 7 of this order, execution on the Money Judgment is otherwise stayed until:
 - a. The later of the death of John or Tassia;
 - b. Any change in control of Broadway Towers; or
 - c. Any re-development of the property owned by Broadway Towers having a civic address of 403 North Road, Coquitlam, British Columbia.
7. On the happening of any of the events set out in paragraph 6 of this order, Helen has leave to apply to the court for an order lifting the stay of execution of the Money Judgment.
8. John and Broadway Towers must notify Helen immediately of any planned change in control of Broadway Towers or any planned re-development of the property owned by Broadway Towers having a civic address of 403 North Road, Coquitlam, British Columbia.
9. John and Virvilis Holdings shall, jointly and severally, pay Helen one-third of her costs of the application heard by the court on January 8-11, 2018 at Scale B.
- [34] As the entirely successful party, Helen shall also have her costs of the present application against John and Virvilis Holdings at Scale B.

[35] I thank counsel for their assistance and wish the parties well.

"L.S. Marchand J."

MARCHAND J.

[1] Both of these values were determined by Mr. Williamson.

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