

CANADA / JUDGMENT

Hawrish v. Hawthorn

2022 BCSC 849

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 849 Hawrish v. Hawthorn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hawrish v. Hawthorn,

2022 BCSC 849

Date: 20220519

Docket: S211121

Registry: Vancouver

Between:

Darren Hawrish

Plaintiff

And

Scott Hawthorn and Native Canada Footwear Ltd.

Defendants

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

April 25 and 26, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 19, 2022

- [1] The defendants apply for a partial stay of proceedings because they say the parties previously agreed to submit their disputes to arbitration as opposed to litigating them in the court.

Background

- [2] The plaintiff and the individual defendant are both shareholders in the corporate defendant, Native Canada Footwear Ltd. ("Company"). The Company is in the business of designing, manufacturing, marketing, and distributing footwear. By all accounts, the Company has done very well and there is significant value to its shares.
- [3] The defendant, Scott Hawthorn, and his holding company, Blood Alley Holdings Inc., collectively own approximately 61% of the common shares in the Company. The plaintiff, Darren Hawrish, owns 4.32% of the common shares, and a company to which he has some association, Presley Investments Ltd. ("Presley"), holds a further 22.69%. While the precise shareholdings are not necessarily germane to these applications, all parties agree that the plaintiff and Presley own more than 25% but less than 33.3% between them, and that the defendant owns or controls more than 50% but less than two-thirds of the common shares.
- [4] The plaintiff is the former president of the Company and was a director until 2020. The defendant has at all material times been a director, and remains so to the present day. Differences have arisen and the plaintiff commenced this claim seeking relief pursuant to the Business Corporations Act, S.B.C. 2002, c. 57.

- [5] When the plaintiff joined the Company as an investor in or about 2013, the parties entered into a shareholders' agreement (the "SHAG"), which is central to this application. The SHAG includes the following clause relating to the arbitration of any disputes:
13. In the event of a dispute hereunder which does not involve a party seeking a court injunction, that dispute shall be resolved by arbitration subject to the provisions of the Commercial Arbitration Act, R.S.B.C. 1996 c. 55 [now the Arbitration Act, SBC 2020, c. 2] as amended from time to time. The arbitrated resolution of the dispute shall be final and binding on all parties. The place of arbitration shall be Vancouver, British Columbia. At the discretion of the claimant, three arbitrators may be appointed, and in such case the majority decision of such arbitrators shall be the arbitrated resolution.
- [6] There are other paragraphs in the SHAG that are germane to this dispute, which I will set out below.
- [7] In the event of default, including a failure to observe, perform, or carry out obligations under the agreement, the parties' remedies are set out in s. 7(b). The non-defaulting shareholder may:

7(b)(i) pursue any remedy available in law or in equity, each shareholder acknowledging that specific performance, injunctive relief (mandatory or otherwise) or other equitable relief may be the only adequate remedy for a Default;

- [8] The SHAG also contemplates remedies in the event of any misuse of the Company's confidential or proprietary information. Section 10(b) of the SHAG confirms that a breach cannot be adequately compensated by a monetary award, and that an injunction or similar relief may be appropriate:

10(b) . . . The parties therefore acknowledge that in the event of any such breach, in addition to all other remedies available to the Company at law or in equity, the Company is entitled to such relief by way of restraining order, injunction, decree, declaration or otherwise as may be appropriate to ensure compliance with the provisions of Section 10(a) as may be granted by a court of competent jurisdiction and each of the parties acknowledge that the granting of such relief is fair and reasonable in the circumstances. . . .

- [9] Of importance on this application are what are referred to in the SHAG as Schedule D provisions, which is a list of certain decisions for which a special resolution of the shareholders is required. The Schedule D provisions include the following:

In addition to such Board and/or shareholder approval, if an, as may be required by law, the Special Matters listed below shall not be undertaken or decided, and the Company shall not carry out such acts or give effect to such decision, until the Shareholders of the Company have passed a special resolution confirming such act and decision:

. . .

- (b) the appointment of, or any changes to, the officers or other senior management of the Company or any of its subsidiaries;
 - (c) the hiring or termination of any managements employee of any other employee whose annual salary and other remuneration exceeds \$100,000;
 - (d) any material change in the salary, fringe benefits or other compensation whatsoever to be paid to the officers or senior management of the Company or any of its subsidiaries;
 - ...
 - (g) any borrowing by the Company or any of its subsidiaries;
 - ...
 - (m) the creation, allotment or issue of, or agreement to create a lot or issue, any shares or the securities of the Company or any of its subsidiaries, or the granting of any options or right capable of becoming an option to purchase any shares or other securities of the Company or any of its subsidiaries. . . .
- [10] In addition to the SHAG, the plaintiff says there is also a voting trust agreement, pursuant to which the defendant was obligated to vote his shares such that the plaintiff would always be a director of the Company. The plaintiff says that the voting trust agreement, also referred to as the "side agreement" was a condition of his agreeing to invest in the Company.
- [11] Although no signed version of the voting trust agreement is in evidence, the parties have nonetheless had discussions about its impact in the past. It is common ground that the plaintiff ceased to be a director in 2020 when the defendant did not vote his shares in such a manner.
- [12] Around the same time, the Company was seeking alternative financing arrangements with outside investors, one of which, referred to as the "Yves Transaction", would have necessitated changes in both the SHAG and the voting trust agreement. The Yves Transaction never came to fruition as a result of shareholder concerns, including but not limited to the plaintiff's.

These Proceedings

- [13] On February 3, 2021, the plaintiff commenced these proceedings by way of petition. The petition claimed relief under the oppression provisions of the Business Corporations Act. The petition was supported by a comprehensive and substantive affidavit sworn by the plaintiff. The parties agreed that the defendant would swear an affidavit in response, following which the parties then consented to convert the petition to an action.

- [14] A consent order was prepared and filed on June 15, 2021, and the plaintiff served his notice of civil claim ("NOCC") on the same date. The NOCC alleges, amongst other things, the defendant breached the voting trust agreement by failing to elect the plaintiff as a director. It also alleges a breach of fiduciary duty and breaches of the SHAG by both the defendant and the Company.
- [15] The defendant and the Company filed their responses to civil claim on September 3 and September 7, 2021, respectively.
- [16] On November 9, 2021, the Company filed an application to dismiss all of the claims against it by way of application for summary judgment. Approximately two weeks before the summary judgment application was heard, the plaintiff served an application to add Presley as a plaintiff and to amend the NOCC. The application has not yet been heard, but the plaintiff amended its NOCC as of right on January 19, 2022 ("Amended NOCC"). The nature and character of the amendments is a key issue on this application - the defendant says that the amendments advance a separate and distinct claim from the ones made in the original NOCC. The plaintiff disagrees.
- [17] Further, as part of the amendments, the plaintiff for the first time pleaded a claim for an injunction. The plaintiff argues this is important because the wording of paragraph 13 of the SHAG excludes claims where an injunction is sought from the mandatory arbitration provision.
- [18] The summary judgment application proceeded in January 2022, on the basis that the application sought only to dismiss the claims against the Company in the NOCC and not those raised in the amendments.
- [19] The summary judgment application was heard by Madam Justice E. McDonald. She reserved her decision, but coincidentally it was released on day two of this application and is reported at 2022 BCSC 651.

Legal Basis

- [20] The defendants' applications are brought pursuant to s. 7 of the Arbitration Act, S.B.C. 2020, c. 2, which states the following:

7 (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

(3) An arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

- [21] As the Court of Appeal confirmed in *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117 at para. 21, the general rule in British Columbia is that court proceedings are stayed whenever the applicant makes out an arguable case that the dispute is one that the parties have previously agreed will be resolved by way of arbitration.
- [22] The plaintiff does not dispute that the bar for granting a stay in the face of an arbitration clause is a low one, nor is it disputed that the decision as to whether or not a dispute falls to an arbitrator is one that the arbitrator is to make.
- [23] There are a number of principles that apply to the court's determination of whether or not to stay a proceeding under s. 7 of the Arbitration Act. These principles are not seriously disputed.
- [24] First, jurisdictional questions regarding the scope of the arbitration agreement are to be resolved by the arbitrator as opposed to the court: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34:
- [84] First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
- [85] If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
- [25] This is sometimes referred to as the "competence - competence" principle, that is, the arbitrator has the competence to determine whether or not the arbitration proceeding is the proper form.
- [26] Second, the court does not have an overarching discretion to determine how the dispute ought to be resolved. Rather, the wording of s. 7(2) is mandatory. The court's role is therefore limited to determining:

- a) whether the legal proceedings pertain to a matter that the parties agreed to be submitted to arbitration;
- b) whether the applicant has brought the application in a timely manner, i.e. has the application been brought prior to the party submitting its first response on the substance of the dispute; and
- c) is the arbitration agreement "void, inoperative or incapable of being performed".

[27] When addressing these questions, the ordinary rules of contractual interpretation apply, which were described by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47-48, 57-58.

[28] Third, the court's analysis is informed by policy considerations that parties to a valid arbitration agreement should be held to their bargains. If the parties have agreed that any disputes will be resolved in a certain manner, the parties will be required to follow through on the agreements they reached and should not be permitted to choose to resort to the courts for strategic or tactical reasons.

[29] The concerns about strategy and tactics apply also to the requirement that the party seeking to invoke the arbitration agreement must do so prior to taking any steps in the court proceeding. A party must not be permitted to either waste time or cause expense to his opponent by engaging in a court process only to then argue that the court process may not proceed. Equally important, a party cannot proceed by way of litigation and then seek to change track if matters are not proceeding as they might have wished or hoped.

[30] In disputes between shareholders where a shareholders' agreement includes a mandatory arbitration clause, the Court of Appeal has previously determined that arbitration is not limited to disputes concerning the interpretation of the contract. Rather, disputes that also encompass allegations of breach of trust and breach of fiduciary duty, if based on the shareholders' agreement, will also fall within the ambit of the mandatory arbitration clause under that shareholders' agreement: *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 [St. Pierre].

[31] It is against that backdrop that I return to the applications before the Court.

Positions of the parties

[32] The defendants are only entitled to a stay if these applications were made in a timely way; in other words, to mirror the language of s. 7(1) of the Arbitration Act, did the defendants bring these applications for a stay before submitting their first responses on the substance of the dispute?

- [33] The defendants argue that the claims under the original NOCC pertain primarily, even if not exclusively, to the plaintiff's allegations that the defendant breached the voting trust agreement by failing to elect him as a director. As for the amendments, the defendants argue that these all pertain to interpretation and enforcement of the SHAG and that the two sets of claims are different and distinct.
- [34] For his part, the plaintiff argues that his claim for an injunction in the Amended NOCC renders the arbitration clause inoperable based on the plain wording of s. 13 of the SHAG. The arbitration clause states that the parties will arbitrate their disputes if the dispute "does not involve a party seeking a court injunction".
- [35] The plaintiff also says that the claims in the Amended NOCC all pertain to the same claims, namely that he has been oppressed by the defendant. He says that he was not previously aware that the defendant had purported to make changes to the SHAG as it relates to the Schedule D protections, and he was also not aware that the articles had never been amended to implement the terms of the SHAG, including those Schedule D protections. The plaintiff says that the substance of the dispute is clearly set out in the notice of claim, which is grounded in oppression, breach of fiduciary duty and knowing assistance, and this has not changed as a result of the amendments to the NOCC.
- [36] The defendants suggest that the fact the plaintiff says he was not previously aware is further proof that the allegations are new.

Issues

- [37] The relief sought by the defendants on these applications is that only the additional claims articulated under the Amended NOCC should be stayed.
- [38] The question is not whether the claims fall under the arbitration clause, but rather whether the defendants have already attorned to the jurisdiction of the court because they have already taken procedural steps in the litigation.
- [39] There is no dispute that the plaintiff's claims could fall under the arbitration clause because the plaintiff's claims as set out in the Amended NOCC include allegations that his rights as a shareholder under the SHAG have been violated, and the arbitration clause is found in the SHAG.
- [40] There is also no dispute that the defendants have already attorned to the court with regard to the claims in the original version of the NOCC because substantive affidavits have been filed, after which the defendants have:
- a) entered into a consent order that confirmed that the Supreme Court Civil Rules would apply to the dispute;
 - b) filed responses to civil claim which made references to, and expressly denied the plaintiff's claims under the SHAG;

- c) the Company filed an application to summarily dismiss the claims; and
 - d) the defendant, although not the Company, has provided extensive lists of documents.
- [41] The question of attornment therefore depends on whether or not the Amended NOCC raises new claims, or if they are the same claims as those already asserted in the original NOCC.
- [42] The question of whether the defendant or the Company have made their applications in a timely manner depends on the answer to the question of whether the proposed Amended NOCC alleges different claims. If the claims are different, the applications should be granted.
- [43] For the reasons that follow, I conclude that the claims in the Amended NOCC are substantially the same as those in the original NOCC, and the applications are dismissed.
- [44] I therefore do not need to address the plaintiff's argument that his claim for injunctive relief in his Amended NOCC would suffice to oust the jurisdiction of an arbitrator.

Discussion

- [45] I begin by noting that although a stay may leave the parties in the position of having some aspects of the dispute between them before an arbitrator and other aspects before the court, this is a function of the parties' agreement. Courts have recognized that a consequence of an arbitration clause may be the bifurcation of proceedings, but so long as the party is not precluded from eventually pursuing the other relief in court, there is no prejudice: *The Owners, Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 103. A stay is not the same as a dismissal and does not prevent a claim from being advanced; rather, it simply delays adjudication of the claim until some other event has happened.
- [46] I therefore do not accept that the plaintiff's concern about bifurcated proceedings is, in and of itself, a sufficient justification to deny the applications for a stay. The parties must be presumed to have envisioned that certain disputes would be resolved through an arbitration process when they agreed to the arbitration clause in the SHAG.
- [47] The plaintiff's case is three-pronged: oppression, breach of fiduciary duty, and knowing assistance. Both the claim for oppression and the claim for breach of fiduciary duty are based not only on the voting trust agreement as the defendant alleges, but also on the provisions of the SHAG.
- [48] The plaintiff's claims are that the defendant has breached the provisions of the SHAG, and in particular, has acted contrary to the Schedule D minority protections. This was specifically pleaded in the NOCC, and was supported by the affidavit that accompanied the petition.

- [49] While the plaintiff also alleges the breach of the voting trust agreement based on the defendant's failure to elect him to the board of directors, I do not accept that the pith and substance of the plaintiff's claim relates solely to his exclusion from the board. The plaintiff in his NOCC makes specific reference to the Yves Transaction and the defendant's intention to dilute shares, change the provisions of the SHAG, and override, or at least ignore, the voting trust agreement.
- [50] The defendant argues that the Yves Transaction never occurred and therefore it is not a live dispute. I do not agree. The threat of an oppressive act, even if the threat has passed before the matter proceeds to court, will not necessarily oust the court's jurisdiction to find oppression. If the aggrieved shareholder continues to suffer from the effect of the past oppression, the application may be held to be timely even though oppressive actions themselves have ceased: *Khela v. Phoenix Homes Limited*, 2015 BCCA 202 at para. 52. Indeed, Justice McDonald heard the same argument by the Company during its summary judgment application and rejected it at paras. 34 to 39.
- [51] By filing their responses to civil claim, the defendant and the Company have already agreed that the Supreme Court of British Columbia will determine whether the plaintiff has been oppressed by virtue of his exclusion from the board of directors by way of a breach of the voting trust agreement and by the defendant's efforts to ignore the Schedule D restrictions designed to protect minority shareholders such as the plaintiff.
- [52] What the plaintiff says he did not know at the time he filed the petition and the NOCC was that the defendant had already purported to consent to a waiver of some of the Schedule D restrictions. Section 14 of the SHAG provides for amendments, and s. 14(b) states the following:
- 14(b) Amendments. This Agreement may be amended and any breach of this Agreement may be waived and be valid, effective and binding upon all Shareholders by written agreement of the Company Shareholders holding at least 50% of the issued and outstanding Common Shares in the capital of the Company, however, in no instance shall this Agreement be amended without the written consent of Hawthorn. Any amendment that would materially and adversely affect such Shareholder disproportionately (and without regard to the number of Shares held) more than any other Shareholders holding the same class of Shares as such Shareholder shall not be effective against such Shareholder without each Shareholder's written consent with respect thereto.
- [53] According to the defendant, a proper reading of this clause afforded him the opportunity to amend the SHAG unilaterally.

- [54] The defendant in his response to civil claim specifically pled at paragraph 14 that, notwithstanding discussions around the time of the proposed Yves Transaction that there may be amendments to the SHAG, no amendments had in fact been made. However, subsequent to the filing of the NOCC and prior to filing the Amended NOCC, the plaintiff discovered that the defendant had purported to amend or waive one or more of the terms of the SHAG in 2016.
- [55] For the purposes of these applications, I assume the pleading was an innocent error or mistake - while the defendant clearly signed a document that purports to do so, it is equally apparent that the plaintiff would have seen the document the defendant signed. However, what flowed from the new information from the plaintiff's perspective was amendments to his claim that would make specific reference to the defendant's conduct in changing or waiving the Schedule D protections.
- [56] Similarly, the plaintiff also discovered that to give effect to the Schedule D protections, amendments to the articles were required but had never been made. The Amended NOCC specifically includes a claim for a mandatory injunction to be granted to compel both the Company and the defendant, as the holder of more than fifty percent of the shares, to make the changes required to give effect to the Schedule D protections.
- [57] The plaintiff will argue that the defendant does not have the ability to amend the SHAG unilaterally pursuant to s. 14(b), and that the clause is either unenforceable, or at least does not permit him to do so absent the written consent of each shareholder who might be disproportionately affected.
- [58] Although the defendants argue that improper use of s. 14(b) of the SHAG and a claim that the Company amend its articles to implement the Schedule D minority protections is a new claim and one that is subject to the agreement to arbitrate, I conclude the pith and substance of the dispute between the parties remains whether or not the plaintiff was oppressed, whether the defendant acted in breach of his fiduciary duty and whether the Company was liable for knowingly assisting the defendant with that conduct.
- [59] The fact that the Company never amended its articles, or that the defendant relied on s. 14(b) of the SHAG without the knowledge of the plaintiff and indeed perhaps other minority shareholders are simply additional facts to support the original causes of action, namely the plaintiff's treatment by the defendants, and whether the plaintiff is entitled to a remedy.
- [60] The plaintiff also seeks a remedy for breach of fiduciary duty here, which duty is denied.
- [61] The Arbitration Act, s. 7(1) refers to "a matter agreed to be submitted to arbitration". 'A matter' in this context does not refer to a discrete material fact upon which the plaintiff may rely. In *St. Pierre*, the Court of Appeal took a broad view of what constituted a matter that was covered by the arbitration clause, finding that it included matters beyond interpretation of the contract, such as a claim for breach of fiduciary duty.

[62] The Court concluded in *St. Pierre* that only by interpreting the contract, which included a mandatory arbitration clause, could the question of whether there was a fiduciary relationship be answered. At para. 29, the Court of Appeal cited Madam Justice Wedge's decision in *James v. Thow*, 2005 BCSC 809 at para. 73 ["James"] with approval:

While the litigation concerns allegations such as breach of trust and fiduciary duty, it remains to be determined whether the partnership agreements give rise to fiduciary obligations. The LPA circumscribes the nature of the relationship between the parties. The agreements appear to create a partnership limited to the acquisition and operation of the Aircraft. Whether James Ltd. and Thow Ltd. are partners in a general sense, or whether they are agents for one another in a general sense except as specifically provided in the agreements, are issues for the Arbitrator to determine.

[63] Presumably, the question of whether the defendants owed a fiduciary duty to the plaintiff will also be informed, at least in part, by their agreements, including the SHAG. An application for a stay brought by the defendants before responding to the NOCC may have been viewed similarly to the applications in *St. Pierre* and *James*.

[64] If the Court were to adjudicate the claims based on the facts that were pleaded in the original NOCC, but the new facts in the Amended NOCC were decided by an arbitrator, the plaintiff would be pursuing the same causes of action in both forums while relying on different material facts in support of each.

[65] For example, under the original NOCC, the plaintiff claims that his investment was contingent upon a seat on the board of directors, and a shareholders agreement including the minority protections in Schedule D, and that he relied on their enforceability. Under the Amended NOCC, the plaintiff claims that he relied on the defendant's representations that the minority protections in Schedule D were enforceable, and he seeks an injunction requiring that they be implemented. I confess I am unable to discern how one would draw a clear line between the claims under the NOCC and the Amended NOCC.

[66] Claims of oppression and of the existence of a fiduciary duty involve a holistic examination of all of the facts and of the relationship between the parties. It is not apparent how a bifurcated process could result in an overall evaluation of the plaintiff's claims if different facts were proved before different presiders, nor what process would be employed to assess and determine whether the plaintiff has established an entitlement to a remedy, recognizing that relief for oppression under the Business Corporations Act involves an exercise of discretion on the part of the presider.

[67] In all of the circumstances, I conclude that the amendments are simply additional material facts that may, if proven, serve to further ground the plaintiff's claims. They do not constitute new or discrete claims. As Justice McDonald found in her decision on the Company's summary judgment application at paragraphs 26 to 29, with the exception of a claim in conspiracy, the amendments are simply additional material facts in support of the original causes of action.

[68] Here, the defendants have clearly attorned to this Court to resolve matters relating to the plaintiff's allegations of oppression, breach of fiduciary duty, and knowing assistance as pleaded in his original NOCC. The defendants cannot now seek a stay in order to arbitrate what are in pith and substance the same matters. It is too late.

Disposition

[69] In all of the circumstances, the applications are dismissed. The plaintiff is entitled to the costs of both applications.

"Wilson J."

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