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CANADA / JUDGMENT

## Jahn v. Jahn Enterprises Ltd.

2016 BCSC 2273

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 2273 Jahn v. Jahn Enterprises Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jahn v. Jahn Enterprises Ltd.,

2016 BCSC 2273

Date: 20161205

Docket: S175620

Registry: New Westminster

Between:

Ralph Jahn

Petitioner

And

Jahn Enterprises Ltd. and Udo Jahn

Respondents

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Petitioner:

J. Goheen

Counsel for the Respondents:

J. Gagnon

Place and Date of Hearing:

New Westminster, B.C.

June 23, 2016

Place and Date of Judgment:

New Westminster, B.C.

December 5, 2016

## I. Introduction

- [1] The petitioner seeks orders requiring the respondents to comply with the dissent provisions of the Business Corporations Act, S.B.C. 2002, c. 57, as amended (the "Act"). The basis for the application is the petitioner's contention that the corporate respondent has leased all or substantially all of its holdings, without obtaining authorisation to do so by special resolution, in circumstances where a special resolution was required.
- [2] The petitioner has delivered a notice of dissent and seeks to invoke the dissent provisions of the Act so that the company responds to his notice and purchases his shares.
- [3] The respondents say that the petitioner has no right to dissent because the leases were entered into in the ordinary course of the company's business.

## II. Background

- [4] Ralph Jahn and Udo Jahn are brothers and, together with their other brother, Reinhold Jahn, are the sons of Werner Jahn and his wife, Theresa Jahn. Because of the common last name I will refer to the members of the Jahn family by their first names.
- [5] Jahn Enterprises Ltd. (the "Company") is a company that was incorporated by Werner in 1979. The Company's shares consist of 100 Class A voting common shares and 3,000 Class B non-voting common shares. From November 1979 until the date of Werner's death in October 2013, Werner was the registered owner of the Class A shares and the three sons were each the registered owners of 1,000 Class B shares. Werner was the sole director and president of the Company throughout that time.
- [6] On Werner's death in 2013 his Class A shares were transferred to Udo and Theresa jointly. They were also made directors of the Company.
- [7] Theresa died in November 2014. Since that time Udo has been the sole director and officer of the Company. He has also been the sole owner of the Class A shares, although Udo says these are held in trust for the estate.

- [8] Werner also had another company, Modern Engineering (1973) Ltd, which Ralph described as "the family business". It was, and is, the operating company in the general family enterprise. It operates a machining business out of premises owned by the Company. Currently, Udo is the sole director and officer of Modern Engineering and he owns all of the voting shares of Modern Engineering.
- [9] The Company is a holding company that owns two parcels of real property and owns certain shares in Modern Engineering. Specifically, since 2006 the Company has owned 21,000 Class E non-voting preferred shares of Modern Engineering, each share being valued at \$100. According to Ralph, these shares were created by Werner and Theresa as part of an estate plan, the idea being that Modern Engineering would redeem those shares over time and the redemption proceeds would be paid equally to the three sons through dividends paid to them by the Company. In this way, the underlying value of Modern Engineering would pass to each son.
- [10] Ralph says that no redemptions of Modern Engineering shares have taken place and this operates to his detriment. He also says he has never received any dividends on account of the Class B shares he owns in the Company.
- [11] Since 1979 the Company has owned several properties and leased them to Modern Engineering and others. The details are as follows:
- a) in the 1980s the Company owned property on East Hastings Street in Vancouver. It leased that property to Modern Engineering through a formal written lease. The Company sold that property in May 1986;
  - b) in May 1986 the Company acquired property on River Road in Delta and by 1987 it had constructed an industrial building there (the "River Road Property"). The Company has leased this property to Modern Engineering since 1987, although there were also other commercial tenants at the River Road Property at times; and
  - c) in January 2011 the Company acquired a commercial strata lot located on 72nd Street in Delta (the "Commercial Unit"). It leases these premises to Modern Engineering.
- [12] Ralph's counsel wrote to the Company's solicitors on October 2, 2015 and made a number of requests, including a request for copies of all leases between the Company and Modern Engineering. When no response was received, Ralph delivered a notice of dissent dated October 8, 2015 pursuant to ss. 238 and 242 of the Act. At that time, Ralph's understanding was that up to that point the Company had never entered into long-term leases and, instead, the Company and Modern Engineering merely reviewed and set rents informally each year and did not execute formal leases.

- [13] Ralph's understanding was incorrect. The Company did in fact enter into formal written leases with Modern Engineering and had done so since the 1980s. Nonetheless, Ralph submits he has a right of dissent because he considers that the long-term leases recently entered into by the Company are not transactions done in the ordinary course of business.

### III. Other Evidence

- [14] Ralph commissioned appraisals of the River Road Property and Commercial Unit to establish current values and market rents. The aggregate value of the two properties was appraised at \$4,080,000 and the total annual market rent was appraised at \$208,720. The actual annual rent payable under the current leases is \$175,320, or approximately 84% of the total appraised rent.

- [15] In his affidavit, Ralph deposed as follows:

I was advised by Udo that each year my parents would meet with Modern Engineering and the Company's Controller, Janine Lawes, to discuss the appropriate lease rate to be charged to Modern Engineering for the Properties. Udo advised me that my parents would request Ms. Lawes to perform some market research on commercial leasing rates in the area, and she would provide my parents with a range of figures. My parents would then decide on a rate, typically something in the mid-range.

- [16] The suggestion that this process took place annually is obviously incorrect given that the Company always entered into multi-year leases with Modern Engineering. Nonetheless, Ralph's general description of the process for setting lease rates was not denied by Udo and constitutes the only evidence on the subject.

- [17] In his affidavit Udo confirmed that the Company leased its properties by way of formal, multi-year leases and had done so since 1980. He said an employee of Modern Engineering, Janine Lawes, has prepared all the leases, using the same process, since the time she was first employed by that firm. Udo said the manner or process by which the properties have been leased has not changed.

- [18] Reinhold similarly deposed that the manner or process by which the properties have been leased has not changed. He also deposed that he attended a shareholders' meeting in 2006, which Ralph also attended, through which Reinhold became fully aware that the Company leased all of its properties and, in particular, that the properties were purchased for the purpose of leasing under formal written agreements.

- [19] Ms. Lawes deposed that she has been employed by Modern Engineering since 1995. Since that time her duties have included the preparation of formal written leases for the subject properties. For the River Road Property, the annual lease amount has been based on the square footage occupied by the tenant (the Company). The amount of space occupied by the Company has increased over the years. For the Commercial Unit the leasing rate has been the same since the initial lease of the unit in 2011.

- [20] Ms. Lawes said she has followed the same process for each lease she has prepared.
- [21] The most recent leases were entered into in August 2014. The River Road Property lease is for five years, with options for two more five-year terms. The lease for the Commercial Unit is for five years, with two three-year renewal options. In both leases the options include a rent arbitration process in the event that rent amounts cannot be agreed upon.
- [22] In his written submissions, Ralph summarized some terms and amounts in the River Road Property leases between the Company and Modern Engineering and between the Company and other lessees. This summary shows that between 1987 and 2007 Modern Engineering paid between \$3.85 and \$6.25 per square foot. Between 1987 and 1997 third parties paid between \$3.96 and \$6.75 per square foot, although those leases appear to have been for much smaller areas of the premises. According to Ralph, for Modern Engineering's 2014 lease of the River Road Property the lease amount per square foot is \$6.25.

#### IV. Position of the Parties

##### A. The Petitioner

- [23] The petitioner notes that s. 301(1) of the Act prohibits a company from leasing all or substantially all of its undertaking for over three years unless it does so in the ordinary course of business or it has been authorized to do so by special resolution. Only the former exception is invoked by the Company here.
- [24] The petitioner submits that the 2014 leases were not entered into in the ordinary course of business because: (1) the leases involve fundamental decisions concerning the affairs of the company; (2) there is no established method by which lease rates or leasing terms have been set; (3) in the past, the Company has treated leasing as director-level decisions, not management-level decisions; and (4) the leases were not entered into at arm's length and the lease rates are demonstrably low.
- [25] The petitioner cited cases suggesting "ordinary course of business" means decisions that may be made by management without direction or authority from a board of directors. Here, the petitioner submits, the Company has established no leasing guidelines or criteria that management could apply in order to set lease rates or lease terms. Furthermore, he claims there is no historic pattern for leases, including rent or term, other than the fact that the director (Werner) would set rates after conferring with the controller, who reviewed and reported on market rates. This, the petitioner submits, demonstrates that these decisions were made by the director of the Company, not management.

- [26] The petitioner's own analysis of the 2014 lease rates compared to market rates shows that the current rates used for the Modern Engineering leases are about 85% of market rates and are therefore demonstrably low. The petitioner emphasizes that the low rates are the result of a non-arm's length transaction. In this regard, I took the petitioner to be suggesting that these lease rates ultimately benefit Udo because he owns all the voting shares of Modern Engineering.
- [27] Finally, the petitioner says in light of the fact that the Company's only business is holding and leasing land, the leasing of all of its property is the fundamental aspect of that business and therefore ought not to be considered its "ordinary course of business".

## B. The Respondents

- [28] The respondents note that the petitioner no longer relies on a change in the leasing process as founding a basis for dissent. This was perhaps the main complaint originally made by the petitioner. Instead, the respondents note, the petitioner now relies solely on the assertion that the leases were not entered into in the ordinary course of business.
- [29] The respondents emphasize that: (1) the Company is a holding company that has as its only business the holding of land and the leasing of its properties; and (2) the long-established practice of the Company has been to lease its properties by way of multi-year leases with options to renew. The process carried out when Werner was the sole officer and director of the Company is the same process followed for the 2014 leases. Nothing has changed in decades.
- [30] As for the rent amounts, the respondents submit the Court does not have sufficient evidence to gauge the reasonableness of the rents or to conclude, as the petitioner submits, that the rates are unreasonably low in the circumstances. There is no first-hand evidence as to how the rents were arrived at. Furthermore, the materials before the Court indicate that Modern Engineering provided a guarantee of the loan or loans by which the properties were purchased, which takes this situation out of an ordinary market rent situation because that guarantee provided, and continues to provide, a significant benefit to the Company. The Company also has the significant benefit of a reliable long-term tenant that pays all of the property taxes and other expenses relating to the properties.
- [31] The respondents submit the section of the Act relied on by the petitioner is designed to protect shareholders where a company looks to sell or dispose of all or most of its assets. It does not apply to a company whose business is merely holding and leasing land.

## V. Discussion

### A. Statutory Provisions

- [32] Section 301 of the Act reads, in full, as follows:

301 (1) A company must not sell, lease or otherwise dispose of all or substantially all of its undertaking unless

- (a) it does so in the ordinary course of its business, or
- (b) it has been authorized to do so by a special resolution.
- (2) If the company contravenes subsection (1) in respect of a disposition of all or substantially all of a company's undertaking, the court, on the application of any shareholder, director or creditor of the company, may, unless subsection (3) applies, do one or more of the following:
  - (a) enjoin the proposed disposition;
  - (b) set aside the disposition;
  - (c) make any other order the court considers appropriate.
- (3) A disposition of all or substantially all of the undertaking of a company is not invalid merely because the company contravenes subsection (1), if the disposition is
  - (a) for valuable consideration to a person who is dealing with the company in good faith, or
  - (b) ratified by a special resolution.
- (4) Despite the passing of a special resolution under subsection (1) (b) or (3) (b) to authorize or ratify a disposition of all or substantially all of the undertaking of a company, the directors may abandon the disposition without further action by the shareholders.
- (5) Any shareholder of the company may send notice of dissent, under Division 2 of Part 8, to the company in respect of a special resolution under subsection (1) (b) or (3) (b).
- (6) The prohibition in subsection (1) does not apply to a disposition of all or substantially all of the undertaking of the company
  - (a) by way of security interest,
  - (b) by a lease if
    - (i) the term of the lease, at its beginning, does not exceed 3 years, and
    - (ii) any option or covenant for renewal included in the lease is not capable of extending the total lease periods beyond 3 years,
  - (c) to a corporation that is a wholly owned subsidiary of the company,
  - (d) to a corporation of which the company is a wholly owned subsidiary,
  - (e) to a corporation if the company and the corporation are
    - (i) wholly owned subsidiaries of the same holding corporation, or
    - (ii) wholly owned by the same person, or

- (f) to the person, other than a corporation, who holds all of the shares of
- (i) the company, or
- (ii) a corporation of which the company is a wholly owned subsidiary.

[33] The key provision in this case is s. 301(1)(a), which provides an exception to the dissent provisions for leases of all or substantially all of the undertaking of a company if it is done in the ordinary course of its business.

## B. General Principles

[34] Because the respondents concede that the leases in question comprise all or substantially all of the undertaking of the Company the only issue here is whether they were entered into in the ordinary course of business. It must still be remembered, however, that there are two aspects to the statutory provision: (1) whether the transaction disposes of "all or substantially all" of the undertaking of the company; and (2) whether the transaction was done in the "ordinary course of business".

[35] In *85956 Holdings Ltd. v. Fayerman Brothers Limited*, 25 D.L.R. (4th) 119; [1986] 2 W.W.R. 754 (Sask. C.A.) [Fayerman Brothers], the court reviewed the historical context of statutory dissent provisions (at 757 W.W.R.):

Historically, the sale of all of the assets of an ongoing business required the consent of all the shareholders. That was based on the theory of implied contract between the shareholders to pursue the business for which the corporation was formed. A sale of the assets would destroy that corporate purpose and therefore could not be consummated without mutual agreement to cancel the contract: see *Cotton v. Imperial and Foreign Agency and Investment Corporation*, [1892] 3 Ch. 454.

A dissenting shareholder could demand an exorbitant price for his concurring vote and exercise influence on the company beyond the extent of his interest. The common law rule was altered to allow disposition in certain circumstances, and a sale of all or substantially all of the property of the corporation made in the ordinary course of business did not require shareholder approval.

[36] The court in *Fayerman Brothers* went on to discuss both components of the provision. On the matter of "ordinary course of business" the court adopted (at 758 W.W.R.) the following definition from *Re Bradford Roofing Industries Property Ltd.*, [1966] 1 N.S.W.R. 674; 84 W.N. (N.S.W.) 276 (S.C.) [Bradford Roofing]:

Perhaps a satisfactory working phrase to describe the particular concept enacted in S. 207(1) [the dissent provision in the New South Wales Companies Act, 1961] is that the transaction must be one of the ordinary day-to-day business activities, having no unusual or special features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities such as, for example, to his board of directors.

[37] The court added the following to that definition (at 759 W.W.R.):

A transaction in the ordinary course of business that has no unusual features because it is part of the undistinguished common flow of the company's business does not require shareholder consent.

[38] The court went on to discuss the other component of the provision, "all of substantially all" of the company's assets. While this discussion is not directly necessary here because that aspect is conceded in this case, nonetheless the following excerpt provides helpful guidance in construing the provision generally:

The purpose of statutes like the one under consideration was to protect the shareholders from a fundamental change in the corporation and to ensure that the means to accomplish the object of the corporation were not impaired. A sale of all of the assets of the company would destroy the corporate business. The phrase "substantially all" is, in my opinion, intended to mean a sale which would effectively destroy the corporate business.

[Emphasis added.]

[39] Counsel referred to a few cases on "ordinary course of business" but indicated that there was a dearth of authority on the subject. This is perhaps understandable given the highly fact-specific nature of these sorts of inquiries, a feature noted in many of the authorities. The cited cases include the following:

- a) British Columbia Telephone Company v. Minister of National Revenue, [1986] 1 C.T.C. 2410, 86 D.T.C. 1286 (T.C.C.) [B.C. Tel v. MNR], where the court said:

[27] In a bankruptcy matter before the High Court of [Australia], Rich, J. wrote that for transactions to be considered in the ordinary course of business supposes "that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary business as carried on, calling for no remark and arising out of no special or particular situation": Downs Distributing Co. Pty., Ltd. v. Associated Blue Star Stores Pty., Ltd. (In Liquidation), (1948), 76 C.L.R. 463, at page 477. Street, J., of the Supreme Court of New South Wales stated that "the transaction must be one of the ordinary day-to-day business activities, having no unusual or special features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities, such as, for example, to his board of directors.": Re Bradford Roofing Industries Pty., Ltd., (1966) 84 W.N. (Pt. 1) (N.S.W.) 276 at 285; Street, J., borrowed with minor adaptations the words of Rich, J.: "the requirement is that the transaction must fall into place as part of the undistinguished common flow of the company's business, that it should form part of the ordinary course of the company's business as carried on, calling for no remark and arising out of no special or particular situation". See also Re Pacific Mobile Corporation; America Biltrite (Canada) Ltée

v. Robitaille, 44 C.B.R. 190 at pages 201 to 205.

[Emphasis added.]

- b) Roynat Inc. v. Ron Clark Motors Inc., [1991] O.J. No. 194 (Ont. Gen. Div.) [Ron Clark Motors], which again adopted the definition of "ordinary course of business" articulated in Bradford Roofing; and
- c) 369413 Alberta Ltd. v. Pocklington, 2000 ABCA 307, 194 D.L.R. (4th) 109 [Pocklington], where the court said:

[21] Courts are required to undertake a broad and case-specific analysis of the ordinary course of a particular company's business, for it is considered unwise to attempt a comprehensive definition: Robitaille v. American Biltrite (Canada), [1985] 1 S.C.R. 290 at 291. The analysis is to be achieved through an objective examination of the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation": Aubrett Holdings Ltd. v. Canada, [1998] G.S.T.C. 17 (T.C.C.).

[Emphasis added.]

[40] The court in Pocklington listed some factors to be taken into account in the analysis:

[22] In order to determine whether a transaction was in the ordinary course of a company's business, a court must consider all the circumstances which were known, or ought reasonably to have been known, by the parties at the time: Ford Motor Credit Co. of Canada Ltd. v. Centre Motors of Brampton Ltd. (1983), 38 O.R. (2d) 516 (H.C.J.). Courts have identified a number of factors which may be taken into account:

- (i) The nature and significance of the transaction: it ought to be one that a manager might reasonably be expected to carry out on the manager's own initiative without making prior reference back or subsequent report to superior authorities, such as the board of directors or the shareholders: Roynat Inc. v. Ron Clark Motors Ltd. (1991), 1 P.P.S.A.C. (2d) 191 at 197 (Ont. Gen. Div.); and 85956 Holdings Ltd. v. Fayerman Brothers Limited, [1986] 2 W.W.R. 754 (Sask. C.A.);
- (ii) The value of any asset sold: the disposition should have been made with proper regard to its value: Estevan Credit Union Ltd. v. Dyer, [1997] 8 W.W.R. 49 (Sask. Q.B.); and Ford, supra;
- (iii) The quantity of assets sold: the transaction ought not to resemble a liquidation of assets: Fayerman, supra;
- (iv) The reason for the transaction: it ought not to have occurred as a response to financial difficulties or in suspicious circumstances: Ford, supra, and Countrywide Banking Corp'n. Ltd. v. Dean, [1998] A.C. 338 (P.C.); and

- (v) The intent of the transaction: neither its intent nor its effect should have been to undermine bank security: Ford, *supra*.

To this list I would add:

- (vi) The frequency of the type of transaction: an unusual or isolated transaction might be viewed differently from a routine one; and
- (vii) The arm's length nature of the transaction: a transaction between a company and a party with whom it is related should receive careful scrutiny.

- [41] I return some of the cases just cited in order to illustrate the manner in which the principles have been applied in other factual situations.
- [42] In *Fayerman Brothers* the company was a wholesale distributor of hardware, plumbing and electrical supplies. Its normal course of business was to purchase inventory and stock and resell it to its customers. Two of the principals of the company were in failing health and were finding it increasingly difficult to compete in the marketplace. They proposed to sell off the inventory and not purchase any new inventory. One shareholder sought to invoke the dissent provisions of Saskatchewan's Business Corporations Act, R.S.S. 1978, c. B-10. The Saskatchewan Court of Appeal found the proposed sale of inventory was not a sale in the regular course of business since the stock was not to be replaced and so it was essentially a liquidation of the inventory and the operating part of the business.
- [43] In *Ron Clark Motors* a debenture granted a fixed charge over certain specific assets and a floating charge over present and future property not otherwise secured. Until the floating charge crystallized the company could dispose of its assets in the ordinary course of business. The company's finances became precarious and it ceased operating as a going concern. During this time it sold a piece of equipment to a creditor of the company in return for forgiveness of debt. Among other things, the court noted: (1) the company was not in the business of selling equipment of this type, instead its business was using this kind of equipment; (2) prior sales of this type of equipment had been done with the knowledge of the finance company; (3) the company had ceased to operate as an active business and it was experiencing financial difficulties; and (4) no money changed hands in the transaction. Herold J. concluded the sale was conducted in "somewhat suspicious circumstances" and was therefore not done in the ordinary course of business.
- [44] In *B.C. Tel v. MNR* the issue was whether B.C. Telephone Company could claim an inventory allowance under the Income Tax Act, R.S.C. 1985 c. 1 (5th Supp.), for property held for the purposes of sale "in the ordinary course of the business". The court disallowed some items because they did not involve actual sales; these are not relevant to the issue at hand. Other equipment, however, was sold to other telephone companies, albeit at cost. The court noted: (1) at least one employee of the company had these equipment sales as part of his regular duties; (2) the employee was in regular touch with the purchasers to determine their equipment needs; (3) the sales to other telephone companies were part of a cooperative

arrangement by which the firms assisted one another from time to time; and (4) the sales were not isolated. Based on those facts, the court found that the inventory for those sales was held in the ordinary course of the business of the company.

- [45] Finally, in *Pocklington* a company granted a secured charge against all its present and future assets. The financing agreement provided that the company would not sell or otherwise dispose of its assets without the prior written consent of the secured creditor, except in the ordinary course of business. One day prior to the secured creditor calling the loans and commencing the seizure of assets, the sole director and beneficial shareholder of the company transferred a substantial asset (shares in another company, which in turn owned land) to another company he owned. The trial judge concluded that since the asset transfer was part of the company's continuing attempts to secure financing to permit it to continue to operate, and the transfer was part of an arrangement designed to obtain further financing, the transfer was carried out in the ordinary course of the company's business. On appeal, the Alberta Court of Appeal reversed that finding. In doing so the Court of Appeal noted the following: (1) the company was not in the business of holding or developing land or trading in shares of corporations that did so; (2) the transfer was a material transaction requiring authorization from the board of directors; (3) the shares were sold for a nominal sum (\$100); (4) asset transfers between the company and related companies were rare and this transfer was unusual; (5) the transaction was not at arm's length; (6) the transaction occurred when the company was in fatal financial difficulty; and (7) the timing of the transaction was suspicious because it occurred at a time when the company's principal had been given notice that the secured creditor intended to act on its security.

### C. Analysis

- [46] The factors set out in *Pocklington* provide a useful starting point for the analysis.
- [47] All parties agree that the business of the Company, since inception, has been to hold real estate and to lease its properties to Modern Engineering primarily, but also to others. Throughout, the Company has entered into written, multi-year leases with Modern Engineering. Accordingly, it is evident that the Company's 2014 leases with Modern Engineering are consistent with the history of the Company's business to date. They are not, for example, unusual transactions born out of financial difficulties, nor do they constitute or resemble a liquidation of assets or the effective cessation of the business.
- [48] The crux of the petitioner's argument is that the current leases are at rates less than market rates and were set without director approval, as was done in the past. The suggestion seems to be that this was done so that Modern Engineering, and by extension Udo, would benefit. This allegation engages several *Pocklington* factors: (1) the value of the asset disposed of; (2) the intent behind the transaction; (3) the non-arm's length nature of the transaction; and (4) the nature and significance of the transaction or, in other words, whether it is a transaction that a manager might reasonably be expected to carry out without seeking approval from superiors. I deal with these as follows:

- a) lease rates: given that Modern Engineering guaranteed the loans by which the Company acquired its properties, as well as some other benefits it offers as a tenant, it is not at all obvious to me that lease rates at 84% of appraised market rates represent a material or substantial undervaluing of the Company's assets.

I note as well that there is no appraisal evidence about how lease rates from prior leases compared to the market rates of the time, although there is evidence about the rates set in the Company's leases to other tenants up to the time leases to outside parties ceased in 2002.

Whether those rates are sufficient or appropriate to establish what a market rate was at the time may be an open question, but I have examined them anyway. Using the figures set out in the petitioner's submissions, for leases entered into between 1987 and 1997 the lease rates to Modern Engineering varied from a low of about 81% to a high of about 110% of the rates reflected in leases to others. This, I find, is not a sufficient basis on which to conclude the present lease rates are out of step from rates set in the past;

- b) intent behind the transactions: the evidence of Udo is, in effect, that these leases were merely continuations of the existing business relationship between the Company and Modern Engineering. Based on that evidence, the intent behind the present leases of the Company's properties to Modern Engineering is to continue business as before. There is no direct evidence supporting the view that the lease rates were intended to benefit Modern Engineering and, by extension, Udo. For the reasons just discussed I conclude that the circumstantial evidence offered – rates at approximately 84% of market rates – does not establish an intent to benefit given the fact that Modern Engineering provided other benefits to the Company;
- c) non-arm's length transaction: I agree that this calls for heightened scrutiny, but I also note that that over the many years the two companies have been in existence the leasing of the Company's properties to Modern Engineering has never been at arm's length; and
- d) nature and significance of the transaction/approval by directors: some of the authorities discuss or illustrate this factor by reference to matters that management might handle on its own initiative without authority from superiors such as the board of directors or the shareholders. However, that scenario is not easily transposed to the situation of a closely-held family corporation such as the Company, where management and directors are one and the same. This difficulty is highlighted in the petitioner's submission insofar as he asserts that the historic process for the leasing of the Company's properties involved decision-making only at the director level (i.e., by Werner). It is, however, not clear in what capacity Werner made these decisions as he was both the sole director and the president of the company. As a result of this I am unable to conclude that past leasing decisions were unquestionably made at the director level, as asserted by the petitioner.

[49] Udo, it must be said, was not very forthcoming about exactly how or why the current lease rates were set. He simply said there was no change in the leasing process. As mentioned earlier, he did not contradict Ralph's evidence about what Ralph had been told by Udo

concerning the leasing process. Udo also deposed that "No significant decisions required my approval for these leases", leaving it unclear whether he considered it unnecessary to personally approve the leases at all or whether he approved the leases but there was nothing "significant" requiring his particular approval. I note the signatures on the 2014 leases do not provide an answer or potential answer to this question because the copies in evidence do not show a signature on behalf of the Company.

[50] Ultimately, the evidence before the Court is that the process for the leasing of the properties of the Company in 2014 was the same as it was for past leases. The available evidence concerning the past process indicates Ms. Lawes would do some market research on leasing rates in the area and present a range of figures to Werner and Theresa, who typically selected a figure around the middle of the range. There is no suggestion that Ms. Lawes ever set the rates, so presumably the rate is now set by Udo. I am not satisfied that the evidence establishes any material change in either the way things were done or in the level of rents paid under the 2014 leases.

[51] Based on a consideration of all of the evidence, I am not persuaded that the 2014 leases entered into by the company fell outside of the "undistinguished common flow" of the business of the Company. The leases were part of the ordinary business of the company, "calling for no remark", and do not arise out of any special or particular situation, all of which borrows the language from the authorities earlier referred to.

[52] To borrow further from another of the authorities referred to earlier, Fayerman Brothers, I conclude that the 2014 leases did not comprise a fundamental change in the Company and did not impair the means to accomplish the objects of the Company. They fell within the ordinary course of the business of the Company.

## VI. Conclusion

[53] The petition is dismissed with costs.

"Blok J."

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CASE PAGE              <https://chat.esheria.ai/case-law/canada/jahn-v-jahn-enterprises-ltd-2016>

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