
CANADA / JUDGMENT

Kular v. Wahlla

2011 BCSC 61

COURT

Supreme Court of British Columbia

DECIDED

20 January 2011

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2011 BCSC 61 Kular v. Wahlla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kular v. Wahlla,

2011 BCSC 61

Date: 20110120

Docket: S098895

Registry: Vancouver

Between:

Jasvinder Kular

Petitioner

And

Satinderjit S. Wahlla

Respondent

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Petitioner:

R.A. Kasting

Counsel for the Respondent:

R.A. Finlay

Place and Date of Hearing:

Vancouver, B.C.

November 12, December 10 and December 17, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2011

- [1] The petitioner and her brother-in-law, the respondent, are equal shareholders and directors in Nirwana Holdings Ltd. ("Nirwana"). Nirwana owns a gas station and convenience store located at 15989 - 108th Avenue, Surrey, B.C. Since 2005, there has been escalating disagreement between the petitioner and the respondent over the management of Nirwana. This has resulted in the respondent taking control of Nirwana and its finances, and refusing to allow the petitioner physical access to the gas station and convenience store or access to Nirwana's bank accounts. The petitioner alleges this conduct is oppressive, and that she is entitled to an order that Nirwana's assets be sold at fair market value. On this application, the petitioner sought an order that the gas station and convenience store be sold to a third party for the amount of \$700,000 on the terms and conditions set out in a contract for purchase and sale. Alternatively, she seeks an order that the respondent purchase the petitioner's shares in Nirwana.
- [2] During the hearing, I was advised that the petitioner was no longer seeking an order for sale to the third party. Instead, the petitioner seeks an order that the respondent purchase her shares and, in the event he is unable to do so, she be allowed to purchase his shares for the same amount she has offered to sell him her shares for. This type of sale between shareholders is commonly known as a "shotgun sale." As well, the petitioner seeks orders setting the amount of the shareholders' loans, and a determination of the respondent's right to past wages and expenses from Nirwana.
- [3] The respondent, while not agreeing he has conducted Nirwana's affairs in a manner that is oppressive to the petitioner, agrees the parties are deadlocked and their business interests should be separated. The respondent takes the position that the just and equitable remedy to the deadlock between the shareholders is to allow him to purchase the petitioner's shares for fair market value. The respondent says this is fair because he is the shareholder who has been responsible for the day-to-day management of Nirwana, whereas the petitioner has not had any involvement in its management.
- [4] The issues are:
- 1) Should the respondent be given the right to purchase the petitioner's interest in Nirwana and, if so, at what price?

- 2) What is the value of the shareholders' loans? and
- 3) What was the agreement between the parties regarding the respondent's salary for managing the gas station and convenience store and what, if any, monies are owing to the respondent for deferred past wages and expenses?

Background

- [5] In the fall of 2003, the parties, through Nirwana, purchased the gas station and convenience store for \$550,000, excluding inventory. The parties each invested \$232,979 and obtained a loan for \$250,000. An additional \$140,000 was invested to purchase the inventory of gas, tobacco products, and lottery tickets for a total investment of \$690,000.
- [6] At the time the gas station and convenience store were purchased, the parties agreed that the respondent would be responsible for the day-to-day running of the business. The petitioner says that the agreement was that the respondent would receive a salary of \$5,000 per month for the first two years, and then his salary would be decreased to \$3,000 per month. The respondent says there was no agreement to decrease his salary after the first two years, and that Nirwana owes him money for deferred wages in the amount of \$110,600.
- [7] Since Nirwana began operating the gas station and convenience store, the respondent has been responsible for the day-to-day management, and the petitioner has essentially been a silent partner.
- [8] The petitioner and respondent have been discussing a purchase of the petitioner's shares by the respondent for a number of years. However, they have not been able to agree on a purchase price. Tension has arisen over the signing authority to Nirwana's bank account. As a result of the petitioner taking the position that the account needed two signatures, the respondent opened a parallel bank account in April 2009. The petitioner objected, and the account was frozen. This petition was filed in December 2009 and, in August 2010, an order was made granting the respondent sole control of Nirwana's bank account.

Petitioner's position

- [9] The petitioner is agreeable to a "shotgun sale." To that end, she has offered to sell her interest in Nirwana to the respondent for \$450,000, including the repayment of her shareholder's loan. If the respondent is unwilling or unable to purchase her interest, the petitioner is willing to purchase the respondent's interest in Nirwana for the same amount, on the condition that the \$450,000 would satisfy the respondent's claim for repayment of his shareholder's loan and his claim for past wages. She submits this is equivalent to the third party offer of \$700,000 because the proposed purchase did not include the inventory or the money in Nirwana's account. The petitioner says that when those amounts are added to the third party offer, the third party offer was worth approximately \$900,000.

Respondent's position

- [10] The respondent agrees that he should be entitled to purchase the petitioner's interest in Nirwana, but says there should not be a shotgun sale. He says, as a result of the complexity of the finances, it is appropriate for the Court to set the fair value at which he should purchase the petitioner's interest. The respondent says the reasonable amount to pay for the petitioner's interest in Nirwana, including repayment of her shareholder's loan, is \$289,000. This amount is based on an analysis preformed by an independent accountant, Mr. Bouchey, of what the equivalent share purchase offer is to the third party asset purchase offer.
- [11] The respondent asserts that the evidence of Nirwana's accountant, Mr. Grewal, verifies the amounts due to him from Nirwana.

Analysis

- [12] The applicable sections of the Business Corporations Act, S.B.C. 2002, c. 57, provide:

227 (2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
 - (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

...

- (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
- (h) directing a shareholder to purchase some or all of the shares of any other shareholder,

324 (1) On an application made in respect of a company by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if

...

(b) the court otherwise considers it just and equitable to do so.

...

(3) If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:

...

(b) make any order under section 227 (3) it considers appropriate.

[13] Section 324 allows a court to make any order that it considers appropriate under s. 227(3) if it is "just and equitable" to do so: *Whistler Service Park Ltd. v. Glacier Creek Development Corp.*, 2005 BCCA 472 at para. 8; *Kang v. Sachdev*, 2008 BCSC 1032 at para. 9. It will be "just and equitable" to apply s. 324 when there is a deadlock in a company: *Kinzie v. The Dells Holdings Ltd.*, 2010 BCSC 1360 at paras. 10-11; *Palmieri v. A.C. Paving Co.*, [1999] B.C.J. No. 1648 (S.C.).

[14] In this case, it is evident the shareholders have reached a deadlock over the management of Nirwana. The petitioner takes the position that the acts of the respondent are oppressive and prejudicial to Nirwana, but did not spend a great deal of time arguing that issue. Rather, she agreed there was a deadlock between the shareholders, and that the business interests of the parties should be separated. Many of the allegations that the petitioner makes regarding the respondent's conduct are denied, and there is conflicting evidence on many alleged acts of oppression. However, both parties agree that their business interests should be separated by one of the parties purchasing the other's shares.

[15] It is clear from the evidence of both parties that there is a deadlock between the shareholders over the management of Nirwana. Accordingly, s. 324 is engaged and I have jurisdiction to order a remedy pursuant to s. 324(3) either by liquidating and dissolving the company or under s. 227(3) of the Business Corporations Act.

[16] Pursuant to s. 324, the court may order a sale of one party's interest to the other instead of winding up the company and selling its assets. Generally speaking, in oppressive or deadlock situations, the court is inclined to order a sale of one party's interest to the other, rather than wind up the company and sell the assets. The court looks at the reasonable expectations of the parties in determining what remedy is just and equitable: *Naneff v. Concrete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.) at 490.

[17] Any remedy fashioned by the Court must be made "with a view to remedying or bringing to an end the matters complained of": s. 227(3). As noted in *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Div. Ct.) *aff'd* (1991), 3 B.L.R. (2d) 123 (Ont. Div. Ct.) and cited with approval in *Naneff* at 491:

The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, not a battle axe. I think that this principle would hold true even if the past conduct of the oppressor were found to be scandalous. The job for the court is to even up the balance, not tip it in favour of the hurt party.

[18] It is appropriate to take a liberal approach to the words "just and equitable" in the case of a family company in which one family member is no longer allowed to participate in the business: *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 (C.A.) at para. 102.

[19] In this case, the petitioner acknowledges that it is appropriate to give the respondent the opportunity to purchase her shares in Nirwana. The real conflict concerns the purchase price and the form the purchase should take. In order to determine the value of each party's interest, two issues need to be resolved: the value of each party's shareholder's loan; and whether the respondent is owed any deferred salary or expenses.

What is the value of the shareholders' loans?

[20] The parties have agreed on the following values for the shareholders' loans:

- 1) The petitioner's shareholder's loan balance is \$112,697.03;
- 2) The respondent's shareholder's loan balance is \$140,212.03.

Is the respondent owed deferred salary?

[21] As indicated earlier, there is a dispute regarding the amount of salary the respondent was to be paid for managing the gas station and convenience store. The petitioner agrees that the respondent was to be paid a salary for managing the gas station and convenience store, and was entitled to his reasonable automobile and telephone expenses. She says the agreement between the parties when Nirwana purchased the gas station and convenience store was that the respondent would be paid \$5,000 per month for the first two years, after which his salary would be reduced to \$3,000 per month.

[22] The respondent claims there was no agreement to reduce his salary after two years, and that he should have been paid \$375,000 in salary since 2003 for managing the gas station and convenience store. He says he has only been paid \$264,400. He asserts the difference of approximately \$110,600 is due and owing to him from Nirwana and should be taken into account in the valuation of his shareholder's loan.

[23] The petitioner says the fact that the \$110,600 of deferred wages claimed by the respondent was not included in the financial statements, either as a liability or a note, is indicative of the fact that the respondent is not owed any money for deferred salary. She says the respondent gave the instructions to the accountant who produced the financial statements, and that if salary was owed to him it should have been reflected on the financial statements.

- [24] The petitioner takes the position that the reduction of the salary was agreed to by the parties because they were of the view the work needed to manage the gas station and convenience store would decrease over time. She says the fact the respondent has been able to obtain his real estate licence and work as a realtor, as well as manage the gas station and convenience store, belies his claim that managing the business is a full-time job and his time commitment has not decreased over the seven years he has been managing the gas station and convenience store.
- [25] While there may have been a discussion at the commencement of the parties' involvement in Nirwana that the respondent's salary would be reviewed in two years, the petitioner's evidence the parties came to an agreement in 2003 that the respondent's salary would be reduced to \$3,000 per month after two years does not make sense in the context of the evidence as a whole. The petitioner agreed that the parties had no idea of the amount of time it would take the respondent to manage the gas station and convenience store in 2003. The petitioner still has no idea of how much work is involved because she has not been involved in the management of the gas station and convenience store. Rather, the petitioner points to the fact that the respondent obtained his real estate licence and worked as a realtor during the period in issue as evidence that his work load has diminished since 2004 and 2005.
- [26] However, the respondent's uncontroverted evidence is that managing the gas station and convenience store is his main job and occupies him full-time. His evidence is that his real estate work has occupied a small portion of his time, and that the work involved to manage the gas station and convenience store has not reduced over time.
- [27] The respondent testified that, at the time he started to manage the business, the parties expected it to prosper. He says he has worked hard, and has been on call 24 hours a day, 7 days a week, to deal with any problems that arise. The fact that the gas station and convenience store have been well-managed is evidenced by the fact the loan the parties took out to purchase the gas station and convenience store has been retired.
- [28] The evidence of both the respondent and Nirwana's accountant, Mr. Grewal, is that a salary of \$5,000 per month for managing the business is reasonable, and is in fact the same salary the last owner received for managing the gas station and convenience store. The respondent's evidence is that he would have to pay \$5,000 per month to hire a manager.
- [29] Mr. Grewal's evidence is that the deferred income was not allocated and was, therefore, not on the financial statements because of cash flow issues. His evidence was that if \$60,000 per year was allocated to the respondent for salary, it should have been recorded on the financial statements. Mr. Grewal received his instructions from the respondent when completing the financial statements. The evidence is that the respondent is not a sophisticated businessman. Prior to becoming involved in Nirwana, he drove a truck.

- [30] The respondent's evidence is that the agreement was he would be paid \$5,000 per month for managing the gas station and convenience store. He took out an operational loan, instead of monies in the form of salary, because of cash flow issues, and because it was more beneficial to him for tax purposes. There was no explanation as to why the deferred salary was not noted, other than cash flow problems. After a dispute arose about his salary in 2009, the respondent started receiving a salary of \$5000 on a monthly basis.
- [31] The agreement the petitioner alleges, i.e. that the respondent's salary would be reduced after two years, was never reduced to writing. The evidence is that the respondent and petitioner did not have any discussion after two years whereby the petitioner affirmed her understanding that the respondent would reduce his salary. The petitioner's evidence is that she expected the respondent to reduce his salary because the work needed to run the gas station and convenience store would decrease after two years. She testified that she did not mention or confirm the reduction in the respondent's salary after the two years because she thought the respondent would purchase her interest in Nirwana.
- [32] However, as stated earlier, the respondent's evidence is that the work of the manager has not decreased since Nirwana started operating the gas station and convenience store. I accept his evidence that it would not have been reasonable to agree to a reduction in salary at the beginning of the enterprise when both parties thought the business would be successful.
- [33] Having considered the evidence as a whole, I have concluded that the parties agreed the respondent's income would be \$5,000 per month and there was no agreement to reduce it to \$3,000 per month after two years.
- [34] Accordingly, the respondent is entitled to \$110,600 in deferred income.

Is the respondent owed any expenses for a home office?

- [35] The respondent has claimed expenses from Nirwana for a home office. The petitioner takes issue with the respondent receiving an amount for a home office. She says there was no agreement between the parties that the respondent could claim expenses for a home office from Nirwana because there is an office for the manager in the gas station. The petitioner submits that the expenses the respondent is seeking to claim for his home office are the ones sanctioned by Revenue Canada and have nothing to do with his actual expenses.
- [36] It is clear from the evidence there was no agreement between the parties that the respondent was entitled to claim expenses for a home office. The amount he is seeking is simply a percentage of the overall cost of the house in his wife's name.
- [37] Given the lack of any agreement between the parties that such an expense is reasonable, I have concluded that the respondent is not entitled to claim the amount of \$13,731.01 for home office expenses.

What is the value of each party's interest in Nirwana?

- [38] The petitioner takes the position that the value of each party's interest in Nirwana should be based on the third party offer. She submits that the third party offer is equivalent to \$900,000 if the cash in the company and accounts receivables are included. She says that the shareholders' loans are approximately equivalent, and the parties should each be willing to pay half of \$900,000 for the other's interest in Nirwana, which would include each other's shareholder's loan.
- [39] The petitioner says that the \$110,600 in deferred wages should not go to increase the shareholder's loan owed to the respondent. However, the accounting evidence from Mr. Grewal is that the deferred wages that were not recorded would increase the respondent's shareholder's loan by \$110,600.
- [40] If the petitioner's position that the parties should be paid an equal amount for their shares and shareholder's loan was acceded to, that would be unfair to the respondent. His shareholder's loan of \$237,081.02 ($\$140,212.03 + \$110,600 - \$13,731.01 = \$237,081.02$) is greater than the petitioner's shareholder's loan of \$112,697.03.
- [41] Also, in her approach to valuation of the parties' interests, the petitioner is comparing an asset purchase to a share purchase. There are factors, including tax ramifications, which need to be considered in an asset purchase. These factors distinguish the valuation of an asset purchase from a share purchase.
- [42] Mr. Bouchey reviewed both the asset purchase and a valuation of Nirwana prepared by a valuator, BDO LLP, in October 2010. He provided an analysis of the third party offer from an accounting and tax perspective and provided an opinion as to what the equivalent amount would be if the parties were purchasing shares as opposed to the assets of the company. In arriving at his valuation, Mr. Bouchey considered the assets and liabilities of Nirwana, including the inventory of \$78,023, and the cash on hand and receivables of \$154,153. As well, he considered the liabilities of \$84,399 and the long term loan of \$19,890 (which has since been retired) in coming to his valuation. Mr. Bouchey concluded that the fair market value of the shares of Nirwana is in the range of \$305,000 to \$340,000, if the respondent's shareholder's loan is \$139,128, and in the range of \$194,000 to \$230,000 if the respondent's shareholder's loan is \$231,826.
- [43] The petitioner takes issue with Mr. Bouchey's valuation because it assumes that there are both corporate and personal taxes payable on the purchase price, as well as a commission of 5% payable. Mr. Bouchey also values the long term loan as a liability in the amount of \$19,890, and the evidence is that the loan has been paid off.
- [44] In my view, it is inappropriate to consider the personal taxes in the analysis of the asset sale because Mr. Bouchey has assumed that the shareholders can use their \$750,000 lifetime taxable capital gain exemption to offset the capital gains realized on the sale of their shares, but does not make the same assumption in regards to the asset sale.

- [45] Doing the best I can with the evidence available to me, and taking into consideration the fact that the long term loan has been repaid, and deducting the shareholder's loans of \$349,778.05 (\$112,697.03 + \$237,081.02), the value of each shareholder's interest in Nirwana is \$225,818.48. This amount has been calculated based on Mr. Bouchey's valuation, but deleting the commission, the personal taxes payable, and the long term loan from his calculation. That results in a net cash payable to the shareholders of \$801,415. After the deduction of the shareholders' loans, the amount left for the shareholders is \$451,636.95, or \$225,818.48 per shareholder.
- [46] In my view, a fair value for the respondent to pay to the petitioner for her interest in Nirwana, including the assets, accounts receivable and cash, is \$225,818.48 for her shares plus \$112,697.03 to repay her shareholder's loan for a total of \$338,515.05. The respondent will have 30 days from the date of the judgment to purchase the petitioner's interest for that amount.
- [47] If the respondent does not purchase the petitioner's interest within 30 days for the amount of \$338,515.05, the petitioner is at liberty to purchase the respondent's interest in Nirwana. The purchase price to be paid by the petitioner for the respondent's interest in Nirwana is \$462,889.50, the total of his shareholder's loan of \$237,081.02 plus \$225,818.48, within 30 days of the respondent's notice to the petitioner that he will not be purchasing the petitioner's interest.
- [48] In the event that neither party purchases the other's interest, the parties will be at liberty to sell the shares in Nirwana or its assets. The parties will have joint conduct of the sale. If necessary, they are at liberty to apply to the Court for further directions regarding a sale to a third party.
- [49] Given the divided success, each party will bear their own costs, subject to submissions.

"Gerow J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/11/00/2011BCSC0061.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kular-v-wahlla-2011-bcsc-61>

Prepared on 28 October 2026 · Esheria