

CANADA / JUDGMENT

Melcer Estate v. Boxer

2020 BCSC 1686

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1686 Melcer Estate v. Boxer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Melcer Estate v. Boxer,

2020 BCSC 1686

Date: 20201106

Docket: S1610318

Registry: Vancouver

Between:

Lee Watson, in his capacity as personal representative

of the Estate of George Melcer

Petitioner

And

Jacob Boxer, also known as Jake Boxer, Regina Boxer,

Boxer Holdings Ltd. and Radio City Investments Ltd.

Respondents

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Petitioner:

(via telephone)

J.H. Goulden, Q.C.

S. McCalla

Counsel for the Respondents:

(via telephone)

A. Epstein

Place and Date of Hearing:

Vancouver, B.C.

October 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2020

Introduction

- [1] These parties were originally before me in February 2018 on an oppression petition. I rendered reasons on May 11, 2018 (the "Reasons"), indexed at 2018 BCSC 775. I ordered that the parties jointly appoint a qualified business valuator to perform a valuation of Radio City Investments Ltd. ("Radio City"). The parties agreed to retain a business valuator, Daniel Sturgess, (the "Valuator"), to conduct a valuation of the fair market value of Radio City. Radio City owns an apartment building in Vancouver (the "Radio City Property") and shares in a company, Canaland Developments Ltd., which in turn owns an apartment building also in Vancouver (the "Canaland Property").
- [2] The parties were back before me on September 10, 2018 seeking directions on the form of the instruction letter to the Valuator. At issue was whether tax implications should be considered as part of the valuation. I directed that the instruction letter should include: "The Valuator should consider any tax implications of Radio City."
- [3] On October 25, 2019, the Valuator provided his draft valuation to both parties (the "Draft Report") for their review and comment. In determining the market value of the properties the Valuator relied upon undated appraisal reports prepared by Burgess Cawley Sullivan & Associates Ltd. ("Burgess Cawley"). I will adopt the Valuator's definitions of the appraisals:
- a. Appraisal of the Canaland Property as of August 27, 2019 as the "West 7th Appraisal"; and
 - b. Appraisal of the Radio City Property as of September 4, 2019 as the "Burnaby Street Appraisal".
- [4] In the Draft Report the Valuator provided a low and high range of fair market value for Radio City, with a calculated mid-point.

- [5] On November 25, 2019, counsel for the respondents emailed the Valuator posing some questions about the Draft Report.
- [6] On December 12, 2019, the Valuator responded with answers to those questions. He also advised that he had made an error in one of the calculations in the Draft Report. The error impacted the low range of the fair market value. The Valuator adjusted his calculations accordingly, resulting in an increase in the low range of fair market value, and correspondingly in the calculated mid-point, but no impact to the high range.
- [7] On February 21, 2020, counsel for the respondents wrote to the Valuator with additional questions and comments (the "February Letter").
- [8] The parties returned before me on March 5, 2020 to seek directions in this matter. I ordered that the Valuator should be instructed to provide his response to the questions posed in the February Letter and that the parties had until March 27, 2020 to instruct the Valuator to finalize his Valuation. The parties were given liberty to return before me.
- [9] On March 13, 2020, the Valuator provided his comments in response to the February Letter (the "March Letter").
- [10] The petitioner sought to have the Valuator complete his final report. The respondents would not agree. They sought the petitioner's agreement that directions should be given to the Valuator to perform further work. Since the parties could not agree on the finalization of the Valuation they sought to reappear before me for directions.
- [11] There was a delay in returning before me due to the impact of the COVID-19 pandemic and the restrictions on applications.
- [12] The parties returned before me on October 30, 2020.
- [13] The notice of application of the petitioner included the following relief:
1. The Court direct that within one business day of the date of this order, the parties instruct the valuator appointed by the parties (the "Valuator") pursuant to paragraph 6 of the May 11, 2018 order of Madam Justice Forth (the "May Order") to finalize his draft report (the "Final Valuation") within 7 days of this order, in the form circulated on October 25, 2019, subject only to the changes that the Valuator, in his sole discretion, deems necessary to address the error identified in the Valuator's December 12, 2019 email.
 2. The Court direct that the reference to the "highest fair market value of Radio City determined by the Valuation (the "Option") at paragraph 7 of the May Order, means the highest value in the range of fair market values identified by Valuator in his Final Valuation.
 3. The Court award the costs of this application, including but not limited to the disbursements for expert costs incurred for this application, to the Petitioner by the Respondents, Jacob Boxer, Regina Boxer, and Boxer Holdings Ltd.

[14] The respondents ask the Court to direct the parties to instruct the Valuator to correct "the inadequacies in his draft report and issue his final report." They further seek an order that the scale to be used for the Option process, as referred to in the May Order, should be the lower end of the range of fair market value.

Issues

[15] The application materials and submissions raise the following issues:

1. What directions should the Court provide for the finalization of the Valuator's Report?
2. Should the Court provide further direction respecting the range of value to be used in exercising the Option?
3. Should an award of costs be made to the petitioners?

What directions should the Court provide for the finalization of the Valuator's Report?

Petitioner's Position

- [16] The petitioner points out that the respondents were given an opportunity to make comments on the Draft Report and the Valuator responded to their comments.
- [17] In the March Letter, the Valuator did not make any recommendations for changes to the Draft Report. The Valuator agreed that it was possible for the appraiser, Marion Lohead, of Burgess Cawley (the "Appraiser") to provide a land/building split for the two buildings. The Valuator noted that it would be relatively straightforward to provide a land/building split for the Canaland Property but more complex for the Radio City Property. He further did not provide a liquidation value for Radio City because that method of valuation would provide a windfall to the respondents, and he was not instructed to provide a liquidation value for Radio City.
- [18] The petitioner argues that the respondents have been responsible for delays in getting information and documents to the Valuator. The Estate and its beneficiaries have been prejudiced by those delays.
- [19] The petitioner submits that the respondents are seeking to have the Court direct the Valuator to make changes to the Draft Report in order to benefit them, and contrary to the Valuator's decision to reject those changes.
- [20] The petitioner points out that the Valuator, except for the error he identified, has not accepted that any deficiencies of the type the respondents submit, exist in his Draft Report.

Respondents' Position

- [21] The respondents seek directions from the Court that the Valuator correct deficiencies in the Draft Report and then finalize the valuation. One such alleged deficiency is that the Valuator adopted the allocation of value based on the property tax assessment, which assigned virtually no value to the improvement and all the value to the land for the Radio City Property. The respondents argue that approach is in error and a more accurate valuation can be ascertained by the Appraiser if she is instructed to provide a land/building split.
- [22] The respondents note with respect to the Burnaby Street Appraisal states: " we are of the opinion that the current use as a rental apartment building will deliver the greatest net return to the property." The Valuator advised that the City of Vancouver's tax assessment for that property was based on the assumption that it will be redeveloped. The improvements are valued at \$33,400 in the 2019 property tax assessment.
- [23] The respondent argues that the Valuator based his conclusions on an incorrect fact, being that the value of the Radio City Property is in the land as a potential development. They submit this is contrary to the statement in the Burnaby Street Appraisal that the current use of the building as a rental apartment will deliver the greatest net return to the property.
- [24] The respondents argue that the Valuator's reliance on this fact is an error. They say it would be "easy, inexpensive and quick to fix" the error by having the Appraiser provide an addendum to the Burnaby Street Appraisal with a breakdown of the land/improvement values for the Radio City Property, given the lack of redevelopment potential.

Analysis

- [25] The methodology to be used for the valuation of the properties rests squarely within the specialized expertise of a qualified business valuator and outside of the Court's knowledge and expertise. The Court requires opinion evidence of such an expert in this field.
- [26] The Valuator chosen by the parties is a Chartered Professional Accountant, a member of the Canadian Institute of Chartered Business Valuators, and is certified in Financial Forensics. He has more than 18 years of experience.
- [27] As part of the valuation process, the Valuator retained an appraiser to conduct an appraisal of the Radio City and Canaland Properties. As noted above, the Burnaby Street Appraisal concluded that the highest and best use of the Radio City Property would be as a rental apartment building. The Burnaby Street Appraisal valued the Radio City Property at \$7,630,000. The Appraiser did not provide an allocation of the value between the land and improvements.

[28] The Valuator explained that since the Appraiser had not provided a land/improvement split, he "allocated the overall market value as determined by Burgess Cawley between land and building based on their relative values per the property tax assessments in the Burgess Cawley Report." The split was needed in order to come up with the income taxes payable on the disposition of the properties.

[29] For the Radio City Property the Valuator notes that " given the age and condition of the building, most of the value has been ascribed to the land; whereas there is still significant value being attributed to the building in the case of Canaland."

[30] The 2019 property tax assessment for the Canaland Property provided the following breakdown:

Land: \$17,904,000

Improvements: \$20,731,000

Total: \$38,635,000

[31] The 2019 property tax assessment for the Radio City Property provided the following breakdown:

Land: \$11,896,000

Improvements: \$33,400

Total: \$11,929,400

[32] As a result of inquiries made by the respondents about whether a more accurate split of market value could be made between the land and building the Valuator contacted the Appraiser for more information. The Valuator advised, in his March Letter, that the calculation of the split for the Canaland Property would be relatively straightforward but not for the Radio City Property. Attached as Appendix A to the Valuator's March Letter are comments from Ms. Lohead. She explains in detail how complicated it would be to provide the valuation of the land/building split of the Radio City Property.

[33] The respondents brought up concerns about one particular comment in the Valuator's March Letter. The Valuator's understanding is that the City of Vancouver assumed, in its tax assessment, that the Radio City Property will be developed. Yet the Appraiser, in the Burnaby Street Appraisal, concluded that the use of the building as a rental apartment will deliver the greatest net return.

[34] The respondents argue that the Valuator based his conclusion on an incorrect fact: that the value of the Radio City Property is in the land as a potential development.

- [35] I am concerned that if the door is opened for the respondents to have the Valuator address the land/building split, the same door should be left open for the petitioner to address concerns they have with the Draft Report. Those initial concerns were set out in Mr. Goulden's letter dated November 29, 2019:
- a) The deductions of \$1,180,000 and \$432,000 from the value of the properties to account for deferred maintenance. It is our client's position that Boxer Holding's failure to keep the properties in proper repair should not have resulted in savings to Boxer Holdings in the context of the purchase of the Estate's shares. In particular, the [Draft] Report notes that the Burnaby Street Property has been poorly maintained, including with respect to leak damage to sub-floors, ceilings and walls. The Report also notes that there are several items of deferred maintenance outstanding at the West 7th Property, including with respect to underground parkade leaks, plumbing leaks, and electrical matters. It is our client's position that Boxer Holdings has failed to meet its duty to properly maintain the subject properties, and that it would not be in the best interests of Radio City for Boxer Holdings to continue as property manager.
 - b) The valuations of the properties at 23% and 36% less than assessed value. Our client's position is that the [Draft] Report does not justify these significant deviations from assessed value.
 - c) The application of a latent tax discount. It remains our client's position that a prudent purchaser would engage in common and simple tax planning practices to eliminate most of any latent tax liability.
 - d) The related party loans from Canaland to Boxer Holdings and Spring Ram Ventures Inc., which we understand is controlled by Dr. Gunn. As you know, Canaland's three shareholders are Boxer Holdings, Dr. Gunn and Radio City. In essence, Canaland appears to be lending funds to two of its shareholders, to the exclusion of its third shareholder, Radio City. It is our client's position that this unfair treatment of shareholders should not result in a negative impact on the Estate's interest in Radio City.
- [36] The door could be open even wider to address the petitioner's concerns with both the Burgess Cawley appraisals. The petitioner obtained a review report of both the Burnaby Street Appraisal and the West 7th Appraisal, from Garnett Wilson, an appraisal company, dated October 19, 2020. This review report concludes that the current market value found in the Burnaby Street Appraisal is actually below market value. Mr. Wilson opines that the current fair market value of the Radio City Property is in the range of \$7,917,000 and \$8,677,000. This compares to Ms. Lohead's opinion of \$7,630,000.
- [37] Mr. Wilson assesses the current value of the Canaland Property in the range of \$31,920,000 and \$34,920,000. This compares to Ms. Lohead's opinion of \$29,700,000.

- [38] If the Valuator was asked to use Mr. Wilson's appraised values, instead of Ms. Lohead's, it would clearly impact the fair market values of the two properties. The petitioner retained McEwen Valuation & Forensic in October 2020 to provide answers to a series of questions posed by counsel. Mr. McEwen's opinion was that if the values set out in the Garnett Wilson review report were provided to the Valuator, it would result in the Valuator finding "materially higher" fair market values. Mr. McEwen raises some further "errors or inconsistencies which Sturgess may wish to examine."
- [39] The respondents consulted two different real estate brokers in October 2020, Colliers International and NAI Commercial, to provide their views on how the real estate market's performance over the last 12 months might impact the sale of multifamily apartment buildings in Vancouver's West End.
- [40] The Valuator was alerted to the respondents' concerns with the Draft Report. The only change, in his professional judgment, that needed to be made was to account for the error he identified.
- [41] I am not convinced that the door should be unlatched to allow the parties to challenge the opinion of the Valuator. This will create the proverbial slippery slope, with each party seeking to raise issues they say will change the ultimate valuation in their favour.
- [42] I conclude that there needs to be an end to the parties' relationship and it can only be achieved if the May Order is now complied with.

Should the Court provide a further direction respecting the range of value to be used in exercising the Option?

- [43] As I noted in my Reasons, and reiterated in my oral reasons of September 11, 2018 (the "Oral Reasons"), the process that was put in place was intended to be "just and equitable" to both parties.
- [44] The Valuator provided a low and a high range and then a calculated mid-point. The Draft Report explains the impact of the taxes on these ranges at paras. 69-70:

69 In consideration of latent taxes on the disposition of the real estate held by Radio City, I have on the low end deducted 100 percent of likely disposition costs, and taxes on capital gains and recapture (column 2, lines 19 to 21), which assume an immediate sale of the assets. The rationale for fully accruing latent taxes is that a prudent purchaser of the shares would be aware of the Company's potential tax liabilities and attempt to negotiate an outcome whereby the vendor effectively assumes responsibility for their payment.

70 However, a prudent vendor would likely counter that it is not reasonable to suggest the asset would be liquidated immediately following a sale of the shares, and would attempt to negotiate a transaction excluding the above noted latent taxes. The vendor would concede, though, that by acquiring shares of the Company the purchaser would be able to deduct only the undepreciated capital cost ("UCC") of the Company's depreciable assets (i.e., the building) and not their fair

market value as at the Valuation Date. This would result in a tax disadvantage to the purchaser since the fair market value of its depreciable asset exceeds their UCC. On the high end of my range, therefore, I calculate and deduct the present value of this tax disadvantage at column 3, line 22 of Schedule 1, on the assumption a vendor would attempt to negotiate a transaction based only on the deduction of this tax shield. The fair market value of the tax shield in this case is nominal, reflecting the low market value ascribed to the building based on its age and condition.

[emphasis in original]

[45] Both parties sought further expert advice on how to interpret the income tax effects on Radio City if the assets are sold. The petitioner retained Mr. McEwen, as noted above, and the respondent retained Don Spence. Both accepted that the low value in the Draft Report reflects an immediate sale, and the high value reflects the asset as held in perpetuity. Mr. Spence further notes that the Valuator did not factor in what is referred to as "an illiquidity discount" for the indefinite holding period.

[46] The respondents argue that:

In the circumstances of the "one-way shotgun" clause, once the price is set, if the Respondents do not agree to pay it, the company will be sold - thus there is an immediate liquidation. As a result, the price should be the same as the rest of the market would pay on liquidation.

[47] The respondents therefore submit that if they are forced to exercise an option at a price higher than the low end of the range provided by the Valuator, this creates the potential that the respondents alone will pay a price higher than the market would pay. As such, the respondents seek an order that allows the low point of the ultimate Valuation to be used.

[48] The petitioner relies on the wording of the May Order requiring Boxer Holdings Ltd. to purchase the petitioner's shares at 50% of the highest fair market value of Radio City as determined by the valuation.

[49] I turn now to consider the Valuator's views on whether the value that should be used is the "liquidation value". The Valuator states in his March Letter:

But performing a liquidation approach provides the Boxer Parties with a windfall gain. If the Company is wound up, all parties will be forced to bear 100% of any latent taxes and disposition costs. If it is valued on a liquidation basis, then the Boxer Parties will acquire the Melcer Interest on the assumption that 100% of any latent taxes and disposition costs have been incurred, which will greatly reduce the fair market value of the Company and ensure the Melcer Party effectively pays those taxes and fees. But in purchasing the Melcer Interest the Boxer Parties will not be forced to incur those taxes and fees but can defer them indefinitely.

[50] As far as I can determine the Valuator did not address the issue of applying of the "illiquidity discount", referenced by Mr. Spence. The Valuator may well have an explanation that addresses this issue but was not given an opportunity to do so.

[51] Once again, I am not prepared to second guess the Valuator and the judgment he exercised on how to calculate the low and high ends of the fair market value of the properties, and the adjustments he made.

[52] I am not convinced that it is just and equitable to vary the May Order to allow Boxer Holdings Ltd. to offer to purchase 50% of Radio City at the low end of the fair market value.

Conclusion

[53] The following orders are made:

1. On or before Tuesday, November 10, 2020 at 4 p.m. the parties shall instruct Daniel Sturgess to finalize his draft report (the "Final Valuation") within 10 days commencing on November 11, 2020, in the form as circulated on October 25, 2019, subject only to the changes that Mr. Sturgess, in his sole discretion, deems necessary to address the error he identified in his email of December 12, 2019.
2. The reference to "the highest fair market value of Radio City" at paragraph 7 of the order dated May 11, 2018, means the highest value in the range of fair market values identified by Mr. Sturgess in his Final Valuation.

[54] I turn now to the issue of costs. In my Reasons and Oral Reasons, I ordered that each party bear their own costs. On the March 5, 2020 appearance the petitioner was awarded costs. In my view, the petitioner was successful in this application and as such it is entitled to costs. The costs will include the disbursements incurred for the McEwen Valuation & Forensic report and the Garnett Wilson review report.

[55] I am of the view that the time has long passed for this matter to be concluded and the beneficiaries of the Melcer Estate to have closure.

"Forth J."

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