
CANADA / JUDGMENT

Melcer Estate v. Boxer

2021 BCCA 81

COURT

British Columbia Court of Appeal

DECIDED

23 February 2021

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2021 BCCA 81 Melcer Estate v. Boxer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Melcer Estate v. Boxer,

2021 BCCA 81

Date: 20210223

Docket: CA47111

Between:

Lee Watson, in his capacity as personal representative of the

Estate of George Melcer

Respondent

(Petitioner)

And

Jacob Boxer, also known as Jake Boxer, Regina Boxer, Boxer Holdings Ltd.

and Radio City Investments Ltd.

Appellants

(Respondents)

Before:

The Honourable Madam Justice Fisher

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 6, 2020 (Melcer Estate v. Boxer, 2020 BCSC 1686, Vancouver Docket S1610318).

Counsel for the Appellant
(via teleconference):

A.N. Epstein

Counsel for the Respondent
(via teleconference):

J. Goulden, Q.C.

S.J. McCalla

Place and Date of Hearing:

Vancouver, British Columbia

February 9, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 23, 2021

Summary:

Application for leave to appeal a discretionary order related to a valuation of shares allowed. The appeal is significant to the parties, has some merit, and will not unduly hinder the progress of the action.

Reasons for Judgment of the Honourable Madam Justice Fisher:

Application for leave to appeal

- [1] The applicants seek leave to appeal an order pronounced November 6, 2020 requiring a valuator to finalize a draft report on the valuation of a company. This application follows an unsuccessful application for a stay of execution of the order.

Background

- [2] The underlying proposed appeal arises in the context of an oppression action involving Radio City Investments Ltd. Radio City owns interests in two apartment buildings in Vancouver, one on Burnaby Street that is owned directly (the Burnaby Street property), and another on West 7th Avenue that is owned by another company in which Radio City holds a

minority interest (the Canaland property). This issues in dispute in this appeal concern the value of the Radio City shares, and arise principally in respect of the value of the Burnaby Street property.

- [3] Radio City was originally founded by Joseph Boxer and George Melcer, long standing business partners who held their shares in Radio City equally. Joseph Boxer held his shares in his holding company, Boxer Holdings Ltd., and George Melcer held his shares personally. Both men have passed away, Mr. Boxer in 1989 and Mr. Melcer in 2001, leaving their respective interests in Radio City to their heirs. I will refer to the applicants as the Boxer Group and the respondent as the Melcer Estate.
- [4] These parties were unable to agree on what to do with the company. The Boxer Group had been managing the apartment buildings, and in January 2013 offered to purchase the interest of the Melcer Estate for \$3,050,000. This offer was not accepted, as the Melcer Estate wanted an independent valuation. Eventually it brought a petition alleging oppressive conduct by the Boxer Group. In that petition, the Melcer Estate made a number of complaints about being excluded from involvement in the operation of Radio City and not receiving dividends in a timely manner. The Boxer Group countered with complaints that the Melcer Estate failed to sign financial statements and other corporate documents and caused the company to lose business opportunities.
- [5] The chambers judge, in reasons indexed at 2018 BCSC 775, did not find that either party had conducted themselves in a way that supported an oppression remedy. However, she concurred with both parties that there was a deadlock between the two shareholders regarding the management of Radio City, and a remedy was needed "to ensure equity is achieved and the deadlock is brought to an end" (at paras. 63-64).
- [6] To resolve this deadlock, the chambers judge ordered the parties to jointly appoint a qualified business valuator to value the company, and the Boxer Group would then have the option to purchase the Melcer Estate's shares "at 50% of the highest fair market value of Radio City" determined by the valuation. If the option was not exercised, the company was to be wound up and its assets sold. In making this order, the judge rejected the Boxer Group's proposal for a shotgun sale, explaining at paras. 102-106:
- [102] In my view, the reasonable expectations of the parties, their relationship, and their positions with respect to Radio City do not support that it would be just and equitable to order a "shotgun" sale to resolve the deadlock.
- [103] The respondents submit that a "shotgun" sale is appropriate in this case because one of the parties is seeking to retain control on the company, there are only two definable parties involved with the deadlock, there is an equal division of shares between the parties, the deadlock is resulting in significant interferences of the typical operations of the company, and there is little likelihood of reconciliation: see *Kang v. Sachdev*, 2008 BCSC 1032 at paras. 17-22; *Hurtsfield v. Hektoen*, 2011 BCSC 1290 at para. 24.

- [104] Although I agree with the respondents that "shotgun" sales combine the advantages of a market sale with the advantage of a buyout by one of the parties, the case at hand is not a situation in which the parties, in reality, share an equal opportunity to acquire the other's interest in the business. Unlike in [Kinzie v. The Dells Holdings Ltd., 2010 BCSC 1360], at para. 25, the parties in this case are not equally familiar with the business property.
- [105] Here, there are imbalances between the parties that would risk an unjust result if this Court were to order a "shotgun" sale. I note that Boxer Holdings is in an advantageous position compared to the Estate, which has limited knowledge of Radio City's business operations. Moreover, the Estate does not appear to have the desire to purchase Boxer Holdings' shares or be in a position to continue the business: see e.g. *Bartholomew Estate v. Electric Power Equipment Ltd.* (1999), 68 B.C.L.R. (3d) 312. That this imbalance may stem from the Estate's unwillingness to be active with the operation of Radio City does not persuade me that a "shotgun" sale would be just and equitable.
- [106] In my view, the just and equitable approach is to have an independent valuation performed, and then give Boxer Holdings the option to purchase the petitioner's one-half interest in Radio City. As Radio City's assets are primarily real estate, and not restricted assets (compare *Cyprus Anvil Mining Corp. v. Dickson* (1986), 8 B.C.L.R. (2d) 145 at paras. 72-75 (C.A.)), this is a reasonable way of assessing fair market value.
- [7] This order, dated May 11, 2018 (the May Order), was not appealed.
- [8] In September 2018, the parties sought further directions regarding the instruction letter to the valuator and the judge directed the valuator to consider any tax implications in determining the value of Radio City. In October 2019, the valuator released a draft valuation report to the parties. He relied on appraisal reports for the underlying properties and provided a range of fair market value for Radio City, from low to high, along with a calculated mid-point.
- [9] In November 2019, counsel for the Boxer Group raised some questions with the valuator. The valuator responded in December 2019 and advised that he had made a calculation error. He adjusted his calculations, which resulted in an increased value at the low end and mid-point. His estimate of the fair market value of the company ranged from \$13.41 million to \$16.78 million, and \$15.1 million at the mid-point.
- [10] In February 2020, counsel for the Boxer Group raised further questions with the valuator about his treatment of the latent tax liability and the apportionment of value of the properties as between the land and improvements. The Boxer Group was particularly concerned about the Burnaby Street property, where the improvements had been assessed at close to zero despite the appraiser's opinion that the best use of the property was its current use as an apartment building. In March 2020, the parties again sought directions and the judge ordered the parties to instruct the valuator to provide responses to the Boxer Group's questions and finalize his valuation.

- [11] The valuator provided his responses to the parties on March 13, 2020. With respect to the land/improvement split of market value for the Burnaby Street property, he explained that while it could be done, it was not straightforward due to uncertainty about what could be developed on the site.
- [12] The Melcer Estate sought to finalize the report, but the Boxer Group asserted that the responses raised more questions. After some delay due to the COVID-19 pandemic, the parties appeared before the judge on October 30, 2020. The Melcer Estate sought directions that (1) the parties instruct the valuator to finalize his draft report and (2) the reference to the "highest fair market value" of Radio City determined by the valuation means the highest value in the range of fair market values identified by the valuator. The Boxer Group sought a direction that the parties instruct the valuator to correct "inadequacies in his draft report and issue his final report". It also sought an order that the scale to be used for the option process should be the lower end of the range of fair market value.
- [13] The judge did not accede to the requests by the Boxer Group and on November 6, 2020 made the following order:
1. On or before Tuesday, November 10, 2020 at 4 p.m. the parties shall instruct [the valuator] 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 [the valuator], 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 [the valuator] in his Final Valuation.
- [14] This is the order for which leave to appeal is sought. The judge's reasons are indexed at 2020 BCSC 1686.

The judgment below

- [15] The judge considered what directions she should provide for (1) the finalization of the valuator's report and (2) the range of value to be used in exercising the option.
- [16] On the first issue, the judge considered that the methodology to be used for the valuation rested squarely within the specialized expertise of the valuator. She explained the issues as follows:

- [27] As part of the valuation process, the Valuator retained an appraiser to conduct an appraisal of the [Burnaby Street] and Canaland Properties. As noted above, the Burnaby Street Appraisal concluded that the highest and best use of the [Burnaby Street] Property would be as a rental apartment building. The Burnaby Street Appraisal valued the [Burnaby Street] 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 [Burnaby Street] 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."
- [17] The judge considered the valuator's responses to the Boxer Group's questions about the land/improvement split for the Burnaby Street property and the Boxer Group's submission that the valuator based his conclusion on an incorrect fact (the value of the Burnaby Street property was in the land as a potential development). She expressed concern that if "the door is opened" for the Boxer Group to have this issue addressed then "the same door should be left open" for the Melcer Estate to address its concerns with the draft report. The Estate's concerns included deductions made from the value of the properties to account for deferred maintenance in light of its position that the Boxer Group had failed to keep the properties in proper repair, higher assessed values of the properties, the application of a latent tax discount, and unfair treatment of shareholders.
- [18] The judge also expressed concern about opening the door even wider to address the Melcer Estate's concerns with the appraisals, noting that it had obtained a review appraisal report that assessed higher values for the properties.
- [19] She also noted that the valuator had been alerted to the Boxer Group's concerns and had exercised his professional judgment that the only change required was to account for the error he had earlier identified.
- [20] The judge was not convinced "the door should be unlatched" to allow the parties to challenge the valuator's opinion, as this would "create the proverbial slippery slope, with each party seeking to raise issues they say will change the ultimate valuation in their favour" (at para. 41). She therefore concluded that there needed to be an end to the parties' relationship that could only be achieved if the May Order was complied with.
- [21] On the second issue, the judge noted that the process put into place was intended to be "just and equitable" to both parties. She referred to the following paragraphs from the valuator's draft report that explained the impact of the taxes on the ranges of value:

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.

[22] She referred to expert advice each party had obtained regarding the tax implications on a sale of assets, in which it was accepted that the low value in the draft report reflected an immediate sale and the high value reflected the asset as held in perpetuity. She rejected the Boxer Group's submission that the price should be the same as the rest of the market would pay on liquidation, otherwise it alone would pay a higher price than the market would pay. She considered the following view expressed by the valuator:

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.

[23] The judge was not prepared to second guess the valuator's judgment on how to calculate the low and high ends of the fair market value and refused to vary the May Order to allow the Boxer Group to purchase the Melcer Estate's interest in Radio City at the low end of the fair market value.

Events subsequent to the order

- [24] In accordance with the November 6, 2020 order, the valuator delivered his final report on November 20, 2020, valuing Radio City at the high range at \$16,780,000. The effect of the order, then, was that the Boxer Group was required to pay \$8,390,000 for the shares of the Melcer Estate by December 20, 2020 if it chose to exercise its option.
- [25] On December 17, 2020 the parties appeared in chambers before Griffin J.A. seeking a stay of execution of the November 6, 2020 order in advance of their application for leave to appeal. As noted above, this application was dismissed, in reason indexed at 2020 BCCA 380. Justice Griffin noted that the preferred practice is to hear both the leave to appeal and stay applications at the same time, as both applications involve a preliminary consideration of whether there is some merit to the appeal, but to a different end. She therefore addressed the merits in the context of the requirements for a stay but also considered the test for leave to appeal a discretionary order. She had difficulty finding merit in the grounds of appeal, and expressed the view that the Boxer Group "will have a difficult time making out a case that the judge erred in principle, that the order is not supported by the evidence, or that enforcing the order will result in an injustice" (at para. 54). However, she did not consider an application for leave to be vexatious.
- [26] Finally, on December 20, 2020 the Boxer Group exercised the option to purchase the Melcer Estate's one-half interest in Radio City in accordance with the orders of the chambers judge. It has since been determined that the transaction is to conclude by April 30, 2021.

Grounds of appeal

- [27] The Boxer Group proposes an appeal on three grounds:
- a) The chambers judge erred in fact and law in concluding that an end to the parties' relationship could only be achieved by compelling the valuator to finalize his report without amendment;
 - b) The chambers judge erred in fact and law by ordering that it is just and equitable to require the Boxer Group to purchase the petitioner's shares at a price that includes the respondent's tax liability; and
 - c) The chambers judge erred in the exercise of her discretion in ordering the parties to instruct the valuator to finalize his draft report without further amendment.

Leave to appeal

- [28] On an application for leave to appeal, the onus is on the applicant to satisfy the following criteria:
- a) The point on appeal is of significance to the practice;
 - b) The point on appeal is of significance to the action itself;

- c) The appeal is prima facie meritorious and not frivolous; and,
- d) The appeal will not unduly hinder the progress of the action.

See *Gichuru v. Law Society of BC*, 2012 BCCA 159 at para. 16 (Chambers); and *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers).

- [29] Leave to appeal a discretionary order will only be granted where the order is clearly wrong, a serious injustice will occur, or where discretion was not exercised judiciously or was exercised on a wrong principle: *V.F. v. E.B.*, 2011 BCCA 238 at para. 23 (Chambers); see also *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31 (Chambers); *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 at para. 19.
- [30] The overarching requirement is that it is in the interests of justice that leave be granted: *Price v. Robson*, 2017 BCCA 419 at para. 37 (Chambers); *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers). Even if each of the criteria are met, leave to appeal may be denied if granting leave would not be in the interests of justice: *British Columbia (Director of Civil Forfeiture) v. Johnson*, 2014 BCCA 268 at para. 19 (Chambers).

Analysis

1) Significance of the appeal to the practice

- [31] Where the order being appealed is very specific to the action, there is limited significance to the practice generally: *Gulamani v. Chandra*, 2009 BCCA 206 at para. 15 (Chambers).
- [32] The Boxer Group submits that the proposed appeal will be of great utility to the practice because it will contribute further appellate authority on the scope of the judicial discretion of a chambers judge. The Melcer Estate submits that the order was specifically tailored to the factual circumstances of this dispute, and so this appeal would be of little practical utility or significance to the practice as a whole.
- [33] In this instance, the judge made discretionary orders based on the specific relationship of the parties and facts surrounding their dispute. I see no utility to the practice. The scope of judicial discretion is well developed in the jurisprudence.

2) Significance of the appeal to the action

- [34] Considerations under this criterion may include the significance of the appeal to the proposed parties: *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCCA 419 at para. 12 (Chambers). However, where a point may be of significance to the party but not of significance to the action, leave may be refused: *Columbia National Investments Ltd. v. Abbotsford (City)*, 2007 BCCA 368 at para. 24 (Chambers).

- [35] The Boxer Group submits the proposed appeal is of significance to the action itself because the practical effect of the order is that the option price for which the Boxer Group could purchase the shares is increased by approximately \$840,000. It also estimates a \$1 million value to the failure to provide an appropriate land/building allocation for the Burnaby Street property.
- [36] In the Melcer Estate's submission, the appeal is not significant to the action itself. The May Order that set out the mechanism to resolve the parties' dispute is not the subject of this appeal. Instead, the only significance to the action is the sum of money at stake as reflected in the valuation. While a large sum of money may be relevant to an issue on appeal, the Estate says this cannot prevail where the merits test or the general interests of justice test are not met.
- [37] I do not doubt that the appeal is significant to the parties. It has less significance to the action but I do not agree with the Melcer Estate that this is restricted to the sum of money at stake. Despite the fact that the Boxer Group has now exercised the option to purchase the Melcer Estate shares in Radio City, the factual validity of the valuation is of some significance to the mechanism ordered to resolve the dispute.
- 3) Merits of the appeal
- [38] To meet this branch of the test, the applicant must present an arguable case with some prospect of success. A vexatious, frivolous, or unnecessary case or one with no chance of success will not pass the requisite threshold: *Gichuru* at para. 22; *Teck Cominco Metals Ltd. v. British Columbia*, 2009 BCCA 3 (Chambers).
- [39] The parties' submissions focused largely on the merits of the proposed appeal.
- [40] The Boxer Group acknowledges the discretionary nature of the order but submits that the judge made an extricable error of law by deciding a matter that was not before her. It says she erred in concluding that the draft valuation report had to be finalized in order to avoid the "proverbial slippery slope" of each party seeking to raise issues, because the Melcer Estate had not sought any additional changes or corrections to the report. Related to this is its submission that the judge gave no weight, or insufficient weight, to the evidence specific to the inconsistency in the report regarding the valuation of the Burnaby Street property as it pertained to the tax implications arising from the land/improvement split.
- [41] The Boxer Group also submits that the order to finalize the valuation report was inconsistent with the intention of the May Order to put into place a process that was just and equitable for both parties, because its effect is to require them to pay the latent tax liability of the Melcer Estate. It says this results in a windfall to the Estate of approximately \$2 million.
- [42] The Melcer Estate submits that the appeal has no merit, as the proposed grounds of appeal simply quarrel with the judge's exercise of discretion and the deferential approach in appeals from discretionary orders has particular force here in light of the judge's experience in the matter since 2018. The Estate disputes the Boxer Group's assertion that the chambers

judge decided an issue that was not before her, as its own concerns about the valuation had been raised several times, and it was open to the judge to consider whether the order sought by the Boxer Group would result in an injustice to the Estate. It contends that the judge properly exercised her discretion when she considered that opening the door to potential further adjustments in the valuation would be a slippery slope for both parties.

[43] The Melcer Estate also disputes that it is benefiting from a "windfall" given the valuator's opinion that the liquidation approach on which the low end of the range was based would provide the Boxer Group with a windfall gain.

[44] There is no question that the kind of discretionary decision at issue here is entitled to considerable deference from this court. However, I am satisfied that the Boxer Group has an arguable case that has some prospect of success. I intend to make only a few comments to highlight the basis for my conclusion:

- However one characterizes the judge's concern about the slippery slope, it is arguable that she was not required to consider anything other than the application before her, which was brought by the Melcer Estate seeking to have the draft valuation report finalized, and opposed by the Boxer Group on the basis of a specific concern about an underlying factual basis for the valuation of the Burnaby Street property.
- It is arguable that the judge failed to consider the difference between the specific questions raised by the Boxer Group and the concerns raised by the Melcer Estate's experts.
- It is arguable that the judge failed to consider whether the high end of the range was just and equitable in light of the valuator's confirmation that the tax shield for the Burnaby Street property at the high end of the range was nominal as reflecting the low market value ascribed to the building.

4) Will the appeal unduly hinder the progress of the action?

[45] The temporal concerns with regard to this appeal are not at issue now that the Boxer Group has exercised the option to purchase the Melcer Estate's shares in Radio City and it has now been determined that the transaction will conclude on April 30, 2021. Neither party submitted that they would be unable to resolve any issues arising if the appeal is successful, resulting in any subsequent adjustments to the valuation.

Conclusion

[46] Despite the discretionary nature of the order sought to be appealed, I am satisfied that the appeal is significant to the parties, has some merit and will not unduly hinder the progress of the action. I therefore grant the application for leave to appeal.

"The Honourable Madam Justice Fisher"

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Prepared on 26 October 2026 · Esheria