CANADA / JUDGMENT

Mirage Trading Corporation v. Ghahroud

2024 BCSC 1552

COURT
Supreme Court of British Columbia

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2024 BCSC 1552 Mirage Trading Corporation v. Ghahroud

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mirage Trading Corporation v. Ghahroud,

2024 BCSC 1552

Date: 20240826

Docket: S244258

Registry: Vancouver

Between:

Mirage Trading Corporation

Petitioner

And

Rouzbeh Rabiei Ghahroud, MAJ Enterprises Inc., and Teknocan Properties Inc.

Respondents

Before: The Honourable Justice Latimer

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

August 12-13, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2024

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Introduction

[1] In these two applications, Norseyl Properties Ltd. ("Norseyl"), AXA Consulting Services Inc. ("AXA") and Pan Pacific Business Corporation ("Pan Pacific") (collectively, the "applicants"), apply under Rule 6-2(7) to be added as respondents to a petition brought by Mirage Trading Corporation ("Mirage").

[2] Mirage opposes the addition of the applicants as party respondents in these proceedings arguing that these applications are barred by the doctrine of issue estoppel and/or constitute an abuse of process. In the alternative, Mirage argues that the applicants do not meet the requirements of Rule 6-2(7).

[3] The named respondents who are all represented by counsel take no position on these applications.

Issues

[4] The issues for determination are:

a) Whether these applications are barred by the doctrine of issue estoppel and/or constitute an abuse of process;

b) If not, whether the applicants ought to be added as respondents under Rule 6-2(7)(b) and/or Rule 6-2(7)(c).

[5] For the reasons that follow I conclude:

a) These applications are not barred by the doctrine of issue estoppel or abuse of process.

b) The applicants are added as respondents in this proceeding.

c) Pursuant to Rule 6-2(8)(a), Mirage's petition is stayed pending filing and service upon the applicants of the amended petition.

d) The applicants are entitled to costs from the petitioner to be taxed on Scale B.

Background Facts

Petition Proceeding

[6] On June 21, 2024, Mirage filed this petition. Mirage is owned and controlled by Abo Taheri ("Taheri").

[7] The petition was not served on the applicants and does not name the applicants as respondents.

[8] The petition is an oppression proceeding brought under s. 227 of the Business Corporations Act, S.B.C. 2022, c. 57 [BCA]. The petition is brought against Rouzbeh Rabiei Ghahroud ("Rouzbeh"), MAJ Enterprises Inc. ("MAJ") and Teknocan Properties Inc. ("Teknocan").

[9] Teknocan is the company that is the subject to the oppression proceeding. MAJ is the 90% shareholder of Teknocan. Mirage is the registered 10% shareholder of Teknocan. Rouzbeh is the director and officer of Teknocan.

[10] The petition revolves, in part, around an October 2022 Annual General Meeting ("AGM") of the shareholders of Teknocan where a resolution was passed effectively removing Taheri as one of two directors of Teknocan ("Resolution"). It is alleged by the petitioner that the AGM proceeded improperly as there was no quorum, that the Resolution was invalid and a nullity, and that it was inconsistent with the petitioner's reasonable expectations that Taheri would always be a director of Teknocan.

[11] It is the position of the applicants, that there is a written trust agreement ("Trust Agreement") whereby Mirage agreed that half of its 10 shares would be held in trust on behalf of the three applicants. The applicants say that under the Trust Agreement, they have control over Mirage's shareholder voting rights. They alleged that in advance of the AGM, in accordance with the Trust Agreement, the petitioner sought instructions about how to vote its shares. Their instructions were to vote in favour of the Resolution. They allege that after receiving these instructions, Taheri failed to attend the AGM and failed to vote for the shares as directed. This, they say, is pertinent to the question of what the petitioner's reasonable expectations were. They say the relief sought in the petition is inconsistent with the facts and the voting rights aspects of the Trust Agreement.

[12] Mirage disputes the validity of the Trust Agreement.

[13] The petition seeks, amongst other relief:

a) a declaration that Teknocan be liquidated and dissolved;

b) a declaration that the Resolution was invalid and of no force and effect;

c) orders prohibiting and remedying alleged oppressive and unfairly prejudicial conduct, or in the alternative, Mirage's loss of confidence;

d) an order directing the respondents Rouzbeh and MAJ to compensate Teknocan for sums allegedly improperly paid from Teknocan to the applicants and any other person; and

e) an order directing MAJ, or in the alternative Teknocan, to purchase the shares registered in the name of Mirage.

[14] On July 5, 2024, the applicants filed the within notices of application seeking to be added as respondents in this proceeding and other ancillary relief.

[15] On July 22, 2024, Justice Millman became seized of all interlocutory applications in this proceeding, except these two, until the petition is heard. The hearing of the petition has been tentatively scheduled for three days commencing October 21, 2024.

Actions Involving the Same Parties and/or Their Principals

[16] Teknocan is a holding company and its underlying asset is Seylynn Properties, a real estate development in North Vancouver (the "Development").

[17] These same parties and/or their principals are and/or have been embroiled in a number of actions relating to the Development which will be briefly described here.

Vancouver Registry S225627

[18] On July 13, 2022, Taheri sued Mahmoud Rabiee Ghahroud ("Rabiee") ("Action S225627").

[19] Rabiee is the respondent Rouzbeh's father. In the petition, it is alleged that Rabiee and Taheri have a long history of friendship and business dealings.

[20] In Action S225627, Taheri alleged, among other things, that in or around July 2016, Rabiee demanded repayment of an interest-free loan made in respect of the Development. In response to this demand, it was alleged that Taheri and Rabiee entered into a new oral agreement on specific terms including that Taheri would retire the interest-free loan, and pay off all interest charges levied by Rabiee using half of his stake in Teknocan (being 5%, held by Mirage).

[21] Action S225627 further alleges that to perform this obligation, Taheri then divided up and agreed to transfer half his stake in Teknocan to three others in exchange for those individuals' confirmation that they would pay off all of Taheri's debt owed to Rabiee.

[22] Action S225627 was dismissed by consent.

Vancouver Registry S225945

[23] On July 21, 2022, Pan Pacific sued Mirage for breach of the Trust Agreement ("Action S225945"). Relief sought in Action S225945 includes, among other things, an order requiring Mirage to transfer shares of Teknocan that are said to be held in trust by Mirage for Pan Pacific, to Pan Pacific. In the alternative, damages for breach of trust and/or breach of contract are sought.

Vancouver Registry S233936

[24] On May 29, 2023, Norseyl and AXA sued Mirage for breach of the Trust Agreement ("Action S233936"). Relief sought in Action S233936 includes, among other things, an order requiring Mirage to transfer shares of Teknocan that are said to be held in trust by Mirage for Norseyl and AXA, to Norseyl and AXA. In the alternative, damages for breach of trust and/or breach of contract are sought.

[25] On November 9, 2023, Mirage filed a third-party notice in Action S233936. On February 16, 2024, Mirage filed an amended third-party notice ("Third Party Notice").

[26] The Third Party Notice sought to add Babak Marzbani ("Marzbani"), Teknocan and Rouzbeh to Action S233936. Marzbani is the principal of AXA.

[27] The claims advanced in the Third Party Notice include claims of oppression against Rouzbeh and Teknocan and claims of fraud against Rouzbeh.

[28] In January 2024, Teknocan and Rouzbeh applied, among other things, to have the claims in the Third Party Notice dismissed. Norseyl and AXA consented to that relief. Although not a party in Action S233936, and although no third-party notice was filed in Action S225945, Pan Pacific filed an application response in Action S233936 on February 16, 2024 in which it also consented to that relief. The position of Norseyl and AXA as set out in the application response was two-fold:

a) The claims advanced by Mirage against Teknocan and Rouzbeh under the BCA must be commenced by way of petition and could not be pursued by a third-party notice;

b) The remaining third-party claims are separate from and unrelated to the relief sought and the issues raised in Action S233936.

[29] Pan Pacific took the position in its application response that all of the claims advanced were unconnected to the original actions. It further agreed that the oppression claims had to be brought by way of petition.

[30] On May 9, 2024, Associate Judge Robertson struck the Third Party Notice: Norseyl Properties Ltd. v. Mirage Trading Corporation, 2024 BCSC 1225.

[31] Actions S225945 and S233936 are set to be tried at the same time, subject to the direction of the trial judge, in December 2025.

Analysis

Position of the Parties

[32] The applicants rely upon Rule 6-2(7) (b) and (c) and seek to be added as parties to the petition. Under Rule 6-2(7)(b), they argue that they are directly impacted by the relief sought in the petition. In particular, one of the orders sought by Mirage to remedy the alleged oppression is that Teknocan or MAJ be compelled to purchase all of Mirage's shares. That would include those shares that the applicants say Mirage holds in trust for them. The effect of this order, they argue, would be to wipe out their shareholder rights. That would deprive them of the primary relief they seek in Actions S225945 and S233936.

[33] The petitioner opposes these applications and says that the applicants are taking an inconsistent position as compared to the position they took in response to the Third Party Notice. The petitioner's position is that Rule 3-5 mirrors the requirements of Rule 6-7 and Associate Judge Robertson's decision gives rise to issue estoppel in respect of whether the relief sought in the oppression proceeding impacts on the relief sought in Actions S225945 and S233936. In the alternative, if the specific requirements of issue estoppel are not met,

the petitioner says the broader doctrine of abuse of process can fill those gaps. In the final alternative, the petitioner says the pre-requisites of Rule 6-2(7) are not met.

[34] In reply, the applicants argue none of the preconditions to the operation of issue estoppel are met. They say further that these applications are not an abuse of process.

Discussion

Issue Estoppel and Abuse of Process

Legal Principles

[35] An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided: Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44 [Danyluk].

[36] The law has developed a number of techniques to prevent abuse of the decision-making process. Mirage invokes the doctrines of issue estoppel and abuse of process.

[37] The preconditions to the operation of issue estoppel are

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[38] If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: Danyluk at paras. 25 and 33.

[39] The broader doctrine of abuse of process precludes re-litigation where one or more of the requirements of issue estoppel typically, privity, are not met, but where allowing the litigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: Lamb v. Canada (Attorney General), 2017 BCSC 1802 at para. 81

Analysis

[40] The first specific requirement of issue estoppel is not met in this case. Associate Judge Robertson did not decide the same question that is asked in these applications.

[41] The question before Associate Judge Robertson on the application to strike the Third Party Notice, was whether it was proper for Mirage to attempt to advance claims of oppression and fraud within the confines of Action S233936 which dealt with interpretation of a contract, and whether there had been a breach of that contract (that the third parties were not parties to).

[42] It was properly conceded on that application that the oppression claims had to be advanced by petition which in and of itself was a jurisdictional flaw to that aspect of the Third Party Notice: Sahsi v. Bhuthal (20 January 2020), Vancouver Registry S1913342 (B.C.S.C.) at paras. 37-39.

[43] Given that concession, to the extent that Associate Judge Robertson commented upon the application of Rule 3-5(1) to the oppression aspects of the Third Party Notice, those comments were obiter. Even if they were not, those comments would not give rise to the doctrine of issue estoppel.

[44] With respect to R. 3-5(1)(b), Associate Judge Robertson accepted at para. 11 there was some relationship between the claims brought in the Third Party Notice and Action S233936; however, she held that those similarities were held together "by the barest of threads". Associate Judge Robertson held:

[11] In particular, the claims that are alleged to arise as a result of these fraudulent activities involve oppressive actions which are matters as between Mirage and the third parties which have no bearing on the ultimate results of the main action.

[12] While I accept Mirage's argument that there may, at some time, be a need to define and quantify the value of the shareholders' loans and possibly determine whether or not there is some obligation on the third parties to satisfy Mirage in respect of those shareholder loans, it is not necessary for that to be done in this action because the relief being sought by the plaintiffs in this action are not a payout of the shareholder's loan. [Emphasis added.]

[45] Thus, Associate Judge Robertson's focus under Rule 3-5(1)(b) was on whether or not Action S233936 could be effectively adjudicated upon without the addition of the proposed third parties and the resolution of the issues raised in that proceeding. She concluded that the resolution Action S233936 would not deprive Mirage of the relief it sought in the Third Party Notice.

[46] With respect to R. 3-5(1)(c), Associate Judge Robertson concluded, at para. 14, that the questions or issues between the parties were not substantially connected. Further, at para. 15, she held:

[15] As to the secondary consideration of discretion, I am satisfied that the inclusion of this matter would be unduly prejudicial to the third-party. Put another way, it would not be in the interests of justice to allow what is, at this point, largely a claim that involves the interpretation of agreements and enforcement of them according to their terms to become an action in fraud and an accounting exercise in respect of the quantum of various

shareholders' loans which are not being called upon or otherwise dealt with, such that their quantum need be determined to resolve the main action.

[47] Again, the focus here was on whether participation by the third parties would be prejudicial to them given their participation was not needed to resolve the issues raised in Action S233936.

[48] Those are not the same questions now before this Court. I have determined that this application falls to be disposed of under Rule 6-7(2)(b). Under Rule 6-7(2)(b), the questions are:

a) whether the applicants "ought" to have been joined as respondents in the oppression proceeding; or

b) whether the applicants are "necessary" parties to ensure that all matters raised in this oppression proceeding may be effectually adjudicated.

[49] As noted, it was conceded before Associate Judge Robertson that the oppression proceeding had to be pursued by petition. Associate Judge Robertson was not asked and did not opine on, who would be the proper parties to the oppression proceeding nor who would be necessary parties to ensure that all matters raised could be effectually adjudicated.

[50] Given that the issues now before the Court are being considered for the first time, I also do not consider this to be an appropriate case in which to exercise the broader doctrine of abuse of process. In particular, permitting these applications to proceed does not violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

Rule 6-2(7)

[51] The addition of parties under Rule 6-2(7) is a matter of discretion to be exercised to allow effective determination of the issues, without delay, inconvenience or separate hearings.

[52] Rule 6-2(7)(b) has been given a narrow interpretation. It is intended to remedy defects in the proceeding as it stood prior to the application to add a party. "Ought to have been joined" deals with the situation where the person sought to be added has a direct interest in the outcome of the existing proceeding. "[N]ecessary to ensure that all matters may be effectually adjudicated" deals with a situation where the participation of the person sought to be added is required in order for the existing claim to be fully and properly adjudicated: Byrd v. Cariboo (Regional District), 2016 BCCA 69 at para. 36.

[53] I am satisfied that the applicants ought to have been named as respondents under Rule 6-2(7)(b).

[54] Rule 16-1 governs petition proceedings. It provides in relevant part:

(3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought. [Emphasis added.]

[55] In light of the relief claimed in Actions S225945 and S233936, the petitioner was required to serve the applicants under Rule 16-1(3) as persons whose interests may be affected by the orders sought. While Mirage disputes the validity of the Trust Agreement, the broad language of Rule 16-1(3) requires that the applicants be given notice and an opportunity to respond despite that dispute.

[56] Most obviously, the applicants may be affected by the order sought in the petition directing MAJ, or in the alternative, Teknocan, to purchase the shares registered in the name of the petitioner. If this order was granted, it would deprive the applicants of the ability to obtain the primary remedy sought in Actions S225945 and S233936.

[57] If they had been served as Rule 16-1 required, the applicants would have had the right to file a response to petition pursuant to Rule 16-1(4). While Rule 16-1 is not determinative of the question of party standing, the requirements of that rule are some indication that the applicants are likely appropriate parties to the oppression proceeding.

[58] I am also satisfied that it is necessary to add these applicants as respondents to ensure that all matters raised in this proceeding may be effectually adjudicated. Oppression claims are premised on the reasonable expectations of the shareholder. In order to determine what the petitioner's reasonable expectations were, the Court will need to resolve whether or not the Trust Agreement is valid, whether or not it constrains Mirage's voting rights, and what impact, if any, that may have on Mirage's reasonable expectations. The applicants may have significant evidence to give about events leading up to the AGM that may have impacted on the petitioner's reasonable expectations. Given the other respondents are not parties to the Trust Agreement, the applicants also have a position and perspective which is distinct from the other respondents to advance in argument on these issues.

[59] The applicants have satisfied the requirements to be parties under Rule 6-2(7)(b).

[60] If I am wrong about that, I also conclude the applicants ought to be added under Rule 6-2(7)(c). Rule 6-2(7)(c) has been given a broad interpretation. It authorizes the court to order that a person be added as a party if there may exist between the person and any party to the proceeding a question or issue relating to or connected with either, (i) any relief claimed in the proceeding; or (ii) the subject matter of the proceeding: Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39, 2023 BCSC 1108 at para. 23.

[61] For the same reasons outlined above, I conclude there may exist between the applicants and the petitioner an issue connected to the relief claimed in this proceeding and that claimed in Actions S225945 and S233936. The applicants also may have an interest in the subject matter of the litigation which concerns the conduct of Teknocan's affairs. Delay has not been argued to be an issue.

Conclusion

[62] The applicants have been successful on this application and are entitled to their costs from the petitioner to be taxed on Scale B.

"Latimer J."

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