

CANADA / JUDGMENT

Neural Capital GP, LLC v. 1156062 B.C. Ltd.

2021 BCSC 192

COURT

Supreme Court of British Columbia

DECIDED

2 February 2021

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2021 BCSC 192 Neural Capital GP, LLC v. 1156062 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neural Capital GP, LLC v. 1156062 B.C. Ltd.,

2021 BCSC 192

Date: 20210202

Docket: S191431

Registry: Vancouver

Between:

Neural Capital GP, LLC, as the General Partner of Ascension Capital LP

Plaintiff

And

1156062 B.C. Ltd., Mawji Ventures Inc., Christopher Keshian, Hanif Mawji and Bijan Mawji

Defendants

In Chambers

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

Counsel for the Plaintiff, via teleconference:

B.J. Cabott

K. Mansveld

Counsel for the Defendants other than Christopher Keshian, via teleconference:

G. Forrester

Counsel for the Interested Party, Miller Thomson LLP, via teleconference:

S.A. Dawson

K. Smith

Place and Dates of Hearing:

Vancouver, B.C.

January 25-26, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 2, 2021

I. Introduction

- [1] The plaintiff ("Ascension") is a U.S.-based investor in blockchain-backed digital assets. It advanced US\$5 million to a British Columbia entity for investment in a cryptocurrency wallet platform project under development by a U.K. entity called Mycelium Technologies Ltd. or MyTech. The project did not proceed. Ascension wants its money back.
- [2] The British Columbia entity is 1156062 SPV Limited Partnership (the "SPV"). "SPV" stands for "Special Purpose Vehicle". Its business purpose was to serve as a Canadian conduit between Ascension and MyTech. The defendant, 1156062 B.C. Ltd. ("115") is the general partner of the SPV. Ascension is the sole limited partner.
- [3] The investment was brokered by the defendant, Bijan Mawji and persons associated with him, including the defendant, Mawji Ventures Inc. Bijan Mawji is the sole director of 115. Through 115, Mr. Mawji managed the disbursement of funds through the SPV.
- [4] For all but a short period, the US\$5 million advanced by Ascension was held in trust by a British Columbia law firm, Miller Thomson LLP, acting on instructions from 115. At present, Miller Thomson holds approximately US\$2.9 million and CDN\$210,000. The balance of the US\$5 million has been disbursed. Only US\$667,176 was advanced directly to MyTech. Ascension maintains that funds were wrongfully disbursed and the defendants are responsible. The defendants maintain that funds disbursed to third party vendors, including Mr. Mawji, should be considered as having been advanced to MyTech, and that everything was done properly.

- [5] Ascension commenced this action in February 2019 and it is set for trial for four weeks commencing in June 2021. Pending trial, there have been interlocutory applications focusing on preservation and control of the very roughly US\$3.1 million still held by Miller Thomson. In particular:
- a) On March 21, 2019, Macintosh J. made a preservation order preventing 115 from disbursing further funds. His reasons for judgment are indexed at 2019 BCSC 478;
 - b) On June 28, 2019, Fisher J.A. denied the defendants leave to appeal the preservation order made by Macintosh J., with costs. Her reasons for judgment are indexed at 2019 BCCA 258;
 - c) On September 19, 2019, Milman J. heard a petition by which Ascension sought to replace 115 with a general partner of its choosing. He rejected one of the grounds put forward by Ascension and held that the others raised triable issues that should be determined in this action, which he ordered consolidated with the petition proceeding. Milman J.'s reasons for judgment are indexed at 2019 BCSC 2180.
- [6] The present applications constitute further skirmishing. Ascension again seeks to replace 115 with a general partner that it controls. If Ascension succeeds in its application, its new general partner will not be bound by the preservation order pronounced by Macintosh J. It would be able to return the US\$3.1 million to Ascension.
- [7] The defendants seek security for costs, but only if Ascension's application succeeds.
- [8] Miller Thomson seeks a declaration of lien and charging order over the funds it holds in trust to the extent necessary to secure payment of legal fees it says it is owed by the SPV.

II. Ascension's application

- [9] Ascension maintains that 115 became insolvent and is deemed to have resigned as the general partner of the SPV. It relies on Art. 3.11 of the partnership agreement constituting the SPV, which states:

3.11 Deemed Resignation of the General Partner

The General Partner shall be deemed to have resigned as the General Partner of the Limited Partnership in the event of the bankruptcy, insolvency, dissolution, liquidation or winding-up of the General Partner (or the commencement of any act or proceeding in connection therewith which is not contested in good faith by the General Partner), or if applicable, the appointment of a trustee, receiver or receiver and manager of the affairs of the General Partner, unless waived by Extraordinary Resolution.

- [10] Ascension applies for summary judgment pursuant to Supreme Court Civil Rule 9-6. In its notice of application, Ascension submits that:

15. From and beginning on 22 October 2019 at the latest:

- (a) the GP was unable to meet its obligations as they generally became due; and/or
 - (b) the aggregate of the GP's property, at a fair valuation, was not sufficient to enable payment of its obligations due and accruing due.
- [11] Summary judgment can only be granted under R. 9-6 where there is no genuine issue of material fact requiring a trial; *Canada v. Lameman*, 2008 SCC 14 at para. 11; *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at paras. 36-38.
- [12] Ascension does not rely on its claims that are to be tried in this action as evidence of obligations 115 has failed to meet as they generally became due. It acknowledges that these claims involve triable issues. Rather, it relies on 115's failure to pay costs owing to Ascension in consequence of its failed application for leave to appeal, prior to October 22, 2019.
- [13] Costs were payable by 115 to Ascension in consequence of Fisher J.A.'s order of June 28, 2019, but the costs were not assessed by Registrar Outerbridge until October 3, 2019. He assessed the costs payable at \$2,789.63. Ascension demanded payment on October 7, 2019. The demand letter did not fix a deadline for payment.
- [14] On October 29, 2019, Mr. Mawji paid the costs by delivering a bank draft to Ascension's lawyers. I interpret the note that accompanied the payment as an indication that the payment was made on behalf of both Mr. Mawji and 115. Ascension says that this payment was too late. It says that 115's failure to pay its debt by October 22, 15 days following delivery of demand, means that it was insolvent.
- [15] Ascension relies on branches (a) and (c) in the definition of an insolvent person found in s. 2 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. They refer to a person:
- (a) who is for any reason unable to meet his obligations as they generally become due, or
 - (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.
- [16] Concerning branch (a), I do not accept that a failure to pay a single debt of less than \$2,800 within 15 days after demand could constitute a failure on 115's part to meet its obligations (plural) as they generally became due.
- [17] Concerning branch (c), Ascension submits that 115 has no identifiable assets to meet its liabilities as they come due. 115 is a shell company set up to occupy the role of general partner. Ascension submits that, as a shell company, 115 was not necessarily an insolvent person, but it became insolvent when it acquired an obligation, namely the costs liability, that it could not satisfy from its own resources.

- [18] Counsel for Ascension, Mr. Cabott, accepts that the use of shell companies as general partners of limited partnerships is not uncommon. Nor are provisions such as art. 3.11 at all uncommon. If Ascension is correct, the practice is a dangerous one, because such companies would always be teetering on the very brink of insolvency, at risk of being deemed to have resigned. I do not think that art. 3.11 contemplates that result.
- [19] A shell company such as 115 may depend on its shareholders to supply it with funds to meet its obligations. If they can be counted on doing so reasonably quickly, and do so in fact, then the company should not be considered as insolvent in the context of a limited partnership in which the use of a shell company was part of the arrangement.
- [20] Moreover, 115 was not limited to looking to its shareholders to supply it with funds. Pursuant to art. 3.6 of the limited partnership agreement, it was entitled to be indemnified, to the extent of the SPV's assets

from and against all costs, expenses, damages or liabilities suffered or incurred by reason of the acts, omissions, or alleged acts or omissions arising out of the activities of the General Partner on behalf of the Limited Partnership under this Agreement or in furtherance of the interests of the Limited Partnership, unless the acts, omissions or the alleged acts or omissions on which the actual or threatened action, proceeding or claim are based were not believed in good faith the General Partner to be within the scope of the authority conferred by this agreement or otherwise by law, or were performed or omitted fraudulently or in bad faith or constituted negligence or wilful or reckless disregard of the obligations of the General Partner under this Agreement or applicable law.

- [21] 115 has a claim under the indemnity that Ascension concedes is triable. Its claim constitutes a chose in action, that is, an asset belonging to 115. I am not in a position to value that asset on this application. It is at least potentially an asset that would have permitted 115 to satisfy its costs obligation, but for the preservation order made by Macintosh J. at Ascension's request.
- [22] I conclude that 115's failure to pay the costs prior to October 22, 2019, should not be considered as having rendered it insolvent for the purpose of art. 3.11 of the partnership agreement under either arm of the BIA definition.
- [23] Mr. Cabott refers to 115's apparent inability to pay Miller Thomson's legal accounts totalling approximately \$413,000 as a further indicator of insolvency, though he did not press the point. These accounts are arguably covered by the indemnity and 115 has been prevented from paying them by Macintosh J.'s preservation order. I cannot conclude on this application that an inability to pay the accounts by reason of an order made in this proceeding is evidence of insolvency, when the inability may be resolved by the trial.
- [24] For these reasons, I am not persuaded that Ascension is entitled to summary judgment declaring that 115 is deemed to have resigned and has been replaced by Ascension's nominee. Ascension's application is dismissed.

- [25] Having come to that conclusion, I need not address the defendants' application for security for costs. It is adjourned generally.

III. Miller Thomson's application

- [26] Miller Thomson asks for declarations that it is entitled to both a retaining lien and a charging order over the funds in its possession. In simple terms, the claimed retaining lien is a right to retain the funds in Miller Thomson's possession until its accounts are paid. The claimed charging order is a property right in the fund conferred by s. 79 of the Legal Profession Act, S.B.C. 1998, c. 9, and at common law. In the authorities, a charging order is sometimes referred to as a charging lien, but this terminology risks confusion of the charging order with the retaining lien. They are substantially different legal rights; Stephen Antle, "Solicitors' Charging Liens", *The Advocate*, vol 48, part 5, p 673 (1990) [Antle]; *Cliffs Over Maple Bay (Re)*, 2011 BCCA 346 at paras. 22-23.
- [27] Miller Thomson's unpaid accounts total \$413,347.38. On Miller Thomson's theory, only those unpaid accounts that relate to the conduct of litigation commenced by Ascension are accounts potentially secured by a charging order. Those accounts total \$362,131.63.
- [28] The defendants support Miller Thomson's application.
- [29] Counsel for Miller Thomson, Mr. Dawson, acknowledges that any order it may obtain must provide that the accounts are subject to assessment.
- [30] In its third amended notice of civil claim, Ascension's claims include a plea that it was induced to enter into the SPV and invest US\$5 million by misrepresentations concerning the structure and purpose of the investment. It further pleads that, pursuant to s. 44 of the Partnership Act, R.S.B.C. 1996, c. 348, the agreements constituting the SPV should be rescinded and that it is entitled to a lien securing the return of the \$5 million.
- [31] Mr. Dawson accepts that Ascension's claim for rescission raises a triable issue that I cannot resolve on this application. Accordingly, he accepts that any order he obtains on this application must be "provisional", that is, it must allow for the possibility that Ascension may succeed at trial and obtain an order rescinding the limited partnership agreement and directing the return of the funds to it. In my view, Mr. Dawson is correct to make this concession.

A. The claim for a retaining lien

- [32] At common law, a lawyer has a right to retain property of the client in the lawyer's possession until accounts rendered to the client are paid; *Randall (Re)* (1956), 6 D.L.R. (2d) 78 (B.C.S.C.) at paras. 8-9. This lien attaches to funds held by the lawyer in trust for the client, provided that they are not saddled with a trust to be used or paid out in a particular way; *Randall* at para. 7.

[33] I agree with the following proposition from Mr. Dawson's written argument:

23. To exercise a retaining lien, the lawyer must possess property belonging to the client. The lawyer's right to impose a retaining lien over a client's property is no greater than the right a client would have over that property, if it were in the client's possession.

[34] It will only be decided at trial whether the funds in Miller Thomson's trust account belong to the SPV (Miller Thomson's client) are subject to a prior lien securing their return to Ascension. If Ascension makes out its rescission claim at trial, then Miller Thomson's claim to a retaining lien will fail.

[35] Likewise, the rescission claim may fail. In that case, it will be established that the funds in the trust account belong to 115, holding them for the benefit of the SPV as provided by art. 3.3 of the limited partnership agreement. This would appear to be the case even if Ascension succeeds in establishing some of its other claims, such as the claim that 115 disbursed funds in breach of a fiduciary duty owed to Ascension. In such circumstances, Miller Thomson's claim to a retaining lien may well be made out.

[36] Miller Thomson should not be prejudiced prior to trial in its ability to maintain an arguable claim for a retaining lien at the conclusion of the trial. Miller Thomson's claim requires that it remain in possession of an amount sufficient to secure its claim until the trial is concluded. Its ability to remain in possession of the funds is not presently at risk, because 115 is bound by the preservation order and Ascension's latest attempt to displace 115 has failed. I will address what further provision is necessary to protect Miller Thomson's position at the conclusion of these reasons.

B. The claim for a charging order

[37] The requirements for a charging order are essentially the same under s. 79 of the Legal Profession Act as at common law; *Antle* at p 675. The lawyer must show that:

1. he or she was retained in a court proceeding;
2. property was recovered or preserved;
3. as a result of the lawyer's efforts; and
4. at least prima facie, the lawyer will not be paid unless a charging order is granted.

[38] As with the claim for a retaining lien, Miller Thomson's claim for a charging order depends on the outcome of the trial. If Ascension succeeds and obtains rescission, the funds will not constitute property recovered or preserved as a result of the proceeding. The court will have to assess the substance of the litigation, taking everything into account; *Cliffs Over Maple Bay* at paras. 28-29; *Wilson, King & Co v. Lyall (Trustees of)* (1987), 37 D.L.R. (4th) 512 (BCCA) at 519.

- [39] Mr. Dawson submits that, while the claim for a charging order may fail at the end of the day, at this preliminary stage, Miller Thomson has succeeded in preserving the fund for the benefit of 115 and the SPV. It has fought off Ascension's attempts to recover the money by replacing 115 with its nominee. He therefore urges me to make a provisional charging order that may ultimately lapse or have to be set aside.
- [40] The decision to make a charging order is discretionary and I am not persuaded that it is just and proper to grant Miller Thomson what the cases describe as the "privilege" of a charging order at this stage; *Cliffs Over Maple Bay*, at para. 24. While 115 remains the general partner, the preservation order prevents dissipation without further order of the court or the agreement of 115 and Ascension. 115 supports Miller Thomson's claim. Unless 115 changes its mind or the preservation order is set aside, there is no material risk of dissipation of the funds to Miller Thomson's detriment.

C. Alternative claims of Miller Thomson

- [41] Miller Thomson applies, in the alternative, for a preservation order. In light of my refusal of Ascension's application, the alternative application is unnecessary.
- [42] Miller Thomson applies, in the further alternative, for an order requiring Ascension to post security for the undertaking as to damages it gave as a condition of the preservation order. I agree with Miller Thomson that it is a person affected by the preservation order with standing to make this application pursuant to paragraph 5 of the order.
- [43] I do not think that security for the undertaking is required. The real issue in this case is not whether Ascension will recover at least some of the money it advanced, but how much it will recover. There are no cross-claims advanced against Ascension, and US\$3.1 million is tied up here in British Columbia for the time being. So long as the fund is here, there is no material risk that Miller Thomson will have a claim under the undertaking that exhausts the readily exigible assets belonging to Ascension here in British Columbia.

IV. Disposition of Miller Thomson's application

- [44] Miller Thomson's claims to a retaining lien and a charging order are adjourned for consideration by the trial judge at the conclusion of the trial.
- [45] As a term of the adjournment, for the protection of Miller Thomson's position, I direct that:
- a) any application to vary the preservation order pronounced by Macintosh J. must be made on notice to Miller Thomson; and
 - b) Miller Thomson is to be provided at least 14 days notice before any agreement between 115 and Ascension resulting in a substitution of another entity for 115 as general partner of the SPV is put into effect.
- [46] Counsel, is there anything arising?

- [47] MR. FORRESTER: It's Forrester, My Lord. Just the matter of costs. I submit on behalf of my clients they should be entitled to costs, in any event of the cause, of the application by the plaintiff for the resignation of the general partner.
- [48] MS. MANSVELD: My Lord, it's Mansveld. On the issue of costs, we would say that costs should be in the cause, given our friend commenced but ultimately didn't pursue his security for costs application, and if certain claims of Ascension are, in fact, made out at trial we submit that it would be inappropriate for costs to be provided to the Mawji defendants on the GP application.
- [49] MR. FORRESTER: In reply to that, My Lord, none of this goes -- this was a narrow application, that necessarily ended up taking two days. My clients are not institutional clients. They've been cut off to their recourse of the indemnity and have had to pay counsel for a lengthy and complex hearing of an application that in their view should never have been brought. That prejudices them and again has nothing to do with the greater issues in this case, so it wouldn't be unjust to award them their costs of the application.
- [50] THE COURT: I think that the defendants should have their costs, but not for a two-day application.
- [51] The reason this application took two days had to do first with Mr. Forrester's application for security for costs in the alternative, which has been adjourned generally, and second because of Mr. Dawson's application. Had Ascension's application been considered in isolation, I have no doubt that it could have been easily heard within a single day.
- [52] I will order that the defendants cover costs of Ascension's application in any event of the cause, not payable forthwith, but only for a single day of hearing.
- [53] MR. DAWSON: My Lord, it's Dawson. May I address just two points arising?
- [54] THE COURT: Yes.
- [55] MR. DAWSON: Thank you. I noted Your Lordship's reasons provided Miller Thomson with 14 days' notice of any agreement to substitute the general partner. There is, of course, provision in Justice Macintosh's order for the parties to agree to pay out money as well, and I wonder if that 14-day notice might be appropriate to be extended to any agreement to pay out money and not just limited to the substitution of a general partner.
- [56] It would have the same effect, namely to protect Miller Thomson from having the money disappear before the matter of the charge and the lien is finally disposed of.
- [57] THE COURT: Yes, I understand. Ms. Mansveld, do you have anything to say to that?
- [58] MS. MANSVELD: My Lord, I would only say that if you were to provide for that, I think it would make sense for that to be only required if the amount to be paid out was such that it would leave less than Miller Thomson is claiming in the account, if that makes sense.

- [59] THE COURT: It does. I think probably it should be a little more than that, because there may well be costs claimable as a result of all of these proceedings to Miller Thomson's benefit, so there should be some allowance for that as well. Mr. Dawson, do you object if we provide for any payment out that would leave less than \$500,000 U.S. in the account?
- [60] MR. DAWSON: I think that makes perfect sense, My Lord, and just on the question of costs, I think the upshot of Your Lordship's reasons are that the status quo is essentially preserved, and the retaining lien and charging order stand to be argued at the conclusion of the trial, so I would ask that the costs consequences of Miller Thomson's application be left to the judge who disposes of the application at the conclusion of trial, if that is acceptable, My Lord.
- [61] THE COURT: Yes. Very well.
- [62] The order I have pronounced will be varied to provide that Miller Thomson is to be provided at least 14 days' notice before any agreement between Ascension and 115 that would result in the payment of monies to Ascension leaving less than U.S. \$500,000 in Miller Thomson's possession is put into effect.
- [63] The costs of Miller Thomson's application are reserved to the trial judge following disposition of Miller Thomson's applications by the trial judge.
- [64] MR. DAWSON: Thank you, My Lord.
- [65] THE COURT: Is there anything further?
- [66] MR. FORRESTER: Nothing further from me, My Lord.
- [67] THE COURT: Very well.
- [68] MS. MANSVELD: Nothing further from me, My Lord.
- [69] THE COURT: Thank you all. We are adjourned.
- "Gomery J."

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