
CANADA / JUDGMENT

Nieuwesteeg v. Ehman

2019 BCSC 72

COURT

Supreme Court of British Columbia

DECIDED

23 January 2019

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2019 BCSC 72 Nieuwesteeg v. Ehman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nieuwesteeg v. Ehman,

2019 BCSC 72

Date: 20190123

Docket: S28487

Registry: Cranbrook

Between:

Gerardus Maria Nieuwesteeg, Adriana Maria Nieuwesteeg, Alexander Bondarchuk and George Michael Low

Petitioners

And

Dale A. Ehman

Respondent

Before: The Honourable Mr. Justice Bernard

Reasons for Judgment

Counsel for the Petitioners:

G.A. Purdy, Q.C.

Counsel for the Respondent:

M. Larsen

Place and Date of Trial/Hearing:

Cranbrook, B.C.

October 22, 2018

Place and Date of Judgment:

Cranbrook, B.C.

January 23, 2019

A. Overview

- [1] The petitioners and the respondent are both the shareholders and directors of 685945 B.C. Ltd. ("Company"). The Company is a closely held corporation in which the five shareholders entered into a Unanimous Shareholders' Agreement ("USA") shortly after incorporation. The USA requires, inter alia, that the shareholders vote their shares to elect one another as the sole directors of the Company and that all directors' resolutions be made by unanimous consent resolution (clause 5).
- [2] The respondent is the sole director withholding his consent to a resolution to approve the sale of the Company's only asset, a hotel.
- [3] The petitioners seek a declaration that clause 5 is void and of no effect as inconsistent with the Articles of the Company ("Articles") and unduly fettering the discretion of the directors to act in the company's best interests.
- [4] For the reasons that follow, the petition is dismissed.

B. Background

- [5] The Company was incorporated on January 26, 2004, for the sole purpose of acquiring and operating a commercial property known as The Northern Hotel ("Hotel"). On February 21, 2004, the parties and the company entered into the USA.
- [6] The Hotel proved not to be as lucrative as expected. In 2008, by shareholder resolution, the Hotel was put on the market for sale, with the sale, itself, subject to the approval of the board of directors. The Hotel was then marketed but there was little-to-no buyer interest for many years.
- [7] In 2017, the Company received a purchase offer of \$940,000 which was unanimously approved by the directors; however, that purchase and sale fell through.
- [8] In the spring of 2018, an offer to purchase the Hotel for \$950,000 was received. In this instance, the petitioners favoured accepting this offer but the respondent did not. Unable to achieve the unanimity required under the USA, the frustrated four directors filed the instant petition.

C. Factual Framework

[9] The Company was incorporated with standard Articles of Incorporation. The provisions particularly germane to this petition have been identified by the parties as follows:

PART 15 - PROCEEDINGS OF DIRECTORS

15.1

The directors may meet together at such places as they think fit for the dispatch of business, adjourn and otherwise regulate their meetings and proceedings, as they see fit. The directors may from time to time fix the quorum necessary for the transaction of business and unless so fixed such quorum shall be a majority of the Board. The Chairman of the Board, if any, or in his absence the President of the Company, shall be chairman of all meetings of the Board, but if at any meeting neither the Chairman of the Board, if any, nor the President shall be present within 15 minutes after the time appointed for holding the same or if both the Chairman of the Board and the President, being present decline to act, the directors present may choose some one of their number to be chairman at such meeting. A director interested is to be counted in a quorum notwithstanding his interest. In the event the Company is a one-man company, a quorum shall consist of one.

15.2

A director may at any time, and the Secretary shall, upon the written request of a director, call a meeting of the directors. Reasonable notice thereof specifying the time and place of such meeting shall be mailed, postage prepaid, addressed to each of the directors at his registered address before the time fixed for the meeting or such notice may be given to each director either personally or by leaving it at his usual business or residential address or by telephone, telegram, telex or other method of transmitting visually recorded messages. It shall not be necessary to give to any director notice of a meeting of directors immediately following a general meeting at which such director has been elected or notice of a meeting of directors at which such director shall have been appointed. Accidental omission to give notice of a meeting of directors to, or the non-receipt of notice by, any director, shall not invalidate the proceedings at that meeting.

15.3

A meeting of the directors at which a quorum is present shall be competent to exercise all or any of the authorities, power and discretion for the time being vested in or exercisable by the directors.

15.4

The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed pursuant to these Articles as the necessary quorum of directors, the continuing directors or director may act for the purpose of filling vacancies increasing the number of directors to that number, or for the purpose of summoning a general meeting of the Company, but for no other purpose.

15.5

The directors may delegate any but not all of their powers to committees consisting of such of the directors as they think fit. Any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may from time to time be imposed on it by the directors, and shall keep regular minutes of their transactions and shall cause such minutes to be recorded in books kept for that purpose, and shall report the same to the Board of Directors at such times as the Board shall require.

15.6

A committee may elect a chairman of its meetings; if no such chairman is elected, or if at any meetings the chairman is not present within 15 minutes after the time appointed for holding the same, the members present may choose one of their number to be chairman of the meeting;

15.7

The members of a committee may meet and adjourn as they think proper. Questions arising at any meeting shall be determined by a majority of votes of the members present and in case of an equality of votes the chairman shall not have a second or casting vote.

15.8

All acts done by any meeting of the directors or by a committee of directors or by any person acting as a director shall, notwithstanding that it shall be afterwards discovered that there was some defect in the appointment of any such director or person, acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

15.9

For the first meeting of the Board to be held immediately following the appointment or election of a director or directors at an annual or general meeting of shareholders or for a meeting of the Board at which a director is appointed to fill a vacancy in the Board, no notice of such meetings shall be necessary to the newly elected or appointed director or directors in order for the meeting to be duly constituted, provided that a quorum of directors is present.

15.10

Any director of the Company who may be absent either temporarily or permanently from the Province of British Columbia may file at the office of the Company a waiver of notice which may be by letter, telegram or cable of any meeting of the directors and may at any time withdraw such

waiver, and until such waiver is withdrawn, no notice of meetings of directors shall be sent to such director, and any and all meetings of the directors of the Company, notice of which shall not have been given to such director, shall, provided a quorum of the directors is present, be valid and binding upon the Company.

15.11

Questions arising at any meeting of the directors shall be decided by a majority of votes. In case of an equality of votes, the Chairman shall not have a second or casting vote.

15.12

A resolution consented to in writing, whether by document telegram, telex or any method of transmitting legibly recorded messages by all of the directors shall be as valid and effectual as if it had been passed at a meeting of the director duly called and held. Such resolution may be in two or more counterparts which together shall be deemed to constitute one resolution in writing. Such resolution shall be filed with the minutes of the proceedings of the directors and shall be effective on the dates stated therein or the latest date stated on any counterparts.

15.13

A director may participate in a meeting of the Board, or of any committee of the directors through the use of conference telephones or other communication facilities by means of which all directors participating in the meeting can hear each other and provided that all such directors agree to such participation. A director participating in a meeting in accordance with this Article shall be deemed to be present at the meeting and to have so agreed and shall be counted in the quorum therefore and be entitled to speak and vote thereat.

[10] The parties and the Company entered into the USA with the stated purpose of promoting "harmony in the operation and control of the Company". The USA addresses various matters typically found in USAs for closely held corporations: for example, there are limits on the transfer or sale of shares, "first refusal" rights to shareholders, and a requirement that the shareholders vote one another onto the board of directors. The impugned clause 5 provides as follows:

5. All decisions to be taken by the Board of Directors of the Company shall be taken by unanimous consent resolution.

[11] The parties took no steps to amend the articles (if such was required) to conform with the USA, and they have abided by the terms of the USA since its inception approximately 15 years ago. It is only as a result of their inability to reach unanimity in relation to the recent offer to purchase the Hotel that the petitioners now seek to resile from the director unanimity requirement of clause 5. Notably, the USA does not provide a mechanism for dispute resolution.

D. Discussion

[12] The validity of the parties' USA, per se, is not in issue, and no evidence was tendered regarding the parties' agreement beyond the USA itself. In K.P. McGuinness's textbook *Canadian Business Corporations Law*, Second Edition (Markham: LexisNexis Canada Inc., 2007), at 1212-1223, the author explains the rationale for USAs as follows:

12.201 For narrowly held corporations, perhaps the most common method of restraining director managerial authority is by way of a unanimous shareholder agreement ("USA") . . .

12.202 The term "unanimous shareholder agreement" describes a written agreement among all the shareholders . . . that restricts, in whole or in part, the powers of the directors to manage or supervise the management of the business and affairs of the corporation . . .

. . .

12.204 Both the OBCA [Ontario Business Corporations Act, R.S.O. 1990, c. B.16] and the CBCA [Canada Business Corporations Act, R.S.C. 1985, c. C-44] now expressly contemplate unanimous shareholder agreements that will affect the manner of corporate governance. Such an agreement may be not merely determinative as to where de facto control resides within a corporation, but also as to where de jure control resides with respect to those matters to which the agreement pertains. However, the precise status of a unanimous shareholder agreement under the present law is not clear. It is not part of the articles of a corporation and is not filed on public record. For this reason, such an agreement is not generally binding on outsiders to the corporation . . .

12.205 Under the present law, a unanimous shareholder agreement enjoys a status vastly superior to that of a by-law of the corporation or a simple contract. It is binding on the corporation irrespective of whether it is a party to it.

. . .

12.207 In *Duha Printers (Western) Ltd. v. Canada* [1998] S.C.J. No. 41, Iacobucci J. stated that a USA is "a corporate law hybrid, part contractual and part constitutional in nature". In that case, the Supreme Court concluded that such an agreement is to be treated as one of the constating documents of the corporation along with its articles of incorporation and by-laws. In other words, it forms part of the constitution of the corporation to which it relates. Significantly, both the OBCA and the CBCA provide that compliance orders may be obtained to enforce a USA - the remedy serving in this respect as the corporate law analog of a judgment for specific performance.

. . .

12.208 The meaning of a USA is determined in accordance with the general rules governing contractual interpretation . . . However, the modern approach to the construction of commercial agreements of business people is generally to endeavour to uphold the apparent or evident bargain between the parties . . .

12.209 . . . the scope and subject matter of a shareholder agreement is left to the parties' unrestricted discretion. For this reason the specific provisions likely to be found in any such an agreement will be determined by the particular requirements of the parties. In addition, provisions are scattered throughout the OBCA and the CBCA indicating various subjects that may be dealt with in a USA aside from the general authority to restrict the power of the directors . . . It is also common for a unanimous shareholder agreement to deal with a wide range of issues that either bind the shareholders themselves, or that create additional rights in their favour. By way of illustration, such agreements may confer a right . . . to representation upon the board of directors . . .

[Footnotes omitted].

- [13] In *The Law of Partnerships & Corporations*, 3rd ed. (Toronto, Irwin Law, 2009) at 290-291, author J. Anthony VanDuzer explains why corporations with a small number of shareholders may want to customize their relationship through a USA. He comments that if there are minority shareholders then concerns over power imbalances may give rise to a need to protect minority shareholders. This may cause shareholders to agree to contract inter se so as to remove the imbalance by allowing them to vote their shares to elect each other as directors; they may also agree that all decisions of the board must be unanimous.
- [14] While USAs are expressly provided for under the Canada Business Corporations Act, R.S.C. 1985, c. C-44, at s. 146, as well as in the legislation of some provinces, they are not specifically recognized in the [British Columbia] Business Corporations Act, S.B.C. 2002, c. 57 [BCA]; however, s. 137 of the BCA allows for the articles of the company, either in the first instance or by later amendment (by special resolution) to transfer directorial powers to shareholders. Such a transfer is often one of the purposes of a USA.
- [15] Turning to the instant USA, clause 5 specifically requires that all directors' decisions be made by "unanimous consent resolution" ("UCR"). A UCR is a well-recognized means of exercising directorial powers without holding meetings of the board. These resolutions are in writing and bear the signatures of all directors. By statute, a UCR is deemed to be a meeting of the board: see s. 140(3) of the BCA. Article 15.2 herein, also expressly provides for UCRs.

Is clause 5 of the USA void for conflicting with the Articles?

- [16] It is not contentious that the Articles constitute a contract between the shareholders and the Company, and that the shareholders cannot breach that contract by acting other than in accordance with it: see *Alder v. Dobie*, [1999] B.C.J. No. 808 (S.C.) at para. 40 [Alder].
- [17] In support of their position that clause 5 is in conflict with the Articles, the petitioners rely specifically on articles 15.1, 15.3 and 15.11, but I am not persuaded that these provisions conflict with clause 5. They address, in standard language, the topic of meetings of the directors and the procedures that apply if meetings are held, but they do not require that meetings be held.

- [18] Article 15.1 states that "[t]he directors may meet together . . . for the dispatch of business . . ." [emphasis added]. The language employed is permissive rather than directive, and can co-exist harmoniously with the mandatory language of clause 5. As already observed, article 15.12 expressly recognizes that the directors may pass resolutions by UCR: i.e., without meeting.

Is clause 5 void for fettering directorial discretion?

- [19] It is not contentious that shareholders may not contract inter se to require directors to vote in a certain way; such an agreement by shareholders is a fettering of the discretion vested in the directors to act only in the best interests of the Company in the exercise of their duties as directors (see *Ringuet v. Bergeron*, [1960] S.C.R. 672, 24 D.L.R. (2d) 449 (S.C.C.) cited by Alder).
- [20] In support of their position that clause 5 fetters the discretion of the directors, the petitioners rely on Alder, supra, and *Glassco v. 554252 Saskatchewan Ltd.*, [2008] B.C.J. No. 750 [Glassco], but I am not persuaded that these decisions assist the petitioners.
- [21] In Alder, the shareholders attempted to fetter the discretion of the directors in relation to remuneration, which was a matter for the board to decide. The Court said:
46. While the Shareholders Agreement was unanimous, the Agreement attempted to fetter the discretion of the directors who were required to undertake the management of Allworld in the best interests of Allworld and not in the best interests of the shareholders.
- . . .
50. Even if it could be said that the shareholders could vote to bind the Directors to provide the salaries set out in the June 11, 1992 Letter of Intent, it is clear that the shareholders never subsequently removed from the Directors the power to manage the company. . .
- [22] In Glassco, a non-unanimous shareholders' agreement purported to give a nominee of the shareholders the final say in relation to all matters requiring director approval. The Court said:
14. The clear effect of s. 2.4 is that the subscribing shareholders, directly or through their nominee director, were given a veto over the matters set out in subsections (a) through (d) of that section. I am satisfied this veto is in direct conflict with FinancialCAD's memorandum of articles and, after continuance under the Canada Business Corporations Act, FinancialCAD's bylaws. That section of the Shareholders' Agreement has the potential to fetter the discretion of the directors, who are required to undertake the management of the company in the best interests of the company . . .

- [23] In the instant case, clause 5 is not in conflict with the Articles and it does not purport to interfere with the discretion vested in each director to determine what he or she believes is in the best interests of the Company, and to vote accordingly. Clause 5 simply sets the threshold required to pass resolutions at unanimity rather than something less; each director remains unfettered in the exercise of his or her directorial power to vote as she or he sees fit.
- [24] The petitioners have not shown that imposing a unanimity threshold is, per se, a fettering of discretion simply because one director may thwart the passing of a resolution. As noted above, author VanDuzer recognized that there may be good reason for shareholders in a closely held corporation to agree, as they did here, that all decisions of the board be unanimous.

Should the petitioners be permitted to resile from their agreement?

- [25] Even if I were wrong in dismissing this petition on the basis of a failure to establish a conflict with the articles and/or a fettering of the directors' discretion, the relief sought by the petitioners is troubling. The petitioners are attempting to resile from a term of a USA to which they expressly agreed and have followed for almost 15 years. As noted by author McGuinness, the scope and subject matter of a USA is left to the parties' unrestricted discretion. Here, the parties exercised their collective discretion to craft a USA that suited their collective purposes, including clause 5. Having done so, the petitioners should not be permitted to resile from it because the unanimity to which they agreed cannot be achieved in relation to a resolution to approve the sale of the Hotel.
- [26] The petitioners fairly acknowledge that they are not without legal recourse (e.g., seeking an oppression remedy) if this petition is denied. They simply say that such an action would be complex and time-consuming, but this is an unsound basis for granting the relief sought.

E. Disposition

- [27] The petition is dismissed. The respondent shall have his costs, on scale B.

"Bernard J."

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