

CANADA / JUDGMENT

Sanaie v. Chen

2025 BCSC 1546

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Supreme Court of British Columbia

DECIDED

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2025 1546 Sanaie v. Chen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sanaie v. Chen,

2025 BCSC 1546

Date: 20250812

Docket: S246458

Registry: Vancouver

Between:

Yasaman Sanaie and 1230103 B.C. Ltd.

Petitioners

And

Tina Tin Nar Chen also known as Tina Fung, Elecrae Apparel Inc. and 1230123 B.C. Ltd.

Respondents

Before: The Honourable Justice Morishita

Reasons for Judgment

Counsel for the Petitioners:

M.S. Harrison

K. Sandulescu

Counsel for the Respondents:

C. Elrick

Place and Dates of Hearing:

Vancouver, B.C.

February 12-13, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2025

Introduction

- [1] Ms. Yasaman Sanaie seeks leave to start a derivative action on behalf of Elecrae Apparel Inc. ("Elecrae") against Ms. Tina Chen.
- [2] Elecrae was established by Ms. Sanaie and Ms. Chen in November 2019 and is in the business of selling compression stockings. Ms. Sanaie and Ms. Chen are the two directors of Elecrae, and each (through their respective holding companies) own 50% of the shares of Elecrae. Ms. Sanaie's holding company is 1230103 B.C. Ltd. ("0103"). Ms. Chen's holding company is 1230123 B.C. Ltd. ("0123").
- [3] From November 2019 to May 2024, Ms. Sanaie and Ms. Chen ran the business together and the profits were shared equally between their two holding companies (paid out as dividends).
- [4] Elecrae became profitable quickly. By 2022 the business was issuing monthly dividends of \$8,000.00 to both shareholders, and by 2023 that amount increased to \$20,000.00 a month.
- [5] In May 2024, a dispute arose between Ms. Sanaie and Ms. Chen. By mid-May 2024, Ms. Sanaie no longer had access to various Elecrae accounts, customer information, and the company calendar. As a result, Ms. Sanaie says that she has been unable to perform her responsibilities for the company. Ms. Sanaie alleges that as a direct result of Ms. Chen excluding her from the company operations, the company has lost significant profits, which Ms. Sanaie estimates at \$173,695.27.
- [6] In this petition, Ms. Sanaie seeks the following orders:
 - 1) An Order for leave pursuant to subsection 232(2) of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA] for the petitioners to prosecute legal proceedings in the name and on behalf of Elecrae against the 50% shareholder of Elecrae to recover damages on account of Ms. Chen's breaches of fiduciary duties, and related claims in conversion, loss of profits, and other claims that may be pleaded and proven against Ms. Chen.

- 2) An Order for leave pursuant to subsection 232(2) of the BCA for the petitioners to prosecute legal proceedings in the name and on behalf of Elecrae against the 50% shareholder of Elecrae to recover invoiced amounts, regain access to company accounts, regain access to company property, and continue operations to mitigate the diminishing value of the company.
- 3) In the alternative to (2), an Order that the petitioners have leave to apply in this proceeding for leave to prosecute legal proceedings in the name and on behalf of Elecrae against Ms. Chen to recover amounts invoiced and unpaid after the date of the original Order in this Petition.
- 4) An Order pursuant to subsection 233(3) of the BCA that Elecrae pay to the petitioners the interim costs of any legal proceedings brought pursuant to orders (1), (2) and/or (3) herein, including legal fees and disbursements, on a monthly basis.
- 5) Such further and other relief as this Honourable Court may permit.
- [7] Ms. Chen has brought her own petition seeking a declaration that she and Ms. Sanaie have reached a deadlock over the management of Elecrae, and seeking dissolution and liquidation of the company. This petition was not before this court.
- [8] For the reasons that follow, Ms. Sanaie's petition seeking leave to bring a derivative action is dismissed.

Preliminary matter: admissibility of affidavits of Ms. Sanaie

- [9] At the hearing, counsel for Ms. Chen objected to the whole of Ms. Sanaie's affidavits, or in the alternative, significant portions of them.
- [10] Ms. Sanaie listed and filed two affidavits when the petition was filed: Affidavit No. 1 of Y. Sanaie, made September 13, 2024, and Affidavit No. 1 of K. Orense, made September 13, 2024. Ms. Sanaie subsequently filed the following two additional affidavits, in response to the petition response: Affidavit No. 3 of Y. Sanaie, made February 4, 2025, and Affidavit. No. 2 of K. Orense, made February 4, 2025.
- [11] Ms. Sanaie's first affidavit is 15 pages long and contains 75 paragraphs. Ms. Chen objects to the admissibility of 38 paragraphs (or portions of those paragraphs). Ms. Chen says that the impugned paragraphs in Ms. Sanaie's first affidavit are problematic because they contain argument or opinion, are larded with adjectives expressing opinions of the conduct of others, or self-serving protestations of surprise and shock.
- [12] Ms. Chen raises similar concerns about Ms. Sanaie's third affidavit. In addition, Ms. Chen says that Ms. Sanaie's third affidavit is not truly responsive and offends the rule against case-splitting.

- [13] Ms. Chen did not give Ms. Sanaie notice prior to the hearing that she would be objecting to the admissibility of all of Ms. Sanaie's evidence in its entirety (or in the alternative, portions of it).
- [14] In my view, given Ms. Chen was seeking to have both affidavits ruled inadmissible, she should have filed a Notice of Application in advance of the hearing. Doing so would have given Ms. Sanaie adequate notice of Ms. Chen's position and an opportunity to provide a meaningful and fulsome response at the start of the hearing. Further, filing a Notice of Application would have given the Court an opportunity to review and consider the parties' respective positions prior to the hearing, and to consider case management issues - for example, whether there was adequate time to hear the matter.
- [15] The petition was set for a one-day hearing. Ms. Chen's counsel handed up a six-page written argument. Had counsel taken the Court through each of the impugned paragraphs, the hearing of the admissibility issue alone would have taken almost a day. It was apparent that hearing the matter would require more than one day. Fortunately, counsel and the Court was available the following day. Had the admissibility issue not been raised, the matter might have concluded in one day.
- [16] Counsel for Ms. Sanaie responded to the admissibility issue on the second day of the hearing. His written submissions were 13 pages long.
- [17] Court and counsel time is a precious resource. It is extremely difficult for parties to get before the court on long chambers matters. Getting a date is challenging, and even when a date is obtained matters can get bumped, at times more than once. There are simply not enough court resources to meet the overwhelming demand. To help address this, judges are required to proactively case manage to help ensure that court time is used as efficiently as possible. To this end, parties must abide by the Supreme Court Civil Rules, give accurate time estimates, and should provide each other notice of objections to evidence. Doing so helps ensure that court time is used efficiently and reduces adjournments and continuations.
- [18] For these reasons, I am dismissing Ms. Chen's application for an order that Ms. Sanaie's affidavits are inadmissible in whole or in part.
- [19] That said, regardless of whether a party objects or brings an admissibility application, the Court cannot consider inadmissible evidence. Moreover, evidence that is hyperbolic or includes unnecessary adjectives is not helpful to the court, and generally speaking is given little to no weight.
- [20] There are portions of Ms. Sanaie's affidavits where she uses terms and words such as "I was shocked" or "devastated". While I am mindful that Ms. Sanaie is not a lawyer and the words and terms she uses may be of a different type and tone than those a lawyer would use, I give little to no weight to such evidence.

- [21] Ms. Chen took issue with portions of Ms. Sanaie's affidavit where she projects business revenue. In her view, such evidence is inadmissible as it is opinion evidence. I disagree. In my view, a business owner's evidence about revenue projections is not improper evidence to give.
- [22] Last, Ms. Chen argues that Ms. Sanaie's third affidavit contains non-responsive evidence. I note that Ms. Chen's first affidavit attaches as an exhibit the affidavit she filed in her own petition proceeding. In numerous occasions, her affidavit filed in this petition cross references portions of the affidavit in the other petition. Ms. Sanaie's third affidavit is largely responsive to evidence from each of Ms. Chen's affidavits. That said, in my view paragraphs 12, 13, and 14 of Ms. Sanaie's third affidavit are not responsive to the respondents' pleadings, and should have been included in her original affidavit. These paragraphs are thus inadmissible.

Analysis

- [23] In *Su v. Hougen Co. Ltd.*, 2025 BCCA 164, the Court of Appeal recently reiterated the test for granting leave to commence a derivative action. Madam Justice Felon, for the court, writes:
- [14] The parties agree the judge correctly stated the test for granting leave to commence a derivative action. That test corresponds to ss. 232-233 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], which require the applicant to establish that:
- a) The complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding;
 - b) Notice of the application for leave has been given to the company and to any other person the court may order;
 - c) The complainant is acting in good faith; and
 - d) It is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[24] I will address each of these factors below.

Has Ms. Sanaie made reasonable efforts to cause the directors of Elecrae to prosecute the legal proceeding?

- [25] In *Wilson v. G. Wilson Construction Co. Ltd.*, 2024 BCSC 1893 [Wilson], Justice Wolfe sets out the legal principles to consider in assessing this factor as follows:
- [26] Section 233(1)(a) of the BCA requires the applicant for leave to have made reasonable efforts to cause the directors of the company to prosecute the legal proceeding. In some circumstances, this requirement necessitates that the applicant effectively ask one or more individuals to sue themselves. This occurs, for example, if the applicant director or shareholder seeks to have the company sue other directors of the company. It arises in a

different way in the present case: Blair as petitioner and director of GWC asked Kelly, as the other director of GWC, to approve a lawsuit against herself in her capacity as sole director of 444. While there might logically be little point in a petitioner making a demand for a director or another individual to sue themselves (as approval to prosecute such a claim is unlikely to be forthcoming), it nevertheless remains a statutory requirement: *He v. Zhong*, 2020 BCSC 1867 [Zhong] at para. 29, citing *Pok v. 474078 B.C. Ltd.*, 1997 CanLII 1603 (B.C.S.C.) at para. 23.

- [27] The BCA does not define what constitutes "reasonable efforts", particularly in circumstances where a request must be made to an individual or individuals to sanction action against themselves. In *Zhong*, Justice Francis referred to *Gill v. Kalgidhar Darbar Sahib Society*, 2018 BCSC 813 at para. 39, for the proposition that, in such circumstances, a letter from the applicant's solicitor demanding an individual take action to prosecute a claim is sufficient to satisfy the "reasonable efforts" pre-condition. In *Gill*, Justice Harvey reasoned that, since it would be unrealistic to expect directors to approve an action against themselves, the need to make reasonable efforts did not require the applicant to convene a directors' meeting; rather, a letter was enough.
- [26] In sum, a party seeking leave to bring a derivative action must make reasonable efforts to cause the directors of the company to prosecute the action. The case law since *He v. Zhong*, 2020 BCSC 1867 establishes that in some situations, this statutory requirement will necessitate demanding that one or more individuals consent to suing themselves. This is the situation in this case.
- [27] Ms. Sanaie's position is that this element of the test has been met. She says she made reasonable efforts to have Ms. Chen initiate or consent to a derivative action through letters sent by her counsel. When those efforts failed, Ms. Sanaie says she formally notified all the respondents of her intention to proceed with an action, including providing a draft of the proposed derivative action and asking for consent.
- [28] Ms. Chen's position is that Ms. Sanaie has not met this element of the test. Specifically, she argues that although correspondence from Ms. Sanaie's counsel references a derivative action, it contains no demand that Elecrae commence an action against Ms. Chen, nor does it set out the particulars of fact or law supporting such a claim.
- [29] Before filing this petition, Ms. Sanaie, through counsel, sent two letters that could constitute reasonable notice. Those letters are dated May 27, 2024 and August 7, 2024, respectively. In the May 27, 2024 letter, Ms. Sanaie's counsel alleges that Ms. Chen has, among other things, breached her fiduciary duty and engaged in civil fraud. Ms. Sanaie's counsel suggests that the dispute may proceed to court. In the August 27, 2024 letter, Ms. Sanaie's counsel states that if the parties cannot reach a resolution of the matter, she will apply to initiate a derivative action. In neither letter does Ms. Sanaie seek Ms. Chen's consent to start a legal proceeding. Accordingly, these letters did not satisfy the notice requirements of the BCA.

[30] It wasn't until after this petition was filed that Ms. Sanaie specifically asked Ms. Chen and her holding company to initiate a derivative action. This request was made by letter dated October 15, 2024, and sent from her counsel to Ms. Chen's counsel. In addition, by email sent January 27, 2025, Ms. Sanaie's counsel sent a copy of a draft Notice of Civil Claim in the proposed derivative action to Ms. Chen's counsel. These letters, although sent after the petition was filed, meet the requirements set out in *He v. Zhong* and subsequent cases.

[31] Accordingly, Ms. Sanaie has satisfied the first element of the test.

Was notice of the application for leave given to Elecrae and any other person the court may order?

[32] Notice of the petition was given to all affected persons, namely Ms. Chen, her holding company 0123, and Elecrae. Thus, Ms. Sanaie has satisfied the second element of the test.

Is Ms. Sanaie acting in good-faith?

[33] In *Wilson*, Justice Wolfe set out the following considerations in relation to the good faith element of the test:

[32] In *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 [*Eastern Platinum*], the majority of the Court of Appeal confirmed that the good faith requirement focuses on whether the applicant meets its onus to prove, on a balance of probabilities and based on evidence, that the primary purpose for bringing the derivative action is to benefit the company (at paras. 29-30 and 54). In this regard, the Court may consider evidence of the applicant's stated belief in the merits of the proposed derivative action. If accepted, such evidence is a *prima facie* indication of good faith, but it is not determinative. The Court must also consider evidence of ulterior motives and any existing disputes between the parties: *Eastern Platinum* at para. 31; see also para. 47. The good faith requirement is separate from the requirement that the proposed claim be in the best interests of the company; good faith requires evidence and will not be presumed simply because there is some merit to the proposed action: *Eastern Platinum* at paras. 51 and 53.

[33] In addition, since the interests of an applicant and those of the company may align, "the fact that the applicant may benefit from a successful derivative action is not an indicator of bad faith": *Zhong* at para. 33, citing 550934 *British Columbia Ltd. v. A.R. Thompson Group*, 2012 BCSC 1332 [*A.R. Thompson*] at para. 50.

[34] Ms. Sanaie's position is that she has met the onus of establishing that she is acting in good faith. In support of this position, she submits the following:

- As soon as Ms. Chen informed her that she intended to sever the business relationship, she requested access to Elecrae's inventory and accounts to remain involved in operations and prevent losses.

- Since the business relationship deteriorated, she has made efforts to protect Elecrae from the harm caused by Ms. Chen's actions.
 - She proposed an interim co-management agreement to maintain the company's profits until a resolution could be reached; however, Ms. Chen refused to cooperate.
 - Ms. Chen has either refused or failed to generate sales on behalf of Elecrae and has canceled scheduled sales appointments, refused to contact customers, and has actively interfered with Ms. Sanaie's management of the business, resulting in a loss of business and irreparable harm to Elecrae.
 - Ms. Sanaie initiated these proceedings when it became clear to her that Ms. Chen would not act in the company's best interest by restoring her full access to the company accounts in order to maintain Elecrae's operations.
 - There is no evidence that Ms. Sanaie is attempting to use the proposed derivative action to advance personal causes of action or to benefit herself.
- [35] Ms. Chen's position is that the animating force behind Ms. Sanaie's petition is to advance her strategic needs in the petition brought by Ms. Chen, which seeks to wind up and liquidate the company. In support of this, Ms. Chen notes that the only reference to a derivative action in correspondence prior to the filing of this petition is as a negotiation tactic in the shareholder dispute negotiations. In addition, Ms. Chen states that Ms. Sanaie's proposals made before bringing this petition are irreconcilable with her allegation that Ms. Chen has breached her fiduciary duty. In her view, such conduct lacks the hallmarks of good faith.
- [36] Addressing the good faith element requires a brief discussion of the background to this dispute.
- [37] Ms. Sanaie and Ms. Chen met in 2009, when they were in nursing school together. The two became friends and kept in touch. The idea for the business came up at a 2019 dinner party of the two and their respective husbands. Ms. Sanaie and Ms. Chen ultimately incorporated Elecrae and their respective holding corporations, with each holding 50% of the shares of Elecrae and agreeing to split the profits 50:50. The two also agreed that they would manage Elecrae together as directors and would share in the duties required to operate and grow the business.
- [38] Elecrae sourced a manufacturer of the compression stockings in Taiwan and built a direct-to-consumer sales business through their website and in-person sales. Their targeted clientele was medical professionals, and nurses in particular, as Ms. Chen is and was employed full-time as a nurse with Fraser Health and thus had access to a large network of nurses.
- [39] The company became successful quickly. By 2022, the company was earning sufficient profit and thus started issuing monthly dividends of \$8,000.00 to each of the principals' respective holding companies. The company's growth continued, and by 2023 the monthly dividends to each holding company increased to \$20,000.00.

- [40] The evidence about Ms. Sanaie and Ms. Chen's respective contributions to the business are conflicting. Each depose that they were contributing more time and energy to the business than the other.
- [41] Ms. Sanaie and Ms. Chen's evidence about the lead up to the business relationship breakdown and the aftermath is also conflicting. Nevertheless, it is unnecessary for me to reconcile most of the conflicting evidence for the purposes of determining the issues in this petition.
- [42] In early May 2024, the parties agreed to move Elecrae's inventory from Ms. Sanaie's house to Ms. Chen's. Their evidence on why this was done differed.
- [43] On May 16, 2024, the parties had a meeting to discuss sales numbers. The parties agree that at this meeting Ms. Chen indicated her view that Ms. Sanaie was not contributing equally to the running of the business. Beyond this, both parties have different accounts of what happened at that meeting. Ms. Sanaie said that Ms. Chen tried to force her out of the company and proposed that Ms. Sanaie take half the funds from the bank account, and that Ms. Chen would purchase Ms. Sanaie's share of the inventory. Ms. Sanaie further deposed that Ms. Chan offered her an employment position as a salesperson. Ms. Chen deposed that she did not try and force Ms. Sanaie out at that meeting, but rather the two discussed the possibility of breaking up the business relationship.
- [44] Following the meeting, Ms. Chen and Ms. Sanaie's spouse, Dr. Shayan, exchanged text messages in a group text that included Ms. Sanaie. On the evening of May 16, 2024, Dr. Shayan sent a text telling Ms. Chen to "[f]eel free to dissolve Elecrae" and stating that there was "no option to buy Elecrae by either parties [sic]." The next morning, Ms. Chen wrote a text message in response, which concluded by asking Ms. Sanaie to let her know how she would like to move forward. Ms. Sanaie never responded to this request; however, Dr. Shayan responded in the group text with text message that included the following: "There is no further decision to be made by [Ms. Sanaie]. Immediately and effectively all operations by Elecrae must be stopped. The corporation has to be dissolved and books need to be settled." At some point after sending that text, Dr. Shayan wrote in the group text: "[a]t this point I have advised [Ms. Sanaie] to inform the RCMP Financial Fraud section re: unlawful seizure of the [sic] Elecrae's inventory and blocking of all the financial accounts. Any sales going forward will be subject to criminal investigation until [sic] legal status of the inventory is established." Ms. Sanaie never sent a message indicating that she disagreed with Dr. Shayan or that he did not speak on her behalf.
- [45] Ms. Chen deposes that in response to Dr. Shayan's demands that Elecrae cease operations and his comment that she should feel free to figure out how to dissolve the company, on May 17, 2024, she revoked Ms. Sanaie's access to the company's Google and Shopify accounts. Ms. Chan states she did this because she was concerned that Ms. Sanaie and Dr. Shayan would cause harm to the company by communicating to customers that the company would be ceasing operations.

- [46] Ms. Sanaie said that because Ms. Chen changed the login information, she was not able to access those accounts and was prevented from contacting existing and potential customers, and from making sales. Further, she was unable to access the company's calendar, and was thus unable to attend sales events and appointments. Ms. Sanaie deposes that to her knowledge, no one from Elecrae has attended scheduled sales events since the May 16, 2024 meeting.
- [47] Ms. Sanaie deposed that she continued to have access to Elecrae's bank account and has been reviewing it regularly. She deposes that Ms. Chen has been incurring significant Canada Post costs, which she believes are shipping costs for selling inventory. Ms. Sanaie's states that there should be corresponding revenue deposits in the bank accounts of Elecrae, which she says are not shown in the bank records.
- [48] Ms. Chen deposes that she restored Ms. Sanaie's access to the Google and Shopify accounts on September 6, 2024, but that Ms. Sanaie has not yet activated or accessed those accounts. She further notes that Ms. Sanaie has always had access to some of the company accounts.
- [49] Ms. Chen's evidence is that since the May 16, 2024 meeting, the company has sold socks exclusively through its website and ships the orders through Canada post. She deposes that the Canada Post charges are solely the cost of shipping orders.
- [50] In her first affidavit, Ms. Sanaie included copies of Elecrae's business banking statements for June, July, and August 2024. In June 2024, the balance of the account increased from \$274,732.95 to \$323,643.16, an increase of \$48,910.21. In July 2024, the balance increased from \$323,643.16 to \$341,960.92, an increase of \$18,317.76. In August 2024, the balance increased from \$341,960.92 to \$350,795.46, a difference of \$8,834.54.
- [51] Ms. Sanaie deposes that she would expect the earnings from those three months to be in the range of \$50,000.00 to \$80,000.00 per month for a total of \$150,000.00 to \$240,000.00. Given that the increase in the bank balance over that timeframe is only \$76,062.51, Ms. Sanaie estimates the lost profit over that period to be in the range of approximately \$74,000.00 to \$164,000.00. Ms. Sanaie states that September to December are strong earnings months and believes, as of September 2024, that the company would miss out of all or the vast majority of that revenue.
- [52] On May 23, 2024, Ms. Chen sent an email to Ms. Sanaie indicating that she agreed with the proposal to dissolve the company.
- [53] On September 9, 2024, Ms. Chen filed her petition seeking to windup and liquidate the company.
- [54] On September 13, 2024, Ms. Sanaie filed this petition.

- [55] The onus is on Ms. Sanaie to prove, on a balance of probabilities, that the primary purpose for bringing the derivative action is to benefit the company. In assessing this, the court may consider evidence of the applicant's stated belief in the merits of the proposed action and must consider evidence of ulterior motives and any existing disputes between the parties.
- [56] Ms. Sanaie seeks to have Elecrae bring a derivative action against Ms. Chen for breach of fiduciary duties and related claims in conversion and loss of profits. In addition, the proposed action would seek to recover invoiced amounts, regain access to company accounts and property, and to continue operations. The proposed action seeks alternative relief in the form of recovery from Ms. Chen invoiced amounts and unpaid amounts.
- [57] I am satisfied that benefit to the company is a significant purpose for bringing the proposed derivative action. Prior to May 2024, the company was without question a success. Within a few years the parties grew the business such that they were each earning \$20,000.00 in dividends every month (or \$240,000.00 a year). Despite the company's financial success, conflict between the parties was brewing and building. Matters came to a head at the May 16, 2024 meeting (and immediate aftermath). Since then, the company is barely operating. Both Ms. Sanaie and Ms. Chen bear responsibility for this. It would obviously be in the best interest for the company to return to full operations; however, it unlikely that the derivative action could achieve this.
- [58] While I am satisfied that benefit to the company is a significant purpose behind Ms. Sanaie's petition, in my view it is not the primary purpose.
- [59] From May 23, 2024, to the around the time the petition was filed, the parties were engaged in negotiations to resolve this dispute. As indicated, in a May 27, 2024 letter, Ms. Sanaie's counsel alleges that Ms. Chen has, among other things, breached her fiduciary duty and engaged in civil fraud and suggests that if the parties can't resolve the dispute, Ms. Sanaie would file a Notice of Civil Claim. In an August 27, 2024 letter, Ms. Sanaie's counsel states that if the parties cannot reach a resolution of the matter, she will apply to initiate a derivative action.
- [60] I also note that after Dr. Shayan sent the message to the group text that Elecrae must be dissolved, Ms. Sanaie never responded to that text indicating that she wished the company to not be dissolved, nor did she respond to Ms. Chen's May 23, 2024 email where Ms. Chen said she agreed with Dr. Shayan's proposal to dissolve the company.
- [61] In my view, the existing relationship and shareholder dispute is a more significant purpose for the petitioner seeking leave to bring the derivative action. The parties were friends and had built a very successful business together. Unfortunately, resentments quickly developed and grew to the point where it was likely inevitable that the business partnership would fail. In my view, this dispute and the petitioner's desire to gain leverage are more significant drivers than the benefit of the company. Accordingly, the petitioner has not satisfied the good faith element.

Is the proposed action in Elecrae's best interest?

- [62] While I need not go further in the analysis, I will address the question of whether the proposed action is in Elecrae's best interest.
- [63] In *Eastern Platinum*, the Court of Appeal sets out the considerations in determining whether a proposed action is in a company's best interest as follows:
- [34] The question of whether it appears to the court to be in the best interests of the company to prosecute the action includes consideration of the merits of the proposed action.
- [35] In this regard, many of the authorities have adopted the language of Tysoe J. (as he then was) in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R. (3d) 300 [Primex (S.C.)], var'd (1996), 26 B.C.L.R. (3d) 357, leave to appeal ref'd [1997] S.C.C.A. No. 4. He held that the court should consider whether "the proposed action has a reasonable prospect of success or is bound to fail" and whether the defence is "bound to be accepted": at para. 49; see *Discovery Enterprises (C.A.)* at para. 11. This Court in *Discovery Enterprises (C.A.)* approved the description of this requirement as requiring the applicant to show "an arguable case" (para. 10).
- [36] The onus is on the applicant, not the respondent. The applicant has to not only plead a proper cause of action, but also have some evidence to support the case that its proposed claim has a reasonable prospect of success. This is why the authorities typically review the evidence of the merits of the proposed claim in considerable detail: see for example *Discovery Enterprises (S.C.)*; *Primex (S.C.)*; *Arkansas Teacher Retirement System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 [Lions Gate].
- [37] What the authorities illustrate is that the approach to considering the merits of the proposed action lies somewhere on a spectrum. The court should do more than skim the surface of the pleadings and should consider the evidence but ought not to dive so deeply into the merits as to try the case.
- [38] Other factors must also be brought to bear on whether the proposed action appears to be in the best interests of the company, namely whether the potential relief sought in the action makes it worthwhile to the company to undertake the costs and inconvenience of pursuing it: *Primex (S.C.)* at para. 49; *Lions Gate* at paras. 163-165; *Jahnke v. Johnson*, 2018 SKCA 59 at para. 68.
- [64] In my view, the evidence does not establish that the proposed action would be in the best interests of Elecrae. The proposed derivative action is grounded in claims for breach of fiduciary duty, conversion, and unjust enrichment. The evidence, in my view, just barely establishes an arguable case in breach of fiduciary duty; however, the evidence does not establish an arguable case for conversion or unjust enrichment. The evidence shows that payments were made to Canada Post. Ms. Chen's evidence is that these payments were solely for shipping costs. The evidence also shows regular credits into the business bank account from Shopify and Moneris, which relate to online sales and payment processing. In my view,

there was no evidence in the petition which showed that the conversion and unjust enrichment claims have a reasonable prospect of success.

[65] Further, I am not convinced that the potential relief sought in the action makes it worthwhile for Elecrae to undertake the costs and inconvenience of pursuing these claims. It is quite possible that the costs of pursuing the proposed action will exceed any damages that the company may be entitled to.

Conclusion

[66] The petition is dismissed.

[67] The respondents have been successful in this proceeding and awarded costs at Scale B.

"Morishita J."

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