

CANADA / JUDGMENT

Tracey v. Gokturk

2017 BCSC 1813

COURT

Supreme Court of British Columbia

DECIDED

6 October 2017

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2017 BCSC 1813 Tracey v. Gokturk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tracey v. Gokturk,

2017 BCSC 1813

Date: 20171006

Docket: S178996

Registry: Vancouver

Between:

Lance Tracey, Marc Levy and Roger Hardy

Petitioners

And:

Michael Gokturk, John Rante, Ryan Holmes, and Payfirma Corporation

Respondents

Before: The Honourable Mr. Justice Grauer

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

S. M. Fitterman

A. Sabur

Counsel for the Respondent Michael Gokturk:

S. Warnett

R. B. Dawkins

Counsel for the Respondent Ryan Holmes:

B. Olthuis

Counsel for the Respondents John Rante and Payfirma Corporation:

No Appearance

Place and Date of Hearing:

Vancouver, B.C.

October 5, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 6, 2017

- [1] The petitioners are three of the six directors of Payfirma Corporation. The respondents are the Corporation and the other three directors.
- [2] There is no dispute that there is a deadlock of the Board of Directors between the three petitioners and the three respondent directors.
- [3] The respondent Michael Gokturk, in his capacity as a shareholder of Payfirma, requisitioned a special meeting of the shareholders as permitted under the Canada Business Corporations Act, RSC 1985, c C-44 (the "Act"), and in circumstances that I will discuss in more detail shortly, exercised his rights under that Act to fix the date for that special meeting as October 24, 2017. The purpose of the special meeting, in essence, is to consider resolutions removing the petitioners from office as directors, fixing the number of directors at four, and electing a fourth director.
- [4] Mr. Gokturk then proceeded to solicit proxies, and has to date received proxies from just over 52% of the company's shareholders in support of his resolutions.
- [5] In this situation, the petitioners seek orders that, to summarize, would adjourn the special meeting from October 24, 2017, to November 22, 2017, add resolutions proposed by the petitioners, require the respondents to provide all email addresses and telephone numbers for Payfirma shareholders immediately, direct that Wally Oppal, QC or such other person as counsel for the parties shall agree to in writing be appointed to act as an independent chairperson, and require the respondents to provide specific types of information and documentation as requested.

- [6] The principal dispute between the parties that has led to the deadlock is whether the company should pursue a proposed transaction with a view to achieving a degree of liquidity for shareholders. There is at present no market for shares in the corporation. The corporation engaged an institutional advisor to identify and explore potential liquidity transactions. The proposed transaction was the only prospect identified.
- [7] It is, of course, not the business of this court to determine whether further investigation and pursuit of the proposed transaction would be a good idea, or whether any proposals from any other directors might be preferable. Moreover, as the cases make clear, the court's policy in general is one of not interfering in internal corporate affairs: see, for instance, *Montreal and Canadian Diocese of the Russian Orthodox Church Outside of Russia Inc. v Protection of the Holy Virgin Russian Orthodox Church (Outside of Russia) in Ottawa, Inc.*, [2002] OJ No. 4698 (CA) at para 10.
- [8] In my view, this case amply demonstrates the wisdom of that policy. For the reasons that follow, I have concluded that the court should not interfere in this aspect of Payfirma's affairs except to the extent of ordering that the respondent corporation forthwith provide to the petitioners all information in its possession concerning the email addresses and telephone numbers of its shareholders, subject to the condition I discuss in paragraph 29 of these Reasons.
- [9] Because of the time constraints involved, these Reasons will of necessity be concise.
- [10] The petitioners outline a number of incidents of conduct on the part of the respondents, particularly John Rante, who is chair of the board, and Michael Gokturk, who is CEO as well as a director, that the petitioners say constitute a breach by one or more of the respondents of their duties as directors as set out in section 122 of the Act. They refer also to what they suggest has been a rogue and surreptitious campaign to secure the support of certain shareholders, and complain that the respondents have misrepresented the petitioners' position with respect to the proposed transaction. They refer to the proxy circular distributed by Mr. Gokturk, which includes what might fairly be described as inflammatory language.
- [11] The petitioners further focus on a directors' meeting that took place on September 14, 2017, which ended under circumstances of which the petitioners complain and which failed to set a date for a meeting of the shareholders to discuss Mr. Gokturk's requisition pursuant to section 143(3) of the Act. The result of that failure to set a date was that Mr. Gokturk was in a position to call a meeting himself under section 143(4).
- [12] The petitioners then refer to the alleged breaches of duty, and the failure of the directors to call a meeting as required by section 143(3), as justifying the court's intervention both under section 144 to require the special meeting to be held at a different date, and under section 247 to restrain the directors from acting in contravention of the Act or the company bylaws, and requiring their compliance.

- [13] I find myself unable to conclude on the record before me that the petitioners have established breaches by the respondents of their duties as directors. To do so would require me, in essence, to come to a conclusion about the propriety of different proposed strategies for the future of the company, which I am not about to do. This is because the allegations raised require one to view actions through the lens of the petitioners. Viewing the same actions through the lens of the respondents yields a very different result.
- [14] This is particularly true, for instance, of the complaints raised by the petitioners in relation to the special committee of the board that was struck to evaluate the proposed transaction. That committee recommended that the transaction not be pursued. Mr. Rante subsequently carried on discussions with the third party involved, based, he deposes, on information he obtained from the third party that was fundamentally different from information upon which the special committee relied. Depending upon one's point of view, that was Mr. Rante either "going rogue", or acting in the best interests of Payfirma's shareholders. Nothing convinces me that Mr. Rante's actions were motivated by anything other than the latter.
- [15] This is also true of the events of a crucial board meeting held on September 14, 2017. The context includes a previous meeting convened by the petitioners on August 24, 2017, at which they purported to pass resolutions that, inter alia, dismissed Mr. Gokturk as CEO, and terminated any further discussions with the third party about the proposed transaction. This meeting was, however, held without a quorum (the respondents being absent), and without having been properly convened under the company bylaws. The respondents were later obliged to concede that the meeting was a nullity.
- [16] One of the matters to be considered at the meeting of September 14 was Mr. Gokturk's requisition. Mr. Rante had indicated at the outset that the meeting would terminate when the respondent Ryan Holmes, one of the directors, had to leave. That was expected to be at 3:00 p.m., but turned out to be 3:20 p.m., an hour and a half after the meeting started.
- [17] Because the meeting stopped at that time, no vote was held on the timing of the special meeting requisitioned by Mr. Gokturk. The petitioners complain that there would have remained a quorum of directors even after Mr. Holmes left, and the steps taken by the respondents improperly frustrated the holding of a vote they would have lost in the absence of Mr. Holmes' vote. The respondents note that there was nothing to stop the petitioners from bringing the matter forward for a vote before Mr. Holmes left. As they did not, the respondents assert that Mr. Rante was acting properly, endeavouring to ensure that the issue would be considered by the full board, as the shareholders were entitled to expect. Given what had occurred on August 24, this position is not without merit.
- [18] I note that in discussions at the meeting, Mr. Gokturk proposed scheduling the special meeting for October 11, 2017. On behalf of the petitioners, it was proposed that the meeting be held on November 13, 2017. Ultimately, the matter did not proceed to a vote, leaving Mr. Gokturk in a position to call the meeting himself pursuant to section 143(4) of the Act. He called the meeting for October 24, 2017, precisely the midpoint between the two proposals.

[19] Section 144(1) provides:

144(1) A court, on the application of a director, a shareholder who is entitled to vote at a meeting of shareholders or the Director, may order a meeting of a corporation to be called, held and conducted in the manner that the court directs, if

- (a) it is impracticable to call the meeting within the time or in the manner in which those meetings are to be called;
- (b) it is impracticable to conduct the meeting in the manner required by this Act or the by-laws; or
- (c) the court thinks that the meeting should be called, held and conducted within the time or in the manner it directs for any other reason.

[20] In my view, nothing in that section justifies my intervention in Mr. Gokturk's exercise of his dissident shareholder rights by calling the meeting for October 24. This is not a situation coming under subparagraph (a) where it is impracticable to call the meeting within the time in which those meetings are to be called. As the court noted in the Russian Orthodox Church case at para 12, a struggle between two opposing factions does not make it impracticable to call a meeting. It is quite practicable, and it has been done. This is also not a situation coming under subparagraph (b) where it is impracticable to conduct the meeting in the manner required by the Act.

[21] That leaves us with subparagraph (c) - whether the court thinks that the meeting should be called, held and conducted in the manner (in essence) sought by the petitioners; that is, at a later date, with additional resolutions to be considered. Like Mr. Justice Myers in *Goldstein v McGrath*, 2017 BCSC 586, I am not convinced that there is any reason for the court to intervene in this way. To do so, as I see it, would amount to entering the fray to an extent that the circumstances do not justify. To quote from *Airline Industry Revitalization Co. v Air Canada* (1999), 45 OR (3d) 370 (SCJ):

[54] the bareknuckle skirmishes of corporate restructuring warfare are best resolved by the combatants themselves to the extent possible, in their own boardrooms and meeting rooms .

[22] The issue of deadlock clearly needs to be resolved. No one disputes that. Mr. Gokturk's requisition, aimed at resolving that deadlock, has been outstanding since August 25. The petitioners have had plenty of time to deal with the prospect of a special meeting being called to consider the resolution Mr. Gokturk has proposed. In these circumstances, the materials do not satisfy me that the petitioners have been unfairly prejudiced by the date set by Mr. Gokturk.

[23] The petitioners then turn to section 247:

247 If a corporation or any director, officer, employee, agent does not comply with this Act, the regulations, articles or by-laws, a complainant or a creditor of the corporation may, in addition to any other right they have, apply to a court for an order directing any such person to comply with, or restraining any such person from acting in breach of, any provisions of this Act, the regulations, articles or by-laws, and on such application the court may so order and make any further order it thinks fit.

- [24] The petitioners argue that the failure of the respondent directors to comply with their obligations under section 122, and with their obligations to call a special meeting under section 143(3), provide me with the authority to act in the way they seek, ordering the special meeting to be adjourned to November 22, and to make various other orders for the provision of information.
- [25] The respondents rely on *Polar Star Mining Corporation v Willock* (2009), 96 OR (3d) 688 (SCJ) where Madam Justice Hoy pointed out that the section did not apply where the alleged non-compliance was by a director who is also a shareholder, and who was acting qua shareholder. That would be helpful if the petitioners were alleging non-compliance by Mr. Gokturk in his actions qua shareholder, but that is not what they allege. They allege non-compliance by the respondent directors in their actions qua directors.
- [26] Nevertheless, I conclude that this section also cannot justify my intervention in the manner that the petitioners seek. With respect to the directors' alleged breaches of section 122 of the Act, setting out the duties of directors, I have already commented that the materials do not satisfy me that such breaches have occurred. As far as the alleged noncompliance with section 143(3) is concerned, I am unable to conclude from the record that this non-compliance, if that is what it was, can be entirely laid at the feet of the respondents, as opposed to the directors as a whole. Nor does it appear that it would constitute a basis for intervention in any event since the Act sets out the remedy for the failure of the directors to call a requisitioned meeting. That remedy is for the shareholder to call the meeting, and that has taken place. As was noted in *Polar Star*, the section does not apply to Mr. Gokturk's actions qua shareholder in exercising his rights and calling the meeting for October 24, which actions in any event appear to have been reasonable in the circumstances.
- [27] The petitioners rely on the decision of Justice Brown in *Goodwood Inc. v Cathay Forest Products Corp.*, 2012 ONSC 3548, where the court put in place a temporary receiver and manager, and made various orders under section 247. In that case, however, the board of the corporation no longer had a quorum of directors and its shares were under a cease trade order because of the corporation's failure to comply with continuous disclosure requirements. There, intervention was clearly essential. Here, that has not been shown to be the case. A path to break the deadlock has been laid out in accordance with the provisions of the Act, and the court's intervention in that process cannot be justified.

- [28] There is, however, one area in which I think Mr. Gokturk has fallen short. Acting as a dissident shareholder, he has taken advantage of his management position to make use of corporate information concerning shareholders' email addresses and telephone numbers for the purpose of distributing his proxy solicitation materials and other information. The difficulty is that the petitioners do not have access to that information and are therefore at a disadvantage in their efforts to communicate their side of the dispute to the shareholders. Moreover, they wish to propose their own resolutions for consideration. In this regard, in this electronic age, and given the timing involved (as well as the evidence of Kingsdale's executive vice president of the importance of telephone numbers), I am satisfied that to this extent, the playing field is unfairly uneven.
- [29] Accordingly, pursuant to my inherent jurisdiction and section 39 of the Law and Equity Act, RSBC 1996, c 254, I pronounce an order in the nature of mandamus requiring Payfirma to deliver to the petitioners' solicitors forthwith a list of all the email addresses and telephone numbers of its shareholders in its possession. Excluded from this order are email addresses and telephone numbers first obtained by Mr. Gokturk after August 25, 2017, in the course of his proxy solicitation process.
- [30] Because of my conclusion concerning the relief sought by the petitioners under the Act, I can see no basis to intervene by directing that Mr. Oppal or some other person act as an independent chair of the meeting scheduled for October 24, 2017. The meeting should be relatively straightforward, and I accept that Mr. Rante is aware of his obligations.
- [31] Similarly, the materials indicate that the company has provided to the petitioners all of the information they have specifically requested (other than the contact information), and the petitioners have not established a statutory entitlement to the broad general categories of information they have set out in their petition.
- [32] It follows that, with the exception of the order for mandamus I have pronounced, the petition is dismissed.
- [33] The respondents have been substantially successful and are entitled to their ordinary costs of this proceeding.

"GRAUER, J."

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