
CANADA / JUDGMENT

Ulker Holdings Inc. v. AES Engineering Ltd.

2020 BCSC 1823

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1823 Ulker Holdings Inc. v. AES Engineering Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ulker Holdings Inc. v. AES Engineering Ltd.,

2020 BCSC 1823

Date: 20201126

Docket: S198574

Registry: Vancouver

Between:

Ulker Holdings Inc. and Ahmet Alp Ulker

Plaintiffs

And

AES Engineering Ltd.

Defendant

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

Counsel for the Plaintiffs:

S. Nelligan

Counsel for the Defendant:

I.K. Sorenson

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 10-11, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 26, 2020

Table of Contents

INTRODUCTION. 3

BACKGROUND. 4

The Exit Agreement 4

The Non-Payment 7

The Counterclaim.. 8

SUMMARY JUDGMENT AND SUMMARY TRIAL. 10

SEVERABILITY. 11

Section 2.11 of the Purchase Agreement as a Basis for Set-Off 12

The Non-Compete Agreement as a Basis for Set-Off 13

TIMING OF PAYMENT. 15

Interpretation of s. 2.7 of Purchase Agreement 15

Stay or Security. 17

CONCLUSION. 18

INTRODUCTION

- [1] The plaintiff, Mr. Ahmet Ulker, is a senior professional engineer and a founding member of the Vancouver office of the defendant, AES Engineering Ltd. ("AES"). The corporate plaintiff, Ulker Holdings Inc., is Mr. Ulker's wholly owned company. Together, Mr. Ulker and his holding company ("Ulker") seek to recover amounts that AES agreed to pay them upon Mr. Ulker's departure from AES in 2017. These amounts include just under \$400,000 in shareholder loans, a \$100,000 founder bonus, and just over \$6,000 in interest for the late purchase of his shares.

- [2] AES does not contest its obligation to pay these amounts to Ulker as agreed to in an exit agreement between AES and Ulker dated September 30, 2017 (the "Exit Agreement"). However, AES is claiming a right of set-off against these amounts by way of a counterclaim to enforce a non-competition agreement (the "Non-Compete Agreement") that is appended to and part of the Exit Agreement.
- [3] The primary issue before me is therefore whether Ulker is entitled to proceed by way of summary judgment or summary trial to obtain an order enforcing AES' obligations under the Exit Agreement, or whether AES' counterclaim for set-off represents a true defence to Ulker's claims that requires that the two claims be heard together at trial.
- [4] I am satisfied that AES' counterclaim is more properly characterized as a related but separable cross-claim, and that it should be severed and determined at a later date. Furthermore, while I am not in a position to predict the likelihood of success of the counterclaim should it proceed to a proper trial, for the purposes of this summary process, I am not satisfied on the materials before me that the claim has a sufficient foundation to warrant requiring Ulker's funds to be withheld until the trial of the counterclaim.
- [5] These are my reasons for this decision.

BACKGROUND

- [6] In 2017, Mr. Ulker retired from his full-time engineering career at AES, though he continued with contract work to provide continuity on larger projects into 2019, including SkyTrain projects. During his tenure, Mr. Ulker served as a President and Vice-President of AES. He was also a shareholder of AES through Ulker Holdings.
- [7] At the time of Mr. Ulker's departure from AES in 2017, AES owed Ulker Holdings \$397,473.54 in shareholder loans that had been retained by AES over Mr. Ulker's tenure with the company. Although the actual amount of shareholder loans owed at the time of Mr. Ulker's departure was left blank in the agreement, the amount was easily calculated through a review of the dividends declared by AES and owed to Ulker Holdings over the years, but retained by AES during Mr. Ulker's tenure. There is no dispute as to this amount.

The Exit Agreement

- [8] In the late Spring of 2017, AES and Mr. Ulker entered into a number of agreements that comprised the Exit Agreement. The first of these (in presentation if not time) is a purchase and sale agreement, which states that it was effective as of September 30, 2017 (the "Purchase Agreement"). Pursuant to the Purchase Agreement, the parties agreed that AES would purchase Ulker's shares in the company for \$2,150,000 (plus an additional amount for 215 Class E non-voting shares). AES also agreed to pay out Ulker's shareholder loan, and pay an additional \$100,000 "Founder Bonus".

- [9] The closing date was agreed to be 60 days following the full execution of the Exit Agreement, subject to some further terms. For the purposes of this litigation, the parties agree that the closing date of the Exit Agreement was November 30, 2017.
- [10] There was also a provision in the Exit Agreement allowing AES to purchase the shares in four installments over three years that required the continued payment of dividends. There was also a provision that allowed persons other than AES to purchase Ulker's shares. Although there was some delay, giving rise to AES owing the plaintiffs \$6,462.32 in interest on the late payment of share purchases, ultimately it was through this clause that Ulker's shares were purchased by third parties.
- [11] It is unclear from the evidence whether the full value of these shares was ever paid by the third parties to Ulker. However, Ulker agrees that AES is no longer obligated to pay for the shares under the agreement, and that any outstanding obligation is between the third parties and Ulker. In this case, Ulker only seeks the amounts they are owed for Ulker Holdings' shareholder loans and Founder Bonus, together with the \$6,462.32 in interest.
- [12] The relevant provisions of the Purchase Agreement are as follows:

2.2 Time and Place of Closing

Except as otherwise expressly provided in this Agreement, or unless the Company and the Vendor otherwise agree in writing, the purchase and sale contemplated by this Agreement shall be completed at a closing to be held ... on the day (the "Closing Date") which is:

- (a) within 60 days following the date on which this Agreement is fully executed; or

2.4 Purchaser other than Company

If the company presents to the Vendor purchasers (the "Other Purchaser") who are ready willing and able to purchase the Shares prior to the timeframes indicated in section 2.7, the Vendor agrees to sell all or a portion of the Shares to the Other Purchasers at the same Purchase Price per share. In this event, the Company is still responsible to pay the Founder Bonus referred to in section 2.6 and Shareholder Loan.

2.6 Founder Bonus

The Company will pay a fee in the amount of \$100,000.00 to the Vendor Corporation in consideration of the Vendor Corporation being a founding shareholder of the Company.

- [13] In addition, in a required and appended agreement, Ulker agreed not to compete with AES. Relevant provisions of the Non-Compete Agreement include:
- a) The Non-Compete was agreed to commence "when the service contract with the Company or employment with the Company ceases";

- b) The parties acknowledged that the purpose of the sale of Ulker's shares was to facilitate Mr. Ulker's retirement. Ulker specifically acknowledged and agreed that the value of the purchase price of the shares in the Purchase Agreement was based on the Company's earnings and that "it is vital that the Company have the exclusive right to carry on their Business to the extent contemplated in this Agreement". The parties acknowledged that the Non-Compete Agreement was reasonable and necessary "in order to protect and facilitate the Company's purchase of the Shares" and the Company.
- c) The consideration for the plaintiffs' agreement not to compete is stated to be "the purchase by the Company of the Shares and other good and valuable consideration, the receipt and sufficiency of which is acknowledged".
- d) In exchange for the above consideration, the plaintiffs agreed not to:

directly or indirectly, whether as owner, shareholder, director, agent, officer, employee, consultant, independent contractor or in any other capacity whatsoever, of a corporation, partnership or proprietorship:

- (a) compete with, or engage in, or be financially concerned or interested in, or advise, lend money to, guarantee the debts of obligations of or permit his or her name to be used or employed by any person engaged in or concerned with or interested in the Business within a geographic scope that includes any city, district, municipality, area or region (or such other limiter of boundaries as is applicable), as well as an additional eight kilometres from such limiter of boundaries, in which the Company has a physical business presence (the "Geographic Scope") for a timeframe that is the longer of the following:
 - (2) three years from the Closing Date, or when the service contract with the Company or employment with the Company ceases, whichever is longer;
- [14] While the terms "Business" is not defined in the Non-Compete Agreement, "Business" is defined in the Purchase Agreement as "providing comprehensive electrical engineering services for building construction and infrastructure projects in British Columbia and Alberta". "Closing Date" is defined in s 2.2 as within 60 days following the day the agreement is fully executed, and the parties agree this is November 30, 2017.
- [15] Finally, Ulker agreed that a breach of the Non-Compete Agreement would result in damages to AES, and that damages may not adequately protect AES, such that injunctive relief might also be sought to enforce the Non-Compete Agreement.

The Non-Payment

- [16] AES did not make any of the payments to Ulker by the closing date of November 30, 2017. Indeed, AES has made no payments at all to Ulker under the Purchase Agreement to the date of this summary trial.

- [17] I am satisfied that throughout this time Mr. Ulker was making diligent inquiries about his funds, but was open to options that would have allowed AES to make payments over time.
- [18] AES has acknowledged its debt to Ulker on a number occasions since 2017:
- a) On April 2, 2018, after a meeting in which Mr. Ulker asked about the outstanding payments, Mr. Dupuis, the Vice President of AES, sent an email to Mr. Ulker stating: "[w]e need to establish a payment plan for what is owed to you. Maybe a 3-year plan or something."
 - b) On May 9, 2018, Mr. Dupuis advised Mr. Ulker that AES had no money to pay him until AES collected some of its accounts receivable. He told Mr. Ulker the payment was coming and asked him to be patient.
 - c) On November 28, 2018, almost a full year after the closing date of the Purchase Agreement, Mr. Barnes, the Vice President of AES, sent a letter to Mr. Ulker with the subject line "RE: AES Amounts Payable" (the "November 2018 AES Letter"). The letter acknowledged that AES owed the Ulker \$503,935.86 under the Exit Agreement broken down as follows:
 - i. Shareholder Loans payable as of September 2018: \$397,473.54;
 - ii. Founder Bonus: \$100,000; and
 - iii. Interest due for late payment of share purchases in September 2017: \$6,462.32.

That letter also acknowledged that Ulker was also entitled to dividends on their shares for the 2018 fiscal year.

- [19] The November 2018 AES Letter proposed a payment schedule of 19 equal monthly payments commencing March 30, 2019, and ending September 30, 2020, and dividends to be paid as cash flow permitted. No payments were made in accordance with this schedule (or at all).
- [20] As I noted above, Ulker's shares were not purchased by AES, and the \$2.15 million purchase price of Ulker's shares was assumed by third parties (largely employees of AES). So, other than the \$6,462.32 accrued by AES in relation to the delay in the purchase of the shares early on, Ulker is not seeking to recover funds related to the purchase of their shares from AES.

The Counterclaim

- [21] On March 29, 2019, Mr. Ulker received a letter from AES general counsel alleging that Mr. Ulker was in breach of the Non-Compete Agreement. The letter alleged that Mr. Ulker was working with or assisting former employees and shareholders of AES, Mr. Khan and Mr. O'Neill, who had recently formed their own firm, O'M Engineering.
- [22] That letter also stated: "[t]o be absolutely clear, our client is in no way resisting any of its obligation, and our client is not withholding or unprepared to pay its obligations."

- [23] On May 2, 2019, Mr. Ulker sent an email to Mr. Barnes stating that he was "not working with anyone" and asked when he could expect the March 30 and April 30 installment amounts set out in the November 2018 AES Letter. Having received no response to the May 2 email, and no payments from AES of any kind, Mr. Ulker sent a further email dated June 22, 2019, demanding payment of the full amounts owed to him as set out in the November 2018 AES Letter.
- [24] AES filed its counterclaim seeking \$1.3 million in damages on December 2, 2019, for Ulker's breach of the Non-Compete Agreement by "[engaging] in or advising or permitting Mr. Ulker's name to be used or leveraged [] for the purpose of developing, launching and establishing O'M Engineering".
- [25] While AES has no direct evidence of this breach, through the discovery process it obtained numerous emails that strongly suggest that in early 2019 Mr. Ulker began to advise or assist Mr. Khan and Mr. O'Neill while they were in the process of leaving AES and forming O'M Engineering. This includes correspondence in which Mr. Ulker appears to advise the principals of O'M on bidding for TransLink work, a major client of AES, while Mr. Ulker worked for AES. It also includes an undated draft proposal prepared by O'M Engineering seeking TransLink work and including Mr. Ulker as part of the proposed team.
- [26] To support its claim in loss, AES attaches a July 2019 valuation stating that the company was then worth \$1.6 million less than it was in 2017 when Mr. Ulker left. In its legal submissions, AES attributes this loss in value to competition from O'M Engineering.
- [27] Mr. Ulker states that he did not work for O'M Engineering or do work in breach of the Non-Compete Agreement. He says, correctly, that the July 2019 valuation of AES is not evidence that he breached that agreement, or that he (or O'M Engineering) caused a loss to AES.
- [28] He also notes that AES brought an arbitration against the principles of O'M Engineering for breach of their shareholder agreement not to compete against AES in 2019. The terms of that non-compete clause are very similar to the language of the Non-Compete Agreement Mr. Ulker signed as part of the Exit Agreement, including the geographic scope clause. Arbitrator Antle found that the geographic scope clause of the shareholder agreement was ambiguous and therefore unenforceable. Arbitrator Antle also found no evidence that O'M Engineering solicited any AES clients, and AES failed to introduce any evidence of losses caused by O'M Engineering to AES in that arbitration.
- [29] It is not necessary for the purposes of this hearing for AES to prove that Mr. Ulker breached the Non-Compete Agreement. AES says that they have requested, and are awaiting, further disclosure that it says will further support its claim.
- [30] For the purposes of this application, I will assume, without finding, that AES will prove that Mr. Ulker assisted the principals of O'M Engineering after they left AES and started their new company, including advising them on competing for TransLink work, and at least considered doing contract work on projects through their firm.

SUMMARY JUDGMENT AND SUMMARY TRIAL

- [31] Ulker brings this application for summary judgment, or in the alternative, summary trial, pursuant to Rules 9-6 and 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [32] Summary judgment is available with respect to all or part of a claim where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, except possibly as to amount, or a question of law that can be resolved on the application: *Bai v. MLGB E-Sports Inc.*, 2018 BCSC 679.
- [33] Summary trial is available where there is sufficient evidence to find the facts necessary to decide the issues, and it is not unjust to do so. There are numerous factors that a court will consider in determining whether a matter is suitable for summary trial including: the amount involved, the complexity of the matter, its urgency, any prejudice that may arise by reason of delay, the cost of taking the matter forward to a conventional trial, the course of the proceedings, and any other matters which may arise: see *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31. Where there is a counterclaim, as there is here, the court must be satisfied that the issues are severable.
- [34] Subject to my comments below regarding the interpretation of s. 2.7 of the Purchase Agreement, I am satisfied that the only defence raised by AES to Ulker's claims is its claim for set-off against Ulker's claims. This finding could allow for this matter to be considered as an application for summary judgment rather than summary trial.
- [35] However, summary judgment should generally not involve or require reliance on affidavit evidence setting out facts other than, perhaps, the contract. In this case, Ulker has relied upon affidavit evidence with respect to AES' affirmation of the debt obligation, amongst other things. Although this evidence may not be strictly necessary for Ulker's case, I prefer to consider this matter by way of the rules that apply to summary trials.
- [36] AES argues that a summary trial should not proceed until their outstanding discovery requests are completed. I have reviewed these requests and they all relate to AES' claim for breach of the Non-Compete Agreement. The only defence raised to Ulker's claim is the availability of set-off from the claim due to the alleged breach of the Non-Compete Agreement. Therefore, the question of whether this matter is amenable to summary trial turns on whether AES' claim for breach of the Non-Compete Agreement is severable from Ulker's claim for recovery of its shareholder loans, Founder Bonus, and interest.

SEVERABILITY

- [37] Generally, counterclaims may be severed from a claim for the purposes of summary judgment or a summary trial where the set-off at issue does not go to the root of the claim itself. Another way of saying much the same thing is whether the set-off represents a true or equitable defence to the claim, or is more properly characterized as a cross-claim: see *Tahvili v. HSBC Bank Canada*, 2004 BCCA 22; *Bai*; and *XY, Inc. v. IND Lifetech, Inc.*, 2009 BCSC 453.
- [38] Claims and counterclaims may still be severable even where they arise from the same contract. For a counterclaim to represent a true defence that is not severable, it must be so intimately connected with the plaintiff's claim that it goes to the root of that claim: see *Old Mac's Pty Ltd. v. Cavallo Horse & Rider Inc.*, 2007 BCSC 726 at para. 39.
- [39] Equitable set-off is distinguishable from a cross-claim set-off. Equitable set-off is where equitable rights are engaged in the determination of the original claim itself. Claims in equitable set-off are generally responsive to, and dependent on, the plaintiff's claim, rather than a stand-alone claim: see *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 at para. 49.

Section 2.11 of the Purchase Agreement as a Basis for Set-Off

- [40] AES says that it has a claim in contractual or equitable set-off against the debt it acknowledges is owed to Ulker arising from the Purchase Agreement, based on Mr. Ulker's alleged breach of the Non-Compete Agreement.
- [41] Specifically, AES relies on the following provision of the Purchase Agreement to support its claim in contractual set-off:

2.11 Value Adjustments

Should the Vendor take any action that the Company demonstrates or proves had the effect of reducing the Company's value, market share or reputation, or is contrary to any Agreement between the Vendor and the Company, then the Company has the right to deduct or set off any or all of the initial goodwill value of the Shares, as determined by the Board of Directors.

- [42] AES also relies on the recitals of the Non-Compete Agreement noted above setting out that the purpose of the sale of Ulker's shares was to facilitate Mr. Ulker's retirement, and acknowledging that the purpose of the Non-Compete Agreement was to protect the value of the shares, which may be negatively affected if Mr. Ulker were to do work in competition with AES. AES argues that the Non-Compete Agreement should be read broadly as being based on and requiring Mr. Ulker's retirement, and that the Exit Agreement as a whole should be interpreted in light of that assumption.

- [43] On its face and read in the context of the Purchase Agreement, and the Exit Agreement as a whole, s. 2.11 provides an adjustment mechanism for the reduction in the \$2.15 million value of any shares not yet redeemed by AES due to Mr. Ulker breaching the Non-Compete Agreement.
- [44] If Ulker was seeking to enforce the portions of the Purchase Agreement requiring AES to purchase Ulker's shares, s. 2.11 of the Purchase Agreement could provide a defence in contractual set-off. If that were the case, I would be likely to find that the set-off goes to the root of Ulker's claim for the value of those shares, at least with respect to the value of any outstanding shares at the time of Mr. Ulker's alleged breach of the Non-Compete Agreement.
- [45] However, Ulker is not seeking to enforce their claim for the purchase of the shares. AES did not purchase the Ulker's shares and cannot seek a set-off in its favour regarding the value of those shares. Any loss in the goodwill value of those shares that might have been set-off against their contractual value is entirely moot as between Ulker and AES.
- [46] Section 2.11 does not provide a contractual basis for set-off of the value of the shareholder loans or Founder Bonus owed to the plaintiffs since November 30, 2017. The only aspect of Ulker's claim that relates to share value is the \$6,462.23 for "interest due for late payment of share purchases in September 2017" acknowledged by AES in November 2018. Although it is not clear how that amount was calculated, it was an acknowledged debt well before there was any allegation that Mr. Ulker engaged in competitive behaviour, and the value appears to be entirely unrelated to the goodwill value of outstanding shares at that time. I therefore find that s. 2.11 also provides no contractual basis for the set-off of this amount.

The Non-Compete Agreement as a Basis for Set-Off

- [47] Nor does the Non-Compete Agreement provide a basis for contractual set-off of these amounts. The only specific consideration listed in that agreement in exchange for Mr. Ulker's promise not to compete with AES is the purchase of his shares, something that AES did not do.
- [48] I find that AES' obligation to repay Ulker's shareholder loans is entirely independent of the Non-Compete Agreement. Those amounts were due and owing as of November 2017, and represent Ulker's dividends retained by AES over his tenure. Ulker's entitlement to those previously acquired dividends is not dependent on the Non-Compete Agreement.
- [49] With respect to AES' argument that the Non-Compete Agreement should be read broadly as giving rise to contractual and equitable relief against Mr. Ulker, AES could provide no support for that proposition. Generally, in the context of an employee-employer relationship, courts have read restrictions on a person's further ability to contract and work narrowly, not broadly: see *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 22-23.

- [50] Nor was AES able to point to any principle of equity that Ulker has breached. I do not agree that the case of *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, establishes that Mr. Ulker, as a former Vice-President and shareholder of AES, continued to owe fiduciary duties to AES after he had left his position with AES and sold his shares.
- [51] To the extent that a fiduciary employee's duties may extend beyond their employment, something more in terms of evidence and submissions would be required to establish a right of equitable set-off in this case.
- [52] Should AES be able to establish a claim for breach of the Non-Compete Agreement, the claim would be contractual, not equitable. It does not give rise to a claim in equitable set-off.
- [53] I agree with Ulker that AES' claim under the Non-Compete Agreement has nothing to do with their separate liability to repay Ulker's shareholder loans and Founder Bonus. Rather, AES' claim arises entirely from conduct alleged to have occurred more than a year after the Exit Agreement was executed and closed. The legal bases for the AES claim are distinct and separate from Ulker's claim, even though they both arise from contracts that form the Exit Agreement.
- [54] Overall, I find that AES' claim for breach of the Non-Compete Agreement does not give rise to claims based in contract or equity that affect its acknowledged liability to Ulker in relation to the shareholder loans and the Founder Bonus. Those amounts are due and owing.
- [55] AES' claim for damages for breach of the Non-Compete Agreement is a true cross-claim. I find that it can and should be severed from Ulker's claims for recovery of the shareholder loans and the Founder Bonus.

TIMING OF PAYMENT

- [56] I now turn to the question of whether AES should be required to pay the shareholder loans and Founder Bonus to Ulker forthwith, or whether execution should be stayed until the counterclaim is heard or some other date.
- [57] Ulker has agreed that they would be prepared to execute the agreement and hold some portion of the proceedings in trust through their counsel as security for the counterclaim, should I find that the merits of the counterclaim are such that some security should be held or provided.
- [58] AES rejects this proposal, and argues that the funds are not due and owing in any event until November 30, 2020, pursuant to s. 2.7 of the Purchase Agreement.
- [59] I will deal first with s. 2.7 of the Purchase Agreement, and then turn to the issue of a potential stay of execution or the holding of security in trust.

Interpretation of s. 2.7 of Purchase Agreement

[60] In oral argument before me, AES raised for the first time an interpretation of s. 2.7 of the Purchase Agreement to argue that AES had no obligation to pay either the shareholder loans or the Founder Bonus until November 30, 2020. That provision of the Purchase Agreement allowed AES to pay the \$2.15 million purchase price for Ulker's shares in installments over time, with the final installment due and payable on November 30, 2020. That provision reads as follows:

2.7 Payment for Interest and Timing of Payments

(a) the following applies to the timing for payment of the Purchase Price:

(1) the purchases will be effective and the payments shall be made on or before at the following junctures:

(A) on the Closing Date: 10% of the Interest (including the Exchanged Shares representing 2,150 Class A Common Voting shares without par value) will be redeemed by the Company and 10% of the Purchase Price will be paid;

(B) on or before the first anniversary of the Closing Date: 30% of the Interest (including the Exchanged Shares representing 6,450 Class A Common Voting shares without par value) will be redeemed by the Company and 30% of the Purchase Price will be paid;

(C) on or before the second anniversary of the Closing Date: 30% of the Interest (including the Exchanged Shares representing 6,450 Class A Common Voting shares without par value) will be redeemed by the Company and 30% of the Purchase Price will be paid; and

(D) on the third anniversary of the Closing Date: the balance of the Interest (including the Exchanged Shares representing 6,450 Class A Common Voting shares without par value) will be redeemed by the Company and the balance of the Purchase Price will be paid.

[61] I find as a matter of interpretation that s. 2.7 of the Purchase Agreement was intended to address the "timing for payment of the Purchase Price" as stated in its first line, and was not intended to, and did not, provide for installment payments of the shareholders loans or the Founder Bonus.

[62] AES argues that because the term "Interest" is defined earlier in the Purchase Agreement to include Ulker's interest not only in the shares, but also the shareholder loans and the Founder Bonus, that this provision should be interpreted to mean that AES is not required to pay out the shareholder loans or Founder Bonus until November 30, 2020, when the "balance of the Purchase Price" is to be paid. "Purchase Price" is a defined term referring to the \$2.15 million value of the shares

[63] This interpretation is entirely inconsistent with AES' conduct to the date of the hearing, whereby AES repeatedly acknowledged its indebtedness to Ulker, including through its counsel in March 2019. I find that it is also an absurd interpretation of s. 2.7 of the Purchase

Agreement, as it would mean that, if AES chose to rely on the option to purchase the shares by installments over three years in accordance with s. 2.7, it would never have had to pay anything more than the Purchase Price of the shares--the value of the Founder Bonus and shareholder loans are entirely unaccounted for by this provision.

- [64] In any event, I find that AES' obligations under s. 2.7 of the Purchase Agreement were pre-empted by s. 2.4 of that agreement, which authorized the sale of Ulker's shares to third parties. Although those third parties may have the option of relying on the installment payments under s. 2.7, once AES acted on s. 2.4, it could no longer rely on the installment provision in s. 2.7.
- [65] I find that the Purchase Agreement and Exit Agreement read as a whole provided for the payment of the shareholders loans and Founder Bonus upon closing: that is by November 30, 2017.

Stay or Security

- [66] In *Clearly Canadian Beverage Corp. v. Remic Marketing & Distribution Inc.* (1992), 22 C.P.C. (3d) 387, 35 A.C.W.S. (3d) 398 (B.C.S.C.) [Clearly Canadian], this Court suggested a procedure where the court grants summary judgment on a claim in favour of the plaintiff but the counterclaim is allowed to proceed. Specifically, this Court suggested that it should assess the merits of the counterclaim and its potential award, and, after weighing those considerations, it may stay the execution of the summary judgment in whole or in part for a period of time to allow the counterclaim to be determined, or some other time the court thinks appropriate in the circumstances.
- [67] While the principles outlined in *Clearly Canadian* can be used to guide a decision to stay execution, the suggested procedure should not be taken as a strict test: *Bernard v. Western Floral*, 1999 BCCA 635 at para. 10.
- [68] I do not consider that a stay of execution pursuant to the process suggested in *Clearly Canadian* is necessary or appropriate in this case.
- [69] The counterclaim advanced by AES is in its early stages still, with no trial date set. Any stay would be for an indefinite period of time. While I am only making a preliminary determination of the merits of this claim at this stage, I find that AES' counterclaim is not one that warrants the posting of security or staying execution for an indefinite period of time.
- [70] While the evidence may establish that Mr. Ulker assisted or advised, or even bid on work, in competition with AES in early 2019 as alleged by AES, it is far from clear at this point that the Non-Compete Agreement is enforceable. At the time it is alleged that Mr. Ulker breached this agreement, AES had paid no consideration for his forbearance from competition. Furthermore, although the arbitrator's award in the AES proceeding against O'M Engineering is in no way binding upon a future court, the arbitrator's determination that the

provision dealing with geographic scope is ambiguous has legal merit in my view.

[71] Finally, there is no evidence before me to establish what AES' damages might be should it be successful: its reliance on a change in its 2019 share valuation is not evidence that competition from O'M Engineering, let alone Mr. Ulker, caused it any loss. I have no evidentiary foundation to estimate the total damages that AES might achieve by way of its counterclaim for the purposes of security or a stay in this proceeding.

CONCLUSION

[72] I therefore order AES to pay Ulker the following amounts forthwith:

- a) \$397,473.54 for shareholder loans due and payable as of September 2018 (not including any dividends for the 2018 fiscal year);
- b) \$100,000 for the Founder Bonus;
- c) \$6,462.32 for interest due for late payment of share purchases up to November 28, 2018; and
- d) Pre-judgment interest under the Court Order Interest Act, R.S.B.C 1996, c. 79 on these amounts accrued since November 28, 2018.

[73] Ulker is generally entitled to their costs of this summary trial. Should either party have submissions that would affect this entitlement to costs, they should make arrangements in the next 30 days to appear before me through the Registry.

"Marzari J."

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