IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bonjour Vietnam Restaurant Corp. v. Hoang,* 2025 BCSC 723

Date: 20250417
Docket: S241593
Registry: Vancouver

Between:

Bonjour Vietnam Restaurant Corp.

Plaintiff

And

Trung Kien Hoang and Thi Bich Uyen Nguyen

Defendants

Before: The Honourable Justice Dion

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	K. Sandulescu
Counsel for the Defendants:	W.V. Barta S. Fang
Place and Date of Hearing:	Vancouver, B.C. April 2, 2025
Place and Date of Judgment:	Vancouver, B.C. April 17, 2025

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Introduction

[1] Trung Kien Hoang (“Mr. Hoang”) seeks to strike the underlaying action of plaintiff company Bonjour Vietnam Restaurant Corp (“Bonjour Vietnam”) on the basis that, Nguyet Nu Thao Dang (“Ms. Dang”), one of two directors with him, and also a 50% shareholder in Bonjour Vietnam failed to bring the application as a derivative action. Ms. Dang opposes the strike application on the basis that she has a strong claim to implied authority to bring the underlying action.

Issue

[2] I must decide if Mr. Hoang has met his burden of showing that it is plain and obvious that Ms. Dang lacked implied authority to commence and conduct the underlying action on behalf of Bonjour Vietnam.

Background

The Underlying Action

[3] In its notice of civil claim, Bonjour Vietnam alleges that Mr. Hoang, in his capacity as Bonjour Vietnam’s head chef and kitchen manager, misappropriated $70,000 (the “Funds”) from Bonjour Vietnam’s account by transferring it to his wife, Thi Bich Nguyen (“Ms. Nguyen”), and removed and destroyed Bonjour Vietnam’s recipes and other property.

[4] On that basis, Bonjour Vietnam claims that:

(a) By causing Bonjour Vietnam to pay the Funds to Ms. Nguyen, Mr. Hoang is liable to Bonjour Vietnam for conversion, breach of contract, and breach of fiduciary duty.

(b) By conspiring to cause Bonjour Vietnam to pay the Funds to Ms. Nguyen, Mr. Hoang and Ms. Nguyen are liable to Bonjour Vietnam for the tort of conspiracy to injure by lawful or unlawful means.

(c) By receiving the Funds, Ms. Nguyen is liable to Bonjour Vietnam for knowing receipt of property obtained in breach of Mr. Hoang's fiduciary duties.

(d) By depriving Bonjour Vietnam of the Property, Mr. Hoang is liable for breach of contract, conversion or trespass to chattels, and breach of his fiduciary duties owed as head chef and kitchen manager.

[5] Bonjour Vietnam alleges that, as a result of Mr. Hoang and Ms. Nguyen's actions, it has "suffered losses and harms, including lost revenue, extra expenses, goodwill, and the Funds".

The Motion to Strike

[6] Mr. Hoang applies to strike the notice of civil claim in its entirety, without leave to amend. He argues that:

(1) the notice of civil claim ought to be struck as a nullity as it is a derivative action which was filed without leave contrary to s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCBCA*];

(2) the notice of civil claim ought to be struck under Rule 9-5(1)(d) as an abuse of process of this Court for failing to comply with s. 232 of the *BCBCA*; and/or

(3) the notice of civil claim ought to be struck under Rule 9-5(1)(a) as failing to disclose a reasonable cause of action.

[7] In its Response, Bonjour Vietnam argues that:

(1) Mr. Hoang has failed to establish that the notice of civil claim must be struck as a nullity or abuse of process under Rule 9-5(1)(d) as it is not plain and obvious that the notice of civil claim constitutes a derivative action requiring leave under s. 232 of the *BCBCA*;

(2) Mr. Hoang has failed to establish that it is plain and obvious that Ms. Dang, as the actual or *de facto* sole officer of Bonjour Vietnam, had implied authority to authorize the filing of the notice of civil claim on its behalf, without leave; and

(3) Mr. Hoang has failed to establish that it is plain and obvious that the claims in notice of civil claim are bound to fail and therefore ought to be struck as disclosing no reasonable cause of action under Rule 9-5(1)(a).

Legal Principles

Rule 9-5(1)

[8] As above, Mr. Hoang brings this application to strike the underlying action under Rule 9-5(1) of the *Supreme Court Civil Rules* B.C. Reg. 168/2009, which provides as follows:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
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> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[9] To strike a pleading under Rule 9-5(1), it must be "plain and obvious" that the impugned pleading has the fault alleged: see e.g. *Jamieson v. McKinsey & Company Canada*, 2025 BCSC 141 at paras. 30–31.

[10] A pleading may be struck pursuant to Rule 9-5(1)(a) where it is plain and obvious that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if it is certain to fail: *Willow v. Chong*, 2013 BCSC 1083 at

para. 18. In making that determination, no evidence is admissible and the court must generally assume that the pleaded facts are true: Rule 9-5(2).

[11] A pleading may be struck pursuant to Rule 9-5(1)(d) where it is plain and obvious that the claim is an abuse of the process of the court. As Madam Justice Fisher (as she then was) explained in *Willow*:

> [21] Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, 1999 CanLII 6494 (BC SC), [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

[12] Nevertheless, this Court has repeatedly held that courts should only strike pleadings as an abuse of process in the clearest of cases: *Jamieson* at para. 38; citing *A.M. v. Dr. F.,* 2021 BCSC 32 at para. 63.

[13] Thus, on this application under Rule 9-5(1), the question is whether Mr. Hoang has established that it is plain and obvious that the underlying action is a nullity, an abuse of process, or fails to disclose a reasonable cause of action by virtue of non-compliance with ss. 232–233 of the *BCBCA*.

Actions Commenced in the Name of a Company

[14] In *Bajwa Farms Ltd. v. Bajwa*, 2022 BCSC 1056 at para. 34, Mr. Justice Majawa set out three ways in which litigation can be commenced in the name of a company:

(1) an individual may be authorized to do so by the Board of Directors or the articles of the company;

(2) an individual may seek and obtain leave of the court to commence a derivative action in the name of the company; and

(3) a president or the person responsible for the day-to-day operations of the company may have the implied authority to commence litigation in certain circumstances without the need for authorization.

[15] In this case, it is not disputed that Ms. Dang was not (and will not be) authorized by the Board of Directors or the articles of Bonjour Vietnam to file the notice of civil claim on its behalf. As a result, any authority to do so must stem from the legal principles applicable to either derivative actions or implied authority.

Derivative Actions

[16] A shareholder of a corporation does not have a personal cause of action for a wrong done to the corporation: *Treasure Bay HK Limited v. 1115830 B.C. Ltd.*, 2022 BCSC 761 [*Treasure Bay BCSC*] at para. 22, aff'd 2022 BCCA 380 [*Treasure Bay BCCA*], leave to SCC ref'd, 40562 (20 July 2023); citing *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405 at para. 1.

[17] As the Supreme Court of Canada explained in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 1997 CanLII 345 (S.C.C.) at para. 59, this rule, known as the rule in *Foss v. Harbottle*, provides that:

> …individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action…

[18] The rule in *Foss v. Harbottle* is, however, subject to certain exceptions. Of particular relevance to the present case, the rule and its exceptions which permit derivative actions have been statutorily modified in British Columbia with respect to corporations registered pursuant to the *BCBCA*. More specifically, s. 232 of the *BCBCA* allows for derivative actions to be brought before the Court provided leave is sought and obtained in accordance with the criteria set out in s. 233: see *Treasure Bay BCSC* at paras. 23 and 25. As a result, corporations registered pursuant to the

BCBCA can no longer avail themselves of common law derivative actions and must pursue the applicable statutory derivative actions instead: *Treasure Bay BCSC* at para. 25; citing *Goldstream Resources Ltd., Re*, 1986 CanLII 1042 (B.C.S.C.) at para. 6.

[19] As Madam Justice Fitzpatrick explained in *Hougen Co. Ltd. v. Su*, 2024 BCSC 74, the applicable statutory derivative action in this case, namely that prescribed by ss. 232 and 233 of the *BCBCA*, requires that leave of the Court is required *before* any derivative action may be filed:

> [37] Derivative actions were specifically created by the Legislature through statute, to provide a process to advance a cause of action in the name of a company. The clear legislative intent is that judicial oversight is required in respect of whether any such action that may be brought and, if so, on what conditions that can occur. It is a judicial decision as to whether the necessary prerequisite - leave of the Court - will be granted under the *BCA*: *Discovery Enterprises Inc. v. Ebco Industries Ltd.,* 1998 CanLII 7049 (B.C.C.A.) at para. 21; *A.R. Thomson #1* at paras. 8–12.
>
> …
>
> [39] Here, I have no difficulty concluding that the legislative intent in fashioning the derivative action leave provisions in the *BCA* is that leave is required to be obtained *before* such action is filed. Section 232(2) of the *BCA* provides that a complainant may, *with leave of the court*, prosecute a legal proceeding …". The corollary to that provision is that a complainant has *no capacity* to prosecute the legal proceeding if no leave is in hand.

[20] If a derivative action is filed on behalf of a company registered under the *BCBCA* without leave of the court under ss. 232–233 of the *BCBCA*, it is a nullity and ought to be struck: *Hougen* at paras. 86–87.

Implied Authority

[21] Implied authority, as a means by which proceedings may be brought on behalf of a company without board approval or leave of the court, has received very little judicial attention. It stems from our Court of Appeal's decision in *Anderson v. Envoy Realty Ltd.,* 2002 BCCA 10, and was given its current form in *Bajwa*, where Mr. Justice Majawa summarized the principle to be drawn from *Anderson* as follows:

> [54] In summary, my interpretation of the authorities relied upon by the parties is that the person who has the authority to operate the company in its ordinary course and manage its day-to-day business is the person who has the implied authority to commence litigation on behalf of that company without authorization of the company's board or without seeking leave of the court. Depending upon the particular circumstances, the person with that authority may be the company's president, or it may be someone else. Whomever it is, the implied authority is not unlimited. It is constrained to commencing litigation that is related to the company's business or to litigation that is specifically targeted at addressing an emergent situation. The implied authority does not include the ability to commence litigation relating to the affairs of the company.
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> [Emphasis added.]

[22] Implied authority therefore stands as another practical exception to the rule in *Foss v. Harbottle*, in the sense that it allows a category of shareholders to advance claims on behalf of a corporation in limited circumstances without authorization by the Board of Directors or articles of the company, or the court.

Discussion

Key Authorities Cited by the Parties

[23] I will begin with a discussion of the key authorities cited by the parties, namely, *Hougen*, *Treasure Bay* (*BCSC* and *BCCA*), and *Bajwa*, and their application to the present dispute. For the reasons that follow, I am of the view that while *Hougen* and *Treasure Bay* are instructive insofar as they set out and discuss certain relevant legal principles (i.e. derivative actions and implied authority), only *Bajwa* is directly on point and determinative of dispute before me.

[24] In *Hougen*, the petitioner sought and was granted leave to commence a derivative action in the name of the respondent, Toyomoto Canada Supply Chain Inc., against the respondent, Ming Su and others, pursuant to s. 233(1) of the *BCBCA*. However, after that leave was sought but before it was granted, Hougen unilaterally filed a notice of civil claim in the name of Toyomoto. Ms. Su sought an order that the notice of civil claim was a nullity as it was commenced without leave or, in the alternative, that the notice of civil claim be struck as disclosing no reasonable claim or as an abuse of process. The issue to be decided, as Madam

Justice Fitzpatrick framed it at para. 24, was whether the notice of civil claim should be struck or whether a *nunc pro tunc* order was appropriate to, *ex post facto*, validate its filing.

[25] Justice Fitzpatrick concluded that the legislative scheme of the *BCBCA*, pursuant to which Toyomoto was registered, clearly required Hougen to secure leave to commence a derivative action *before* it filed its notice of civil claim, and that a *nunc pro tunc* order to validate its premature filing would frustrate that legislative scheme: *Hougen* at paras. 37–40, 50, and 61-64. In doing so, she noted that:

> [63] Hougen was at all times aware that, unless the Court granted leave, it had no authority to commence an action in the name of Toyomoto. Any "irregularity" on Hougen's part was intentional, a consideration that runs against the granting of any *nunc pro tunc* order: *Green* at para. 90.

[26] In other words, Justice Fitzpatrick was satisfied that Hougen knew that the only avenue by which it could pursue the action in the name of Toyomoto was as a derivative action with leave of the Court pursuant to ss. 232 and 233 of the *BCBCA*. As the notice of civil claim had been filed without said leave, she concluded that the filing of the notice of civil claim was a nullity and should be struck: *Hougen* at para. 86.

[27] In my view, while *Hougen* is instructive on the legal framework under ss. 232–233 of the *BCBCA*, it is not determinative of the dispute before me. First, unlike Hougen*,* Ms. Dang never sought leave to commence the action on behalf of Bonjour Vietnam pursuant to the *BCBCA* and, as a result, she did not file the notice of civil claim on its behalf while such leave was pending. Second, and more importantly, it cannot be said that Ms. Dang knew that the only avenue by which she could pursue the underlying action in the name of Bonjour Vietnam was with leave of the court pursuant to the *BCBCA*. In other words, she was not, as Justice Fitzpatrick was satisfied Hougen was*,* at all times aware that, unless the court granted leave, she had no authority to commence an action in the name of Bonjour Vietnam.

[28] To the contrary, she argues that such leave was not necessary in this case. As a result, Ms. Dang does not seek an *ex post facto* validation of her filing by way

of a *nunc pro tunc* order granting leave. Rather, she asserts that she had authority to commence, and has authority to continue to conduct, the underlying action by virtue of her implied authority. That is not an argument that was advanced or addressed in any meaningful sense in *Hougen*.

[29] *Treasure Bay BCSC* concerned an application to strike a derivative action commenced by Treasure Bay HK Limited, a company registered in Hong Kong. The derivative action at issue was thus a *common law* derivative action as opposed to a *statutory* one, as Treasure Bay was not registered under the *BCBCA* (or any Canadian statute, for that matter). The issue raised by the application was, as Mr. Justice Brongers described it at para. 19, a narrow one: was it plain and obvious that the law in British Columbia imposes a leave requirement on common law derivative actions?

[30] After canvassing authority in Ontario, Australia and British Columbia, Justice Brongers concluded that it was not plain and obvious that a common law derivative action brought in British Columbia without first seeking leave is prohibited by law and therefore certain to fail: *Treasure Bay BCSC* at para. 61. The Court of Appeal agreed and went one step further to find that leave is not required to start or continue a common law derivative action: *Treasure Bay BCCA* at para. 6.

[31] Again, while *Treasure Bay BCSC* and *BCCA* provide some useful commentary on derivative actions, they do not bear directly on the dispute before me. More specifically, the focus in both *Treasure Bay BCSC* and *Treasure Bay BCCA* was on the existence or non-existence of a leave requirement for a foreign corporation (i.e. a corporation not registered under the *BCBCA*) seeking to commence and conduct a *common law* derivative action. Bonjour Vietnam is registered under the *BCBCA*. On my understanding, Ms. Dang does not dispute whether, if the notice of civil claim filed by her on behalf of Bonjour Vietnam was commenced as a derivative action, the leave requirements in ss. 232–233 of the *BCBCA* would apply: they clearly would. Instead, she argues that the notice of civil

claim was properly filed not as a derivative action but as a proceeding she had the implied authority to commence and conduct.

[32] Finally, in *Bajwa*, the Court was faced with competing applications to stay two actions commenced in the name of a corporate plaintiff. Mr. and Ms. Bajwa were the sole officers, shareholders and directors of Bajwa Farms Ltd. On March 4, 2020, Mr. Bajwa commenced an action in his name and in the name of Bajwa Farms without notice to, or the consent of, Ms. Bajwa. On February 11, 2021, Ms. Bajwa commenced an action on behalf of Bajwa Farms against Mr. Bajwa and three of Bajwa Farms' former landlords without notice to, or the consent of, Mr. Bajwa. Each of them then applied for a stay of the other's proceedings on the grounds that the other did not have the authority to commence the action on behalf of Bajwa Farms without first obtaining leave of the Court under the derivative action provisions of the *BCBCA*: *Bajwa* at paras. 1–5.

[33] As above, Mr. Justice Majawa began his analysis by setting out three ways in which litigation can be commenced in the name of a company. Because neither Mr. Bajwa nor Ms. Bajwa was authorized to commence litigation in the name of Bajwa Farms' by the court (option 2 above) or the company's Board of Directors or articles (option 1 above), whether or not Ms. Bajwa and Mr. Bajwa had authority to commence the actions turned on which of them, if any, had the implied authority to commence litigation on behalf of the company (option 3 above): *Bajwa* at para. 6. Applying the approach he set out in para. 54 (reproduced above), Justice Majawa concluded that Ms. Bajwa had implied authority to commence litigation proceedings on behalf of Bajwa Farms, while Mr. Bajwa did not: *Bajwa* at paras. 55–72.

[34] *Bajwa* is directly on point and, as I explain below, determinative of the application before me. That is, the critical question in *Bajwa* was the same as that posed by Mr. Hoang's application: did a director and 50% shareholder of a corporation who filed an originating pleading and thereby commenced proceedings in the name of the corporation, without authorization from the court or the corporation's Board of Directors or articles, have implied authority to commence

those proceedings? I turn now to address that question in the context of the dispute before me.

Did Ms. Dang Have Implied Authority to Commence the Underlying Action?

[35] This question can, on my reading of *Bajwa*, be broken down into two:

(1) Did Ms. Dang have the authority to operate Bonjour Vietnam in its ordinary course and manage its day-to-day business?

(If yes, she had implied authority to commence litigation on behalf of Bonjour Vietnam without authorization of its board or without seeking leave of the court.)

(2) Is the litigation related to Bonjour Vietnam's business or targeted at addressing an emergent situation?

(If yes, Ms. Dang had implied authority to commence, and has implied authority to continue, the underlying action.)

[36] To be more precise, because the question at this stage of the proceedings is whether it is "plain and obvious" that Ms. Dang *did not* have implied authority to commence the underlying action on behalf of Bonjour Vietnam, Mr. Hoang must establish that it is plain and obvious that one or both of the questions above can be answered in the negative.

[37] On my reading of the parties' materials, question (1) can be answered rather briefly in the affirmative. Ms. Dang and Mr. Hoang are the only two shareholders and directors of Bonjour Vietnam. Bonjour Vietnam pleads that Ms. Dang was the actual or *de facto* sole officer of the company, and thus the person authorized to operate the company in its ordinary course and manage its day-to-day business, at all material times after Mr. Dang gave his notice and left the company on March 11, 2022: see Application Response at paras. 29–30.

[38] Mr. Hoang maintains that he remains a director but concedes that "Ms. Dang may have taken a larger operational role in [Bonjour Vietnam] subsequent to [his] resignation as an employee": Notice of Application at para. 24. Thus, on the facts as pleaded, Ms. Dang, appears to have been responsible for the day-to-day operations of Bonjour Vietnam as the sole director and shareholder actively running Bonjour Vietnam's business since Mr. Hoang resigned as an employee: see *Bajwa* at para. 64. At the very least, it cannot be said that it is plain and obvious on the pleadings that she did not have the authority to operate Bonjour Vietnam in its ordinary course and manage its day-to-day business.

[39] On that basis, Ms. Dang had the authority to commence litigation without authorization as long as that litigation was brought in respect of Bonjour Vietnam's business, as opposed to its affairs, or if it was brought in emergent circumstances: *Bajwa* at para. 65.

[40] Moving then to question (2), Bonjour Vietnam appears to restrict its argument in favour of Ms. Dang's implied authority to an assertion that the notice of civil claim relates to Bonjour Vietnam's business, as opposed to its affairs, and does not suggest that it was brought in emergent circumstances. This makes sense, as the pleadings do not indicate to me any circumstances that could be described as an emergency warranting immediate action: see *Bajwa* at para. 60.

[41] The key question, then, is whether the claims advanced on behalf of Bonjour Vietnam in the notice of civil claim relate to its business or its affairs. Those claims are that Mr. Hoang, in his capacity as Bonjour's head chef and kitchen manager, misappropriated $70,000 from Bonjour Vietnam's account and removed and destroyed Bonjour Vietnam's recipes and other property, and that:

> (a) By causing Bonjour Vietnam to pay the Funds to Ms. Nguyen, Mr. Hoang is liable to Bonjour Vietnam for conversion, breach of contract, and breach of fiduciary duty.

(b) By conspiring to cause Bonjour Vietnam to pay the Funds to Ms. Nguyen, Mr. Hoang and Ms. Nguyen are liable to Bonjour Vietnam for the tort of conspiracy to injure by lawful or unlawful means.

(c) By receiving the Funds, Ms. Nguyen is liable to Bonjour Vietnam for knowing receipt of property obtained in breach of Mr. Hoang's fiduciary duties.

(d) By depriving Bonjour Vietnam of the Property, Mr. Hoang is liable for breach of contract, conversion or trespass to chattels, and breach of his fiduciary duties owed as head chef and kitchen manager.

[42] Do those claims relate to Bonjour Vietnam's business or its affairs? The distinction between claims relating to a company's business and its affairs is not obvious or clear-cut. The following discussion in *Bajwa* does, however, cast some light on the distinction generally, as well as provide some specific guidance with respect to the claims advanced by Bonjour Vietnam in the underlying action:

> [66] The Nupinder Action claims that Bajwa Farms' landlords declined to lease land to Bajwa Farms when it was being operated solely by Ms. Bajwa which resulted in a drop in Bajwa Farms' revenue. Thus, the claims against Bajwa Farms' former lessors arise out of termination of those legal relationships. Given that Bajwa Farms allegedly historically operated two-thirds of its farming operations on land leased to it by the Landlord Defendants in the Nupinder Action, litigation involving termination of those leases is, in my view, clearly in respect of Bajwa Farms' business as opposed to its affairs.
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> [67] I agree with Ms. Bajwa that the characterization of these claims as being within the normal course of Bajwa Farms' business is supported by a number of cases relied upon by Ms. Bajwa. For example: [*C.S.A.E. Inc. v. Air Services S.A.,* 2006 CarswellOnt 9896 (S.C.J.)] at paras. 11 and 12 where the court held that since the plaintiff was in the business of leasing aircraft, the plaintiff was required to collect monies due pursuant to its leases and actions to recover such monies could be brought without board approval; and *Superior Material Handling Equipment Inc. v. Erwin* (2003), 37 C.P.C. (5th) 362, 2004 CanLII 34351 at para. 4 (Ont. S.C.J.), where the court held that pursuing trade debts is a normal activity of any company and can be pursued without any special resolutions.
>
> [68] The Nupinder Action also seeks remedies resulting from Mr. Bajwa's alleged interference with Bajwa Farms' leasing relationships, misappropriation of company funds and assets, and breach of fiduciary duties. While it may not be usual that a company commences litigation

> against one of its two directors and its president, this in and of itself does not mean that the litigation relates to the affairs of the company as opposed to its business. The Nupinder Action does not affect or relate to Mr. Bajwa's status as a shareholder, director, or president and does not seek to change those in any respect. Nor does it relate to the organization of the company.
>
> [69] Rather, the Nupinder Action relates to the preservation of Bajwa Farms' business. The preservation and protection of Bajwa Farms' business extends to pursuing a claim against a person who owes a fiduciary duty to the company and allegedly breaches it, whether that person is the president or not. Similarly, pursuing a claim against an individual who has allegedly misappropriated company funds, and therefore, seeking to protect the company's assets is also related to the business of the company as opposed to its affairs. Neither of these actions are particularly unusual in and of themselves. However, I will note that commencing the lawsuit does not mean that the allegations are meritorious. That is a decision for another day.
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> [Emphasis added.]

[43] In a general sense, the above passage suggests that claims relating to a company's business include those that relate to the assets or revenue-earning capacity of a company (e.g. the leases of farmable land in *Bajwa* or the leases of aircraft in *C.S.A.E.*), whereas claims relating to a company's affairs include those which affect or relate to a party's status as shareholder, director, or president, or seek to change the organization of the company: *Bajwa* at paras. 66–67. In a more specific sense, Justice Majawa explicitly concluded that claims seeking remedies resulting from misappropriation of company funds and assets and/or breach of fiduciary duties relate to a company's business, not its affairs: *Bajwa* at para. 68.

[44] Against that background, in my view, the claims Ms. Dang seeks to advance on behalf of Bonjour Vietnam relate very clearly to its business, as opposed to its affairs. In the words of Justice Majawa, they relate to the preservation of Bonjour Vietnam's business. More specifically, the claims arising from Mr. Hoang's alleged misappropriation of the $70,000 seek to protect Bonjour Vietnam's assets. The claims arising from Mr. Hoang's removal and/or destruction of Bonjour Vietnam's recipes and other property relate to Bonjour Vietnam's capacity to raise revenue by making and selling food. Importantly, neither category of claims affect or relate to Mr. Hoang's status as shareholder, director or president, or seek to change the organization of the company.

[45] As for causes of action, the notice of civil claim filed on behalf of Bonjour Vietnam raises many of the same types of claims found in *Bajwa* to relate to a company's business, that is, claims seeking remedies resulting from misappropriation of company funds and assets, and claims arising from breaches of fiduciary duties. Admittedly, Bonjour Vietnam also advances claims in conversion, breach of contract, the tort of conspiracy, knowing receipt, and trespass to chattels. However, all such claims are said to arise from the same events: Mr. Hoang's alleged misappropriation of funds and removal or destruction of property. As a result, they are, in my view, similarly directed at preserving Bonjour Vietnam's business, and do not come any closer to affecting or relating to Mr. Hoang's status as shareholder, director or president, or seeking to change the organization of the company.

[46] In his Notice of Application, Mr. Hoang urges the opposite view, stating that:

> 33. Commencing litigation against Mr. Hoang and Ms. Nguyen for wrongful appropriation and conversion of property is not within the ordinary course of business. This is a unique and complex action that is intertwined with two ongoing petitions. It is clearly a derivative action.
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> …
>
> 35. The issues in dispute in the NOCC and the Petitions relate to the ownership of the Recipes and funds Mr. Hoang says are owed to him by [Bonjour Vietnam] pursuant to a shareholder loan and funds earned during his employment. These are matters related to the affairs of the company, not its business.

[47] With respect, the argument that Ms. Dang lacked implied authority because the commencement of the underlying action was not within the ordinary course of business is misguided. First, the requirement is that the claims contained within the notice of civil claim relate to Bonjour Vietnam's business, not that the filing of the lawsuit itself falls within the ordinary course of its business. Second, as Justice Majawa explained, while it may not be usual that a company commences litigation against one of its two directors, that in and of itself does not mean that the litigation relates to the affairs of the company as opposed to its business. The fact remains that, as in *Bajwa*, the underlying action does not affect or relate to Mr. Hoang's status as a shareholder or director of Bonjour Vietnam, and does not seek to change

those in any respect. Nor does it relate to the organization of the company: see *Bajwa* at para. 68.

[48] Further, Mr. Hoang offers no support for the relevance of his allegation that the underlying action is "intertwined" with two ongoing petitions, nor his statement that the issue of ownership of the recipes and the misappropriated funds relate to the affairs of the company. With respect to the former, I fail to see how the other petitions, which concern a loan made to Bonjour Vietnam and whether said loan is interest-free, bear on the question of whether the underlying action relates to Bonjour Vietnam's business or affairs. If anything, the fact that the underlying action is, in Mr. Hoang's words, intertwined with two ongoing petitions, which are not the subject of this application, weighs against striking it, not in favour of it. As for Mr. Hoang's unsupported assertion that the issue of ownership of the recipes and the misappropriated funds relate to the affairs of the company, as I have tried to explain above, the only authority directly on point (*Bajwa*) suggests otherwise.

Conclusion

[49] In sum, in my view, the claims in the underlying action relate to Bonjour Vietnam's business as opposed to its affairs. At the very least, Mr. Hoang has failed to show, as he is required to do on this application, that it is plain and obvious that such claims relate to Bonjour Vietnam's affairs.

[50] More specifically, on the facts as plead and in light of the relevant authorities, it is not plain or obvious that: (1) Ms. Dang did not have the authority to operate Bonjour Vietnam in its ordinary course and manage its day-to-day business; or (2) the underlying action relates to Bonjour Vietnam's *affairs* as opposed to its *business*.

Disposition

[51] I find that Mr. Hoang has failed to show that Bonjour Vietnam's notice of civil claim is a nullity as a derivative action filed without leave contrary to s. 232 of the *BCBCA*, is an abuse of process, or fails to disclose a reasonable cause of action. In

those circumstances, his application must be dismissed and Bonjour Vietnam's claim allowed to proceed to trial.

"Dion, J."