IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1076897 BC Ltd. v. 1142191 BC Ltd.,* 2025 BCSC 1725

Date: 20250904
Docket: S245606
Registry: Vancouver

Between:

1076897 BC Ltd.

Petitioner

And

1142191 BC Ltd. and Manpreet Berar

Respondents

Before: The Honourable Justice Blake

Reasons for Judgment

In Chambers

Counsel for the Petitioner:	F. Lamer
Counsel for the Respondents:	Y. Li-Reilly
Place and Date of Hearing:	Vancouver, B.C. August 7, 2025
Place and Date of Judgment:	Vancouver, B.C. September 4, 2025

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I. INTRODUCTION

[1] The petitioner, 1076897 BC Ltd. (“1076897”), seeks an order that it be granted leave to bring a derivative claim on behalf of the respondent, 1142191 BC Ltd. (“Holdco”), against Holdco’s sole director, Manpreet Berar, for alleged breach of her fiduciary obligations to Holdco and for negligence.

[2] The two shareholders of Holdco are 1076897 (a company owned by Sunny Gill), and MKB Investments Ltd. (“MKB”), a company owned by Ms. Berar. Both 1076897 and MKB own 50% of the issued and outstanding shares in the capital of Holdco.

II. BRIEF BACKGROUND

[3] Ms. Berar is the sole director of Holdco, whose sole asset of significance is property located at 6490 127A Street, Surrey, BC (the “Property”). The Property had a 2024 assessed value of $1,380,000. Holdco’s sole business purpose is to hold and manage the Property.

[4] Around January 31, 2018, Holdco obtained TD Bank financing secured by way of a TD mortgage, which included the following terms:

a) Ms. Berar was a guarantor of the TD Mortgage;

b) the TD Mortgage had a five-year term, expiring on or around February 1, 2023;

c) the total amount borrowed was $660,000;

d) the principal balance of the TD Mortgage Loan around the expiry date was $609,463.98;

e) the TD Mortgage Loan had a fixed annual interest rate of 3.39%; and

f) all TD Bank Policies and Procedures (“TD Bank Policies”)

(collectively, the “TD Mortgage”).

[5] 1076897 stresses that pursuant to the TD Bank Policies, the TD Bank had the right to renew the TD Mortgage, and had the general policy of "automatically renewing the TD Mortgage Loan at a rate to be set by TD Bank which, in the ordinary course would be its prime rate for open one year mortgage loans plus a percentage rate reflecting the quality of the loan and payment history, typically not exceeding 1.5%."

[6] On March 4, 2022, the house located on the Property was demolished.

[7] On September 9, 2022, counsel for Ms. Berar and MKB wrote to the petitioner, regarding 1076897's underpayment toward the equal sharing of Holdco's expenses, noting Ms. Berar was no longer prepared to contribute to any more than 50% of the monthly mortgage payment, and asking for it to contribute 50% of the mortgage expenses going forward (being $1,457.33). In the alternative counsel proposed each of the shareholders of Holdo pay 50% of the outstanding mortgage to pay out the TD Mortgage. Further, counsel warned:

> If 1076897 BC Ltd. is unwilling or unable to make its fair share of the mortgage payments, or in the alternative, pay out the loan as suggested above, then we expect that the Company will need to consider other options for satisfying its monthly mortgage obligations.

[8] 1076897 agreed to make the monthly mortgage contributions in the amount of $1,457.33 by way of a letter dated September 21, 2022.

[9] Ms. Berar deposes that at the end of 2022 and the beginning of 2023, she received communications from TD regarding the expiry of the five-year term under the TD Mortgage, and a renewal. She says during a telephone call on January 16, 2023, she advised a TD Bank representative that the house on the Property had been demolished. She goes on to explain:

> 43. I spoke with Mr. Sran again on January 17, 2023. During this call, he advised that with collateral, if the TD Mortgage were renewed for another term, the new rate on renewal would be approximately 7%, with a monthly payment of approximately $4,400 per month. However, he advised that TD was not willing to renew the mortgage because the house had been demolished. Mr. Sran advised me to call TD Easyline to look into paying out the mortgage, given that TD was not willing to renew the mortgage, so that

> we would not be in default. I then phoned TD Easyline and spoke with a customer services representative named Tanish, who provided me with the payout balance.

[10] On January 20, 2023, counsel for Holdco wrote to 1076897 again, advising:

> The Mortgage has a 5-year term expiring on February 1, 2023. In the absence of consistent and equal contribution from 1076897 B.C. Ltd., and the now sky-high interest rates, neither the Company nor MKB Investments is willing to continue making these mortgage payments. It is further unclear whether TD will agree to renew the mortgage. As such, please advise by January 26, 2-23 whether 1076897 B.C. Ltd. agrees to:
>
> (a) reimburse MKB Investments as outlined in our previous communications *and* for its share of the November 2022 mortgage payment, by no later than January 30, 2023; and
>
> (b) pay 50% of the outstanding mortgage to TD in the amount of $305,190.76 to pay out the TD loan.
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> In the event that the Company does not receive confirmation of an agreement as set out above or any response from 1076897 B.C. Ltd. before January 26, 2023, it will proceed to consider other urgent ways to deal with this matter, including to sell the Property, or to find a third party lender or investor, without further notice.
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> [Emphasis added.]

The letter did not clearly advise that TD would not renew the mortgage.

[11] The payout statement for the TD Mortgage, dated February 3, 2023, shows a total amount payable to the TD Bank, payable on February 7, 2023, in the amount of $609,875.86.

[12] 1076897 says that the TD Bank did not demand repayment of the TD Mortgage in 2022 or 2023, and so the bank exercised its right to automatically renew the TD Mortgage, in accordance with the TD Bank Policies.

[13] Ms. Berar deposes that she knew from being a licensed realtor that it would be difficult to obtain a mortgage because the Property had a certificate of pending litigation registered against title. She says she reached out to contacts she had with mortgage brokers who confirmed her understanding, and she was advised the best option was to seek private financing, which she did. She attaches several emails she sent to inquire about private financing, dated February 1 and 2, 2023. She deposes

that the quoted interest rates ranged from between 13 and 16%, with an upfront fee of between 3 and 4% when a certificate of pending litigation was registered against title, plus legal fees. Further, each private lender required minimum monthly interest and fee payments, which mean that Holdco would be required to make a monthly minimum interest payment of approximately $7,500. Holdco did not have the funds to make such payments, and she says it would have been difficult for her to come up with half, or all, of the monthly payment.

[14] The parties agree that Ms. Berar did not renew the TD Mortgage but rather caused Holdo to enter into a financing agreement with Berar Capital Corporation, on or around February 22, 2023 (the “Berar Financing”). Berar Capital Corporation is owned and controlled by Ms. Berar’s father, Harjinder Singh Berar, and he is the sole director.

[15] On or about February 22, 2023, Ms. Berar caused a mortgage to be registered on title to the Property in favour of Berar Capital Corporation to secure the loan from Berar Capital Corporation (the “Berar Mortgage”). On the same day, she passed a resolution in her capacity as the sole director of Holdco, authorizing it to enter into the financing agreement with Berar Capital Corporation, register the Berar Mortgage, and pay out and discharge the TD Mortgage.

[16] The Berar Mortgage was for $630,000, and included the following terms:

a) a lender fee of 2% of the principal amount was to be paid to Berar Capital Corporation on the date that the loan funds were advanced to Holdco (the “Lender Fee”);

b) the balance due date was August 22, 2023;

c) at the request of Holdco and at the sole discretion of Berar Capital Corporation, the mortgage may be renewed for a further term of three months, in which event the Plaintiff must pay Berar Capital Corporation a further fee in the amount of 2% of the balance payable ($12,600) (the “Renewal Fee”);

d) the interest payable by Holdco pursuant to the Berar Financing was 15% per annum from February 22, 2023 to June 22, 2023 and 18% thereafter until the financing is repaid in full; and

e) all unpaid accrued interest is added to the principal sum secured under the mortgage, and bears interest collectively with the unpaid principal at 18% per annum.

[17] Mr. Berar, through her counsel, advised 1076897 that she had entered into the Berar Mortgage by way of a letter dated March 2, 2023, which advised:

> Further to our letters of October 13, 2022 and January 20, 2023, attached for ease of reference, the Company has had to find a third party lender in order to repay the Mortgage.
>
> After making a number of inquiries with potential third-party lenders, the Company has taken a loan from Berar Capital Corporation, which is a company owned by Mr. Jinder Berar, in the amount of $630,000. Please find enclosed, as a courtesy, documentation regarding the payout of the Mortgage, and detailing the terms of the loan. The balance of funds from the borrower in the amount of $4,734.51 will be used by the Company to pay expenses including property taxes.

[18] By way of a letter dated March 6, 2023, 1076897 "protested" the action taken to pay off the TD Mortgage, noting "[t]his was unnecessary as TD was prepared to extend its mortgage at a much lower cost than what your client apparently agreed to pay to her father without Mr. Gill's consent".

[19] In response, counsel for Ms. Berar wrote on March 8, 2023, admitting to being "flummoxed" by the letter of March 6, 2023.

> We further refer to our letter of October 13, 2022 and January 20, 2023, regarding your client's lack of participation and contribution, and inviting your client to make any proposal to address the Mortgage. Your client did not respond with any suggestion, including any suggestion that TD was prepared to extend its mortgage at a lower cost, as you now suggest in your letter. The Company did not make a unilateral decision. Your client chose not to engage or contribute when the Company faced the difficult issue of finding financing. It surprised us to now receive a response to our March 3, 2023 letter from you.
>
> The Company made inquiries of TD and other third party lenders, and did not receive this information from TD. TD had advised the Company that it would not entertain a renewal of the Mortgage. Please provide to us your client's

> communications with TD confirming that TD was "prepared to extend its mortgage at a much lower cost". It is surprising that the bank would be prepared to speak to Mr. Gill (presumably) about a mortgage that is not in his name or guaranteed by him, and when he is not a director of the Company. Please advise how he was able to do so, and provide us with any communications or representations he made to TD, including on behalf of the Company or Ms. Manpreet Berar. We view it as highly problematic that Mr. Gill would communicate with TD on behalf of the Company, and then withhold information he allegedly obtained from the Company.
>
> The Company remains open to any suggestions Mr. Gill might have regarding financing for the Property.

[20] The parties agree that Ms. Berar did not put entering into the Berar Financing or the Berar Mortgage to a special resolution of the Holdco shareholders before she entered into them; although they disagree strenuously on whether she was required to do so. That will ultimately be an issue for trial.

[21] In reply evidence, Mr. Gill, on behalf of 1076897, put forward affidavit evidence which included his analysis that the difference between allowing the TD Mortgage to automatically renew and the Berar Mortgage was $459,382.84. The respondent objects to this evidence as improper reply evidence, arguing it was based upon unproven assumptions (that TD Bank would have automatically renewed the TD Mortgage and, if so, at what rate). She also objects on the basis that it was an attempt at improper opinion evidence, as Mr. Gill could not make such a complex calculation. I accept the petitioner's position that this evidence was not tendered for the truth of its contents but rather merely as an illustration for the purposes of the legal test the petitioner must meet. Further, even without such an illustration, I would find that the terms of the Berar Financing were onerous, for the purpose of this petition.

III. LITIGATION HISTORY

[22] The parties agree that between 2014 and 2020 Mr. Gill and Ms. Berar had a romantic relationship, as well as a business relationship, and were engaged for a period of time.

[23] On March 1, 2022, Mr. Gill commenced a family law action against Ms. Berar, Holdco, MKB, Ms. Berar's parents, and a number of their companies (the "Family Action"). In that action, Mr. Gill sought various relief, including (but not limited to) an interest in Holdco, and an interest in the Property as "family property" or, in the alternative, an order for compensation in relation to the Property, and a certificate of pending litigation against the Property. On the same day he sought and obtained an *ex parte* order which, among other relief, froze Ms. Berar's and Holdco's bank accounts. This was set aside by Justice Francis on May 5, 2022, on the basis that Mr. Gill had misled the Court in many respects. She found that "a cavalier attitude towards the truth was demonstrated in the claimant's materials and in his counsel's submissions", and that the "serious nature of the material non-disclosure in this case" was deserving of reproof. Justice Francis ordered Mr. Gill pay special costs, including to Holdco and Ms. Berar.

[24] Mr. Gill also commenced the following claims:

a) a civil claim, originally commenced in September 2022 (S227630), by the petitioner and another company against MKB, Berar Capital Corporation, and others in relation to a separate joint venture;

b) a civil claim, originally commenced in September 2022 (S227631), which involves none of the parties to this proceeding, or the proposed derivative claim, in respect of a separate joint venture agreement; and

c) a civil claim, commenced April 13, 2023 (S232892), by the petitioner and another company against MKB, Berar Capital Corporation, and others in relation to a separate joint venture.

[25] Both Action S227630 and S227631 were filed before Ms. Berar entered into the Berar Mortgage.

[26] Mr. Gill advised the respondents by letter of August 30, 2023 of his intention to discontinue the Family Action; it was ultimately discontinued, by consent, on February 7, 2024.

[27] I am advised by counsel that the three civil claims set out above have been ordered, by consent, to be heard at the same time; are being actively case managed; and are set for trial in February 2026. I am also advised that, if I allow the petition, counsel agree this derivative action should also be heard at the same time as the other three civil claims.

[28] Ms. Berar was aware shortly after she had arranged the Berar Financing, and long before this derivative petition was filed, that Mr. Gill no longer intended to pursue the Family Claim.

[29] The three civil claims relate to separate joint ventures and none of them seek relief that overlaps with the relief that would be sought by Holdco in the proposed derivative claim.

IV. APPLICABLE LEGAL PRINCIPLES

[30] A derivative action authorizes a minority shareholder to bring an action in the name of, and on behalf of, the company, to enforce a right belonging to the company, if those who control the company have refused to do so: *2538520 Ontario Ltd. v. Eastern Platinum Limited*, 2020 BCCA 313 at para. 147 [*Eastern Platinum*], leave to appeal ref'd, 2021 CanLII 44590 (SCC).

[31] Section 232(1) of the *Business Corporations Act*, S.B.C. c. 57 ("*BCA*") defines "complainant" as "in relation to a company, a shareholder or director of the company". Shareholder, in turn, is defined as having the same meaning in s. 1(1) and "includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section" (including s. 233).

[32] Section 233 of the *BCA* gives the court the power to grant leave to a party to commence an action in the name of, and on behalf of, a company, known as a derivative action. Specifically, it provides:

> 233(1) The court may grant leave under section 232(2) or (4), on terms it considers appropriate, if

> (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 appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[33] There is no disagreement that 1076897 satisfies the definition of "complainant"; that it has made reasonable efforts to cause Ms. Berar to prosecute the proposed claim; and that the petition has been properly given to Holdco. The proposed notice of civil claim is attached as Schedule "A" to the within petition (the "Proposed NOCC".)

[34] Rather, the dispute is whether 1076897 has established that it is acting in good faith, and that it is in the best interests of Holdco for the legal proceeding to be prosecuted. Turning first to the requirement that 1076897 establish that it is acting in good faith, the Court of Appeal recently noted in *Eastern Platinum*:

> [29] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27–30.
>
> [30] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 1997 CanLII 4375 (BC SC), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 1998 CanLII 7049 (BC CA), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].
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> [31] The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the proposed action. If this evidence is accepted by the court, it is a *prima facie* indication of good faith, but it is not necessarily determinative: *Jordan Enterprises* at para. 29; *Discovery Enterprises* (S.C.) at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.
>
> [32] A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.

> [33] A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2022 SCC 33 at para. 10; *Discovery Enterprises* (C.a.) at para. 7.

[35] The Court of Appeal also noted that the "key aspect of the good faith test" is that the petitioner establishes the action is brought for "the primary purpose of pursuing the claim for the company's benefit": *Eastern Platinum* at para. 48. It is not enough that there merely be "some belief in the merits of the proposed action": at para. 62.

> [63] There is good reason for this. It is not particularly difficult to believe there is some merit to a proposed lawsuit, or to show on a preliminary basis that there is some merit. But a derivative action application can be brought only after the company's own management has declined to prosecute the proposed action. The consequences of approving the derivative action application can be significant for the company's operations. The good faith requirement helps protect against a party meddling in a company's management for ulterior motives.

[36] A trial judge necessarily, when considering a party's motives for seeking to bring a derivative claim, will have to draw inferences from circumstantial evidence. They are entitled to consider the applicant's stated belief it is in the best interests of the company, together "with all of the circumstances and draw reasonable inferences from the whole of the evidence": *Eastern Platinum* at para. 67.

[37] Turning next to the requirement that 1076897 establish that it is in the best interests of Holdco to be allowed to proceed with the derivative action, it must "not only plead a proper cause of action but also have some evidence to support the case that its proposed action has a reasonable prospect of success": *Eastern Platinum* at para. 36. In addition, the Court must consider whether the potential relief sought in the action, and the nature of the claim, would justify the cost and inconvenience to the company of pursuing the claim: *Eastern Platinum* at paras. 38, 111 and 123. As the Court noted in *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at para. 29 [*Jordan Enterprises*]*:*

> [35] "Appears" or "appears to the court" does not mean trying the case. It encompasses a determination of whether the proposed action has a

> reasonable prospect of success or is bound to fail, whether a defence raised is bound to be accepted, and whether the potential relief will justify the cost and inconvenience to the corporation: *Luft v. Ball* at para. 54, citing *Discovery Enterprises Inc. v. Ebco Industries Ltd*., [1997] B.C.J. No. 1766 (B.C. S.C.) at para. 20, (1997), 40 B.C.L.R. (3d) 43 (B.C. S.C.), aff'd (1998), 50 B.C.L.R. (3d) 195 (B.C. C.A.); *Mikulic v. Peter*, 2013 BCSC 941 (B.C. S.C.) at para. 11; *Holdyk v. Adolph* at para. 19.
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> [36] There is no distinction between the test that a case is "arguable" and the test that a case has a "reasonable prospect of success": *Carr v. Cheng* at para. 21.
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> [37] For a court to determine whether an action has a reasonable prospect of success, it must know what the cause of action is, the facts alleged to give rise to it, and the loss alleged to have been suffered by the corporation: *Mikulic v. Peter* at para. 12.

[38] Finally, even where the conditions in s. 233(1) of the *BCA* are met, the court still retains the discretion as to whether or not to grant leave: *Eastern Platinum* at para. 39.

> [40] Not much has been said about the remaining exercise of discretion to grant or not grant leave. A common approach to the exercise of discretion in analogous circumstances is to consider the required factors as a whole, rather than separately. This is a sensible approach in derivative action applications as well.
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> [41] It is conceivable that there may be cases where the requirements are met but so thinly established that in the end the court will exercise its discretion to not grant leave. More likely, however, if an application fails it will fail on one of the requirements of the test.

V. ANALYSIS

[39] As noted above, there is no disagreement that 1076897 satisfies the definition of “complainant”; that it has made reasonable efforts to cause Ms. Berar to prosecute the Proposed NOCC; and that the petition was served on Holdco. Rather, the issue is whether 1076897 has established that it is acting in good faith, and that it is in the best interests of Holdco for the legal proceeding to be prosecuted.

A. The Proposed Notice of Civil Claim

[40] 1076897 seeks leave that it be permitted to bring the Proposed NOCC on behalf of Holdco, against Holdco’s sole director, Ms. Berar, for an alleged breach of her fiduciary obligations to Holdco and for negligence.

[41] Ms. Berar is the sole director, officer, and shareholder of MKB, the other 50% shareholder of Holdco. She has at all material times been the sole director of Holdco, and so has had full control over the management and operation of Holdco (even though 1076897 is also a 50% shareholder of Holdco).

[42] 1076897 says that TD Bank did not demand repayment of the TD Mortgage in 2022 or 2023, and so exercised its right to automatically renew the TD Mortgage in accordance with the TD Bank Policies. Despite this, Ms. Berar caused Holdco to enter into the Berar Financing, without notice to 1076897. 1076897 says that it is obvious that the additional financial burden to Holdco under the Berar Financing is substantial, and will cause Holdco to incur significant additional interest and fees.

[43] The Proposed NOCC alleges that Ms. Berar breached her fiduciary obligations to Holdco, and acted negligently, in entering into the Berar Mortgage, when the TD Mortgage had automatically renewed at substantially lower cost and on more favourable terms. The underlying position taken by 1076897 is that Ms. Berar preferred her own interests to that of Holdco's.

[44] Ms. Berar, in her own capacity and on behalf of Holdco, argues that 1076897 has failed to prove the proposed action is brought in good faith, and has failed to prove it is in the best interests of Holdco.

B. Acting in Good Faith

[45] *Easter Platinum* makes clear that a complainant brings a derivative action in good faith if the primary purpose of the proposed action is to benefit the company. Mr. Gill, in his affidavit sworn in support of the petition, deposes that he is aware of, and supports, 1076897's application seeking leave to bring a derivative claim on behalf of Holdco against Ms. Berar, in her capacity as director of Holdco, for breach of her fiduciary obligations to Holdco and for negligence. Specifically, he deposes:

> 28. To date, the Respondents have provided no evidence of any of the purported inquiries made with third party lenders in respect of alternative financing, and have not provided any satisfactory or logical explanation for their failure to seek and obtain financing from TD or other financial institutions.

> 29. I sincerely believe that Manpreet Berar's inexplicable conduct, in preferring her father's company to the detriment of Holdco, is a breach of her fiduciary obligations and obligations as director to Holdco, and that Manpreet Berar has taken these steps to benefit herself and her father to the detriment of Holdco.
>
> 30. I have reviewed the draft notice of civil claim which is appended to the Petition in this matter and sincerely believe in the merits of the proposed action and that it will be beneficial to Holdco to pursue the proposed action.

[46] He also deposes to his belief that Ms. Berar has substantial assets through MKB, and that any judgment against her can be enforced against her interest in MKB.

[47] I may consider this evidence in determining whether 1076897 has proven the existence of good faith, but it is not necessarily determinative: *Eastern Platinum* at para. 31. While the applicant's belief in the merits of the proposed action is not necessarily determinative of good faith, if the statement is accepted by the court, it is *prima facie* an indication the applicant is acting with proper motives: *Jordan Enterprises* at para. 29. However, I must "also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties": *Eastern Platinum* at para. 31.

[48] The respondent argues that as Mr. Gill first brought his Family Action, and then later decided to bring the within petition, then a relevant consideration is the existence of the disputes between the parties, the overlap this proposed action had with relief sought in the Family Action. She also argues that this is evidence of animosity resulting from their breakdown of the relationship between the parties, and is evidence of a "tactical context" to this petition. She relies upon the decision of Justice Taylor in *Lu v. 1087041 B.C. Ltd.,* 2024 BCSC 14 [*Lu*].

[49] However, I cannot agree that *Lu* is applicable to this petition. In *Lu*, the relief sought in the family proceedings substantially overlapped with the relief sought in the proposed derivative claim. Justice Taylor characterized the proposed derivative claim as a "mirror image' of the family proceedings.

[50] Here, Mr. Gill has, with the consent of Ms. Berar, discontinued the Family Action. While there are three other outstanding civil claims, there appears to be no overlap in the remedies sought in those civil claims and this proposed derivative claim. In fact, neither Holdco nor Ms. Berar are currently parties to any of those civil proceedings. Further, a dispute between shareholders is not conclusive evidence one is acting in bad faith: *Jordan Enterprises* at para. 32.

[51] In fact, as 1076897 notes, Ms. Berar, through counsel, initially made the opposite argument and submitted that Mr. Gill should pursue civil claims, as opposed to the Family Action. As already noted, this is what he has done. Now that he has discontinued his Family Action, Ms. Berar is arguing that the mere fact of a prior Family Action is an indication of a vendetta and is evidence he is not acting in good faith. I cannot accept this argument.

[52] She further argues that the fact that Holdco has been awarded special costs against Mr. Gill is also highly relevant. Again, while the actions taken by Mr. Gill in the Family Action appear to be very unfortunate, I cannot conclude that the outstanding special costs order is *prima facie* evidence of bad faith for the purpose of this petition.

[53] In all the circumstances, I accept Mr. Gill's evidence, on behalf of 1076897, that he believes in the merits of the proposed action, and I accept that is *prima facie* an indication 1076897 is acting with proper motives.

[54] Further, I am not persuaded the respondent has tendered evidence that would lead me to conclude that Mr. Gill has ulterior motives, notwithstanding the other disputes between the parties. I note that the Proposed NOCC, if ultimately successful, will benefit both shareholders of Holdco equally. Their interest is aligned, and both shareholders should have an equal interest in either selling the Property or finding alternative financing, given the onerous terms of the Berar Mortgage. I do not accept Mr. Gill has selfish motives or is acting in self-interest.

[55] Rather, in all the circumstances, I find 1076897 has satisfied the onus of proving it is acting in good faith.

C. In the Best Interests of Holdco

[56] Turning to whether 1076897 has established that it is in the proposed derivative action is in the best interests of Holdco, it must show that there is an "arguable" case for the proposed cause of action being in the best interests of the company: *Eastern Platinum* at para. 35–36. That does not mean the chambers judge is to try the case; rather it requires a determination of whether the proposed action has a reasonable prospect of success or is bound to fail; whether a defence raised is bound to be accepted; and whether the potential relief will justify the cost and inconvenience to the corporation: *Jordan Enterprises* at paras. 34–35.

[57] The respondent argues the Proposed NOCC is not in the best interests of Holdco because:

a) the Proposed NOCC has no merit and is unlikely to succeed;

b) the potential relief sought would not justify the cost and inconvenience to Holdco; and

c) Mr. Gill is not the proper person to be authorized to direct litigation on behalf of Holdco as its instructing individual.

[58] Turning first to whether 1076897 has established that the Proposed NOCC presents an arguable case, while the respondent argues that 1076897 has put forward no evidence that the TD Bank would actually renew the mortgage, I am satisfied that it has put forward an arguable case. That is not to say I find that 1076897 has proven that the TD Bank would have renewed the mortgage simply based upon the TD Bank Policies; rather, I find that 1076897 has established that the proposed action has a reasonable prospect of success. Notwithstanding Ms. Berar has asserted that her decision was justifiable in the circumstances, that assertion does not, in and of itself, demonstrate that the proposed action is bound to fail. Rather, the evidence establishes that Ms. Berar granted the Berar Mortgage to a non-arms length party – her father's company – at a rate of interest that was substantially above prevailing market rates, on the basis of compound interest, and

with renewal fees that accrue at the rate of 2% of the principal amount every quarter (or approximately $50,400 per year). While she argues that the benefit of the arrangement was that she did not have to pay monthly mortgage rates to her father, there is no evidence to that effect. Further, that belief — if found to be true at trial — does not establish that the Proposed NOCC is bound to fail.

[59] The law is clear that a director of a corporation is *per se* a fiduciary of that corporation: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 37–38. Ms. Berar owed fiduciary obligations to Holdco as its sole director, with control over the management of the company. Further, s. 142(1) of the *BCA* provides a director must act honestly and in good faith with a view to the best interests of the company, and exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances. A court may determine a director has breached this duty of care where they have failed to use reasonable care in obtaining necessary information, consider facts that they knew or should have known, or ignored important information that was in their possession *Eastern Platinum* at para. 40.

[60] In all the circumstances, I find that 1076897 has established an arguable case.

[61] Turning next to Ms. Berar's argument that the potential relief sought would not justify the cost and inconvenience to Holdco, she places great emphasis on a letter from Mr. Gill's counsel dated December 13, 2023, in which he noted that "this issue is an issue of relatively small financial magnitude to be resolved, namely the difference between mortgage financing that could have been obtained from TD and what has been charged by Mr. Jinder Berar". However, that letter was written almost 20 months ago. Under the Berar Mortgage, all unpaid accrued interest is added to the principal sum secured under the mortgage, and bears interest collectively with the unpaid principal, at 18% per annum, compounded monthly, after June 22, 2023. Further, the Renewal Fee payable, in the amount of 2% of the balance payable, is payable every three months. Notwithstanding I do not accept Mr. Gill's calculation of

the amount potentially due and owing under the Berar Mortgage for the truth of its contents, I find it clear that the amount due and owing is increasing significantly every month.

[62] Although counsel for Ms. Berar argued that the Berar Mortgage was intended to be short term bridge financing only, to help Holdco out “in a pinch”, there is no evidence to support this statement. Rather, the evidence tendered establishes that the Berar Mortgage has continued since it was entered into on February 22, 2023, so for over 30 months.

[63] Counsel disagreed whether Mr. Gill had been asked to remove the certificate of pending litigation he had placed on title to the Property. No evidence was tendered from which I can resolve this dispute, nor is it necessary that I do so for the purpose of this petition.

[64] While there is no admissible evidence that establishes the amount due and owing under the Berar Mortgage as at the date of the hearing, I accept that 1076897 has established that the terms of the existing mortgage are onerous, and if the mortgage continues, it will significantly negatively impact on the equity remaining in the Property. I find the potential relief will justify the cost and inconvenience to Holdco.

[65] Finally, Ms. Berar argues that Mr. Gill is not the proper person to be authorized to direct litigation on behalf of Holdco as its instructing individual. She argues that due to his Family Action, and the relief he sought against the Company, including the outstanding special costs order against him in favour of the Company, he should not be authorized to direct litigation on behalf of the Company as its instructing individual. She relies upon *Lu*, at para. 51, noting the practical question that arises in granting leave in a case involving a closely-held corporation — who will manage the litigation on behalf of Holdco?

[66] While I accept that Mr. Gill and Ms. Berar are in conflict, the reality is that this is a relatively simple claim. If it is successful, both shareholders will benefit. Mr. Gill

deposes that he believes Holdco will be able to collect any damages awarded. In these circumstances, where MKB is the only other shareholder and has refused to pursue the Potential Claim, I am satisfied Mr. Gill is the proper person to be authorized to direct the litigation on behalf of Holdco.

VI. CONCLUSION

[67] I am satisfied that 1076897 has established that it is acting in good faith, and the Proposed NOCC is in the best interests of Holdco. In these circumstances I would not exercise my residual discretion to not grant leave.

[68] 1076897 is granted leave to commence and prosecute a legal proceeding in the name of, and on behalf of, Holdco against Ms. Berar, pursuant to s. 232 and 233 of the *BCA*, in the form attached as Schedule “A” to the petition. 1076897 is granted the orders sought in paras. 1, 2 and 4 of the petition.

[69] However, 1076897 also seeks an order that Holdco pay the costs of prosecuting the notice of civil claim, but there is no evidence that Holdco currently has the necessary funds to do so. Accordingly, I order that 1076897 is entitled to be paid the costs of prosecuting the notice of civil claim and is to be reimbursed those costs when Holdco has the funds to do so; presumably out of the net sales proceeds when the Property is sold.

“Blake J.”