

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0463382 B.C. Ltd. v. Hornby Island Resort Ltd.*,
2023 BCSC 1702

Date: 20230816
Docket: S93176
Registry: Nanaimo

Between:

0463382 BC Ltd.

Petitioner

And:

Hornby Island Resort Ltd., 1292383 BC Ltd., 630914 BC Ltd., Lazo Management Corp., and Gregory Osborne

Respondents

Before: The Honourable Justice Tammen

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:

M.W. Buhler

Counsel for the Respondents:

G. Boddy
J. Freedman

Place and Date of Hearing:

Nanaimo, B.C.
July 31, 2023

Place and Date of Judgment:

Nanaimo, B.C.
August 16, 2023

[1] **THE COURT:** The parties are embroiled in a dispute concerning development of a property on Hornby Island for resort purposes. The plan is to build and sell strata units on a beach-front property on which is currently a lodge, restaurant, and pub. The venture initially involved four individuals: John Ross, Brad Hornstein, John, or Jack, Hornstein, and Gregory Osborne.

[2] In 2007 each of those four men, either in their personal capacity or through companies which they controlled, became a 25% shareholder in a company called Hornby Island Resort Ltd. (“Hornby Resort”). Initially that company had four directors, the four men named above.

- a) Mr. Ross controls a numbered company, 04463382 B.C. Ltd. (“382”);
 - b) Brad Hornstein controls a numbered company, 630914 B.C. Ltd. (“914”);
 - c) Jack Hornstein controls a company called Lazo Management Corp.;
- It is through those companies that those three held their 25% interest in Hornby Resort;
- d) Mr. Osborne was a personal shareholder.

[3] The venture commenced in 2011 when Mr. Ross alerted the others to the opportunity to acquire the property, including the lodge. At the outset of the venture, the parties agreed on how each would make an initial contribution to the project, and they agreed that Mr. Ross would remain as manager of the restaurant, for which he would be paid a salary.

[4] A point about which Mr. Ross and Jack Hornstein disagree is the nature of the oral agreement among the parties at the time of incorporation, which would inform the expectations of all participants. Over time, disputes arose between Mr. Ross and the other three principals. Of note, Mr. Ross was relieved of his manager's position in 2012. In 2015, at an annual shareholders' meeting, the three

shareholders other than 382 voted to decrease the number of directors from four to three, and Mr. Ross was thereafter not elected as a director.

[5] It appears that the underlying issue between the parties is Mr. Ross's disagreement with the other three directors concerning the direction of the project and his refusal to contribute additional funds to it. I am deliberately oversimplifying this dispute since it will form the backdrop to any litigation which will next occur.

[6] The dispute reached its boiling point in March 2021. The remaining three directors passed a resolution approving the sale of all the assets of Hornby Resort to a newly incorporated company called Hornby Island Resort 2021 Ltd. ("Hornby Island 2021"). That decision was ratified at a shareholders' meeting on March 31, 2021, over the objection of 382. The asset sale was completed in December 2021.

[7] The new Hornby Island 2021 company was thus in a position to carry on with the development opportunity previously possessed by Hornby Resort. The shareholders of the new company were, at the outset, three of the original principals minus Mr. Ross's company, 382.

[8] Between March and December 2021, 382 attempted to prevent the asset sale from completing, first by filing an interlocutory injunction application, then by filing a petition seeking an oppression remedy. The injunction application was granted by Justice Branch on March 24, 2021, following an *ex parte* hearing. On June 24, 2021, following an inter-parties hearing, Justice Murray declined to extend the injunction based on material non-disclosure at the time of the hearing before Branch J.

[9] In the meantime, on May 14, 2021, 382 filed its petition pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c.57. In summary, the petition claims that the affairs of Hornby Resort are being conducted in a manner oppressive to 382. The relief sought is largely declaratory, seeking to set aside various corporate actions effected through resolutions, most importantly the sale of all corporate assets. Obviously that sale has now occurred.

[10] On the present application, 382 seeks the following orders:

- a) that the style of proceeding be amended to substitute the name “Hornby Island Resort 2021 Ltd.”, formerly known as 1292383 B.C. Ltd., with the name 1292383 B.C. Ltd.;
- b) that this proceeding be converted to an action;
- c) that the applicant is at liberty to file a notice of civil claim substantially in the form attached hereto as Schedule A;
- d) if necessary, leave *nunc pro tunc* to file a notice of application in excess of ten pages; and
- e) costs of the application.

[11] The respondents consent to the proposed amendment to the style of cause. The respondents vigorously oppose the conversion of this petition proceeding into an action. In the comparatively recent case of *Cepuran v. Carlton*, 2022 BCCA 76, a five-person division of the Court of Appeal recalibrated the test for trial judges in deciding whether to refer a petition proceeding to the trial list. Prior to *Cepuran*, a judge was required to do so where there existed a *bona fide* triable issue. In *Cepuran*, the Court of Appeal revisited that requirement and set a more flexible standard. The court in *Cepuran* recognized the discretion for hearing judges to either refer the matter to the trial list or to direct that hybrid procedures be utilized within the existing petition proceedings, as contemplated by Rules 16-1(18) and 22(1)(4) at para. 160:

To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[12] The application judge must always bear in mind the overarching objective of our *Supreme Court Civil Rules*, namely the just, speedy, and inexpensive determination of every proceeding on its merits in a manner that is proportionate to the amount involved and the complexity of the proceedings. On this application, the petitioner says it needs access to the traditional discovery tools of the trial process. The petitioner says there are many disputed issues of fact where credibility will need to be assessed. In addition, the petitioner will likely need to avail itself of the pre-trial mechanism to compel third-party disclosure of documents. That is so principally because there has been a change in the ownership structure of Hornby Island 2021 since its incorporation, with Mr. Osborne selling his ownership interest to a third-party.

[13] The respondents respond by stating that there is a very narrow triable issue, that many of the claims of oppression are either statute barred by application of the *Limitation Act*, S.B.C. 2012, c. 13 or are doomed to fail. In addition, the respondents submit that there is no need for extensive oral and document discovery and that hybrid procedures can be utilized to address those which are necessary.

[14] The parties agree that the case of *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706, provides a helpful starting point for my analysis, but disagree as to its overall applicability to the case at bar. In *Phaneuf* at para. 47, Justice Jackson set out three issues which must be determined post-*Cepuran* in deciding whether to refer a petition proceeding to the trial list. The three issues are:

- a) Is the proceeding one that was properly initiated by petition?
- b) If so, does the proceeding raise triable issues?
- c) If so, should the triable issues be determined by referring the petition to the trial list or by hybrid procedures within the petition proceeding?

[15] I agree that the list set out above provides a useful starting point for my analysis, and I will address those issues *seriatim*. The proceeding was properly

brought by petition, as mandated by R. 2-1(2)(b). I note at this juncture that the proposed notice of civil claim pleads many of the same actions said to be oppressive, as does the petition. However, the relief sought in the petition is now mostly moot. The asset transfer has occurred. There is nothing to unwind with respect to directors or shareholders' resolutions. As a consequence, the notice of civil claim seeks damages, relief that could not have been contemplated at the time the petition was filed.

[16] As for triable issues, the respondents concede that there is an issue to be tried with respect to the manner by which the Hornby Resort sold its assets to a newly incorporated company, Hornby Island 2021, with the practical effect of freezing out one of the four owners of Hornby Resort. There are issues as to fair market value, distribution of sale proceeds, the validity of the decisions taken by the directors, and potentially the change in corporate ownership in the aftermath of the asset sale.

[17] I tend to agree with the respondent's submission that many of the discrete oppression claims of the plaintiff are out of time and thus statute barred and that some may be doomed to fail. The pleadings of the petitioner appear intent on revisiting the entirety of the 14-year history of this corporate endeavour. The petitioner says some of the statute-barred claims, although they may not give rise to damages at trial, may properly be considered by the trial judge as part of a pattern of behaviour constituting cumulative oppressive conduct. I agree that some of that evidence will likely need to be assessed by the trial judge.

[18] In addition, the respondents may wish to call such evidence. In part, the respondents submitted that they had no choice but to act as they did in March 2021 because of Mr. Ross's refusal to contribute financially to the project. As noted earlier, the parties agree that there was an oral agreement made in 2007, when Hornby Resort was incorporated. Mr. Ross has deposed to certain terms. Jack Hornstein in his affidavit disagrees with some of those terms. Jack Hornstein deposes that there

were implied terms of the agreement concerning future financial contribution with which Mr. Ross disagrees.

[19] The nature of the oral agreement will likely need to be determined by considering testimony and any supporting documentation from all the participants. I have considered whether hybrid procedures within the petition proceeding will suffice in permitting a just determination of the issues between the parties and have concluded that they will not. The matter must be referred to the trial list. The petition proceeding should be converted to an action.

[20] I agree with petitioner's submissions that extensive oral and document discovery will be necessary in this case. To date, only one of the three directors, Jack Hornstein, has given a meaningful account in affidavit form of their activities. Brad Hornstein simply adopts the contents of Jack Hornstein's affidavit. Mr. Osborne has not yet provided an affidavit.

[21] In addition, there may be a case to be made for production of documents in the possession of third parties. At this juncture, I cannot say. What I can safely conclude is that there would need to be modifications to any order I could presently make concerning hybrid procedures. I agree with the petitioners that there may need to be several further applications simply to decide what applications may be brought by the petitioner.

[22] The amount in issue here is substantial. The real claim now is one of loss of corporate opportunity. That opportunity may be worth several hundred thousand dollars. For the forgoing reasons, I grant the application of the petitioner.

[23] I order as follows:

- a) that the style of proceedings be amended to substitute the name Hornby Island Resort 2021 Ltd., formerly known as 1292383 B.C. Ltd. for the name 1292383 B.C. Ltd.
- b) that this proceeding be converted to an action.

- c) that the applicant is at liberty to file a notice of civil claim substantially in the form attached as Schedule A to the notice of application filed April 26, 2023.

[24] The petitioner is entitled to costs of this application in the cause at Scale B.

“Tammen J.”