

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kim v. 0852069 B.C. Ltd.*,  
2024 BCSC 1606

Date: 20240830  
Docket: S250468  
Registry: New Westminster

Between:

**Jin Yeol Kim**

Plaintiff

And

**0852069 B.C. Ltd.,  
Kyu Ha Kim and In Sook Lee**

Defendants

Before: The Honourable Justice A. Ross

## Reasons for Judgment

Counsel for the Plaintiff:

P.W. Hansen

Counsel for the Defendant 0852069 B.C.  
Ltd.:

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and In Sook Lee:

I.M. Knapp

Place and Date of Trial/Hearing:

New Westminster, B.C.  
March 7, 2024  
July 26, 2024

Place and Date of Judgment:

New Westminster, B.C.  
August 30, 2024

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**Introduction**

[1] In this corporate litigation, both the plaintiff and the defendant company seek interim remedies.

[2] The main point of contention relates to the preservation of a fund that began at approximately \$900,000 and has been reduced (by agreement and order) to \$661,823. Those funds are currently held in the trust account of the company’s solicitors.

[3] The plaintiff seeks directions pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA], for the orderly conduct of the company’s business and an order setting aside any directors’ resolution declaring a dividend.

[4] In response, the company seeks an order releasing the same funds back to the company without restriction.

[5] For the reasons set out below,

- a) I dismiss the plaintiff’s application for the further preservation of the funds held in trust.
- b) I dismiss the plaintiff’s application to interfere with the decisions and resolutions of the directors.
- c) I vary the prior order of Justice Riley and allow the payment of the trust funds back to the company.

**Factual Background and Chronology**

[6] This litigation relates to the ownership of the Chalet Continental Motel located at 1450 5th Ave. in Valemount, BC. (the “Motel”).

[7] The plaintiff and the two individual defendants are the registered shareholders in a company named 0852069 B.C. Ltd. (“069 Ltd.”). 069 Ltd. owns the Motel.

[8] The company, 069 Ltd. was incorporated on May 15, 2009 for the purpose of purchasing and operating the Motel. The plaintiff and the two individual defendants are each registered as owning one third of the shares in 069 Ltd.

[9] Jin Yeol Kim, the plaintiff, is a shareholder and director of 069 Ltd. and the manager of the Motel.

[10] Ryu Ha Kim and In Sook Lee, the individual defendants, are shareholders in, and directors of, 069 Ltd. They do not participate in the operation of the Motel. I refer to them collectively as the “Individual Defendants”.

[11] 069 Ltd. purchased the Motel on May 27, 2009, at the price of \$2,035,000 plus adjustments. That purchase was financed by the vendor taking a mortgage of \$1.3 million. The remainder of the funds for the purchase came from the Individual Defendants and the plaintiff. The manner of their infusion of money is in dispute in this action.

[12] The underpinning of the plaintiff’s claim is based upon his allegation that the nature of the Individual Defendants’ investment was by way of a loan (and not equity). The plaintiff says:

- a) the Individual Defendants loaned money to him in order to purchase the property;
- b) there was an oral agreement whereby the loan would be paid off over time from the profits of the Motel;
- c) the shares issued to the Individual Defendants were a form of security for their loans;
- d) the oral agreement provided that, upon full payment of the loans, the Individual Defendants would transfer their shares to the plaintiff at no cost; and

e) at that point, the plaintiff would be the sole owner of 069 Ltd. and, hence, the Motel.

[13] The plaintiff worked as the Motel manager from 2009 to the present. During that period, the “profits” of the business were paid out to the individual investors (including the plaintiff). These payments were recorded in the financial statements as the repayment of shareholder loans (as opposed to dividends).

[14] The plaintiff says that he took a low salary in his managerial role in order to pay down the loans as fast as possible.

[15] Then, in September 2022, when the loans were paid down completely, he approached the Individual Defendants. He requested the return of their shares. Both Individual Defendants denied the existence of any such oral agreement.

[16] As set out at para. 10 of the notice of civil claim the plaintiff alleges:

10. The oral agreement between the shareholders/directors was that upon repayment of the loan, [the Individual Defendants] would surrender their shares in the company to [the plaintiff]. In breach of the agreement the defendants ... have neglected or refused to surrender their shares to [the plaintiff], or to consent to resolutions that would approve surrender of their shares.

[17] The notice of civil claim also puts forward an alternative claim: If the plaintiff is not successful on the claim described above, then the operation of the 069 Ltd. has been oppressive. In particular, he says that he has taken a low salary as the manager of the Motel in order to facilitate the orderly and timely repayment of the loans to the Individual Defendants. He seeks a retroactive adjustment to his salary such that he would have been reasonably compensated, both past and present.

[18] The Individual Defendants deny any oral agreement. They maintain that they are shareholders in 069 Ltd.

[19] By the end of the 2023 fiscal year, 069 Ltd. had accumulated more than \$900,000 in retained earnings.

**History of this Action and the Current Application**

[20] The plaintiff filed the notice of civil claim on August 9, 2023.

[21] Presumably, in response to this action, on September 22, 2023, the other directors (the Individual Defendants) gave notice of a resolution to declare a dividend of \$450,000. However, no meeting was called to vote on that dividend.

[22] On October 4, 2023, the plaintiff filed an amended notice of civil claim.

[23] On October 6, 2023, independent counsel was appointed for 069 Ltd.

[24] Also, on October 6, 2023, the Individual Defendants gave notice of a resolution to declare a \$450,000 dividend (\$150,000 to each shareholder, including the plaintiff) (the “October 6 Notice”).

[25] On October 31, 2023, the Individual Defendants filed their response to the amended notice of civil claim.

[26] The plaintiff’s counsel responded to the October 6 Notice on November 20, 2023, indicating his objection to the resolution and dividend.

[27] Independent counsel for 069 Ltd. sought and obtained an accountant’s report on the financial health of 069 Ltd. That report indicated that the proposed dividend would not endanger the operation of the company.

[28] Based upon that accountant’s report, on December 15, 2023, the Individual Defendants, in their capacity as directors, gave notice to the plaintiff of a Directors’ Meeting to be held on December 28, 2023. They planned to vote on the proposed dividend.

[29] There ensued an exchange of correspondence regarding availability for the meeting. The plaintiff’s counsel advised, on December 20, 2023, that he was not available for the meeting on December 28, 2023.

[30] The next day (December 21, 2023), the plaintiff withdrew \$900,000 from 069 Ltd.'s bank account. He deposited those funds into a personal account. On the same day, he attended at his lawyer's office and executed a declaration of trust over those funds. He did not inform the Individual Defendants of this step.

[31] The meeting proceeded on December 28, 2023. The plaintiff and the Individual Defendants attended. The plaintiff's counsel did not attend. A recording was made. A transcript was tendered in evidence. I need not refer to it here. The vote on the dividend passed by a 2-1 vote.

[32] The Individual Defendants discovered the funds were missing when they attempted to withdraw funds to pay the retainer of 069 Ltd.'s independent counsel. They demanded that the plaintiff return the funds.

[33] On February 2, 2024, the plaintiff filed this application to:

- i. set aside, or vary, the directors' resolution approving the \$450,000 dividend;
- ii. obtain an order securing the original \$900,000 until the resolution of this action.

[34] The parties appeared before Justice Riley on February 27, 2024. There was insufficient time to hear the application. In the interim, Justice Riley ordered (by consent):

- a) the plaintiff to pay the \$900,000 to the solicitors appointed to act for 069 Ltd., with those funds to be held in the solicitor's trust account; and
- b) 069 Ltd.'s solicitors were enjoined from diminishing the funds held in trust except by agreement or further order.

[35] The parties appeared before me on March 7, and again on July 26, 2024. At the March 7 hearing, the parties could not complete their submissions. I ordered that, in the interim, the solicitors for 069 Ltd. should pay out a dividend of \$50,000 to

each of the shareholders. That order was based upon the evidence that the Individual Defendants, to some extent, relied upon the income from 069 Ltd. for living expenses. Thus, the funds in trust were reduced to approximately \$750,000.

[36] Two additional withdrawals were made after July 26. \$50,000 was paid to the operating bank account of the Motel at the request of the plaintiff. A further sum was paid out for the retainer of counsel appointed for 069 Ltd.

[37] I am informed that, as of July 26, 2024, the balance held in trust was \$661,823.

[38] The trial of this matter is scheduled for July 23, 2025.

**Legal Basis**

[39] Due to the passage of time and the unfolding of events, the cross-applications have evolved to some extent:

- a) The plaintiff continues to seek:
  - i. directions from the court for the orderly conduct of business of 069 Ltd. until the resolution of this action; and
  - ii. an order that any resolution for the payment out of dividends be set aside, varied, or prohibited upon terms the court deems fair.
  
- b) The company, 069 Ltd., seeks:
  - i. an order releasing the remaining funds held in trust, and the payment of those funds to 069 Ltd. without restrictions or limitations on their use; and
  - ii. special costs of this application from the plaintiff.

[40] The legal basis for the plaintiff's application is found within the *BCA*, s. 227(2)-(4):

(2) A shareholder may apply to the court for an order under this section on the ground

(a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or

(b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

(3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

...

(k) varying or setting aside a resolution,

(4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

[41] The parties agree that the relief sought under s. 227 of the *BCA* is injunctive in nature. The test for the court on an application for an interim order is the same test oft cited for an interim injunction from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [RJR]. As noted by Justice Girn recently in *Petersen v Hawley*, 2024 BCSC 472:

[53] In British Columbia, the RJR test has been reformulated with only two prongs: *Coburn v. Nagra*, 2001 BCCA 607; *British Columbia (A.G.) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 345, 1986 CanLII 171 (C.A.). In this two-part assessment, the applicant must demonstrate: (1) that there is a serious issue to be tried, and (2) that the balance of convenience favours granting the relief sought: *Mayer v. Mayer*, 2014 BCSC 1850 at para. 7; *Morrison v. Kaaringten*, 2022 BCSC 2413 at para. 6. The two-part and three-part tests are generally of no practical difference: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at para. 93. The irreparable harm consideration is “subsumed into the balance of convenience analysis”: *Abougoush* at para. 38. Whether or not irreparable harm makes up its own step in the analysis, it remains “at the very least an important component of the test”: *Mclsaac v. David*, 2019 BCSC 931 at para. 53.

[42] For the reasons set out below, I base my ruling on the balance of convenience. Hence, I spend little time on the first issue.

**Serious Issue to be Tried**

[43] The first issue is whether there is a serious issue to be tried.

[44] Without going into great depth, I accept that there is a serious issue to be tried in this case. The bar for the plaintiff to clear is simply to show that his claim is not frivolous or vexatious.

[45] The plaintiff submits that he had a reasonable expectation that the Individual Defendants would surrender their shares to him upon the payment of their loans. That question will be for the trial judge. His claim is based upon an oral agreement.

[46] To the extent that the Individual Defendants submit that the plaintiff's case (relating to the oral agreement) is weak, I address that submission under my consideration of the balance of convenience. However, having considered the evidence before me on this application, I find that the plaintiff's claim relating to the oral agreement is not frivolous or vexatious. The plaintiff clears the first part of the test.

[47] I pause to note, however, that the plaintiff also argues his alternate cause of action. He submits that the payment of dividends "unfairly disregards the plaintiff's interest to be paid a regular wage". I can deal with that submission under this heading. In short, this submission has a very weak legal basis:

- a) The plaintiff is proceeding under the oppression remedy in the *BCA*. The law is clear that a claimant under the *BCA* cannot assert those rights in their capacity as an employee. That claim, to the extent it is made under the *BCA*, has little merit.
- b) To the extent that it is not made under the *BCA*, the "regular wage" claim constitutes an employee seeking to prevent the employer from declaring and paying dividends to shareholders on the basis that the employee has

been underpaid for a number of years. In my opinion, while it is possible that there may be a serious issue to be tried, this is not the sort of claim where the court should intercede in the ordinary functions of a closely held company. (In stating that, I am not considering this case to fall under the *Employment Standards Act*, R.S.B.C. 1996, c. 113.)

[48] Hence, in my discussion below, I am only addressing the plaintiff's submissions regarding the alleged oral contract and the alleged breach thereof.

**Balance of Convenience, Including Irreparable Harm**

[49] In my opinion, the balance of convenience clearly lies with the defendants.

[50] The plaintiff argues that the Individual Defendants, who represent a majority of the shareholders and directors, have taken steps to pay out the dividend:

- a) against the wishes of the plaintiff;
- b) in circumstances that would render 069 Ltd. incapable of paying any monetary judgment that he may obtain at trial.

[51] In my opinion, the sole basis of the plaintiff's claim for relief on this application is his desire to preserve the company's funds to ensure that, if he is successful at trial, there will be a pot of money from which he can claim his damages. Hence, his concept of "irreparable harm" is defined by the fact that he has a claim in monetary damages and he is concerned about the Individual Defendants' ability to pay. The plaintiff notes that, in defence of this application, the Individual Defendants have indicated that they rely on the dividends from 069 Ltd. as income in their retirement. This fact suggests that they will not have funds to pay damages.

[52] Boiled down to its essential elements, the plaintiff's submission is:

- a) I told the defendants that I have a claim against them.
- b) As a result, I am entitled to tie up all funds held by 069 Ltd. so that, if I win at trial, I will be paid.

[53] In my opinion, apart from the potential struggle to execute on (part of) the anticipated award of damages, there is no other element of the claim that would “irreparable”.

[54] Following up on the prior paragraph, I note that, if he is fully successful at trial, the plaintiff will be entitled to the transfer of the Individual Defendants’ shares in 069 Ltd. and, thus, full ownership of the company and Motel. That element of his claim is not in any danger. Only his ability to execute on an award of damages will be in jeopardy.

[55] Hence, on the plaintiff’s own submission, I have difficulty in concluding that there will be “irreparable harm” as that consideration is considered within the “balance of convenience” mix. Instead, at worst, there may be difficulty in executing on a damage award.

[56] I now move to the submissions of the Individual Defendants. Their counsel styled the submissions on the basis that the sole issue on this type of application is whether it is in the interests of justice to grant the application. In other words, counsel folds the “serious issue to be tried” in with the rest of the balance of convenience considerations. I find that I reach the same result whether I follow that suggested approach, or the two-step or three-step approach.

[57] The Individual Defendants’ submission is in four basic parts:

- a) Strength (weakness) of the plaintiff’s case;
- b) The plaintiff did not act in a timely manner as required by s. 227(4);
- c) The plaintiff does not have clean hands; and
- d) The balance of convenience should be decided based upon the financial need of the defendants.

[58] I address each argument below.

***Strength of Case***

[59] The Individual Defendants submit the plaintiff's case is weak. They rely on the following:

- a) The plaintiff pleads that he made an oral agreement with the Individual Defendants. The Individual Defendants deny any such agreement. The lack of documentation is, in itself, a weakness.
- b) The share registry of 069 Ltd. indicates that the Individual Defendants are shareholders. That registry should govern at trial.
- c) Looking at the reasonableness of the business decisions, the amounts supplied by each party, and the shares issued, were identical, suggesting an equal ownership. Equal contribution is not consistent with the Individual Defendants having loaned money to the plaintiff.
- d) The plaintiff is unable to point to any definitive agreement on specific terms of the alleged oral loan agreement. For example, there is no indication of:
  - i. the interest rate that would be paid; or
  - ii. the time period over which the loan would be repaid.
- e) One of the Individual Defendants borrowed money from a bank, and mortgaged her house, to invest in 069 Ltd. It defies business reality that a person would:
  - i. mortgage their house to borrow funds;
  - ii. then lend those funds to a company;
  - iii. fail to take mortgage security for that loan; and
  - iv. undertake these transactions without knowing the interest rate or duration of the personal loan for to 069 Ltd. or the plaintiff.

[60] Hence, the Individual Defendants submit that these transactions were clearly investments for which the individual investors became shareholders. The plaintiff's claim is weak.

***Acting in a Timely Manner***

[61] The Individual Defendants say the plaintiff did not act in a timely manner as required by s. 227(4):

- a) The Individual Defendants first indicated their intention to declare the \$450,000 dividend on October 6, 2023.
- b) The plaintiff's counsel wrote on November 20, 2023, indicating his objection to the resolution. Despite knowing of the intention to declare a dividend, the plaintiff took no (legal) step until February 2, 2024, when this application was filed. He could have made this application on October 7, 2023.
- c) In the interim, the plaintiff wrongfully removed \$900,000 from the company's bank account (which is the subject of the next heading).

[62] The Individual Defendants note the requirement in s. 227(4) of the *BCA* that claimants must act in a timely manner.

***Clean Hands***

[63] The Individual Defendants say the plaintiff does not have clean hands. They submit:

- a) While "clean hands" are not a strict requirement for equitable relief, the complainant's conduct is not an irrelevant consideration: *Mayer v. Mayer*, 2012 BCCA 77 at paras. 206–209.
- b) In this case, rather than pursue this application in a timely fashion, or seek some other pre-judgment remedy, the plaintiff effectively stole \$900,000 from the bank account of 069 Ltd. This was clearly a "self-help" remedy. It

was a step that was taken despite the commencement of this action and the involvement of counsel.

- c) In this application, the plaintiff seeks to “launder” his mis-deeds, by obtaining the *ex post facto* approval of the court.

[64] The Individual Defendants submit that the court should not condone this type of self-help remedy.

### ***Financial Need***

[65] Finally, the Individual Defendants say that the balance of convenience should be decided based upon the financial need of the defendants:

- a) The affidavits of the defendants indicate as follows:
  - i. Kyu Ha Kim says that he is in desperate need of the dividends, which are his only source of income apart from Canada Pension Plan and Old Age Security.
  - ii. In Sook Lee says that the dividends are an important part of her retirement income.

### **Analysis and Decision**

[66] As foreshadowed above, I find that the balance of convenience favours the Individual Defendants on this application:

- a) Although the plaintiff meets the “serious question to be tried” threshold, there are (on the evidence before me) issues with the plaintiff’s case. A trial judge may well question the business reality and common sense of the transaction propounded by the plaintiff.
- b) The plaintiff cannot show any irreparable harm. His reliance on the prospect of the Individual Defendants being unable to satisfy a damage award is not, in my opinion, a basis for granting injunctive relief.

- c) Tying up the company's funds may have the effect of limiting the retirement plans of at least one of the Individual Defendants.

[67] I further note that this is not a case wherein the Individual Defendants have been taking every possible dollar out of the business. I have reached my decision within the context of the parties having accumulated significant retained earnings in 069 Ltd. That fact provides me with some confidence that good business judgement has been, and will be, exercised moving forward.

[68] Considering all of these factors together, the factors discussed above would be sufficient for me to dismiss the plaintiff's application.

[69] However, my decision is strengthened by the step taken by the plaintiff. I accept the submission of the defendants that the court should not countenance self-help remedies. The plaintiff had legal avenues that he could have pursued. Instead, he chose the self-help remedy. In my opinion, that decision alone would be sufficient to dismiss this application.

### **Conclusion, Order, and Costs**

[70] It follows that the plaintiff's application is dismissed in its entirety. I decline to preserve the funds held in trust. I decline to interfere with the business decisions of the company or its directors.

[71] It further follows that I grant the relief sought by 069 Ltd. I order that the funds currently held in trust by 069 Ltd.'s solicitor be released to 069 Ltd. without restriction. Hence, I vary the order of Justice Riley to the extent required to accomplish those ends.

[72] As to costs, 069 Ltd. seeks its costs of this application assessed as special costs. The Individual Defendants seek the costs on the tariff.

[73] In my opinion, the fairest result is:

- a) Each of the two sets of defendants (069 Ltd. and the Individual Defendants) is entitled to their costs of the application, in the cause.
- b) The plaintiff is not entitled to any costs.

“A. Ross J.”