IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mostyn v. Schmiing,* 2011 BCSC 275

Date: 20110307
Docket: S105025
Registry: Vancouver

Between:

Ursula Mostyn, Ursula Mostyn as Trustee of the Ursula H.J. Schmiing Trust, and the said Ursula H.J. Schmiing Trust

Petitioners

And

Gerhard Schmiing, Gerhard Schmiing as Trustee of the Gerhard H.J. Schmiing Trust, the said Gerhard H.J. Schmiing Trust, and Suffolk Services Ltd.

Respondents

- and -

Docket: S107415
Registry: Vancouver

In the Matter of the *Business Corporations Act*, SBC 2002, Chapter 57, and Amendments Thereto

And in the Matter of Suffolk Services Ltd.

Between:

Gerhard Schmiing, Gerhard Schmiing as Trustee of the Gerhard H.J. Schmiing Trust, and the said Gerhard H.J. Schmiing Trust

Petitioners

And

Ursula Mostyn, Ursula Mostyn as Trustee of the Ursula H.J. Schmiing Trust, the said Ursula H.J. Schmiing Trust, and Suffolk Services Ltd.

Respondents

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

(In Chambers)

Counsel for the Petitioners in S105025 and Counsel for the Mostyn Respondents in 107415:	H.A. Mickelson, Q.C. and G. Trotter
Counsel for the Schmiing Respondents in S105025 and Counsel for the Petitioners in 107415:	M.A. Richter
Place and Date of Trial/Hearing:	Vancouver, B.C. January 17-19, 2011
Place and Date of Judgment:	Vancouver, B.C. March 7, 2011

[1] Ursula Mostyn and her brother Gerhard Schmiing each own–through their respective family trusts–50 per cent of the shares in a family company and are the company's only directors. Conflict has arisen and they are no longer able to work together. Each now wants to acquire the other's shares and applies for an order requiring the other to sell them. In the alternative, each seeks an order for sale of the company's assets and division of the proceeds.

[2] The primary asset of Suffolk Services Ltd. is a 55-year old, 28-suite apartment building in the west end of Vancouver. Ms. Mostyn and Mr. Schmiing inherited their shares in the company upon the death of their father in 2002. Ms. Mostyn became the president of the company and Mr. Schmiing the secretary. Both say it was their father's wish that the property remain in the family after his death. The equal ownership arrangement initially functioned well, but the present conflict arose in 2008 and the parties now agree that there is a deadlock.

[3] Ms. Mostyn says she has been managing the building since her father's health began to deteriorate in 2001. Since his death, she says she has continued to manage the building with little assistance from her brother and has increased the property's value through necessary and long-overdue renovations.

[4] Mr. Schmiing says he contributed physical labour to the maintenance and upgrading of the building and dealt with problem tenants. He agrees that Ms. Mostyn has been primarily responsible for the financial management of the company. In fact, he says she kept the finances under her exclusive control and he now alleges mismanagement that he says he has only recently become aware of. This mismanagement is alleged to include the use of company funds for personal expenses and extravagant spending on renovations, including renovations to a penthouse suite that Ms. Mostyn lived in rent-free from 2004 to 2008. Ms. Mostyn now lives in Victoria but says she still uses the penthouse suite as an office and stays there when she is in Vancouver.

[5] Ms. Mostyn concedes that some company funds may have been used to pay personal expenses, although not to the extent Mr. Schmiing alleges. The parties have agreed that a forensic accountant should be appointed as a special referee to review the company's books and records in order to identify any amount that Ms. Mostyn must repay the company and, if necessary, to correct any errors in the accounting records that impact on the share valuation.

[6] Mr. Schmiing is also seeking a benefit from the company equivalent to the benefit he says Ms. Mostyn received through her rent-free occupation of the penthouse. Ms. Mostyn says that if she is now required to effectively pay back rent, she is entitled to be paid for her management services on a *quantum meruit* basis. If the court allows a *quantum meruit* claim, the parties agree that another special referee should be appointed to determine the value of the

work done by each of them. The parties also agree that if the court orders one of them to sell their shares to the other, the buy-out price should be determined by a special referee.

[7] The issues to be decided on this application are therefore:

a. Whether one party should be ordered to buy the other's shares or whether the company should be liquidated;

b. If one party is to buy out the other, which party will be ordered to do so; and

c. In fixing a buy-out price or in division of proceeds of a liquidation, what effect, if any, should be given to the free rent received by Ms. Mostyn and her corresponding claim to be compensated for her services.

[8] Ms. Mostyn's claim is made pursuant to s. 324 (1) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*] which reads:

> On an application made in respect of a company by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if
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> (a) an event occurs on the occurrence of which the memorandum or the articles of the company provide that the company is to be liquidated and dissolved, or
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> (b) the court otherwise considers it just and equitable to do so.

[9] Although he also relies on s. 324, in the alternative Mr. Schmiing seeks a remedy for oppression under s. 227 (2) of the *BCA*, which reads:

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

[10] An order under either section gives the court a wide choice of remedies, including an order for liquidation and dissolution of the company or an order that one shareholder purchase the shares of another. Section 324 (3) of the *BCA* reads:

> If the court considers that an applicant for an order referred to in subsection (1) (b) is a person who is entitled to relief either by liquidating and dissolving the company or under section 227, the court may do one of the following:
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> (a) make an order that the company be liquidated and dissolved;

> (b) make any order under section 227 (3) it considers appropriate.

Section 227 (3) includes the following:

> 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
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> ...
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> (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
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> ...
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> (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,

[11] Although the same remedies are available under either section, there is an important difference between them that may affect the choice of remedy in a particular case. Unlike s. 324, s. 227 of the *BCA* requires a finding of wrongful conduct or bad faith by the company or its directors that harms the legal or equitable interest of a shareholder: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 66-67; *Walker v. Betts*, 2006 BCSC 128 at paras. 80-81. In *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods Inc.* (1991), 56 B.C.L.R. (2d) 273 (C.A.), Southin J.A. stated at 280:

> If oppression has been established, then ordinarily it would not be right to make an order sought by the respondent to which the oppressed petitioner objects. It is not, generally, a proper exercise of discretion for the court to reward the wrongdoer.
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> But where, as here, what has been established is a deadlock, the court may properly order the purchase by any shareholder of the shares of any other. Deadlock is not of itself oppression and does not necessarily connote wrongdoing by either party.

[12] In this case, there is no doubt and no dispute about the existence of a classic deadlock that makes an order under s. 324 appropriate. However, in determining what remedy will provide a just and equitable solution as between these parties, it is still necessary to consider Mr. Schmiing's oppression claim because, if he has been the victim of oppressive conduct, the equities may weigh more heavily in his favour.

[13] Mr. Schmiing's oppression claim is based on an allegation that Ms. Mostyn and her family have received benefits from the company far in excess of the benefits he and his family have received. These excess benefits include, but are not limited to, the rent-free occupation by Ms. Mostyn of the penthouse apartment. Mr. Schmiing says his sister has, since their father's death in 2002, treated the company and its money as her own, but he only discovered and began investigating this in 2008.

[14] The difficulty with that position is that Mr. Schmiing was, at all relevant times, an equal shareholder, director and officer of the company. As such, he not only had a right to access

financial records–and to seek the assistance of the court if access was refused–but a duty to be involved in or to supervise the company's affairs. Although Mr. Schmiing alleges that he has been denied timely access to financial records, those allegations relate to the time since this dispute arose in 2008. There is no evidence of him asking for or being denied access to financial records before that time. In fact, his affidavit specifically states that the current dispute "relates to my requests since 2008 for financial transparency." [Emphasis added.]

[15] This is not a case of a minority shareholder being denied information and lacking the power to intervene. If Mr. Schmiing was unaware of how Ms. Mostyn was managing the company's finances, then that appears to have been the result of his own choice not to involve himself in those matters. Indeed, his lack of involvement was a breach of his own duties to the company as an officer and director.

[16] Mr. Schmiing was not only in a position in which he should have known about the things he now complains of, he appears to have in fact known about many of them. For example, he knew Ms. Mostyn had renovated and was living in the penthouse unit and, prior the dispute arising in 2008, was a frequent visitor to that apartment. There is no evidence that he ever raised any complaint about what he now says were unnecessarily luxurious renovations or suggested that Ms. Mostyn should be paying rent.

[17] In those circumstances, I cannot find that Mr. Schmiing has been the victim of oppressive conduct within the meaning of the statute. Even if there was anything oppressive in the conduct of Ms. Mostyn or the company, in view of what Mr. Schmiing knew or should have known he has clearly failed to raise the matter in a timely way, which s. 227 (4) establishes as a pre-condition to any oppression remedy being granted:

> (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.

[18] In the absence of oppression, I do not consider it necessary to make findings as to how the present deadlock arose or to assess blame for it. It is simply a matter of determining the fairest and most efficient way to disentangle these parties. It is also not necessary to deal with the alleged benefit received by Ms. Mostyn in the form of free rent or to order a valuation of any services performed by either party. Any concern about these issues should have been raised and dealt with by the two directors of the company long ago.

[19] Each party seeks an order requiring the sale of the other's shares or, in the alternative, an order that the building be sold on the open market, with the proceeds divided and the company then wound up.

[20] Neither party seeks, even as an alternative, the kind of order often given in cases of this

kind–one requiring a "shot gun" sale. In a shot gun sale, one party is ordered to offer their shares for sale to the other at a stated price. If the other party refuses to buy at that price, the first party must buy the other's shares at the same price. The practical effect of this method was noted in *Kinzie v. The Dells Holdings Ltd.*, 2010 BCSC 1360 [*Kinzie*] at para. 25: "If the offer is too low, it will be readily accepted at an obvious loss to the offeror, and if the offer is too high, the offeror may be forced to pay that price in the event the offeree refuses to accept the offer. " The idea is that both parties have an incentive to determine the proper market value and make an offer as close to that value as possible.

[21] In the state of the relationship between these parties, I do not think a shot gun offer would work as intended and the parties are quite right not to suggest it. Either or both of these parties may be less interested in making an offer at market value then in setting a price that ensures the other does not acquire the property. The likely result would be one party being required to buy the other's interest at an inflated price for which they would be unlikely to obtain financing, leading to further litigation.

[22] The question then becomes whether the court should decide whether acquisition by one party or the other is more appropriate. In considering that question, I place no weight on the fact that Mr. Schmiing may have at one point indicated he was prepared to sell his shares. That sale never occurred and Mr. Schmiing is entitled to change his mind.

[23] Nor do I place much weight on the evidence from both parties that their father wanted the building to remain in the family. Mr. Schmiing Sr. set up the corporate structure under which each of his children held a 50 per cent interest in the company after his death. Subsequent events have made the arrangement unworkable and it is pointless to speculate on what he might have wanted had he anticipated the current situation. In any case, both parties are seeking relief under the *BCA*–the court is not being asked to determine the intentions of a testator in a will.

[24] In determining whether it is just and equitable in the circumstances that one shareholder buy out the other, the court is required to strike a fair balance between all the relevant considerations: *Whistler Service Park Ltd. v. Glacier Creek Development Corp.*, 2005 BCCA 472 [*Whistler Service Park*].

[25] Majority shareholders are frequently ordered to buy the interests of minority shareholders. When the shareholdings are equal, a frequent remedy, as said above, involves shot gun offers: *Whistler Service Park*; *Kinzie*. I have not been referred to any case where the court has been asked to specifically determine which of two equal shareholders should become the sole owner of the company. Ms. Mostyn relies on *Cariboo Western Lumber Ltd. v. Mochizuki,* 2000 BCSC 1537, which involved a dispute between two brothers who were equal

shareholders. The court ordered that the brother who was actively involved in management of the company buy out the other's share. However, that brother was the only one who had expressed an interest in acquiring the other's shares:

> [47] In making that order, rather than winding up the company, I consider that K. Mochizuki has managed Cariboo since 1987 and that after his accident G. Mochizuki worked just one year for Cariboo, leaving the company voluntarily in 1997 just prior to the sale of the company's assets. It is also preferable that Cariboo continue in existence until it has received all the monies due from the sale of its assets.
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> [48] K. Mochizuki is prepared to pay fair market value for G. Mochizuki's shares, whereas G. Mochizuki has evidenced no interest in purchasing K. Mochizuki's shares.

[26] Ms. Mostyn says that she has a greater attachment to the building as a result of her active management, which included significant upgrading, and for which she obviously takes great pride. Mr. Schmiing is now retired and has had health problems. He says full ownership of the company would provide him with a reasonable income, but he could not live on income generated from the net proceeds of sale of a half interest.

[27] Although I must consider all factors in arriving at a just and equitable solution, I cannot ignore the legal reality that this is a commercial venture in which both parties have an equal interest. Inherent in that relationship is the intention that neither party obtain advantage or preference over the other, except by mutual agreement: *Vallée v. Pickard* (2007), 28 B.L.R. (4th) 149 (Ont. S.C.J.) [*Vallée*] at paras. 46-50. Whatever personal interest, attachment to the building or plans either party has, their interests are fundamentally financial ones. It is, to put it bluntly, "only money".

[28] Each party has put forward understandable reasons why they wish to become the sole shareholder, but I cannot find that either has a greater or more compelling equitable claim than the other.

[29] I have referred to the reasons why an order for a shot-gun sale would be inappropriate in these circumstances. A sale of the company's principal asset on the open market is the best guarantee that each party will receive fair market value for their interest, but would also involve additional costs and invite further disputes on matters such as the choice of a listing realtor or the acceptance of an offer.

[30] In the circumstances, and given the broad discretion with regards to choice of remedy under s. 227 (3) of the *BCA*, I find that the best solution is an "auction" sale as was ordered by the Court in *Vallée*. Each party will provide the court with a sealed bid to purchase the other's shares. The highest bidder shall be entitled to purchase the half interest of the other.

[31] This remedy eliminates the need to give one party the first right to purchase in

preference to the other and avoids at least some the other difficulties that might arise with a shot gun sale involving these parties. Each party will have to make a good faith effort to submit a price that reflects fair market value and any difference between the bids is likely to be the best indicator of which party most wants to own the company.

[32] The obvious downside to an order of this nature is the potential inability of either party to secure the funds or obtain the necessary financing in support of their bid within the specified timeframe fixed by the court. In the event the buy-out does not occur, for whatever reason, the building that comprises the principle asset of the company will then be sold on the open market.

[33] The sealed bid process that I have ordered cannot yet take place because the parties have agreed to the appointment of a special referee to investigate the company's finances and neither party can be expected to determine a fair market price to offer until that process is complete. I therefore order that the sealed bids be submitted within 30 days after the results of the special referee's accounting are certified pursuant to Rule 18-1(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[34] In dealing with the accounting issues, the special referee will not be required to consider the value of the benefit received by Ms. Mostyn as a result of her residence in the penthouse, nor will it be necessary to consider the value of services provided by either party.

[35] Each party will bear their own costs of this application.

"N. Smith J."