IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Taheri v. Hosseini,*
2023 BCSC 801

Date: 20230511
Docket: S223980
Registry: Vancouver

Between:

Abo Taheri

Petitioner

And

Abbasali Shapour Hosseini and Seylynn (North Shore) MP Ltd.

Respondents

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Petitioner:	R. Robertson K. Wiebe T. Falcone, Articled Student
Counsel for the Respondent Abbasali Shapour Hosseini:	J. Dawson A. Rehlan
Place and Date of Hearing:	Vancouver, B.C. November 22–23, 2022 March 2–3, 2023 April 5, 2023
Place and Date of Judgment:	Vancouver, B.C. May 11, 2023

Table of Contents

I. INTRODUCTION

[1] The petitioner, Dr. Abo Taheri, seeks leave under s. 232 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*Act*], to commence a proceeding on behalf of Seylynn (North Shore) MP Ltd. ("Seylynn"). The claim is for management fees said to be owed or to become owing to Seylynn by the owner of the Seylynn Village property development, Seylynn (North Shore) Development Limited Partnership (the "Partnership").

[2] Dr. Taheri and the respondent, Dr. Abbasali Shapour Hosseini, are the two directors and, indirectly, the owners of Seylynn. Seylynn was the general partner of the Partnership until April 2021. Under the partnership agreement, Seylynn was to earn a management fee of eight percent of net income.

[3] Over the course of its time as general partner, Seylynn received monthly draws based on the development's estimated net profit. The management fees received by Seylynn were then dispersed to Dr. Taheri and Dr. Hosseini.

[4] In April 2021, when the development was nearing completion, the Partnership removed Seylynn as general partner, and a new general partner corporation was created. Seylynn has, as a result, ceased operating.

[5] Dr. Hosseini was appointed a director of the new general partner corporation. Dr. Taheri was not. As a result, since 2021, Dr. Hosseini has continued to act on behalf of the Partnership while remaining a director and 50 percent owner of the now-defunct Seylynn.

[6] Since Seylynn's removal as general partner, Dr. Taheri has attempted to take steps on behalf of the company to claim more than $4 million in outstanding management fees (although the precise amount will depend on actual net profits) that he says the Partnership owes to Seylynn for the breach of contract, a claim which he says can only be enforced by Seylynn itself pursuant to the arbitration clause in the partnership agreement between the parties.

[7] Dr. Taheri maintains it is in Seylynn's best interest to pursue the management fee claim and not in its interest to forgo or lose that management fee claim. Dr. Taheri further says that the failure to grant Dr. Taheri leave to pursue this action would mean the loss of Seylynn's claim due to the deadlock between himself and Dr. Hosseini.

[8] In February 2022, the petitioner, Dr. Taheri, began emailing Dr. Hosseini, asking him to allow the petitioner to prosecute Seylynn's claim for the outstanding management fees. In his capacity as Seylynn's co-director, Dr. Hosseini, however, has refused to allow this action against the Partnership (in which he has an interest) to move ahead. As a result, Dr. Taheri alleges that Seylynn is deadlocked.

[9] In April 2022, legal counsel for the Partnership then wrote to Seylynn maintaining that the Partnership did not owe Seylynn any further management fees, and, in fact, Seylynn had been overpaid and owed the Partnership over $800,000.

[10] This petition was subsequently filed on May 13, 2022.

II. ISSUE

[11] The issue to be decided in this case is whether the petitioner should be granted leave pursuant to s. 232 of the *Act* to prosecute the described legal proceeding set out above, in the name of and on behalf of Seylynn.

III. BACKGROUND

[12] On December 6, 2011, the Partnership was formed for the development of the Seylynn Village project through the signing of a partnership agreement. Under this agreement, Seylynn was incorporated to act as the general partner of the Partnership, a position it held until April 2021.

[13] As co-director of Seylynn, Dr. Taheri was involved in this project from the beginning, acting as the primary manager of the development's construction until April 2021. Despite being Seylynn's other co-director, Dr. Hosseini appears to have played a more secondary role in the company.

[14] With regards to Seylynn's ownership structure, Dr. Taheri and Dr. Hosseini each own 50 percent of the shares of 0926979 BC Ltd., which in turn owns all of Seylynn's shares.

[15] In addition, both Dr. Taheri and Dr. Hosseini indirectly hold an interest in limited partnership units giving them an equity stake in the Partnership. Each of Dr. Taheri and Dr. Hosseini has an interest in one of the four companies that own a share of the Partnership.

[16] Pursuant to article 3.6(b) of the partnership agreement, as general partner, Seylynn was entitled to a management fee equal to eight percent of the net income payable by monthly draws based on estimated net income:

> **3.6 Fees and Reimbursement of General Partner**
>
> The General Partner is entitled to:
>
> …
>
> (b) a fee in an amount equal to 8.0% of Net Income (calculated excluding such fee), payable by way of a monthly draw commencing retroactively as of October 1, 2011, based on the General Partner's estimate, made acting reasonably and adjusted from time to time, of Net Income.

[17] The petitioner notes that the partnership agreement does not specify how, when, or even if management fee draws paid to the general partner based on estimated net income are to be reconciled against actual net income. Furthermore, it does not set out a formula or manner for paying out the general partner a portion of the total management fee if the general partner leaves or is removed prior to the completion of the project pursuant to article 3.15, as happened here.

[18] The petitioner maintains that the representatives of the Partnership's limited partners and Seylynn's directors proceeded and conducted themselves on the basis that a final payout of the management fee would be made upon completion of the Seylynn Village project, less any draws

[19] The petitioner says a handwritten agreement signed by the parties on December 14, 2011, appears to codify this understanding. However, the respondent

Dr. Hosseini disputes that and objects to the admissibility of the affidavit to which the handwritten agreement is attached as an exhibit.

[20] The development was initially estimated to take ten years and include two residential high-rise towers along with a number of low-rise buildings. Subsequently, Dr. Taheri, on behalf of Seylynn and the Partnership, obtained the District of North Vancouver's approval to reconfigure Keith Road in exchange for approval to construct a third high-rise tower, maximizing profit for the Partnership.

[21] The rezoning was completed in 2013 and the first tower, called "Beacon", was completed in 2015. The second tower, called "Compass", along with an amenities building, called "Horizon", were completed in 2018.

[22] The final tower, called "Apex" consisting of 32 floors and 276 units, was said to comprise a major component of the project's profits.

[23] After the 2013 rezoning, Dr. Taheri, Dr. Hosseini, and the Partnership's CFO, Mr. Marzbani, frequently discussed how the sale of units in Apex would generate higher profits than either of the other high-rise towers. Dr. Taheri says that once it became clear that the Seylynn Village development would be quite profitable, it was also understood the final payout of Seylynn's management fee would be substantial. A December 2020 spreadsheet circulated by the Partnership's accountant showed an estimated profit of over $110 million.

[24] In 2019, construction of Apex began but was halted at grade level due to market conditions and, subsequently, the onset of the COVID-19 pandemic.

[25] Later in 2020, Seylynn started pre-sales of Apex and sold approximately 80 units in one month. However, in November 2020, a majority of the limited partners of the Partnership directed Seylynn to cease all pre-sales and cancel the contracts already signed. Dr. Taheri disagreed with this decision. From this point forward, the relationship between Dr. Taheri and certain limited partners in the Partnership deteriorated.

[26] In December 2020, the Partnership stopped issuing the management fee draw payments to Seylynn. Seylynn had received approximately $5.32 million in management fees to date.

[27] Ultimately, this deterioration resulted in a decision by the Partnership to remove Seylynn (and, by extension, Dr. Taheri) as general partner in April 2021.

[28] There is disagreement regarding the extent to which the general partner's duties were effectively complete at the time of Seylynn's removal. Dr. Taheri says Apex was fully completed in terms of all necessary permits, construction negotiation contracts, and marketing agreements. Market conditions were favourable, and Dr. Taheri alleges that all units would have been sold quickly by pre-sale had the Partnership's limited partners not intervened. Dr. Hosseini disagrees with this proposition.

[29] On April 13, 2021, counsel for the Partnership announced a new general partner, a company called Seylynn Village MP Ltd. (the "New G.P. Company"), whose co-directors were the respondents Dr. Hosseini and Rouzbeh Rabiei Ghahroud.

[30] The New G.P. Company waited until September 2021 to commence actively selling Apex units. Construction and pre-sales then proceeded as planned.

[31] Since December 2020, Dr. Taheri has sought to advance, on behalf of Seylynn, the company's claim for outstanding management fees, which he says it is entitled to because the work of the general partner was complete or substantially complete prior to Seylynn's ouster as general partner. Dr. Hosseini, on behalf of the Partnership, wrote to Dr. Taheri rejecting these requests.

[32] Dr. Taheri alleges that Dr. Hosseini has leveraged his position as a director of Seylynn to prevent the company from pursuing these claims through an arbitration proceeding. The petitioner maintains that as a director of both Seylynn and the New G.P. Company, Dr. Hosseini is in a conflict of interest. The petitioner submits that because of this conflict of interest and in accordance with relevant corporate

legislation, good governance practice, and the jurisprudence surrounding directors' conflicts, Dr. Hosseini should abstain from deciding whether Seylynn should pursue the proposed derivative proceeding.

[33] The respondents argue strongly against this Court granting leave for the derivative action and says two additional actions are relevant to its position. In the first action, filed on May 12, 2022 (the "Taheri Action"), the Partnership has filed a claim against Dr. Taheri, his wife and Mirage Trading Corporation (owned by the Taheri family), alleging that Dr. Taheri owes the Partnership $2.5 million plus damages for alleged misuse of the Partnership's funds.

[34] In the second action, Dr. Taheri has made a claim against Mahmoud Rabiee Ghahroud, a shareholder of MAJ Enterprises Inc. (the "Ghahroud Action"), seeking damages equal to the amount of management fees Dr. Taheri would have received had Seylynn remained the general partner. I will deal with the details of these claims as necessary within my analysis.

IV. ADMISSIBILITY OF THE PETITIONER'S AFFIDAVITS

[35] The respondents seek orders striking significant portions of the petitioner's first and second affidavits. In particular, they maintain that these affidavits are replete with unsourced hearsay, statements of opinion and/or argument (among which are references to the petitioner's subjective understanding of contractual terms), and settlement discussions—none of which should be accepted by the court as evidence in this proceeding.

[36] In addition, the respondents say that the petitioner's first affidavit copies verbatim portions of the petition. Thus, this purported evidence is simply a restatement of the pleadings and does not represent the petitioner's authentic voice. Accordingly, the respondents submit that those portions of the petitioner's first affidavit should also be disregarded by the court.

[37] The petitioner asserts that the affidavits are admissible, in line with the more lenient, liberal approach to admissibility in interlocutory matters adopted by the court

of Appeal in *Tietz v. Affinor Growers Inc*., 2022 BCCA 307. He also notes that the cases relied upon by Dr. Hosseini involve final orders rather than interlocutory matters, and thus are of limited assistance to the court.

A. Law

[38] Rule 22-2(13) of the *Supreme Court Civil Rules* states that hearsay evidence in an affidavit is allowed in an interlocutory application if the source of the information and belief of the person swearing the affidavit is given. Because an order granting leave to prosecute a derivative action is interlocutory, hearsay evidence is therefore admissible in the present petition: *Tietz* at para. 91, quoting *Jiang v. Piccolo*, 2020 BCSC 1584 at para. 44.

[39] Much of the jurisprudence setting out the rules for affidavits relied upon by Dr. Hosseini involve final orders and are therefore distinguishable: see e.g. *Empire Building Supplies Ltd. v. Green Canada Construction Ltd.*, 2022 BCSC 1903.

[40] As set out in *Tietz* at para. 78, and as concluded by this Court at the commencement of the hearing when these issues were raised, it is not appropriate to rule on objections to admissibility until all the evidence had been heard and its impact may be assessed:

> In many cases, on an application to exclude evidence, it is appropriate to not rule on objections to admissibility until all of the evidence has been heard and its impact may be assessed, as advocated by the petitioners and as demonstrated in *Achtymichuk v. Bayer Inc.*, 2020 BCSC 1601, leave to appeal granted, 2021 BCCA 147. It is frequently difficult to weigh evidence when assessing its admissibility as a preliminary question.

[41] For this reason, the admissibility issues raised by the respondents have been determined as part of the merits of the case.

[42] Furthermore, in addressing the relevance and admissibility of certain affidavits, it is important to note, as set out in *Tietz* at para. 106, that the task of the trial judge is:

> to determine whether there was a *reasonable possibility* that the action founded upon the secondary market claim would be resolved at trial in favour

> of the plaintiff. In support of an application for leave, the petitioner may adduce evidence in support of its claim—but it may also show that there is probative evidence that *it will be able to obtain*.
>
> [Emphasis in original.]

[43] As part of my analysis, I also note the helpful comments in *876502 Ontario Inc. v. I.F. Propco Holdings (Ontario) 10 Ltd.*, 37 O.R. (3d) 70 at 77, 1997 CanLII 12196 (Ct. J. (Gen. Div.)):

> Our system ordinarily reserves that function to the judicial officer hearing the merits of the matter. I view that as desirable, for two reasons. First, such rulings are better left to the person charged with acquiring a full understanding of the matter, who is then best positioned to balance the competing arguments and rule wisely. Second, encouraging interlocutory rulings and appeals on admissibility can only serve to fragment proceedings and encourage delay, as evidenced by this case, without appreciably assisting the ultimate decider of the matter in his or her task.

B. Analysis

1. Unsourced Hearsay

[44] The respondents identify what they say is double hearsay or unsourced hearsay in the affidavit material, evidence which is inadmissible in interlocutory proceedings.

[45] I note that Dr. Tehari provided a second affidavit to address some of the issues raised by Dr. Hosseini's affidavit, including addressing unsourced views by setting out the basis of his knowledge. This included reference to a copy of a handwritten note that he says Dr. Hosseini wrote in his presence in November 2019. He also included two further emails that he says confirm certain understandings between the parties with respect to the outstanding management fees.

[46] In sur-reply, the respondent focused on the unsourced aspect of the hearsay which it maintains its prohibited in any application, whether final or interlocutory.

2. Opinion, Argument and Subjective Understandings of Contractual Terms

[47] The respondents allege that Dr. Taheri's affidavits contain numerous statements of opinion, statements of argument and subjective understandings of contractual terms. With regards to the latter of these points (which they treat as a separate error from the alleged statements of opinion), they submit that the analysis of whether the partnership agreement legally entitled Seylynn to management fees from the Partnership after its removal as general partner must be informed by those facts known to the parties at the time of the agreement's formation. Because opinion or speculation does not assist the court in interpreting the partnership agreement, the respondents argue that the petitioner's subjective understanding of the agreement's terms is irrelevant and inadmissible.

[48] The petitioners disagree with the respondents' position, noting that Dr. Taheri is entitled to give opinions in his affidavit on lay matters and matters of which he has specific knowledge, as lay opinion evidence is admissible where "the evidence consists of inferences drawn from observed facts, and … the opinion is a compendious mode of speaking that allows the witness to sum up more accurately and adequately the facts he or she is testifying about": *American Creek Resources Ltd. v. Teuton Resources Corp.,* 2013 BCSC 1042 at para. 17; see also *Graat v. The Queen*, [1982] 2 S.C.R. 819 at 837, 840. Put another way, where a lay person's opinion would be of assistance to the court, they should be allowed to speak as they would normally speak. In addition, they note that the subject of these opinions is not something the court has to rule on in this interlocutory matter.

[49] I cannot accept the respondents' arguments on this point. Dr. Taheri's comments are not opinions or speculation, nor are they irrelevant and inadmissible at this early stage of the proceedings. While the respondents' arguments may ultimately be found to be valid when the issue is tried on its merits in the proposed derivative proceeding, it would be precipitous of the court to pre-emptively decline to consider one party's view of the agreement. While contractual cases are focused on the facts, evidence that reflects the subjective views of the participants can also be

relevant. In addition, the projections of estimated profits and or estimated management fees are not necessarily lay opinion, but simply estimates.

[50] For example, the respondents submit that Dr. Taheri's statement that the work on Apex was "fully completed in terms of all necessary permits, construction negotiations and contracts, and marketing agreements" is unreliable because he was no longer involved in the development after April 13, 2021. In contrast, Dr. Hosseini's evidence is that much more work remained for the general partner after this date is based on personal knowledge gained through his ongoing involvement in the development as part of the New G.P. Company. In my view, the impugned statement of Dr. Taheri is neither opinion nor speculation. Rather, it is probative evidence that the petitioner will be able to provide in the derivative action that conflicts with the evidence of Dr Hosseini.

[51] As another example, the respondents object to Dr. Taheri's opinion that Apex's units "would have been sold by way of pre-sale, very quickly". This, however, was an assessment that Dr. Taheri made as when he was in charge of selling units in Apex. Dr. Hosseini disagrees with Dr. Taheri's view on this and then provides his own view of the market for real estate at the time and his view that the Apex building still needed more work. It is unclear why Dr. Hosseini's opinion would be admissible evidence while Dr. Taheri's would not.

[52] Ultimately, however, the truth of these example statements—and many of the others objected to by the respondents—are not something this Court needs to determine as part of this application at this early stage of the proceedings. Rather, in granting leave for a derivative action under s. 232 of the *Act*, the court is looking at whether there is "an arguable case"—i.e. one that has a reasonable prospect of success and is not bound to fail—not whether the case will likely be successful: *550934 British Columbia Ltd. v. A.R. Thomson Group*, 2012 BCSC 1332 at para. 59 [*A.R. Thomson Group*], citing *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, 13 B.C.L.R. (3d) 300 at para. 34, 1995 CanLII 717 (S.C.), var'd 26

B.C.L.R. (3d) 357, 1996 CanLII 3240 (C.A.), leave to appeal to SCC ref'd, 25729 (24 April 1997).

3. Settlement Discussions

[53] The respondents object to the inclusion in Dr. Taheri's affidavits of certain settlement discussions, as they say the proposed notice to arbitrate is based upon statements that are subject to settlement privilege. In particular, the respondents rely on *Empire Building Supplies Ltd.* at paras. 36–37 and 40–43 to argue that it is unnecessary to apply to strike paragraphs referring to discussions held for the purpose of exploring settlement, as they should not have been placed in the record in the first place.

[54] The respondents also rely on the recent case of *Lu v. Li*, 2023 BCSC 271 at para. 132, quoting *Ross v. Bragg*, 2020 BCSC 337 at paras. 11–12, for its summary of the governing principles on settlement privilege to argue strongly that these discussions, which are covered by privilege, are being used as the basis for this action. The respondents allege that the petitioner is effectively attempting to use the settlement discussions to bootstrap its arguments regarding the outstanding management fees, which should not be allowed.

[55] Notably, in all of the cases relied upon by the respondents, an action had been commenced. It cannot be that all discussions seeking to resolve something prior to an action are subject to settlement privilege. I am not persuaded by this argument, as such a sweeping proposition has the potential to preclude evidence relevant to the question of whether reasonable efforts were made to progress this matter under the s. 233 test.

[56] With regards to *Lu*, the principles laid out in that case make clear that for litigation privilege to apply, a litigious dispute must be in existence or within contemplation, and the communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed: *Lu* at para. 132, quoting *Ross* at para. 12. Accordingly, the respondents need

specific evidence on these points to be successful in this position and such is not present in this case.

[57] Furthermore, as noted by the petitioner, no party is specifically claiming privilege over these discussions. The petitioner says the discussions were not privileged in nature as they predated the litigation by a significant time period. The petitioner has raised discussions that occurred prior to April 13, 2021, after which time they acknowledge there was a marked change in tone.

[58] Ultimately, however, I agree that this issue would be a matter for the proposed derivative proceeding. Further, the claim of privilege could only properly be made by the Partnership.

4. Copying of Pleadings

[59] The respondents additionally allege that much of the petitioner's first affidavit is reproduced verbatim from the petition. The respondents rely in particular on the case of *Zheng v. Anderson Square Holdings Ltd.,* 2022 BCSC 801 at paras. 20–25, to argue that little or no weight should be placed upon this evidence as the verbatim reproduction of language from pleadings in an affidavit suggests these passages are not representative of the affiant's authentic voice.

[60] I do not find these objections persuasive in this case. As pointed out by the petitioner, the affidavit in question was filed before the petition, such that the pleadings were in fact borrowing language from Dr. Taheri's first affidavit, rather than the other way around. The fact that a petition follows the facts and statements made in a supporting affidavit is not objectionable on its face. Rather, it is the contents of the affidavit that must be examined.

[61] More importantly, the practices that caused *Zheng* court to conclude that the affidavit in that case "[did] not represent [the affiant]'s authentic voice, but rather [was] evidence prepared by his lawyer to which he ha[d] simply attached his signature" (para. 20) are not evident in this case: Dr. Taheri's affidavit material is not replete with legalese (see *Zheng* at para. 21) and, while some sentences and

paragraphs have been reproduced verbatim, there is far less repetition of language from pleading than was the case in *Zheng*, where large sections of text comprising of multiple paragraphs from the pleadings were reproduced in the impugned affidavit (see *Zheng* at para. 22). Further, unlike the affiant in *Zheng*, Dr. Taheri has provided a description of his personal involvement in relevant events or decision-making and attached several corroborating exhibits: see *Zheng* at para. 23.

[62] Ultimately, as set out in *Yan v. 0797861 B.C. Ltd*., 2015 BCSC 1001 at para. 6, the proper place for resolution of disputed facts is not in the application for leave to proceed but rather in the hearing of the derivative action itself. As noted in *Safarik v. Hall*, 2006 BCSC 283:

> [20] It is not unusual for there to be a conflict in the affidavit material and it is common for a petitioner, who is usually a minority shareholder or director, to seek leave to have conduct of an action by a company. Invariably, prospective defendants will deny the allegations or seek to explain them and a chambers judge will not be in a position to resolve the disputed facts based on the conflicting affidavits. Accordingly, a conflict in the affidavits is not sufficient reason to refuse the petition and a resolution of the disputed facts should be for the trial judge hearing the derivative action.

[63] Having made these general determinations with regards to the admissibility of the petitioner's affidavit evidence, I will deal with other objections and particulars as part of the analysis below. I now turn to the disputed requirements under s. 233 of the *Act* for leave to prosecute a legal proceeding on behalf of a company.

V. GRANTING LEAVE FOR THE DERIVATIVE ACTION

A. Law

[64] Section 232(2) of the *Act* permits a complaining director or shareholder to prosecute derivative legal proceedings in the name of and on behalf of a company with leave of the court:

> (2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company
>
> (a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or
>
> (b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

[65] Section 233 of the *Act* outlines the conditions that must be met before the court may grant leave on terms it considers appropriate for a derivative action pursuant to s. 232:

> (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.

[66] While the notice of the application for leave required under s. 233(b) is not contested, the other three conditions are in dispute.

[67] The petitioner submits that the jurisprudence establishes that the test under s. 233 is not onerous. While the court is obligated

> to deny the application if it appears that the intended action is frivolous or vexatious or is bound to be unsuccessful[, w]here the applicant is acting in good faith and otherwise has the status to commence the action, and where the intended action does not appear frivolous or vexatious and could reasonably succeed; and where such action is in the interest of the shareholders, then leave to bring the action should be given.

See *Holdyk v. Adolph*, 2010 BCSC 1411 at para. 15, rev'd on other grounds 2012 BCCA 37, citing *Re Marc-Jay Investments Inc. and Levy et al.*, 50 D.L.R. (3d) 45 at 47, 1974 CanLII 786 (Ont. H.C.). See also *Saadatmandi v. 1136242 B.C. Ltd.* (21 January 2022), Vancouver S214509 (B.C.S.C.) at para. 11.

B. Analysis

1. Reasonable Efforts

[68] The first question is whether Dr. Taheri made reasonable efforts to cause Dr. Hosseini to agree to prosecute Seylynn's claim for the outstanding management fees.

[69] Dr. Hosseini submits that Dr. Taheri has failed to satisfy the reasonable efforts requirement because Dr. Hosseini never unequivocally said "no" to begin a

proceeding. In addition, the respondents say that Dr. Taheri notified Dr. Hosseini of the proposed claim only in a general way and was not responsive to an April 14, 2022, letter from Dr. Hosseini's counsel. Instead, they say Dr. Taheri only indicated that he did not need to respond to all the points raised in the letter

[70] The affidavit evidence however, confirms that Dr. Taheri has consistently requested permission to move forward with the claim, having made a number of requests to Dr. Hosseini between February and April 2022. Instead, I find that Dr. Hosseini has through his non-responsiveness sought to delay this matter.

[71] Initially, Dr. Hosseini did not take issue with the fact that Seylynn would obtain a management fee based on the reconciliation of final net profits. In a later email, however, he disputed this. Ultimately, in his petition response, Dr. Hosseini said this arrangement was not feasible.

[72] In the meantime, however, as Dr. Taheri sought to move the claim along without success, he then emailed Dr. Hosseini and Mr. Rabiei of the Partnership on March 31, 2022, seeking the Partnership's position on the management fee claim. In response, on April 14, 2022, counsel for the Partnership issued a letter to Seylynn indicating that not only was there no term in the partnership agreement requiring a reconciliation or final payment of management fees, but Seylynn owed money to the Partnership due to overpayment of these fees through the monthly draws.

[73] In view of this reply, in May 2022, Dr. Taheri sought Dr. Hosseini's agreement to allow Seylynn to advance the management fee dispute, attaching a draft directors' resolution for signature. Dr. Hosseini refused, however, to sign the resolution, saying they should obtain a legal opinion. As per the response to petition, Dr. Hosseini now appears to assert that the derivative claim is based on a legal fiction and is bound to fail.

[74] With respect to allegations that Dr. Hosseini is in a conflict of interest, the respondents point out that perceived conflicts of interest do not vitiate the petitioner's obligation to make reasonable efforts to cause the company to bring the proposed

claim. The respondents also say Dr. Taheri took an adversarial approach and made unwarranted allegations of misconduct to Dr. Hosseini when, in an April 27, 2022, email, he alleged that Dr. Hosseini was acting in a conflict of interest and threatened to "put that on the public record before the court and have this lawsuit approved by judicial order".

[75] On this point, the respondents note that Dr. Hosseini has played no role in instructing counsel with respect to the Tehari Action or the petitioner's demands for management fees. Dr. Hosseini wishes to avoid the legal fracas that the proposed derivative proceeding will engender. Dr. Hosseini does not want to be sued on account of the overpayments and has done his utmost to forestall such a claim.

[76] At the outset, I note that Dr. Hosseini is a director of the new general partner company. He therefore has fiduciary duties to both the new company and the Partnership. Mr. Hosseini therefore has a *prima facie* conflict of interest between his duties to Seylynn with regard to any decision to commence a proceeding against the Partnership. As per s. 149(2) of the *Act*, directors with an interest in a contract or transaction are not entitled to vote on its approval. This sets the stage from which the actions of Dr. Hosseini can be viewed.

[77] The petitioner says that whether Dr. Hosseini believes the management fee is payable or whether the claim is bound to fail, Dr. Taheri has made the required reasonable efforts to cause his fellow directors to prosecute the management fee proceeding. I agree.

[78] In my view, based on the petitioner's actions as set out above, Dr Taheri has demonstrated that he made reasonable efforts to secure Dr. Hosseini's consent to prosecute the claim for management fees in this matter.

2. Good Faith

[79] As set out in *A.R. Thomson Group* at para. 48, the test for good faith is

> whether the action has been brought primarily for the purpose of pursuing a claim on the company's behalf. The court considers the applicant's belief in the merits of the proposed claims, as well as existing disputes between the

> parties and alleged ulterior motives. Good faith is ultimately a question of fact to be determined on all the evidence and the particular circumstances of the case …

[80] The petitioner's belief in the merits of the proposed litigation is, if accepted by the court, a *prima facie* indication of good faith: *Jordan Enterprises Ltd. v. Barker,* 2015 BCSC 559 at para. 29, citing *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 50 B.C.L.R. (3d) 195 (C.A.) at para. 5.

[81] The petitioner maintains he is acting in good faith and simply wants Seylynn to collect the management fees it is owed. The receipt of those fees is no doubt in the best interests of Seylynn. The petitioner believes in the merits of the proposed derivative claim and Dr. Taheri's affidavit explains in detail his involvement in the project from its inception in 2011.

[82] The petitioner has been clear that he wants Seylynn to commence arbitration against the Partnership for the outstanding management fees. He admits that he does this for personal financial gain, but, as a shareholder of Seylynn, his personal interests coincide with those of the company. He believes in Seylynn's prospects of success in the arbitration and is willing to shoulder the legal fees and indemnify Seylynn for any award made against it if it loses.

[83] In contrast, Dr. Hosseini initially refused to decide one way or another on the arbitration, claiming he needed more information because he did not understand the claim. He then asked for a formal directors meeting to discuss the merits of the claim (which was not necessary) and suggested they seek a legal opinion (which he could have sought himself).

[84] On balance, Dr. Taheri has a better claim to the moral high ground of good faith in this proceeding than does Dr. Hosseini. Every position Dr. Hosseini takes must be viewed through the lens of his aforementioned conflict of interest. Given that the Partnership has significant assets and operations—and Seylynn has no assets or operations—Dr. Hosseini's retention of his directorship in Seylynn would appear to serve one purpose: to prevent the company from pursuing arbitration.

[85] Furthermore, Dr. Hosseini will benefit from the dismissal of this petition. He owns 20 percent of the Partnership's units. If the Partnership does not have to pay the management fee claim, he stands to gain personally 20 percent of whatever they save. Saving the Partnership from paying the over $4 million in management fees said to be outstanding would net Dr. Hosseini at least $800,000.

[86] In contrast, Dr. Taheri must sue through the corporate entity to claim the management fees and as a shareholder of the Partnership his interests coincide with the Partnership.

[87] The petitioner points out the Ghahroud Action is not inconsistent with this petition. It is contingent upon the outcome of Seylynn's arbitration and seeks to compensate Dr. Taheri for the full amount of management fees he would have earned if Seylynn had never been removed as general partner in April 2021. Any amounts Seylynn obtains in arbitration would have to be deducted.

[88] Dr. Hosseini also says the petitioner is using this petition to support his claims in the Taheri Action and essentially make it an adjunct to that action. In my view, while the two actions both relate to the same overall real estate development, they do not deal with the same issues at all. Furthermore, the proposed derivative action is not an adjunct but rather as described by the petitioner, the "main event" between the parties.

[89] Dr. Taheri explained the circumstances regarding his removal from the project, noting that he had a genuine belief—grounded in part in various discussions he had with Dr. Hosseini and others in the Partnership—that Seylynn would be entitled to receive the management fees. This is supported by certain statements and exhibits attached to his affidavit evidence, including:

a) those statements identifying Dr. Taheri's discussions with Dr. Hosseini on this topic;

b) the handwritten note of Dr. Hosseini dated November 4, 2019, showing Dr. Hosseini's estimate of the current value of the management fees;

c) the discussions and emails between Dr. Taheri and Dr. Hosseini and the Partnership's CFO, Mr. Marzbani, on January 10 and 13, 2021, suggesting arbitration over management fees based on the value of each project and showing an assessment of the total management fees earned to date; and

d) the contract for the $2.5 million advance payable from "backend management fees, signed on June 7, 2018, by Dr. Hosseini, Dr. Taheri, and Mr. Marzbani.

[90] The petitioner points out that Dr. Hosseini was involved in all of the above documents and conversations contemplating Seylynn's obtaining significant management fees. Again, Dr. Hosseini's sudden failure to understand the management fee claim must be viewed through the lens of his conflict of interest in this case.

[91] Essentially, Dr. Taheri believes in Seylynn's claim and has the wherewithal and resources to pursue it properly. There is very little reason not to pursue the claim and, as I will explain in greater detail, it is in the company's best interest.

[92] The respondents, however, also point out that the petitioner seeks leave to commence a derivative proceeding so that he may recover what he candidly admits is for his personal benefit. This personal benefit consists of his share of management fees.

[93] While the petitioner argues that the company is entitled to be paid eight percent of the Partnership's net profits months if not years after its removal as general partner for services it has not provided, the respondents say this interpretation is at odds with the partnership agreement's terms. The respondent says the petitioner realizes this and, for this reason, has brought the Ghahroud Action, in which he seeks damages personally from Mr. Ghahroud for the loss of the management fees that the company received from the Partnership. The Ghahroud Action is based upon the company not having a right to management fees after it was removed as the general partner.

[94] Furthermore, the respondents say the proposed derivative claim is based on the parties' alleged subjective understandings of the partnership agreement. Such evidence is inadmissible, and the cases on contractual interpretation cited by the petitioner predate *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57, where the Supreme Court of Canada warned that "[w]hile the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [because] the goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract."

[95] The respondents say that while the petitioner sees a benefit to bringing claims having no merit, as demonstrated by the fact he is a party to at least two legal suits, it appears this may benefit him in terms of leverage to obtain leave to sue those who are suing him. His interests are not "coincident" with the company—rather, they take precedence—and in seeking leave, the petitioner does not satisfy the statutory test requiring good faith.

[96] I must now consider whether the good-faith requirement under s. 233 of the *Act* has been fulfilled.

[97] When considering this matter, I accept Dr. Taheri's claim of good faith in pursuing this proceeding. While no doubt Dr. Taheri will obtain some benefit from this proceeding, as noted previously, Dr. Hosseini will financially benefit from the dismissal of this petition and the general inability of Seylynn to pursue the management fee claim because of his 20% interest in the Partnership.

[98] It is also relevant that Dr. Taheri is willing to shoulder the legal fees and indemnify Seylynn for any costs ordered against it if Seylynn loses the derivative action.

[99] The respondents point out, however, that if the derivative action were to proceed, the company would also be subjected to a counterclaim for an

overpayment of the amount sought. The Partnership will respond by bringing a counterclaim against Seylynn. Accordingly, the proposed derivative action poses significant legal risks to the directors, including Dr. Hosseini. While this may be of little concern to Dr. Taheri because the Partnership has already brought a significant claim for damages against him and his company, Mirage Trading Corporation in the Taheri Action, Dr. Hosseini has sought to stay out of this legal fracas. He does not wish to be sued by the Partnership on account of alleged overpayments.

[100] While Dr. Hosseini has consistently raised the spectre of a counterclaim, I conclude this argument rings hollow. Dr. Hosseini is a director of the Partnership and as a director would have a role in deciding whether the Partnership would pursue that counterclaim. Indeed, Dr. Hosseini recognized this and, in his material, pointed out that he is consequently staying out of the affairs of the Partnership. This decision, however, stands in stark contrast to his position regarding Seylynn, as has been clearly articulated in his response to this petition.

[101] Furthermore, the letter from the Partnership indicating that Seylynn owes the Partnership money due to the overpayment of management fees supports the view that there is a live dispute over the allegation of outstanding management fees.

[102] I am also not convinced that the existence of either the Ghahroud Action or the Taheri Action indicate any bad faith on account of Dr. Taheri.

[103] With regards to the Ghahroud Action, it involves oral agreements between Dr. Taheri and Mr. Ghahroud. It does not resolve the amount of management fees owing between the parties. Rather, as the petitioner says, it seeks to compensate Dr. Taheri for the full amount of the management fees if Seylynn had not been removed as the general partner in April 2021. Any amounts recouped at the arbitration by Seylynn would accordingly be deducted from those sought in the Ghahroud Action. In other words, the details of that matter are embedded in the arbitration that Seylynn seeks to pursue.

[104] The only relevance of the Ghahroud Action to the proposed derivative action is that if Seylynn was successful in its arbitration claim, the Ghahroud Action would become moot. If Seylynn is not successful, Dr. Taheri could pursue the Ghahroud Action to seek compensation for lost management fees to which he would otherwise have been entitled had Seylynn remained a general partner after April 2021. In other words, the only relevance would be with respect to remedy.

[105] With regards to the Taheri Action, in it, the Partnership is claiming a $2.5 million advance it expects to be repaid from the money that Dr. Taheri expects to receive from the management fee claim. Thus, the two actions do not deal with the same issues, and accordingly, it does not appear the proposed derivative action is an adjunct to the Tehari Action, as suggested by the respondent.

[106] It is therefore difficult to see how either of these demonstrates duplicity or bad faith on the part of Dr. Taheri.

[107] As the petitioner points out, to be cited as an indicator of bad faith, the motive of personal gain unrelated to the interests of the company must be the primary reason for seeking the derivative action: see *Bennett v. Rudek****,*** 2008 BCSC 1278 at paras. 56, 63. In this case, the petitioner's self-interest coincides with the interests of Seylynn to enforce and collect its full claim to management fees. In addition, Dr. Hosseini also stands to gain if the derivative action succeeds by way of his indirect shareholding in Seylynn.

[108] In view of all the above, the petitioner Dr. Taheri has fulfilled the requirement of good faith as set out under s. 233 of the *Act*.

3. Best Interests of the Company

[109] To determine whether the derivative action is in the best interests of the company, the court must determine "whether the action 'appears to be' in the company's best interests; it does not require that the court be satisfied that the action is in fact so": *A.R. Thomson Group* at para. 58, citing *Re Bellman et al. and Western Approaches Ltd.*,130 D.L.R. (3d) 193 at 201, 1981 CanLII 490 (B.C.C.A.).

Accordingly, it is sufficient for the petitioner to demonstrate an arguable case: *A.R. Thomson Group* at para. 59.

[110] The respondents argue that the proposed derivative proceeding is bound to fail and that its costs far outweigh any benefit that could be obtained. The respondents say, the petitioner asks the court to refer to the post-contractual conduct to inform the interpretation of the partnership agreement. However, evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous: *Wade v. Duck,* 2018 BCCA 176 at para. 28, citing *Re Canadian National Railways and Canadian Pacific Ltd.*, 95 D.L.R. (3d) 242 at 262, 1978 CanLII 1975 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668, 1979 CanLII 229. The respondents maintain no ambiguity arises in the partnership agreement therefore this evidence cannot be considered.

[111] The respondents argue strongly that no evidence other than that at the time of the contract should be considered in this matter. Evidence of subsequent conduct may only be used by the court to determine the intentions of the parties at the time they contracted: see *Brar v. Pannu,* 2011 BCSC 1620 at para. 55. In terms of assessing the parties' interpretation at the time of the contract, the evidence is that Seylynn began receiving draws immediately in 2011 even though it would have been well known that there would not be any profit for several years. Indeed, the financial statements set out in Dr. Hosseini's affidavit evidence confirm that the development generated no revenue until 2015. This supports the suggestion that the parties never intended article 3.6. to be based on the estimate of the current year's net profit.

[112] The respondents also argue the petitioner is simply wrong when he says the partnership agreement does not entitle an outgoing general partner from receiving a management fee from the Partnership. The respondents refer to articles 3.15 and 3.17, which deal with the removal of a general partner and its replacement. In particular, article 3.17 specifically requires an outgoing general partner to transfer its interest in the Partnership to the new general partner. Accordingly, once this is done,

the old general partner has no further interest or claim to management fees after its removal.

[113] In addition, while the petitioner points out that article 3.6 entitles the general partner to a fee in the amount of eight percent of net income, the respondents note that net income is a defined term under the partnership agreement and is limited temporally. They say that the petitioner conflates “net profit” with “net income”.

[114] Giving the words their ordinary meaning, the respondents argue that Seylynn was entitled to eight percent of the net income in fiscal periods in which it was the general partner. The company was to be paid this management fee during each fiscal period by means of a monthly draw. Although required when reasonable, the respondents say Seylynn failed to adjust its draw, with the evidence demonstrating this led to an overpayment of $808,723.00. Further, article 3.6(b), upon which the proposed derivative proceeding is said to be based, does not refer to net profit. According to the respondents, Seylynn does have a contractual entitlement to eight percent of the Partnership’s actual profit after working expenses for the development.

[115] Furthermore, while the petitioner argues Seylynn is entitled to the full management fee because the project was substantially complete on April 13, 2021, the respondents contest this, noting that other than building two floors of the Apex’s parking garage, it was not involved in the building’s construction or subsequent pre-sale marketing campaign.

[116] The respondent says that should the petitioner be granted leave to commence a proceeding against the Partnership, the Partnership will likely respond with the counterclaim. This counterclaim will likely involve Seylynn’s directors, who will likely be alleged to have received an overpayment of the management fee. The respondents say Dr. Hosseini has done his utmost to be conciliatory and is hopeful that a claim shall not be brought against Seylynn and its directors on account of the overpayments.

[117] In considering these points, I am cognizant of the direction in the leading case of *Primex Investments Ltd.* at para. 41 noted:

> The authorities are clear that the Court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) has been satisfied. The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not.

[118] The court must therefore assess whether there is an arguable claim as asserted by the petitioner. It is not required to determine the ultimate merits of the case.

[119] In this case, the claim for management fees is made pursuant to article 3.6(b) of the agreement, under which the general partner is said to be entitled to a fee equal to eight percent of the net income of the project.

[120] The petitioner submits that the partnership agreement lacks any provisions governing the division of management fees between an incoming and outgoing general partner, nor does it contain a provision that prevents an outgoing general partner from receiving the full eight percent management fee. The petitioner says, as discussed throughout the project, Seylynn expected its full management fee, particularly once the general partner's work on the project was substantially complete or mostly complete at the time of its removal as general partner. Alternatively, Seylynn makes a claim for the percentage of the full management fee based on the percentage of the general partner's work completed before its removal.

[121] The petitioner says the agreement does not provide for anything less than eight percent to be given to the general partner if it is removed. While the respondent argues this cannot be the case and it would not make commercial sense to do so, the partnership agreement on its face appears to promise Seylynn eight percent of the development's profits. At arbitration, Seylynn will be able to rely on cases like *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.,* 17 C.L.R.

(2d) 40, 1994 CanLII 448 (B.C.S.C.), where the plaintiff general contractor, who was to be paid five percent of the cost of the work, was dismissed six weeks into the job. Despite this, the plaintiff was found to be entitled to five percent of the cost of the work, including the unperformed portion. In any event, Seylynn will be able to argue that it completed all or substantially all of the duties and tasks required to complete the development.

[122] Furthermore, the petitioner points to specific evidence that all the parties involved expected this payment to be made to Seylynn. Once again, this is evidence that the respondent seeks to have struck for the reasons dealt with earlier.

[123] The petitioner maintains that based on the estimate of profit it has obtained, total profits on the project were expected to be over $110 million and therefore total management fees would be over $8.5 million. Seylynn has received only $5.32 million in management fees to date, meaning it would stand to lose at least $3.5 million if it fails to pursue its claims. The petitioner points out these numbers are based on estimates from January 2021, and any increases in market value or selling prices on the “Apex” tower’s units will result in even higher projected projects along with a higher management fee.

[124] The petitioner submits that the court has discretion to interpret a contractual clause in a way to achieve a fair outcome through principles of contract interpretation, implication of terms, rectification or amendment by conduct: see e.g. *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* [1993] 1 S.C.R. 12, 1993 CanLII 145 (implied term found by the conduct of the parties); *Canadian Premier Life Insurance Company v. Sears Canada Inc*., 2010 ONSC 3834 (contract amended by conduct).

[125] In *Canadian Resort Development Corporation v. Swaneset Bay Resort Ltd.*, 2000 BCCA 436 [*Swaneset Bay Resort*]*,* the court upheld a trial judge’s finding that an unsigned written agreement was binding. Similar to this case, there was no clause articulating rules or formulae for determining the management fee payable if the company was terminated before the end of the project. Accordingly, the trial

judge ruled that the plaintiff was entitled to a five percent fee in accordance with the work it had performed: *Swaneset Bay Resort* at para. 33.

[126] In addition, the petitioner maintains Seylynn will make an alternative claim that a term should be implied into the agreement to properly reconcile the management fee by fairly assessing how much the efforts have increased the development's value. Rectification will also be argued on the basis that the parties share a common continuing intention that the provisions in question stand as agreed rather than as reflected in the instrument. Rectification can be awarded where by mistake a legal instrument does not accord with the true agreement it was intended to record because the term has been admitted, an unwanted term included or a term incorrectly expressed in the parties' agreement.

[127] In this case, Seylynn will argue that the doctrine of rectification ought to apply to correct the management fee term in the agreement to reflect what the parties had always agreed upon and followed. There is considerable evidence on this and additional documents that would support this.

[128] Finally, as argued by the petitioner, this action is clearly in the best interests of the company: Seylynn stands to receive compensation for the significant outstanding management fees; Dr. Taheri will pursue the claim using his own resources for legal fees while offering to indemnify Seylynn for any costs award against it if he loses; Seylynn has no business operations, so the proceeding will have no negative effect on its operations; and, Seylynn has no cash or assets, so therefore has very little to lose in terms of any claim being made against it.

[129] From the above, I agree with the submissions of Seylynn and conclude that there is a serious issue to be tried between the parties in this matter. Essentially, the respondents are asking this court to make a definitive determination on a number of issues and reach the conclusion that the plain language of the agreement between the parties precludes the claim of Seylynn, which appears to be based on collateral documents such as a handwritten signed document, the conduct of the parties over the years and discussions by the parties prior to filing this action.

[130] Each of these issues, however, is not something that must be determined as part of the application before me. To do so would be to run afoul of the principle set out earlier that the court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) has been satisfied. At the most, I must determine whether the action has a reasonable prospect of success or is bound to fail.

[131] I cannot conclude that this action is bound to fail. I conclude it has a reasonable chance of success, albeit with the challenges that may come about if the petitioner is unsuccessful on a number of jurisprudential points, including whether a mistake can be found or rectification ordered. It is, however, not for me to definitively determine the answer to those questions in this interlocutory application. While the respondent relies upon the “clear” language of the agreement, the petitioner has made a number of arguments based on the conduct and practise of the parties, along with referencing a specific understanding set out in a signed written document in support of its position.

[132] The respondent essentially seeks this court’s determination that these arguments will fail. I cannot determine that will be the case and accordingly conclude, as there is jurisprudence in support of the petitioner’s argument, it is in Seylynn’s best interest to have this claim proceed.

VI. SUMMARY

[133] In view of all the above, I conclude the test under s. 233 of the *Act* has been satisfied and I grant the petitioner leave to commence a derivative proceeding on behalf of Seylynn to assert its claim for management fees.

[134] Seylynn is in a deadlock position, and Dr. Taheri has made reasonable efforts to have Dr. Hosseini consent to letting this claim proceed. Dr. Hosseini resists and is in a clear conflict of interest between his duties to Seylynn and the Partnership. I have concluded that Dr. Taheri brings this application in good faith and the proposed claim appears to be in the best interests of Seylynn.

[135] The application is therefore granted.

[136] In the normal course, costs are awarded to the successful party. If there are matters with respect to costs that should be brought to the court's attention, the parties are at liberty to file such an application, provided it is done within 30 days of the judgment.

"Burke J."