CITATION: Srivastava v. DLT Global Inc., 2023 ONSC 7103
COURT FILE NO.: CV-23-00698870-00CL
DATE: 20231221

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: NEERAJ SRIVASTAVA, Applicant

AND:

DLT GLOBAL INC., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Jessica A. Zagar and Kiyan Jamal* for the Applicant

Andrew McCoomb & Devan Tamura, for the Respondent

HEARD: December 13, 2023

ENDORSEMENT

Introduction

[1] The Applicant, Neeraj Srivastava, brings this application against DLT Global Inc. ("DLT Global") as Respondent.

[2] Mr. Srivastava seeks an order winding up DLT Global pursuant to section 207(b) or, alternatively, section 207(a), of the *Business Corporations Act*, R.S.O. 1990, c. B 16 (the "*OBCA*").

[3] For the following reasons, this application is dismissed.

Background Facts

[4] Mr. Srivastava is a shareholder, co-founder, former director, and former Chief Technology Officer of DLT Global.

[5] In January 2015, Mr. Srivastava incorporated an Ontario business called Conatus Solutions Inc. ("Conatus") to carry on blockchain service activities in Canada. Mr. Srivastava is the sole director and shareholder of Conatus.

[6] From 2015-2017, Conatus primarily operated as a software research and development firm, supporting and servicing clients' requirements through software solutions and consulting, including blockchain and distributed ledger technology. Mr. Srivastava operated Conatus under the business name "DLT Labs".

[7] Conatus outsourced to India the labour to generate the code for Conatus. Mr. Srivastava enlisted his network of professional associates and family in India to start the business and handle the day-to-day operations. On February 1, 2017, DLT Labs Technologies Private Limited ("DLT India") was incorporated pursuant to the laws of India to carry on this business.

[8] In the summer of 2017, Mr. Srivastava was introduced to a businessman and investor, Loudon Owen. Mr. Srivastava's evidence is that he realized that in order to grow Conatus to its full potential and generate more revenue, he needed to engage someone experienced in venture businesses and growing small companies, especially in technology. Mr. Owen had that experience and wanted to enter the blockchain industry. During initial funding discussions, he informed Mr. Srivastava that he had access to approximately $25 million CAD from investors that would be used to grow the business.

[9] Mr. Srivastava and Mr. Owen decided to enter into business together.

[10] Conatus (using the name DLT Labs Inc.) and Mr. Owen's personal business corporation, the Owen Corporation, entered into an agreement on July 10, 2017. Pursuant to this agreement, Mr. Srivastava was to be granted 50% of four million common shares to be issued in either "DLT Labs Inc." or a new company to be incorporated. Mr. Owen was to be granted the remaining 50% of the common shares. There were other terms and conditions including that Mr. Srivastava "shall be entitled to consideration of a total of $750,000 in value reflective of the current value of the Company [DLT Labs Inc.]".

[11] After entering into this agreement, Mr. Srivastava and Mr. Owen incorporated DLT Global to take part in the distributed ledger technology industry. DLT Global began to use the name "DLT Labs" with Conatus' permission. Mr. Srivastava ceased operations in Conatus and moved clients and the DLT India operations and development team from Conatus to DLT Global. He also transferred $108,280 CAD from Conatus to DLT Global.

[12] On November 7, 2018, DLT India and DLT Global entered into a Development Services Agreement pursuant to which DLT India would provide labour to generate product for DLT Global. DLT India does not provide services to anyone except DLT Global. DLT India does not generate income on its own, but provides services to DLT Global. DLT Global provides capital to DLT India for its operation and pays the salaries of DLT India employees and its operating expenses.

[13] The original board of directors of DOT Global was comprised of Mr. Owen, Mr. Srivastava, and David Freeman who assumed the titles of Chief Executive Officer, Chief Technology Officer, and Chief Financial Officer, respectively.

[14] On August 16, 2021, Mr. Srivastava and Mr. Owen signed a memorandum of understanding ("MOU"). The MOU outlined four intended transactions which were

envisioned to close on August 31, 2021. The four transactions were (1) cash disbursements to be made on closing, (2) the share purchase of DLT India by DLT Global, (3) equity allocations for DLT Global shareholders, and (4) the share purchase of Conatus by DLT Global for $850,000. Mr. Owen's evidence is that the MOU did not become effective since it was required to be approved by the Board of Directors of DLT Global and this was not done.

[15] The DOT India share purchase transaction was completed on or about December 29, 2022. DLT Global employs approximately 35 employees in Canada and, through DLT India, 170 in India. Conatus is still owned by Mr. Srivastava.

[16] During the timeframe of 2018 to 2021, Mr. Srivastava assigned certain patent applications to DLT Global and a related company. Mr. Srivastava's evidence is that it was agreed with Mr. Owen that he would receive payments for these patents, which have not been made. Mr. Owen denies that such an agreement was made and deposes that, as an employee and fiduciary and of DLT Global and its subsidiaries, Mr. Srivastava was required to assign his rights in these patents to DLT Global in the ordinary course, and did so.

[17] By the end of 2018, DLT Global entered into a business relationship with a now core client, Walmart Canada Ltd., to service their supply chain infrastructure through blockchain products. Walmart is an anchor client for DLT Global. It produces revenue of approximately $90,000-$100,000 per month.

[18] The evidence on this application shows that that DLT Global had substantial gross and net monthly cash expenses that significantly exceeded its revenue. This is not in dispute. The "burn rate" (as told to prospective investors) was $1.8 million per month that was projected to reduce to a target of $1.4 million by the end of Q2 of 2023. Mr. Owen's evidence is that the shortfall was being funded by investors and family offices. His evidence is that, in all, approximately $68 million has been invested into DLT Global by outside investors and, in addition, each member of the Board has funded DLT Global, with the exception of Mr. Srivastava.

[19] In March 2023, Mr. Srivastava raised his concerns with Mr. Owen and DLT Global's Board of Directors about DLT Global's liquidity issues and its inability to meet ongoing financial obligations.

[20] On March 8, 2023, DLT Global brought a motion, without notice, in the Ontario Superior Court of Justice seeking to restrain Mr. Srivastava from communicating with customers of DLT Global and from taking steps to restrict access to DLT Global or destroy its records. The Court granted relief on March 10, 2023 on condition that DLT Global commence its proceeding by March 13, 2023. DLT Global issued a statement of claim and the order was extended by a subsequent order dated March 15, 2023. The extended order expired on March 20, 2023 and was not renewed. The statement of claim has not been served and the time to do so has expired.

[21] On March 14, 2023, Mr. Srivastava received notice from DLT Global that his employment had been terminated for alleged cause. Mr. Owen's evidence is that the termination of Mr. Srivastava's employment was justified by what he describes as "erratic conduct" on the part of Mr. Srivastava involving, among other things, threatening to shut down DLT India and causing DLT Global to be dismantled so that its technology and customer relationships can be transferred to a new entity under his control. Mr. Owen alleges that Mr. Srivastava has misappropriated funds belonging to DLT Global. Mr. Srivastava denies this alleged misconduct. He denies that the termination of his employment was justified.

[22] Mr. Srivastava's evidence is that technology and intellectual property, including the Conatus source code which Conatus still owns, forms the basis for all DLT Global products and applications. His evidence is that each of these products and applications was created using the source code and the architecture and design elements owned by Conatus, for which Conatus (and Mr. Srivastava) have received no compensation.

[23] Mr. Owen denies that DLT Global is using intellectual property owned by Conatus or Mr. Srivastava, including source code.

[24] Mr. Owen's evidence is that DLT Global closed in excess of $17 million in additional financing in the spring and summer of 2023. This financing is being provided by existing DLT Global shareholders. DLT Global provided bank statements showing receipts of funds in excess of $17 million.

[25] This application was brought by Notice of Application issued on May 2, 2023.

Analysis

[26] On this application, Mr. Srivastava makes application for:

a. an order winding up DLT Global Inc. and distributing its assets pursuant to section 207(1)(b)(iii) or (iv) of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"); or

b. in the alternative, an order winding up DLT Global Inc. and distributing its assets pursuant to section 207(1)(a) of the *OBCA*.

Should an Order be made winding up DLT Global Inc. pursuant to s. 207(b)(iii) of the OBCA?

[27] Section 207(1)(b)(iii) of the *OBCA* provides:

A corporation may be wound up by order of the court,

(b) where the court is satisfied that,

...

(iii) the corporation, though it may not be insolvent, cannot by reason of its liabilities continue with its business and it is advisable to wind it up, ...

[28] Mr. Srivastava submits that DLT Global cannot, by reason of its liabilities, continue its business and it is advisable to wind it up.

[29] Mr. Srivastava submits that the evidence shows that DLT Global (a) is unable to pay Internet, electricity, rent and salary when payments become due; (b) its monthly burn rate is $1.4 million to $1.8 million despite only generating roughly $100,000 per month from its anchor client; and (c) it has extensive ongoing litigation in multiple jurisdictions.

[30] Mr. Srivastava submits that to the extent that DLT Global has not already spent some or all of the funds purportedly raised through the rights offering, it still would not be enough to extend the company's operations through next year. Mr. Srivastava submits that there is no basis to conclude that DLT Global has a reasonable prospect of changing course.

[31] DLT Global submits that, recognizing that this is an early-stage, scaling, technology company in a novel innovative space, there is no reason why this Court should make a winding up order. DLT Global submits that it has a demonstrated record of meeting its commitments and continuing development. DLT Global submits that the evidence shows that it has had a considerable burn rate and required ongoing investment for several years, all to Mr. Srivastava's knowledge. DLT Global submits that the Court should not usurp the business judgment of DLT Global's Board of Directors and management in deciding whether and how to run the company.

[32] Winding up may not be appropriate where the corporation may continue to operate profitably, and the Court is obliged to consider whether there are less restrictive options available: *P.M.M. v. Y.W.M.*, 2019 ONSC 866 (CanLII), at para. 50.

[33] The evidence is that DLT Global has successfully raised $17 million in the last several months and that it has access to this capital to fund its working capital deficiency for the time being. Whether DLT Global will become profitable remains to be seen. Whether it will be able to raise capital sufficient for it to continue to meet its operating expenses, and for how long, cannot be determined on this record. I am satisfied, however, that Mr. Srivastava has not shown that DLT Global cannot by reason of its liabilities continue with its business.

[34] I decline to make an order winding up DLT Global pursuant to section 207(1)(b)(iii) of the OBCA.

Should an Order be made winding up DLT Global pursuant to s. 207(1)(b)(iv) or s. 207(1)(a) of the OBCA?

[35] Section 207 (1) (b) (iv) of the OBCA provides:

A corporation may be wound up by order of the court,

(b) where the court is satisfied that,

...

(iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; ...

[36] Section 207(1)(a) of the *OBCA* provides:

A corporation may be wound up by order of the court,

(a) Where the court is satisfied that in respect of the corporation or any of its affiliates,

(i) any act or omission of the corporation or any of its affiliates effects a result,

(ii) the business or affairs of the Corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(iii) the powers of the directors of the Corporation or any of its affiliates are or have been exercised in the manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer;

[37] In *Falus v. Martap Developments 87 Limited*, 2012 ONSC 2301 (CanLII), D.M. Brown J., as he then was, set out the governing legal principles when an application is made to order the winding-up of a corporation pursuant to section 207(1)(b)(iv) of the *OBCA*:

> Pursuant to section 207(1)(b)(iv) of the *OBCA* a court may order the winding-up of a corporation where "it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up". If a court concludes that the winding-up of a corporation would be just and equitable, it "may make such order under this section or section 248 as it thinks fit". [citation omitted] Although the "just and equitable" ground does not require a finding of "oppression", the remedial powers of the court under *OBCA* section 207(2) enable it to grant the wide range of

> discretionary remedies available to it in an oppression remedy case, even though facts justifying a determination on the ground of oppression do not exist. [citation omitted]
>
> The words "just and equitable" are regarded as words "of the widest significance", to be given a broad interpretation. [citation omitted] They act as a kind of bridge between the statutory grounds for a winding-up and "the principles of equity developed in relation to partnerships." [citation omitted]. Lord Wilberforce, in *Ebrahami v. Westbourne Galleries Ltd*., articulated the core meaning of the concept of "just and equitable" in the context of the winding up of a corporation. In the *Ebrahami* case he noted that the words "just and equitable" recognized "the fact that a limited company is more than a mere judicial entity, with a personality and law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure ..." Therefore the policy objective underlying the "just and equitable" ground for winding up a company seeks to prevent one party from disregarding the obligation it assumed by entering a company and to:
>
> > enable the court to subject the exercise of equitable rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[38] In *Falus*, D.M. Brown J. explained that the "just and equitable" principle has often been used to wind up a company in circumstances where a dominating or more powerful shareholder attempts to exclude another or to force another out of the relationship. Justice Brown held that there is a need to establish a link between the breakdown in mutual confidence and the financial fate of the corporate enterprise.

[39] In *Falus*, D.M. Brown J. referred to the decision of Wilton-Siegel J. in *Animal House Investments Inc. v. Lisgar Development Ltd.*, 2007 CanLII 82794 (ON SC) and he cited the following passage from that decision with approval:

> All of the cases cited to the Court reflect the underlying and unifying principle that a Court will only exercise its discretion to order a "just and equitable" winding-up if the disharmony has resulted in a sufficiently serious failure of the reasonable expectations of the parties to warrant such equitable relief. In order to satisfy this test of a serious failure of expectations, an applicant must demonstrate that the parties regarded, or would have regarded if they had turned their minds to it at the time of formation of the business association, the

> particular circumstances resulting from the disharmony to constitute the termination or repudiation of the business relationship among them. *Accordingly, incompatibility is significant only insofar as it has resulted in a state of affairs in which the reasonable expectations of the parties are unattainable and from which the Court can reasonably infer that the business arrangement between the parties has been repudiated or terminated.* (emphasis added by D.M. Brown J.).

D.M. Brown J. noted that in dismissing an appeal from this decision, the Divisional Court, [2008] O.J. No. 3155 (Div. Ct.), adopted the analysis employed by Wilton-Siegel J.:

> Although there are cases where the equitable remedy of winding up has been granted where irreconcilable differences exist, in no case cited to us was the remedy granted in the absence of a finding that the reasonable expectations of the applicant had been breached. Whether a reasonable expectation existed is a question of fact.

[40] Mr. Srivastava submits that the original animating purpose of the business (i.e., to enable Mr. Srivastava to grow his pre-existing business) has been lost. Mr. Srivastava submits that DLT Global is, in essence, a partnership between Mr. Owen and Mr. Srivastava who co-founded the business together. Mr. Srivastava also relies on the 2017 agreement and the MOU as evidence of the parties' intention to operate as effectively equal partners. Mr. Srivastava submits that the relationship of trust and confidence between him and Mr. Owen has broken down and the continuation of the business between them operating as equal partners is not possible. Mr. Srivastava submits that the misappropriation of the Conatus source code and Mr. Srivastava's patents without compensation also contravenes his reasonable expectations.

[41] Mr. Srivastava submits that for these reasons, a winding up of DLT Global is just and appropriate.

[42] DLT Global submits that Mr. Srivastava has not shown that he has expectations that are not submerged in the corporate structure and that such expectations have not been satisfied, resulting in unfairness or prejudice that is sufficiently serious that it can only be rectified by a winding up order.

[43] Mr. Owen submits that it has not been shown that there are circumstances that resulted in any unfairness or prejudice to Mr. Srivastava concerning his rights and interests as a DLT Global shareholder, let alone as a former employee of DLT Global. Mr. Owen submits that although there is a dispute over how many shares Mr. Srivastava beneficially owns (a delta of less than 200,000 shares), there is no justification for winding up the company into which others have invested tens of millions of dollars of capital.

[44] Mr. Owen submits that the Mr. Srivastava has not shown that there is a deadlock with respect to the future of the business of DLT Global. He submits that DLT Global's purpose and function are unchanged from when it was founded: it continues to scale in the blockchain technology space, and Mr. Srivastava remains a shareholder of the company. Mr. Owen contends that aside from Mr. Srivastava's current inability to continue as an employee and director of the company, all shareholders, including Mr. Srivastava, continue to be able to take part in the future of DLT Global.

[45] Mr. Owen submits that winding up is a remedy of last resort and that Mr. Srivastava has not shown why winding up is the only remedy for his claims of prejudice.

[46] In support of its assertion that Mr. Srivastava's employment was terminated for just cause, DLT Global relies on the affidavit of Karamjot Singh Anand that was affirmed March 7, 2023 and used as evidence on the *ex parte* motion brought by DLT Global for interim injunctive relief. Mr. Anand is Assistant Vice-President Product Consultant at DLT Global. In this affidavit, Mr. Anand gives evidence of his conversations with Mr. Srivastava during the week of February 28, 2023 in which, he states, Mr. Srivastava threatened to fire a number of employees of DLT India and stated that he would "take this Company apart" and "remove the Canadian team". Mr. Anand deposes that Mr. Srivastava stated his intention to cause harm to DLT Global so as to create pressure on it to secure financing for salaries. According to Mr. Anand, Mr. Srivastava told him to stop all ongoing work for prospective clients from Canada and, if anyone from Canada asks, to say that they are not working on any new initiatives.

[47] Mr. Srivastava denies that the ever threatened to damage, or tried to damage, DLT Global. He states that DLT Global was his business into which he had invested heavily, and he wanted it to succeed. Mr. Srivastava deposes that he had a good relationship with all of DLT Global's clients and employees and he does not recall ever being confronted by Mr. Owen about his behaviour. Mr. Srivastava denies the allegation made by Mr. Owen that he misappropriated funds from DLT Global or DLT India.

[48] There is a stark conflict in the evidence between, on one hand, Mr. Owen's evidence and Mr. Anand's evidence that Mr. Srivastava was engaging in misconduct directed to harming the business of DLT Global, and, on the other hand, Mr. Srivastava's evidence that he was acting responsibly as a director of DLT Global in drawing attention to its financial difficulties and the serious problems such difficulties were having with respect to the operations of DLT India and his denials of making statements intended to harm DLT Global. This evidence raises credibility issues and I am not able to determine on this paper record whether DLT Global did or did not have just cause to terminate Mr. Srivastava's employment.

[49] I am not able to determine, on the evidence before me, that DLT Global has misappropriated source code that is owned by Mr. Srivastava. The evidence in this

respect involves highly technical issues which would require an analysis of the technical qualities of the software products being sold by DLT Global. There are also significant credibility issues in relation to this issue. The evidence before me is insufficient to allow me to make the necessary findings of fact to determine the source code ownership issue. In addition, I am not able to determine, on the evidence before me, whether Mr. Srivastava was dismissed for just cause.

[50] I am, however, satisfied that there has been a breakdown of trust between Mr. Srivastava and Mr. Owen such that they are unable to work closely together to advance the interests of DLT Global.

[51] I do not accept Mr. Srivastava's submission that he reasonably expected that he and Mr. Owen, when they formed DLT Global, intended to operate the company effectively as equal partners and that DLT Global is a company that is akin to a two-person partnership. From the outset, it was understood that significant additional capital would be required in order for DLT Global to grow and prosper in a new, highly competitive, technology space. Mr. Owen's evidence is that substantial capital was raised from outside investors who acquired rights in DLT Global in exchange for their contributions of capital. Mr. Srivastava's evidence is that he joined forces with Mr. Owen because Mr. Owen had access to $25 million from investors which could be used to grow the business. As a result of these investments, DLT Global has been able to continue in business and employ many employees, notwithstanding that its operating expenses significantly exceed its current revenues. DLT Global is not a two-person company that is akin to a partnership. There are many other stakeholders.

[52] Mr. Srivastava remains a shareholder of DOT Global. Mr. Srivastava may have claims arising from the circumstances in which he was dismissed as an employee of DLT Global, in respect of his claims for alleged misuse of proprietary source code of which he claims ownership and for other claims in relation to his rights as a shareholder of DLT Global and the transfer of the Conatus business to DLT Global. There were remedies available to Mr. Srivastava for his claim, short of a winding up order. However, this only remedy that Mr. Srivastava seeks in his Notice of Application.

[53] Mr. Srivastava has not shown that, as he contends, DLT Global is a dysfunctional business with no prospect of becoming profitable, such that it should be wound up. The fact that investors have contributed more than $17 million in additional capital in recent months belies this contention. Mr. Srivastava has not shown that DLT Global has failed to meet his reasonable expectations and that such failure has resulted in unfairness or prejudice that is sufficiently serious that a winding up order is just and equitable.

[54] Given that both Mr. Srivastava and Mr. Owen expected that substantial additional outside capital would have to be invested in order for DLT Global to prosper, I do not accept that either Mr. Srivastava or Mr. Owen, at the time they formed DLT

Global, would have regarded that disharmony between them would constitute the termination or repudiation of their business relationship through DLT Global.

[55] I am not satisfied that Mr. Srivastava has shown that it is just and equitable to make an order winding up DLT Global. This would result in the liquidation of the company's assets, dismissal of its employees, and loss of the investors' opportunities to profit through their investments in the new blockchain technology space. Other remedies, short of dissolution of DLT Global, were available to Mr. Srivastava for his claims, but he chose not to pursue them.

[56] At the hearing of this application, counsel for Mr. Srivastava submitted that if I was not satisfied that in order winding up DLT Global should be made, I should make another order to remedy the alleged oppressive conduct on the part of DLT Global upon which Mr. Srivastava relies on this application. In support of this submission, Mr. Srivastava relies on section 207(2) of the *OBCA* which provides that, upon an application under section 207(1), the court may make such order under this section or section 248 as it thinks fit.

[57] I accept that I have jurisdiction to make a remedial order under s. 207 of the *OBCA* that is not limited to an order that DLT Global be wound up. However, Mr. Srivastava does not plead a claim for an alternative order in his Notice of Application. DLT Global was not confronted with a pleaded claim for alternative relief, and has not made submissions in response to this application, other than insofar as Mr. Srivastava seeks an order that DLT Global be wound up. In the circumstances, given the claim as pleaded, I decline to consider granting alternative relief.

Disposition

[58] For these reasons, the application is dismissed.

[59] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel and approved by me (4 pages excluding costs outlines; 2 pages for reply, if any).

Cavanagh J.

Date: December 21, 2023