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Docket: CI 21-01-33890
(Winnipeg Centre)
Indexed as: Badda Boom Trucking Ltd. et al. v. Liondale Inc. et al.
Cited as: 2023 MBKB 64

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B E T W E E N:

BADDA BOOM TRUCKING LTD. and KRISTIAN D'IGNAZIO,	)	PETER HALAMANDARIS
	)	for the applicants
applicants,	)	
- and -	)	ANDREW W. BOUMFORD and
	)	BRAEDEN K.S. CORNICK
	)	for the respondents
LIONDALE INC., ALEXANDER DRYSDALE, WARREN'S HYDROVAC INC., WARREN CAMPBELL, EASY TECH INFRASTRUCTURE GROUP LTD. and KIRBY ISAAC,	)	
respondents.	)	JUDGMENT DELIVERED:
	)	April 5, 2023

TURNER J.

I. INTRODUCTION

[1] HiRoad Projects Inc. ("HiRoad") was incorporated in October 2020. Badda Boom Trucking Ltd. ("Badda Boom"), Liondale Inc. ("Liondale"), Warren's Hydrovac Inc. ("Hydrovac") and Easy Tech Infrastructure Group Ltd. ("Easy Tech")

each own 25% of the shares of HiRoad. Kristian D'Ignazio, Alexander Drysdale, Warren Douglas Campbell and Kirby Isaac are the directors of HiRoad.

[2] There is no dispute that the relationship between D'Ignazio and the other three directors has soured. Since the applicants filed their initial application in December of 2021, it would seem that the parties have become more and more frustrated with each other.

[3] In this motion (the second contested motion since the initial application) the applicants seek the following orders:

- That the buy-sell notice issued by Easy Tech, dated February 3, 2023, be set aside and be of no force and effect;
- That the shareholder loans paid from HiRoad on February 3, 2023, be returned;
- That no dividends be paid from HiRoad without the express consent of all shareholders; and
- That no salaries and other remuneration or compensation to shareholders, participating individuals and any other person not at arms' length to a shareholder or participating individual is determined or increased without the express consent of all shareholders.

II. BACKGROUND

[4] In the fall of 2020, D'Ignazio, Drysdale, Campbell and Isaac discussed forming a company that would perform signals work for rail companies. The four

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individuals and their respective companies had different skills and experience required for such work:

a. D'Ignazio and his corporation, Badda Boom, owned a boom truck and D'Ignazio was going to provide start-up funding;

b. Drysdale and his corporation, Liondale, had experience doing signals work and would provide labour;

c. Campbell and his corporation, Hydrovac, would focus on getting work contracts; and

d. Isaac and his corporation, Easy Tech, would work on hydrovac and drilling, as well as use his prior contacts in the industry to get work contracts.

[5] Since HiRoad's inception, Drysdale and Isaac conducted the management and operations of the company. It was always expected that D'Ignazio's role was to provide start-up funding and he would not be involved in HiRoad's operations.

[6] In February and March of 2021, HiRoad's four directors were having weekly meetings to discuss business. Over the following months, conflicts started to arise between D'Ignazio and the other directors on a variety of issues.

[7] The corporate shareholders are all party to a Unanimous Shareholder Agreement (the "USA") dated August 18, 2021. As set out in more detail below, the USA included agreements on a variety of subjects, including quorum, matters requiring a unanimous decision of the shareholders and buy-sell notices.

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[8] On December 10, 2021, Easy Tech issued a buy-sell notice to the other three directors ("Buy-Sell Notice") in accordance with the USA. Easy Tech offered to buy all of Badda Boom's, Liondale's and Hydrovac's shares. In the alternative, Easy Tech offered to sell all of its shares to the other three shareholders. As per the USA, Badda Boom, Liondale and Hydrovac had 30 business days to respond.

[9] On December 22, 2021, D'Ignazio filed a Notice of Application in this Court seeking a variety of oppression remedies (the "Initial Application"). The first was an order that the time period to respond to the December 10, 2021 Buy-Sell Notice be suspended until further order of the Court. It also sought an order that the other three directors produce all financial documents and an accounting for HiRoad (including shareholder loan accounts), that no monies be disbursed without the consent of all directors, that HiRoad not draw on any credit without the consent of all directors and that the respondents compensate HiRoad for any amounts improperly taken. Finally, the application sought an order that, after the issues on the Initial Application had been rectified, an auction take place regarding the shares in accordance with the USA.

[10] Since filing the Initial Application, D'Ignazio has not attended any HiRoad directors' meetings, however minutes from the meetings continue to be sent to him. Drysdale included D'Ignazio on emails that were sent to the other directors. D'Ignazio has only participated in 18 of the approximately 60 email threads before and after the Initial Application was filed.

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[11] On January 20, 2022, the parties, through their counsel, made an agreement concerning certain aspects of this litigation and the operation of HiRoad's business, pending the outcome of the Initial Application. The terms of the Agreement are contained in an email:

- Complete financial disclosure which includes not only quickbooks access, but supporting documents;
- Suspension of the buy-sell until agreement between the parties or order of the court;
- No expenses be paid other than normal operational expenses;
- Drysdale and Isaac can be paid at the rates you indicated, without prejudice to our right to argue that they were not proper; and
- Particulars of expenses will be uploaded 48 hours before payment (which includes automatic withdrawals). The particulars will include supporting documents such as receipts, timesheets and pos.

[12] On May 27, 2022, the applicants filed a Notice of Motion seeking a variety of financial disclosure on the grounds that the parties entered into an agreement on January 20, 2022, and the respondents failed to comply.

[13] The motion was set to be heard on February 2, 2023. On January 27, 2023, counsel wrote to Justice Grammond to advise that the only outstanding issue regarding the motion was the issue of costs. In her Endorsement following the hearing, Justice Grammond noted that the disclosure sought on the motion had been provided to the applicants.

[14] Justice Grammond included a thorough review of the facts regarding the dispute over the disclosure in her Endorsement so I will not repeat them in detail

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here. In summary, between March 10, 2022 (when the applicants sought the disclosure) and January 23, 2023 (when all of the disclosure was provided), the respondents stalled in providing some of the information sought. Justice Grammond found that, although the respondents agreed to provide disclosure, they then ignored, reneged upon and finally provided some of the disclosure almost five months after they had agreed to so do. She wrote:

> [15] … [T]he three deficiencies [in the disclosures provided] taken together are troubling, because a commitment to produce documents ought not be taken lightly, and should be complied with within a reasonable timeframe. …
>
> [19] … In my view, the respondents allowed their frustrations with the applicants, and perhaps the court process, to get the better of them, and in the result resorted to tactics (some overt and some more subtle) that the court cannot condone.

[15] On the same day Justice Grammond heard submissions, there was a HiRoad director/shareholder meeting attended by two directors, Drysdale and Isaac. The minutes of the meeting reflect that those in attendance voted to pay out all shareholders' loans. The minutes also indicate that dividend disbursement and salaries of dedicated management would be voted on at the next directors' meeting.

[16] On February 3, 2023, Easy Tech issued another Buy-Sell Notice to the three other shareholders. As with the previous Buy-Sell Notice, Easy Tech offered to buy all of Badda Boom's, Liondale's and Hydrovac's shares. In the alternative, Easy Tech offered to sell all of its shares to the other three shareholders. As per the USA, Badda Boom, Liondale and Hydrovac had 30 business days to respond.

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III. ISSUES

[17] The respondents raise a preliminary issue that would determine how this motion should proceed. The respondents say that the applicants are seeking interim injunctive relief, therefore in order to succeed, they must meet the test set out in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 ("***RJR-MacDonald***"). The applicants say that they are seeking relief pursuant to s. 234(3) of *The Corporations Act*, C.C.S.M. c. C225, therefore the test in ***RJR-MacDonald*** is not applicable.

[18] The remaining issues are:

a. Should the February 3, 2023 Buy-Sell Notice be set aside and of no force and effect?

b. Should the shareholders and their principals be required to return the shareholder loan payments they received on or about February 3, 2023?

c. Should there be an order that:

   i. no dividends be paid from HiRoad without the express consent of all shareholders; and

   ii. no salaries and other remuneration or compensation to shareholders, participating individuals and any person not at arms' length to a shareholder or participating individual is determined or increased without the express consent of all shareholders?

IV. ANALYSIS

A. Does the *RJR-MacDonald* test apply?

[19] In ***Gershkovich et al. v. Sapozhnik et al.***, 2019 MBQB 115, the applicants, who were minority shareholders in a corporation, sought ongoing payments and compensation on an interim basis, as well as a variety of other

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oppression remedies. Justice Grammond noted that there were no previous decisions in Manitoba regarding interim relief in the context of an oppression-remedy claim. In her decision, she undertook a review of a number of decisions from other jurisdictions in which interim relief was requested and summarized the principles reflected in those decisions. She wrote:

> [32] I accept that in keeping with the spirit of oppression remedy legislation, s. 234(3) of the *Act* should be applied flexibly, particularly on an interim motion. In my view, the equities and "fair play" of the situation should be considered in every case, to align with the legislative intent. In other words, the Court should always consider whether the relief sought is fair and equitable in all of the circumstances. The reasonable expectations of the minority shareholders will often be important to that analysis. …
>
> [33] I do not agree that an applicant on an interim motion is necessarily required to establish a strong *prima facie* case before obtaining relief. Given the wide range of relief that could be sought on this type of motion, this threshold may be appropriate in some cases, but will not apply in others. Certainly, both the nature of the relief sought and the circumstances of the parties will be important factors in determining whether to apply that criterion.

[20] In this case, the respondents say the applicants are asking for injunctive relief because they seek an order imposing a positive obligation on the respondents to pay back shareholder loans. The applicants' request that the February 3, 2023 Buy-Sell Notice be set aside is also injunctive because it would restrain the respondents from exercising the buy-sell mechanism provided for in the USA.

[21] The respondents point to the Ontario Superior Court of Justice decision in ***Western Larch Limited v. Di Poce Management Limited***, 2010 ONSC 3046 ("***Western Larch***"), in which the applicants sought an injunction to restrain certain defendants from implementing a buy-sell offer. The Court, in that case,

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undertook an analysis based on the ***RJR-MacDonald*** test. However, I do not find ***Western Larch*** particularly helpful because there was no agreement between the parties regarding the buy-sell offer, as there is here.

[22] The applicants reply that they are simply asking that the January 20, 2022 agreement and the terms of the USA be enforced. In addition, they rely on s. 234(3) of *The Corporations Act* which provides that the Court "may make any interim or final order it thinks fit."

[23] The applicants say that there is no authority for the proposition that in order to enforce an agreement between parties one has to get an injunction. They say that common sense dictates that parties are bound by the agreements they make through counsel and that a party should not have to seek an injunction to require the parties to adhere to their agreements. If such agreements cannot be enforced, then counsel simply will not make them anymore.

[24] I agree with the applicants that the relief they are seeking on this motion is not injunctive relief such that the ***RJR-MacDonald*** test applies. Section 234(3) of *The Corporations Act* provides a wide discretion to make any interim order the Court thinks fit. If the Legislature intended to impose a test, such as the ***RJR-MacDonald*** test, it would have done so in the legislation.

[25] The applicants are seeking orders to require the respondents to adhere to the agreements they made on January 20, 2022, and in their USA. As noted by the Alberta Court of Appeal in ***Mallet v. Administrator of the Motor Vehicle***

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Accident Claims Act, 2002 ABCA 297 (at para. 71), "It goes without saying that counsel are held to their agreements at trial." In my view, the same is true of agreements made at any stage in a litigation.

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[26] The equities of fair play in this situation require that the respondents keep to their word in relation to the agreements that they made. In these circumstances, the applicants are not constrained by the principles of the ***RJR-McDonald*** test in order to get the relief they seek. There remains, however, the question of whether the orders sought by the applicants were covered by the agreements previously made.

B. Should the February 3, 2023 Buy-Sell Notice be set aside and of no force and effect?

[27] On December 10, 2021, Easy Tech issued a Buy-Sell Notice with a purchase price of $50.00 per share.

[28] On January 20, 2022, through counsel, the parties agreed to a "suspension of the buy-sell until agreement between the parties or order of the court".

[29] On February 3, 2023, Easy Tech issued a new Buy-Sell Notice with a purchase price of $2,000.00 per share.

[30] Article 6.2 of the USA provides that:

> …[O]nly one Shareholder (and no combination of Shareholders) may exercise such right to give a [Buy-Sell] Notice at any given time, and while any offer has been made pursuant to such a Notice and the transactions contemplated or resulting thereby have not yet closed, or remain pending, then during such period, no other Shareholder may give another Notice until such transactions are complete or have otherwise been terminated pursuant to this Agreement or the final order of a court or arbitrator.

[31] The respondents argue that nothing in the USA prevents a shareholder who issued a prior buy-sell notice to issue a new or further buy-sell notice. They say that nothing in the January 20, 2022 agreement says that a new or further buy-sell notice cannot be issued.

[32] The applicants respond that under the terms of the USA, it is impossible to have two outstanding buy-sell notices at one time. They say that the February 3, 2023 Buy-Sell Notice is an example of the respondents seeking to renege on an agreement made between counsel.

[33] While the wording of the January 20, 2022 agreement does not specifically speak to the issuance of any new buy-sell notices, a common-sense approach dictates that the agreement was meant to suspend the purchase or sale of shares under the USA until the Initial Application was resolved either by agreement between the parties or by a court order.

[34] A common-sense reading of Article 6 of the USA seeks to prevent more than one buy-sell notice pending at one time. It makes sense that once a buy-sell notice is issued by a shareholder, a decision on that offer to purchase or sell has to be completed before another offer can be made.

[35] As a result, the February 3, 2023 Buy-Sell Notice issued by Easy Tech is of no force and effect.

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C. Should the shareholders and their principals be required to return the shareholder loan payments they received on or about February 3, 2023?

[36] Drysdale and Isaac were the only two directors in attendance at the HiRoad shareholder/director meeting held on February 2, 2023. The minutes of that meeting note:

> **Shareholder Loans**
> All in attendance would like them paid out immediately and formally requested as per our USA on numerous occasions. Voted – all in attendance in favour to pay out all shareholder loans to save HiRoad more fees. Bank drafts will be available for pickup from [Drysdale.]

[37] The applicants say that the decision is contrary to Article 2.6 of the USA, contrary to s. 11 of HiRoad By-law No. 1, and contrary to the January 20, 2022 agreements. In addition, they note that the respondents were well aware that the shareholder loans were an issue as they were specifically enumerated in the Initial Application and accompanying affidavit material. Therefore, the applicants say, the payments should be returned to HiRoad.

[38] The respondents say that D'Ignazio has not attended any HiRoad meetings since the Initial Application and has therefore put HiRoad at a standstill regarding the repayment of shareholder loans.

[39] Article 2.6 of the USA states:

> **Quorum**
> Except as hereinafter provided, a quorum for the transaction of business at any meeting of the Board shall be a majority of directors and a quorum for the transaction of business at any meeting of Shareholders shall be that Shareholder or those Shareholders present in person (in the case of a corporate Shareholder, such Shareholder being represented by a

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> Participating Individual by valid proxy), holding a majority of the voting shares of the Corporation then issued and outstanding. …
>
> [emphasis added]

[40] Section 11 of HiRoad By-law No. 1 states:

> ***Quorum:*** A majority of the number of authorized directors shall form a quorum for the transaction of business.

[41] The January 20, 2022 agreements included that "no expenses be paid other than normal operational expenses".

[42] I agree with the applicants that the decision to repay the shareholder loans was not properly made according to the By-law and USA. Only two of the four directors and shareholders were at the February 2, 2023 meeting, therefore, there was not quorum. In addition, the repayment of shareholder loans cannot be said, in these circumstances, to be a "normal operational expense" therefore the decision was also contrary to the January 20, 2022 agreement.

[43] I understand the respondents' frustration with D'Ignazio's unwillingness or refusal to attend HiRoad meetings. However, they have not pointed me to any authority that requires a director or shareholder to attend meetings. They could achieve quorum with the attendance of three directors, however, they are still faced with the fact that they made an agreement regarding expenses on January 20, 2022, and that agreement must be honoured until there is a request to withdraw it or this litigation is resolved.

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[44] As a result, the shareholders and their principals are required to return the shareholder loan payments they received on or about February 3, 2023.

D. Should there be an order that no dividends be paid from HiRoad without the express consent of all shareholders; and an order that no salaries and other remuneration or compensation to shareholders, participating individuals and any person not at arms' length to a shareholder or participating individual is determined or increased without the express consent of all shareholder?

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[45] The applicants object to the respondents' apparent intention to discuss dividend payments and salary adjustments at the next HiRoad shareholder/director meeting.

[46] Article 2.8 of the USA is clear:

> **Matters Requiring Special Approval**
>
> Without a prior unanimous decision or consent of all of the Shareholders, the Board of Directors or the Shareholders shall not affect any of the following:
>
> ….
>
> (p) ***Dividends and Distributions*** – the declaration and payment of dividends, or the declaration and payment of bonuses, the determination of salaries and other remuneration or compensation to Shareholders, Participating Individuals, and any person not at arm's length to a Shareholder or a Participating Individual.

[47] Nothing in the January 20, 2022 agreements addressed the disbursement of dividends. The agreements included "Drysdale and Isaac can be paid at the rates you indicated, without prejudice to our right to argue that they were not proper".

[48] The minutes from the February 2, 2023 meeting note:

> **Dividends**
> Burn rate to be reviewed this week to see what is required in the worst case scenario of 3 slow months. Cash on hand vs burn rate to be reviewed and dividend disbursement voted on during next meeting
>
> **Dedicated Management**
> With Hiroads growth, dedicated management will be req'd this year. Salaries to be discussed and voted on next meeting

[49] Clearly there has not been unanimous consent of all of the shareholders, therefore, dividends cannot be paid. There has not been unanimous consent of the shareholders regarding determination of salaries, remuneration or compensation to shareholders.

[50] By merely expressing their intentions, the respondents have not yet violated the January 20, 2022 agreement or the USA, however, there will be an order that no dividends be paid from HiRoad without the express consent of all shareholders. There will also be an order that no salaries and other remuneration or compensation to shareholders, participating individuals and any person not at arms' length to a shareholder or participating individual is determined or increased without the express consent of all shareholders.

CONCLUSION

[51] It is obvious that the business relationship amongst the parties is likely irreparable. However, the parties made agreements through the USA and through counsel on January 20, 2022. Those agreements must be honoured by all of the parties.

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[52] The orders requested by the applicants are granted with costs.

_____J.

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