CITATION: The Matter Corporation v. Southside Construction Management Limited, 2024 ONSC 4879
COURT FILE NO.: CV-23-00710981-00CL
DATE: 20240905

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE MATTER CORPORATION

AND:

SOUTHSIDE CONSTRUCTION MANAGEMENT LIMITED, VITO FRIJIA and WONDERLAND POWER CENTRE INC.

BEFORE: KIMMEL J.

COUNSEL: *Mark Dunn/ Sarah Stothart/Mark Leonard*, for the Plaintiff

John Downing/ Brian Whitwham, for the Defendants

HEARD: July 23, 2024

ENDORSEMENT
(PLAINTIFFS' MOTION FOR INTERLOCUTORY INJUNCTION)

Overview

[1] The plaintiff (Matter Corp.") seeks an interlocutory injunction to enforce what it believes its rights to be as a 50% Owner of a Joint Venture that is managed by the other co-owner, Southside Construction Management Limited ("Southside"). Matter Corp. seeks to enforce notice, consultation and approval rights relating to new development, working capital commitments and future borrowing. The plaintiff also seeks on order for disclosure of information and documents it has requested about the existing business and future plans of the Joint Venture.

[2] Some of the relief the plaintiff seeks meets the requirements for an interlocutory injunction and is granted. Specifically, the relief with respect to notice and consultation about new development (e.g. the construction of new commercial or residential space on the Joint Venture Properties) and with respect to disclosure of existing books of account and records (historical and ongoing). Other aspects of the relief sought with respect to working capital commitments associated with the leasing of already constructed commercial space, with respect to disclosure of documents that do not exist and would have to be created and with respect to future borrowing does not meet the requirements for an interlocutory injunction and is not granted.

Background to the Dispute

[3] This dispute centers around a Joint Venture Agreement dated February 27, 1998 (the "Joint Venture Agreement"). Wonderland Power Centre Inc. (the "Trustee Corporation") is the legal owner of the Joint Venture's commercial real estate portfolio located in and around London Ontario (the "Joint Venture Properties"). Matter Corp. and Southside[1] are each 50% beneficial owners (collectively, the "Owners") of the Joint Venture Properties.

[4] The Joint Venture was created in 1998 to acquire and develop the Joint Venture Properties. The Trustee Corporation is the owner and landlord of the Joint Venture lands. The ordinary course day-to-day management, construction and development functions are carried out by Southside for an agreed upon management fee.

[5] The principals of Matter Corp. (Mr. Sprackman) and Southside (Mr. Frijia) were both experienced developers. They enjoyed a long business relationship based on mutual respect. They spoke about the Joint Venture business on a regular basis. Mr. Frijia confirmed that he and Mr. Sprackman spoke about all major decisions regarding the Joint Venture.

[6] Mr. Sprackman passed away in late 2020. His grandson, Kobi Joffe, who had been working with Mr. Sprackman took over Matter Corp.'s business. There was no agreed upon succession plan for the Joint Venture. Mr. Frijia says he does not want to teach or babysit Mr. Joffe. Mr. Joffe has an MBA and spent six years in commercial real estate finance and in real estate private equity before joining his grandfather to work at Matter Corp. and does not think he needs to be taught or babysat, but he wants to ensure that Matter Corp.'s interests and rights are respected.

[7] Since Mr. Sprackman's death, Mr. Frijia has been managing the Joint Venture through his company Southside without consulting with Mr. Joffe or Matter Corp. about plans for development or capital commitments associated with leases of existing commercial space. Mr. Frijia and Southside (collectively, sometimes referred to as “Southside”) believe that Southside has full decision making power regarding the business of the Joint Venture as part of Southside's mandate as construction and development manager under the Joint Venture Agreement and because it is a guarantor (itself or through affiliates) of loans to the Joint Venture that remain outstanding, which gives it a casting vote for board decisions. Southside does not believe there is any obligation to give notice to, consult with or seek the agreement of the other 50% Owner, Matter Corp., regarding any decisions about the management, construction or development plans for the Joint Venture.

[8] Since Mr. Sprackman's death, Southside has been committing the Joint Venture's capital to make leasehold improvements and to offer inducements for new and existing (renewing) tenants. It considers itself to be unconstrained in its ability to continue to do so. This ties up cash that would otherwise be available for distribution to the Owners. Southside further asserts that it can bind the Trustee Corporation to further capital expenditures for the construction of new commercial and

[1] The original company that signed the Joint Venture Agreement. "FirstCo", is part of the Southside Group and that 50% Owner is now Southside.

residential space on the Joint Venture Properties without consulting with or obtaining approval from Matter Corp. This will tie up the Joint Venture's available cash farther into the future and likely also require additional third-party financing.

[9] Matter Corp. is concerned that the now known commitments of working capital, and others that may be contemplated, will require a pause in annual distributions to the Owners. Between 2014 and 2024, dividends totaling $29 million were distributed to the two Owners (50% each). The total amount distributed each year was between $2 to $4 million, except one year in which no dividends were distributed (in 2018).

[10] Matter Corp. has asked for information about planned commitments for future development and working capital needs. It has further asked to be consulted and given the opportunity to agree (or disagree) before any new commitments are made.

[11] This action was commenced in December 2023 after Matter Corp. learned of certain capital commitments (totaling $47 million) associated with leases that Southside had bound the Joint Venture to in the face of Matter Corp.'s outstanding requests for advance notice and consultation. Southside has said it is only prepared to inform Matter Corp. and Mr. Joffe about construction, development and new commitments of working capital after the fact unless the court orders otherwise. The action asserts breach of contract and oppression claims.

[12] Southside has responded to some of the document and disclosure requests of Matter Corp., but not all of them. Southside says some of the documents do not exist. With respect to the remaining outstanding requests, Mr. Frijia has invited Mr. Joffe to attend Southside's office to review any documentation that he wishes regarding the Joint Venture's business.

The Action and The Injunctive Relief Sought on this Motion

[13] Matter Corp. maintains that the persistent lack of disclosure, lack of consultation and failure to seek its agreement (described above) entitles it to recourse for breach of contract and under the oppression remedy. It is ultimately seeking an order that the Joint Venture Properties be sold and the Trustee Corporation be wound up. In the alternative, Matter Corp. seeks an order requiring its approval as a prerequisite for all new or renewed leases, including renewals, financing, tenant improvements and inducements, and all new financing commitments.

[14] The defendants deny the alleged breaches, but also oppose the primary remedy of partition and sale. They appear to want to keep the Joint Venture intact.

[15] Matter Corp. seeks the following three specific interlocutory orders while the action is pending:

a. To compel production of information about the Joint Venture, including about new development plans, budgets, borrowing and other essential matters (the "Production Order").

b. To prevent further development without its consent (the "New Development Order").

c. To prevent further borrowing without its consent (the "Borrowing Order").

[16] On April 9, 2024, when the injunction motion was scheduled, the following without prejudice disclosure arrangement ("Disclosure Arrangement") was agreed to and endorsed by the court:

> The Defendants' counsel shall provide a list to the Plaintiff's counsel of any agreement to lease, lease, lease extensions or other contracts involving Wonderland Power Centre Inc. ("WPC") that are expected to be finalized over the next 90 days, and that include construction or development costs, inducements, or capital expenditures on the part of WPC of more than $750,000. Defendants' counsel will continually update this list while the Plaintiff's motion is pending. The list will include the expected expenditure by WPC.
>
> WPC has agreed not to commit to any contract referenced above without giving the Plaintiff 14 days' notice of its intention to do so. Such notice will be provided by the Defendants' counsel to the Plaintiff's counsel.
>
> The above agreement is without prejudice to the rights of either party and any positions that they may take, or any arguments that they may advance, in respect of the Plaintiff's motion or in the civil action. Further, this agreement is only to remain in place until a decision on the Plaintiff's motion is rendered, or until the motion is otherwise withdrawn or settled.

[17] At the hearing of this motion, counsel for the defendants advised that the defendants would be prepared to keep this without prejudice Disclosure Arrangement in place until a trial decision or other disposition of this action.

Factual Background

The Contractual Framework

[18] The Joint Venture Agreement contains, among others, the following provisions:

> **Section 1.02 - Purpose and Scope**
>
> The purpose of the Joint Venture is to complete the transaction of purchase and sale provided for in the Purchase Agreement and to own, operate, develop and market (hereinafter called the "Joint Venture Project"). The Joint Venture Project shall be limited strictly to the

purpose hereinbefore set out and to the Joint Venture Lands hereinbefore described.

Section 1.04 - Apportionment of Profits and Losses

Except as hereinafter otherwise specifically provided, all net profits derived from and all expenditures and losses of the ownership, operation, development or sale of the Joint Venture Lands shall belong to or be borne by the Members in the following proportions: [50% to each Owner]

Section 2.01 - The Purpose

For the purpose of expediting and facilitating the conduct of the affairs of the Joint Venture, the Members appoint the Trustee Corporation as their nominee and trustee. The Trustee Corporation shall be and act as Nominee of and as Trustee for and on behalf of the Members of the Joint Venture, and shall hold all property, assets and rights of the Joint Venture, and shall do all things, as the Members may, in accordance with the provisions of this Agreement, direct.

Section 2.03 - Organization of the Trustee Corporation

(b) There shall initially be two (2) directors, being one nominee of each Joint Venture Members.

(d) The Trustee Corporation shall have one (1) officer, namely, a President/Secretary, the office of which shall at all times be filled by the nominee of Firstco [895649 Ontario Limited, now Southside]

(e) All cheques and other banking documents, deeds, transfers, contracts, offers to lease, leases, agreements, mortgage financing commitments and individual mortgages, and other documents required to be executed by the Trustee Corporation from time to time during the normal course of business of the Joint Venture, including without limitation all of those matters for which the Manager has supervision pursuant to Section 4.01 hereof (all of which are hereinafter referred to as the "normal course of business of the Joint Venture"), and subject to the restrictions hereinafter set forth, shall be executed on its behalf by the President alone.

(g) [Decisions of the Directors and Shareholders of the Trustee Corporation had to be unanimous, but,]

> (vii) the chairman presiding at director or shareholders' meetings shall have the right to vote in the first instance in

> his capacity as a director or shareholder, and as long as any amount is owed by the Joint Venture or Trustee to Firstco, or any guarantees remain outstanding by Firstco or any party related to or associated with Firstco, the President being the nominee of Firstco shall have a second or casting vote or tie breaking vote in case of an equality of votes; provided that unanimous consent is required for the sale, cross mortgage security (except guarantees) or financing above market rates.

Section 2.05 - Construction and Development

Firstco or his nominee shall have the exclusive right and authority to construct, develop and market the Joint Venture Project and shall be entitled to a further construction management fee of 5 per cent in the ordinary course.

Section 4.01 - Appointment and Duties of Manager

The Members of the Joint Venture hereby engage the Manager [Southside Construction Management Limited] on behalf and for the benefit of the Joint Venture, to manage and supervise all aspects of property management, leasing, financing, maintenance, capital expenditures, and any other incidental matters pertaining to the Joint Venture Project.

Section 5.01 - Banking

…
All cheques drawn on such bank account and other banking documents, including authorizations required to be executed by the Joint Venture from time to time in respect only to the conduct of the normal day-to-day business of the Joint Venture, shall be executed on its behalf by the President of the Trustee Corporation.

Section 5.02 - Books of Account

Proper books of account shall be kept by the Joint Venture, and entries shall be made therein of all such matters, terms, transactions and things as are usually written and entered in books of account kept by others engaged in an enterprise of a similar nature, and each of the parties hereto shall have free access at all times to inspect, examine and copy them, and shall at all times furnish to the other, correct information, accounts and statements of and concerning all such transactions without concealment or suppression.

Section 5.03 - Distribution of Available Funds

> Receipts and revenues of the Joint Venture from any source whatsoever, shall be applied and distributed in the following order of priority, no distribution being made in any category set forth below unless and until the preceding category has been satisfied in full, unless the Members otherwise unanimously agree in writing:
>
> (a) The payments of all debts, obligations, liabilities, costs and expenses in connection with or on account of the Joint Venture Project including the Management Fee and construction management fee herein provided.
>
> (b) The repayment of any monies loaned or advanced pursuant to Section 3.01 hereof [loans from Firstco to purchase the Joint Venture Properties, long ago repaid].
>
> (c) The distribution of the monies remaining, if any, to the Members of the Joint Venture in accordance with their rights and interest in the Joint Venture as set out in Section 1.04 hereof, subject to a reasonable contingency fund.
>
> All distributions shall be made annually provided that a reasonable reserve can be held by the Trustee for future contingencies.

[19] In a letter dated July 16, 2012, Mr. Frijia confirmed on behalf of Southside that the parties had agreed to the following (the "2012 Agreement"):

a. that in the future, annual financial statements will be reviewed in draft form; and

b. the cash flow will be distributed each year, subject only to deducting amounts agreed by the parties as required with respect to future development and amounts required for working capital.

Conduct of Joint Venture Business and Past Distributions

[20] There has never been a formal meeting of the shareholders or directors of the Trustee Corporation. There was little or no reporting in writing. Prior to Mr. Sprackman's death, the Joint Venture operated collaboratively. Mr. Frijia testified on cross-examination that he spoke to Mr. Sprackman once every week or two and that they discussed and agreed to all major decisions.

[21] Despite their generally successful relationship, Mr. Sprackman and Mr. Frijia had a long-standing disagreement about whether (and to what extent) the Joint Venture should be distributing available cash to the Owners as opposed to using it to fund new development. Mr. Sprackman wanted stable cash flow and for available cash to be distributed to the Joint Venture Owners on a regular basis. Southside did not want or need cash and was prepared to defer distributions.

Southside earns substantial management fees whether or not distributions are paid and also is involved in other investments and businesses outside the Joint Venture.

[22] Even after the Joint Venture began generating significant income in 2011, Mr. Frijia did not initially agree that distributions were appropriate and asserted that the Joint Venture Agreement required repayment of all debts (including long-term mortgage debt that had recently been committed to fund a new phase of development referred to as Westwood II) before anything could be distributed to the Owners. Mr. Sprackman did not agree with this interpretation and maintained that the Joint Venture Agreement required available cash to be distributed while borrowed funds were paid down in the normal course.

[23] After a series of meetings and exchanges of correspondence, Mr. Sprackman and Mr. Frijia reached the 2012 Agreement, in which they agreed that cash would be distributed each year subject "only to deducting amounts agreed by the parties as required with respect to future development and amounts required for working capital". Annual distributions have been made since 2014 with a one year hiatus in 2018.

[24] Mr. Frijia now claims that when he wrote in the 2012 Agreement that the parties would agree to "amounts required with respect to future development" he meant only in respect of future land purchases. Mr. Frijia does not say that he discussed his subjective view and interpretation with Mr. Sprackman. Mr. Sprackman is not here to explain what he subjectively understood those words to mean at the time of the 2012 Agreement.

[25] Since Mr. Sprackman's death in 2020, the plaintiff has discovered that Mr. Frijia has committed the Joint Venture to approximately $47 million in capital improvements or inducements to existing (renewed) or new tenants in commercial space that has already been constructed on the Joint Venture Properties. Mr. Joffe has undertaken a financial analysis that suggests that these commitments will prevent any distributions by the Joint Venture to the Owners before fiscal year-end 2028.

[26] While Mr. Frijia says that distributions might resume in 2027, he admitted on cross-examination that the Joint Venture would need to borrow funds to pay distributions in the face of the capital expenditures that are committed to or that might be committed to.

[27] Southside has also secured permission from the municipality for the Joint Venture to build at least another 80,000 square feet of new commercial space. Mr. Frijia confirmed that he plans to pursue this new development as soon as he can find tenants. Based on Mr. Joffe's (unchallenged) projections, building all this new space will increase the immediate short term capital needs of the

Joint Venture by a further estimated minimum of $18 million, to $65 million,[2] and prevent distributions to the Owners until fiscal year 2030.

[28] In addition, Mr. Frijia testified that the Joint Venture owns significant land that may be suitable for high-rise residential development, and that he now plans to pursue that new residential development as well, at further capital cost to the Joint Venture.

The Test for an Interlocutory Injunction

[29] The test for an injunction is well-established. An injunction should be granted where (a) there is a serious issue to be tried; (b) the moving party would suffer irreparable harm should the injunction not be granted; and (c) the balance of convenience favours granting the injunction: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, at pp. 348-349 and *Le Maitre Ltd. v. Segeren*, [2007] OJ No. 2047, at para. 30.

[30] The "serious issue to be tried" standard in the traditional test is replaced with the "strong prima facie case" standard where the motion seeks a mandatory order. To ascertain this: “the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from* doing something." *R. v. Canadian Broadcasting Corp*., 2018 SCC 5, [2018] 1 SCR 196, at para. 16.

[31] The defendants submitted in their factum that the higher standard also applies where the issue involves the interpretation of a contractual term, based on the case of *Global Knowledge Network (Canada) Inc. v. ESI International Inc*., 2009 CanLII 72335 (ON SC). The plaintiff points out that this case was based on the now outdated view that contract interpretation is a question of law (which the Supreme Court of Canada has said is not the case in *Sattva v. Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633). The application of a higher standard for an interlocutory injunction in contract interpretation cases was rejected in *Barry's Bootcamp Canada Inc. v. 100 Bloor Street West CanLII Corporation*, 2022 ONSC 2962, at paras. 11-13. I similarly reject this proposition, although it has no bearing on the outcome of this case for reasons detailed in the next section of this endorsement.

Analysis

The Merits Branch of the Injunction Test

[2] Different estimates have been given for the cost to construct an additional 80,000 square feet of commercial/retail space but the low end of the range is approximately an additional $18 million over and above the $47 million in capital already committed to leasehold improvements/inducements.

[32] The Supreme Court of Canada in *CBC* explained (at para. 15) that a mandatory injunction "directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or otherwise 'put the situation back to what it should be'".

[33] While the proposed interlocutory orders associated with development and borrowing are worded as prohibitive (not to develop or borrow without consent), the real essence of what the plaintiff seeks is to require Southside to follow the Joint Venture Agreement and 2012 Agreement, and comply with a mandatory governance structure that the plaintiff contends requires Southside to provide advance disclosure, consult with Matter Corp. and seek its consent.

[34] Where the relief sought, "even to the extent that it is limited to require the defendants to give notice, is, in substance, a request for a mandatory order because the overall effect of the injunction would be to require the defendants to do something, as opposed to refrain from doing something" it invokes the higher strong *prima facie* case standard: see *Modopoulos v. Hershberg*, 2021 ONSC 2025, at para. 37. The proposed New Development Order and Borrowing Order have the overall effect of requiring the defendants to do something and invoke the higher standard.

[35] The disclosure of records sought is also clearly a mandatory order, requiring the defendants to do something. Matter Corp. concedes this.

[36] Having considered the essence of what the plaintiff seeks to enjoin, I have determined that the strong *prima facie* case standard applies to the injunction orders sought in this case. This standard requires Matter Corp. to establish that it is "clearly right" and "almost certain", or there is a strong likelihood that, it will be successful at trial in proving the allegations set out in its statement of claim: see *CBC*, at paras. 15 and 17. That is the standard that has been applied in the analysis that follows.

[37] I am satisfied that Matter Corp. has met the higher merits standard for certain aspects of the injunctive relief it seeks, specifically:

a. Within the Production Order, to compel production of existing information about and records of the Joint Venture, including about any new development plans, budgets, borrowing and other business.

b. Within the New Development Order, to compel Southside to consult with Matter Corp. and seek its consent regarding any future development of new commercial and residential space on the Joint Venture Properties.

[38] I am not satisfied that Matter Corp. has met the higher merits standard for the Borrowing Order by which it seeks to compel Southside to consult with Matter Corp. and seek its consent for any further borrowing, nor has it done so with respect to the remaining aspects of the Production Order (documents that do not exist and that would have to be created) and the New Development Order (working capital commitments with respect to the leasing of existing space).

a) <u>The Production Order</u>

[39] Section 5.02 of the Joint Venture Agreement mandates that each Owner "shall at all times furnish to the other, correct information, accounts and statements of and concerning all such transactions without concealment or suppression". Other provisions of the Joint Venture Agreement make it clear that Southside's nominee is the authorized signing officer of all agreements and is in charge of the banking and the accounting. Southside controls all the books and records of the Joint Venture and must provide available information and records to Matter Corp. The 2012 Agreement additionally entitles Matter Corp. to be provided with draft annual financial statements for review. Matter Corp. has established a strong *prima facie* case for its entitlement to information and records about the Joint Venture.

[40] Southside argues that it has complied with any production and disclosure obligations it has through various disclosures it has made, and through its offer to allow Matter Corp. to attend the Southside office to review whatever it wants regarding the Joint Venture's business. It further notes that Matter Corp. has not availed itself of this opportunity. Therefore, Southside contends that there is not a strong *prima facie* case of any breach of its contractual or other disclosure obligations,

[41] Southside's offer to Matter Corp. to take a self-guided tour of the filing cabinets at its offices is not a substitute for an Owner/manager's obligation to produce documents to a 50% Owner who is entitled to be provided with the books of account and records of the Joint Venture business. Southside has provided some documentation, but not all of what Matter Corp. has asked for. At the motion, Southside confirmed that it is prepared to provide Matter Corp. with any documents that exist.

[42] There is a strong likelihood that Matter Corp. will succeed in its claim that Southside has not met its contractual obligation to provide existing information and records about the business of the Joint Venture. A strong *prima facie* case has been established that Southside remains obligated to provide the requested information and documents that are available, or as they become available, in a timely manner.

[43] Conversely, a strong *prima facie* case has not been established that Southside (or the Trustee Corporation) has an obligation to create documents that do not exist, such as overall budgets and plans, in order to satisfy the Production Order. The only exception to this would be those documents that Southside is otherwise obligated to create in its role as manager/Owner (an obvious example, that the parties provided for in the July 2012 Agreement, being the draft annual financial statements).

[44] This does not mean that every item listed on the updated Schedule "A" list of requested disclosure and production would necessarily be included in a Production Order, as there is evidence that some of the requested documents do not exist and would not be prepared in the normal course, particularly some of the future oriented material. Southside will have to take the time to respond individually to the listed requests, and any future ones, to identify those for which there are no documents and there is no information to provide by way of response and to otherwise provide the requested disclosure.

b) <u>The New Development Order</u>

[45] The 2012 Agreement provides that Matter Corp. will be consulted and given the opportunity to agree (or not agree) regarding amounts required for future development. It also allows for amounts needed for such agreed future development to be deducted from the available cash flow to be distributed each year.

[46] There is a strong *prima facie* case that the 2012 Agreement (written by Mr. Frijia himself) is valid and enforceable. The regular discussions between Mr. Frijia and Mr. Sprackman, and the distributions of dividends that occurred in most years after it was entered into (as the Joint Venture's debt was being reduced), are consistent with the parties adherence to and acceptance of the 2012 Agreement.

[47] The 2012 Agreement is itself consistent with section 5.03 of the Joint Venture Agreement mandating that there will be annual distributions of net cash (after payment of expenses), subject to a reasonable reserve that the Trustee Corporation is permitted to hold for future contingencies. The 2012 Agreement further clarifies that "the cash flow will be distributed each year, subject only to deducting amounts agreed by the parties as required with respect to future development" [emphasis added].

[48] Despite their litigation position, the defendants have only raised general "questions" about whether there was an actual agreement entered into in 2012 and, if so, about its scope and enforceability.

[49] The defendants primary defence focusses on the distinction they seek to draw between future development of the existing Joint Venture Properties and the future development of new lands, not yet purchased by the Joint Venture. They maintain that they are not in breach of the 2012 Agreement because, according to Mr. Frijia's subjective understanding and interpretation of the phrase "future development", it was only intended to apply to future development of new lands purchased by the Joint Venture.

[50] Mr. Frijia’s subjective understanding about what future development means is of little value to the interpretive exercise. One party's subjective intention and understanding rarely is. Mr. Frijia does not suggest that this understanding was shared by or discussed with Mr. Sprackman at the time and there is no evidence that Mr. Sprackman shared this same understanding.

[51] Reading the Joint Venture Agreement as a whole, it is clear by its own terms (for example, see sections 1.02, 1.04 and 2.05) that the parties treated the land purchase of the Joint Venture Properties as distinct from construction, management, development and operation of the Joint Venture on the Joint Venture Properties. Further, the common meaning of development is typically something done on and to lands after they have been purchased. It is reasonable to expect that experienced developers such as Mr. Frijia and Mr. Sprackman understood the difference between purchasing and developing land. There is a strong *prima facie* case that it was within the objective contemplation of the Owners that they would be developing the Joint Venture Properties over time and that the phrase "future development" in the 2012 Agreement was directing itself to future development on the existing Joint Venture Properties.

[52] The other argument raised by the defendants against this interpretation (that new development includes development of the existing Joint Venture Properties) is that they contend that requiring consensus for decisions about the future development of existing properties is inconsistent with Southside's total control over the management and operation of the business of the Joint Venture (for example, in sections 2.03, 2.05 (e), 4.01 and 5.01 of the Joint Venture Agreement). They further argue it is inconsistent with Southside's veto regarding any directors' decisions (in section 2.03 (g) (vii) of the Joint Venture Agreement). But there is a strong *prima facie* case (as already found) that this is precisely what the parties did agree to regarding decisions about future development that could potentially impact distributions to the Owners. This interpretation is not, as the defendants suggest, the imposition of an entirely new governance scheme that is at odds with the provisions of the Joint Venture Agreement when the full context and terms of the 2012 Agreement are accounted for (as outlined earlier).

[53] Taking all of this into consideration, there is a strong likelihood that the 2012 Agreement will be found to be consistent with both the conduct of the parties and the factual matrix surrounding it and will be found to apply to future development of the Joint Venture Properties already owned.

[54] Mr. Frijia has said that he intends to pursue future development of new commercial and residential space on the Joint Venture Properties without consulting with Matter Corp., consistent with how Southside has been conducting the business of the Joint Venture since Mr. Sprackman's death.

[55] I find that Matter Corp. has established a strong *prima facie* case of anticipatory breaches of Southside's contractual obligations to seek Matter Corp.'s consent regarding future development of new commercial and residential space on the Joint Venture Properties. Whether Matter Corp. is entitled to all the specific relief that it is asking for if these claims are proven at trial remains to be determined but need not be decided at this interim injunction stage.

[56] Conversely, the case is not as strong with respect to the contention that Matter Corp. must approve amounts required for working capital (e.g. ongoing expenses and liabilities, including arising out of leases or leasehold improvements or inducements offered to tenants by Southside), even if those might reduce the cash available for annual distributions. The case is weaker in this regard because of how the 2012 Agreement is worded: it refers to amounts "as agreed" by the parties with respect to future development, but only refers to amounts "required" for working capital. The latter part of the sentence is not qualified by the words "as agreed". That may be a serious issue for trial, but I do not find that it meets the high merits standard of a strong *prima facie* case on the record for purposes of granting an interlocutory injunction.

c) The Borrowing Order

[57] A strong *prima facie* case has not been made out for the requested interlocutory Borrowing Order. There is no express requirement for consent to future borrowing in either the Joint Venture Agreement or the 2012 Agreement. Southside's management functions under the Joint Venture Agreement include arranging for financing for the Joint Venture.

[58] The requested Borrowing Order would have to flow from the oppression claims (e.g., the alleged manipulation of borrowing terms to extend the veto power under s. 2.03 (g) (vii) of the Joint Venture Agreement) rather than breach of contract claims. The oppression claims are factually more complex and are predicated on disputed facts and legal arguments that have not been established to the higher standard of strong *prima facie* case on the record for this motion.

Irreparable Harm

[59] Harm is irreparable if it cannot be quantified in monetary terms or cannot be cured. *RJR*, at p. 341.

[60] Governance disputes can involve irreparable harm, because once an entity (in this case, the Joint Venture) takes a step (in this case, committing to new development involving third party tenants and lenders) that step is difficult or impossible to undo: Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2020) at §5.5.

[61] While the cases cited by Matter Corp. involve the potential harm that can be done by someone who has allegedly improperly seized control of a corporation away from the moving party (see *Ayotte v. Beauline*, 2016 ONSC 4928 and *Cheema v. Dhaliwal*, 2023 ONSC 6693), in principle there is no distinction between that and a situation where a party is allegedly improperly exercising its control in a manner that exceeds its authorization, to do things that may be difficult or impossible to undo.

[62] As was stated by Pepall J. in *Le Maitre Limited v. Segeren*, 2007 CanLII 18735, at para. 34: "Turning to the issue of irreparable harm, it has repeatedly been stated that courts should avoid taking a narrow view of irreparable harm. It seems to me that irreparable harm would ensue if the transaction were completed and rendered irreversible."

a) <u>The New Development Order</u>

[63] Once Southside executes contracts on behalf of the Joint Venture in respect of new development, the damage is done. Southside's authority to bind the Trustee Corporation (and Joint Venture) *vis-à-vis* third parties is not challenged. It is the process by which decisions are made before binding commitments with third parties are entered into that is challenged.

[64] This is not just about damages that may be caused by Southside's unilateral actions (and compensated for after the fact). It is about a course of conduct that fundamentally disregards one of the Owners' right to be consulted about future development that ties up funds that would otherwise be available for distribution, potentially for a number of years. Unilateral commitments for future development of new commercial and residential space on the Joint Venture Properties could also impact the Joint Venture's ability to sell or refinance the Joint Venture Properties moving forward.

[65] Southside argues that there can be no irreparable harm from an anticipated state of affairs that might result in no dividends. It argues that Matter Corp. has the ability to call a directors' or shareholders' meeting at any time to consider a resolution to issue dividends, including through

additional borrowings if necessary and suggests that is the appropriate recourse, not an injunction to prevent new development that is motivated by a desire to receive annual distributions. As with any corporation, that is the process that allows for resolutions to be presented, debated, voted upon, and documented. Matter Corp. has never taken this step and thus the record is devoid of evidence about whether dividends will be issued.

[66] This focusses on the wrong point. Until 2024, dividends were paid. It is future dividends that are being put in jeopardy by the potential for future new development, which Mr. Frijia has said he intends to proceed with unless ordered otherwise by the court. If the Joint Venture continues to commit to development and is required to borrow money to fund it, then if a meeting is called, the directors or shareholders will have one hand tied behind their backs when it comes time to decide whether to make a distribution and whether additional borrowing is justified to allow for it. Further, Southside itself emphasizes that it has a veto over these decisions because there is still outstanding debt that it has guaranteed that will remain in place until 2026 (even if it doesn't guarantee any new debt going forward).[3]

[67] In these circumstances, there will be little to be gained by calling a board or shareholder meeting to consider making distributions; it does not address the immediate concern, which is the commitments for new development that might be made in the interim that would necessarily influence those decisions. The ability to call a board or shareholders meeting after the fact does not mitigate the irreparable harm that will be caused if the New Development Order is not made with respect to commitments for the future development of new commercial or residential space on the Joint Venture Properties. Such commitments cannot be undone and change the nature and extent of the Joint Venture development and could have irreversible implications for the ultimate remedy that the plaintiff seeks, for the sale of the Joint Venture Properties (e.g., the difference between selling vacant development land vs. selling land that is subject to development contracts): see *Modopoulos*, at para. 64.

[68] If there had been a finding of a strong *prima facie* case for the New Development Order to be extended to new working capital commitments in respect of tenancies at the existing commercial space on the Joint Venture Properties, the same argument of irreparable harm might have applied; although, the nature and extent of any change to the Joint Venture development would be less impactful with respect to existing commercial space. However, that need not be determined since the New Development Order will not extend to those working capital commitments for reasons previously indicated in this endorsement.

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[3] The plaintiff asks the court to exercise caution regarding Mr. Frijia's evidence about the existing guarantees because they were only disclosed on cross-examination, rather than in response to the motion initially. However, they do appear to have been provided on the evidence he has given. Thus, absent a good reason to disregard that evidence, the court must accept that there are currently guarantees in place that would entitle Southside to the casting vote in respect of any matters that would be decided by a board resolution, such as a decision to make a distribution to the Owners.

b) The Production Order and the Borrowing Order

[69] Similarly, non-compliance with obligations to provide information and documents can lead to irreparable harm if it leaves Matter Corp. in the position of only finding out about third party commitments for new development, working capital and borrowing after they have been made. This risk will remain so long as nothing is done and Southside is permitted to carry on as it has since Mr. Sprackman died.

[70] The Production Order will inform Matter Corp.'s decisions regarding any future efforts to exercise its contractual and other rights as appropriate while the litigation is pending and beyond, depending upon the outcome. This would apply even in relation to aspects of the Joint Venture business that is not subject to any interim injunction. Losing this ability will likely have implications that are not easily translatable into damages.

[71] One example of the type of disclosure that the plaintiff needs now, not later, is information and documents about proposed third party financing. The Borrowing Order is not being made because the higher merits standard has not been met. Nor has irreparable harm in respect of that order been demonstrated where the lending arrangements already in place include guarantees that give a casting vote to Southside that is expected to remain in place during the period leading up to the trial, assuming the trial can be scheduled within the next twelve to eighteen months. However, information about the extent and terms of existing or proposed financing commitments will still inform the decision making and conduct of Matter Corp.

[72] This is where the Production Order and the Borrowing Order intersect. While the Borrowing Order is not being made, the Production Order should alleviate at least the disclosure aspects of any proposed new financing and provide Matter Corp. with the opportunity to do something about it, and to make inquiries about any proposed new guarantee by Southside.

[73] Southside suggests that Matter Corp. will, as a practical matter, inevitably be contacted by any prospective lenders about proposed new financing in the interim in any event. That does not relieve Southside of its disclosure obligations.

Balance of Convenience

[74] The final stage of the injunction test is a determination of which of the parties will suffer greater harm from the granting or refusing of the proposed interlocutory injunction. see ***RJR***, at pp. 342-343.

a) The New Development Order

[75] The initial argument against the New Development Order was that the Joint Venture will suffer significant harm if the court sets aside leases that have already been executed, but Matter Corp. does not seek to undo any existing leases; it accepts that they are in place and binding *vis-à-vis* the counterparties to them.

[76] Southside also claims that the Joint Venture's operations will be impeded if Matter Corp. must consent to all new leases. Matter Corp. says it is only seeking to enjoin leases that require an investment of working capital in excess of $250,000 without its consent. Even at that level, there are a number of examples of such leases having been entered into before and after this litigation was commenced. Therefore, it is reasonable to conclude that an injunction, even one at the $250,000 working capital commitment threshold, would continue to impact leasing decisions for the Joint Venture.

[77] Southside says these types of working capital commitments associated with the leasing of existing commercial space on the Joint Venture Properties is part of the normal course of the Joint Venture's business that it is tasked with managing.

[78] Mr. Frijia testified that business decisions have been made in the past by Southside about leasehold improvements and commitments of working capital to both existing and new tenants. In its role as manager, it has the authority to make those decisions on a case-by-case basis. Southside has not made such decisions based on overall budgets or plans; whereas Mr. Joffe has stated on cross-examination that if he is asked for Matter Corp.'s consent he will insist on overall budgets and plans for the Joint Venture and its future plans before he will provide his consent to an individual lease proposal. While not articulating any particular concern about most of the leases that have been entered into, Mr. Joffe could not say (even now) whether he would have consented to the majority of those leases without general plans, budgets and projections that do not exist and would have to be created.

[79] This is a concern for the Joint Venture's ability to lease up the remaining estimated 6% of the existing commercial space on the Joint Venture Properties that is untenanted. Further, this scenario could also prevent Southside from negotiating tenant arrangements in a timely manner while Southside navigates disclosure demands and waits for a decision from Matter Corp. This concern is justified based on Mr. Joffe's testimony. The requested injunction in this respect would place Southside in the position of ceding its management role to the plaintiff.

[80] The defendants have agreed to keep the without prejudice Disclosure Agreement in place with the $750,000 consultation threshold. That strikes the appropriate balance for the ongoing leasing decisions.

[81] For these reasons, if I had found the New Development Order was justified on the merits to extend to working capital commitments for existing or new leases (which I did not find), at a $250,000 working capital commitment threshold the balance of convenience would not favour the granting of the injunction (New Development Order) to extend to such circumstances. Rather, the balance of convenience favours the manager of the Joint Venture and its ability to make decisions about leases, even those that may require the investment of working capital up to the $750,000 threshold, to complete the lease up of the existing commercial buildings on Joint Venture Properties.

[82] However, the same does not hold true for future development of new commercial or residential space on the Joint Venture Properties, where I find the balance of convenience favours the plaintiff notwithstanding Southside's concerns.

[83] Southside is concerned that the proposed injunction under the New Development Order will mean that the plaintiff's agreement (or non-agreement) to any proposed new future development could be motivated by Matter Corp.'s stated priority for continued annual distributions. This decision about new development might be made without a board or shareholders meeting. Avoiding having to call a meeting to consider new development also avoids the veto that Southside has over decisions at the board level (under the existing financing that it has guaranteed and that will remain in place until 2026).

[84] Southside contends that the balance of convenience should not favour a situation that overrides its board veto through the casting vote provisions of the Joint Venture Agreement. Southside's argument also relies on the general legal principle that decisions about distributions are in the discretion of the board and should not be made through a process that circumvents the board process: see Kevin McGuinness, *Canadian Business Corporations Law*, 4th ed., Vol. 2 (Markham: LexisNexis, 2023), at para. ¶19-522.

[85] These contentions by Southside are problematic on two levels. First, the Joint Venture Agreement itself makes distributions mandatory under section 5.03 once the other priority payments (for liabilities and expenses) have been satisfied. Even then, "[a]ll distributions shall be made annually provided that a reasonable reserve can be held by the Trustee for future contingencies." Thus, by the parties' agreement from the outset, the board's discretion with respect to distributions is fettered. Second, they fail to consider the 2012 Agreement which modified those provisions with respect to decisions concerning this very type of new development, requiring that both the Owners both agree to it.

[86] Matter Corp. has raised other arguments against the heavy reliance placed by Southside on the veto/casting vote, but I need not get into those for purposes of this analysis.

[87] There is no evidence that the Joint Venture will lose good opportunities, or any opportunities, if new future development and construction cannot proceed without Matter Corp.'s consent pending trial. Any concerns would be purely speculative since there are no plans in place for this. Speculative concerns will not typically tip the balance of convenience: see *Golden Globe Pizza Inc. v. Domino's Pizza of Canada Ltd*., 2015 BCSC 356, at paras. 24-26.

[88] Outside of the leasing decisions, the balance of convenience favours Matter Corp.'s right to be consulted and agree to any future development of new commercial or residential space on the Joint Venture Properties, which will inevitably exceed the $250,000 threshold.

b) The Production Order

[89] For the requested disclosure, there can be no suggestion of harm to Southside in having to provide disclosure of known information and existing records. As indicated earlier in this endorsement, it will not be obligated to create documents. That is unless they are records under

section 5.02 of the Joint Venture Agreement that comprise part of the books and records the Joint Venture is already required to keep or unless they are draft financial statements that Southside agreed to provide under the 2012 Agreement.

c) The Borrowing Order

[90] For reasons previously indicated, a strong *prima facie* case has not been established in favour of granting the requested Borrowing Order.

[91] Under the existing financing, the Joint Venture could be debt free by 2026. Matter Corp. is concerned that additional borrowing commitments will be entered into that bind the Trustee Corporation and the Joint Venture. It is further concerned that Mr. Frijia and his affiliates will provide guarantees, even if not required by the prospective lenders, so as to perpetuate Southside's veto (casting vote) for board decisions.

[92] If this transpires, it can be addressed as part of the oppression remedy (if established at trial). That remedy is broad and flexible enough to correct for any such unwarranted veto or casting vote if later determined to have been improperly and unnecessarily extended by Southside providing guarantees for new financing that were not warranted. Additionally, any loans will have to be justified as having a legitimate business purpose and to have been properly approved if later challenged.

[93] As a practical matter, most additional borrowing would likely be in service of new future development that will be subject to the New Development Order. Further, according to Mr. Frijia, outside lenders have in the past, and likely will still, require Matter Corp.'s consent to any proposed financing.

[94] The balance of convenience does not favour granting the Borrowing Order to override Southside's management authority in respect of financing.

Final Disposition and Costs

Recap of Interlocutory Orders and Directions

[95] For the above reasons, the New Development Order (with respect to future development of new commercial and residential space on the Joint Venture Properties, but not with respect to leasing of existing commercial space) is granted. The Production Order is granted with respect to known information and such existing books of account and records and draft financial statements of the Joint Venture/Trustee Corporation as the plaintiff may reasonably request. Southside is directed to respond in a timely manner to the specific requests, and any future ones, to identify those for which there are no documents and there is no information to provide by way of response, and to otherwise provide the requested disclosure.

[96] These interlocutory orders shall remain in place until trial, subject to any further order of this court.

[97] The without prejudice Disclosure Arrangement contained in the April 5, 2024, endorsement shall also remain in place until a trial decision or other disposition of this action.

[98] The balance of the interlocutory relief sought by Matter Corp. is dismissed.

Moving Forward

[99] The court recognizes that an injunction is an extraordinary remedy, and its impacts should be minimized. Both parties expressed at the hearing of this motion their willingness to work on a fast track to trial. Ideally, the trial will take place before the existing financing and guarantees mature in 2026. The parties have indicated that they are committed to doing the examinations for discovery in the fall and to being put on a track for a trial within twelve to eighteen months after that. They should proceed in this manner as expeditiously as possible and the court directs that they do so.

[100] This can be achieved through a case conference to timetable the steps through discovery and then a further timetable to trial once the parties are ready to file a trial record. These case conferences can be arranged in the normal course through the Commercial List scheduling office. I will assist if I am available but am not seized and they may be scheduled before any available judge.

Costs

[101] In accordance with the court's direction at the conclusion of the hearing, costs outlines for this motion were exchanged and uploaded onto Case Center. The parties were asked to try to reach an agreement on costs, but have not been able to do so. While the plaintiff was successful in certain respects, it was not in others. Its costs outline indicates all-inclusive costs on a partial indemnity scale of $198,507.01 and on a substantial indemnity scale of $293,563.29. The costs outline of the defendants indicates all-inclusive costs on a partial indemnity scale of $180,448.68 and on a substantial indemnity scale of $266,857.64.

[102] The court encourages the parties to try to reach an agreement on costs now that the outcome is known and given that their costs outlines disclose similar amounts claimed. If they are unable to do so, a case conference may be scheduled before me for further directions regarding costs. If the parties wish to exchange written submissions regarding costs, to be supplemented by oral submissions at the case conference, those should be limited to a maximum of five pages double spaced for each side. Any case conference to address the matter of costs shall be scheduled for a minimum of one hour.

[103] If the parties just wish to seek directions regarding cost submissions to be made at a later date, that may be done at a 9:30 scheduling appointment before me. Brief Aide Memoire's (of no more than 1.5 pages each, double spaced) may be delivered in advance of any such scheduling appointment.

KIMMEL J.

Date: September 5, 2024