COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ai Kang Capital Inc. v. Xing,*
2024 BCCA 175

Date: 20240506
Dockets: CA47823; CA47824

Docket: CA47823

Between:

Ai Kang Capital Inc.

Appellant
(Respondent)

And

Huai Xiang Xing and Bin Chen

Respondents
(Petitioners)

And

Aikang GP (006) Management Ltd. and Dong Wang aka Wang Dong

(Respondents)

– and –

Docket: CA47824

Between:

Dong Wang aka Wang Dong

Appellant
(Respondent)

And

Huai Xiang Xing and Bin Chen

Respondents
(Petitioners)

And

Aikang GP (006) Management Ltd. and Ai Kang Capital Inc.

(Respondents)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated September 13, 2021 (*Xing v. Aikang GP (006) Management Ltd.*, 2021 BCSC 1787, Vancouver Docket S201944).

Counsel for the Appellant in CA47823:	D.A. Byma J.M. Kindrachuk
Counsel for the Appellant in CA47824:	S.K. Boyle D.J. Urquhart P.J. Palmer
Counsel for the Respondents:	S. Pun
Place and Date of Hearing:	Vancouver, British Columbia October 21, 2022
Place and Date of Judgment:	Vancouver, British Columbia May 6, 2024

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Mr. Justice Hunter

Summary:

Mr. Xing and a corporation owned by Mr. Chen were minority shareholders in Aikang GP; A.K. Capital was the majority shareholder. Dr. Wang, through his company, controlled 50% of the shares in A.K. Capital. He acted as sole director of Aikang GP in recent years. Mr. Xing and Mr. Chen brought a petition seeking a declaration that the affairs of Aikang GP were being conducted in an oppressive manner and asking for a variety of remedies. A.K. Capital and Dr. Wang sought to have the petition referred to the trial list. The chambers judge dismissed the application. Although he considered that some of the issues in the proceeding raised arguable questions of fact and law, he found that the question of whether the company's affairs were being conducted oppressively could be determined summarily. A.K. Capital and Dr. Wang appealed, seeking an order that the matter proceed as a trial. Mr. Xing and Mr. Chen opposed the appeal, arguing not only that the matter should proceed summarily in the trial court, but also that issue estoppel would prevent the defendants from arguing that the company's affairs were not conducted oppressively. After the appeal was commenced, but before it was argued, this Court established a more flexible approach to the question of when the trial court should refer a petition to the trial list (Cepuran v. Carlton, 2022 BCCA 76).

Held: Appeal dismissed. While there were some flaws in the judge's analysis, it was not an error to refuse to refer the petition to the trial list, particularly in light of the more flexible approach adopted by this Court in Cepuran. The matter is returned to the B.C. Supreme Court for further proceedings. That Court will have to determine what procedures should be undertaken to resolve the dispute fairly and efficiently.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The respondents, Huai Xiang Xing and Bin Chen, commenced a proceeding by petition alleging that the affairs of Aikang GP (006) Management Ltd. ("Aikang GP") had been conducted in a manner oppressive to them. The majority shareholder in Aikang GP is Ai Kang Capital Inc. ("A.K. Capital"). That company and its director, Dr. Dong Wang, applied to have the proceeding converted into an action. The judge dismissed the application, and A.K. Capital and Dr. Wang appeal.

[2] The matter under appeal is complicated by the fact that the framework for referring petitions to the trial list was modified by this Court in *Cepuran v. Carlton*, 2022 BCCA 76 [*Cepuran*], a decision that was pronounced after the order was made in the court below but before the appeal was heard. Further, the parties disagree on several fundamental issues, including the scope of the decision below and the approach that this Court should apply on appeal.

[3] For reasons that follow, it is my view that, while there were some errors in the approach adopted by the chambers judge, it cannot be said that his decision to dismiss the application, as framed, was improper. That said, it is essential that the trial court retain full procedural control over the litigation, and the existing order should not be treated as foreclosing it from making further orders as to how the matter should proceed.

[4] The issue of what procedures the court below should adopt to resolve the case is one that should be determined by that court. It is in the best position to assess what procedures are most likely to be expeditious and effective, and it is that court that will be faced with the task of managing the procedures.

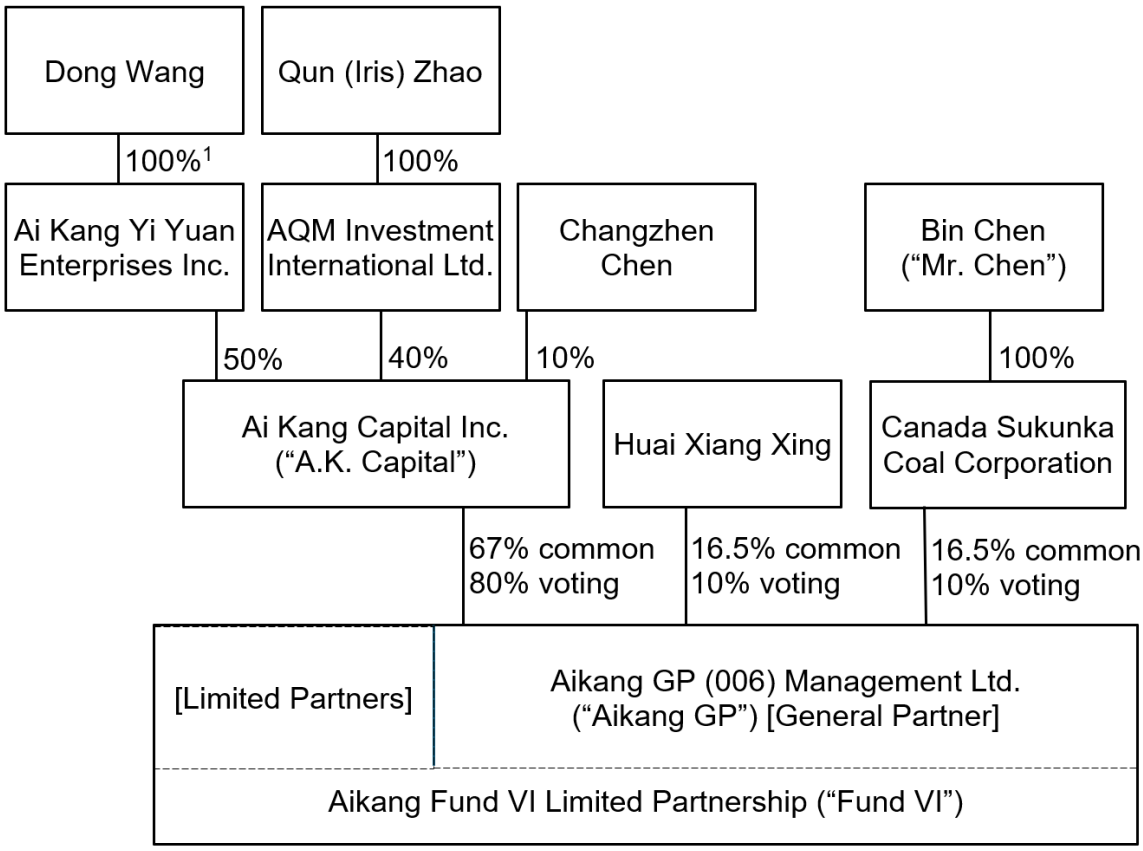
Background to the Claim

[5] For the purposes of this appeal, it will often be convenient to think of Dr. Wang as controlling the majority interest in Aikang GP and Mr. Chen and Mr. Xing as the minority shareholders. The actual holdings are, however, considerably more complicated. For the sake of completeness and accuracy, I begin by setting out the actual ownership structure. I am including a chart in this judgment to assist in explaining the roles of the various players.

[6] Mr. Xing is a minority shareholder in Aikang GP. He holds 16.5% of the common shares, and 10% of the voting shares. Mr. Chen's shareholdings in Aikang GP are the same as Mr. Xing's, but Mr. Chen holds his interest through his corporation, Canada Sukunka Coal Corporation. The remaining shares in Aikang GP (67% of the common shares and 80% of the voting shares) are held by A.K. Capital.

[7] A.K. Capital has three shareholders: 50% of the shares are controlled by Dr. Wang through his company, Ai Kang Yi Yuan Enterprises Inc. The other major investor in A.K. Capital is Qun (Iris) Zhao, who holds 40% of the shares through her company, AQM Investment International Ltd. The remaining 10% interest in A.K. Capital is held by Changzhen Chen (no relation to the plaintiff Bin Chen). Changzhen Chen does not figure prominently in this litigation, and when I refer to "Mr. Chen", I am referring to Bin Chen.

[8] Aikang GP is the general partner in the Aikang Fund VI Limited Partnership ("Fund VI").



[1] The parties describe Dr. Wang as having "effective control" of 100% of the shares in Ai Kang Yi Yuan Enterprises Inc.

[9] Fund VI invested in development property on Kaslo Street in Vancouver in November 2016, paying $52 million to purchase the shares of a company that holds legal title to two lots as a bare trustee. The Bank of China provided Fund VI with financing in the amount of $30 million secured by a mortgage over the land. Dr. Wang provided a personal guarantee on the loan. The loan was for a term of two years.

[10] At the same time as Aikang GP made the investment, its shareholders entered into a shareholders' agreement. The agreement required that certain expenditures and investments by the company would have to be authorized by a vote of shareholders representing at least 75% of the company's common shares. In effect, this meant that the transactions covered by the agreement had to have the

support of A.K. Capital and either Mr. Xing or Mr. Chen. The agreement applied to any expenditure exceeding $200,000, any non-arms length transaction not contemplated in Fund VI's partnership agreement, and any transaction that increased Aikang GP's stake in Fund VI.

[11] In the fall of 2018, the mortgage over the Kaslo Street property was due to be renewed. Initially, Dr. Wang indicated that he was not prepared to continue to provide a personal guarantee. It is clear that there were some discussions among the parties with respect to the guarantee, but they do not agree on what, exactly, was discussed or decided.

[12] Fund VI was arranging to sell the Kaslo Street property at that time, and it appears that the Bank of China agreed not to commence foreclosure proceedings or to require renegotiation of the mortgage. It opted, instead, to wait for the sale to complete. Dr. Wang continued to be the guarantor of the loan.

[13] During this period, business arrangements between Dr. Wang and Ms. Zhao became strained. In the Spring of 2018, Dr. Wang acted to remove Ms. Zhao as a director of A.K. Capital. Ms. Zhao commenced oppression proceedings against A.K. Capital and Dr. Wang.

[14] Ms. Zhao remained, at that time, the sole director of Aikang GP. In that capacity, she negotiated the disposition of the Kaslo Street property. Under an agreement that she kept secret from the other Aikang GP investors, Fund VI undertook to sell the shares of the company that held legal title to the property to a third party for $73.5 million (the "Kaslo Sale Transaction").

[15] Dr. Wang wished to have Ms. Zhao removed as the director of Aikang GP and sought a general meeting of the company. The general meeting did not take place until November 2018. At that meeting, Dr. Wang and Mr. Xing were made directors in place of Ms. Zhao.

[16] The Kaslo Sale Transaction was to be completed on March 28, 2019, but complications arose as a result of disputes between the investors, leading to

litigation. On March 22, 2019, in a decision indexed as *Zhao v. Ai Kang Capital Inc.*, 2019 BCSC 587, a judge of the B.C. Supreme Court declared that Ms. Zhao had ceased to be a director of Aikang GP, and that Dr. Wang and Mr. Xing had become directors. He also made orders to ensure that the Kaslo Sale Transaction proceeded.

[17] The net proceeds of the sale, after the discharge of the charges on the land and the payment of sale costs were $36,530,234.50. That amount was held on behalf of Aikang GP by MNP Ltd. On June 25, 2019, the B.C. Supreme Court ordered that $36 million be paid out to the limited partners of Fund VI and to Aikang GP. Aikang GP received approximately $3.6 million of that amount.

[18] There were ongoing disputes between the parties. Dr. Wang asserted that he was entitled to be paid a 1.5% fee for acting as a guarantor for the mortgage. He asserted that Ms. Zhao had agreed to such a fee on behalf of Aikang GP when she was its director. He said that, with interest, the sum had risen to approximately $547,380.

[19] He also contended that he was entitled to a similar fee for continuing to act as guarantor beyond the term of the initial mortgage. Ms. Zhao denied that any fee had been agreed upon for Dr. Wang to act as guarantor but said that a sum of $450,000 had been paid by Aikang GP to A.K. Capital for arranging the Bank of China financing. Mr. Xing and Mr. Chen denied knowledge of any such arrangements.

[20] On September 25, 2019, the parties attended a meeting for the purpose of negotiating an agreement with respect to the guarantee and loan arrangement fees. While it appears that some progress was made on the issues, the parties disagree on the question of what terms were discussed, and on whether there was a settlement.

[21] After the September 25 meeting, Dr. Wang called an annual meeting of Aikang GP. Mr. Xing and Mr. Chen disputed the legitimacy of the meeting, and

neither attended. At the meeting, Dr. Wang purported to remove Mr. Xing as a director, leaving himself as the sole director of Aikang GP.

[22] Mr. Xing and Mr. Chen continued to press for further distribution of the proceeds of the Kaslo Sale Transaction, but no such distribution was made. Dr. Wang asserted that, as the majority shareholder and sole director of Aikang GP, he alone was entitled to determine what funds would be distributed and when distributions would be made.

[23] After Dr. Wang became the sole director, a number of transactions occurred. In December 2019, Aikang GP made payments to law firms totalling approximately $230,000. Dr. Wang said that most of the fees related to work done for Aikang GP but acknowledged that some of the fees related to matters unconnected with that company.

[24] A further amount of $564,961 was paid by Aikang GP to Dr. Wang's company in December 2019. That sum was said to be in respect of fees for guaranteeing the mortgage on the Kaslo Street property.

[25] On January 10, 2020, Aikang GP paid approximately $255,000 to Dr. Wang's company, purportedly as a "finders' fee" for him having attracted investment funds from A.K. Capital, Mr. Xing and Mr. Chen.

[26] On January 14, 2020, Aikang GP transferred $2,000,000 to Dr. Wang's company. Neither Mr. Xing nor Mr. Chen approved the transaction; indeed, they were not even informed of it. Those funds were lent out to a third party on a short-term basis. The funds were repaid to Aikang GP in early February, together with $5,095 in interest.

[27] In February 2020, Aikang GP commenced an action against Ms. Zhao, alleging that she had received a secret commission on the Kaslo Sale Transaction. The action also alleges that Ms. Zhao accepted an offer for the property that was lower than another offer she had received.

[28] Also in February 2020, Mr. Xing and Mr. Chen commenced the current proceedings under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57, alleging that the affairs of Aikang GP were conducted in an oppressive manner. They claim that, under the 2016 shareholders' agreement, several transactions required their approval, but their rights were ignored and approval was not sought. They also say that in operating Aikang GP, Dr. Wang ignored their interests. They place particular reliance on the following:

a) The payment by the company of unexplained legal fees;

b) The payment by the company of a "loan guarantee fee" in respect of the Kaslo Street mortgage;

c) The making of an unauthorized short-term loan of $2,000,000;

d) The payment of a "finder's fee" for attracting investors;

e) The persistent failure to obtain and provide financial statements for the company;

f) The failure to distribute the remaining proceeds from the Kaslo Sale Transaction.

The Procedure Adopted in the Hearing in the Court Below

[29] The appellants applied to have the petition converted into an action and transferred to the trial list. The respondents set the hearing of the petition for the same date as the application.

[30] At the time that the matters came on for hearing, the leading case on the conversion of a petition to an action was *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [*Saputo*]. In that case, the Court held that a petition should be converted into an action whenever there were triable disputes of fact or law. Only where a party was "bound to lose" could the matter be determined under the petition procedure.

[31] The judge decided to deal with the application to convert the petition into an action as a preliminary matter, and then hear full argument on the petition if he decided not to convert it to an action.

[32] I have some difficulty understanding how the parties expected the proceeding to unfold. If the judge found that there was a triable issue, of course, the matter would be converted into an action, and would never be heard as a petition. On the other hand, if the judge found that there was no triable issue, it is difficult to understand what purpose would have been served by hearing further argument on the petition, as the judge would already have determined that the petition respondents were bound to lose.

[33] The judge did, in fact, find that the petition respondents (the appellants) were "bound to lose" on the issue of whether there was oppression. This has led to some rather strained arguments on appeal. The appellants say that they have been denied procedural fairness because the judge did not fully hear their arguments on the petition before concluding that they were bound to lose. On the other hand, the respondents say that, while the petition was not technically heard, the finding that there is no arguable defence raises an issue estoppel such that the appellants would be precluded from making arguments on the petition itself.

[34] It seems to me that, given the strictness of the *Saputo* test, the judge's decision to bifurcate the hearing was not the most efficient manner of proceeding, and was bound to lead to confusion.

The Framework Adopted in *Cepuran*

[35] It is not necessary, however, to say anything further on that issue, as the *Saputo* test is no longer the law in British Columbia. In *Cepuran,* this Court rejected the idea that the mere existence of a *bona fide* triable issue required a petition to be converted into an action. The Court noted that the *Supreme Court Civil Rules* now provide judges with tools that allow considerable procedural flexibility:

> [159] The modern approach to civil procedure, as encouraged in *Hryniak* [*Hryniak v. Mauldin*, 2014 SCC 7], is to allow parties and the trial courts to

> tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
>
> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[36] The Court in *Cepuran* declined to give comprehensive guidance on the issue of when the trial court is required to convert a petition into an action. The Court was, in my view, wise to leave that issue open.

[37] Judges faced with applications to convert petitions into actions now have considerable flexibility in deciding what procedures are most appropriate. They may find that the summary procedure traditionally available for the hearing of a petition is adequate; equally, they may find that the arguable issues are sufficiently pervasive and complex as to require full-scale trial procedures. However, they are not limited to choosing one option or the other. They can also choose hybrid procedures. Rules 22-1(4)(a) and (b) allow a judge to order examination or cross-examination of witnesses, either before the hearing or in court. Rule 22-1(4)(c) provides a judge with the ability to make order for limited discovery of documents. Rule 22-1(4)(e) gives a court flexibility in the types of evidence it chooses to receive. Judges at first instance, in short, have broad discretion as to the procedures they adopt and the manner in which they tailor them to a case.

[38] This Court should not, without good reason, narrow the discretion provided to judges under the *Rules*. First, it is important to recognize that judges at first instance are well-placed to determine what procedures are most likely to be effective and fair in resolving the matters raised in a petition. They should be given scope to exercise discretion in the first instance. Second, interlocutory appeals dealing with such

procedural matters are apt to be time-consuming and inefficient. They are likely to delay the ultimate resolution of a matter.

The Approach Taken by the Judge

[39] The judge's approach was driven by the requirements set out in *Saputo*. He considered himself bound to convert a petition into an action if there was a *bona fide* triable issue. The judge interpreted that requirement narrowly. In his view, as long as he found that the petitioners were bound to succeed in showing oppression, the matter did not need to be converted to an action.

[40] I am not convinced that *Saputo* was intended to operate in that manner. When *Saputo* spoke of a *bona fide* issue of fact or law, it was not confining itself to a part of the proceeding. Rather, I read *Saputo* as having required the matter to be referred to the trial list whenever a triable issue of fact or law would critically affect the analysis of a case.

[41] In this case, the judge considered the elements that needed to be shown in order to establish oppression under s. 227 of the *Business Corporations Act*. In doing so, he was properly guided by the detailed discussion of those requirements in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. The judge found that the petitioners had objectively reasonable expectations based on the shareholders' agreement, and that those expectations had not been met. He also found the petitioners to have shown that at least some of the conduct of the respondents unfairly prejudiced the petitioners and represented an unfair disregard for their interests.

[42] The judge acknowledged there were a number of triable issues in the case: he referred to some as being issues that required an assessment of credibility, for example. He was of the view, however, that despite those issues, there was no arguable case to be made for the proposition that there was no oppression.

[43] The judge placed some emphasis on the fact that he was not, on the application, being asked to address the issue of remedies. Remedies, however, are

integral to oppression under s. 227 of the *Business Corporations Act*. The entire purpose of the section is “remedying or bringing to an end the matters complained of” that are established to be oppressive. The section does not create a statutory cause of action, *per se*. Rather, it provides for limited court supervision of corporate affairs to protect minority shareholders, and grants the court broad remedial powers. It is, therefore, essential that a court applying s. 227 identify the oppressive conduct with some precision.

[44] The judge treated the case before him as if it had been ordered bifurcated into a hearing on the existence of oppression and a hearing on the need for a remedy. In my view, s. 227 does not lend itself to such bifurcation. The judge should not have treated the petition as if it had been two separate proceedings.

Disposition

[45] The judge dismissed the application to convert the petition into a trial. I am not persuaded by the appellants’ arguments that nothing short of a full-scale trial will suffice for deciding the issues on this petition. Much of the underlying story is uncontroversial. While there are some issues of credibility, they are not pervasive. They may well be resolvable by giving the parties limited recourse to cross-examination and discovery.

[46] Given that the case below was argued under the *Saputo* framework, which is no longer applicable, I am not persuaded by the respondents’ argument to the effect that the judge’s tentative findings can found an issue estoppel.

[47] This matter must be returned to the trial court. I would not interfere with the judge’s order dismissing the application to convert this matter into an action. In my view, the appellants have not established that complete trial procedures are needed in order for this matter to be fairly determined. Under the *Cepuran* framework, however, there is broad scope for hybrid procedures, and the trial court will retain its discretion to make orders as to the procedures that will be available.

[48] It is important, as well, to recognize that the order under appeal is interlocutory, and made at an early stage in the proceedings. As the matter develops, the judge in the court below will have the ability to order that effective and fair procedures be followed, unfettered by the early interlocutory order.

[49] I would dismiss the appeal. Neither side has been substantially successful in obtaining the result that they argued for in this Court. I would, accordingly, order that each side bear its own costs.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Mr. Justice Hunter"