COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Weisstock v. Weisstock,* 2023 BCCA 18

Date: 20230105
Docket: CA48696

Between:

Walter Weisstock and Antony Weisstock

Appellants
(Respondents)

And

Albert Weisstock

Respondent
(Petitioner)

And

Silvia Rita Gerard, Witmar Holdings Ltd., and Islandview Country Estates Ltd.

Respondents
(Respondents)

Before: The Honourable Mr. Justice Frankel
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated October 28, 2022 (*Weisstock v. Weisstock*, 2022 BCSC 1886, Kelowna Docket S127397).

Oral Reasons for Judgment

Counsel for the Appellants:	T.J. Moran S. Silver
Counsel for the Respondent, Albert Weisstock:	S.D. Dvorak
Counsel for the Respondent, Silvia Rita Gerard (via videoconference):	Y.D. Gershony L.D. Nykolaychuk
Counsel for the Respondent, Witmar Holdings Ltd.:	D.A. Garner H.A. Bromley

Place and Date of Hearing:	Vancouver, British Columbia January 5, 2023
Place and Date of Judgment:	Vancouver, British Columbia January 5, 2023

Summary*:*

The appellants, two brothers, apply for a stay of an order that requires their family-run real estate and investment company to be liquidated, subject to the parties engaging in a process that requires them to provide the judge with their respective proposals for an alternative to liquidation. They argue that without the stay, they would suffer irreparable harm, either through the liquidation of the company or by being forced to provide the opposing party a with-prejudice proposal as to the disentanglement of the company. The respondents, the brother and sister of the appellants, oppose the stay. They argue that it is either unnecessary or premature, as liquidation is not imminent but only a possibility. Held: Application granted. Absent a stay, the appellants will suffer irreparable harm because the order forces them to participate in a process that will require them to incur costly and nonrecoverable expenses and to disclose information that they would not otherwise disclose. On the balance of convenience, the stay will cause minimal prejudice to the respondents, as the company will continue to operate as it has for years.

[1] **FRANKEL J.A.**: The appellants, Walter and Antony Weisstock, who are brothers, apply for a stay of an order made by Justice Betton of Supreme Court of British Columbia pending the determination of their appeal from that order. The subject matter of the litigation is Witmar Holdings Ltd. (“WHL”), a family-run real estate management and investment company with assets in excess of $70 million, including hotels. The order under appeal requires WHL to be liquidated subject to the parties engaging in a process that requires them to provide the judge with their respective proposals for some other order.

[2] The principal respondents are Albert Weisstock and Silvia Rita Gerard, who are the appellants’ siblings. They say a stay is either unnecessary or premature, to the extent it seeks to avoid the imminent liquidation of WHL.

[3] For convenience, and without meaning any disrespect, I will refer to these persons by their given names.

[4] WHL adopts and relies on the submissions made by Walter and Antony.

[5] WHL was incorporated in 1981 by Willy and Maria Weisstock, who are both now deceased. The beneficial owners of WHL are now their four children: Walter, Antony, Albert, and Silvia. Each claim to hold a 25% interest in WHL’s shares.

Different family members were involved in or excluded from the management of WHL at different times.

[6] In 2011, Albert was excluded from management of WHL by his father. Since at least that time, the relationship between Albert, on one hand, and Walter and Antony, on the other, has been acrimonious. The current directors are Walter, Antony, and Silvia.

[7] Albert brought an application by way of petition for liquidation of WHL pursuant to s. 324 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which provides that a court can order a company liquidated and dissolved where it is "just and equitable to do so". Silvia supported that application. Antony and Walter opposed the application, arguing that there was no evidence the siblings' acrimony had led to operational deadlock within the company. They described the sought-after winding-up and liquidation order as a draconian option of last resort, lacking any cogent or compelling legal basis.

[8] In reasons for judgment pronounced on October 28, 2022 and indexed as 2022 BCSC 1886, the chambers judge determined that the basis for an order that the company be liquidated under s. 324 of the *Business Corporations Act* had been made out. In particular, he found that the "partnership analogy" applied—that WHL was in substance an undertaking formed on the basis of personal relationships, involving mutual confidence, and that there had been a breakdown in the mutual trust upon which that original undertaking was founded. The judge also noted that Albert had a reasonable expectation of being involved in the management of the company, that the lack of deadlock in the day-to-day management of the company was achieved only through the manipulations of voting control, and that the jurisprudence gave the phrase "just and equitable" under s. 324 a broad interpretation in the context of family companies.

[9] While the judge concluded that the basis for a liquidation order had been made out, he declined to make that order immediately. Instead, he noted that each party had indicated they wished an opportunity to work towards a solution before

liquidation was imposed upon them. In the result, he ordered that WHL be liquidated but not before the parties had been given the opportunity to provide him with their views in regard to the distribution of WHL's assets.

[10] The formal order entered to give effect to the judge's reasons reads, in part:

> 2. Subject to paragraph 3 of this Order below, the respondent, Witmar Holdings Ltd., shall be liquated pursuant to s. 324 of the *Business Corporations Act*, SBC 2002, c. 57.
>
> 3. Within twenty-one (21) days of this Order, the parties shall arrange to appear for directions as to the process for receiving submissions on the specific terms under which the parties may be given an opportunity to achieve consensus to disentangle themselves as an alternative to an order for liquidation of Witmar Holdings Ltd.

[11] Walter and Antony filed their notice appealing this order on November 24, 2022.

[12] On December 15, 2022, the chambers judge gave directions with respect to implementing Clause 3 of his order. Those directions require the parties to submit written submissions with respect to the process to be followed in separating their interests in WHL by the end of January. The parties are to appear before the judge again at the end of February to, in effect, discuss next steps.

[13] The parties agree that the process put in place by Clause 3 requires them to provide the judge with their respective with prejudice proposals as to how their interests in WHL should be disentangled. After hearing submissions, it will be open to the judge to accept one of those proposals and make whatever orders are necessary to give effect to it. However, it will also be open to the judge to reject the proposals and make some other order, including the appointment of a liquidator.

[14] Walter and Antony filed their stay application on December 23, 2022.

[15] The three-part test for a stay of proceedings is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. To succeed, the applicant must show:

a) that there is some merit to the appeal in the sense that there is a serious question to be determined;

b) that irreparable harm would be occasioned to the applicant if the stay was refused; and

c) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[16] With respect to the merits, the threshold for determining whether there is a serious question to be tried is “a low one”, as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; “a prolonged examination of the merits is generally neither necessary nor desirable”: *RJR-MacDonald Inc.* at 337–338.

[17] I do not intend to rehearse the parties’ submissions with respect to the merits of the appeal in any detail. Walter and Antony allege the judge made four errors of mixed fact and law. Albert, supported by Silvia, says these grounds are devoid of merit. At this stage, it is enough to say that I consider the proposed grounds arguable; they are worthy of consideration by a division of the Court.

[18] Turning to irreparable harm, as stated in *RJR-MacDonald Inc.* at 341, “‘irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”.

[19] Walter and Antony submit that if a stay is not granted, WHL could be liquidated or otherwise broken apart, rendering the appeal moot. They note that at the last appearance before the judge on December 15, 2022, the judge confirmed that the ultimate relief granted could be the appointment of a liquidator. They say the breakup of WHL, regardless of how that occurs, would cause them to lose the company they have helped build for over 30 years. They further say they would be

prejudiced if required to make a with prejudice divestiture proposal, something they would not do but for the October 28, 2022 order.

[20] Walter and Antony note that to prepare a proposal with respect to a company with significant real estate holdings and ongoing business operations will require them to expend both time and money. For example, assets will need to be appraised, ongoing business interests valued, and tax consequences determined and considered. In addition, there will be added litigation costs.

[21] Albert argues this application is unnecessary and premature to the extent that it seeks to avoid the imminent liquidation of WHL. Albert says the order appealed from does not mandate the liquidation of WHL. Rather, it gives the parties an opportunity to propose resolutions short of liquidation. He says that, therefore, while the liquidation is a possibility, there is no present serious or imminent risk of that happening. Albert further says the sole effect of a stay at this time, would be to prevent the judge from receiving proposals and submissions on potential remedies short of liquidation. When liquidation or some other remedy is ultimately ordered, it will be open to Walter and Antony to then seek a stay. Silvia supports Albert's position. She submits that Walter and Antony are not prejudiced by having to submit a with-prejudice proposal. She notes as well that until the judge orders a remedy WHL will continue to operate as it has for years.

[22] I agree with the position advanced by Walter and Antony. Absent a stay, they will suffer irreparable harm because the order is a "sword of Damocles" hanging over their heads. It forces them to participate in a process that, but for the order they would not be involved in. That process will not only require them to incur nonrecoverable costs, but it will also require them to disclose information they would not otherwise have to disclose.

[23] Last, with respect to the balance of convenience, the following from *RJR-MacDonald Inc.* at 342, is germane:

> The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* [1987] 1 S.C.R. 110 at p. 129

> as: “a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits”. In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

[24] In my view, the balance of convenience tips in favour of Walter and Antony.

[25] As already mentioned, if a stay is not granted, Walter and Antony will be forced to participate in a costly process that ultimately may be for naught. On the other hand, a stay will cause minimal, if any, prejudice to Albert and Silvia; WHL will continue to operate as it has for years.

[26] In summary, I have concluded a stay is warranted. The chambers judge’s October 28, 2022 order is stayed pending the determination of this appeal. Costs of this application are in the appeal.

[27] In light of the stay, this appeal should be heard as soon as reasonably possible, which is something I will now discuss with counsel.

[Discussion with counsel re: timeline of appeal]

[28] **FRANKEL J.A.**: I will direct that the appeal be brought on for hearing on or before May 31, 2023. This direction will be subject to the parties mutually agreeing on a later date.

“The Honourable Mr. Justice Frankel”