IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Norseyl Properties Ltd. v. Mirage Trading Corporation,* 2024 BCSC 1225

Date: 20240509
Docket: S-233936
Registry: Vancouver

Between:

Norseyl Properties Ltd. and AXA Consulting Services Inc.

Plaintiffs

And

Mirage Trading Corporation

Defendant

And

Babak Marzbani, Tecknocan Properties Inc. and Rouzbeh Rabiei

Third Parties

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	J.G.M. Foster
Counsel for the Defendant:	R. Robertson
Counsel for the Third Parties Tecknocan Properties Inc. and Rouzbeh Rabiei:	D.L. Cayley
Counsel for Pan Pacific Business Management Inc.:	J.A. Dawson
No other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. May 9, 2024
Place and Date of Judgment:	Vancouver, B.C. May 9, 2024

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The applicants, two of three third parties, Tecknocan Properties Inc. (“Tecknocan”) and Mr. Rabiei (collectively, the “Applicants”) seek an order striking a third-party notice that has been filed as against them.

Background

[3] By way of a brief, and probably oversimplified, background, by virtue of the notice of civil claim filed on May 29, 2023, the plaintiff seeks, in essence, specific performance of alleged agreements with respect to the defendant company, Mirage Trading Corporation (“Mirage”). The plaintiff alleges that Mirage was a 10% shareholder in Tecknocan. The alleged trust agreement, insofar as it is described in the pleadings, involved two sub-agreements or collateral agreements. I do not want to define them with any meaning ascribed given the disputes, but it is alleged that there were two parts to the agreement.

[4] The first was that Mirage would transfer half of its interest, equating to a 5% interest, in Tecknocan on the basis that approximately 14,504,204 UAE dirham, which is the approximate equivalent of $5 million CAD, would be paid to a third company in satisfaction of a debt owed to that company by the principal of Mirage. The second part of the agreement, which is alleged to have been put into a written agreement that is referred to as a trust agreement, provides that half of Mirage's shares were to be transferred to the plaintiffs in this action, as well as the plaintiff in another action, Pan Pacific Business Corporation (“Pan Pacific”).

[5] Pan Pacific has commenced its own action which, for all intents and purposes, mirrors the within action, and claims to primarily arise out of the same transactions with one slight difference, which I will get to later.

[6] The relief being sought in the notice of civil claim includes:

a) declarations that the plaintiffs are the beneficial owner of the corresponding interest in the shares that were intended to be transferred to them or, in the alternative,

b) an order terminating the trust and making an order that the shares themselves be transferred, and

c) related relief, such as injunctions preventing the transferring of those shares and in the further alternative, damages for breach of trust and/or breach of contract.

[7] In its response, Mirage disputes various terms of the alleged agreements, but primarily takes issue with the fact that, in its view, it has not been established that the consideration was paid for the transfer of the shares, or to put it in more simplistic terms, they argue that the obligation to transfer the legal or beneficial interest was not triggered.

[8] In the course of raising that defence, Mirage provides a great deal of background in the response as to how the shares themselves had been dealt with, including with respect to some involvement by a third party, Mr. Rabiei's father.

[1] Mirage also filed a third party notice which was amended and, in addition to repeating and relying on the facts as set out in the response to civil claim, raises other facts with respect to the role of Mr. Rabiei and Tecknocan, including oppression remedies and claims as against Tecknocan and Mr. Rabiei with respect to various issues that they raise, including that the Mirage's shareholders' loans would be treated *pari-passu* with shareholder loans by Tecknocan's other shareholders, that they would participate in the management of Tecknocan, and that Mirage would be treated fairly. There are various particulars plead regarding how those duties were allegedly not complied with, including a failure to provide proper financial reporting and accounting, and various other matters.

[2] In terms of the claim as against Mr. Rabiei, the claim is founded in one of fraud, in that it is alleged that Mr. Rabiei became a director of the partnership, which

was the ultimate real estate development vehicle that the companies were working through, and in that role he made various false representations with respect to, among other things, the shareholder's loan that Mirage held in respect of Tecknocan, as well as "fraudulently manipulated" the financial records of Tecknocan, again with reference specifically to the shareholder loan accounts, and misdealt with the shareholders' loans.

Legal Framework

[3] The parties do not disagree as to the legal test with respect to an application under R. 3-5(8) under the *Supreme Court Civil Rules,* BC Reg 168/2009, which provides that at any time, on application, the court may set aside a third-party notice.

[4] The seminal case considering striking third party notices is *Lui v. West Granville Manor Ltd*., 1985 CanLII 155 (“*Lui”)*. In *Lui* the court detailed the considerations for the court on an application to strike a third-party notice, in that case under the previous iteration of the rule, R. 22(1), in light of the rule change by which, rather than leave being required to file a third-party notice, the rules were changed to provide for its filing, but with discretion for the court to then strike it for non compliance. The court notes as follows as to the scope of the court’s discretion, starting at p. 16:

> … The substance of the matter is that there is a wide discretion under Rule 22(4), to be exercised on the basis of whether, for any relevant reason, the third party proceedings should be struck out; and there is a more restricted discretion under para. 22(1)(c), to be exercised on the basis of whether a common issue should properly be determined, not only as between the plaintiff and the defendant, but also as between the plaintiff and the defendant and the third party, or between any or either of them.
>
> I do not think that it is wrong to consider all the factors that should influence the exercise of the two discretions, together and at the same time, for the purposes of paragraph (c) of Rule 22(1) and for the purposes of Rule 22(4). Indeed, I think that it is the correct course to consider them together. I say that in order to emphasize the fact that I think the question of whether the common issue should properly be determined between the plaintiff and the defendant at the same time as between the defendant and the third party is not only a question under para. 22(1)(c) but is also a question that should guide the exercise of the discretion under Rule 22(4), in cases where the third party proceedings are brought under paragraph (b) of Rule 22(1). And if the question can be considered under Rule 22(4) for the purposes of

> para. 22(1)(b) then surely the same question can be considered under Rule 22 (4) for the purposes of para. 22(1)(c). So where proceedings are brought under paragraph (c), the question of whether the common issue should properly be determined between all parties at the same time is one of the factors under Rule 22(4) at the same time as it is the only factor under para. 22(1)(c). And it should be considered for both purposes at the same time.
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> I move on now to my second general point. It is that the exercise of the discretion should be activated by a consideration of the purposes of the Rule. The first purpose is to avoid the problem of having different results on the same issue between the same parties but for different purposes. The second purpose *is* to avoid a multiplicity of proceedings.
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> My third general point is that there are a number of factors that should always be considered in the exercise of a discretion. What is the fair thing to do? Who suffers prejudice if the discretion is exercised? How much prejudice? Who suffers prejudice if the discretion *is* not exercised? How much prejudice? Have the parties acted properly and reasonably in their own interests? If *a* party has not acted properly and reasonably, should he be relieved from the consequences of his own behaviour? Is there another course available to one or other of the parties? Where does the balance of convenience lie? This list is illustrative, but not exhaustive, of the questions that should be asked with respect to the parties before the court. But part of the purpose of the Rule *is* to avoid multiplicity of proceedings for the benefit of other litigants, so that congestion in the courts is avoided. So it is proper to ask questions in that area *as* well.

[5] Here, the Applicants argue that the third-party notice fails to comply with the requirements under R. 3-5(1), specifically (b) and (c), under which the third-party notice must contain allegations that:

> (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
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> (c) a question or issue between the party and the person
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> (i) is substantially the same as a question or issue that relates to or is connected with
>
> (A) relief claimed in the action, or
>
> (B) the subject matter of the action, and
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> (ii) should properly be determined in the action.

[6] While the wording of R. 3-5(1)(b) is different than was R. 22(1)(b) as considered by the court in *Lui,* in that R. 22(1)(b) required that the relief be "substantially the same" as that claimed by the plaintiff, wording that was removed in R. 3-5(1)(b), the court said as follows at the last paragraph of p. 13:

> The fact that in both cases the remedy claimed is in the form of damages does not make the remedy substantially the same. Nor does the fact that the claims in each case arise from the same incident.

[7] In *Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd.*, 2016 BCSC 2089, the court had occasion to summarize the case law with respect to R. 3-5 and the appellate decisions, including *Lui*. After commenting on the purpose, the court set out the discrete factors for consideration:

> [36] These various considerations have since been synthesized and crystallized so that courts now, in exercising their discretion to grant leave, focus on the following discrete factors:
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> a) prejudice to the parties;
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> b) expiration of the limitation period;
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> c) the merits of the proposed claim;
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> d) any delay in proceedings; and
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> e) the timeliness of the application.

[8] In *Module Resources Inc. v. Sookochoff*, 1997 CanLII 2799 ("*Module Resources*"), again in considering R. 22, although as it was later restated with the "substantially the same" connection being removed from R. 22(1)(b), the court specifically commented at para. 7 upon that change, but referred at para. 18 to the findings in *Lui* as referenced above that just because damages are claimed in both cases, that does not make the remedy substantially the same, nor does the fact that the claims arise from the same incident, a conclusion that the court noted has not been changed as a result of the change in the rule:

> [26] The removal of the "substantially the same" test from the requirements to satisfy Rule 22(1)(b) has widened the application of the Rule. However, the amendment is not so far-reaching as to sanction the third party notice at issue in this application. From the material submitted, the relief claimed by Sookochoff against Anderson appears to be related to or connected with the original action against Sookochoff by Module by only the finest of threads.

[9] Further, the court adopted the two part test from *Liu* in respect of R. 22(1)(c), namely that there is a two part test, the first being whether the third party proceedings raise:

> . . . "any question or issue" relating to or connected with "the original subject matter" that is substantially the same as some "question or issue" arising between the plaintiff and the defendant in the original action.

Analysis and Conclusion

[10] There is some similarity between *Module Resources* and this case as there was an initial action by a company as against one of its directors with respect to losses that it alleged were suffered as a result of various fraudulent activities. The third-party notice by that director was brought as against the other director claiming that the other director had also caused certain damages and loss. The court, as cited above, found that there was a barest, or only the finest, of threads holding the two matters together.

[11] In this case, similarly, while there is some relationship between the claims brought in the third party claim and the original claim, those similarities are held together by the barest of threads. In particular, the claims that are alleged to arise as a result of these fraudulent activities involve oppressive actions which are matters as between Mirage and the third parties which have no bearing on the ultimate results of the main action.

[12] While I accept Mirage's argument that there may, at some time, be a need to define and quantify the value of the shareholders' loans and possibly determine whether or not there is some obligation on the third parties to satisfy Mirage in respect of those shareholder loans, it is not necessary for that to be done in this action because the relief being sought by the plaintiffs in this action are not a payout of the shareholder's loan.

[13] At most, the plaintiffs here are seeking a conveyance back to themselves of the interest they say they are entitled to, whether that is interest in the shareholder loan or the shares themselves. They are not seeking repayment of the shareholder loan at this time, which would render the issues as to whether or not there is a setoff or claim for contribution or indemnity under the shareholder's loan account of more importance to this action.

[14] Even if I am wrong in that respect, I would agree that the third-party notice does comply with the two part test under R. 3-5(1)(c) as referenced in the case law, including *Lui* and *Module Resources*. In particular, the questions or issues between the parties are not substantially connected.

[15] As to the secondary consideration of discretion, I am satisfied that the inclusion of this matter would be unduly prejudicial to the third-party. Put another way, it would not be in the interests of justice to allow what is, at this point, largely a claim that involves the interpretation of agreements and enforcement of them according to their terms to become an action in fraud and an accounting exercise in respect of the quantum of various shareholders' loans which are not being called upon or otherwise dealt with, such that their quantum need be determined to resolve the main action.

[16] To do so would result in more court time, longer discoveries, and further document discovery.

[17] The application to strike is granted.

[18] I will hear the parties quickly as to costs.

[19] CNSL D. CAYLEY: On costs, my clients have been successful. I am not seeking special costs, but now that the action against them is at an end, just costs of the action on Scale B, the usual scale.

[20] THE COURT: Anything to add?

[21] CNSL R. ROBERTSON: Not really. If you're only asking about costs if -- the application is granted, I would just ask that the wording be added about the petition -- that there be leave to file those. I know it's in your reasons. I would just ask that that be put in the order. I realize you just asked me to comment on costs, but that's --

[22] THE COURT: Sorry, what is the exact wording? I am concerned about this. Obviously you are entitled to commence an action. I do not need to make an order to

grant leave for you to file a notice of civil claim or a petition. I commented about that during submission.

[23] CNSL R. ROBERTSON: Right.

[24] THE COURT: The option is available to your client.

[25] CNSL R. ROBERTSON: I guess one problem is we did not really -- you know, we didn't really have the argument on the petition because I -- because I conceded --

[26] THE COURT: Right.

[27] CNSL R. ROBERTSON: -- on that point, and that it is more proper for an oppression claim to be brought by petition. And so I would like -- you know, that's all I'm conceding to, not that the claims are dismissed outright.

[28] THE COURT: Yes, I see. the claims are not dismissed, they are just struck, but I am wondering if a way to deal with it is to just say simply that this is without prejudice to any claims or defences that any party may have in respect of the filing of such notices of claim or petitions?

[29] CNSL D. CAYLEY: Lest I be thought of as always wanting to kick the can down the road, this was something that was fleshed out in response, so we're just kind of on our feet trying to deal with this.

[30] THE COURT: Yes.

[31] CNSL D. CAYLEY: My thought is we can -- we -- the relief sought has been granted. I will draft an order. If my friend says I'd like some extra wording in there, we can throw it around the horn, see if we can agree on something.

[32] THE COURT: Yes, adding the “without prejudice” disclaimer may solve the issue subject to your agreement as to the wording.

[33] CNSL D. CAYLEY: I'm okay with that conceptually.

[34] THE COURT: -- You can argue the timeliness elements.

[35] CNSL D. CAYLEY: I think the spirit of the order is clear. The exact wording will be something that we'll pass around.

[36] THE COURT: Okay,

[37] CNSL D. CAYLEY: And if we can't agree on it, then you'll see us again.

[38] THE COURT: For the purposes of the clerk's notes, because I don't want it to get bounced at the registry level -- that the parties have liberty to add additional wording, provided that all parties sign and agree, without further directions. That is just a note to the registry more something that need be included in the drafted order, so that if it does have extra wording after "application dismissed", they will know that it does not necessarily have to come back to me for signature, in case I am not here.

[39] CNSL D. CAYLEY: That works for me.

[40] THE COURT: And of course, I will say that the parties have liberty to appear before me for further directions, if any issue does arise.

[41] CNSL D. CAYLEY: Order on costs?

[42] CNSL J. DAWSON: I would say that we would get costs of this application in any event of the cause in the Pan Pacific action.

[43] THE COURT: The order as to costs will be that the third parties, Tecknocan and Mr. Rabiei will have their costs against the defendant at Scale B. The plaintiffs' costs will be as against the defendant in the cause.

"Associate Judge Robertson"