Court of King's Bench of Alberta

Citation: Worth Ventures Ltd v MegaSys Enterprises Ltd, 2024 ABKB 385

Date: 20240626
Docket: 2201 13753
Registry: Calgary

Between:

Worth Ventures Ltd. and 972179 Alberta Ltd.

Applicants

- and -

MegaSys Enterprises Ltd., 971789 Alberta Ltd., and David Varley Woronuk

Respondents

Reasons for Decision of the Honourable Justice R.A. Neufeld

Overview

[1] This case arises from a long running series of disagreements between two brothers. Together, they have built a successful business offering IT services to companies and governments around North America. However, they have disagreed as to the way in which the business has been operated and have developed a deep distrust for each other.

[2] These disagreements and distrust have reached the point where there is ongoing litigation regarding operational decisions and allegations of misconduct. The brothers agree that the business should be sold but cannot agree how that sale should be done. One of them now applies for appointment of a "manager" under section 13(2) of the *Judicature Act*, RSA 2000, c J-2, who

would be empowered to break deadlocks in managerial decisions and to undertake a broadly based marketing process for sale of the joint venture assets. The other opposes court intervention and a forced sale, arguing that there is no jurisdiction for the Court to appoint a manager under the *Judicature Act* and that a broadly marketed receivership sale would result in a discounted price, as well as potentially alienating existing customers whose contracts with the joint venture would be disclosed, albeit under nondisclosure agreements.

[3] To decide this matter, I must determine first whether the relief sought is available under the *Judicature Act*, and, secondly, whether it is just and convenient to grant the Order sought. I have decided that there is jurisdiction, as the application is in substance one for appointment of a receiver. I have also decided that with certain variations to the proposed receivership designed to provide transparency of joint venture assets, and an opportunity to keep the joint venture under the ownership of one of the two brothers through a shotgun sale process, it is just and convenient to grant the application. My reasons for reaching those conclusions follow.

Factual History

[4] Niclaus Woronuk ("Nick") and David Woronuk ("Dave") are brothers. Nick's wife, Sharon Woronuk ("Sharon"), is the sole shareholder and director of Worth Ventures Ltd. ("Worth") and 972179 Alberta Ltd. ("972"). Although Nick transferred his shares of Worth and 972 to Sharon in 2011, he remains in control of the day-to-day operations of these companies and has authority to speak on their behalf in these proceedings. Dave is the sole director and voting shareholder of MegaSys Enterprises Ltd. ("MEL") and 971789 Alberta Ltd. ("971").

[5] Worth and MEL are each 50% owners of the joint venture MegaSys Computer Technologies ("MCT"), a software business. 972 and 971 are each 50% owners of 1111 Properties, which operates the commercial real estate business related to MCT, and of which MCT is a tenant. Nick and Dave started the MCT joint venture in 1989, and the 1111 Properties joint venture in 2002. They entered these joint ventures (collectively the "Joint Venture") via oral contract.

[6] Nick and Dave's ability to communicate and resolve issues relating to their Joint Venture has deteriorated over the last several years. Each allege that the other is dishonest, has misappropriated Joint Venture funds, and has taken unilateral action to the exclusion of the other. They also disagree as to whether Nick has full unrestricted access to the digital files of the Joint Venture.

[7] The Joint Venture has also had to respond to serious challenges, including a cybersecurity/ransomware attack in 2020, and a significant fraud by a staff member that was discovered in 2023. Nick and Dave each accuse the other of leveraging or mismanaging the cybersecurity attack, and being negligent about, or complicit in, the employee fraud. Each brother also has had harassment complaints alleged against him by staff, and mutually allege impropriety in the management of those complaints.

[8] The parties disagree as to whether they are in a "deadlock", but the brothers' lack of effective communication has exacerbated, and been exacerbated by, these situations. The workplace environment has also been negatively impacted. Their interpersonal conflict has also resulted in issues with the Joint Venture's banking, including a temporary freezing of their account, which endangered the Joint Venture's ability to pay employee compensation and health

insurance expenses when due. Each brother alleges that the other leveraged the bank account problems to try and force the other's hand in various respects.

[9] The merits of Nick and Dave's mutual allegations in these respects are not at issue in this application.

[10] Although Nick and Dave agree that the Joint Venture should be sold, they disagree on the process by which it should be sold.

Procedural History

[11] There are two ongoing actions in this application's history: the 2020 Action and the 2022 Action. There are also two completed proceedings: a 2015 action brought by a third party, and a 2020 urgent application.

[12] In 2015, Justice Nixon dismissed an unrelated claim by Dennis Woronuk, cousin to Nick and Dave. In so doing, she made a number of findings with respect to the oral contract between the parties, including:

- MCT is a contractual joint venture;
- Both Nick and Dave have an equal interest in MCT's assets, liabilities, and intellectual property;
- Worth and MEL historically report 50% of MCT's revenues and expenses on their financial statements;
- Nick and Dave may both bind MEL and Worth; and
- Nick and Dave make business decisions together.

[13] The 2020 Action is ongoing, and it involves alleged misuse of company funds, product and business development, and an overall devaluation of goodwill and of the business. Via the 2020 Action, both parties are seeking the sale of the Joint Venture. They have exchanged affidavits of records and have agreed to conduct questioning but have delayed that questioning pending the decision on this application.

[14] The 2020 urgent application was prompted by the Joint Venture experiencing a cybersecurity/ransomware attack. This prompted the Applicant to bring an urgent application seeking the Court's appointment of an investigator and manager. Justice Nation rejected that application on the basis that the relief sought was premature. The remedies now sought are similar to the 2020 urgent application.

[15] The parties attempted mediation in 2020 but did not reach resolution.

[16] The 2022 Action is also ongoing. It includes additional allegations of wrongful financial conduct, negligence, and mismanagement, which are harming the stakeholders and the business. In particular, it includes the allegation that Dave has wrongfully entered into contracts to his sole benefit, and to the exclusion of Nick.

This Application

[17] Nick asks the Court to order the appointment of a limited-scope manager (the "Manager") as an officer of the Court to manage and oversee the sale of the Joint Venture, under section 13(2) of the *Judicature Act*.

[18] The proposed Manager would make decisions only where the brothers cannot agree, and would be charged with taking the following, general steps:

a) Solicit bids for MCT and 1111 Properties and establish the bidding process;

b) Prepare the Data Room;

c) Assess the sufficiency of the information disclosure in the Data Room and seek judicial direction if it is insufficient;

d) Ensure confidentiality and non-disclosure of the Data Room information;

e) Verify the creditworthiness of bidders and reject any uncreditworthy bids;

f) Determine the winning bid;

g) Negotiate and agree to amendments; and

h) Close the sale of both MCT and 1111 Properties.

[19] The Manager would be empowered to take possession of all Joint Venture property and manage, operate, and carry out the Joint Venture's business. The Manager would be empowered, to the exclusion of all others, including Nick and Dave, to take any actions or steps in respect of the powers articulated in the Order.

[20] The proposed Order prescribes a broadly marketed sales process and provides for sealed bids. Nick and Dave would be allowed to make their own sealed bid.

Positions of the Parties

[21] The parties disagree as to whether the Court has the jurisdiction to make the sought Order, and as to what test would apply to the granting of such an Order.

Nick's Position

[22] Nick asserts that he does not have access to the full financial records of the Joint Venture, and that his unequal access to information would make Dave's proposed shotgun buy-sell process unfair. He also contends that the ongoing deterioration of their relationship will cause irreparable harm to the financial and reputational health of the Joint Venture, thus making the balance of convenience favor court intervention.

[23] Nick claims that his proposal does the following: alleviates the concern over unequal access to information via the creation of a data room, as per conventional practice; maximizes profit for both brothers; and avoids the damage that will be caused by maintenance of the status quo.

[24] Nick's position is that the Court has jurisdiction to make the sought Order primarily under section 13(2) of the *Judicature Act*, which reads as follows:

> 13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

[25] He argues that because section 13(2) provides that the Court may order injunctive relief or a receiver, this section allows the Court to order a remedy of lesser intensity: a Manager whose powers fall short of those of a receiver.

[26] Nick also argues that section 8 of the *Judicature Act* grounds the Court's power to make the Order:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

[27] Nick provided case law in relation to section 8 in support of his argument that the powers articulated therein must be interpreted in a broad and purposive way, and that it provides "plenary and open-ended jurisdiction": ***DGDP-BC Holdings Ltd v Third Eye Capital Corporation***, 2021 ABCA 226 at para 17. Thus, the Court's power to appoint a Manager is apparent.

[28] With reference to a *Business Corporations Act*, RSA 2000, c B-9 provision on oppression remedies, with language similar to the *Judicature Act*'s section 8, the Court in ***Keho Holdings Ltd v Noble***, 1987 ABCA 84 [***Keho***] stated that "the intention of the legislation [is] to ensure settlement of intra-corporate disputes on equitable principles as opposed to adherence to legal rights": ***Keho*** at para 19. Nick advances that this interpretation is applicable to section 8 of the *Judicature Act* and grounds the appropriateness of the remedy sought.

[29] Because, Nick argues, the parties in this case cannot avail themselves of contractual remedies (due to the lack of a written joint venture agreement), statutory remedies (due to the lack of coverage of joint ventures by existing legislation), or other legal remedies, equity requires the Court to apply another remedy.

[30] The appointment of a Manager, in his submission, solves many of the ongoing disputes between the parties, as equitable access to information would be guaranteed by the data room. Further, the Manager's ability to make the final decision on matters not agreed upon between the brothers would encourage them to meaningfully attempt to agree, or else risk a decision that neither prefers. Also, "deadlock" between the brothers would not result in a shutdown of operations or lack of governance, because the Manager would be empowered to take on any needed decision-making and management roles in such a situation. This proposal, Nick argues, protects all stakeholders, including Nick, Dave, employees, contractors, and a future buyer.

[31] Nick therefore advances that the applicable test under section 13(2) of the *Judicature Act* is met as (i) there is an issue to be tried, (ii) Worth will suffer irreparable harm if the application is refused, and (iii) granting the application is supported by the balance of convenience.

[32] He also provides a list of 16 factors from ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27 [***Paragon***], which he proposes that the Court should consider when determining whether an order under section 13(2) is just and convenient. In particular, he emphasizes the following factors:

(a) Irreparable harm: irreparable harm flows from declining to make the sought Order, because the brothers' conflict will erode the business over time;

(b) Nature of the property and preservation of property: the nature of the property in question would be better managed by the Manager rather than via numerous court-litigated decisions;

(c) Balance of convenience: allowing the business to carry on in the ordinary course best protects employees, clients, creditors, and other stakeholders;

(d) Extraordinary relief: given that both parties are seeking sale of the business, and their only disagreement is the process, this extraordinary remedy is sensible and appropriate;

(e) Effect on the parties: the Manager would have an overall positive impact on the parties' interests;

(f) Conduct of the parties: appointing the Manager would maximize the Joint Venture's value and mitigate the negative impact of the brothers' dysfunctional relationship on the sales process;

(g) Length of the appointment: the Manager's role would be limited to the sales process, and would be subject to agreement between the brothers;

(h) Cost: the Manager would cost less than a traditional full receivership; and

(i) Maximizing return: the proposed process would ensure that the marketing and sales process would maximize the sale price of the business to the benefit of both Nick and Dave and mitigate the effect of ongoing litigation on the value of the Joint Venture.

Dave's Position

[33] Dave disagrees that the process sought by Nick in this application is just and convenient. Dave submits that the appointment of a Manager by the Court would result in purchasers seeking a "receivership discount" despite the financial health of the business.

[34] Via the 2022 Action, and in his counterclaim to the 2020 Action, Dave proposes a basic shotgun buy-sell process where one brother can buy the other's share, or where they can sell 100% of the Joint Venture to a third party.

[35] Dave is opposed to the Court intervening to force them to sell their business. Also, while Nick maintains that the brothers cannot communicate effectively whatsoever, Dave asserts that they can make certain decisions together when necessary.

[36] Dave's position is that the Court does not have jurisdiction under the *Judicature Act* to grant the relief sought by Nick, and in any event, the evidentiary record is insufficient to ground

such an impactful Order. This is a very complex situation with many moving parts, and the Order sought has the effect of taking away the business owners' power over their companies. The Court should not impose such a heavy handed and wide-ranging decision on these parties, especially not on the available evidentiary record.

[37] He analogizes the relief sought in Nick's application to that which would be sought in a summary judgment application, to highlight the lack of evidence to ground the Order and the drastic impact that the Order would have.

[38] Dave contests Nick's position that the Court has jurisdiction to impose the remedy of appointing a Manager. Section 13(2) only affords the Court the power to appoint a receiver, nothing more and nothing less. The Court's powers in that respect have been expressly defined and a derogation from the legislature's specific language is not warranted.

[39] Dave also highlights that the Manager remedy is available under section 94 of the *Business Corporations Act*. Had the legislature intended to afford the Manager remedy under the *Judicature Act*, it would have done so. Relatedly, there is no case law in which a Manager has been appointed by a court for a joint venture.

[40] Dave characterizes Nick's application as an invitation to the Court to make a new agreement between the parties, and to force an immediate sale of the business. There is no evidence that any of the businesses involved in the Joint Venture are at risk of failure, and as Dave disputes the existence of "deadlock", there is no basis for the Court to intervene.

[41] Also, according to Dave, the existence of a letter from 1990 undermines Nick's assertion that the parties cannot avail themselves of contractual remedies.

[42] With respect to the test under section 13(2), Dave disputes that it applies because Nick is seeking to appoint a Manager rather than a receiver, and that remedy is only available under the *Business Corporations Act*.

[43] He also argues that the tripartite test is not met in any event. Primarily, the parties' evidence is conflicting on almost all material issues, including, in particular, the existence of a "deadlock" between the parties. There is, therefore, not a strong case or a *prima facie* serious issue to be tried. Dave contends that there is a total lack of legal authority for the appointment of a Manager, and thus the remedy sought by Nick is simply not possible.

[44] Dave characterizes the proposed Order as risking irreparable reputational and financial harm, because the involvement of the Court in the sales process will cause buyers to seek a lower price than they would otherwise be willing to offer. He argues that the high level of complexity and specialization involved in running the Joint Venture makes it incompatible with the kind of remedy sought by Nick.

Analysis

[45] To decide this application, I must first determine whether the Court has jurisdiction to appoint a Receiver/Manager in these circumstances , and second whether it is just or convenient to do so, and on what conditions

Does the Court have the jurisdiction to make the sought Order?

[46] In determining whether the Court has jurisdiction in this case, it is necessary to first examine the relief being sought. In argument before me, the Applicant stated that the term "manager" was used in order to address concerns over the potentially negative impacts that the appointment of a receiver would have during the sales process. It is not in the interest of either party for the sale to be perceived as one that is being made under distress.

[47] As discussed earlier, the specific steps that the Manager would be charged with taking would include all steps necessary to solicit bids for MCT and 1111 Properties, such as preparing a data room; assessing the sufficiency of the information disclosed in the data room and seeking judicial direction if necessary; ensuring confidentiality and nondisclosure of the data room information; verifying the creditworthiness of bidders; determining the winning bid; negotiating and agreeing to amendments; and closing the sale of both MCT and 1111 Properties.

[48] In my view, these steps are typical of that which would be done by a receiver. Indeed, the term "receiver" itself connotes the identification of assets, their "receipt" into the hands of the receiver for the purpose of a sale, and the sale and distribution of proceeds of sale of the assets so received. Accordingly, while the Applicant may have chosen to use the term "manager" only, this is fundamentally an application for appointment of a receiver whose activities would extend to management only where necessary due to disagreements between the two owners. Therefore, I will use the term "Receiver/Manager" to refer to the person whom the Applicant seeks to have appointed.

[49] It follows that as long as the application satisfies the requirements of section 13(2) of the *Judicature Act*, it can be granted subject to such terms and conditions as the Court sees fit.

Is it just or convenient that a Receiver/Manager be appointed?

[50] As noted earlier, the Applicant contends that because the parties cannot avail themselves of contractual remedies (due to the lack of a written joint venture agreement), statutory remedies (due to the lack of coverage of informal joint ventures by existing legislation) or other legal remedies, equity requires the Court to apply another remedy.

[51] In considering that proposition, the Court is driven to ask why judicial intervention is just or convenient in such a situation. Ordinarily, when sophisticated parties enter into a business association, they take steps to establish proper governance and procedures that will apply should one or all of the venturers decide to exit the business. This can take the form of creating a corporation with an underlying unanimous shareholder agreement, or a properly structured joint venture agreement. In this case, Nick and Dave used their own corporations to house their investments in MCT but chose to leave that investment to operate as a loose, informal joint venture. While this allowed them to take advantage of small business tax advantages, that came at the cost of uncertain governance—a problem of their own making.

[52] Nonetheless, the Joint Venture's business appears to have been very successful. MCT has grown into a thriving enterprise, with over $7 million in the bank and customers throughout North America. Accordingly, there is no immediate financial pressure dictating a receivership and sale. This rather appears to be a continuing family feud. Moreover, both successful businesspersons agree that the business should be sold. They simply cannot agree on how that sale should take place.

[53] While it is somewhat tempting to require the parties to try harder to solve their own problems without court intervention, it must be recognized that there are other stakeholders whose interests stand to be adversely affected by continued conflict between the parties. These include the companies' employees, suppliers, and customers. On a broader basis, continued conflict may also impose unnecessary and avoidable demands on the judicial system.

[54] Accordingly, I find that it would be just and convenient to appoint a Receiver/Manager, but the Order will be limited in scope.

[55] Specifically, I am prepared to assist in resolving two obstacles to the sale of the Joint Venture's assets—the distrust of Nick regarding disclosure of information necessary to provide him a fair opportunity to participate in a shotgun sale arrangement and his concern regarding potentially adverse effects of a broadly based marketing process. The former obstacle is what caused Nick to reject Dave's recent offer to engage in a shotgun sale.

[56] "Shotgun" or "buy-sell" provisions are often incorporated into joint venture or unanimous shareholder agreements to address a potential breakdown of the parties' relationship and a resultant deadlock: ***Western Larch Limited v Di Poce Management Limited***, 2013 ONCA 722 at para 40 [***Western Larch***]. They allow for one or more of the parties to be expelled from a business venture, which will carry on without the participation of the expelled party or parties: ***Western Larch*** at para 40.

[57] A shotgun provision is triggered by the offeror proposing to buy the offeree's interest in the business venture, or to sell its own interest at a specified price: ***Western Larch*** at para 41. The offeree must then decide whether to buy out the offeror, or to sell its interest to the offeror, at the set price and by a specified date: ***Western Larch*** at para 41. A key attribute of a shotgun mechanism is that it incentivizes each party to make their offer as close to market value as possible, as the offeror does not know whether they will be required to buy or sell: ***Blackmore Management Inc v Carmanah Management Corporation***, 2022 BCCA 117 at para 44.

[58] In this case, the process should effectively reduce the need for a broader market sounding from the perspective of ensuring a fair price. It provides the opportunity to avoid negative connotations or market responses associated with a perceived distress sale and reduces the risk of a negative reaction from customers whose service contracts may be subject to disclosure to prospective third-party buyers (even under nondisclosure obligations). In doing so, it substantively addresses the equitable considerations embedded in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC) and ***Paragon*** as applied to conventional receivership applications. Both parties agree that a sale should happen and by reducing the obstacles to a sale from one brother to another, the extent of judicial intervention can be minimized, and a balanced outcome can result.

[59] To effectuate this resolution, the proposed Receiver/Manager will be authorized to solicit offers for MCT and 1111 Properties from the parties under a shotgun sale process. Such offers will include, among other things, appropriate non-competition and confidentiality covenants and a proposed form of purchase and sale agreement. The Receiver/Manager may engage counsel as necessary to evaluate the offer and proposed agreement and assist on any other matter. Absent agreement between the parties regarding that process, the Receiver/Manager may seek direction of the Court.

[60] The Receiver/Manager will also be charged with preparing the data room for use by either or both of the parties, and to assess the sufficiency of the information disclosure in the data room, seeking judicial direction if considered necessary. This includes identification of all material Joint Venture assets and liabilities. The Receiver/Manager shall ensure confidentiality and nondisclosure of the data room information. The Receiver/Manager will also oversee implementation of the shotgun sale process, including closing the sale of the selling party's interest in the Joint Venture to the purchasing party.

[61] If neither party is prepared to make a shotgun offer in an expeditious manner and on terms acceptable to the Receiver/Manager, the Receiver/Manager or the parties may apply to the Court for further direction, including authorization to undertake a broad solicitation of interest and sales process.

[62] Given the history of operational disagreements, the Receiver/Manager will also be authorized to take possession of property and the Joint Venture's business if the parties are not able to agree on significant operational decisions. Once again, the Receiver/Manager may seek direction from the Court regarding the existence of an operational deadlock and its significance if it considers that necessary.

Conclusion

[63] The facts and circumstances leading to this application are unusual. I have therefore decided to grant the application, but subject to conditions that will facilitate a fair buyout between brothers who have managed to build a successful business despite family dysfunction and a shaky legal and governance foundation . My decision should not be taken as an invitation for business venturers to eschew appropriate joint venture or unanimous shareholder agreements in favor of court-ordered mechanisms for exiting a business relationship after differences arise.

[64] I also expect the parties to fully cooperate with the Receiver/Manager in effectuating a resolution to the sale issue. To encourage such cooperation, the issue of costs in respect of this application will be addressed (if necessary) after the sale process has been completed.

Heard on the 2nd day of May, 2024.
Dated at the City of Calgary, Alberta this 26th day of June, 2024.

R.A. Neufeld
J.C.K.B.A.

Appearances:

David Madsen and Bradon Willms
for the Applicants

Daniel C.P. Stachnik
for the Respondents