

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lu v. 1087041 B.C. Ltd.*,
2024 BCSC 14

Date: 20240104
Docket: S232040
Registry: Vancouver

Between:

Xuan Lu

Petitioner

And

1087041 B.C. Ltd.

Respondent

Corrected Judgment: The front page of the judgment was corrected where changes were made on January 12, 2024.

Before: The Honourable Justice M. Taylor

Reasons for Judgment

Counsel for the Petitioner:

M. Dinh

Counsel for the Respondent:

N. Yan
J.F. Gray

Place and Dates of Hearing:

Vancouver, B.C.
October 26, 27, 2023
November 20, 2023

Place and Date of Judgment:

Vancouver, B.C.
January 4, 2024

Introduction

[1] The petitioner, Xuan Lu, seeks leave to prosecute a legal proceeding in the name and on behalf of the respondent, 1087041 B.C. Ltd. (the “Company”), pursuant to sections 232 and 233 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [the “Act”] against the company’s sole director and majority shareholder, PengWei Dong, and third parties Wei Yan, Hu Chen Cong and Fu Ling Liu.

Background

The Parties

[2] The Company is a closely-held corporation incorporated under the laws of British Columbia in August 2016.

[3] The Petitioner, Xuan (or Rebecca) Lu, is a 49% non-voting shareholder of the Company. The proposed defendant, Mr. PengWei (or David) Dong, is a 51% voting shareholder of the Company. Mr. Dong is also the sole Director of the Company.

[4] Ms. Lu and Mr. Dong were married in 2014 and separated in 2021. Ms. Lu filed a notice of family claim on August 10, 2022, which was amended on November 1, 2022 (the “Family Proceeding”). Mr. Dong and the Company were named as respondents in the Family Proceeding.

[5] Mr. Dong filed a response to family claim in the Family Proceeding on September 16, 2022, amended November 25, 2022, and a counterclaim against Ms. Lu, her parents and the Company on September 28, 2022. A 15-day trial in the Family Proceeding is scheduled for December 2, 2024.

[6] Ms. Lu also commenced a separate legal proceeding against Mr. Dong in China in November, 2022, seeking a divorce and custody orders. On December 14, 2022, there was a one-day hearing in the Chinese proceeding, in which Ms. Lu’s claims were dismissed.

The Company

[7] The Company owns and operates a Blenz coffee franchise at 460 Doyle Avenue in Kelowna pursuant to a franchise agreement. The Company commenced operating the coffee shop in late 2017 and continues to operate the same business up to the present day.

[8] Mr. Dong deposed that, after the parties got married in 2014, Ms. Lu's father suggested that the couple start a small family business, and told Mr. Dong that he would give the couple money to start the business. Mr. Dong looked into it and eventually decided on owning a coffee shop.

[9] The estimated cost of purchasing the coffee shop and undertaking renovations was approximately \$360,000. Ms. Lu and Mr. Dong provided about \$100,000 of the funding themselves as shareholder loans. Ms. Lu alleges that she obtained a loan from her father for that full amount. This is denied by Mr. Dong, who alleges that he loaned \$71,200 and Ms. Lu loaned \$31,200 to the Company.

[10] The parties also obtained bank financing in the amount of about \$245,000 to cover the remaining balance of the investment. The bank financing was secured by a pledge of security on two properties owned by the parties: one property located at 3336 Hockaday Place, Coquitlam (the "Coquitlam Property") and their family home, located at 482 Knowles Road, Kelowna (the "Kelowna Property").

[11] In the Family Proceeding, Ms. Lu also alleged that her father has a legal and beneficial interest in the Coquitlam Property, which was used to secure in part the loan on the Company's investment in the coffee shop.

[12] Since the opening of the coffee shop, the undisputed evidence is that Mr. Dong has been solely responsible for directing the day-to-day operations of the Company and is also the sole guarantor under the franchise agreement. Ms. Lu has never been actively involved in running the coffee shop. Until recently, the supervisor of the coffee shop was Ms. Rachel Liang, a former Company employee. Ms. Liang swore affidavits on this petition in which she gave evidence in support of

Ms. Lu's allegations concerning some of Mr. Dong's allegedly questionable withdrawals from Company bank account and activities at the Company.

[13] The proposed derivative action alleges principally that Mr. Dong misappropriated funds from the Company bank account to gain a personal benefit to the detriment of the Company. It also alleges that Mr. Dong transferred or directed the transfer of funds from the Company bank account to the proposed defendants Wei Yan, Hu Chen Cong and Fu Ling Liu, who are allegedly friends or acquaintances with Mr. Dong, for reasons unrelated to the business or operations of the Company.

[14] The proposed derivative action would include claims of breach of fiduciary duty, unjust enrichment, conversion and negligence against Mr. Dong. The sole claim against the proposed third-party defendants is in knowing assistance of breach of fiduciary duty.

Applicable Law

[15] Ms. Lu applies to this Court for leave pursuant to s. 232(1) of the Act to bring an action on behalf of and in the name of the Company.

[16] The relevant provisions of the Act are as follows:

232 (1) In this section and section 233,

"**complainant**" means, in relation to a company, a shareholder or director of the company;

"**shareholder**" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

(3) Subsection (2) applies whether the right, duty or obligation arises under this Act or otherwise.

(4) With leave of the court, a complainant may, in the name and on behalf of a company, defend a legal proceeding brought against the company.

233 (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

- (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
- (b) notice of the application for leave has been given to the company and to any other person the court may order,
- (c) the complainant is acting in good faith, and
- (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

Analysis

[17] It was not disputed by the parties that the first two s. 233 requirements have been met on this petition and I conclude on the facts that they have indeed been met. I will address each briefly in turn.

(a) The reasonable efforts requirement

[18] With respect to the first requirement, Ms. Lu made the following efforts to cause Mr. Dong, the sole director of the Company, to prosecute the proposed claim:

- On August 12, 2022, counsel on behalf of Ms. Lu delivered a letter to Mr. Dong in respect of the allegedly misappropriated funds and put Mr. Dong on notice that she would seek to commence a derivative action against him on behalf and in the name of the Company if the issue of the misappropriated funds could not be resolved;
- On November 2, 2022, counsel on behalf of Ms. Lu delivered a further letter to Mr. Dong formally requesting that Mr. Dong, *qua* director of the Company, cause the Company to commence legal proceedings against himself for, among other things, breach of fiduciary duty and unjust enrichment;

- Mr. Dong has acknowledged receipt of this letter and deposes that he had been requested to cause the Company to start a lawsuit against himself. He also deposes in his affidavit that he refused to do so.

[19] In my view these efforts were reasonable. In this respect I note that Justice Francis in *He v. Zhong*, 2020 BCSC 1867 found that a letter in similar form to the above-referenced November 2, 2022 letter was sufficient to constitute reasonable efforts to satisfy the statutory requirement.

(b) The notice requirement

[20] With respect to the second requirement, Mr. Dong was served with notice of the petition on March 21, 2023, delivered by e-mail to Mr. Dong and by registered mail to the Company's registered and records office. Mr. Dong, on behalf of the Company, has been actively defending against the petition. The notice requirement is therefore clearly met.

[21] However, the question whether the third and fourth requirements are met on this application was highly contested on the application. I will address each of these requirements in turn.

(c) The good faith requirement

[22] In *2538520 Ontario Ltd. v. Eastern Platinum Ltd.*, 2020 BCCA 313 [*Eastern Platinum*], Griffin J.A. set out the applicable analysis with respect to the good faith requirement:

[29] The requirement that the complainant be acting in good faith focuses on the primary purpose for the bringing of the derivative action. The primary purpose must be to benefit the company. The onus is on the applicant to provide evidence proving this question of fact: *Jordan Enterprises Ltd. v. Barker*, 2015 BCSC 559 at paras. 27–30.

[30] The good faith requirement is a separate requirement that must be established by the complainant based on evidence. It cannot simply be presumed, even where the claim can be said to be in the best interests of the company: *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1997), 40 B.C.L.R. (3d) 43 at paras. 117–118 (S.C.) [*Discovery Enterprises* (S.C.)]; aff'd (1998), 50 B.C.L.R. (3d) 195 at para. 5 (C.A.) [*Discovery Enterprises* (C.A.)].

[31] The evidence that may be considered by the court in determining the good faith requirement includes the applicant's stated belief in the merits of the proposed action. If this evidence is accepted by the court, it is a *prima facie* indication of good faith, but it is not necessarily determinative: *Jordan Enterprises* at para. 29; *Discovery Enterprises (S.C.)* at para. 117. The court must also consider evidence that indicates the applicant has ulterior motives, including considering any existing disputes between the parties.

[32] A conclusion that there is an absence of "good faith" simply means that the applicant has not met the onus of showing that the primary purpose of the action is to benefit the company. There is no requirement that the respondent show the applicant is acting in bad faith.

[33] A finding of good faith, or of a failure to prove good faith, is a finding of fact in the purview of the trial judge, typically based on inferences drawn from the record, and the appeal court will not interfere absent a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Discovery Enterprises (C.A.)* at para. 7.

[23] In *Eastern Platinum*, the Court of Appeal made it clear that the onus is on the applicant to provide evidence proving that the primary purpose is to benefit the company. The good faith requirement is a separate evidentiary requirement that cannot simply be presumed, even where the claim can be said to be in the best interests of the company.

[24] In my view, Ms. Lu has failed to meet this evidentiary onus on this petition.

[25] Ms. Lu deposed that she has a belief in the merits of the proposed action. This is a relevant consideration but the Court of Appeal cautioned that a statement of this nature is inherently self-serving and therefore must be weighed in light of all the evidence (*Eastern Platinum* at para. 67):

[67] Determining a party's motives for seeking to bring a derivative claim will necessarily be a matter of drawing inferences from circumstantial evidence. Any well-advised applicant will state its belief that the proposed lawsuit is for the best interests of the company and will not admit to any other purpose. While such evidence is necessary, it is also obviously self-serving. A judge considering such an application is entitled to consider that evidence together with all of the circumstances and draw reasonable inferences from the whole of the evidence.

[26] In this case my conclusion is that the evidence does not support the conclusion that Ms. Lu's primary purpose in bringing the action is to benefit the Company, for at least four reasons.

[27] First, there are existing disputes between the parties which the Court of Appeal indicated in *Eastern Platinum* is relevant to the issue of good faith, as it may reveal ulterior motives. In this case, Ms. Lu has previously commenced a divorce and custody proceeding against Mr. Dong in China and has also commenced the Family Proceeding in British Columbia against both Mr. Dong and the Company. The Family Proceeding is ongoing and active and a 15-day trial is scheduled for December, 2024.

[28] Ms. Lu has also threatened to commence a third proceeding relating to Mr. Dong. In a letter dated January 6, 2023, counsel for Ms. Lu wrote to the Lawyer's Indemnity Fund attaching a draft notice of civil claim alleging negligence against the conveyancing lawyer who assisted Mr. Dong in the sale of the Kelowna Property. In that claim, Ms. Lu alleges that she never agreed to sell the Kelowna Property, that Mr. Dong did so unilaterally and that Mr. Dong forged her signature. This threatened third proceeding overlaps with the Family Proceeding, where the similar allegation is also made that the Kelowna Property was sold by Mr. Dong without Ms. Lu's knowledge and that he forged her signature.

[29] Second, there is evidence of significant animosity between the parties, which could quite plausibly be a primary factor motivating Ms. Lu's decision to bring this application. For example, in an exchange of text messages between the parties in 2020, Ms. Lu called Mr. Dong a "loser", "fucking sick" and suggested: "Why don't you go die?" Ms. Lu argued that these statements were simply a reflection of her emotional upset about the breakdown of the relationship and not her litigation motives. While this may have been true at that time, they do reveal a level of animosity which does not appear to have dissipated and is similarly reflected in later comments by Ms. Lu about Mr. Dong after the Family Proceeding and the Chinese litigation was commenced.

[30] In particular, in a series of more recent texts sent by Ms. Lu to Mr. Dong in October 2022, Ms. Lu made statements that are more difficult to justify as mere spontaneous expressions of emotion rather than a reflection of her actual litigation motives. For example, she stated:

- “I’ve helped you summarize all the things that you’ve cheated, a list of 15. Let’s continue to play the file-a-claim and respond-to-a-claim game later”;
- “Other traps you set up for me also have been discovered by me. No problem. I’m not afraid of spending money. I’ll utilize all human resources and material resources to slay a scumbag man such as yourself on my own. Let’s continue to play! Just have the empty shell of the coffee shop accompany keep you working hard!”
- “So boring, [I] don’t know what else I can do other than slay a scumbag man.”

[31] In addition, in a text to a friend sent on January 28, 2023, following Mr. Dong’s filing of a counterclaim against her and her parents, Ms. Lu stated to her friend: “My parents are in Canada and will give him company and play with him too.” She further stated:

“And he also sued my parents. You tell me how amazing and catty he is. Since you’ve dragged parents in, don’t blame me.”

[32] Ms. Lu’s texts reveal that she has a very clear motive apart from the best interests of the Company to seek leave to bring this derivative action. Her references to the “file-a-claim... game” designed to “play” with Mr. Dong and her threat to use her material resources to “slay” the “scumbag man” (i.e. Mr. Dong) are strong and expressly stated evidence that she has a motivation to raise the financial and emotional cost for Mr. Dong by burdening him with multiple legal claims. There was also evidence on the petition that Ms. Lu has access to more family financial resources than Mr. Dong, which raises a further suspicion that these superior resources could be used to create a tactical advantage by expanding the scope of litigation to include a derivative action.

[33] Ms. Lu argues that the above texts were merely a reflection of her “genuine belief that Mr. Dong has misappropriated funds from the Company for his own purposes, without her knowledge or consent, and her efforts to bring a *bona fide* claim in the name and on behalf of the Company.” I am not persuaded by that argument. Even giving Ms. Lu the benefit of the doubt relating to her colourful language, the fact is that the bulk of Ms. Lu’s text comments are clearly an expression of a primary desire to inflict personal pain on Mr. Dong rather than to

address specific matters of concern relating to the Company's finances. Even Ms. Lu's dismissive reference to the "empty shell of a coffee shop", for example, is couched in language indicating that she views financial difficulties at the coffee shop as a form of punishment for Mr. Dong that will "keep [him] working hard!" This instrumental reference to the Company is not the type of language one would expect from a concerned shareholder who has only the best interests of the Company at heart.

[34] I also pause here to re-emphasize that the burden of proof is on Ms. Lu to demonstrate good faith and not the respondent to prove bad faith. Thus, even if these comments taken alone are not sufficient to demonstrate bad faith on a balance of probabilities, they certainly at a minimum bring into considerable question Ms. Lu's ability to meet the good faith burden.

[35] Third, it is difficult to ignore the substantial overlap between the allegations and remedies sought in the Family Proceeding and those sought in the proposed derivative action. For example, in the amended notice of family claim filed November 1, 2022, Ms. Lu named the Company as a defendant in addition to Mr. Dong, which puts her in the position of both suing the Company and seeking leave to prosecute a proceeding on behalf of the Company at the same time. Ms. Lu also sought orders that:

- Mr. Dong repay to the Company monies withdrawn from the corporate bank account in an amount of approximately \$215,000 which were unrelated to the business and not in the ordinary course of business. Ms. Lu's amended family claim also expressly references the three individuals named as defendants in the proposed derivative action as recipients of these funds;
- Mr. Dong be solely responsible for repaying to Canada Revenue Agency any grants, loans or financial support received during the Covid-19 pandemic;

- Mr. Dong be solely responsible for any liabilities relating to breach of the Company's franchise agreement and tax liabilities arising from Mr. Dong's negligence;
- An accounting and tracing of all assets in the name of the Company or held in trust for the Company in which Ms. Lu has an interest; and
- The Company pay compensation to Ms. Lu for disposing of, transferring, converting or exchanging property into another form.

[36] Notably the above allegations and remedies are materially similar, and in many respects identical, to the material facts and relief sought in the proposed derivative action. Indeed, it is fair to say that the claims in the proposed derivative action are in large part a mirror image of the claims relating to the Company in the Family Proceeding with the exception that the Company in the derivative action would be transformed from a defendant into a plaintiff and the three individuals referenced in the amended notice of family claim would become named defendants.

[37] Further, there are additional common issues between the Family Proceeding and the proposed derivative action which create further overlap. For example, both Ms. Lu and Mr. Dong allege in the Family Proceeding that they received loans from their families which were used to finance the Company's investment in the coffee shop. Ms. Lu also alleges that her family provided capital for the Coquitlam Property which was used to help obtaining financing. Thus, one of the key questions in the proposed derivative action, namely the quantum of shareholder loans and other contributions made by Ms. Lu, Mr. Dong and their respective parents to the Company (which is of course relevant to Mr. Dong's historical legal entitlement to withdraw certain funds from the Company account) is also a central issue in the Family Proceeding.

[38] The overlap between the issues and claims in the Family Proceeding and the proposed derivative action raises real additional questions in my view about Mr. Lu's true motivations. The discovery process in the Family Proceeding has commenced

and counsel for Ms. Lu has already been actively seeking documentary disclosure from Mr. Dong and the Company with respect to all the allegations she now seeks to make on behalf of the Company in the derivative action. The discovery process in the Family Proceeding will obviously be expensive and time-consuming. However, to the extent that leave to commence a derivative action were granted, the cost and inconvenience of pursuing Ms. Dong for very similar remedies to those sought in the Family Proceeding would thereafter be borne at least in part by the Company not Ms. Lu alone, and these costs would be shared by Mr. Dong himself as a shareholder. In essence, the Company would be transformed into a litigation weapon at the behest of Ms. Lu against Mr. Dong (and at the partial expense of Mr. Dong), which would no doubt give her powerful leverage against Mr. Dong in the Family Proceeding and also have a punitive effect on Mr. Dong. It would also potentially give Ms. Lu access to Company records, personal records of Mr. Dong and other information that could potentially be used to her and her family's advantage in the Family Proceeding. It is difficult in my view to ignore this tactical context in weighing all the other evidence on good faith.

[39] Ms. Lu argues that there is not a true overlap between the proposed derivative action and the Family Proceeding because the proposed derivative action names the three third-party individuals as defendants, whereas the amended notice of family claim does not. In my view this is not a sufficient basis for concluding that the good faith requirement has been met. The focus of the proposed derivative action is clearly Mr. Dong, who is alleged to have wrongfully misappropriated the funds, and not the three third-party individuals who are merely alleged to have assisted him as conduits; they are clearly merely tangential players in the larger dispute. Further, and as noted above, the three individuals are already named in the family claim (albeit not as defendants) and could presumably be pursued with the use of a tracing remedy. In my view, this does not truly differentiate the family claim from the proposed derivative action in a material way.

[40] Fourth, the evidence was clear that Ms. Lu took no interest at all in the management and operation of the Company from 2017 until she commenced the

Family Proceeding in 2022. To the extent that Ms. Lu alleges that her primary purpose is now to benefit the Company, I note that this is a purpose which developed very late in the day, and only after family litigation commenced, which again brings her good faith claim to be an activist shareholder into some doubt.

[41] Taking all the foregoing into account, it is difficult to resist the conclusion, as noted in *Link v. Link*, 2020 NSSC 293 at para. 60, that this proposed derivative action is essentially a “personal dispute with the trappings of corporate structures”. Namely, it is really only one portion of a larger family dispute between Ms. Lu and Mr. Dong, and their respective parents, concerning the division of various property holdings and interests, which include the Company.

[42] Accordingly, I conclude that Ms. Lu has not met her onus of showing that the primary purpose of the proposed derivative action is to benefit the Company.

(d) Best interests of the Company

[43] As I have found that the good faith requirement has not been met, it is strictly unnecessary for me to address this final requirement. However, for the sake of completeness and if I am wrong on good faith, I will briefly do so.

[44] In *Eastern Platinum*, the court set out the applicable analysis:

[36] The onus is on the applicant, not the respondent. The applicant has to not only plead a proper cause of action, but also have some evidence to support the case that its proposed claim has a reasonable prospect of success. This is why the authorities typically review the evidence of the merits of the proposed claim in considerable detail: see for example *Discovery Enterprises* (S.C.); *Primex* (S.C.); *Arkansas Teacher Retirement System v. Lions Gate Entertainment Corp.*, 2016 BCSC 432 [*Lions Gate*].

[37] What the authorities illustrate is that the approach to considering the merits of the proposed action lies somewhere on a spectrum. The court should do more than skim the surface of the pleadings and should consider the evidence but ought not to dive so deeply into the merits as to try the case.

[38] Other factors must also be brought to bear on whether the proposed action appears to be in the best interests of the company, namely whether the potential relief sought in the action makes it worthwhile to the company to undertake the costs and inconvenience of pursuing it: *Primex* (S.C.) at para. 49; *Lions Gate* at paras. 163–165; *Jahnke v. Johnson*, 2018 SKCA 59 at para. 68.

[45] On the application, Ms. Lu adduced evidence with respect to four categories of misconduct by Mr. Dong that she alleges were a breach of his fiduciary duty to the Company:

- (a) the misuse of the \$60,000 Canada Emergency Business Account loan from TD Bank to the Company for general COVID-related government assistance;
- (b) the misuse of \$30,000 granted to the Company by the provincial government specifically to purchase COVID-related distancing and personal protective equipment for staff and patrons;
- (c) the transfer of Company funds, generally, for purposes unrelated to the business or operations of the Company, without the knowledge or consent of Ms. Lu; and
- (d) directing employee paycheques to be issued to employees or third parties who performed no services for or on behalf of the Company, for his personal benefit.

[46] In response, Mr. Dong adduced affidavit evidence providing various explanations with respect to these actions, including: (1) the alleged valid business purpose of some of the individual payments and transactions; (2) the fact that some of these transactions involved his own funds and not Company funds (explaining that he was essentially using the Company bank account as a conduit for transfer of his own or family funds); and (3) that some of the payments were expressly discussed and approved in advance by Ms. Lu. There was conflicting affidavit evidence on many of these issues and, without the benefit of cross-examination, it is not possible for me to resolve these matters with any certainty at this stage nor is it my role on this application to “dive so deeply into the merits as to try the case”.

[47] However, I would say that Ms. Lu did bring to light a number of very questionable transactions (for example the admitted diversion by Mr. Dong and loss of \$70,000 in COVID-19 government grant funds related to the coffee shop to a failed pork investment in China and the lack of a compelling explanation as to why

he found it necessary to use the Company bank account, as opposed to his personal account, to send personal funds to China) that were not adequately explained by Mr. Dong. In this light, it would be difficult for me to conclude that at least some aspects of the proposed derivative action did not have a reasonable prospect of success. In this respect I also emphasize that the courts have recognized that the threshold for a “reasonable prospect of success” is relatively low.

[48] That said, I am not convinced in this case that the potential relief sought in the proposed derivative action makes it worthwhile to the Company, under all the circumstances, to undertake the costs and inconvenience of pursuing such relief. Ms. Lu alleges misappropriation of funds out of the Company of which she is aware in the amount of \$150,000, although she suggests that the amount could be higher. Mr. Dong in turn adduces evidence to explain that many of the alleged misappropriations were unsubstantiated and suggests that the amount at issue could therefore be much lower. The amount at stake is certainly not immaterial but it is also not huge, nor was there compelling evidence in my view that the future of the Company is in jeopardy. Ms. Lu adduced some evidence (in particular from Ms. Liang) that Mr. Dong had taken certain steps that may have put the Company at certain financial risk but Mr. Dong denies this and deposes that the coffee shop cash flow is healthy and the business is a viable going concern. There was insufficient financial evidence adduced on the application to reach a definitive conclusion on the true financial health of the Company.

[49] However, one fact is relatively certain: if leave is granted to commence the derivative action, the Company will have to retain legal counsel which will be a material expense in addition to the legal costs that will need to be incurred in simultaneously defending the Company in the Family Proceeding (likely separate counsel will need to be retained for these two actions due to the clear conflict of interest issues that arise). It is worth repeating that this Company runs a small coffee shop, with limited resources, and the coffee shop recently lost its experienced supervisor Ms. Liang who resigned this year, leaving Mr. Dong on his own to run the business. Ms. Lu has refused a recent request by Mr. Dong to assume responsibility

herself for managing the coffee shop. She has instead suggest that Ms. Liang be re-hired but this is obviously problematic due to Ms. Liang's decision to swear affidavits on Ms. Lu's behalf on this petition.

[50] Managing the litigation in two separate pieces of litigation, in addition to the coffee shop itself, will clearly put strains on the Company's limited management resources which, at present, consist of solely Mr. Dong. Finally, Mr. Dong emphasizes that the Company may potentially also have certain claims against Ms. Liang relating to her accessing certain Company information without authorization, which might place Ms. Lu and Ms. Liang in a conflict of interest position, creating additional complexity in the litigation.

[51] Finally, I note the practical question that arises in granting leave in a case involving a closely-held corporation of this nature, which is: who will manage the litigation on behalf of the Company? There are at least three alternatives, in my view, and none of them would be ideal from a Company perspective. First, Mr. Dong is the majority shareholder and sole director but he obviously cannot manage the litigation, which involves a claim against himself. Second, Ms. Lu is the minority shareholder but she is not well-placed to manage the litigation since she is not a director and also is involved in acrimonious family litigation with Mr. Dong. For the reasons I have mentioned above, it would be challenging for her to maintain an objective Company-focussed perspective that clearly differentiates Company interests from her own and family interests in the larger Family Proceeding. Her management of the litigation would also put her in the position of having to interact directly with Mr. Dong, with potentially explosive consequences. A third alternative would be the appointment of a trustee. This might be the most viable alternative, in light of the other issues, but would add substantially to the cost and complexity of the litigation.

[52] Taking the foregoing considerations into account, my view is that the proposed action is not on balance in the best interests of the company. While there was sufficient evidence to conclude that at least some aspects of the proposed claim have a reasonable prospect of success, I am not convinced that the potential relief

sought in the action makes it worthwhile to the Company to undertake the costs and inconvenience of pursuing it.

Exercise of Discretion

[53] In *Eastern Platinum*, the Court of Appeal explained that the court retains a residual discretion to deny leave even where all the other requirements have been met:

[41] It is conceivable that there may be cases where the requirements are met but so thinly established that in the end the court will exercise its discretion to not grant leave. More likely, however, if an application fails it will fail on one of the requirements of the test.

[54] It is unnecessary for me to exercise my discretion in this case since I have found that third and fourth of the s. 233 requirements have not been met. However, even if they had been met, I would find that this is an appropriate case to exercise that discretion.

[55] Section 10 of British Columbia's *Law and Equity Act*, R.S.B.C. 1996, c. 253 requires the court to grant, so far as is possible, any remedy to avoid a multiplicity of legal proceedings: *Law and Equity Act*, s. 10.

[56] In my view, given the substantial overlap between the pleadings in the Family Proceeding and the proposed derivative action, granting leave would unnecessarily create a multiplicity of duplicative and parallel proceedings, with an attendant material risk of conflicting rulings.

Order

[57] The claim for relief in the petition is therefore dismissed. The parties shall have leave to speak to the issue of costs.

“M. Taylor J.”