IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Norseyl Properties Ltd. v. Mirage Trading Corporation,* 2024 BCSC 1990

Date: 20241030
Docket: S233936
Registry: Vancouver

Between:

Norseyl Properties Ltd. and AXA Consulting Services Inc.

Plaintiffs

And

Mirage Trading Corporation

Defendant

And

Babak Marzbani, Teknocan Properties Inc. and Rouzbeh Rabiei

Third Parties

- and –

Docket: S225945
Registry: Vancouver

Between:

Pan Pacific Business Corporation

Plaintiff

And

Mirage Trading Corporation

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiffs and Third Party, Babak Marzbani:	R. Power
Counsel for the Application Respondent, Pan Pacific Corporation:	J.A. Dawson
Counsel for the Defendant:	R. Robertson
Place and Date of Hearing:	Vancouver, B.C. October 22, 2024
Place and Date of Judgment:	Vancouver, B.C. October 30, 2024

Introduction

[1] The plaintiffs apply for an order releasing them from their implied undertaking of confidentiality with respect to the examination for discovery evidence of Abo Taheri, a representative of the defendant Mirage Trading Company. They wish to use the discovery transcript and the documents referred during the discovery in an oppression proceeding that was brought by Mirage. The plaintiffs are also respondents in the oppression proceeding, having been added to that proceeding by order of Justice Latimer made August 26, 2024.

[2] The application is supported by Pan Pacific Business Corporation which is the plaintiff a related action against Mirage that is to be tried together with the present action. Pan Pacific was also added as a respondent to the oppression proceeding by Latimer J. The present application is opposed by Mirage.

Background

[3] These actions concerns a claim by the plaintiffs, Norseyl Properties Ltd. and AXA Consulting Services Inc. in one action and Pan Pacific in another action, both related to shares held by Mirage in a company called Teknocan Properties Inc. Mirage is the registered owner of 10 shares of Teknocan, representing 10% of the total issued and outstanding shares. The other 90% is held by MAJ Enterprises Inc. Teknocan is a holding company whose major asset is a real estate development in North Vancouver called Seylynn Developments.

[4] In July 2016, Mirage agreed to transfer half of its shares in Teknocan (*i.e.* a 5% interest in Teknocan) to Norseyl (2%), AXA (1%) and Pan Pacific (2%) in exchange for approximately $5 million. According to the plaintiffs, Dr. Taheri, whose family controls Mirage, directed Norseyl, AXA, and Pan Pacific to pay the purchase price for the Teknocan shares to certain third parties as payments towards Mirage's debt to a Dubai company called Treaty Real Estate Brokers LLC. Treaty is associated with the Rabiei family which also controls MAJ Enterprises, the controlling shareholder of Teknocan.

[5] On January 5, 2017, the parties entered into a written trust agreement by which Mirage acknowledged and agreed that it held half of its shares in Teknocan in trust for Norseyl, AXA, and Pan Pacific. The trust agreement also requires Mirage to vote the 5% of shares it holds beneficially for Norseyl, AXA, and Pan Pacific as they direct. The trust agreement refers to Mirage's debt to Treaty but it is otherwise silent on the purchase price for the beneficial interest in the shares.

[6] On May 18, 2022, Pan Pacific demanded that Mirage transfer to Pan Pacific the legal title in the 2% of Teknocan shares that Mirage was holding in trust for it. Norseyl and AXA made the same demand for their shares on June 30, 2022. To date, Mirage has not transferred the shares.

[7] On July 21, 2022 Pan Pacific commenced an action in B.C. Supreme Court claiming that Mirage was in breach of trust for failing to convey legal title in the Teknocan shares as requested (the "Pan Pacific Action"). On May 29, 2023, Norseyl and AXA commenced a similar action respecting their shares.

[8] On October 18, 2022, Teknocan held an annual general meeting. In advance of that meeting, MAJ Enterprises advised Mirage that it intended to reduce the number of Teknocan directors from two to one with Mr. Rabiei, who controls MAJ Enterprises, being the sole director. Dr. Taheri would thus no longer be a director. Norseyl, AXA and Pan Pacific were supportive of this change and directed Mirage to vote their 5% shares in favour of the change. Mirage (and Dr. Taheri) did not support that change and did not send a representative to the AGM. Thus, none of its shares, including the 5% it holds in trust for Norseyl, AXA, and Pan Pacific, were voted at the AGM. However, since MAJ Enterprises controls 90% of Teknocan's shares, the resolution passed.

[9] On May 29, 2023, Norseyl and AXA commenced the present action claiming Mirage breached the Trust Agreement by failing to transfer legal title in the Teknocan shares to Norseyl and AXA when asked to do so (the "Norseyl Action"). The plaintiffs seek declarations that Mirage holds the shares in trust for Norseyl and AXA and orders conveying legal title to them.

[10] In its response to civil claim, Mirage asserts that the Trust Agreement was drafted by Babak Marzbani who is Norseyl and AXA's principal. Mirage asserts that the agreement failed to stipulate the consideration that Mirage was to receive under the trust agreement. Mirage asserts that Norseyl and AXA were to retire a debt that Mirage owed to Mr. Rabiei and this was agreed to separately but not included in the trust agreement. The notice of civil claim also refers to a separate (presumably verbal) agreement concerning the consideration for the shares but the amount alleged there (11,801,682 AED plus $420,000 CDN) is around $700,000 less than what is alleged in the response to civil claim (13,000,000 AED plus $654,000 CDN).

[11] The response to civil claim also asserts that Mirage sought confirmation that the Mirage's debt to Mr. Rabiei was in fact retired but Norseyl and AXA refused to give that confirmation. Mirage further asserts that the trust agreement did not create a bare trust arrangement and does not require Mirage to transfer legal title of the shares to Norseyl and AXA. Alternatively, it asserts the trust agreement is unenforceable for lack of consideration.

[12] By order of Associate Judge Dick dated November 20, 2023, the Norseyl and Pan Pacific Actions are to be tried together with evidence in one being evidence in both. They are set for a 15-day trial starting December 1, 2025.

[13] On November 9, 2023, Mirage filed a third party notice in the Norseyl Action naming Teknocan and others as third parties. The notice sought, among other things, "relief from shareholder oppressions pursuant to section 227 of the *Business Corporations Act"* in relation to Dr. Taheri's removal as a director of Teknocan. On May 9, 2024, Associate Judge Robertson struck the third party notice on the basis that the oppression claim had to be brought by petition and that the claims it advanced had only a slight relationship to the Norseyl Action, "held together by the barest of threads": *Norseyl Propertis Ltd. v. Mirage Trading Corporation*, 2024 BCSC 1225 at para. 11.

[14] On June 21, 2024, Mirage started a separate oppression claim by petition naming Teknocan, MAJ Enterprises, and Mr. Rabiei as respondents. The oppression

claim generally alleges, among other things, that Mr. Taheri has been shut out of the management and payment of dividends from Teknocan. Thus, while Dr. Taheri's removal as a director at the October 2022 AGM is part of the claim, that is one event (albeit an important one) in a much larger course of conduct that Mirage asserts is oppressive conduct that has excluded it and Dr. Taheri from the Seylyn project.

[15] Among the relief sought in the petition is an order that Teknocan or MAJ Enterprises be compelled to purchase Mirage's shares in Teknocan. This would include those shares that Norseyl, AXA, and Pan Pacific claim Mirage holds in trust for them.

[16] On July 5, 2024, Norseyl, AXA, and Pan Pacific applied to be added as respondents to the oppression proceeding. They argued their rights under the trust agreement may be affected by the relief sought in the petition in that if Teknocan or MAJ Enterprises were compelled to buy Mirage's shares, this could deprive Norseyl, AXA, and Pan Pacific of the relief they seek in the Norseyl and Pan Pacific Actions. Justice Latimer agreed and ordered that Norseyl, AXA and Pan Pacific be added as respondents. She also found it would be necessary to determine the validity of the trust agreement in the oppression proceeding in order to determine what Mirage's reasonable expectations were with respect to Dr. Tahei being assured a director's position on the Teknocan board:

> [58] … Oppression claims are premised on the reasonable expectations of the shareholder. In order to determine what the petitioner's reasonable expectations were, the Court will need to resolve whether or not the Trust Agreement is valid, whether or not it constrains Mirage's voting rights, and what impact, if any, that may have on Mirage's reasonable expectations. The applicants may have significant evidence to give about events leading up to the AGM that may have impacted on the petitioner's reasonable expectations. Given the other respondents are not parties to the Trust Agreement, the applicants also have a position and perspective which is distinct from the other respondents to advance in argument on these issues.

[17] She also observed at para. 12 that "Mirage disputes the validity of the Trust Agreement."

[18] On September 17, 2024, Norseyl and AXA examined Dr. Taheri for discovery as a representative of Mirage in the Norseyl Action. Mirage suggests this discovery was done with the collateral purpose of obtaining evidence and admissions that could be used against Mirage in the oppression proceeding. It points out that the trial in the Norseyl Action is more than a year away (with plenty of time to complete discoveries) whereas the oppression proceeding is set to be heard in November 2024.

[19] During the discovery, Dr. Taheri acknowledged the trust agreement and its terms but maintained it was not settled whether the consideration – being the repayment on his behalf of his debt to Mr. Rabiei (or Treaty) – had been paid in full and acknowledged by Treaty or Mr. Rabiei.

[20] As Mirage predicted, Norseyl and AXA, supported by Pan Pacific, now seek to use that discovery evidence in the oppression proceedings and seek leave to be released from their implied undertaking in order to do so.

Legal Principles

[21] When a party to a legal proceeding compels evidence from an opposing party through document production or examinations for discovery, that evidence is subject to an implied undertaking that it will be used only for the purposes of the litigation in which it was obtained: *Juman v. Doucette*, 2008 SCC 8 at para. 4. However, the court has a discretion to vary the scope of that undertaking in certain circumstances. One of those circumstances is where it is shown that "there is sufficient connection between the two actions, by the parties, their interests and the broad issues between them, so that it can be said that the actions are related": *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors*, 1998 CanLII 5684 at para. 20 (B.C.S.C.).

[22] The onus for showing such a connection is not heavy. Justice Hood described the standard in these terms in *Scuzzy Creek* at para. 20:

> The overall question is whether the evidence given by the witness at discovery in the earlier action, may have some bearing or relevance, directly or indirectly, on the evidence he may give in the second action. Any doubt in this regard, in my view, should be resolved in favour or the applicant,

> provided there is no evidence that substantial detriment or injustice will be done to the witness, and which in most cases will be unlikely. Even then restrictions on the use of the transcript in most cases should reduce any detriment or injustice to the witness, to the extent that the balancing of the competing interests will come down in favour or the party seeking to use the transcript.
>
> [Emphasis added]

Parties' Positions

[23] Norseyl and AXA, supported by Pan Pacific, say the standard described in *Scuzzy Creek* is clearly met in this case. They point to Latimer J.'s finding that the enforceability of the trust agreement is an issue in the oppression proceeding. It is also a central issue in the Norseyl and Pan Pacific Actions. The discovery evidence speaks directly to that question. They argue that alone is enough to meet the low threshold described in *Scuzzy Creek*. They further point to Latimer J.'s finding that the relief sought in the oppression proceedings could deprive Norseyl, AXA, and Pan Pacific of the relief they seek in their actions as a further demonstration of the connection between the two proceedings.

[24] Mirage argues the discovery evidence is not relevant to the oppression proceeding because Mirage does not deny the enforceability of the trust agreement in that proceeding. It argues the only issue with respect to the trust agreement is whether the debt that was to have been retired by the sale of the shares has been fully paid. It says the real issue in the oppression proceeding is whether Dr. Taheri had a reasonable expectation that he would be a director of Teknocan and whether he was unfairly deprived of that. Mirage points to Associate Judge Robertson's reasons for judgment where she said the Norseyl Action and Mirage's attempted third party claim in the Norseyl Action (which was the oppression claim in its original form) were connected only by the "barest of threads."

[25] Further, regardless of any connections between the proceedings, Mirage argues it is an abuse of process for Norseyl and AXA to obtain evidence for use in the oppression proceeding by conducting an examination for discovery in the Norseyl Action. Mirage alleges that this was Norseyl and AXA's true purpose in

conducting the examination for discovery and it seeks to use that evidence to avoid tendering an affidavit from their principal, Mr. Marzbani.

Analysis

[26] As set out in *Scuzzy Creek*, there is a very low bar for releasing a party from the implied undertaking so that evidence given on discovery by a person in one proceeding can be used in a related proceeding. In my view, that bar is met in this case. While the oppression proceeding encompasses a much broader range of conduct and more parties than he Norseyl and Pan Pacific Actions, there is some overlap in subject matter and parties. The fact that the Norseyl and Pan Pacific actions are specifically mentioned in the oppression claim petition certainly indicates some connection between the proceedings: see Amended Petition dated August 26, 2024, paras. 79(c) and (d).

[27] I am not persuaded that Associate Judge Robertson's finding that the oppression claim (then in the form of a third party notice) is only tentatively connected to the Norseyl Action is determinative of the issue now before me. The test for upholding a third party notice requires a higher degree of connection between the third party claim and the original action than is required between two proceedings in which a party seeks to relax the implied undertaking (see Associate Judge Robertson's summary of the test for striking a third party claim at paras. 4-9 of her reasons). Here, where the parties are the same, all that must be shown is that the discovery evidence *may* have *some* bearing or relevance on the evidence in the oppression claim: *Scuzzy Creek*, para. 20. That is a low standard, especially when one considers that any doubt is to be resolved in favour of relaxing the undertaking.

[28] Justice Latimer found that the enforceability of the trust agreement will have to be determined in the oppression claim. Dr. Taheri's discovery evidence speaks directly to that issue. Mirage suggests that it will not argue in the oppression proceeding that the trust agreement is unenforceable but, as I have said, Latimer J. appears to have been given to believe otherwise. Further, Mirage's response to civil claim in the Norseyl Action specifically asserts that the trust agreement is

unenforceable. I am persuaded that there is at least some potential for the validity of the trust agreement to be in issue in the oppression proceeding as it clearly is in the Norseyl Action. Even if it is not in issue for purposes of the alleged oppressive conduct, it appears to be an issue for the remedy. Thus, I am at least left with doubt about what is and is not in issue in the oppression claim and that doubt is to be resolved in favour of relaxing the undertaking unless Mirage can show some prejudice or injustice in using the discovery evidence in the oppression claim. It has not done so.

[29] Rather than point to prejudice, Mirage argues that the way Norseyl and AXA have gone about to obtain and use the discovery evidence is an abuse of process. Given the timing of the examination for discovery, it is hard to disagree with Mirage's suggestion that Norseyl conducted the discovery when it did in the hopes of using that evidence in the oppression proceeding. Nevertheless, I am not persuaded this constitutes an abuse of process. Norseyl has a right to conduct the discovery in the Norseyl Action when it likes. It is limited to seven hours (Rule 7-2(2)) and if it chooses to use up some of that time early in the pre-trial process, that is its choice. There is nothing illegitimate or abusive about the discovery itself. It is not as though Norseyl and AXA commenced the Norseyl Action for the sole purpose of obtaining discovery evidence that they could not obtain in the oppression proceeding. The Norseyl Action preceded the oppression claim and the questions asked on the discovery were within the scope of the issues in that action. Having conducted a legitimate discovery within its rights under the Norseyl Action, I am not persuaded that it is an abuse of process for Norseyl and AXA to now seek to rely on that discovery for the oppression claim, even if that had been Norseyl's objective when it set down the discovery.

[30] Finally, I do not consider it to be an abuse of process to use the discovery evidence instead of an affidavit from Mr. Marzbani. If the issues in the oppression claim include whether the trust agreement is enforceable or whether Mirage's debt to Treaty had been paid, admissions from Dr. Taheri are more probative than assertions that Mr. Marzbani might make in an affidavit. I see no reason to exclude

more probative discovery evidence that was legitimately obtained through another proceeding with the same parties and potentially related issues.

Conclusion

[31] For these reasons I would grant the order sought by Norseyl and AXA releasing it from the implied undertaking to the extent of using the examination for discovery of Dr. Taheri from the Norseyl Action in the oppression proceedings. They may also use the documents referred to in the discovery as those documents provide necessary context for the discovery evidence itself. Norseyl and AXA will have their costs of this application.

"Kirchner J."