Court of King's Bench of Alberta

Citation: Gutama Estate v Vital Property Services Inc, 2023 ABKB 436

Date: 20230720
Docket: 2303 00601
Registry: Edmonton

Between:

Endale Gutama as Litigation Representative of Melesse Dahessa Gutama (Deceased)

Plaintiff

- and -

Vital Property Services Inc., Tidy Holdings Corporation, Hussein Choufi also known as Huss Choufi, and Basima Choufi

Defendants

Reasons for Judgment
of the
Honourable Justice M. J. Lema

I. Introduction

[1] Should two companies, already in interim receivership, be put into full receivership?

[2] For one company, the question turns on the continued existence (or not) of a shareholder agreement, including its sale-of-shares-on-death-of-shareholder provision.

[3] Per the litigation representative of a deceased shareholder and director, the other shareholder and director repudiated that agreement, undercutting those provisions and leaving a

pre-existing shareholders' deadlock in place, with a receiver needed to pursue and oversee a necessary sale of the corporation or its business.

[4] The other (owned-by-the-same-persons) company has no shareholders' agreement. Per the litigation representative, a full receivership is needed to break the same deadlock and oversee the same necessary sale.

[5] The surviving shareholder denies repudiating the agreement and seeks to enforce its sale-on-death provision, solving (per him) the deadlock there. On the other front, he disputes the need for a full receivership.

[6] I find that receivership is not warranted on either front.

II. Analysis

A. Vital Property Services Inc. (VPS)

1. Sale-on-incapacity provision in shareholder agreement

[7] VPS's two shareholders – Melesse Gutama (now deceased) and Hussein Choufi – entered into a unanimous shareholder agreement on July 15, 2015.

[8] Article 8 outlines "General Provisions Relating to the Purchase and Sale of Shares."

[9] Article 9 and the associated schedule 2 address a purchase and sale "upon the incapacity or disability of a shareholder."

[10] It appears to be common ground that, for about one year before his death, in Ethiopia, on January 15, 2022, Gutama lacked capacity. Per Choufi, Gutama was effectively missing in action throughout most, if not all, of that period, travelling to and staying in Ethiopia, largely out of contact, until his death.

[11] Gutama's apparent loss of capacity in or around early 2021 triggered an option (but not a duty) on Choufi to buy out Gutama's shares. At one stage, Choufi took the position that he wished to exercise that right, but no evidence showed that a necessary precondition – the fixing of the purchase price by VPS's auditors (para 9.1 of sch 2) – had occurred.

[12] I find that, whatever option Choufi had under Article 9 and schedule 2 to buy Gutama's shares did not ripen (with no purchase price set) before any such option was eclipsed by Gutama's death and the associated triggering of the sale-on-death provision (Article 10 and the associated schedule 3), reviewed next.

2. Sale-on-death provision in shareholder agreement

[13] Here are the key parts of schedule 3:

> Upon the death of any Shareholder, **[VPS] shall be obligated to purchase and the Personal Representative of the deceased Shareholder shall be obligated to sell** all … of the Shares held by the [PR] free of any lien, charge or encumbrance as hereinafter provided.
>
> The **price** to be paid for the Shares held by the [PR] … shall be the **fair market value per Share as at the date of death** of the deceased Shareholder multiplied by the number of Shares of [VPS] held by the [PR]. [paras 10.2 and 10.3, sch 3]

[14] [VPS] shall satisfy the Purchase Price as follows:

a. as to an amount equal to the aggregate of **insurance proceeds** received by [VPS] on the policy or policies of insurance on the **life of the deceased Shareholder**, by certified cheque on closing;

b. as to the **balance of the Purchase Price**, if any, by the execution and delivery to the [PR] on closing of a **promissory note** of [VPS] in an amount equal to such **unpaid balance** and providing that the unpaid balance from time to time shall bear **interest** from the time of closing at [a defined prime rate]. The **unpaid balance** … plus the accrued annual interest, shall be paid in **thirty-six (36) consecutive monthly instalments commencing one (1) year from the date of closing**. [Next: acceleration-on-default and prepayment provisions] and

c. the surviving [Shareholder] shall **personally guarantee payment of the promissory note** by [VPS]. [paras 10.2, 10.3 and 10.4 of sch 3] [emphasis added]

[15] In other words, a mandatory purchase of the deceased shareholder's shares by, and sale to, VPS, paid first by any insurance proceeds and second by monthly payments of the balance, with interest.

[16] The threshold question, on the VPS front, is whether the shareholder agreement continued to operate as of Gutama's death, versus having earlier been repudiated by Choufi, which Gutama's litigation representative argues.

3. Requirements for repudiation

[17] Repudiation involves contract-disaffirming conduct by one party and a resulting election of the other party either to affirm the contract or to "accept" the repudiation and so terminate it.

[18] The Supreme Court of Canada described these essentials in ***Guarantee Co of North America v Gordon Capital Corp*** [1999] 3 SCR 423:

> **Repudiation … occurs "by words or conduct evincing an intention not to be bound by the contract. …. … the effect of a repudiation depends on the election made by the non-repudiating party**. If that party treats the contract as **still being in full force and effect**, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at p. 541. If, however, the non-repudiating party **accepts the repudiation**, the contract is terminated, and the parties are discharged from **future obligations**. **Rights and obligations that have already matured are not extinguished**. Furmston, *supra*, at pp. 543-44. [para 40] [emphasis added]

[19] In ***Booster Juice Inc v West Edmonton Mall Property Inc***, 2019 ABCA 58, the Court of Appeal elaborated on the "acceptance" aspect, drawing on a Nova Scotia Court of Appeal decision in turn drawing on *Chitty on Contracts*:

> In *White v EBF Manufacturing Ltd*, 2005 NSCA 167 at para 91, 239 NSR (2d) 270, Saunders JA cited with approval the following passage from *Chitty on*

Contracts, 28th ed (London: Sweet & Maxwell, 1999) at paras 25-012, concerning **acceptance of repudiation**:

> **It is usually done by communicating the decision to terminate [to] the party in default although it may be sufficient to lead evidence of an "*unequivocal overt act which is inconsistent with the subsistence of the contract...***without any concurrent manifestation of intent directed to the other party." **Unless and until the repudiation is accepted the contract continues in existence for "an unaccepted repudiation is a thing writ in water." Acceptance of a repudiation must be clear and unequivocal and mere inactivity or acquiescence will generally not be regarded as acceptance for this purpose.** *But there may be circumstances in which a continuing failure to perform will be sufficiently unequivocal to constitute acceptance of a repudiation*. It all depends on "the particular contractual relationship and the particular circumstances of the case." [emphasis added]

See also *Brown v Belleville (City)*, 2013 ONCA 148 at para 48, 359 DLR (4th) 658. [para 20] [emphasis added]

[20] More guidance on "acceptance" comes from ***Anthem Crestpoint Tillicum Holdings Ltd v Hudson's Bay Company ULC Compagnie de la Baie D'Hudson SRI***, 2022 BCCA 166:

> If the non-repudiating party elects to accept the repudiation and to terminate the contract, this **election must be communicated within a reasonable time to the repudiating party**. The reason prompt communication is necessary was explained by this Court in *Kaur v. Bajwa*, 2020 BCCA 310:
>
> > The **practical rationale** for the requirement that an innocent party **accept a purported repudiation rests on the need for both parties to understand whether they remain bound by the terms of their contract and to avoid having the repudiating party continue to fulfil that contract in the belief that it remains in effect.** Accordingly, the innocent party is required to reject or accept the repudiation within a reasonable period of time and cannot adopt a "wait-and-see" approach, as its decision simultaneously determines the position and ongoing legal obligations of the repudiating party. [para 28]
> >
> > [Citations omitted].
>
> The **non-repudiating party has the onus of establishing that it has accepted the repudiation and communicated that acceptance to the repudiating party within a reasonable time:** *Ginter v. Chapman* (1967), 1967 CanLII 810 (BC CA), 60 W.W.R. 385 at 389 (B.C.C.A.), aff'd 1968 CanLII 72 (SCC), [1968] S.C.R. 560. An election to accept or decline to accept a repudiation is irrevocable. Once made, it cannot be retracted: *Osmack v. Reynolds*, 1973 ALTASCAD 55 (CanLII), [1974] 1 W.W.R. 408 (Alta. C.A.) at 420–421, aff'd without reasons [1976] 2 W.W.R. 576 (S.C.C.); S.M. Waddams, *The Law of Contracts*,

> 7th ed (Toronto: Canada Law Book, 2017) at para. 628. [paras 53 and 54] [emphasis added]

4. Asserted repudiating actions

[21] The litigation representative (LR), one of Gutama's brothers, focused principally on Choufi's decision, during Gutama's time in Ethiopia, to register a change in the 50:50 shareholdings of VPS at the Corporate Registry, effectively (per the LR) eclipsing Gutama's half interest for no consideration and without any compensation.

[22] The LR elaborated in his two affidavits (key excerpts here):

> … on December 13, 2021, I am advised by [my] counsel that a Peter Cave [VPS employee] filed a Change of Director/Shareholder with the Registrar of Corporations wherein the **records of the Registrar of Corporations were amended to show that [Choufi] was made the sole voting shareholder of VPS**.
>
> Attached here to and marked as Exhibit "K" is a true copy of [a May 25, 2022] letter from [Choufi's counsel] to Seada Hasen [Gutama's surviving spouse]. I do note that the **shares held by [Gutama] were purported to be transferred** after the date of this letter, indicating [that Gutama] was still a shareholder of VPS. [paras 11 and 15 of the LR's affidavit filed January 18, 2023]
>
> It caused great incalculable distress to me [i.e. the LR], my brother Sora Gutama [i.e. another Gutama sibling], and [Gutama's] wife, when we found out that [Choufi] had unilaterally exercised self-help and had **changed the shareholdings of [VPS** and Tidy Holdings Corporation (THC) i.e. the other co-owned corporation] to remove [Gutama] from the business[es] after his death. It has [a]ffected my whole family and has [a]ffected my sleep. [para 20 of LR's affidavit filed April 20, 2023]

[23] In his June 2, 2023 follow-up submissions, counsel for the LR provided this expanded catalogue of perceived repudiatory actions by Choufi:

1. rather than pursuing the USA [presumably meaning a share buy-out via the shareholder agreement], resorting to self-help by changing of having the shareholders of VPS changed with the Registrar of Corporations, despite no legal authority to do so and in effect repudiating the USA;
2. purporting to oust the Estate of … Gutama … as shareholder by unilateral action, and again effectively repudiating the USA; [**COMMENT**: the LR did not explain its "again … repudiating" position i.e. how any such perceived ousting was somehow different from the "self-help" step described immediately above i.e. what further or incremental repudiatory action occurred];
3. failing to provide information the Estate would be entitled to as a shareholder of VPS under the USA; [**COMMENT**: here, the LR was presumably referring to his counsel's January 11, 2023 letter to VPS and THC asking for copies of various documents (e.g. articles, bylaws, shareholder agreements, shareholder-meeting minutes, and financial statements) pursuant to ss 21 and 23 *ABCA*. Per an April 3, 2023 email from a VPS representative to (in part) the Interim

> Receiver (IR), VPS provided all the requested information to the IR. Per the IR's response, it had received some, but not all, of that information, providing a detailed list of information sought by the LR but not relayed (at least not yet) to the IR. In any case, regardless of the state of information disclosure, it is not apparent how any provide-information shortcomings by Choufi or anyone associated with him amount to repudiating the shareholder agreement i.e. instead of (possibly) breaching ss. 21 and 23 *ABCA*)];
>
> 4. failing to utilize the mechanism in the USA to effect a share transaction despite full knowledge of the USA and the processes necessary to effect the transaction; **[COMMENT**: as with the comment above on item #2, it is not clear what, if any, separate conduct the LR refers to here. As far as I can tell, items #1, #2 and #4 overlap completely];
> 5. purporting to hold [a] directors' meeting without quorum or notice in violation of the USA and the [*Business Corporations Act*] [**COMMENT**: given Gutama's apparent lack of capacity and, in any case, lack of responsiveness in this period, it is not clear that Gutama could or would have participated in the meeting in question];
> 6. not complying with the notice requirements under the USA (article 3.1(e) or the [*Business Corporations Act*] [**COMMENT**: same comment as immediately above];
> 7. using corporate funds for personal purposes; [**COMMENT**: no apparent link to the USA and, accordingly, irrelevant to the repudiation argument]; and
> 8. generally, disregarding the USA whenever it suited him. [**COMMENT**: no particulars provided].

[24] Accounting for duplication and factoring out irrelevant or immaterial assertions, the LR's complaints effectively distill to Choufi's change to the Corporate Registry record of VPS shareholdings i.e. showing himself as the sole shareholder i.e. without having first purchased Gutama's (or his estate's) shares via the on-disability or on-death buy-out provisions in the shareholder agreement.

[25] In making that change in those circumstances, did Choufi repudiate the shareholder agreement i.e. did he "evince an intention not to be bound by" that contract?

5. No repudiation

[26] The answer is no.

[27] **First**, consider the circumstances leading up to the Corporate Registry change, per Choufi:

> Starting in 2019 until being removed as a shareholder [on August 31, 2021] [Gutama] [began] taking out of country trips to both the United States and Ethiopia with increasing frequency, without notice, without a firm timetable for return, and with decreasing effort and attention to the business of the companies.
> …

> From 2020 on [Gutama] [failed] to respond to bids, client inquiries, supplier issues, in general opportunities instead focusing increasingly on his other business ventures to the detriment of the subject companies ….
>
> In 2020 [Gutama] [attended] on site at the office for VPS and in contradiction of the [shareholder agreement] encouraged key staff to take alternative employment and to pursue opportunities away from VPS.
>
> While away and despite not providing any confirmation of a firm expected date of return, [Gutama] would not use an out of office or similar type message on his voicemail or e-mail accounts and yet still failed to respond to clients[,] suppliers and stakeholders alike.
>
> Throughout this time I became increasingly concerned about his disengagement, lack of attention to the business of the companies, failures to remit taxes and payroll, his breach of the USA as it relates to the treatment of the staff, and the increasingly erratic behaviour which included consistently requesting additional funds and resources as he made multiple requests for more money and greater compensation. [paras 8-10, 15 and 16 of Choufi's affidavit sworn May 9, 2023]

[28] As far as I know, Choufi was not cross-examined on these segments or any part of this affidavit.

[29] The LR's own evidence confirms at least some of Choufi's evidence of Gutama's absence and disengagement:

> [Gutama] had travelled to Ethiopia in November of 2020 to visit family with a planned return in April 2021; however at the time he was too ill to travel back to Canada and, ultimately, he did not return. [Exhibit B – Ethiopian death certificate confirming Gutama's death there on January 15, 2022]
>
> I am advised by Dr. Game, [Gutama's] physician and longtime friend, that for a period of at least a year prior to his death [i.e. back to approximately January 2021], [Gutama] was not in any state of mind to be able to manage his affairs. [paras 3 and 4 of the LR's affidavit sworn January 16, 2023]

[30] Even if (from the outside i.e. far from Ethiopia) Choufi was unaware of the precise details of Gutama's missing-in-action state, Choufi's reading of incapacity or disability was reasonable and, as it turned out, in fact accurate. In that circumstance, per the shareholder agreement, Choufi had an option to buy out Gutama's shares.

[31] In other words, Choufi did not manufacture a reason or ground for a buy-out: Gutama's perceived (and in fact actual) incapacity provided an actual, and legitimate, ground.

[32] **Second**, the minutes of a VPS director(s) meeting on August 31, 2021, at which Gutama was "removed" as a shareholder, reflect Choufi's true intention i.e. not somehow eclipsing Gutama's shareholding without consideration or compensation (if even possible), but a buy-out:

> The Director(s) / Shareholder(s) discussed at great length regarding the serious business issues currently incurring with [Gutama] / Business Partner, for example:
> - (due to gross negligence of responsibilities as 50% Partnership and Shareholder of the Corporation, including draining financial value(s) from the Corporation ….

> And as a result, have realized that we need help to restructure the Business Corporation before it is too late!
>
> a. So, as agreed upon, a decision was made to **remove and buyout** [Gutama] … in order to save the Corporation from the said gross negligence issues. … (See detail information under section 9.0 – Contract Agreement).

[33] The participants at this meeting were Choufi and the noted Peter Cave, described as a business administrator i.e. only one of the two directors (Choufi and Gutama) was present.

[34] Choufi's buy-out intention is confirmed by the resolution's reference to "Section 9.0 – Contract Agreement", which can only be understood as referring to Article 9 of the shareholder agreement, entitled "Incapacity and Disability" (i.e. of a shareholder) and the associated schedule 2 (summarized above), which provide for a buy-out of the incapable or disabled shareholder's shares.

[35] Even if Choufi can rightly be criticized for registering an inaccurate change with Corporate Registry (i.e. with no actual underlying change of share ownership), and possibly breaching an *ABCA* provision (s. 251) in the process), his expressed animating concept was the noted buy-out of Gutama's shares.

[36] **Third**, no evidence showed that Choufi actually (even purportedly) transferred, or directed the transfer, of Gutama's shares to himself (if even possible).

[37] Whatever Choufi thought he had accomplished by way of that registration change, the underlying reality was that Gutama's shares did not transfer to Choufi, with the registration change itself insufficient to accomplish that change.

[38] Corporate Registry records reflect what is filed, not necessarily the underlying reality: see ***Tran v Premiere Airport Facilities Inc***, 2019 ABPC 197 (Corbett PCJ) (paras 30, 34 and 36) and ***Mansell Management Enterprises Inc v Iwaschuk***, 2005 ABPC 379 (Donnelly PCJ) (para 3). See also ***Varghese v Director of Employment Standards***, 2022 CanLII 127714 (AB ESA) (Johnson, Vice Chair): " … There is no compelling alternative explanation as to why Mr. David would file corporate records indicating that the Appellant was a director, nor was there any compelling evidence presented that would call into question the accuracy of the Corporate Registry records." Unlike the present case, where no evidence shows the shares in question were actually transferred to Choufi (again, if that were even possible in the circumstances here) i.e. where the evidence confirms the Corporate Registry records were inaccurate i.e. showing Choufi as the sole shareholder in advance of an actual transfer.

[39] In other words, Choufi got ahead of himself in registering a change in shareholdings i.e. in logging such a change before initiating and concluding a buy-out of Gutama under Article 9. But acting prematurely with that registration was not inconsistent with Choufi's stated (buy-out) intention i.e. exercising his buy-out right to bring the shareholding reality into to line with the (premature) registration of the change.

[40] In the end, Gutama (and later his estate) continued to own his shares throughout, with the Registry filing not changing that. (This is reflected in the LR's counsel's January 11, 2023 letter to the two corporations here, requesting various information for the Gutama Estate, which it described as "a shareholder in the Corporations" i.e. not as a former shareholder.)

[41] **Fourth**, the LR produced no evidence of any statements or actions by Choufi inconsistent with him exercising that right at some point e.g. a statement by Choufi that the share transfer could (somehow) be accomplished by the registration alone or anything akin or that Gutama or his estate would not be paid for his shares.

[42] Instead, we have this (unchallenged) evidence from Choufi:

> Though not immediately made aware of [Gutama's] death [on January 15, 2022], when I did find that [Gutama] had died **I reached out to [the LR]** … to express my condolences and **to again be forthright with my intention to honour the [shareholder agreement] and purchase [Gutama's] shares valued at the moment of incapacitation or death**. [He] made no immediate efforts to negotiate or request records. [para 20] [emphasis added]

[43] **Fifth**, no evidence showed that Choufi took any particular steps on the authority (or at least ostensible authority) of being VPS's sole shareholder e.g. purporting to sell, or offer to sell, all of VPS's shares to a third party, charging all of its shares as security for a loan, or otherwise acting as a sole shareholder.

[44] **Sixth**, no evidence showed that any third party (i.e. outside of Corporate Registry officials) acted on, read, noticed or was even aware of the registered-at-Corporate-Registry change of shareholdings or, in any case, took any steps in reliance on the (mistaken) perception (per Registry records) that Choufi had become VPS's sole shareholder.

[45] **Seventh**, Choufi offered an explanation (however misconceived) for the Registry change:

> In 2021, I was advised by the accountant for the companies, Peter Cave, that given the conduct, personal expenses, requests for more money, and absenteeism it would be best to remove [Gutama] from the Corporate Registry to safeguard the companies['] assets. The recorded minutes … from that meeting show that it was my intention to implement a buyout under the [shareholder agreement].
>
> In August 2021, following a period of non-contact with [Gutama] and on the advice of the corporate accountant Peter Cave did remove [Gutama] as shareholder. [paras 17 and 18]

[46] While it may have made more sense, assuming the perceived concerns about Gutama were on-target, to remove him as a director (and to follow the governing *ABCA* and relevant shareholder-agreement provisions (if any) to accomplish that), Choufi at least offered a superficially plausible explanation for the change i.e. his and the accountant's perception (apparently formed without the benefit of legal advice) that registering the shareholder change would (somehow) "safeguard" the corporate assets.

[47] **Eighth**, the Corporate Registry shareholder changes for both VPS and THC were reversed by consent, as part of a Consent Interim Receivership Order granted and filed on February 6, 2023, shortly after the LR filed a statement of claim, on January 11, 2023, seeking various relief from Choufi, including reversal of those changes. This squares with Choufi's above-found buy-out intention i.e. with him not opposing the Registry-change reversals (e.g. by arguing that he somehow accomplished share transfers via those changes and seeking to defend them).

[48] **Ninth**, even if the Registry-record change reflected repudiation of the shareholder agreement by Choufi, no evidence showed that Gutama or the LR in his place accepted the repudiation within the meaning of the above case law i.e. made a clear and unequivocal (and communicated) decision to terminate the contract.

[49] Instead:

- in Gutama's statement of claim, filed January 11, 2023, the LR pleaded (in part) that:

> On or about December 13, 2021, improperly and without legal authority, [Choufi] filed a change of shareholders for VPS wherein he purported to change the shareholdings of VPS to list [Choufi] as a shareholder holding 50 per cent of the issued and existing common shares and [CHECK] [his spouse] as holding 50 per cent of the issued and existing common shares of VPS. …
>
> Immediately prior to the filing of the change of shareholders by [Choufi] on December 13, 2021, the records of the Registrar of Corporations indicated [that Gutama] held 50 per cent of the voting shares of VPS.
>
> Pursuant to a [shareholder agreement] in VPS, dated July 29, 2015, VPS was obliged to purchase the shares of the Estate from the Estate at fair market value and notwithstanding the terms of the [shareholder agreement], VPS failed or neglected to purchase the shares in VPS held by the Estate.
>
> No such transaction has occurred as required by the [shareholder agreement] and **the [shareholder agreement] has not been rescinded or amended to the knowledge of the Estate**. [paras 10-13] [emphasis added]

  In other words, with knowledge of the Registry changes, the LR invoked the shareholder agreement, characterizing it (in part) as "not … rescinded" i.e. presumably meaning in full force and effect;

- in his first affidavit (filed January 18, 2023), and after noting the Registry change (para 11), the LR noted the shareholder agreement (including its "disability" and "death" share-sale provisions) and that no such sales had occurred and stated: "I am … unaware of whether the VPS [shareholder agreement] remains in force or was terminated; however, I was provided with a copy of a [May 25, 2022 letter from VPS's counsel to Gutama's widow indicating in part] that … [t]here is a [shareholder agreement] in force and effect in respect to VPS. I can only assume this to be the VPS

[shareholder agreement]" (paras 13 and 14). Here again the LR was apparently not taking the position that he viewed the Registry change as a disavowal of the shareholder agreement or, if he did, that he was accepting that disavowal and treating the agreement as terminated. Instead, he seemed to regard the agreement's possible termination as an unrelated event i.e. as turning on something other than the Registry change;

- in paragraph 18 of that affidavit, the LR stated (in part) that "it is a term of the VPS [shareholder agreement] that [Gutama's] representative may be a Director of the corporation" – another recognition of the shareholder agreement;
- same thing in para 38, in part stating "VPS is not adhering to the VPS [shareholder agreement]";
- in his second affidavit (filed May 6, 2023), the LR stated (in part):

With respect to VPS, the [shareholder agreement] … provided that:

a. The Estate and [Choufi] each shall elect nominees to the board of directors of VPS, which shall have 2 directors and no casting votes; and

b. A quorum of 2 directors.

As such, it is impossible for this deadlock in management of VPS to be resolved. Furthermore, **this [shareholder agreement] provides it is terminated on the receivership of VPS. As such, the USA was terminated pursuant to its terms upon the interim receivership of VPS [on February 6, 2023] and is no longer applicable in my opinion.** [para 13] [emphasis added]

This position (termination on receivership) is inconsistent with the LR's stance that the Registry change was a disavowal of the shareholder agreement and that the LR had accepted that disavowal i.e. that he had earlier terminated the agreement and on that basis; and

- in para 27 of his second affidavit, the LR cited, as a pro-appointment-receiver ground, "the fact that VPS and/or [Choufi] is not adhering to the VPS [shareholder agreement] (if it remains in place as they allege)." The only basis raised by the LR to this point for why the agreement might not be in force is its asserted termination on receivership i.e. a distinct event from the Registry change.

[50] All said: the LR produced no evidence of having accepted the asserted Registry-change repudiation at any point i.e. of deciding to terminate the shareholder agreement on that basis and communicating that decision to Choufi.

[51] **Concluding on this aspect**, the core reality is it was not anything said or done by Choufi that sidelined Gutama or neutralized his voice in VPS's affairs; it was Gutama's own decisions and (ultimately unfortunate) circumstances that left Choufi alone to manage them.

[52] Choufi's Corporate Registry changes were both premature and clumsy (i.e. as a "safeguarding" step) but were also somewhat understandable, with Gutama effectively missing in action, for a long spell, and Choufi potentially needing to make decisions about the corporations in that vacuum i.e. even in advance of initiating and concluding the intended and shareholder-agreement-authorized buy-out of Gutama's shares.

[53] And, as explained, the Corporate Registry change did not actually undercut Gutama's interest or serve as a platform for any Choufi steps prejudicing Gutama in any way.

[54] Most importantly for the "repudiation" analysis, the Corporate Registry change, viewed in the full context here, did not reflect an intention by Choufi to disavow the shareholder agreement. As noted, the key resolution expressly referred to buying out Gutama's shares and to accomplishing that via the applicable ("incapacity or disability") provision of that agreement i.e. to enforcing – not disavowing – the agreement. (As found above, Gutama's later death engaged the "sale on death" provisions, eclipsing the "sale on disability" ones.)

[55] It is true that no "auditors" valuation was prepared here, meaning that the "incapacity or disability" provision did not ripen. But that only means Choufi did not advance along the available buy-out pathway, not that he was disavowing the agreement.

[56] For that and the other reasons above, the Registry change was not a disavowal of the shareholder agreement.

[57] In any case, as explained above, neither Gutama himself (before his death) nor his estate nor LR thereafter accepted any asserted Registry-change disavowal i.e. treated it as terminating the shareholder agreement and so advised Choufi.

[58] I accordingly find that the shareholder agreement continued in full force and effect until, at minimum, the appointment of the VPS receiver on February 6, 2023.

6. Even if agreement terminated later, crystallized obligations continued

[59] Per the LR, the appointment of the interim receiver on February 6, 2023 terminated the shareholder agreement, per s. 13.15, which includes, among other agreement-terminating events, "the bankruptcy, **receivership**, or dissolution of [VPS]."

[60] Per Choufi, "receivership" in that provision does not include an interim receiver.

[61] That debate does not need to be resolved here.

[62] Even if "receivership" includes an interim receiver and (accordingly) the shareholder agreement terminated on the noted date, any such termination would not eclipse the agreement completely i.e. render it meaningless for all purposes and at all times.

[63] Instead, crystallized rights and obligations would continue, as explained by Friesen J. in ***Harco Enterprises Ltd v Knelsen Sand and Gravel Ltd***, 2021 ABQB 263 (affirmed on this point 2021 ABCA 385):

> The choice to terminate the agreement is not rescission in the true legal sense of the word, being *void ab initio* by a vitiating element; rather, **the parties are discharged from future obligations, but remain bound by rights and obligations that have accrued through partial performance**: ***Guarantee*** [cited above] at paras 40–41, see also ***Ascent One Properties Ltd v Liao***, 2020 BCCA 247 at paras 88–89.

> In other words: the contract has ended, but it remains binding in terms of past acts and defaults: ***Chomedy Aluminum Co v Belcourt Construction (Ottawa) Ltd***, 1979 CanLII 66 (ON CA), [1979] 24 OR (2d) 1, at para 15, 97 DLR (3d) 170 (CA). **Lawful termination of a contract does not deprive the breaching party of accrued contractual rights**: ***Norwood*** [***Construction Ltd v Post 83 Co-operative Housing Association***, [1988] 30 CLR 231] at para 36. [paras 174 and 175 of QB decision] [emphasis added]

[64] I see no reason why this result would not also apply where a contract (arguably) terminates by its own terms i.e. in addition to a termination election by one party following repudiation by the other. (Again, I find no repudiation or, in any case, any accepted repudiation here.)

[65] On this point, see ***Heyman v Darwin*** [1942] AC 356, which addressed the operation of an arbitration clause where a contract had come to an end. Per two judges (Viscount Simon LC and Lord Macmillan), and not contradicted by the other judgments, a core distinction exists between defects going to the very existence of the contract (and thus of the arbitration clause itself) and contract-terminating events downstream of a binding contract being made and (by definition) not affecting its initial existence.

[66] Both held that, in the latter case, it did not matter how the contract came to be terminated: the contract (including its arbitration clause) had existed, and the arbitration clause continued to operate i.e. to disputes falling within its scope. In other words, pre-existing and engaged contractual rights continued to operate despite the later termination (by whatever means) of the contract.

[67] Per Viscount Simon:

> … **If the parties are at one on the point that they did enter into a binding agreement in terms which are not in dispute, and the difference that has arisen between them is as to their respective rights under the admitted agreement in the events that have happened**, for example, whether the agreement has been broken by either of them, or as to the damage resulting from such breach, or whether the breach by one of them goes to the root of the contract and entitles the other party to claim to be discharged from further performance, or **whether events supervening since the agreement was made have brought the contract to an end so that neither party is required to perform further -- in all such cases it seems to me that the difference is within such an arbitration clause as this.** …
>
> … If the dispute is whether the contract which contains the clause **has ever been entered into at all**, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is **contending that it is void ab initio** (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation **where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them** whether there has been a breach by one side or the other, or

> **whether circumstances have arisen which have discharged one or both parties from further performance**, such differences should be regarded as differences which have arisen "in respect of," or "with regard to," or "under" the contract, and an arbitration clause which uses these, or similar, expressions should be construed accordingly. … [from pp 360-361 and 366] [emphasis added]

[68] Per Lord Macmillan:

> … an **admittedly binding contract** containing a general arbitration clause **may stipulate that in certain events the contract shall come to an end**. If a question arises whether the contract has for any such reason come to an end I can see no reason why the arbitrator should not decide that question. … [from p 371] [emphasis added]

[69] In the same way, other pre-existing rights and obligations are typically not eclipsed when a contract is terminated, whether via an accepted repudiation or simply the contract's own terms (which arguably happened here) i.e. without any breach by any party.

[70] See also ***Stoney Tribal Council v Canadian Pacific Railway***, 2017 ABCA 432, where Wakeling JA (at footnote 72) made the same point:

> … See *Skillsoft Asia Pacific Pty Ltd. v. Ambow Education Holdings Ltd.*, [2013] HKCFI 2108, ¶26 (the court granted **summary judgment for the payment of an outstanding amount payable before the defendant terminated the contract**: "I agree ... that the [defendant's] argument is completely contrary to the **established principle of law that the termination of an agreement would not affect any right or liability which has been crystallized prior to termination. In the absence of clear wording, I do not begin to see how the court can construe the Agreement as one which undermines such established principle**") & Cameron, "Summary Judgment: Law and Procedure in Transition", 24 Hong Kong L. Rev. 347 (1994). [Footnote 72] [emphasis added]

[71] And Re City of Ottawa and Ottawa Professional Firefighters' Association, Local 162, International Association of Firefighters, 1985 CanLII 2153 (ONHCJ – Div Ct):

> **… Neither the proposed prospective termination nor the resignation applied retroactively to deprive the grievor of a benefit under the collective agreement that he had earned and was available to him before the proposed prospective termination or resignation. In the circumstances the only penalty sustained by the grievor for his fraudulent misrepresentation was his loss of employment**. [per Craig J.] [emphasis added]
>
> In my view the governing factor on this aspect of the case is that the City, although it had the right to, did not rescind the contract. The fraudulent misrepresentations did not make the contract void, only voidable, and the City, after initial steps to terminate the employment, did not follow through. **The employment was terminated only when the City accepted the employee's resignation.**
>
> **Where the events giving rise to the litigation, and hence to the claim for payment or reimbursement of the former employee's legal costs, took place during the course of his employment the subsequent retirement of the**

> **employee does not disentitle him to payment or reimbursement** under the collective agreement.
>
> In my opinion, **so far as the benefits claimed are concerned, the employee has the same rights as he would have had if his employment had been ended by his death or retirement or by his resignation in the absence of any threat of dismissal.** [per Sutherland J.] [emphasis added]

[72] **Applying those principles here**, if the appointment of the interim receiver (on February 6, 2023) terminated the contract, the termination came after Gutama's death (on January 15, 2023) and the resultant triggering, under Article 10.1 of the shareholder agreement and the associated Schedule 3, of VPS's obligation to purchase, and the Gutama Estate's obligation to sell, Gutama's shares:

> Upon the death of any Shareholder, the Corporation shall be obligated to purchase and the Personal Representative of the deceased Shareholder shall be obligated to sell all … of the Shares held by the Personal Representative free of any lien, charge or encumbrance as hereinafter provided. [Schedule 3 – Death – Art. 10.2]

[73] And nothing in the (possibly applicable) termination clause signals any retroactive effect of termination:

> This Agreement shall terminate upon the occurrence of any one of the following events: (b) … the receivership … of the Corporation ….

[74] Instead, the literal and natural reading is that, on receivership, the agreement would cease operating i.e. in a forward sense.

[75] If the parties had intended the additional, and more radical, effect that the agreement should be treated as never existing (thus eclipsing any accrued rights and obligations), they would have said so explicitly.

[76] Especially against the backdrop of the cases noted above, with contract terminations typically not undercutting crystallized or matured rights and obligations.

[77] In response to my question on this point (addressed by both parties in their supplementary submissions), the LR argued that:

> … the breaches by [Choufi] and VPS, while under his control if anything, constitute repudiation of the [shareholder agreement] and lead to inequity were he permitted now to rely on [it], and to allow … continued enforcement of [it] would be contrary to law.
>
> If the acts of [Choufi] and VPS constitute repudiation of [the shareholder agreement], recourse to [its] terms [is] no longer available to them. The [shareholder agreement's] survival [provision] does not provide for the survival of terms post-termination of the agreement.
>
> > 13.11 […] all provisions of this Agreement shall forever survive the execution and delivery of this Agreement [and] any and all documents delivered in connection herewith. [footnote omitted]

> Where the breach itself is fundamental and to the root of the contract (as the unilateral actions of [Choufi] are in changing shareholders and ousting the Estate) rescission is appropriate such that the agreement is void *ab initio*:
>
> > Breaches that entitle rescission have been described in various ways, but fundamentally, rescission is permitted where the repudiating party can show a breach going to the root of the contract, a breach tantamount to frustration of the contract, or a substantial failure of performance. This Court has referred to a breach of this kind as "fundamental breach" and a "breach going to the root of the contract", or a "repudiatory breach" [cases omitted] [*LMK Marketing Inc v 1133181 Alberta Ltd*, 2010 ABCA 301 at para 20].

[78] As explained above, Choufi did not repudiate the agreement; in any case, the LR did not accept the repudiation. Accordingly, repudiation cannot anchor the LR's "void ab initio" position.

[79] As for para 13.11, the LR did not point to cases holding that a comparable "shall survive termination" clause is necessary for crystallized rights and obligations to survive termination. As the above-noted cases illustrate, the default position is the other way i.e. termination does *not* typically eclipse accrued rights and obligations i.e. when the contract is interpreted as a whole.

[80] In my view, the presence of a "pre-existing rights survive termination" clause would only be "for greater certainty" i.e. would not add to the default position that such rights survive subject to a contrary interpretation mandated by the express words or other markers of the parties' intention on this point. In other words, the absence of such a clause is not fatal to the default position advanced by Choufi.

[81] Given the default position as exemplified by the noted cases, the LR had the onus of showing that, whether via explicit provision or implicit meaning, the shareholder agreement should be interpreted as effectively evaporating, for all purposes, on receivership.

[82] No such explicit provision is found in the agreement, and nothing else in it signals that the parties intended such a drastic effect.

[83] Finally, as for repudiation (not found here) making a contract void *ab initio*, ***LMK Marketing*** does not support that proposition. In any case, the Supreme Court of Canada in ***Guarantee Co*** (cited above) closed the door on that argument, citing an earlier SCC decision:

> … Problems have arisen … from misuse of the word "rescission" to describe an accepted repudiation. In *Keneric Tractor Sales Ltd. v. Langille*, 1987 CanLII 29 (SCC), [1987] 2 S.C.R. 440, at p. 455, Wilson J., writing for the Court, addressed the distinction as follows:
>
> > The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations under the contract as from the date of termination but the prospective obligations

> embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), and *Moschi v. Lep Air Services Ltd.*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.). [Emphasis added.]
>
> See similarly Waddams, *supra*, at para. 629; Furmston, *supra*, at p. 287, note 12; G. H. Treitel, *The Law of Contract* (9th ed. 1995), at p. 341; S. Williston, *A Treatise on the Law of Contracts* (3rd ed. 1970), by W. H. E. Jaeger, vol. 12, § 1454A, at p. 13; cf. *Sail Labrador Ltd. v. Challenge One (The)*, 1999 CanLII 708 (SCC), [1999] 1 S.C.R. 265, at paras. 31 and 50.

[84] The LR has not shown any convincing reason to regard the interim receivership here, even if it terminated the shareholder agreement, as eclipsing its already-engaged "sale on death" provisions.

[85] Either way (agreement terminated on receivership or not), the sale-on-death provisions, triggered on Gutama's death on January 15, 2022, continue to apply.

[86] With what consequence?

7. Gutama Estate's interest narrowed to being paid out

[87] The crux of the LR's position is that the estate both continues to be a 50 per cent shareholder in VPS and, as such, has an ongoing, and equal role, with Choufi, in operating VPS's business. That is the essential platform for its request for full receivership of VPS i.e. given the current deadlock over the future of the business, a full receivership is warranted, providing a mechanism for the selling the business and, as part of that, calling for, examining, ranking, and paying all claims against the business, including those of the shareholders.

[88] However, that overlooks the effective conversion of the estate's interest here on Gutama's death. Via the "sale on death" provisions, the estate's interest is no longer that of an equal shareholder with an equal stake in the future of VPS. Instead, per those provisions, the estate's sole interest is receiving its appropriate pay-out of its shareholder stake, gauged at the time of Gutama's death. The estate has **no ongoing stake in the business** and has had none since Gutama's death.

[89] The key "sale on death" provisions (from Schedule 3) were outlined above (heading #2). The keys are a mandatory sale, by the estate, to VPS, of the estate's shares at the "fair market value per Share as at the date of death" i.e. January 15, 2022, with payment first out of any "insurance proceeds received by the corporation on the policy or policies of life insurance on the life of the deceased shareholder" and the balance, anchored by promissory note, paid out in 36 consecutive monthly instalments.

[90] The estate argued, in its supplementary brief, that VPS has defaulted in making the required payments under Schedule 3 and, accordingly, deprived itself from further recourse to the "sale on death" mechanism.

[91] I disagree:

- neither Schedule 3 nor Art. 8 ("General provisions relating to the purchase and sale of shares") sets a particular "closing date" for a death-of-shareholder share sale or provides any mechanism for setting a closing date. (The LR's default argument

assumes a closing date was agreed to or somehow set, with payment default(s) measured from such a date);

- no closing date can be, or could have been, set until the parties either agreed to the "fair market per share" for Gutama's shares at the date of death (January 15, 2022) or the FMV was somehow determined (e.g. by an agreed-on or court-appointed valuator, by the Court, or otherwise);
- since Gutama's death, the estate's focus has been vindicating its (perceived) continuing role as a shareholder i.e. in the ongoing operations and future of VPS i.e. not on seeking the (mandatory) sale-on-death pay-out. And Choufi's focus (in part) has been on responding to that position. As far as I can tell, neither party has initiated, or at least has not completed, steps toward determining the FMV of Gutama's shares;
- it has taken this judgment for the parties, or at least the estate, to recognize its actual position here i.e. as determined by this judgment i.e. the recipient of the appropriate FMV-per share pay-out under Schedule 3 i.e. no longer playing a role in the operations, present or future, of VPS;
- it might be different if the estate had proposed an FMV number for its share interest and a closing date anchored on that number. But it did not do so; and
- in any case, even if Choufi had the onus of proposing an FMV number and closing date, it would have been, and has been, reasonable for Choufi to postpone taking such steps until resolution of the debate over the estate's status i.e. until clarification, per this judgment, of the estate's (pay-out recipient only) status.

[92] All to say: the parties must now turn their attention to accomplishing the pay-out mandated by Schedule 3, starting with either agreeing on share FMV or, failing agreement, agreeing on a mechanism for determining that number (e.g. abiding by a valuator's opinion, binding arbitration, etc.) or, failing agreement on a mechanism, applying to the Court for the setting of the FMV number or a method of determining it.

[93] As I see it, a full receivership of VPS is not the answer: Choufi is now in full control of VPS and has been since January 15, 2022, with Gutama's death. A full receiver's aid in operating the business or in overseeing a sale process is not required in this circumstance i.e. with Choufi able to decide ongoing business matters on his own and with no evidence that he wishes to sell the business.

[94] To the extent having a neutral business-expert party assist in determining the share FMV, the interim receiver already in place is (at least potentially) able to do so.

[95] If either or both parties believe the interim receivership is no longer required, they or whichever party can apply for that relief.

8. **Additional rulings**

[96] The LR also sought a receivership (i.e. beyond the perceived need for oversight of the operation of the business and eventual sale of it) on the basis of alleged oppressive conduct (per the *Business Corporations Act*) of Gutama and his estate by Choufi.

[97] The central allegation there was the same (Corporate Registry change) one examined above. I reject it for the same reasons: fundamentally, the registration of incorrect shareholdings had no impact on Gutama's actual shareholdings, and Choufi did not take any steps on the strength of his registered-but-not-actually-achieved full-shareholder status or, in any case, cause any prejudice to Gutama's or the estate's interests.

[98] As for the LR's reliance on ***McGovern-Burke v Martineau***, 2016 ABKB 514 (Yamauchi J.), where an incorrect Corporate Registry filing was characterized as oppressive, the larger context there was a material "squeeze out" of the "deregistered" shareholder's position i.e. more than simply the incorrect filing (see para 80). That did not happen here. In any case, any "solo" dealing by Choufi occurred largely either during Gutama's self-imposed or incapacity-caused absence or, after Gutama's death, when Choufi was effectively permitted to operate solo i.e. having only to pay out the estate (as described above).

[99] In any case, the per-Registry shareholdings have already been corrected, as noted above.

[100] As for allegations of Choufi improperly pursuing insurance proceeds or failing to provide requested information to the estate or the LR, Choufi appears to have been pursuing insurance proceeds as contemplated under Schedule 3 i.e. corralling any VPS-as-beneficiary monies as a preliminary step to paying out the estate. Information-wise, at least since February 6, 2023, the interim receiver has had effective control over, or at least the potential power to obtain, any necessary business records of VPS. If the LR sought information from the interim receiver and the IR did not already have that information from VPS or Choufi himself, the interim receiver could have demanded the information from Choufi and, failing production, applied for an order compelling its production.

[101] In any case, since January 15, 2022, the estate's participation rights, whether to information about VPS's ongoing business affairs or otherwise, have diminished if not disappeared, with its only right (as noted) being to pay-out of the share FMV (50 per cent, that is) as of that date.

[102] Same for the LR's concern about Choufi using VPS funds to participate in this litigation; at this stage, the estate has no stake in how VPS uses its current monies. And, in any case, the amount in question ($5,000) is likely too small to make any difference when it comes to VPS's ability to meet its pay-out obligations (spread out over 36 months, from whenever the closing date occurs) to the estate.

[103] Same for the LR's request for liquidation of VPS: the estate's (pay-out-recipient-only) interest no longer supports that request, with no continuing "ownership deadlock" here.

[104] As for the LR's bid for punitive damages against Choufi, for these same reasons, no such damages are warranted here. The estate's shareholdings never changed or were at risk, and its position has diminished to pay-out-recipient only.

B. Tidy Holdings Corporation

[105] THC is another company that Choufi and Gutama owned 50:50, albeit without a shareholder agreement.

[106] Choufi filed an incorrect shareholdings report with Corporate Registry for it too (showing his spouse as the other half-owner instead of Gutama). Again, no evidence showed that the

shareholdings actually changed, and, per the same consent order noted above, the Corporate Registry information for THC was corrected in February of this year.

[107] The LR argued that, whatever the outcome on the VPS front, a receivership or liquidation was warranted for THC, given a deadlock over anything to do with THC and no shareholder-agreement solution as on the VPS front.

[108] I find that neither receivership nor liquidation of THC is warranted, primarily because of its small scale, namely, a holding company owning one combined business-residential property worth (per a 2020 certificate of title) approximately $310,000 (currently clear title), one vehicle (value unknown), and cash (as at February 8, 2023) of approximately $140,000. Matched against estimated liabilities of approximately $3,000.

[109] While THC's records are not up to date, this best-efforts estimate of THC's current assets and liabilities convinces me that the formal mechanisms of a court-appointed receiver or court-appointed liquidator are vastly disproportionate to the problem at hand with THC i.e. finding a way for Choufi to either buy out the estate at an agreed-on or court-set value or, failing that, a sale process for the property and vehicle.

[110] As well, the interim receiver in place should presumably be able to assist the parties in arriving at fair values for these two assets or in helping them devise a sales process if no buy-out agreement is reached. Especially with that process launching on the VPS front (as discussed above) i.e. presumably the parties can fold the THC dimension into their next steps on the VPS front.

[111] If the parties are unable to arrive at a buy-out price or a sale process, either with or without the IR's assistance, they can each submit their respective proposals, via letter (maximum 2 pages) sent to me via my assistant by August 25th, 2023, and I will determine the next steps on the THC front.

C. Conclusion

[112] For these reasons, no receivership or liquidation is warranted for VPS or THC, and no other relief is warranted on either front.

[113] Choufi is entitled to his costs of the commercial-list application, per Schedule C.

[114] I thank the parties for their helpful written and oral submissions.

Heard on the 12th day of May, 2023.
Dated at Edmonton, Alberta this 20th day of July, 2023.

M. J. Lema
J.C.K.B.A.

Appearances:

David Archibold
Sharek Logan & van Leenen LLP
for the Applicant Estate

Andrew S. Rice
Cooper Regel LLP
for the Respondent H. Choufi

Bren R. Cargill
Witten LLP
For the Interim Receiver MNP Ltd.