IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Briere Sound Ltd. v. Briere,*
2014 BCSC 417

Date: 20140317
Docket: S063388
Registry: Vancouver

2014 BCSC 417 (CanLII)

Between:

Briere Sound Ltd.

Plaintiff

And

Christopher John Briere, Natalie Patricia Blomly, Briere Production Group Inc., Denis Robert Briere, 734540 B.C. Ltd., Donald Walter MacKenzie, Westminster Savings Credit Union, Murray Morrison and Morrison & Co. Law Corporation

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:	G.S. McAlister
Counsel for the Defendant, Christopher Briere:	J.S. Adler
Counsel for the Defendants, Murray Morrison and Morrison & Co. Law Corporation	A.A. MacDonald
Place and Date of Hearing:	Vancouver, B.C. July 6 & September 12, 2012 January 7, 2013 June 19, 20 & 21, 2013 September 11 & 12, 2013 November 12, 2013
Place and Date of Judgment:	Vancouver, B.C. March 17, 2014

2014 BCSC 417 (CanLII)

INTRODUCTION

[1] This is a derivative action. Norman Reis has conduct over the action.

[2] There are several applications before me. The first application is by the defendant Christopher Briere for an order disqualifying Mr. Reis from having conduct of the action on behalf of the plaintiff. Mr. Briere also seeks special costs as well as leave for Mr. Briere to have conduct in order to obtain an order for dismissal of the action.

[3] The other applications are by the defendants. All of them are made pursuant to Rule 9-7 and seek summary dismissal of the action in any event.

BACKGROUND

[4] Briere Sound Ltd. ("BSL" or the "Company") was incorporated in 1997 by Mr. Briere. The Company's business was the provision of production services for public events and concerts. It rented and set up audio and visual equipment and staging.

[5] In 1998, Mr. Reis purchased a one-half interest in the Company. Mr. Reis and Mr. Briere operated the Company essentially as a partnership. Mr. Briere handled the clients and Mr. Reis saw to administration and bookkeeping matters. Mr. Reis made some $250,000 in shareholder loans to the Company. Mr. Reis and Mr. Briere were guarantors of the Company's indebtedness to Westminster Savings Credit Union.

[6] Additionally, Mr. Reis' mother, Celina Reis, lent $70,000 to the Company. A promissory note in her favour was signed on behalf of the Company on December 9, 2002.

[7] By 2005, the Company had assets worth approximately $1.2 million and was generating revenue in excess of $700,000 per year.

[8] In early 2005, Mr. Briere's wife, the defendant Natalie Blomly, joined the management of the Company. The banking arrangements were changed to reflect

this: cheques then required two signatures, any two of Mr. Briere, Ms. Blomly and Mr. Reis.

[9] Mr. Reis says that while he was away from Canada, the other signatories took steps to exclude him from management, including cutting off all access to accounting and financial records.

[10] On June 17, 2005, Mr. Reis commenced an oppression action against the Company and Mr. Briere (Petition No. L051510), seeking as relief the purchase of his shares by Mr. Briere or, alternatively, the sale of the Company by a receiver.

[11] On July 21, 2005, the parties entered into a consent order to address, among other things, the affairs of the Company and the preservation of assets:

> THIS COURT ORDERS that
>
> 1. the Respondents return to the records office of the Respondent, Briere Sound Ltd., at Suite 300 - 713 Columbia Street, New Westminster, British Columbia, all of the records that must be kept at that office pursuant to section 42 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and that the Respondents permit the Petitioner to inspect the corporate records as a current director of the Company, BY CONSENT;
> 2. the Respondents return to the offices of Mr. Kenneth Y. Lee, C.A., at Jung & Lee, Chartered Accountants, 1800 - 1066 West Hastings Street, Vancouver, British Columbia, V6E 3X2, the accounting records of the Respondent, Briere Sound Ltd., that must be kept at that office pursuant to section 196 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and that the Respondents permit the Petitioner to inspect the accounting books and records of the Company in the Accounting Office or held elsewhere, recorded in whatever format including electronic, as a current director of the Company, BY CONSENT;
> 3. except by the consent of the parties or further Order of this Court, no monies of the Respondent, Briere Sound Ltd., be paid, loaned, taken by or otherwise provided to or for the benefit of the Respondent, Christopher John Briere (“Mr. Briere”), pending the resolution of this proceeding, except for a monthly salary to the Respondent, Mr. Briere, of $3,300, BY CONSENT;
> 4. starting in June 2005, if the Company has sufficient monies to operate to pay Mr. Briere his monthly salary, the Petitioner will also be paid his monthly salary of $3,300 in each month and at the same time as the Respondent, Mr. Briere, receives payment, BY CONSENT;
> 5. except by the consent of the parties or further Order of this Court, no assets of the Respondent, Briere Sound Ltd., be encumbered pending

2014 BCSC 417 (CanLII)

2014 BCSC 417 (CanLII)

the resolution of this proceeding, except for reasonable and legitimate operating purposes, and then only if ten (10) days notice is given to all parties hereto, and that the Petitioner and the Respondent, Mr. Briere, have leave, should the parties not agree, to apply to this Court within seven (7) days of his receipt of notice, for further relief from this Court, BY CONSENT;

6. the Respondent, Briere Sound Ltd., provide ten (10) days advance notice to the Petitioner of any equipment or other capital purchases in excess of $3,000, pending the resolution of this proceeding, and that the Petitioner have leave, should he object to such purchase, to apply to this Court within seven (7) days of his receipt of notice, for further relief from this Court, BY CONSENT;

7. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to the Petitioner's lawyer, Mr. Edward G. Wong ("Mr. Wong") at his office or at some other location as designated by Mr. Wong, a list of all of the Company's confirmed bookings and signed contracts and confirmations and a copy of each signed contract within seven (7) days of the date of this Order, and continue to do so on a weekly basis on each successive Monday for the past week's activities until the resolution of this proceeding, BY CONSENT;

8. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to Mr. Wong at his office, or at some other location as designated by Mr. Wong, a statement of the Company's current cash flow and a statement setting out all of Company's present problems within thirty (30) days of the date of this Order, and continue to do so on a weekly basis on each successive Monday for the past week's activities until the resolution of this proceeding, BY CONSENT;

9. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to Mr. Wong at his office, or at some other location as designated by Mr. Wong, a list of all of the Company's assets and inventory including serial numbers of items where applicable within seven (7) days of the date of this Order, BY CONSENT;

10. a certified accountant be appointed by agreement of the parties, or by further order of the Court, and that all sums due to the Petitioner and the Respondent, Mr. Briere, for loans, contributions, salary and wages and sums the Petitioner and the Respondent, Mr. Briere, have incurred on behalf of Briere Sound Ltd., be assessed by the certified accountant by August 31, 2005, or soon thereafter as reasonably possible, BY CONSENT;

11. the Respondents, Briere Sound Ltd. and/or Mr. Briere, will produce all relevant financial and accounting records by July 22, 2005, or at a later date if agreed to by the Petitioner or by further Order of this Court, to the certified accountant appointed in paragraph 10 above, and to Mr. Wong at his office, or at some other location as designated by Mr. Wong, including the report of Mr. Remo Gaita, of Gaita & Associates, setting out his review of the financial transactions of the Respondent, Briere Sound Ltd., from March 1997 to June 2005, and

continue to do so until the resolution of this proceeding, BY CONSENT; and

12. all notices required to be given to the Petitioner in this Order shall be made to Mr. Wong at his office, or at some other location as designated by Mr. Wong.

[12] The order was consented to by Eugene Wong, then counsel for Mr. Reis, and by the defendant Murray Morrison, on behalf of the Company and Mr. Briere.

[13] On September 2, 2005, Madam Justice Arnold-Bailey of this Court ordered the Company and Mr. Briere, jointly, to pay Mr. Reis $150,000 in monthly installments of $30,000. This was for partial payment of Mr. Reis' shareholder loans to the Company. It did not represent any part of Mr. Reis' one-half interest in the Company. The value of Mr. Reis' shares was still to be determined. The payment ordered by Madam Justice Arnold-Bailey has not been made.

[14] Previously, in August 2005, Celina Reis obtained judgment against the Company for $69,000 owing to her. On August 31, 2005, she served a garnishing order on Westminster Savings Credit Union, the Company's banker.

[15] This caused the credit union to accelerate the balance due to it on the Company's outstanding loans. The credit union seized approximately $68,000 from the operating account of the Company to reduce its loan to $86,944.

[16] The credit union had a general security agreement over the assets of the Company.

[17] In early September 2005, Mr. Morrison learned that the credit union intended to realize on its security. He was of the view that if that occurred, either Mr. Reis or Mr. Briere could purchase the credit union's security and receivership.

[18] Mr. Morrison was on his way out of town on vacation. He therefore contacted a colleague, Sandy McCandless, who was at the time a practicing lawyer.

[19] In a memorandum to Mr. McCandless dated September 13, 2005, Mr. Morrison set out the circumstances of this case from the point of view of his

2014 BCSC 417 (CanLII)

client, Mr. Briere. Mr. Morrison agreed in cross-examination he had two goals in involving Mr. McCandless: first, to have Mr. McCandless step into Mr. Morrison's shoes while he was away; and second, to (in Mr. Morrison's words) "put [his] considerable legal talents" to Mr. Briere's goal which he expressed the memorandum as follows:

> …[A]s discussed, Mr. Briere's goal is to (in the best of all possible worlds) have the company petitioned into bankruptcy and to "get in on the back side".

Mr. Morrison went on to express these thoughts:

> My further concern is that ultimately the company owes responsibilities to both its shareholders after all other creditors to the degree it can after liquidation and that Mr. Briere be relieved by the court from any obligation to pay Mr. Reis.

[20] Mr. McCandless' subsequent notes of his discussion with Mr. Briere indicate the seeds of the idea: to let the bank appoint a receiver and then to purchase the bank's security.

[21] On September 8, Mr. Briere directed Mr. Morrison to incorporate the defendant 734540 B.C. Ltd. ("734540"). The sole shareholder and director of 734540 was the defendant Donald MacKenzie, the uncle of Ms. Blomly. Mr. Morrison's understanding was that 734540 might be used to purchase the credit union's security and receivership.

[22] On September 16, 2005, the credit union did act on its security and appointed Boale, Wood & Company Ltd. ("Boale Wood") as receiver.

[23] On September 18, 2005, Boale Wood published a report in which the Company's assets were valued at approximately $197,300. That amount included accounts receivable. The appraised value of the inventory, fixed assets and equipment was approximately $161,560.

[24] In late September, Mr. Briere instructed Mr. Morrison to incorporate 736524 B.C. Ltd. ("736524") for Dennis Briere, Mr. Briere's father.

2014 BCSC 417 (CanLII)

[25] In late September and early October 2005, Mr. Morrison, acting for 734540 and Mr. Briere, arranged for the purchase of the credit union's security and receivership.

[26] There is a dispute on the evidence as to whether Mr. Reis was informed of this transaction.

[27] Reinhart Aulinger is a Vancouver lawyer. He acted for a client who wanted to lend $60,000 to 734540 to help purchase the Company's assets from the credit union.

[28] In this regard, Mr. Aulinger received a letter from the defendant Mr. Morrison, who was still then solicitor for Mr. Briere. The letter dated September 29, 2005, provides, in relevant part:

> Further to our telephone conversation of September 28, 2005, we will now outline the circumstances surrounding the situation whereby your client wishes to advance to 734540 B.C. Ltd. certain funds in which security will be exchanged therefore.
>
> The background of the situation is as follows:
>
> 1. Briere Sound Ltd. is a corporation with two equal shareholders and directors, one being our client Christopher John Briere;
> 2. A dispute arose among the shareholders whereby (on the basis of certain allegations of improper conduct) Mr. Briere barred the other partner from the Company's premises and the other shareholder sought declaratory relief under the *British Columbia Corporations Act*;
> 3. The crux of the matter was that a valuation of the Company was to be obtained, and unfortunately, that didn't happen in timely fashion, such that an order was obtained by the other shareholder against both the Company and Mr. Briere that the sum of $150,000.00 be paid in five monthly installments of $30,000.00 each to the other shareholder;
> 4. Shortly after that order issued, the Company's bankers, Westminster Savings Credit Union placed the Company into receivership on the 16th day of September, 2005, under a general security instrument granted in November 1999;
> 5. Our client through the above noted company owned and operated by his uncle wishes to acquire the Credit Union's security and right to the receivership for the sum of approximately $80,000.00, and we understand that your client is prepared under appropriate circumstances to advance funds in that regard;

2014 BCSC 417 (CanLII)

> 6. At this stage of the transaction the security that could be granted by 734540 B.C. Ltd. to your client (upon completion of the purchase of this security receivership) would be a form of general security agreement presumably attaching the banks documents and the rights thereunder;
>
> 7. Ultimately, 734540 B.C. Ltd. proposes to sell (in the receivership) the underlying assets to that General Security Agreement to yet another company for fair market value (as determined by the receiver) which approximates the sum of $170,000.00;
>
> 8. We believe that at that time the security could be granted to your client by the second company to replace the security over the Credit Union's instrument thereby granting security over "real assets";
>
> The purchasing Company will however, be seeking a line of credit from a financial institution and at that time there may be some concern about priorities, although the company that will ultimately purchasing [sic] we understand already has significant assets and cash flow and that may or may not be a problem; …

[29] After receiving that letter, Mr. Aulinger wrote to Mr. Morrison and said that his client was prepared to advance the loan upon certain conditions. One of the conditions was as follows:

> (iv) your written advice that the "other shareholder" of [Briere Sound Ltd.] has received notice of the receivership, has made no offer to the receiver, was aware of the balance of [Briere Sound Ltd.] immediately prior to the receivership and has asserted no claims since the receivership…

[30] The following day, October 6, 2005, Mr. Morrison responded. The relevant part of his letter provides as follows:

> 4. … As to our awareness as to whether the outside other shareholder of [Briere Sound Ltd.] has received Notice of the Receivership, we advise that we enclose the correspondence between Mr. Edward Wong, Counsel for the other shareholder and Messrs Boale, Wood, wherein Mr. Wong is advised by Messrs Boale, Wood, wherein Mr. Wong is advised by Messrs Boale, Wood that they were appointed as Receiver.
>
> …
>
> 6. As well, we spoke this day with Mr. Alan Frydenlund, Counsel for Westminster Savings Credit Union and was advised that the "other shareholder" has made no offer to the Receiver, and has asserted no claims since the Receivership to the knowledge of Mr. Frydenlund.
>
> 7. The writer is not aware of any other claims made by the "other shareholder".

2014 BCSC 417 (CanLII)

[31] Mr. Aulinger deposed that he wanted to confirm the information in Mr. Morrison's letter and therefore called Mr. Wong himself. His notes of that conversation record details of a discussion which took place on October 11, 2005:

> He says he has bombarded the receiver with letters and he has not responded. His position: the valuation is incorrect. The role the receiver played is incorrect (the receiver was initially only appointed to do an appraisal). He has met with Frydenlund (lawyer for Credit Union) in chambers and asked him why his letters are not responded to. Only reason why no actions taken was too busy with another matter until today which is now resolved. Murray Morrison was in a conflict. He cannot act for [Chris] Briere personally and for the Briere Company [not sure he acts for Briere Company]. Says he has asked for info regarding sale and is stonewalled. Why the rush with everything.
>
> Conclusion: we are just buying a lawsuit.

[32] Mr. Aulinger deposed that, based on his recollection and review of the notes, it was clear that Mr. Wong understood his client intended to loan money to "the company" in order to assist it in purchasing the credit union's debt and security in the receivership of Briere Sound Ltd. Mr. Wong expressed his displeasure with Mr. Aulinger's client's intended course of action and said that by so acting, the client would only be "buying a lawsuit".

[33] In light of this discussion, Mr. Aulinger deposed that he called his client and suggested he not make the loan. His client subsequently instructed him to proceed to close on the loan despite Mr. Aulinger's advice.

[34] Mr. Wong has a different recollection of his discussion with Mr. Aulinger.

[35] Mr. Wong deposed that he found the call "unusual". The call came "out of the blue" and Mr. Aulinger provided little context.

[36] Mr. Wong said Mr. Aulinger told him he had a client who was interested in lending money to "the Company". Mr. Wong took this to mean Briere Sound Ltd. Mr. Aulinger made no mention, according to Mr. Wong, of the name of his client or of 734540.

2014 BCSC 417 (CanLII)

[37] Mr. Wong said that if he had learned from Mr. Aulinger of the plan for a new company to buy the security interest from the credit union, he certainly would have told his client, Mr. Reis. He told him no such thing. Mr. Wong said he only learned of the existence of 734540 a couple weeks later, in the letter from Boale Wood quoted below.

2014 BCSC 417 (CanLII)

[38] The security interest held by the credit union was assigned to 734540 on October 13, 2005.

[39] On October 21, 2005, Boale Wood wrote to the Company's creditors. This is the letter which came to Mr. Wong's attention and first informed him of the existence of 734540:

> **Re: Briere Sound Ltd.**
> **In Receivership**
>
> We wish to advise you that the security to which Boale, Wood & Company Ltd. was appointed as Receiver of Briere Sound Ltd. was assigned to 0734540 BC Ltd. As such, Boale, Wood & Company Ltd. was discharged as Receiver of Briere Sound and L. Popoff & Associates Inc. was appointed in its place.
>
> All further inquiries regarding Briere Sound Ltd. should be directed to:
>
> Larry Popoff
> L. Popoff & Associates Inc.
> 115 - 15225 104th Avenue
> Surrey, BC V3R 6Y8
>
> Telephone: (604) 584-2129
> Fax: (604) 584-2199

[40] On October 26, 2005, Mr. Morrison ceased acting on behalf of both Mr. Briere and the Company. He took no further action on behalf of any of the defendants with respect to the receivership of the Company.

[41] There is another conflict in the evidence regarding the sale of the assets from the new receiver, Mr. Popoff.

[42] Mr. Popoff was appointed as receiver on October 14, 2005. An appraisal of the company's assets indicated a value of $171,030 on the basis of an "orderly

liquidation" and $123,675 on a "forced liquidation". The appraisal of the previous receiver showed a value of $161,560.

[43] Mr. Popoff testified that he met with Mr. Reis shortly after he was appointed receiver. He said he explained to Mr. Reis that the assets were to be sold through public tender and that he, Mr. Reis, was free to make a bid for the goods.

[44] Mr. Popoff's evidence is that he followed the appropriate steps for the proper sale of the assets: he obtained the necessary appraisals, placed the advertisement in the newspaper and conducted the sale on a sealed tender basis.

[45] The advertisement stated that the sale of the assets could be on either an *en bloc* basis or a lot-by-lot basis. The only offer on an *en bloc* basis was $180,000. This offer was made by 736524 (which eventually became Briere Production Group Inc.). The director of that company is the defendant Denis Briere, the father of Christopher Briere.

[46] According to Mr. Popoff, offers were made on individual lots. The highest of those offers was $105,000. He said that if the highest offer for each lot had been accepted, the maximum realization would have been only $149,000.

[47] Mr. Popoff said the assets were sold to the highest bidder, Denis Briere's company. Mr. Reis did not place any bid.

[48] This evidence is contradicted, in part, by the evidence of Colin McKee. Mr. McKee is an accountant who was acting as agent for a company which was interested in purchasing some of the Company's equipment being sold in the receivership by Mr. Popoff.

[49] Mr. McKee said he viewed the equipment on November 16, 2005. He said he then had a conversation with Mr. Popoff. He deposed as follows in his affidavit of July 3, 2012:

> 2. I spoke by telephone with Mr. Popoff within a day or so of having viewed the Equipment. My purpose in contacting Mr. Popoff was to inquire about the composition of the lots in which the Equipment was

2014 BCSC 417 (CanLII)

> being sold. This conversation occurred before the cut-off date set for submission of offers to the Receiver. Instead of responding to my question about the lots, Mr. Popoff said words to me to the effect that it was all over and the Equipment had already been sold.
>
> 3. I found Mr. Popoff's statement most unusual, given the public process he had embarked upon to sell the Equipment. It was immediately clear to me that it would be a waste of time and effort for Masterplan to even bid on any of the Equipment although I subsequently became aware that Mr. Sabina put in a very low bid of about $35,000 for the Equipment. At the time I spoke to Mr. Popoff, I had the distinct impression that the fix was in, by which I mean that, notwithstanding the public process by which the Receiver appeared to be selling the Equipment, a decision had already been as to who the successful purchaser was.

2014 BCSC 417 (CanLII)

[50] Mr. Popoff adamantly denies Mr. McKee's recollection of their conversation. He was cross-examined with respect to this and stated:

> I did not say that. In all my years in practice I have never said to anybody prior to any closing that everything is done and somebody's bought the assets. That's unethical. That's why I get into trouble -- people get into trouble with the Superintendent of Bankruptcy. We've got a date for closing. We wait 'til the closing date. I've never in my life said that to anybody that something is finalized before the day -- the date of the closing. And in this case I did not.

[51] In any event, the result of the transaction was that at the end of 2005 Briere Production Group Inc. acquired the Company's assets for $180,000 and carried on the former business of Briere Sound Ltd.

[52] Mr. Reis asserts that Briere Production Group Inc. is carrying on the same business as the Company did. It operates out of the same premises. Mr. Reis says the new company treats itself as the successor of the old company.

Commencement of Derivative Action

[53] Mr. Reis then applied to the court for leave to commence this derivative action. The application came before Mr. Justice Masuhara: *Norman Reis v. Briere Sound Ltd.* (May 19, 2006), Vancouver S061232 (B.C.S.C.).

[54] Masuhara J. noted that many of the Company's assets appear to have disappeared before the receivership. He stated that Mr. Briere put forward an

explanation for this but agreed with Mr. Reis that this was a matter for trial. His Lordship pointed to these facts and allegations in relation to the derivative action:

> [22] The petitioner says that … Mr. Briere indirectly acquired a secured debt against his own company and forced a sale of assets to a new company that he now operates and which he owns indirectly through his father.
>
> [23] The petitioner points to the following facts around Briere Production. He states that Briere Production carries on the same business as the Company, carries on business on the same premises as the Company, and is managed by Mr. Briere as an operations manager and Ms. Blomly who is in charge of administration and accounting. The Briere Productions Internet website as of February 14, 2006, indicates that it treats itself as the successor of the Company and treats the company's clients and engagements as its own and redirects customers looking for the Company's website to its own website. Briere Productions refers on its website to artists, customers and events for which the Company provided services as its own clients and states on its website that "over 90 percent of our annual business stems from prior relationships." On the same web page Briere Production refers to recent shows which include shows clearly serviced by the Company in 2004 and 2005. It is further pointed out that Briere Production, if it is not already obvious, uses the same name as the Company.
>
> [24] Moreover, the petitioner alleges that Briere Production appears to have inherited inventory never subject to valuation by Boale Wood as it offers used equipment for sale and rental are alleged to have been formerly owned by the Company but never listed as inventory for Boale Wood's valuation.
>
> [25] The petitioner also notes that Mr. Briere does not address the diminished value of the Company's assets in September 2005, and does not contest the key facts underlying the forced sale, indeed the petitioner notes that Mr. Briere admits to many of the key facts. Specifically, Mr. Briere admits to being advised that the credit union would in all likelihood be prepared to sell its security documents. Mr. Briere admits to eliciting the assistance of Mr. Donald MacKenzie to set up a company to take over the security of the credit union, although ostensibly to avoid a sale of the Company's assets. Mr. Briere admits his later intent to liquidate all the Company's assets, and while Mr. Briere reports such a liquidation to be needed to satisfy the indebtedness that was initially outstanding to the Westminster Credit Union, the fact is clear the petitioner says the debt in issue was, in fact, only $87,000, the balance after the credit union had paid off debt from the Company's operating expense. Mr. Briere admits to causing his father to incorporate Newco [Briere Production Group], for the purposes of acquiring the Company's assets upon liquidation and to employ Mr. Briere. Finally, Mr. Briere admits Newco purchased the Company's assets.

[55] The court concluded that Mr. Reis was acting in good faith, the Company's case was not "bound to fail" and the derivative action was in the "best interests" of the Company:

2014 BCSC 417 (CanLII)

> [28] Further, the petitioner submits that the facts show possible claims that various persons knowingly assisted Mr. Briere in breaches of fiduciary duty. More specifically, that Ms. Blomly may have knowingly assisted Mr. Briere to misappropriate property and make improper payments in the summer of 2005. The credit union may have participated in a scheme to force a buyout using its security interests and by agreeing to demand payment of its entire loan and then reassigning the debt to Holdco [734540]. Mr. MacKenzie and Holdco purchased and enforced the credit union's secured debt against the company. Mr. Denis Briere and Newco purchased the company's assets on a forced sale and now compete in the same business with Mr. Briere at the head of the helm. Mr. Morrison and Morrison & Co. likely incorporated both Holdco and Newco for the purposes of assisting Mr. Briere to carry out the scheme of breaching his fiduciary duties.
>
> [29] In my view, the facts relied upon arguably disclose the possibility of each of these persons acting with a want of probity or the requisite degree of dishonesty to attract liability and equity. Moreover, some of the proposed defendants may hold corporate property as a result of the fiduciary breaches and are properly subject to a remedial constructive trust.
>
> [30] Additionally, there is an arguable case against Morrison & Co and Mr. Morrison who have a fiduciary duty as a legal advisor of the Company. As a fiduciary, Mr. Morrison and the law firm would have had a duty to avoid positioning itself such that its duties to the Company might be in possible or actual conflict with the duties to Mr. Briere and Holdco.
>
> [31] In summary, having regard to the above, I find that the facts alleged in the circumstances disclose arguable causes of action and are not overcome by the materials filed in support of Mr. Briere. I say that arguable causes of action - means causes of action not bound to fail - which if proven would entitle the Company to recover equitable damages or an accounting of profits from Mr. Briere, as well as possible proprietary remedies to recover property forcibly sold only by virtue of the fiduciary breaches.
>
> [32] The efforts by the petitioner, though having a personal interest, are, in my view, *bona fides* in terms of the Company. …
>
> [33] Also, it appears that the best interests of the Company would be served by prosecuting the proposed litigation.

[56] Westminster Savings Credit Union is no longer a party. It reached a settlement with the plaintiff which the court approved on September 9, 2009.

[57] Mr. Reis is no longer a shareholder or director of the company. On March 18, 2011, the parties to the oppression action agreed to a consent order: Mr. Reis received $150,000 for his shares and resigned as an officer and director of the Company. It was acknowledged that Mr. Reis' shareholder loans are still

2014 BCSC 417 (CanLII)

outstanding in the amount of $130,000 and that Mr. Briere has no personal liability to him. The Company still owes Celina Reis approximately $70,000 as well.

Factual Disputes

[58] There are two factual disputes to be determined. The first is a conflict between the evidence of Mr. Aulinger and Mr. Wong. Mr. Aulinger recalls telling Mr. Wong of his client's intention to lend $60,000 to 734540 for the purpose of acquiring the security and receivership from the credit union.

[59] Mr. Wong, on the other hand, was adamant that he was not told this. He testified that he understood Mr. Aulinger's client intended to lend money to Briere Sound Ltd. He was unaware of the existence of 734540 at the time.

[60] Frankly, it does not make much sense that Mr. Aulinger's client would lend money to Briere Sound Ltd. Any such funds would go directly through the receiver to the Company's creditors.

[61] On the other hand, if Mr. Wong had learned of 734540's existence at that time and that the overall plan was to acquire the credit union's security interest, he would certainly have told Mr. Reis of this. He did not do so.

[62] I conclude that Mr. Aulinger and Mr. Wong were, in the words of counsel for the plaintiff, "ships passing in the night".

[63] These two lawyers did not know each other. The conversation was not a full discussion of their client's positions.

[64] Mr. Aulinger wanted to ensure that Mr. Reis, Mr. Wong's client and the "other shareholder", was aware of the intended transaction. While I accept Mr. Aulinger's account of the events and although I found him to be a forthright and credible witness, I do not accept that he communicated exactly what he wanted to communicate to Mr. Wong.

2014 BCSC 417 (CanLII)

[65] Mr. Wong, I conclude, was excitable and leery during this telephone conversation. He likely should have concluded that it made no sense for Mr. Aulinger's client to lend money to Briere Sound Ltd. He should have asked more specific questions and, if he had, he would have learned exactly what Mr. Aulinger wished for him to know. But he did not do so.

2014 BCSC 417 (CanLII)

[66] I conclude, therefore, that Mr. Reis did not know of the existence of 734540 until he learned of it from Boale Wood's letter regarding the appointment of a new receiver dated October 21, 2005.

[67] I next turn to the question of Mr. Popoff's evidence and that of Mr. McKee. A useful statement of principle for resolving conflicts in the evidence is found in *Faryna v. Chorney* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.). O'Halloran J.A. said the following about credibility at para. 11:

> [11] ... The test [for the credibility of a witness] must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. …

[68] If Mr. McKee's allegation is true, Mr. Popoff was engaged in highly unethical conduct. It is entirely unlikely that a receiver would permit himself or herself to engage in such improper conduct. Moreover, even if a receiver chose to disregard professional standards, it would be highly improbable and unlikely that the receiver would then tell a stranger or potential bidder that he or she was doing that.

[69] To put it another way, there was no reason for Mr. Popoff to say such a thing to Mr. McKee.

[70] I am reinforced in this conclusion by the fact that Mr. McKee did in fact place a bid on certain lots on behalf of his client. It makes no sense for him to have done so if he truly understood and believed that the whole matter was a sham.

[71] Mr. McKee swore his affidavit on July 3, 2012. He was recalling a conversation which occurred over six and a half years earlier. I conclude that he was mistaken in his recollection.

DISQUALIFICATION APPLICATION

[72] The first issue is whether the court should disqualify or otherwise prevent Mr. Reis from having further conduct of this derivative action brought in the name of Briere Sound Ltd.

[73] Sections 232 and 233 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCBCA*], provide 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.

2014 BCSC 417 (CanLII)

(2) Nothing in this section prevents the court from making an order that the complainant give security for costs.

(3) While a legal proceeding prosecuted or defended under this section is pending, the court may,

(a) on the application of the complainant, authorize any person to control the conduct of the legal proceeding or give any other directions for the conduct of the legal proceeding, and

(b) on the application of the person controlling the conduct of the legal proceeding, order, on the terms and conditions that the court considers appropriate, that the company pay to the person controlling the conduct of the legal proceeding interim costs in the amount and for the matters, including legal fees and disbursements, that the court considers appropriate.

(4) On the final disposition of a legal proceeding prosecuted or defended under this section, the court may make any order it considers appropriate, including an order that

(a) a person to whom costs are paid under subsection (3) (b) repay to the company some or all of those costs,

(b) the company or any other party to the legal proceeding indemnify

(i) the complainant for the costs incurred by the complainant in prosecuting or defending the legal proceeding, or

(ii) the person controlling the conduct of the legal proceeding for the costs incurred by the person in controlling the conduct of the legal proceeding, or

(c) the complainant or the person controlling the conduct of the legal proceeding indemnify one or more of the company, a director of the company and an officer of the company for expenses, including legal costs, that they incurred as a result of the legal proceeding.

(5) No legal proceeding prosecuted or defended under this section may be discontinued, settled or dismissed without the approval of the court.

(6) No application made or legal proceeding prosecuted or defended under section 232 or this section may be stayed or dismissed merely because it is shown that an alleged breach of a right, duty or obligation owed to the company has been or might be approved by the shareholders of the company, but evidence of that approval or possible approval may be taken into account by the court in making an order under section 232 or this section.

2014 BCSC 417 (CanLII)

Parties' Positions

[74] Mr. Briere's position is:

- Mr. Reis is no longer a shareholder or director of BSL. Further, he does not have a sufficient remaining interest in BSL such that he should continue to be regarded as an "appropriate person" to have conduct of the derivative action;
- the derivative action is not in the best interests of BSL; and
- Mr. Reis has not conducted the derivative action in good faith.

2014 BCSC 417 (CanLII)

[75] Mr. Briere says that the derivative action is an exercise in futility and is therefore not in BSL's best interests. He points out that all the evidence confirms BSL is an insolvent corporation. It has never emerged from receivership since September 2005. Its current financial circumstances indicate that BSL has outstanding unsecured claims against it totalling over $250,000 with less than $50,000 in current assets. Mr. Briere says there is no evidence that Mr. Reis' conduct of the derivative action could repair or revive BSL or otherwise improve its interests.

[76] With respect to the fact that the complainant must act in good faith, the evidence shows that Mr. Reis would stand to personally benefit from the continuation of the derivative action.

[77] Mr. Briere also argues *in pare materia*: i.e., statutes that have a common purpose with respect to the same subject matter must be interpreted in light of each other. Mr. Briere points out that the definition of "complainant" in the *BCBCA* differs from that found in equivalent statutes. For instance, the federal *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 238 [*CBCA*], and the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 245 [*OBCA*], both include registered and former shareholders as well as former directors in their definitions of "complainant". Further, "any other person who, in the discretion of the court, is a proper person to make an application under this Part" is also included in those statutes.

[78] Mr. Briere further argues that creditors are intentionally omitted from the s. 232(1) definitions of "complainant" and "shareholder" so as to be ineligible from being considered an "appropriate person". This is because creditors are explicitly

included in the list of those whom the court may consider an "appropriate person" to seek a liquidation or dissolution order under s. 324(1) of the *BCBCA*:

> 324 (1) On an application made in respect of a company that is a financial institution by the commission, or made in respect of a company, including a company that is a financial institution, by the company, a shareholder of the company, a beneficial owner of a share of the company, a director of the company or any other person, including a creditor of the company, whom the court considers to be an appropriate person to make the application, the court may order that the company be liquidated and dissolved if …

[79] Mr. Reis' position is:

- he was a shareholder and director of BSL at the time the derivative action was commenced. He is still a creditor of BSL and therefore an "appropriate person" to have conduct of the derivative action; and
- the material facts have not changed since Masuhara J. granted leave. Therefore, Masuhara J.'s decisions with respect to the criteria of good faith and best interests of the corporation are *res judicata*.

Discussion

[80] Section 233(3) addresses the jurisdiction of the court when a derivative action is pending. The court arguably has the power to order that a complainant who previously obtained leave to commence a derivative action should no longer have conduct of the action. In *Discovery Enterprises Inc. v. Ebco*, (1998) 58 B.C.L.R. (3d) 105 at para. 15 (C.A.) the Court of Appeal said:

> [15] As for the more substantive question of how Ebco can protect itself against a decision by Discovery to continue prosecuting a losing action under s. 201 in order to obtain a benefit for the Class D shareholder(s), the court has the jurisdiction to make directions on the application of any member or director of the company. Again, Ebco will have standing to appear in any such application. Should it appear that the derivative action is being abused, the court has the authority to make an appropriate order, not limited to costs. Any such abuse might even lead a court to conclude that Discovery is in fact not acting in good faith or should no longer have conduct of the action.
>
> [Emphasis added.]

[81] However, *Discovery Enterprises Inc.* was decided under the former *Company Act*, R.S.B.C. 1996, c. 62, s. 201(4), which provided:

2014 BCSC 417 (CanLII)

> (4) While an action brought or defended under this section is pending, the court may,
>
> > (a) on the application of a member or director, authorize any person to control the conduct of the action or give any other directions for the conduct of the action, and
> >
> > (b) on the application of the person controlling the conduct of the action, order, on terms and conditions it sees fit, that the company pay the person interim costs, including legal fees and disbursements, for which the person may be made accountable to the company by the court on the final disposition of the action.

2014 BCSC 417 (CanLII)

[82] Thus, s. 201(4) permitted an application by a member or director. However, s. 233(3) of the current *BCBCA* requires that such an application be made by the "complainant". Undoubtedly, that is a reference to Mr. Reis, the complainant who was given leave to commence the derivative action.

[83] On that basis, I doubt that the quoted passage and reasoning from *Discovery Enterprises Inc.* is still applicable under the *BCBCA* today.

[84] Nevertheless, even if the defendants or Mr. Briere do not have standing under s. 233(3) to bring a disqualification application, the court has inherent jurisdiction to stay the proceedings or may grant approval to dismiss the proceedings under s. 233(5).

[85] The defendants and Mr. Briere argue that Mr. Reis no longer has standing as a "complainant" to conduct the derivative action. A complainant is defined in s. 232(1) as a shareholder or director. A further definition of "shareholder" includes "any other person whom the court considers to be an appropriate person to make an application under this section".

[86] Much of the jurisprudence regarding standing as a complainant was decided the derivative action provisions of the *Company Act*, where the term "proper person" was used instead of "appropriate person". I take both phrases to have the same meaning in this context.

[87] In *Re Daon Development Corporation* (1984), 54 B.C.L.R. 235 (S.C.), Wallace J. addressed the definition of "complainant" and held that a debenture holder creditor did not constitute a "proper person":

> [36] Obviously the legislature intended that the person making the application must have some particular legitimate interest in the manner in which the affairs of the company are managed — otherwise s. 225 would simply include in the category of persons who could make the application "any other person".
>
> [37] In my judgment, some insight into the category of person the legislature had in mind as being a "proper person" is gathered from the inclusion in s. 225 of "director" and "member" in the class of persons entitled to bring the application with leave of the court. Obviously, if "any person" may apply to bring such an action there is no need for directors or members to be specifically singled out as having that privilege.
>
> [38] Without attempting to limit or define with exactitude the category of person who constitutes a "proper person" under s. 225(8), I consider the history of derivative actions and the wording of the section requires that the category be composed of those persons who have a direct financial interest in how the company is being managed and are in a position — somewhat analogous to minority shareholders — where they have no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interest.
>
> [39] Accordingly, I would decline to exercise the discretion afforded me by s. 225(8) to designate a person in the position of Mr. MacRae — whose only interest in the management of the company is the general and indirect one of wishing to see the company prosper — to be a "proper person" to apply for leave of the court to commence a derivative action. I am of the opinion that if there is merit in the contemplated action and if it is to the benefit of the company that it be prosecuted, there are classes of persons which have a more direct interest in the management of the company affairs than that of a debenture holder — with all the contractual rights the trust indenture gives him — whose debenture is not in default.
>
> [Emphasis added.]

[88] In my view, the phrase "direct financial interest" must be considered in the context of the specific facts of that case. The applicant in *Daon* was a creditor, but his loan was not in default. If it were, the applicant would certainly have had a financial interest in the company recovering money, albeit indirectly, and yet could have been denied standing based on the concept of "directness".

[89] In *Ginther v. Rainbow Management Ltd.*, [1989] B.C.J. No. 636 (S.C.), Cowan L.J.S.C. referred to *Daon* and held that the principal of a company that was a

2014 BCSC 417 (CanLII)

shareholder itself was a "proper person", even though his financial interest was indirect:

> The respondents assert that since the petitioner is only a shareholder of a shareholder (Rainbow) of Jafran that, in the words of Wallace J., he is not a person with a direct financial interest in how the company (Jafran) was being managed.
>
> I do not agree with that submission. While the holding company Rainbow is interposed, as it were, between the petitioner and the operating company Jafran, so that the petitioner does not have a "direct financial interest" in Jafran in that sense, nevertheless in my view, there is a sufficient connection between the petitioner and Jafran to warrant my exercising my discretion to decide that the petitioner is a proper person to bring the application. I do not consider that the fact that the financial benefits arising from Jafran's operations now to the petitioner through the holding company Rainbow should disqualify him from seeking to obtain the remedies available under sections 224 and 225.
>
> [Emphasis added.]

[90] In *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 50 B.C.L.R. (3d) 195 (C.A.), the Court of Appeal dismissed Ebco's appeal of the granting of leave to Discovery to commence the derivative action. Discovery was the largest single minority shareholder in Ebco. Mr. Justice Cumming, writing for the Court, held that an indirect interest was sufficient at paras. 22-23:

> [22] There is no requirement under the *Company Act* that the petitioner have a financial interest in the outcome of the derivative action, and one should not be created from the court's discretion. An indirect interest in the integrity, prosperity and continued existence of the company is sufficient to give effect to the purpose of the leave provision (see: *Hurley & Anor v. B.G.H. Nominees Pty. Ltd.* (1982), 1 A.C.L.C. 387 at 395 (S.C.S.A.)). A small minority shareholder has the same right as the largest shareholder to insist that the company's assets not be wrongfully diverted. Often, a derivative proceeding is the only effective discipline that a small minority shareholder has against the majority/directing mind for wrongs committed against the company. That remedy is an essential aspect of modern company law and it should not be denied simply because the shareholder has a relatively small stake in the outcome.
>
> [23] In my respectful view, the Chief Justice correctly exercised his discretion to grant leave, having found that Discovery is acting in good faith and that it is *prima facie* in the interests of the company that the action proceed.
>
> [Emphasis added.]

2014 BCSC 417 (CanLII)

[91] In *International Capital Corp. v. Schafer* (1996), 153 Sask. R. 241 (Q.B.), the court stated that the applicant had to have a "sufficient interest" in order to have status to bring a derivative action under *The Business Corporations Act*, R.S.S. 1978, c. B-10:

> A "complainant" is defined by s. 231 of the Act to mean a former officer, director or shareholder of the corporation. Such a person has the status and right to bring an application for leave under s. 232. But simply having the status to apply is not the end of the matter. Leave will not be granted to an applicant who does not have a sufficient interest or potential interest in the corporation which can be enhanced or established by the commencement of the proceedings for which leave is sought.
>
> [Emphasis added.]

2014 BCSC 417 (CanLII)

[92] In the context of the *CBCA*, Cullity J. in *Millgate Financial Corporation Ltd. v. BCED Holdings Ltd.* (2003), 47 C.B.R. (4th) 278 at para. 97 (Ont. S.C.J.) held:

> [97] … If, as I believe to be correct, the appropriate remedy for shareholders who wish to challenge the validity of a transaction on that ground is by way of a derivative action pursuant to section 239 of the *CBCA* - … - the same procedure should be available to creditors as "complainants" for purposes of the section if, by virtue of the insolvency of the corporation - or its near insolvency - their interests are to be considered to be those of the corporation.
>
> [Emphasis added.]

[93] Further, the Supreme Court of Canada held in *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at para. 49, that the interests of creditors become more relevant as a company's financial situation worsens:

> [49] The fact that creditors' interests increase in relevancy as a corporation's finances deteriorate is apt to be relevant to, *inter alia*, the exercise of discretion by a court in granting standing to a party as a "complainant" under s. 238(d) of the *CBCA* as a "proper person" to bring a derivative action in the name of the corporation under ss. 239 and 240 of the *CBCA*, or to bring an oppression remedy claim under s. 241 of the *CBCA*.

[94] In *Valor Invest et al v. Vista Online et al*, 2004 BCSC 1787 at para. 15, the applicant seeking leave to bring a derivative action was a beneficial shareholder and creditor. Mr. Justice Davies determined that the applicant had standing as a shareholder and relied on the applicant's status as a creditor as additional support:

> [15] As to the first question, I am satisfied that the complainant Valor Invest Ltd. and Mr. Ross Wilmot, one of the directors of Vista Online Inc.,

> have the necessary status under s. 232(1) to apply to commence a derivative action. I need go no further than to make reference to the fact that the petitioner Valor Invest Ltd. is the beneficial owner of shares of the company through its share pledge agreements. It is also a creditor of the company. The authorities relied upon by the petitioner, in particular *A E Realisations (1985) Ltd. v. Time Air Inc.* (1995), 131 Sask. R. 249 (C.A.) and *Levi Russel Ltd. v. Shieldings Incorporated* [phonetic], provide additional standing to Valor Invest Ltd. as a creditor.

2014 BCSC 417 (CanLII)

In *A E Realisations*, a creditor was held to be a proper person to bring a derivative action under the *CBCA* where the creditor alleged that, in order to avoid judgment, the assets of a corporation had been transferred to a new corporation which continued the same business. In *Levy-Russell Ltd. v. Shieldings Inc.* (1998), 41 O.R. (3d) 54 (Gen. Div.), a judgment creditor qualified as a complainant under the oppression remedy provisions in the *OBCA*.

[95] In *First Edmonton Place Ltd. v. 315888 Alta. Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Q.B.), rev'd on preliminary grounds (1989), 71 Alta. L.R. (2d) 61 (C.A.), McDonald J. considered whether a creditor can be an "appropriate person" to whom leave will be granted to bring a derivative action. The decision was based on the provisions of the *Business Corporations Act*, S.A. 1981, c. B-15. Notwithstanding, I find his reasoning apposite:

> In the case of a creditor who claims to be a "proper person" to make a s. 232 [derivative action] application, in my view the criterion to be applied would be whether, even if the applicant did not come within s. 231(b)(i) or (ii), he or it would nevertheless be a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right the wrong allegedly done to the corporation. The applicant would not have to be a security holder (as I have defined that notion), director or officer of the corporation. The applicant could be a creditor. The applicant might even be a person who at the time of the act or conduct complained of was not a creditor but was a person toward whom the corporation might have a contingent liability. No good purpose would be served in saying more than that now.
>
> I turn now to an application by a person who claims to be a "proper person" to make an application under s. 234 [oppression action]. As in the case of an application made under s. 232, an applicant for leave to bring an action under s. 234 does not have to be a security holder, director or officer. The applicant could be a creditor, or even a person toward whom the corporation had only a contingent liability at the time of the act or conduct complained of. However, it is important to note that he would not be held to be a "proper person" to make the application under s. 234 unless he satisfied the court that there was some

> evidence of oppression or unfair prejudice or unfair disregard for the interests of a security holder, creditor, director or officer.
>
> Having said that, *assuming* that the applicant was a creditor of the corporation at the time of the act or conduct complained of, what criterion should be applied in determining whether the applicant is "a proper person" to make the application? Once again, in my view, the applicant must show that in the circumstances of the case justice and equity require him or it to be given an opportunity to have the claim tried.
>
> There are two circumstances in which justice and equity would entitle a creditor to be regarded as "a proper person". (There may be other circumstances; these two are not intended to exhaust the possibilities.) The first is if the act or conduct of the directors or management of the corporation which is complained of constituted using the corporation as a vehicle for committing a fraud *upon the applicant*. …
>
> [Italicizing in original; underline emphasis added.]

2014 BCSC 417 (CanLII)

[96] In Kevin Patrick McGuinness, *Canadian Business Corporations Law*, 2d ed. (Markham: LexisNexis, 2007) at 1342, in relation to the *OBCA* and referring to *First Edmonton Place*, the author writes:

> §13.205 … Although the holders of securities are expressly mentioned in the definition of "complainant", creditors as such are not. A bare creditor who is not the holder of a security may be given leave to proceed as a complainant. However, the courts are reluctant to convert simple debt actions into derivative claims and will not permit this to be done where the creditor's interest in the affairs of the corporation is remote or where the complaints of the creditor have nothing to do with the circumstances giving rise to the debt.

Analysis

[97] On May 19, 2006, when Mr. Reis obtained leave to commence this derivative action, he was a 50% shareholder and one of only two directors of BSL. But that has changed. On May 11, 2011, Mr. Reis was party to a consent order which provided, among other things, that he transfer all his shares in the Company and resign as a director. Today, Mr. Reis continues to be only a creditor of BSL. He has shareholder loans of $130,000.

[98] The question is whether, pursuant to s. 232(1) of the *BCBCA*, Mr. Reis can still be considered an "appropriate person" to maintain conduct of the derivative action. I was not referred to and am not aware of any case in British Columbia in which a creditor who is not a shareholder or director has been granted leave to commence a derivative action. However, the issue in this case is whether a party

who has ceased to be a shareholder and director – and was previously granted leave to commence a derivative action as a complainant on those bases – may continue to have carriage of the action. I was referred to no authority on that narrow point either.

[99] Although the defendants' *in pari materia* argument bears consideration, it must be noted that creditors, although omitted from the definitions of "complainant" and "shareholder" in s. 232(1), are not specifically excluded either. Neither are former shareholders or former directors. Based on the jurisprudence, it appears that the applicant must only be something more than a bare creditor. In other words, a bare creditor, without more, may not have a sufficient interest in the corporation to be an "appropriate person". Otherwise, that could turn all actions for debt into derivative actions. (As has always been the case, it would not be prudent to bring a derivative action when a bare creditor can simply sue under contract for debt if money has been diverted away from the company.)

[100] In *First Edmonton Place Ltd.*, McDonald J. referred to "other circumstances" in which "justice and equity would entitle a creditor to be regarded as 'a proper person'." In my view, these are such circumstances. If the applicant has a financial interest in the company and that interest has been harmed and the company's interests have also been harmed, then the applicant should be considered an "appropriate person" to bring a derivative action on behalf of the company.

[101] Here, the requirement for something more has been met. Mr. Reis was a shareholder and director at the time BSL was placed in receivership. And although only a bare creditor today, Mr. Reis alone holds approximately half of BSL's currently outstanding debt. BSL is currently an insolvent and, at this point in time, Mr. Reis' interests are the interests of BSL. He was and is intimately tied to the harm alleged to have been done to the Company. In the words of McDonald J., Mr. Reis is "a person who could reasonably be entrusted with the responsibility of advancing the interests of the corporation by seeking a remedy to right the wrong allegedly done to the corporation." Under the circumstances of this case, justice and equity require

2014 BCSC 417 (CanLII)

Mr. Reis to be given an opportunity to have the claim tried. Therefore, I am of the view that he still be considered an "appropriate person" for the purpose of continuing the derivative action on behalf of BSL.

[102] However, that said, the additional criteria of good faith and best interests of the company still need to be considered.

[103] The defendants rely on *Schafer v. International Capital Corp.* (1996), [1997] 5 W.W.R. 98 (Sask. Q.B.), for the proposition that a company's tenuous financial circumstances are sufficient to hold that the contemplated derivative action is not in the best interests of the corporation. Further, BSL has been in receivership since 2005 and there is no evidence that this derivative action could repair or revive BSL or otherwise improve its interests.

[104] With respect to whether the complainant is acting in good faith, the defendants say the evidence shows that Mr. Reis stands to personally benefit from the continuation of the derivative action.

[105] Mr. Reis says the conclusions reached by Masuhara J. when he granted leave to commence the derivative action are *res judicata*.

[106] The only change in circumstances since Masuhara J.'s decision is that Mr. Reis is now only a creditor and no longer a shareholder or director. I have concluded, for the reasons given above, that alone does not disqualify Mr. Reis.

[107] For the reasons given by Masuhara J., there are arguable causes of action which give BSL an opportunity to recover assets which are alleged to have been diverted or misappropriated from it.

[108] Mr. Reis has a personal interest in the outcome but that is not at all inconsistent with the interests of BSL.

[109] I conclude Mr. Reis's actions in pursuing this are in good faith. The derivative action continues to be in BSL's best interest.

2014 BCSC 417 (CanLII)

[110] For these reasons I conclude that Norman Reis is not disqualified from continuing to have conduct over the action.

SUMMARY DISMISSAL APPLICATIONS

[111] I turn to the applications seeking summary dismissal. The applications by the defendants seek summary dismissal pursuant to Rule 9-7 of the *Supreme Court Civil Rules.*

[112] In the course of final argument in this matter, an affidavit of Christopher R. Bacon, sworn November 6, 2013, was proffered by the defendants. I reserved on its admissibility but indicated that if I decided to have regard to it, counsel for the plaintiff would have the right to recall Mr. Reis for further examination in chief and, it follows, cross-examination.

[113] In light of my conclusions concerning the disqualification application, I am going to be examining the merits of this matter. It follows that Mr. Bacon's affidavit is relevant and in the circumstances, I intend to have regard to it.

[114] In light of that, counsel for the plaintiff should indicate to the registry whether he wishes to call further evidence from Mr. Reis. If so, a short hearing will be convened. If not, I will proceed to decide the remaining issues.

[115] The question of costs will be addressed when the remaining issues have been addressed.

"Kelleher J."

2014 BCSC 417 (CanLII)