

SUPREME COURT OF YUKON

Citation: *Wen v. Qiu*, 2018 YKSC 31

Date: 20180705
S.C. No. 16-A0091
Registry: Whitehorse

BETWEEN

XUN WEN

PETITIONER

AND

GUO HUA QIU AND QIU'S RESTAURANT INC.

RESPONDENT

Before Mr. Justice R.S. Veale

Appearances:
Jack Wang
Mark E. Wallace

Counsel for the petitioner
Counsel for the respondents

REASONS FOR JUDGMENT

INTRODUCTION

[1] The petitioner, Mr. Xun Wen, seeks leave from this Court pursuant to s. 241 of the *Business Corporations Act*, R.S.Y. 2002, c. 20, as amended (the "*Act*"), to bring an action in the name and on behalf of Qiu's Restaurant Inc. against the Respondent, Mr. Guo Hua Qiu, and 535993 Yukon Inc. mainly for diverting an existing business opportunity and profit from Qiu's Restaurant Inc. Mr. Wen also seeks an order authorizing him to control the conduct of the action as well as directions from the Court

for the conduct of the action. Mr. Wen finally seeks an order that all or some of the amount adjudged payable by Mr. Qiu in the action be paid directly to him.

[2] The petitioner no longer seeks, at this stage of the proceeding, the remainder of the relief set out in his Petition.

Preliminary Issue: Admissibility of Mr. Wen's second affidavit

[3] Both parties filed affidavits in support of their respective positions. The petitioner filed two affidavits from Mr. Wen. The respondents filed one affidavit from Mr. Qiu.

[4] Counsel for the respondents objects to the admissibility of Mr. Wen's second affidavit based on its tardiness and objectionable hearsay content.

[5] At the hearing, counsel for the petitioner conceded that paragraphs 3 and 4 of Mr. Wen's second affidavit were inadmissible but submitted that the remainder of his affidavit was admissible. Counsel for the respondents indicated that he was content with the proposed resolution but submitted that a portion of paragraph 7 which refers to Mr. Wen's uncle was also hearsay and should be disregarded or struck.

[6] I agree with the resolution proposed by counsel regarding paragraphs 3 and 4 of Mr. Wen's second affidavit. Those paragraphs constitute hearsay and will therefore be struck. Also, all reference, at paragraph 7, to Mr. Wen's uncle's knowledge or denial of an exchange with Mr. Qiu will be struck as well on the same basis.

FACTS

[7] Since 2007, Mr. Wen and Mr. Qiu have been equal shareholders of Qiu's Restaurant Inc., a company duly incorporated in the Yukon. Since 2007, Mr. Qiu has been the sole director of the company.

[8] In May 2008, Qiu's Restaurant Inc. opened Sakura Sushi Japanese Restaurant ("Sakura") in Whitehorse.

[9] For a number of years, Sakura appeared to operate profitably. However, on October 1, 2015, Mr. Qiu shut down Sakura for the purpose of conducting a forensic audit as he suspected that some of its employees were diverting money away from the company. Mr. Wen, who was in China at the time, agreed with the forensic audit exercise. However he did not consent to closing the restaurant, even temporarily, for that purpose.

[10] While Mr. Qiu indicates in his affidavit that it was always his intention to reopen Sakura in January 2016, after the forensic accounting was completed, Sakura never reopened.

[11] On October 28, 2015, a new company, 535993 Yukon Inc., was incorporated under the laws of Yukon. Mr. Qiu is the sole director of that numbered company. Mr. Wen is neither a shareholder nor a director of 535993 Yukon Inc.

[12] Between December 2015 and March 2016, then counsel for Mr. Wen and counsel for Mr. Qiu exchanged correspondence regarding the circumstances surrounding Sakura's closing and the winding down of Qiu's Restaurant Inc.

[13] On January 21, 2016, 535993 Yukon Inc. opened a new sushi restaurant, Golden Sakura Sushi Japanese Restaurant ("Golden Sakura"), at the same location as Sakura and, apparently, with the equipment, remaining inventory and liquor licence belonging to Qiu's Restaurant Inc.

[14] From October 2015 to December 2015, Qiu's Restaurant Inc. paid rent for Sakura's commercial space. The lease expired on January 31, 2016.

[15] On September 14, 2015, without Mr. Wen's authorization or notice being given to him, Mr. Qiu issued a cheque of \$100,000.00 to himself from the bank account of Qiu's Restaurant Inc. Mr. Qiu does not deny issuing a cheque to himself, but indicates that he

did this to protect Qiu's Restaurant Inc.'s finances and has since reimbursed Qiu's Restaurant Inc. by paying for a number of Qiu's Restaurant Inc.'s expenses.

[16] Between October 1, 2015 and December 16, 2015, while Sakura was closed, Qiu's Restaurant Inc. paid approximately \$7,500 in legal fees to its law firm.

[17] While Qiu's Restaurant Inc. still exists as a corporate entity, it is unclear what, if any, assets it holds.

LEAVE TO PURSUE A DERIVATIVE ACTION

[18] Pursuant to s. 241(2) of the *Act*, the Supreme Court may grant leave to bring a derivative action if the following four requirements are met:

- (i) the directors of the corporation or its subsidiary will not bring, diligently prosecute, defend or discontinue the action;
- (ii) reasonable notice of the application has been given to the corporation or its subsidiary and to any other person the Supreme Court may require;
- (iii) the complainant is acting in good faith; and
- (iv) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

[19] The powers of the Court in connection with a derivative action or leave to commence a derivative action are set out in s. 242 of the *Act*.

242 In connection with an action brought or intervened in under section 241 or paragraph 243(3)(q), the Supreme Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following

- (a) an order authorizing the complainant or any other person to control the conduct of the action;
- (b) an order giving directions for the conduct of the action;

- (c) an order directing that all or some of any amount adjudged payable by a defendant in the action shall be paid directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;
- (d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action

[20] The wording of s. 241 of the *Act* is almost identical to the provisions of the British Columbia *Business Corporations Act* regarding leave to commence a derivative action. Caselaw developed in British Columbia is therefore helpful in determining the applicable test as well as in identifying the relevant factors to consider in assessing the requirements set out in s. 241.

First requirement: the director of the corporation will not bring, prosecute, defend or discontinue the action.

[21] The first requirement of s. 241(2) of the *Act* is not at issue in this proceeding. Mr. Qiu, as the sole director of the company, has not and is not expected in these circumstances to bring an action on behalf of Qiu's Restaurant Inc. against himself or 535993 Yukon Inc., of which he is the sole director.

Second requirement: reasonable notice

[22] The respondents argue that they have not received reasonable notice of Mr. Wen's application because the petitioner did not set out clearly in his Petition the action he intends to pursue against Mr. Qiu on behalf of Qui's Restaurant Inc. and did not file a draft Statement of Claim. Counsel for the respondents argues he only found out what the proposed action was upon receiving Mr. Wen's Brief of Law on December 7, 2017. He also argues that Mr. Wen's claim is hypothetical.

[23] I cannot accept this argument. The petitioner's written submissions were provided to the respondents within the delay specified by the *Rules of Court* of the Supreme Court of Yukon. The facts upon which the petitioner relies, as well as the nature of the proposed action he seeks leave to pursue on behalf of the company against Mr. Qiu, are clearly set out in his materials. Consequently, a draft Statement of Claim was not required to provide sufficient notice to the respondents.

Third requirement: Is the petitioner acting in good faith?

[24] The parties agree that the test for determining whether the petitioner is acting in good faith is whether the proposed action is primarily for the purpose of pursuing a claim on behalf of the company. *Bennett v. Rudek*, 2008 BCSC 1278, para. 46; *Discovery Enterprises Inc. v Ebco Industries Ltd.*, [1998] B.C.J. No. 1301, para. 5.

[25] The petitioner bears the onus of showing positively that the petition is brought in good faith. *Bennett v. Rudek*, para. 45; *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, [1995] B.C.J. No. 2262, para. 38.

[26] Good faith is a question of fact to be determined based on all of the evidence and with due regard to the particular circumstances of the case. *Bennett v. Rudek*, para. 45; *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, para. 5.

[27] Factors to be considered in assessing good faith include the petitioner's belief in the merits of the proposed claim, existing disputes between the parties, and alleged ulterior motives. *Bennett v. Rudek*, para. 46; *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, para. 5.

[28] The petitioner's belief in the merits of the proposed claim raises a *prima facie* inference of good faith. However, it is not determinative. All relevant factors must be assessed on the totality of the evidence before coming to the conclusion that the

petitioner is acting in good faith. *DeCotiis v. Petromin Resources Ltd.*, 2017 BCSC 514, para 47; *Discovery Enterprises Inc. v Ebco Industries Ltd.*, para. 5.

[29] The respondents argue that Mr. Wen's primary motive for bringing this application is not the company's best interest but his own. They also argue that the ongoing dispute between Mr. Qiu and Mr. Wen colors Mr. Wen's interest in pursuing a claim on behalf of the company against Mr. Qiu. The respondents finally submit that Mr. Wen has an oblique motive in bringing this application in that it constitutes an attempt to interfere with and eliminate Golden Sakura because it is a direct competitor to his aunt and aunt by marriage's new restaurant in Whitehorse. The respondents also submit that Mr. Wen did nothing for almost a year to move his petition ahead which calls into question his belief in the merits of the claim.

[30] Mr. Wen argues that Qiu's Restaurant Inc. is the distinct legal entity that has been harmed by the actions of its sole director, Mr. Qiu. It is Qiu's Restaurant Inc.'s business opportunity and profit that have been diverted for the benefit of the newly formed numbered company and it is therefore in the interest of Qiu's Restaurant Inc. to pursue a claim in damages against Mr. Qiu and the numbered company.

[31] Mr. Wen also argues that pursuing one's self-interest as a shareholder is not determinative of the issue and that his interests are co-incident with the interests of Qiu's Restaurant Inc. He submits that the existence of an ongoing dispute between the parties is not conclusive either. Mr. Wen denies having any oblique motive. Finally, it is argued that the delay in bringing this application cannot be arbitrarily attributed to Mr. Wen's lack of confidence in the merits of his claim.

[32] As noted in *Bennett v Rudek*, para. 57: "(...) the fact that an applicant may benefit from the success of a proposed derivative action is not necessarily indicative of

bad faith, because it may be that the applicant's personal interests are co-incident with the interests of the company: *Primex Investment*." (See also *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, [1997] B.C.J. No. 1766, at paras. 108-109; and *Primex Investments Ltd. v Northwest Sports Enterprises Ltd.*, para. 42).

[33] As noted in *Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd.*, 2009 BCSC 938, para. 57:

Perceived self-interest, an existing shareholder dispute, the fact that the parties were involved in eleventh hour negotiation, or the fact that litigation followed a failure in negotiation are not, by themselves, evidence of bad faith: see ***Discovery BCSC***, at paras. 108 to 111. The existence of a meritorious claim can support a conclusion that a petitioner is acting in good faith. The question is whether the petitioner has the best interests of the company, or self-interest or ulterior motives, as its primary objective in advancing the claims: see *Bennett v. Rudek*, 2008 BCSC 1278, 51 B.L.R. (4th) 207 (B.C.S.C.) at paras. 56 and 61. (emphasis already added)

The petitioner's belief in the merits of the proposed claim

[34] The basic facts before the Court are that the only asset of Qiu's Restaurant Inc., Sakura, was closed down by Mr. Qiu on October 1, 2015. A new company, 535993 Yukon Inc., was incorporated a month or so later. At the end of January 2016, the new company opened a Japanese restaurant under a name similar to Sakura's, at Sakura's previous business location, using its equipment, its liquor licence and the remainder of its inventory. Those basic facts set out in Mr. Wen's affidavit are not contested. They support his argument and belief that damages have not only been incurred by him as a shareholder, but by Qiu's Restaurant Inc. because business opportunity and profit have been diverted from the company to the benefit of 535993 Yukon Inc. While there may be an explanation for what has occurred, a complete evidentiary record was not filed

with the Court in the context of this application. In any event, it would not be for this Court at this stage of the proceedings to thoroughly assess that evidence.

[35] While the petitioner's belief in a meritorious claim supports the conclusion that he is acting in good faith, the respondents' allegations that the petitioner is acting primarily out of self-interest and/or for an ulterior motive, need also be assessed.

Ulterior motive

[36] Allegations of wrongdoing by some of Mr. Wen's family members, including his aunt by marriage, who worked at Sakura have been made by Mr. Qiu during this proceeding. Mr. Qiu also alleges that Mr. Wen is merely a *nominee* for his aunt by marriage in this matter. He also alleges that Mr. Wen's Petition against Mr. Qiu is being brought for the benefit of Mr. Wen's family's new restaurant in Whitehorse. However, except for exchanges that Mr. Qiu states he had with Mr. Wen's aunt by marriage and uncle, no evidence was presented by Mr. Qiu to support these allegations. Mr. Wen does not deny that his aunt and aunt by marriage opened another restaurant in Whitehorse after they were laid off, be it temporarily, by Mr. Qiu. This fact is in and of itself insufficient for me to conclude that Mr. Wen is acting as a nominee and that his actions are motivated by his family's desire to get rid of a competitor. I also note that while Mr. Qiu makes a number of allegations of wrongdoing against a number of Mr. Wen's family members, he has not, in the context of this application, filed a complete evidentiary record to support his allegations. Finally, I note that while Mr. Qiu indicates that he could not reopen Sakura because most of its employees would not come back to work, it did not prevent him from opening a new sushi restaurant at the end of January 2016. I therefore cannot find, on the basis of the facts presented in this application, that Mr. Wen is bringing his application for an ulterior motive.

Self-Interest

[37] British Columbia courts have consistently held that the fact that a shareholder may benefit from the success of a proposed derivative action is not necessarily indicative of bad faith as it may be that the petitioner's personal interests are co-incident with the interests of the company. I find that such is the case here. While the action may benefit Mr. Wen as a shareholder in maximizing the value of its share and profit, such action, if successful, would also benefit Qiu's Restaurant Inc.

Existing disputes between the parties

[38] A review of the cases filed by both parties shows that applications for leave to bring a derivative action are often made against a backdrop of dispute between the parties. However, based on the evidence adduced in this proceeding, I find that the ongoing dispute regarding the ceasing of Sakura's operations and the fate of Qiu's Restaurant Inc. goes hand in hand with the petitioner's belief in the merits of the claim.

[39] I therefore conclude that the petitioner is acting in good faith.

Fourth requirement: Does the action appear to be in the interests of the company?

[40] In determining whether a derivative action will appear to be in the interests of the company, the Court must determine whether the action has a reasonable prospect of success, or is bound to fail. *DeCotiis v. Petromin Resources Ltd.*, paras. 47 and 58

[41] At the Petition stage, this requirement under the *Act* is not that the derivative action be in the interests of the company, only that it "appears" to be so. See *Yan v Ho.*, 2016 BCCA 93, para. 18.

[42] In conducting this analysis, the Court should not attempt to try the case. The Petition is not the proper forum to weigh the evidence or to make finding of facts. (*DeCotiis v. Petromin*, para. 63).

[43] In *Lost Lake Properties*, Justice Adair adopted, at para. 73, the reasoning of Justice Tysoe in *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.*, at para. 41:

[T]he Court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) has been satisfied. The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by the trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not. As noted in the Dickerson Report, the Court should also be satisfied that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action.

[44] As indicated in *Lost Lake* at para. 74: “The sole purpose of considering the respondent’s version of the facts is to test the reasonableness on its face of the petitioner’s version: see *Discovery BCCA*, at para. 12; *Gartenberg v. Consolidated Stone Industries Inc.*, 2005 BCCA 462, 50 B.C.L.R. (4th) 1 (B.C.C.A.), at para. 26. The court must examine whether in the circumstances the petitioner’s allegations are believable enough to be arguable: see *Maxwell v. Schuman*, 2005 BCSC 1430, 9 B.L.R. (4th) 307 (B.C.S.C. [In Chambers]), at para. 42.”

[45] Based on the facts presented in this application, I find that the action against Mr. Qiu for breach of fiduciary relationship for taking and/or diverting of business

opportunity and profit as well as for misappropriation of funds has a reasonable prospect of success.

[46] As indicated in *Primex Investments Ltd.*, at para. 49: “A cause of action based on the taking of a corporate opportunity is founded on the fiduciary relationship between the corporation and its directors and officers. The leading statement in Canadian jurisprudence with respect to the consequences of the fiduciary relationship is found in *Canadian Aero Service Ltd. v. O’Malley* [1974] S.C.R. 592.”

[47] Mr. Qiu was the sole director of Qiu’s Restaurant Inc. As such, he was in a fiduciary relationship with the company. As decided in *Canadian Aero Service Ltd. v. O’Malley*, pages 606 & 607:

It follows that O’Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O’Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

[48] While sole director of Qiu’s Restaurant Inc., Mr. Qiu closed Sakura and allowed 535993 Yukon Inc., of which he was also the sole director, to open a new Japanese restaurant with a similar name at the premises leased by Qiu’s Restaurant Inc. He also allowed 535993 Yukon Inc. to use Qiu’s Restaurant Inc.’s equipment, its remaining inventory, and its liquor licence. In doing so, Mr. Qiu essentially allowed 535993 Yukon Inc. to take over Qiu’s Restaurant Inc.’s business.

[49] Mr. Qiu also issued a cheque to himself in the amount of \$100,000 from Qiu's bank account and authorized a spending of \$7,500 in legal fees while Sakura was closed.

[50] Mr. Qiu has raised in his defence the fact that it was in the best interest of Qiu's Restaurant Inc. to close Sakura because its funds were being misappropriated by members of Mr. Wen's family. According to Mr. Qiu, the forensic audit of Sakura is still ongoing. He also alleges that cheques and credit card statements reveal irregularities for unauthorized charges, as set out in exhibits to Mr. Qiu's affidavit. However, without further specific evidence, the Court cannot draw any inferences from these documents. Mr. Qiu also attached to his affidavit copies of receipts showing payments to Sakura from him totalling \$100,000 to pay what he describes as some of Qiu's Restaurant Inc.'s expenses. No evidence was led to explain the legal fees other than Mr. Qiu stating at para. 36 of his affidavit that those fees were legitimately incurred by Qiu's Restaurant Inc.

[51] Also, correspondence exchanged between counsel for the respondents and former counsel for the petitioner, filed as exhibits to Mr. Qiu's affidavit, is mainly hearsay and is neither conclusive vis-à-vis the allegations of misappropriation of Qiu's Restaurant Inc.'s funds nor with respect to the parties' intentions regarding winding down the corporation.

[52] Furthermore, even if it were the petitioner's intention to ask the Court to wind down the corporation at the end of the proceedings, this could not automatically be seen as going against the best interests of the corporation. As noted by the British Columbia Court of Appeal in *Holdyk v. Adolph*, 2012 BCCA 37, at paragraphs 24 and 25: "Such

an ultimate goal is not inconsistent with also wanting to advance the interests of the Company before it is wound up.”

[53] At this stage of the proceedings, and considering the evidence led by both the petitioner and the respondents, I cannot find that Mr. Qiu’s defence is one that is bound to be accepted by a trial judge nor that Mr. Wen’s version of events is unreasonable. Mr. Qiu may ultimately be successful in his defence to the Derivative Action, but such a determination requires the assessment and resolution of disputed facts (*Yan v. Ho*, paras. 18 and 19). It will be for the trial judge to weigh the evidence in that regard.

[54] The same may be said about the claim against 535993 for taking and/or diverting an existing business opportunity and profit. I note that Mr. Wen’s Petition does not refer to the starting of an action against that company. However, considering the materials filed and the representations made by both parties, I order that the plaintiff may include 535993 Yukon Inc. as a co-defendant when an action is filed on behalf of Qiu’s Restaurant Inc.

[55] In the circumstances of this case, I also find that the potential relief of the proposed action is sufficient to justify the inconvenience to the company, which appears to be inactive at this point, of being involved in the action.

[56] On balance, at this stage, the derivative action appears to be in the interests of Qiu’s Restaurant Inc.

The availability of an oppression proceeding

[57] The respondents argue that leave to commence a derivative action should not be granted because the appropriate recourse for Mr. Wen as a shareholder is to seek an oppression remedy.

[58] In *Discovery Enterprises Inc. v. Ebco Industries Ltd*, at para. 21, the court stated that the same conduct can give rise to both oppression and derivative proceedings.

[59] Further in *Starcom International Optics Corp. v. Macdonald Re: Starcom International Optics Corporation*, [1994] B.C.J. No. 548, para. 31, the court stated: "... the two causes of action are not mutually exclusive, and that particular conduct on the part of directors may constitute both a breach of fiduciary duty in respect of which the company may sue, and the basis of an oppression action provided the petitioning shareholder has also been affected *qua* shareholder by the breach ...".

[60] The availability of an oppression remedy is not in and of itself a ground to deny leave to commence a derivative action. Therefore, this argument is dismissed.

CONCLUSION

[61] I, therefore, grant leave to Mr. Wen to commence an action on behalf of the company for the taking and/or diverting a business opportunity and profit as well as for misappropriation of funds. The Court further directs that the action be commenced by the filing of a Statement of Claim by Qiu's Restaurant Inc. against Guo Hua Qiu.

Mr. Wen will have conduct of the action.

[62] I decline to make an order directing that all or some of any amount adjudged payable by Guo Hua Qiu be paid directly to Xun Wen. It is preferable at this stage of the proceedings to leave that question to the trial judge.

[63] I order that the petitioner shall have his costs of this application on Scale C in the cause.