Date: 2008 04 22
Docket: S-1-CV2008000010

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE
BUSINESS CORPORATIONS ACT, S.N.W.T. 1996, c.19

BETWEEN:

ADEL MOSTAFA HUSSEIN SAAD

Applicant

-and-

NORTHERN MANAGEMENT & DEVELOPMENT LTD. and
NORTHERN ENGINEERS & ARCHITECTS LTD.

Respondents

MEMORANDUM OF JUDGMENT

[1] The Applicant is a minority shareholder in each of the Respondentcorporations, Northern Management & Development Ltd. ("NMDL") and Northern Engineers & Architects Ltd. ("NEAL"). In the past few years, he has requested that his shares be retracted by the Respondents and that unsecured debt owing to him by them be repaid. When his requests were not addressed, he commenced these proceedings in which he asks the Court to order that the Respondents provide him with financial information, purchase his shares or, alternatively, appoint an inspector to investigate and monitor the affairs of the Respondents.

[2] An order was made on consent on February 1, 2008 that the Respondents provide the Applicant with certain financial information. His application for the appointment of an inspector is scheduled to be heard on May 13, 2008.

[3] In the application now before me, the Applicant seeks an interlocutory injunction to restrain the Respondents from dealing with their assets. He seeks the same relief against MillenniumConstructionLtd. ("Millennium"), a corporationwhich

is not a party to these proceedings. Relief against certain individuals who are also not parties was initially sought but then not pursued.

[4] The Applicant began to lend money to the Respondents in 2001, after becoming reacquainted with the then President of the Respondents, Sam Kassem. A portion of the Applicant's loan was converted into ownership of shares. The loan amount was reduced by payments from time to time but no action was taken on the Applicant's request for retraction of his shares. After Sam Kassem died in 2006, his son and daughter became the majority shareholders in and directors of the Respondents. Since then, the Applicant says, he has received no notice of any annual shareholders' meetings and little information about the Respondents' finances and activities.

[5] It appears from the materials filed that the Applicant claims to be owed a total amount of approximately $600,000.00(Exhibit "H" to his affidavitsworn February22, 2008).

[6] The information and documentshe has received,in part pursuantto the February 1, 2008 order, have caused the Applicant concern that while his requests for information were going unanswered many of the Respondents' assets have been disposed of and other creditors and shareholders have receivedpayments in preference to the amounts owing to him. He points to the absence in the Respondents' minute books of any reference to the loans owing to him. He also refers to copies of resolutions which he has not signed but which purport to be passed by unanimous consent of the shareholders and which waive notice of the time and place of the annual shareholders' meeting; waive disclosure of remunerationpaid to directors,officers and employees and waive the provision of audited financial statements. It is not clear whether these resolutions have been signed by other shareholders.

[7] The Applicant also points to transfers of real property from the Respondents to Millennium, a company owned by David Kassem, who is now the President of the Respondents, repayment by the Respondents or one of them of Mr. Kassem's person credit card debt and disposition of vehicles and other equipment valued at approximately $400,000.00 by NMDL to other parties. In argumentthe Court was also referred to what appears in the unauditedfinancial statementsto be a sizeablereduction of the shareholder's loan of another shareholder.

[8] David Kassem denies that any funds of the Respondents were used to pay his credit card debts; the Applicant has not provided any evidence contradicting him. Mr.

Kassem says that the Respondents have suffered significant cash flow problems since his father's death in 2006 due to unsuccessful projects and other issues. He says that when the Canadian Imperial Bank of Commerce ("CIBC"), which holds security over virtually all the assets of the Respondentsand relatedcompanies, demanded repayment of its loans, an agreement was entered into between the Respondents and others and CIBC by which CIBC would not enforce its security provided the debtors took steps to pay out the loans (the "Forbearance Agreement"). As they were not successful in obtaining refinancing, the Respondents began to sell some assets to reduce the indebtedness to CIBC.

[9] As for real property sold by NMDL to Millennium, Mr. Kassem says that the transfer price was fair market value as stated in an appraisal obtained for CIBC. Part of the price was paid by set off against money owed by NMDL to Millennium. The net proceeds of sale were paid to CIBC as required by the Forbearance Agreement.

[10] Mr. Kassem also indicates that vehicles and other equipment no longer of use to NMDL and for which it could not service the debt were sold to Millennium at a value determined by a third party accountant. Approximately half the $500,000.00purchase price was paid by the assumption of existing financing against the assets and the balance by set off against money owed by NMDL to Millennium. It appears from the Forbearance Agreement, to which Millennium is a party, that CIBC also has a security interest in these assets as collateral to Millennium's guarantee of NMDL's debt to CIBC (article 5.4(a)].

[11] The sale of assets to pay down the CIBC debt is one of the terms of the Forbearance Agreement: article 8.5 is a covenant by NMDL and others to take all steps necessary to cause their assets to be sold so as to cause the outstanding balance of the CIBC debt to be paid in full by a certain date.

[12] There is also evidence from Mr. Kassem that NMDL has obtained mortgage approval for the refinancing of an existing mortgage to CIBC on two buildingsit owns worth 2.3 million dollars. It is expected that with the new mortgage,CIBC will be paid out in full and there will be additional funds that can be used to pay other creditors, including the Applicant. There is no indication in the material that Mr. Kassem or the Respondents deny the debt owed to the Applicant.

[13] As to the reduction of one shareholder's loan, the Respondentssay that there are reasonable explanations for this which do not involve actual repayment. In his

affidavit Mr. Kassem says that all proceeds from the sale of assets have gone to CIBC and that no payments were made to shareholders, directorsor other creditorsother than what was set off against amounts owing to Millennium.

[14] The Applicant submits that there is something wrong with all of this, that it "doesn't smell right". He seeks an injunction to preserve the status quo and prevent further dissipation of assets. He proposes that the injunction be worded so as to allow disposition of assets with his consent or by court order so as not to interfere with compliance with the Forbearance Agreement.

[15] The Respondents oppose an injunction. They say that the Applicant has not shown any evidence of wrong-doing. If NMDL is prohibited from refinancingthe two buildings, it will not be able to comply with the ForbearanceAgreement and CIBC will be in a position to foreclose on the remaining assets, which may result in no surplus funds being available for unsecured creditors or shareholders.

[16] As Richard J. stated in *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1996] N.W.T.J. No. 19 (S.C.), an interlocutory injunction is by nature an immediate and drastic remedy. The Court must be satisfied that without that remedy, the applicant's rights will be nullified before the trial date. The factors to be considered are:

> (i) a preliminary assessment of the merits of the case to ensure that there is a serious question to be tried;
>
> (ii) whether the applicant litigant will suffer irreparable harm if the injunction is refused; and
>
> (iii) an assessment of the balance of convenience between the parties, i.e. which of the parties will suffer the greater harm from the granting or refusingof the injunction.

[17] On the first factor, whether there is a serious issue to be tried, the Applicant argues that the information he has obtained reveals a serious issue of preferential treatment and the failure to retract his shares. He has not, however, provided any statutory or other authority that would prevent the Respondents from dealing with creditors in the way that they appear to have done.

[18] The Respondents point out that in his OriginatingNotice, the Applicantrequests an order that the Respondents re-purchase or retract his shares. They argue that he cannot be successful in obtaining this relief because of the financial situation of the

Respondents. They rely on s. 243(7) of the *Business Corporations Act*, S.N.W.T. 1996, c. 19, which states:

> 243(7) A corporation shall not make a payment to a shareholder under paragraph (3)(g), (h) or (i) if there are reasonable grounds for believing that after the payment
>
> (a) the corporation would be unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would be less than the aggregate of its liabilities.

[19] The relief sought in the Originating Notice falls under subparagraph 243(3)(g): an order directing a corporation or any other person to purchase securities of a security holder.

[20] The Respondents say that in their current financial situation, the Applicant cannot demand retraction of his shares as payment to him would contravene the Forbearance Agreement and put CIBC in a position to foreclose, thus rendering the Respondents insolvent. He can be paid only if the Respondentscan continuewith their arrangements with CIBC. Therefore, they say, the Applicant cannot be successfuland there is no serious issue to be tried.

[21] The Applicant says that s. 243(7) is irrelevant at this stage. The whole point of asking that an inspector be appointed is to have the Respondents' financial situation investigated. The status quo should be maintained while that investigation takes place.

[22] In my view the ability of the Respondents to retract the Applicant's shares is not irrelevant at this stage of the proceedings. What the Applicant ultimatelyseeks is to be paid for his shares and for other amounts owing to him as an unsecured creditor. However, the Respondents' financial situation, and the reality, is such that the Applicant cannot obtain that relief so long as the debt to CIBC remainsoutstanding. In my view, this is a significant obstacle for the Applicant. If he acts to prevent the Respondents from disposing of assets so as to pay down the CIBC debt, the risk is that CIBC will exercise its right to foreclose. Either way, the assets will be disposedof and the bulk of any proceeds of sale will go to CIBC.

[23] In these circumstances, I have to conclude that the meritsof the Applicant'scase are not strong. In their current financial situation, the Respondents are not able to meet his demands. Section 243(7) of the *Business Corporations Act* and the terms of the Forbearance Agreement prevent payment to him. Only by complying with the Forbearance Agreement and paying out CIBC will the Respondents be in a position where they may be able to pay the Applicant what he is owed.

[24] Other provisions of the *Business Corporations Act* also stand in the way of the relief the Applicant seeks. Sections 35 and 37 restrict a corporation's power to repurchase its shares if it would then be unable to pay its liabilitiesas they becomedue.

[25] As far as the allegation that there is something wrong or fraudulent about what the Respondents are doing, in my view that is simply speculation. There is clear evidence of financial difficulty on the part of the Respondents but no evidence of fraud. The failure to provide the Applicant with the information he has requested in a timely manner and the absence of documentation of his loans in the minute books along with the unsigned copies of resolutions have understandably contributed to his concern but they are not in themselves evidence of fraud.

[26] The second factor for consideration is whether the Applicant will suffer irreparable harm if an injunction is refused. From the information before me, I am unable to conclude that he will suffer such harm if an injunction is refused; he may, however, suffer that harm if an injunction is granted and the Respondentsare unable to carry through with the Forbearance Agreement.

[27] As to the balance of convenience, there can be little doubt that the injunction requested would impede and possibly prevent the Respondents from fulfilling their obligations under the ForbearanceAgreement by requiringthe Applicant'sconsent or a court order before they can deal with their assets.

[28] In my view it is relevant that the Forbearance Agreement itself puts controls on the Respondents' ability to deal with their assets so that the CIBC debt will be paid down. The Applicant did not question the validity of that debt or suggest that the Agreement is unreasonable. The existence and terms of the Agreement provide some assurance that the Respondents will not dispose of assets for less than reasonable value. Article 8.5 contains a covenant by the Respondentsto take all steps necessaryto cause their assets to be sold on commercially reasonable terms with CIBC's written consent or to be refinanced with CIBC's written consent so as to cause the outstanding

balance of NMDL's CIBC debt to be repaid. Article 10.1 contains a covenant by the Respondents, Millennium and others to carry on their business in the ordinary course and take all reasonable steps to preserve the realizable value of their respective assets.

[29] Obviously the Forbearance Agreement exists to protect CIBC and not the Applicant, however it does provide for restrictions on the Respondents' ability to dispose of assets, which is the Applicant's main concern.

[30] In these circumstances, I am not satisfiedthat the Applicanthas shown that more harm will result to him if an injunction is refused than will result to the Respondents if it is granted.

[31] For the above reasons, the application for an injunction is dismissed. I do, however, order that the Respondents disclose to the Applicant all documents and records relating to (i)the refinancing of the 2.3 million dollar buildings owned by NMDL, (ii) the sale, refinancing and any other financial dealingswith assets owned by NMDL or NEAL and (iii) all payments made on the CIBC debt.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 22nd day of April 2008.

Counsel for the Applicant: Steven Eichler
Counsel for the Respondents: Edward Gullberg

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THE HONOURABLE JUSTICE V.A. SCHULER