COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bhuthal v. Sahsi,*
2024 BCCA 73

Date: 20240301
Docket: CA48761

Between:

Bahadur Bhuthal, Jasdip Bhuthal and Sonu Bhuthal

Appellants
(Plaintiffs)

And

Harminder Sahsi, J&S Cabinet Doors Ltd. and 1061155 B.C. Ltd.

Respondents
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Horsman

On appeal from: Orders of the Supreme Court of British Columbia, dated November 18, 2022 and June 28, 2023 (*Bhuthal v. Sahsi*, Vancouver Docket S199400).

Counsel for the Appellants:	R.S. Fleming
Counsel for the Respondent Harminder Sahsi:	E. Cribb
Place and Date of Hearing:	Vancouver, British Columbia November 16, 2023
Place and Date of Judgment, with Written Reasons to follow:	Vancouver, British Columbia November 16, 2023
Place and Date of Reasons:	Vancouver,British Columbia March 1, 2024

Written Reasons of the Court

Summary:

The parties on both sides of the underlying dispute include the only two directors and shareholders of the respondent companies. The companies do not have counsel. A party applied to have an independent person appointed to represent the companies' interests in the proceedings. The judge below made the order sought under Rule 20-3(15) of the Supreme Court Civil Rules. The

appellants contend the judge erred by using Rule 20-3(15) to appoint a third party representative, rather than the derivative action provisions of the Business Corporations Act ("BCA").

Held: Appeal allowed. Rule 20-3(15) does not authorize the appointment of a person to defend or prosecute proceedings on behalf of a company; that order can be made only under the derivative action provisions of the BCA. The specific regime in ss. 232 and 233 of the BCA addressing the appointment of a person to represent a company in legal proceedings supersedes the general grant of authority in the Rule. Further, ss. 232 and 233 can be used even where all shareholders, directors and officers may be adverse in interest to the company.

Reasons for Judgment of the Court:

[1] In issue on this appeal is the scope of Rule 20-3(15) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and in particular whether the Rule, rather than the derivative action provisions of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*], can be used to appoint a person to represent a corporation in legal proceedings.

[2] At the conclusion of the hearing we set aside orders made under the Rule directing that an independent third party be appointed to represent the interests of the two corporate respondents. Our reasons for that decision follow.

Background

[3] The appellant, Bahadur Bhuthal, and the respondent, Harminder Sahsi, are the sole directors and shareholders of the respondent companies, J&S Cabinet Doors Ltd. ("J&S") and 1061155 B.C. Ltd. ("106") (together, the "Companies"). Mr. Bhuthal and Mr. Sahsi each control 50% of the Companies' shares through their respective holding companies. The appellants, Jasdip Bhuthal and Sonu Bhuthal, are Bahadur Bhuthal's sons and employees of J&S. Neither holds shares in the Companies.

[4] The Bhuthal and Sahsi families, who are related by marriage, together built J&S and 106 into a successful cabinet making business. Tensions arose over compensation to recognize the parties' respective contributions to the Companies' profitability. The appellants contend Mr. Sahsi ultimately agreed to a profit-sharing agreement under which the appellants were to receive two-thirds of the profits and Mr. Sahsi one-third. Mr. Sahsi denies that such an agreement was reached.

[5] In August 2019 the appellants commenced the underlying action against Mr. Sahsi and the Companies, seeking to enforce the appellants' entitlement to two-thirds of the Companies' profits. In the alternative, they advanced a claim in unjust enrichment. Bahadur Bhuthal made no claim in the proceedings, but was named because his interest, like Mr. Sahsi's, would be affected if Jasdip and Sonu were to succeed in their claims.

[6] When the litigation began, the Companies did not have counsel because they were not

alleged to be parties to the profit-sharing agreement. The action was set for trial in July 2021 but did not proceed because a judge was not available. A second trial date was set for April 2022. In March 2022, Mr. Sahsi filed an application to strike the appellants' claim on the basis that it did not plead that the Companies were parties to the profit-sharing agreement. In response to the strike application, the appellants filed an application to amend their notice of civil claim to include that allegation in the alternative. As it turned out, the trial once again did not proceed because Mr. Sahsi and several key witnesses were in Mexico for a family wedding.

[7] In response to the appellants' application to amend their notice of civil claim, Mr. Sahsi applied to have a third party appointed to represent the Companies' interests in the proceeding. That application came before the chambers judge on October 31 and November 15, 2022 and led to the orders challenged on appeal. A third trial date set for October 10, 2023 had to be adjourned to permit this appeal to proceed.

The Chambers Hearing

[8] Although Mr. Sahsi's notice of application to appoint a third party referred to both the *BCA* and Rule 20-3(15) as the legal basis for the order sought**,** counsel for Mr. Sahsi ultimately relied solely on Rule 20-3(15), which provides:

> (15) The court may give the conduct of a proceeding to any person the court considers appropriate.

[9] The judge concluded that she had jurisdiction to make the order sought under both the Rule and inherent jurisdiction. She dismissed the appellants' argument that a representation order must be made under the derivative action provisions of the *BCA*, noting that no such application was before her: at para. 46. The judge considered herself bound by *Wray v. Taylor*, 2003 BCSC 1627. In that case, Garson J., as she then was, stated that the court had jurisdiction to appoint a representative for a company either under the Rule (then Rule 5(23)) or under s. 200(2)(b) of the *Company Act*, R.S.B.C. 1996, c. 62, but declined to make the order sought: *Wray* at paras. 14, 30.

[10] We respectfully disagree with the judge's conclusion that she was bound by *Wray*. The parties in *Wray* did not dispute the court's jurisdiction to make the order appointing counsel for the company. More importantly, Garson J. was not asked to consider whether the Rule had to be read more narrowly in light of the precise regime in the *Company Act* for appointment of a person to prosecute or defend actions on behalf of a corporation. Given that the pre-eminence of the derivative action provisions was not raised in *Wray*, the decision was not a fully considered one. As a result, horizontal *stare decisis* did not compel the judge to follow it: *Re Hansard Spruce Mills Ltd.*, 1954 CanLII 253 (B.C.S.C.) at 592; *R. v. Sullivan*, 2022 SCC 19 at paras. 73,

[11] The judge also relied on her inherent jurisdiction to make the orders sought: at paras. 33 and

34. However, we note that it is not necessary to rely on inherent jurisdiction when a Rule or other statutory power is available. In *Endean v. British Columbia*, 2016 SCC 42, the Court said:

> [24] The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction: see, e.g., *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 63-68. As The Honourable Georgina Jackson and Janis Sarra write, "[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances": "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 73.
>
> [Emphasis added.]

[12] Having determined that she had the jurisdiction contended for by Mr. Sahsi, the judge made the following orders:

> 1. Mr. Bhuthal and Mr. Sahsi shall, within 30 days, agree on a mechanism to appoint a person to have conduct of the proceeding on behalf of the Companies, and who may appoint and instruct counsel for the Companies in the proceedings.
>
> 2. If Mr. Bhuthal and Mr. Sahsi are unable to agree they have leave to apply for directions.
>
> 3. Costs of the application to Mr. Sahsi in the cause.

[13] Perhaps not surprisingly, Mr. Bhuthal and Mr. Sahsi were not able to agree on a mechanism to appoint an independent third party. Although they agreed on a suitable candidate, they could not agree on the terms of their appointment. The appellants were not willing to indemnify the third party, and sought clarity regarding whether the third party could bring counterclaims on behalf of the Companies, who would be responsible for paying the third party's accounts, and from whom that third party should take instructions.

[14] Eventually, Mr. Sahsi brought an application for directions from the judge, seeking in particular that the parties provide an indemnity for the third party. The appellants cross-applied seeking additional terms. Both applications were adjourned but the judge provided the following directions:

> a. A person will be appointed to have conduct of the proceedings on behalf of the Companies. That person may retain and instruct counsel;
>
> b. That person will be paid a reasonable hourly rate, plus disbursements; and
>
> c. That person will also have the authority to commence any counterclaims, that can properly be brought by the Companies in the proceeding, subject to the normal rules.

[15] Despite these further directions, the parties were unable to move forward with the appointment, the litigation stalled, the October 2023 trial date was lost and reset for February 20, 2024 and this appeal ensued.

On Appeal

[16] The appellants raise three grounds of appeal, contending that the judge erred by:

1. Using Rule 20-3(15) to appoint a representative for the Companies, rather than the derivative action provisions of the *BCA*;

2. Granting an order that is not capable of being put into effect; and

3. Failing to give effect to a resolution they say was passed by the Companies' Boards of Directors providing for management to instruct counsel for the Companies.

Analysis

[17] The orders made by the judge were set aside at the conclusion of the appeal hearing because we were all of the view that the first ground of appeal was dispositive of the appeal. Rule 20-3(15) does not authorize appointment of a person to defend or prosecute proceedings on behalf of a company; that order can be made only under the derivative action provisions of the *BCA*.

[18] Fundamentally, the appeal turns on the rule that special legislation overrides general legislation. That rule was expressed in *Re Township of York and Township of North York* (1925), 57 O.R. 644 (C.A.) at 648–649:

> It is, of course, elementary that special legislation overrides general legislation in case of a conflict—the general maxim is *Generalia specialibus non derogant*—see *Lancashire Asylums Board* v. *Manchester Corporation*, [1900] 1 Q.B. 458, at p. 470, *per* Smith, L.J. — even where the general legislation is subsequent: *Barker* v. *Edgar*, [1898] A.C. 748, at p. 754, in the Judicial Committee. The reason is that the Legislature has given attention to the particular subject and made provision for it, and the presumption is that such provision is not to be interfered with by general legislation intended for a wide range of objects: Craies on Statute Law, 3rd ed., p. 317.
>
> [Emphasis added.]

[19] This is a well-recognized principle of statutory interpretation: *City of Ottawa v. Town of Eastview*, [1941] S.C.R. 448 at 461–462; *Taseko Mines Ltd. v. British Columbia (Minister of Environment and Climate Change Strategy)*, 2019 BCCA 452 at para. 26; *R. v. Greenwood*, 1992 CanLII 7750 (ONCA) at para. 18; Ruth Sullivan, *The Construction of Statutes,* 7th ed. (Toronto: LexisNexis Canada, 2022) at § 11.05 [6]. The principle is grounded in the sound view that if the legislature has spoken and laid down the precise manner in which a particular circumstance is to be addressed, its intention cannot be avoided by making use of a broad grant of authority in

another statute, or section of the same statute, that could apply to those same circumstances. In short, the general provision must give way, or be "read down", to exclude the matters governed by the particular provision.

[20] It is helpful at this point to review the *BCA* derivative action provisions in issue:

> **232** …
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> (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.
>
> [Emphasis added.]

For ease of comparison we set out again Rule 20-3(15):

> (15) The court may give the conduct of a proceeding to any person the court considers appropriate.

[21] We leave for another day the precise scope of Rule 20-3(15). For the purposes of this appeal it suffices to note that the Rule contains a general grant of authority, whereas ss. 232 and 233 of the *BCA* set out a specific regime addressing the appointment of a person to represent a company in legal proceedings. The Rule must therefore give way to the *BCA* provisions.

[22] The sections in the *BCA* are broadly worded, providing that "a complainant" may apply to represent a company in legal proceedings. Under s. 232(1), "complainant" is defined as a shareholder or director of a company, but "shareholder" is expansively defined to include "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" (emphasis added). The complainant must satisfy the court that they are "acting in good faith" and that "it is in the best interests of the company for the legal proceeding to be prosecuted or defended".

[23] Section 233(3)(a) provides that a person appointed to represent the company may apply for a court order authorizing another person to control the conduct of the proceeding. Section 233(b) authorizes the court to provide for payment of that person's interim costs including legal fees and disbursements:

> **233** …
>
> (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.

[24] In the hearing before us, the respondent conceded that in most cases the specific provisions of the *BCA*, rather than the general grant of authority in the Rule, must be used when appointment of a person to represent a company is sought. But he says that the Rule remains a source of authority when the *BCA* provisions cannot be used due to the absence of a suitable complainant/applicant.

[25] He asserts that this is such a case because everyone who has an interest in the Companies is already a party to the litigation, with interests adverse to that of the Companies. Although s. 233(3) permits a complainant to apply to have an independent third party step in to represent the Companies, he submits that can occur only after a complainant has been granted the right to defend or conduct proceedings on behalf of the company—a step which cannot be taken without there being an appropriate applicant/complainant in the first place.

[26] The respondent submits that in circumstances such as the present case, where none of the shareholders or directors can act for the Companies because they are all involved in the litigation and in conflict with the Companies, there is no route in the *BCA* to appoint a person to represent the Companies' interests. Therefore, Rule 20-3(15) and the inherent jurisdiction of the court must remain available to ensure that corporate interests can be defended or asserted.

[27] Respectfully, we cannot agree with the respondent's restrictive reading of the *BCA* provisions. First, the words of the statute "'are to be read in their entire context and in their

grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature]'": *Rizzo & Rizzo Shoes Ltd*. *(Re)*, [1998] 1 S.C.R. 27 at para. 21. In our view, read in this way, ss. 232 and 233 are broad enough to apply even in closely-held companies such as the ones in issue here, where all shareholders, directors and officers may be adverse in interest to the company.

[28] That is so because a "complainant" includes "an appropriate person"—an expansive term that could include someone other than a shareholder, director or officer. Indeed, there is a long line of authority, helpfully reviewed by Kelleher J. in *Briere Sound Ltd. v. Briere*, 2014 BCSC 417 at paras. 86–96, confirming that an appropriate person can be any person with at least an indirect interest in the integrity, prosperity and continued existence of the company. We note parenthetically that, in the present case, the issue of the availability of someone other than the parties with an interest in representing the Companies has not yet been determined by the court.

[29] Second, even assuming no "appropriate person" was available to apply to conduct the proceeding on behalf of the Companies, in our view ss. 232 and 233 would allow for an interested but adverse party, such as Mr. Sahsi, to make a two-part application. The adverse party would apply first to be appointed under s. 232(4), <u>for the limited purpose</u> of making a second application under s. 233(3) for appointment of an independent third party to control the conduct of the proceeding on behalf of the Companies.

[30] The benefits of assessing an application for appointment of a third party representative under the *BCA* provisions are evident. Before making an order under s. 233(3), the court must first be satisfied that the complainant is acting in good faith and that the proceeding is in the best interests of the company. Further, the proposed third party representative must be identified, and the complainant-applicant would generally be required to identify the defences or claims (here counterclaims) that the third party would be expected to assert on behalf of the company. In contrast, applying Rule 20-3(15), the judge asked only whether the defences the Companies might wish to advance would be duplicative of and aligned with those already being presented by Mr. Sahsi in his defence of the claims made against him personally: RFJ at para. 48. Mr. Sahsi did not identify who was being proposed to take conduct of the proceeding on behalf of the Companies; nor did he propose the terms upon which that representation was to proceed.

[31] Having determined that the judge did not have jurisdiction under Rule 20-3(15) to make the orders appealed, and that they must be set aside on that basis, it is not necessary to address the second and third grounds of appeal. We wish, however, to comment on the second, which contends that the judge's order for the directors to agree on a mechanism to appoint a third party was incapable of being put into effect, being nothing more than an order to agree.

[32] In fairness to the judge, counsel suggested at the chambers hearing that the directors would be able to agree on a mechanism to select an independent third party. The judge also gave leave to the parties to apply for directions should they be unable to agree on a mechanism. Nonetheless, the order as pronounced could not be enforced on its terms. Although the order was intended to move the litigation along, it instead led to continued conflict, further applications, and delay. Respectfully, such orders are to be avoided: *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267 at para. 18; *Pousette v. Janssen*, 2023 BCCA 176 at paras. 60–63.

Disposition

[33] It is for these reasons that the appeal was allowed and the orders set aside.

"The Honourable Madam Justice Saunders"

"The Honourable Madam Justice Fenlon"

"The Honourable Madam Justice Horsman"