Citation:	Doig et al v. Laurand Holdings Ltd et al 2001 BCSC 780	Date:	20010608
		Docket:	C944200
		Registry:	Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ARTHUR DOIG AND ARMA HOLDINGS LTD.

PLAINTIFFS

AND:

LAURAND HOLDINGS LTD. AND HARRISON DOIG

DEFENDANTS

REASONS FOR JUDGMENT
OF THE
HONOURABLE MADAM JUSTICE SINCLAIR PROWSE

Counsel for Plaintiff	T. Delaney
Counsel for Defendant	P.D. Le Dressay
Date and Place of Hearing/Trial:	September 20, 2000 and May 1, 2001 Vancouver, BC

I. NATURE OF THE PROCEEDING AND RELIEF SOUGHT

[1] The Plaintiff, Arma Holdings Ltd., (Arma), and the Defendant, Laurand Holdings Ltd., (Laurand), were Joint Venture partners. The Plaintiff, Arthur Doig, is, and was at all material times, the President of Arma while the Defendant, Harrison Doig, is, and was at all material times, the President of Laurand. Arthur Doig and Harrison Doig are brothers.

[2] During the period extending from 1985 until 1991, Arma and Laurand participated in a Joint Venture in which they developed a property which they owned in British Columbia (the "Project").

[3] The claims in this action arose as a result of the Project and related transactions. Specifically, the Plaintiffs claimed that they were still owed monies by the Defendants, while the Defendants through their counterclaims contended that they were still owed monies by the Plaintiffs. The claims relate to two transactions which for convenience will be referred to as the "Mortgage Loan" and the "Big West Loan". Both of these transactions are described in more detail later in these Reasons.

[4] Although the Plaintiffs also made claims against Harrison Doig regarding the legal services that he provided to the Project, the Plaintiffs abandoned those claims during the trial.

[5] The trial of this action took place in the fall of 1998. I was the Trial Judge. I rendered my Reasons for Judgment on December 29, 1998.

[6] Since these Reasons were issued, it was discovered that Arma had been struck from the Register of Companies some time ago and that it had not been restored as of the date of the trial, or as of the date of the December 29, 1998 Judgment.

[7] In this hearing, the Defendants sought an order vacating the December 29, 1998 Judgment and dismissing this action.

[8] If the Defendants were not successful with this application, the parties sought an order settling the quantum of the monies owed between them.

[9] In my December 29, 1998 Reasons, I dismissed all of the claims of Arthur Doig, and I granted Arma's claim against Laurand regarding the Mortgage Loan. That is, I concluded that Laurand still owed Arma monies for that debt. It is now apparent however that my calculation as to the quantum of that debt was in error.

[10] As far as the quantum of the remaining claims, including the counterclaims, were concerned, I was unable to make that calculation, as interest had not been included on the Big West Loan.

[11] In my December 29, 1998 Reasons, I directed the parties to acquire the interest information and to make the necessary calculation as to the monies still owed. The resolution of the various claims would flow from that calculation.

[12] Unfortunately, the parties were unable to reach an agreement as to the balance owing on either the Mortgage Loan or the Big West Loan.

[13] On June 8, 2000, before it was discovered that Arma had been struck from the Register of Companies, I ordered that the Defendants were to pay Arma $84,034.00, this amount being the outstanding balances owed to it on the Mortgage Loan and the Big West Loan. When this Order was made, the Defendants were granted Leave to Apply to have it set aside provided that various conditions were met. One of these conditions was that the money be paid into trust.

[14] The Defendants have met all of the conditions imposed.

[15] The quantum of $84,034.00 was based on evidence presented by Arma in the June 8, 2000 Hearing. All of the parties agree that that amount is too high, the interest on the Mortgage Loan having been calculated twice and the interest on the Big West Loan having been calculated as compounded rather than as simple interest.

[16] The purpose of this second application is to establish the balances owed on the Mortgage Loan and the Big West Loan and the consequent amounts owing between the parties.

[17] Lastly, the Plaintiffs are seeking an Order for Special Costs against the Defendants regarding the post-trial proceedings.

II. APPLICATION TO HAVE THE JUDGMENT SET ASIDE AND TO HAVE THE ACTION DISMISSED

[18] In June 2000, as the parties were preparing for a Hearing to Settle the Order arising from my December 29, 1998, Reasons, it was discovered that Arma had been struck from the Register of Companies on August 28, 1998.

[19] Although Arma was a legal entity at the time that this action was started, it was not a legal entity during the trial or at the time that the December 29, 1998, Reasons were rendered.

[20] In June 2000, I stayed the proceedings pending the restoration of Arma, that restoration to take place no later than August 23, 2000. Arma was restored to the Register of Companies on July 27, 2000.

[21] This Stay was granted without prejudice to the Defendants to pursue their application to vacate the December 29, 1998, Judgment and to have the action dismissed on the grounds that Arma had been struck from the Register of Companies at the time of trial and at the time that judgment was rendered.

[22] This is that application of the Defendants.

[23] The first ground on which the Defendants seek to have this action dismissed is that the dissolution of Arma is a fundamental impediment to the granting of Judgment in this matter as a company that is struck from the Register of Companies cannot commence or continue an action.

[24] The Order restoring Arma to the Register of Companies provides that:

> Arma Holdings Ltd. shall be deemed to have continued in existence as if it had never been struck off, without prejudice to the rights of any parties that may have been acquired before the date on which the company is restored to the register.

[25] The Restoration Order contains the words "shall be deemed to have continued in existence as if it had never been struck off." The effect of the inclusion of these words is that the Restoration Order retroactively restores the company as if it had never been dissolved; therefore, dissolution of the company is not a fundamental impediment to the granting of judgment. See: s.262(1),(2)and s.263 of the ***Company Act***, R.S.B.C. 1996, c.62; ***Natural Nectar Products Canada Ltd. v. Theodor*** (1990), 46 B.C.L.R. (2d) 394 (C.A.); and ***Mohan Investments Ltd. v. Vishva Hindu Parishad of British Columbia***, [1995] B.C.J. No. 1183 (Q.L.)(S.C.).

[26] Rather, the question to be addressed in this first argument (because the stay was granted on a without prejudice basis) was whether the Restoration Order should have been made. That is, was

it just to make this Order?

[27] Under s.262(1) of the ***Companies Act***, the Court may restore the company "if it is satisfied that it is just that the company ... be restored to the register...".

[28] For reasons that follow, in my view, it was just.

[29] From the perspective of Arma, given that it was registered when all of the claims in this action arose; that throughout these proceedings it has conducted itself as if it were registered; and that its dissolution was the result of an oversight rather than design, it would be unjust not to restore it as all of its claims would otherwise fail.

[30] As far as the Defendants are concerned, as Arma was registered at the time that all of these claims arose and at the time that this action was commenced, and as the Defendants have conducted themselves throughout as if Arma was registered, it would not be unfair or unjust to the Defendants if Arma is restored. Rather, it would simply restore the situation to that which the Defendants had believed it to be throughout these proceedings.

[31] For all of these reasons I am satisfied that it was just to restore Arma to the Register of Companies and to deem that it have continued in existence as if it had never been struck off.

[32] Having reached this conclusion, given that a retroactively restored company can be granted Judgment I dismiss the Defendants' first ground for vacating this Judgment and dismissing this action.

[33] With respect to the second ground, the Defendants contend that Arma's restoration is prejudicial to the rights that they acquired during the period that Arma was dissolved.

[34] Specifically, the Defendants submitted that as the Restoration Order of Arma was made (as all Restoration Orders are made) "without prejudice to the rights of any parties that may have been acquired before the date on which the company is restored to the register", and as Arma's restoration was prejudicial to the rights acquired by them (the Defendants), Arma should be regarded as dissolved for purposes of this action.

[35] With respect to the rights that the Defendants submit they acquired during the period of dissolution, they contend that they acquired the right to seek recovery of the counterclaim directly against the principal of Arma; the right to seek costs against Arma's solicitors who represented the non-existent company; the right to have the action dismissed prior to trial; the right to have the action stayed prior to trial; the right to have any indebtedness extinguished; and the right not to pay any indebtedness to Arma. That is, during the period that Arma was dissolved, the Defendants submit that they acquired the right to have the Judgment vacated and the action dismissed because Arma was dissolved, having been struck from the Register of Companies.

[36] These are not the type of rights that are protected by the "without prejudice clause". The Defendants' purported rights are tactical advantages arising from Arma's dissolution, not legitimate claims.

[37] The purpose of the "without prejudice clause" is to preserve legitimate claims of third parties that have arisen during the period when the company was struck.

[38] As was set out by Davis J. in ***British Columbia (Attorney General) v. Royal Bank of Canada,*** [1937] S.C.R. 459 at pg 477:

> [t]he without prejudice clause ... is intended to preserve legitimate claims of third parties which have arisen subsequent to the date that the company was stricken off the Register because the Officers and Agents of the company may not have heard of the striking of the name of the company from the Register and may have gone on for some time carrying on the operations of the company in absolute good faith without notice or knowledge that the Registrar had stricken the name of the company off the register.

[39] Although the majority in ***British Columbia (Attorney General) v. Royal Bank of Canada*** did not adopt the above conclusion of Davis J. (having reached their decision on a different ground), this conclusion of Davis J. was approved and applied by this Court in ***Montreal Trust Company v. Boy Scouts of Canada***, [1978] 5 W.W.R. 123 (B.C.S.C.).

[40] Moreover, the court in ***Mohan Investments Ltd. v. Vishva Hindu Parishad of British Columbia***, *supra*, came to the same conclusion, namely, that the acquisition of a tactical advantage arising from the dissolution of a company is not the type of right protected by the "without prejudice clause". In ***Mohan Investments Ltd. v. Vishva Hindu Parishad of British Columbia*** the defendant argued that the action should be dismissed because during the dissolution period it had acquired the right to have the plaintiff's action struck on the basis that the limitation period had now expired. The Court concluded that that was not the type of right protected by this clause and dismissed the defendant's motion.

[41] Given that the rights acquired by the Defendants during the dissolution period are not the type of rights protected by the "without prejudice clause", the Defendants' application based on

this ground is dismissed.

III. APPLICATION TO SETTLE ORDER ARISING FROM THE DECEMBER 29, 1998, REASONS FOR JUDGMENT

[42] As was mentioned earlier in these Reasons, this application pertains to the calculation of the monies owing between the remaining parties as a result of the Mortgage Loan and the Big West Loan.

[43] To put these calculations in context, the Mortgage Loan pertains to monies that Laurand borrowed from the Joint Venture partnership - that is, the partnership of Arma and Laurand.

[44] The Project pertained to the development of land that was owned by Laurand and Arma as Joint Venture partners. Approximately two years before the Project started, Laurand, for purposes of its own, borrowed $104,000.00 from the bank using this Joint Venture property as collateral.

[45] When the Project started, Laurand's $104,000.00 mortgage was merged into the larger loan needed for the Project. This was done on the basis that Laurand would repay the $104,000.00 plus the carrying costs to the Joint Venture partners. This is the Mortgage Loan referred to earlier in these Reasons.

[46] As far as the Big West Loan was concerned, Harrison Doig, as the Manager of the Project, had made an unauthorized loan of $41,511.00 of Joint Venture monies to Big West Construction Ltd. He was personally responsible for the repayment of these monies, including interest which was payable at the same rate that the Royal Bank of Canada would have charged had these monies been borrowed from it. Sometime after the completion of the Project in the spring of 1991, Harrison Doig repaid $45,500.00 of these monies. He made that payment to Arma. This is the Big West Loan referred to earlier in these Reasons.

[47] With respect to the outstanding balance on the Mortgage Loan, I accept the calculations made by Mr. Peters. Mr. Cinnamon, in his Report, presumed that the $104,000.00 was repaid in 1988. The evidence did not support that conclusion. Rather, in 1988 the Joint Venture partners refinanced the mortgage for the Project with a different lending institution. The evidence did not prove that Laurand repaid the Mortgage Loan at that time.

[48] Applying Mr. Peters' calculations, Laurand owed the Joint Venture partners $98,381.00, inclusive of interest, on the Mortgage Loan at April 30, 1991, when the Project concluded. Since that time until December 28, 1998, a further $15,458.00 has accrued in interest, leaving a total of $113,839.00 owing on the Mortgage Loan.

[49] Because this amount is owed to the Joint Venture partners, and because Arma's interest in that partnership is 50%, Laurand owes Arma $56,919.50 for its interest in the outstanding balance of the Mortgage Loan.

[50] With respect to the balance owing on the Big West Loan, I accept the calculations of Mr. Cinnamon over those of Mr. Peters, regarding the interest payable on this loan. That is, Mr. Cinnamon calculated the interest to be $18,502.00 as of December 31, 1998, at prime plus 2% which I accept as the probable rate charged by the Royal Bank.

[51] Given that the principal amount of the Big West Loan was $41,511.00 and the interest is $18,502.00, the total amount of the loan $60,013.00.

[52] As was mentioned earlier, Harrison Doig has repaid $45,500.00, leaving a balance owed by him to the Joint Venture partnership of $14,513.00 for the Big West Loan. As Arma has a half interest in these monies, Harrison Doig owes Arma $7,256.50 for this remaining balance.

[53] As far as the $45,500.00 payment is concerned, that whole amount was paid to Arma. As this was the repayment of a debt owed to the Joint Venture partnership, Arma was only entitled to one half of those monies, namely, $22,750.00. Therefore, Arma owes Laurand $22,750.00

[54] Laurand's Judgment (counterclaim) of $22,750.00 against Arma is set off against Arma's judgment of $56,919.50 against Laurand, leaving a balance of $34,169.50 owing by Laurand to Arma.

[55] In summary, Arma is granted Judgment against Laurand for $34,169.50 and Arma is granted Judgment against Harrison Doig for $7,256.50. The total monies owed to Arma by the Defendants is $41,426.00.

[56] The counterclaims of Harrison Doig are dismissed.

[57] These monies owed to Arma, as well as the monies awarded to the Plaintiffs in costs in the following section, are to be paid from the monies presently held in trust. The balance is to be paid out to the Defendants.

IV. COSTS

[58] In my Reasons rendered December 29, 1998, I ordered that costs were awarded to whichever party succeeded after all of the calculations were done.

[59] As Arma was the most successful party, the Plaintiffs are awarded costs, those costs to be calculated at Scale 3. Although Arthur Doig was not successful in any of his claims, his costs

are also awarded.

[60] The Plaintiff's primary claims were those of Arma, the claims of Arthur Doig being incidental to those claims. Given this situation, it would be difficult, if not impossible, to separate the costs of Arma from the costs of Arthur Doig. Moreover, it is doubtful that the inclusion of the costs incurred to prepare Arthur Doig's claims would increase the overall costs other than modestly.

[61] For these reasons, the Order for Costs will include both Plaintiffs.

[62] Although the Plaintiffs are awarded costs, as was set out in my December 29, 1998, Reasons, they are to reimburse the Defendants for any costs that they incurred to prepare for the claims that the Plaintiffs abandoned during the trial, namely, the claims against Harrison Doig for alleged breaches of his duty as the lawyer to the Project. The costs of this reimbursement are to be deducted from the costs payable to the Plaintiffs.

[63] During this hearing, the Plaintiffs sought an Order that they be granted Special Costs for the post-trial proceedings.

[64] As I have already made specific Orders for Costs in most, if not all, of those proceedings (many, if not all, of which were against the Defendants) this application is dismissed.

"J. Sinclair Prowse, J."
The Honourable Madam Justice J. Sinclair Prowse

Vancouver, B.C.
June 8, 2001