IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kinzie v. The Dells Holdings Ltd.,*
2010 BCSC 1360

Date: 20100928
Docket: S103577
Registry: Vancouver

Between:

**Gwendoline Kinzie, Patricia Graham,
Pauline Newcomb, 3672 Investments Ltd.,
3671 Investments Ltd. and 3668 Investments Ltd.**

Petitioners

And

**The Dells Holdings Ltd., Constance Rosen,
Beverley Candlish, John (Jack) Sigurdson,
Cheryl Johnson, 658135 B.C. Ltd., 658145 B.C. Ltd.,
658150 B.C. Ltd. and 658148 B.C. Ltd.**

Respondents

Before: The Honourable Madam Justice Bruce

Reasons for Judgment

Counsel for the Petitioners:	F.G. Potts C.D. Martin
Counsel for the Respondents, Constance Rosen, Beverley Candlish, John (Jack) Sigurdson, Cheryl Johnson, 658135 B.C. Ltd., 658145 B.C. Ltd., 658150 B.C. Ltd. and 658148 B.C. Ltd.:	E.G. Wong
Place and Date of Hearing:	Vancouver, B.C. September 7 and 8, 2010
Place and Date of Judgment:	Vancouver, B.C. September 28, 2010

INTRODUCTION

[1] The parties are shareholders in Dell Holdings Ltd. (“Dell”). In 1960, Dell began as a joint venture between father and son (Mindy Sigurdson and John Sigurdson Sr.). The parties are all descendants of either Mindy Sigurdson or John Sigurdson Sr. The petitioners and the respondents control the management of Dell; each group has 50% of the voting shares while the petitioners have 40% of the equity shares and the

respondents have 60% of the equity shares. Dell has two directors: Cal Rosen, who is the husband of a respondent, and Michael Kinzie, who is the son of a petitioner. Mr. Kinzie is also the interim manager of the shopping centre. Mr. Rosen has generally represented the respondents in all corporate matters and Mr. Kinzie has generally represented the petitioners.

[2] The sole asset of Dell is a shopping centre located in Surrey, BC. Dell leases space to retail tenants and its income is derived entirely from the rents collected pursuant to the various lease agreements. Since 2007, the respondents and the petitioners have been unable to agree on significant issues affecting both current and future operations of the shopping centre. The most significant and intractable issue involves the potential sale of the shopping centre for redevelopment.

[3] The disputes between these two groups of shareholders have led to a breakdown in their business and personal relationships; there is clearly distrust and a lack of confidence in each side's ability to manage the business and make appropriate decisions in regard to the operation of the shopping centre. The parties agree there is a deadlock as between the two groups of shareholders in regard to Dell's management and that the company's constitution and by-laws do not provide a mechanism for resolving the deadlock. No one has taken responsibility for the deadlock; each side points to the other as the cause of the breakdown in the relationship.

[4] Since 2007, there have been ongoing attempts to sell the shopping centre; however, due to the breakdown in the business relationship among the controlling shareholders, the parties have been unable to present a common front to prospective outside purchasers. The parties have also entertained a share purchase arrangement whereby the petitioners would buy out the respondents' shares at a price reflective of the fair market value, taking into account the different tax consequences of a share transfer versus an asset purchase. The parties' negotiations essentially broke down over a disagreement concerning the method of calculating the taxes payable on a share transfer and the appropriate monetary adjustments to the purchase price based on an asset sale.

[5] While the petitioners have not been opposed to a sale of the shopping centre to an outside party, they have disagreed with the respondents' insistence that any new leases contain a demolition clause. The respondents believe that without a demolition clause, developers would be discouraged from purchasing the shopping centre due to the substantial payouts necessary to end a tenant's lease. Most recently, this difference of opinion led to a conflict between the two opposing shareholder groups during negotiations with Loblaws, a grocery chain that sought to take over a space currently occupied by Value Village.

[6] The conflicts between the parties in respect of the future of the shopping centre led to this application by the petitioners for relief under ss. 324, 223 and 227(3) of the *Business Corporations Act*, S.B.C. 2002, c. 57 ["*Act*"]. Essentially, the petitioners seek a declaration that it is just and equitable to wind up Dell due to the shareholder and director deadlock and further, that instead of liquidating the company's business, the court should exercise its jurisdiction to order the respondents to sell their shares to the petitioners on stipulated terms. The petitioners also seek an interim order permitting them to manage the shopping centre pending completion of the share transfer or a valuation of the shares if this is determined to be necessary.

[7] The respondents do not oppose a declaration under s. 324 of the *Act* that it is just and equitable to liquidate Dell; however, the respondents argue the more preferable course of action is to sell the shopping centre on the market and permit each party to bid in the sale. Alternatively, the respondents argue the court should order a "shot gun" sale where each party is compelled to purchase or sell at the offered price. In the further alternative, the respondents argue that if they are ordered to sell their shares to the petitioners, the court must determine the fair market value of the shopping centre at a trial, based on *viva voce* evidence or, at the very least, provide the respondents with a further opportunity to lead evidence in response to the appraisal obtained by the petitioners shortly before the commencement of this summary proceeding. Finally, the respondents argue they should be given interim authority to manage the shopping centre pending a sale of the shares or a sale of the assets or, alternatively, a professional manager should be appointed during this interim period.

ISSUES

[8] The petitioners' application raises the following issues:

1. Does the court have jurisdiction under ss. 324 and 227 of the *Business Corporations Act* to address the dispute between the parties?

2. Is a summary trial procedure appropriate to resolve the issues in dispute?

3. What remedy should be granted to resolve the parties' deadlock?

DISCUSSION

1. Does the court have jurisdiction under ss. 324 and 227 of the Business Corporations Act to address the dispute between the parties?

[9] The petitioners apply for relief under s. 324 of the *Act* as neither party alleges that the others' conduct has been unfairly prejudicial or oppressive as defined by s. 227(2) of the *Act*, which sets out the basis for an oppression action. Nevertheless, the court has jurisdiction under s. 227(3) of the *Act* to grant the same remedies available in an oppression action if it is satisfied that a winding up of the company is just and equitable and neither party seeks a corporate liquidation: *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods Inc.* (1991), 81 D.L.R. (4th) 649, 56 B.C.L.R. (2d) 273 (C.A.) at para. 31, citing the former s. 224(2) [*S.G. & S. Investments* cited to B.C.L.R.].

[10] The threshold issue is whether it is just and equitable to wind up the company under s. 324 of the *Act*. In my view, the deadlock between the two shareholder groups in Dell constitutes a classic situation in which the court would make an order under s. 324 of the *Act*. In *Palmieri v. A.C. Paving Co.* (1999), 48 B.L.R. (2d) 130, [1999] B.C.J. No. 1648 (S.C.) [cited to QL], Levine J. (as she then was) described some of the circumstances that would normally lead to a finding that it was just and equitable to wind up a company because of a deadlock at para. 28:

> ... there are no other effective and appropriate remedies; there is an equal split or nearly equal split of shares and control; there is a serious and persistent disagreement as to some important questions respecting the management or functioning of the corporation; there is a resulting deadlock; and the

> deadlock paralyzes and seriously interferes with the normal operations of the corporation.

[11] The above quote aptly describes the circumstances in the case at hand. All the factors outlined by Levine J. presently exist on the facts, paralyzing the proper management of Dell's business affairs. Accordingly, I find it is just and equitable to order Dell be liquidated and dissolved.

2. Is a summary trial procedure appropriate to resolve the issues in dispute?

[12] The respondents argue that if the court decides to order a buyout of their shares at a fixed price, then the issue concerning the value of the shopping centre should be referred to the trial list to enable them to lead evidence on this disputed question. The petitioners argue that an application under s. 324 of the *Act* is a summary procedure designed to ensure a quick and inexpensive resolution of the dispute. Further, the petitioners argue that the court may resolve disputed facts in a summary trial procedure based on evidence led in the affidavit material. The petitioners rely upon *Whistler Service Park Ltd. v. Glacier Creek Development Corp.*, 2005 CarswellBC 2271, aff'd 2005 BCCA 472, 9 B.L.R. (4th) 171 [*Whistler Service Park Ltd.* cited to WL Can].

[13] I agree with the petitioners that s. 324 and s. 227 of the *Act* contemplate a summary procedure to provide the parties with a timely and inexpensive resolution to their dispute. Merely because some of the facts are in dispute is not a ground for referring the matter to the trial list.

[14] This issue was addressed by Kelleher J. in *Whistler Service Park Ltd.* at paras. 34 to 39. At paras. 35 to 36, Kelleher J. cites with approval the following passages from *Buckley v. B.C.T.F.* (1992), 70 B.C.L.R. (2d) 210 (S.C.); and *Gaylor v. Galiano Trading Co.*, [1996] B.C.J. No. 2004 (S.C. [In Chambers]):

> [35] In *Buckley v. B.C.T.F.* (1992), 70 B.C.L.R. (2d) 210 (B.C.S.C.), Mr Justice Hood observed:
>
> > Section 224 gives the court a very wide discretion in the protection of individual shareholders or members. With a view to bringing to an end, or remedying the matters complained of, the court may make the order it considers appropriate. The section creates a cause of action in the member and s. 227 stipulates how that cause is to be resolved, that is, in a summary way; and it seems to me that the sections must contemplate that in resolving the cause in the summary way some disputed facts will have to be resolved.
>
> [36] In *Gaylor v. Galiano Trading Co.,* [1996] B.C.J. No. 2004 (B.C.S.C.) [In Chambers], Mr. Justice Bauman reached a similar conclusion at paras. 14 to 16:
>
> > [14] In the result in *Buckley*, Hood J. dismissed the application under 52(11)(d) holding that the petitioner should be entitled to a proceeding in a summary way unless the respondent can clearly show the hearing judge that a full trial was necessary.
> >
> > [15] I believe a similar approach is appropriate in the case at bar.
> >
> > [16] Delay to the petitioner is prejudicial and in that light he should not be denied his *prima facie* right to a disposition on the matters herein by way of a summary proceeding. Difficulties with this approach may arise before the hearing judge, and he or she enjoys a number of alternatives by which to address the problem, other than by ordering a full trial of the proceeding.

[15] In the case at hand, there are no issues of credibility to resolve. While the parties blame each other for the deadlock, neither side alleges the misconduct of the other party amounts to oppression or unfairness.

Further, if the court finds it necessary to establish the fair market value of the shopping centre, this determination can be made without a full trial of the proceeding. It is permissible for the court to draw the proper inferences from the evidence led in this summary proceeding in order to establish a value for the property.

3. What remedy should be granted to resolve the parties' deadlock?

[16] Since neither party desires a winding up of the company, the question is what alternative remedy, pursuant to s. 227(3) of the *Act*, is appropriate in all of the circumstances. Pursuant to s. 227(3) of the *Act*, the court has a broad discretion to craft a remedy that is particularly suited to the circumstances of each case. The overarching legislative purpose, however, is to provide a remedy that brings the parties' conflict to an end. As Southin J.A. says in *S.G. & S. Investments* at paras. 31-32:

> [31] The words of s. 224(2)(c) [now s. 227(3)(h)] may mean "requiring A to purchase from B" or they may mean "giving A the opportunity to purchase from B." In my view, the answer as to which it is is to be found in the context. Section 224 is the oppression section. It contemplates a finding that one shareholder has oppressed the other. The purpose of the power given by subs. (2)(c) is to enable the court to *require* one shareholder or the other to buy out the other and thus bring to an end the oppression.
>
> [32] If something is to be done "with a view to bringing to an end or to remedying the matters complained of" it must be something which will, if carried out, have that effect. An order that A offer to sell but which does not require B to buy cannot be said to have the view of bringing to an end the matters complained of. It may have that result only in B chooses to buy.

[17] The petitioners argue that the conflict between the parties may be resolved by an order that the respondents sell their shares to them at fair market value, less appropriate adjustments. The petitioners argue that the respondents were willing to sell their shares for a price equal to an asset sale for $15,250,000. Relying on the calculations provided by Dell's accountants, BDO Canada, in a memorandum dated February 1, 2010, the petitioners maintain the corresponding price for a sale of the shares is $6,900,000. The petitioners have obtained financing for a purchase of the shares at this price subject to negotiating a lease with Loblaws on acceptable terms. The petitioners argue that a sale on the market would net Dell a substantially smaller sum in light of the June 28, 2010 appraisal of the shopping centre by Carmichael Wilson Property Consultants Ltd. at $13,710,000 ("Appraisal"). Lastly, the petitioners argue that the respondents have never expressed an interest in purchasing their shares in Dell or in maintaining ownership in some capacity. Since at least 2007, the respondents have worked towards a sale of the shopping centre to a third party for redevelopment.

[18] The respondents argue that while they may have accepted the price proposed by the petitioners, in principal, during negotiations for the sale of the shares, there was fundamentally no agreement reached whereby the respondents became obligated to sell their shares for a price equivalent to an asset sale price of $15,250,000. Further, the respondents argue that the negotiations between the parties broke down over a disagreement as to the value of a share sale necessary to net them with the same amount as they would receive in an asset sale based on a price of $15,250,000. Specifically, the respondents rely upon Mr. Rosen's calculations of the tax adjustments necessary to arrive at the sale share price as supporting their

position that the price was actually considerably higher than estimated by the petitioners. The estimate provided by the respondents is $8,749,200.

[19] Because the petitioners failed to serve the respondents with BDO's calculations of the share price equivalent prior to the hearing of this application, I permitted the respondents to file reply evidence to the BDO report. In this regard, the respondents filed a report by Kenneth Chong who is a Chartered Accountant with Dale Matheson Carr-Hilton Labonete LLP. Mr. Chong's report dated September 13, 2010, indicates that the equivalent share price has a range of $8,302,180 at the low end and $8,590,321 at the high end. In reply to Mr. Chong's report, the petitioners filed a report dated September 16, 2010 by Rick Jagpal, who is a Chartered Accountant with Wolrige Mahon. Mr. Jagpal's report indicates the equivalent sale price of the shares is $6,729,068.

[20] The respondents argue it is inequitable to order that they sell their shares to the petitioners at a price fixed by the court when there is no consensus as to the value of the shares or the value of Dell's only asset. In this regard, the respondents maintain they did not have time to obtain an appraisal in response to the Appraisal obtained by the petitioners having been served on August 25, 2010. The respondents also point to inadequacies in the petitioners' Appraisal, including the small number of comparables and the use of a 1.0 density ratio when the Surrey City Plan permits a 3.5 density ratio. To ensure the parties receive fair market value for the shopping centre, the respondents argue it should be sold on the market.

[21] Lastly, and in the alternative, the respondents argue that they are equally interested in acquiring the petitioners' shares. In these circumstances, it is argued, the only proper order is a "shot gun" sale whereby each party is forced to propose a price that reflects true market value. In the interim, it is inappropriate to permit the petitioners to manage the shopping centre because they are clearly not interested in the best interests of the shareholders over the long term.

[22] As an alternative to liquidating Dell, the court has a number of options. First, the court may order that the shopping centre be sold on the market to ensure that the price obtained reflects the true market value. Second, the court may order that the petitioners purchase the respondents' shares at a price fixed by the court, which reflects current market value. Third, the court may order a "shot gun" sale where one party makes an offer to sell their shares to the other party at a fixed price. If the other party refuses to buy at that price, then the first party must purchase the other party's shares at the same price. Finally, the court could order a combination of these alternatives. I will address each of these options in order.

[23] On the one hand, a sale of Dell's only asset on the open market has the advantage of ensuring the parties receive its current fair market value. Where the parties dispute the value of the property, and there is evidence that the real estate market is quite volatile, thereby making a determination of value by the court more difficult, this is a particularly attractive option. On the other hand, a market sale requires the parties to incur the additional expenses that would not be incurred if one party bought out the other's interest in the company. For example, there would be a cost associated with marketing the shopping centre; real estate commissions would be incurred; and a third party purchaser may require Dell to buy out some of the leases, if redevelopment was the ultimate objective, as a condition of the sale. Thus, where one or more of the

parties expresses a desire to purchase the other's interest in the property, this is a far more cost effective means of resolving their dispute. Marketing of the shopping centre will also require some level of cooperation between the parties to fix a listing price, to develop a marketing plan, and to appoint a real estate agent. The past history of the parties' attempts to market the shopping centre clearly indicates that they are unable to cooperate sufficiently to make the necessary decisions regarding the sale of the property. Consequently, if the court orders a market sale, additional court applications will likely be necessary to resolve disputes as they arise.

[24] An order that the respondents sell their shares in Dell to the petitioners avoids the additional costs associated with a market sale. Nor will it be necessary for the parties to work together cooperatively in order to carry out the court's order. However, the court must determine the fair market value of the respondents' shares in Dell in order to fix the price to be paid by the petitioners. The parties dispute the fair market value of the shopping centre. The parties disagree about the method of establishing an equivalency between the gross sale price in an asset sale and the net purchase price based on a share sale. There is over $2 million separating the parties on this issue. The new reports filed by both parties merely confirm the considerable and entrenched dispute about this question. There is also evidence that the commercial real estate market is in flux such that it may be difficult to fix a fair market value for the property. In these circumstances, the court should be reluctant to substitute its decision for the fair market value of the shopping centre in preference to a sale on the open market. Lastly, the respondents maintain they have an interest in acquiring the petitioners' shares in Dell and thus a one sided purchase is contrary to their rights as majority equity shareholders.

[25] A shot gun sale combines the advantages of a market sale with the advantages of buyout by one of the parties. The parties avoid the costs associated with a market sale and are not required to cooperate with respect to the sale to a third party. In addition, the parties are not saddled with a determination of value by the court in circumstances where there is a volatile real estate market. In a shot gun sale, each party has an incentive to make their offer as close to market value as possible. If the offer is too low, it will be readily accepted at an obvious loss to the offeror, and if the offer is too high, the offeror may be forced to pay that price in the event the offeree refuses to accept the offer. The shot gun sale also respects the ownership rights of both parties by giving them an equal opportunity to acquire the other's interest in the business. In addition, both parties in this case are equally familiar with the business and thus equally able to assess its fair market value. The only downside to such an order is that one or both parties may be unable to secure the financing necessary to support their offers within the timeframe fixed by the court.

[26] Lastly, a combination of the above options may involve a shot gun sale with a market sale directed by the court if the buyout does not complete for whatever reason.

[27] After considering these options, I find the most appropriate remedy in the circumstances is to order a "shot gun" sale with a market sale to follow if the purchasing party is unable to obtain financing. Both parties have a desire to acquire ownership of the other's interest in Dell, regardless of whether their motive is to continue operating the shopping centre in the long term or to sell it to a developer at the optimum time. Because the conduct of the parties does not constitute oppression or unfairness within the meaning of

s. 227(2) of the *Act*, it is not appropriate to exclude the respondents from an opportunity to buy out the petitioners due to any wrongdoing on their part. Moreover, an equal right to participate in the buyout is in keeping with the respondents' 60% equity ownership in Dell.

[28] Although the court could fix a sale price at $13,710,000 based on the Appraisal tendered by the petitioners, the fluctuating market conditions cause some significant concerns with respect to its reliability. The authors of the Appraisal clearly identify a volatile real estate market in the Lower Mainland by noting a collapse and a downturn in 2008, a recovery in the residential real estate market in mid-2009 until early 2010, and a softening of the market again in mid-2010 (at 31).

[29] At p. 38 of the Appraisal, the authors underline the uncertainty of the market as a factor affecting their evaluation:

> There is considerable uncertainty as to the direction of all real estate markets in the Greater Vancouver and Fraser Valley area. Recent discussions with realtors and other market participants have indicated that a lack of financing has impacted potential sales of commercial, residential and industrial land sites.

[30] It is also important to consider that the respondents received unsolicited offers to purchase the shopping centre in 2008 and early 2009 for prices ranging from a low of $14,000,000 to a high of $20,000,000. Significantly, these offers were received during the severe economic downturn, which had a substantial adverse effect on the commercial and residential real estate markets in the Lower Mainland. Most recently, the respondents have entertained a third party offer for $15,250,000. These offers also tend to support the respondents' position that the appraisal tendered by the petitioners is not an accurate reflection of the property's fair market value.

[31] In a "shot gun" sale, the court must determine the party who will make the first offer. Normally, the party who is in the best position to assess the value of the business and determine the fair market value is ordered to make the initial offer: *Whistler Service Park Ltd.* at paras. 43-45. In the case at bar, both parties are equally capable of ascertaining the fair market value of the shopping centre. Each group of shareholders is involved in the day to day operations of the business through their representative on the board of directors. Neither party lacks the expertise to fix a fair price.

[32] In these circumstances, I find it is appropriate to designate the respondents as the initial offering party because it is apparent that the parties had such a buyout as their dominant motivation in the months preceding this application. For several months the parties have been negotiating with a view to concluding a buyout of the respondents' shares by the petitioners. The deadlock in their negotiations was due to a dispute over the calculation of the price to be paid for the shares. There is also at least some evidence that the petitioners have arranged for the financing necessary to buy out the respondents.

[33] Accordingly, I order that the respondents must offer to sell their shares to the petitioners within 21 days of the date of this order. The petitioners will have 21 days to accept the offer. If the petitioners do not accept the offer, the petitioners must sell their shares to the respondents, and the respondents must buy those shares for the same price as the respondents' offered to sell their shares. The price must be paid in full

within 90 days of the offer being accepted by the petitioners or rejected by them. The price offered shall be deemed to incorporate and reflect all adjustments and contingencies considered appropriate by the respondents and shall not be subject to any conditions except the usual terms concerning the completion of all documents required to carry out a transfer of the shares. The price should be reflected in gross figures with no deductions or allowances for income tax payable by the petitioners personally or through their corporations.

[34] If either party is unable to obtain financing to complete the purchase of the shares within the 90-day time limit, having made reasonable efforts to do so, the shopping centre shall be listed for sale on the open market with the parties having joint conduct of sale. Either party is at liberty to apply to the court for directions in respect of the marketing of the shopping centre, the list price, and the appointment of a realtor, upon three days' notice to the other party.

[35] The petitioners have applied for an interim order permitting them to enter into a lease with Loblaws on reasonable commercial terms that include the ability to buy out other tenants' leases. The petitioners argue there is some considerable urgency to sign a lease with Loblaws because their offer to rent space in the shopping centre expires on October 1, 2010 and the petitioners' financing to purchase the respondents' shares is conditional upon securing this tenant. The respondents oppose this relief on the ground that a long term lease with Loblaws may not be in the best interests of Dell if the best use of the shopping centre is to hold it in the short term and ultimately sell it for redevelopment. Moreover, the respondents argue there is no evidence that either Value Village or Buy Rite, the two tenants who would have to be bought out by Dell to accommodate Loblaws, have any intention of terminating their leases. They continue to be viable tenants regularly paying rent pursuant to their lease terms.

[36] Weighing the options available to the court, I find it is inappropriate to place one group of shareholders in a position of dominance over the other pending the shot gun sale. I am not satisfied that a lease with Loblaws is critical to the continued operation of the shopping centre in the short term. To permit Mr. Kinzie to conclude an agreement with Loblaws without the concurrence of Mr. Rosen would cause more difficulties between the parties during this transition period. Moreover, at this point it is not known whether it will be the respondents or the petitioners who secure ownership of the shopping centre in the shot gun sale. Thus, it would not be appropriate for the court to designate one side or the other as an interim manager with the authority to ignore the wishes of half the shareholders.

[37] In my view, the appropriate order is to require the parties to forthwith appoint an independent manager for the shopping centre pending the completion of the shot gun sale and the subsequent sale of the shopping centre if that becomes necessary. The manager shall have authority to enter into negotiations with prospective tenants, including Loblaws, and conclude agreements in the best interests of Dell, provided he or she consults with all the shareholders through their respective representatives on the board of directors. In the event that the parties are unable to agree upon an independent manager, either party has leave to apply for a determination of this issue by the court upon three days' notice to the other party.

[38] Each party shall bear their own costs.

"Bruce J."