

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Walker et al v. Betts et al***,
2006 BCSC 1096

Date: 20060714

Docket: S89073
Registry: New Westminster

Between:

Timothy C. Walker and Sunergy Holdings Ltd.

Petitioners

And

Fonda Tre-Anne Betts, Allie's Wholesale Garden Supplies Ltd., Grotek Manufacturing Inc., Agrotek Manufacturing Inc., Aggro Plastics Inc. and 584354 B.C. Ltd.

Respondents

**Corrected Judgment: The front page of this judgment
was corrected on September 5, 2007**

Before: The Honourable Madam Justice D. Smith

Reasons for Judgment

Counsel for Petitioners

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Date and Place of Trial/Hearing:

June 23, 2006
New Westminster, B.C.

[1] In this ongoing shareholders' dispute, the petitioner, Timothy Walker, applies for interim relief pursuant to s. 227 of the ***Business Corporations Act***, S.B.C. 2002 c. 57 (the "***BCA***"). At the conclusion of the hearing I made a number of orders with reasons to follow. These are my reasons.

[2] The background to this litigation can be found in ***Walker et al v. Betts et al*** 2006 BCSC 128, and ***Walker et al v. Betts et al*** 2006 BCSC 612. It may be summarized as follows.

[3] On January 26, 2006, Mr. Walker and his corporate alter-ego Sunergy Holdings Ltd. obtained a

declaration pursuant to s. 227(2) of the **BCA** that the affairs of the three interdependent provincially-incorporated respondents, Allie's Wholesale Garden Supplies Ltd. ("Allie's"), Grotek Manufacturing Inc. ("Grotek"), and Aggro Plastics Inc. ("Aggro Plastics"), collectively referred to as the "Allie's Group", were being operated by the controlling shareholder, Fonda Betts, and her corporate alter-ego 584354 B.C. Ltd. ("584"), in a manner oppressive and unfairly prejudicial to the petitioners.

[4] The oppressive and unfairly prejudicial conduct included the following:

- (a) Unequal repayment of the shareholders loans;
- (b) Continued and ongoing use of the petitioners' capital to fund the activities of the Allie's Group without proposed terms of repayment despite demand;
- (c) Unilaterally changing the manner in which profits and bonuses for Allie's were distributed; and,
- (d) Lack of proper corporate governance including lack of directors or shareholders meetings.

[5] This conduct continued unabated after the declaration of oppression. As a consequence, on April 19, 2006, the Court appointed a Receiver Manager to operate the Allie's Group and to conduct a review of its operation for the period between May 1, 2004, when Mr. Walker departed the Allie's Group, and April 19, 2006, when the Receiver Manager was appointed.

[6] On May 23, 2006, the Receiver Manager issued its report (the "Report"). In the Report it made a number of findings, including the following:

- (a) Between May 1, 2004, and April 19, 2006, Mr. Walker received \$42,485 in personal benefits and Ms Betts received \$764,247 in personal benefits from the Allie's Group;
- (b) Included in the personal benefits received by Ms Betts was \$100,000 in "temporary" coverage for a lapsed life insurance policy, which monies have not been repaid; professional fees of \$94,446 that included payments to her personal lawyer, the corporate lawyer and other professionals for work done in regard to this shareholder's dispute; taxable benefits for the use and maintenance of two vehicles, 80% of which is allocated for her personal use; \$2,475 for a cell phone for her 12 year-old daughter's "nanny"; \$30,690 in medical and dental expenses; and, \$5,000 in other personal expenses;
- (c) In addition to Ms Betts annual salary of \$185,000 from Allie's and \$36,000 from Grotek, her 12 year-old daughter was and continues to be paid a monthly salary of \$1000, which Ms Betts receives on her behalf;
- (c) On June 6, 2005, Ms Betts transferred title to her home to her 12 year-old daughter for one dollar. The transfer was witnessed by the corporate solicitor. According to Ms Betts it was done for "estate purposes";
- (d) Deloitte & Touche's account of \$47,500 on the business valuation was significantly discounted

to \$31,250 (plus GST). Ms Betts had asked Mr. Walker to contribute to the cost of the report which she had quoted to him at \$105,000;

- (e) In regard to the action commenced by Ms Betts against Mr. Walker (the “Fertilizer Action”) based on the information provided it was impossible to state that it was entirely without merit or that it was clearly not worth pursuing based on the information provided;
- (f) In the absence of the shareholders’ dispute being settled, there was no reasonable expectation the business could afford to make a partial payment to Mr. Walker of \$389,000, but that a settlement of the dispute would permit the Allie’s Group to finance an initial lump sum payment to Mr. Walker and subsequent periodic payments.

[7] The parties have reached a clear impasse on any possible resolution of their shareholders’ dispute.

[8] The Report’s findings confirmed that Ms Betts has used corporate funds to finance her defence to this action and to pay for a number of her personal expenses. It disclosed a grossly disproportionate withdrawal of corporate funds for her personal benefit at a time when she was advising the Court that the Allie’s Group could not afford to pay Mr. Walker that portion of his shareholders loans, namely \$389,000, which she had agreed to repay him before his departure from the Allie’s Group. She has consistently maintained that the Allie’s Group could not afford that payment in spite of their agreement. The reason for her position is now apparent.

[9] Ms Betts has also misled the Court. At the hearing in November 2005 she failed to advise the Court of her \$100,000 withdrawal from the Allie’s Group in September 2005. When that information was revealed by the Report she advised the Court that its purpose was “temporary” life insurance because her policy had lapsed and she had to travel to Indian on a business trip. She did not explain why the monies were never repaid at the completion of the trip.

[10] Ms Betts also failed to advise the Court during the November 2005 hearing that in June 2005 she had transferred title to her home to her 12 year-old daughter or that she was paying her daughter a monthly salary of \$1,000 for no apparent work but which she was receiving on her daughter’s behalf. When that information was disclosed by the Report Ms Betts advised the Court that the real estate transaction was for “estate planning” purposes.

[11] In my view, both explanations for these withdrawals of corporate funds were disingenuous.

[12] In short, the Report confirmed many of the allegations of financial misconduct made by Mr. Walker in

support of his application for a declaration of oppression, which allegations had been strongly denied by Ms Betts.

[13] The ongoing nature of this shareholders' dispute has taken a significant toll on the operation of the Allie's Group. The appointment of the Receiver Manager has been at considerable cost. It has had to secure a new credit facility, at significantly higher rates, which has priority over the other debtors. Its costs to date are an estimated \$250,000, with an ongoing monthly fee of about \$50,000 - \$60,000. The Allie's Group has managed to pay these amounts up until now. However, it is now entering its slow cash flow period over the next four months and if these costs continue the Receiver Manager advises the Allie's Group will likely be insolvent by the end of August 2006.

[14] In face of this bleak future for a once thriving business, Mr. Walker applies for the following additional interim orders:

- (a) pursuant to s. 227(3) (e) & (f) of the **BCA** to have the respondent Fonda Betts forthwith removed as a director of the Allie's Group and to have Mr. Walker granted the authority to manage the Allie's Group;
- (b) pursuant to s. 227(3) (r) to grant Mr. Walker authority to commence such legal proceedings on behalf of the Allie's Group, or any of them, as he reasonably believes are in the best interests of the companies; and to terminate such contracts, including employment contracts and/or contracts for professional services as he reasonably believes are in the interests of the Allie's Group or any of them;
- (c) to have the Receiver Manager discharged as Manager but continue to act in its capacity as Receiver;
- (d) to direct the Receiver or Receiver Manager to forthwith market and sell the Allie's Group as a going concern, provided only that the terms of sale are agreed to by the parties hereto or are approved by this Court;
- (e) to require Ms Betts to repay the Allie's Group within 14 days of the date of this order, all of the benefits she has personally received from the Allie's Group as reported by the Receiver Manager, including the \$100,000 borrowed pursuant to the agreement of September 28, 2005, and \$94,446 paid on her behalf for legal fees;
- (f) judgment to Allie's Group against Ms Betts for the amounts set out in (e), such judgment to be stayed for 14 days from the date of pronouncement;
- (g) that Ms Betts shall be liable for the Receiver Manager's fees arising from its appointment in this action, and that such fees shall be deducted from her interest in the Allie's Group upon sale;
- (h) special costs to the petitioners against the respondents Betts and 584354 B.C. Ltd. jointly, for all steps taken by the petitioners to date, and for the present application ; and,

- (i) that all amounts found owing by Betts and 584354 B.C. Ltd., including costs, and fees, to be set off against their interest in the Allie's Group;

[15] It is probable the Allie's Group will not survive to October 2006 when a hearing is scheduled for the valuation of Mr. Walker's shares. If the Receiver Manager's costs continue at their current rate the business will be insolvent by the end of August 2006.

[16] I am satisfied that the initial purpose for the appointment of the Receiver Manager has been achieved. The full extent of the oppression and unfairly prejudicial conduct has now been disclosed to the Court. If someone other than Ms Betts had authority to manage the Allie's Group that would permit the Receiver Manager to be discharged as Manager but continue in its appointment as Receiver. In view of the orders I propose to make, I am satisfied the Receiver Manger can be discharged as Manager but should continue in the role of Receiver. This reduction in the Receiver Manager's duties should result in a corresponding reduction of the Allie's Group's monthly expenses.

[17] The shareholders have also concluded, and in particular Ms Betts has finally conceded, that the Allie's Group must be marketed and sold immediately as a going concern if they are to realize any return on their investment. Therefore, the Receiver is directed to forthwith market and sell the Allie's Group.

[18] Ms Betts does not deny that she owes the Allie's Group the \$100,000 she withdrew in September 2005. On June 21, 2005, two days before the hearing of this application, she repaid \$10,000 of that amount. Accordingly, the order requested in ¶8 (e) is granted to the extent that it gives judgment to the Allie's Group against Ms Betts for \$100,000 and stays execution of that judgment for 14 days from the date of this order.

[19] Ms Betts also acknowledges that at least some of the \$94,000 identified in the Report is owed by her to the Allie's Group for payment of her personal expenses. However, she seeks some additional time in order to confirm or dispute the Receiver Manager's calculations. She shall have time to review those calculations and that part of Mr. Walker's application outlined in ¶8 (e) above shall be adjourned generally.

[20] Similarly, the orders requested in ¶8 (g), (h), & (i) shall be adjourned generally until the sale of the Allie's Group, when the Court will hear the parties' submissions, including those of the Receiver's, on the distribution of the net proceeds of sale.

[21] The most contentious issue in this application was Mr. Walker's request for an order removing Ms Betts as a director of the Allie's Group and a further order that he be granted the authority to manage the business until its sale, including the right to terminate such contracts, including employment contracts and/or contracts for professional services as he reasonable believes are in the interests of the Allie's Group. Ms Betts opposed this application on the grounds that the best interests of the Allie's Group lay in her continued management of the business until its sale because of her expertise in the financial operations of the business.

[22] Section 227(3) of the **BCA** authorizes the removal and appointment of directors. It states in part:

227(3) On an application under this section, the court may, with a view to remedying or brings to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

...

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

[23] The removal of a director of a corporation is an exceptional remedy and one that is rarely exercised unless corrective sanctions are absolutely necessary. Circumstances which might give rise to such an order require something more than directors running afoul of their obligations, more than anticipated misconduct, or more than an apprehension of bias. However, where actual conduct rises to level of misconduct that triggers oppression remedy relief, judicial intervention by removing and replacing a director may be warranted in order to rectify or alleviate the oppression. See **Catalyst Fund General Partner I Inc. v. Hollinger Inc.**, [2004] O.T.C. 1025 (Sup. Ct. J.) aff'd (2006), 79 O.R. (3d) 288 (C.A.) (a director preferred his interests over those of the company); **Re Stellco**, (2005), 75 O.R. (3d) 5 (C.A.) (a removal order overturned on appeal as it was based only on an apprehension of bias); **Brokx v. Tattoo Technology Inc.**, 2004 BCSC 1723 (a director misappropriated corporate funds); **Tsui v. International Capital Corp.** (1993), 108 Sask. R. 62 (Q.B.) (a director's conduct amounted to a conflict of interest and deceit); **Sparling c. Javelin International Ltd.**, [1986] Q.J. No. 2453 (S.C.) (Q.L.) (a removal order was granted because of oppressive and unfairly prejudicial conduct involving an "extraordinary" payment to a controlling shareholder); **Aquino v. First Choice Capital Fund Ltd.** (1996), 143 Sask. R. 81 (Q.B.) (removal of a director to prevent likelihood of

future oppression); **R.S. v. RW-LB Holdings Ltd.** (1993), 15 Alta. L.R. (3d) 153 (Q.B.) (a removal order granted because of director's mismanagement of the holding company and its subsidiaries which was unfairly prejudicial to the interests of the holders of the common shares); and, **Trnkoczy v. Shooting Chrony Inc.**(1991), 1 B.L.R. (2d) 202 (Ont. Ct. J. (Gen. Div.)) (a declaration of unfairly prejudicial conduct due to negligent or incompetent management led to an order granting management of company to complainant shareholder).

[24] In this case, I have concluded that Ms Betts can no longer be a director and manager of the Allie's Group. In spite of her management expertise she has seriously breached her fiduciary obligations to the shareholders by her misappropriation of corporate funds for her personal benefit. She has been dishonest with the Court by failing to disclose the full extent of the monies she had withdrawn from the Allie's Group for her personal benefit, while at the same time advising the Court that there were no funds to repay Mr. Walker that portion of his shareholders loans which she had agreed to repay him before his departure. She has also steadfastly continued in her refusal to follow corporate governance procedures required by the Allie's Groups Articles of Association. In short, through her oppressive and unfairly prejudicial conduct she has repeatedly placed her interests over those of the other shareholders and failed to act in the best interests of the Allie's Group.

[25] In these circumstances, I am not persuaded that her continued management would be in the best interests of the Allie's Group. Accordingly, the application to remove her as a director is granted and Mr. Walker is authorized to replace her as manager of the Allie's Group until its sale.

[26] Given the order for sale of the Allie's Group, and the order removing Ms Betts as a director and manager, I do not find it necessary to address Mr. Walker's application for an order granting him leave to commence a derivative action on behalf of the Allie's Group in regard to the actions of Ms Betts and the corporate solicitor. In my view, such an action could impact negatively on the timeliness of the sale and the price it might attract. Accordingly, that application is adjourned generally.

"D. Smith J."

D. SMITH J.