Released: October 29, 1991 No. 5507/9l

Vernon Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
BROKEN CIRCLE RESOURCES, INC.)	
and KENNETH ROBERT CLIFFORD)	
)	REASONS FOR JUDGMENT
PETITIONERS)	
)	
AND:)	
)	
UNDERHILL GEOGRAPHIC SYSTEMS)	OF THE HONOURABLE
LTD., CHRIS S. CRYDERMAN,)	
GERHARD C. FRIESEN, SOO B.)	
MAH, JOHN M. PARNELL, RODNEY)	
C. POWER, WILLIAM G. ROBINSON,)	
IVAN J. ROYAN, DENNIS L.)	MR. JUSTICE COHEN
SIMPSON, FREDERIC B.)	
UNDERHILL, POWER GEOTECHNICS)	
INC.)	
)	
RESPONDENTS)	

G.J. Schroeder Counsel for the Petitioners

F.G. Potts Counsel for the Respondents

Heard at Vancouver: October 8, l99l

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I. The Relief Sought

The petitioner, Kenneth Robert Clifford ("Clifford") is the principal of the petitioner, Broken Circle Resources Inc. ("BCRI"), which entity is a shareholder in the respondent, Underhill Geographic Systems Ltd. (the "Company"). The personal defendants are directors of the Company. In August,

1991, the petitioner Clifford was removed as a director of the Company.

The petitioners apply to the court for:

(a)Declarations under the Company Act, R.S.B.C. 1989, (the "Act") that the affairs of the Company are being conducted oppressively, in a manner which is unfairly prejudicial, or such that it is just and equitable for the Company to be wound up;

(b)Orders under the Act for the petitioners to be repaid their outstanding shareholders loans, for their shares to be purchased for fair market value, and for a release or indemnity with respect to guarantees granted by the petitioners; and

(c)A declaration that the non-competition clause in the Shareholders Agreement (the "Agreement") is not enforceable against either of the petitioners and in particular, against the petitioner Clifford, and an order that the respondents be restrained from interfering with the employment, work or earning of income by the petitioners.

II. Background

On May 1, 1989, the petitioners entered into a professional service agreement with Underhill Engineering Ltd. ("UEL"). The Company was incorporated in August l989 and since its incorporation, the petitioner Clifford had been responsible for the Company's office in Vernon.

On May l4, l99l, the professional service agreement between the petitioners and UEL was terminated. No issue arises out of the termination. The petitioners then entered into a consulting agreement with Kilborn Engineering Pacific Ltd. ("Kilborn"). On July 2, l99l, counsel for the Company wrote to Kilborn as follows:

...We are the solicitors for Underhill Geographic Systems Ltd. (the "Company").

On or about the 2nd day of October, l990, all shareholders of the Company and the Company entered into a shareholders agreement (the "Agreement") which Agreement dealt with, in part, the conduct of Company shareholders. One of the signatories to this Agreement is BCRI, the principal of which is Kenneth R. Clifford, who we are advised has recently entered into an employment arrangement with Kilborn.

We enclose certain self-explanatory excerpts from the Agreement for your consideration.

On June l9, l99l we wrote to Mr. Clifford and requested that he provide us with details of his employment arrangements with Kilborn, which he has to date failed to do.

Our client has reason to believe that Mr. Clifford is, through the auspices of Kilborn, engaged in activities forming part of the business of our client, namely, data conversion and consulting services in the geographic information systems field.

Prior to taking any further legal action to enforce the non-competition covenants of the Agreement, our client would like to know the details of Mr. Clifford's employment with Kilborn. While you are not obligated to provide this information, should we obtain same and it indicates that Mr. Clifford is not in breach of the non-competition covenants, then the necessity for further legal action would be obviated.

Our client expects the Agreement to be adhered to and will take all such steps as are available to it to ensure that this is the case and to recover any

damages it may suffer in the event the Agreement is breached.

If you are prepared to provide the requested information, we ask that we receive same at your earliest convenience, and in no event later than l2:00 noon on Wednesday, July l0, l99l.

Should you decline to provide us with this information, we anticipate that our client will instruct us to take, without any further notice to you, all steps to enforce its rights that the law permits.

In the interim, if you require additional information or wish to discuss this matter further, please do not hesitate to contact the writer.

The non-competition clause mentioned in the letter to Kilborn provides as follows:

A Shareholder will not while a Shareholder of the Company and until the expiration of a period of one year from the date that the Shareholder ceases to be a Shareholder of the Company, directly or indirectly, as principal, agent, trustee, or through the agency of any incorporation, partnership, association or agent or agency, within the Territory (as hereinafter defined):

(a)solicit, encourage or suggest to any Shareholder or Shareholders or employee or employees or agent or agents of the Company that such Shareholder or Shareholders or employee or employees or agent or agents or any of them leave the employ of the Company or cease to act as its agent;

(b)canvass or solicit business of a kind being done by the Company from any individual, firm or company who shall at any time while he was a Shareholder of the Company, have been a client or customer of the Company;

(c)engage in the Territory, in any of the activities forming part of the business of the Company, or any other business competitive with or similar to the business that the Company has carried on, directly or indirectly, while he was a Shareholder of the Company, and shall not either directly or indirectly, either as principal or agent, as a director or manager of a company or in any other capacity whatsoever carry on or be engaged or concerned or be interested in or assist any other person or firm to carry on or be engaged or concerned or interested in a business which is competitive with the Company for business in the Territory.

For the purposes of this Article, Territory means:

i)within the Yukon and Northwest Territories and the Province of British Columbia;

ii)within the Province of British Columbia;

iii)within the Lower Mainland; and

iv)within the boundaries of the City of Vancouver.

If any territorial restriction contained in this Article is held to be illegal or unenforceable, the territorial restriction imposed by the next succeeding paragraph shall apply.

Each Shareholder hereby acknowledges and agrees that the provisions of all restrictions contained in this Article are reasonable in scope, geographical area and time and are necessary for the protection of the Company's legitimate

interests and proprietary rights.

To assist in the interpretation of paragraphs 2.6, 2.8 and 2.9 hereof, it is agreed that the Company was formed to provide data conversion and consulting services in the geographic information systems field.

At a general meeting of the Company held on August 7, l99l, special resolutions were passed by the shareholders, with only the petitioner Clifford dissenting, to remove Clifford as a director, and to reduce the number of Company directors from l0 to 9.

III. The Issue

In essence, the petitioners complain that the removal of the petitioner Clifford as a director of the Company was unfairly prejudicial and the court should grant the relief sought by the petitioners pursuant to s. 224 of the Act.

The conduct of the respondents which the petitioners complain is unfairly prejudicial to them is set out in paragraph l3 of the petitioner Clifford's affidavit sworn July l5, l99l:

l3. That I verily believe that my current work with Kilborn Engineering Pacific Ltd. is not detrimental to, prejudicial to or causing damage to the Company or any of the other Directors of the Company, and that their conduct and actions in refusing to fairly negotiate with me with respect to purchase of my shares and shareholder loans, and in attempting to restrict my employment and ability to earn a livelihood are unnecessary and unreasonable in all of the circumstances. Such actions and conduct as have been carried out or are threatened by the Company and the other Directors create an extremely harsh and financially burdensome situation for me, with the attempts to restrict my employment pursuant to the terms of the non competition covenant in the shareholders agreement being an action which is unfairly prejudicial to myself due to the nature of my work. The only other Director or shareholder who would similarly be affected by enforcement of the non competition covenant would be the Respondent, Soo B. Mah.

(emphasis mine)

The respondent Robinson, a director of the Company, in his affidavit sworn August 2l, l99l, replied to the petitioners complaint as follows:

2l. That in answer to paragraph l3 of the Petitioner's Affidavit, I deny that the Respondents or any of them have acted in a fashion which is unfairly prejudicial to the petitioners or either of them and say that the Respondents are not obliged to purchase the petitioner's shares and that in any event there is a bona fide disagreement as to their fair market value.

Petitioners' counsel conceded that the removal of the petitioner Clifford as a director of the Company in and of itself does not offend the provisions of the Act. However, relying upon the decision in ***Diligenti*** v. ***RWMD Operations Kelowna Ltd., RWMD Operations Prince George Ltd., McConachie, Radcliffe and Welter*** (l976), l B.C.L.R. 36, he argued that the removal of the petitioner Clifford as director in the circumstances complained of by the petitioners constitutes conduct unfairly prejudicial to the petitioners.

The issue for me then to decide is whether the removal of the petitioner

Clifford as a director of the Company in the circumstances complained of in paragraph 13 of the petitioner Clifford's affidavit constitutes conduct or action which is "unfairly prejudicial" to the petitioners within the meaning of those words in s. 224 of the Act.

IV. The Law

Sections 224(l) and (2) of the Act, provide as follows:

224.(l) A member of a company may apply to the court for an order on the ground

(a)that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner oppressive to one or more of the members, including himself; or

(b)that some act of the company has been done, or is threatened, or that some resolution of the members or any class of members has been passed or is proposed, that is unfairly prejudicial to one or more of the members, including himself.

(2) On an application under subsection (l) the court may, with a view to bringing to an end or to remedying the matters complained of, make an interim or final order it considers appropriate, and, without limiting the generality of the foregoing, the court may

(a)direct or prohibit any act or cancel or vary any transaction or resolution;

(b)regulate the conduct of the company's affairs in future;

(c)provide for the purchase of the shares of any member of the company by another member of the company, or by the company;

(d)in the case of a purchase by the company, reduce the company's capital or otherwise;

(e)appoint a receiver or receiver manager;

(f)order that the company be wound up under Part 9;

(g)authorize or direct that proceedings be commenced in the name of the company against any part on the terms the court dictates;

(h)require the company to produce financial statements;

(i)order the company to compensate an aggrieved person; and

(j)direct rectification of any record of the company.

Diligenti, supra, dealt with the meaning of "unfairly prejudicial". At p. 51 of the case, after a thorough review of the reasoning of Lord Wilberforce in ***Ebrahimi v. Westbourne Galleries***, [1913] A.C. 360, Fulton J. said:

Adopting, as I respectfully do, this reasoning in its entirety, three things appear to me to emerge quite clearly. First, in circumstances such as exist here there are 'rights, expectations and obligations inter se' which are not submerged in the company structure, and these rights are enjoyed by a member as part of his status as a shareholder in the company which has been formed to carry on the enterprise: amongst these rights are the rights to continue to participate in the direction of that company's affairs. Second,

although his fellow members may be entitled as a matter of strict law to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of equitable rights which he in fact possesses as a member. And third, although such breach may not 'oppress' him in respect of his proprietary rights as a shareholder, such unjust and inequitable denial of his rights and expectations is undoubtedly 'unfairly prejudicial' to him in his status as member. And from these three findings it follows that, although in England the only remedy to which the member was entitled was an order for winding-up, in this province by virtue of the choice of remedies under the scheme of the 1973 Act, and the inclusion of the 'unfairly prejudicial' provision in s. 221, the applicant is prima facie entitled to one or more of the remedies ---- including winding-up ---- which that section makes available to a shareholder who has thus been unfairly prejudiced.

V. Decision

In my opinion, the petition must be dismissed. First, as to the petitioners' complaint that the respondents have refused to deal with them with respect to the purchase of BCRI's shares in the company, this ground must fail as I agree with the respondents' counsel that there is no obligation under the Agreement for the respondents to purchase BCRI's shares.

Second, as to the petitioners' complaint that the letter to Kilborn is restricting the petitioners' employment, in fact no steps have been taken by the respondents to enforce the non-competition clause. I do not think that injunctive relief is available to the petitioners because the letter to Kilborn merely seeks details of the petitioners' relationship with Kilborn. I am further of the view, that this petition seeking a declaration that the non-competition clause is unenforceable is premature.

While the petitioners' chambers brief lists numerous grounds in support of the petitioners' argument for a ruling in their favour under s. 224, I agree with the respondents' counsel that on the basis of the complaints alleged in the petitioner Clifford's affidavit there has not been conduct by the respondents amounting to a misuse of corporate power so as to justify the court granting the petitioners relief under s. 224.

Accordingly, the petition is dismissed with costs to the respondents.

Vancouver, B.C.

October 29, 1991