

SUPERIOR COURT OF JUSTICE - (COMMERCIAL LIST)

RE: Bryden Ferrato, Applicant

~~-and-~~

Lip Monthly Inc., Chic Monthly Inc. and Aditya Singh, Respondents

BEFORE: Justice L.A. Pattillo

COUNSEL: *Scott G. Lemke*, for the Applicant

R. Bevan Brooksbank & Ashley Thomassen, for the Respondents

HEARD: July 23, 2018

ENDORSEMENT

- [1] The Applicant seeks leave pursuant to s. 239 of the *Canada Business Corporations Act* (CBCA) and s. 246 of the *Ontario Business Corporations Act* (OBCA), to permit him to bring an action on behalf of Lip Monthly Inc. ("LMI") and Chic Monthly Inc. ("CMI") respectively against the respondent Aditya Singh ("Singh") and Grace & Stella Inc. ("G&S") arising out of the alleged appropriation of corporate opportunities belonging to LMI and/or CMI.
- [2] The provisions of both the CBCA and the OBCA dealing with the granting of leave are virtually identical. The test under both statutes is threefold: the complainant has given not less than 14 days' notice to the directors of his or her intention to apply for leave before bringing the application; the complainant is acting in good faith; and it appears to be in the interest of the corporation that the action be brought.
- [3] Both statutes define who is a complainant. There is no issue that the applicant is not a complainant.
- [4] I am satisfied, from the record, that the applicant has complied with the notice provision in respect of LMI's intended action. It is less clear with respect to CMI who was added as a party to the application on consent. No notice was provided formally apart from the request for consent to add CMI which was given some eight days later resulting in the amendment the same day. Section 246 (2) of OBCA specifically requires 14 days' notice. In the circumstances, I find that the applicant did not provide the required notice

to Singh. I am also not satisfied on the evidence that CMI has established it has any claim. CMI was incorporated in July 2014 and has remained dormant since. There is no evidence that the alleged corporate opportunity was one that would be undertaken by CMI.

- [5] The evidence establishes a different scenario with respect to LMI. LMI sells beauty, skincare and wellness products online using a subscription-based sales model. In July 2015, the applicant and Singh, the two directors and shareholders of LMI discussed expanding to sell new beauty, skincare and wellness products. They began by LMI purchasing 1,000 teeth whitening kits from an overseas vendor. LMI retained a branding and packaging consultant to make the kits suitable for sale in North America. Clearly the proposed expansion of products was more than a "mere idea". LMI was actively pursuing it.
- [6] Singh submits that on September 3, 2015, he and the applicant agreed not to pursue the idea of expanding LMI's product line. The transcript of the text messages between them indicates that Singh raised the idea, not the applicant. My concern is that on September 21, 2015, Singh actively took steps to incorporate G & S which is engaged in the same business that LMI had been pursuing (face, hair & body beauty products). In my view, the evidence establishes a prima facie case that Singh appropriated a corporate opportunity from LMI. The proposed action cannot be said to be frivolous or vexatious.
- [7] Nor do I find that the applicant is acting otherwise than in good faith in pursuing the action. There is no question there has been a falling out between the parties and, while subsequent attempts to resolve their issues have failed, the fact that the applicant now wishes to proceed with an action on behalf of LMI is not an indication that he is acting other than in good faith.
- [8] Finally, I am also satisfied on the evidence and also the lack of evidence that it is the best interest of LMI to pursue the action. Singh submits that it makes no sense to pursue G&S as it hasn't been profitable since the outset. Unfortunately, Singh has not produced any G&S financial statements to substantiate that claim. Given the examples in the record of statements Singh made to the applicant or in the record which contemporaneous documents have established were not correct, I am not prepared to merely accept Singh's

statements concerning G&S's lack of profitability. There is no question that if G&S's business is profitable, then it is clearly in LMI's interests to pursue.

- [9] Accordingly, I am satisfied the applicant has met the test under s. 239 of the CBCA and leave is granted to enable the applicant to commence the action on behalf of LMI subject to what follows.
- [10] The application is dismissed with respect to CMI.
- [11] This is a matter that needs to be resolved. In my view, mediation should occur before the action is commenced. The issues are well defined and the parties have filed affidavits and been cross-examined. As part of the mediation, G&S should produce its financial statements.
- [12] Section 240 of the CBCA provides in subsection (b) that the court may give directions for the conduct of the action. Accordingly I direct that mediation shall be held between the parties as soon as possible before a mediator to be agreed, failing which I shall appoint the mediator. Both sides shall share equally the costs of the mediation. The action may only be commenced by LMI if and when the mediation is not successful. In the event there is any disagreement as to the result of the mediation, I may be spoken to.
- [13] The applicant has been partially successful on this application and is entitled to his costs. The Rule 49 offer was made before CMI was added as a party and didn't refer to it. Nor did it encompass mediation, which was admittedly raised by me, not the parties. While I am cognisant of the offer as a factor I must consider in any event, I am not satisfied that it needs the requirements of R. 49 re cost sanctions. Accordingly, costs should be on a partial indemnity basis.
- [14] Based on the cost outlines filed by both parties, I am satisfied that the applicant's requested partial indemnity costs at \$24,403.59 in total is fair and reasonable given the issues—it is also within Singh's contemplation given his counsel's cost outline.
- [15] Given the nature of this application, it is my view that the costs should be to the applicant in the cause of the action, fixed at \$24,403.59 in total.