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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
GERALD KLUWAK	)	R. Brian Foster, Q.C., for the Applicant
	)	
Applicant	)	
	)	
- and -	)	
	)	
IRWIN W. PASTERNAK and THE GRIFFIN CORPORATION	)	Jonathan H. Wigley for the Respondents
	)	
Respondents	)	
	)	
	)	**HEARD:** November 22, 2006

MESBUR J.

Introduction:

[1] This application arises out of a proxy fight for control of the Board of Directors of the respondent Griffin. The applicant Kluwak spearheaded the dissident shareholders in the fight. The respondent Pasternak chaired the annual general meeting at which he disallowed the dissident proxies on the basis of what he viewed as material misrepresentations in the dissident proxy circular. As a result, he declared the management's slate of directors elected. Mr. Kluwak seeks relief from this finding under both sections 107 and 248 of the Ontario *Business Corporations Act* [1](OBCA). He

[1] R.S.O. 1990 c. B-16, as amended

wishes the court to declare the board proposed by the dissident shareholders elected instead.

The Background:

[2] Griffin is a Canadian publicly traded real estate investment company. It owns revenue producing commercial real estate in Ontario. Pasternak is a director and chairman of the board of Griffin. Griffin's CEO is Amin Visram. Kluwak is one of a number of dissident shareholders who became concerned with Griffin's strategic direction and management. As a result of this concern, they decided to solicit the support of other shareholders to change the existing board of directors at the July 21, 2006 annual general meeting of the corporation.

[3] To that end, the dissident shareholders prepared an information circular and proxy that was distributed to all the shareholders. All necessary notices and filing requirements were followed. Neither management nor the directors objected to any of this material prior to the AGM.

[4] Prior to the AGM commencing, the scrutineers reported on the vote tally of the number of proxies in favour of the dissidents' slate of directors and the management slate. The vote tally, net of spoiled proxies, was 8,999,801 in favour of the dissident board, and 8,898,738 in favour of the management board.

[5] Although the CEO would normally chair the AGM, in this case Mr. Visram was unavailable to do so, and asked Mr. Pasternak to act as chair in his stead. The request came at the last minute. Mr. Pasternak is a retired lawyer, with years of experience both as a lawyer, and as the chair for many years of the Ontario Environmental Appeal Board.

[6] At the meeting, Don Sheldon, a lawyer representing Mr. Visram, raised an issue concerning the dissident proxy circulars that had been sent out to solicit proxies for the dissident board. Mr. Sheldon suggested the dissident proxy circulars were materially misleading. Relying on case law he had brought to the meeting, he urged the chair, Mr. Pasternak, to disallow the dissident proxies.

[7] Mr. Pasternak recognized Mr. Sheldon and allowing him to speak, even though Mr. Sheldon was neither a shareholder, officer nor director of Griffin. Lawyers for the dissident group were also present at the meeting. They wanted to respond to Mr. Sheldon's complaints. As a result, Mr. Pasternak decided to hear submissions from all the lawyers in a separate room.

[8] After hearing these submissions, Mr. Pasternak apparently met privately with counsel for the company. Although there is some dispute over whether counsel actually

provided legal advice, in the result Mr. Pasternak determined that the dissident proxy circular contained material misrepresentations. He then decided to disallow those proxy votes, and declared management's slate of directors elected.

The positions of the parties:

[9] Simply put, Mr. Pasternak and the company take the position that Mr. Pasternak's actions at the AGM were perfectly proper, and the management board was properly elected.

[10] Mr. Kluwak suggests that first, there was nothing misleading in the dissident proxy circular at all. Alternatively, he says that if there were, the company or the Board should have objected to the contents prior to the AGM, and dealt with the issue that way. Lastly, he says that in disallowing the dissident proxies, Mr. Pasternak acted outside the scope of what a chairman should do at a shareholders' meeting.

[11] In order to address these issues, it is necessary first to consider the contents of the dissident proxy circular, in order to decide whether or not it contained information that materially misrepresented important facts. If it did, it is next necessary to consider the appropriate process to address material misrepresentations, and discuss whether Mr. Pasternak's approach was the correct one.

The contents of the dissident proxy circular:

[12] The dissident shareholders were apparently dissatisfied with the direction management was taking Griffin. In their information circular to all shareholders, they described themselves as the "Concerned Shareholders", and made the following comments, in support of their proposal that Mr. Kluwak, Joseph Schillaci, John Arnold, Anthony Niessen and Karl Bramwell should all be elected to the Board instead of the slate proposed by management:

> (a) "Unless otherwise noted, information about Griffin contained in this circular has been taken from, or is based upon, publicly available documents or records ... Although the Concerned Shareholders have no knowledge that would indicate that any statements contained therein are untrue or incomplete, other than as set out herein, the Concerned Shareholders do not assume responsibility for the accuracy or completeness of such information....
>
> (b) "Background
>
> Please refer to the Griffin circular for a review of the fees paid to Zayma Realty Holdings Inc. ("Zayma") and Vista Hospitality Co. Canada Inc. in

connection with the purchase and sale of certain commercial properties by Griffin both of which entities (according to the Griffin Circular) are owned or controlled, directly or indirectly by, Amin Visram, the current president & CEO and a director of the Company and all other arrangements between the Company and its insiders.

Pursuant to an agreement dated December 16, 2005 between Zayma, Amin Visram, James Keenan, John Arnold and Gerald Kluwak, John Arnold and Gerry Kluwak agreed to act as directors of the Company, so long as an additional director independent of the then-current management was also appointed and so long as Mr. Kluwak would be appointed as the Chair of the Board and to a managerial position with the company. However, after appointing Mr. Kluwak and Mr. Arnold to the Board, the appointment of the third director has not occurred, nor has Mr. Kluwak been appointed to those positions.

(c) "Proposed Plan for Griffin"

...The Concerned Shareholders intend to protect the Company's business opportunities and ensure that only reasonable fees are paid in connection with the acquisition, disposition and management of the company's commercial properties...

[13] It is these provisions that are alleged to be materially misleading, and having formed the basis for the disallowance of the proxies. First I must consider whether the proxies were, as the Chair decided, materially misleading.

Was the dissident proxy circular misleading?

[14] The author of *Shareholder Remedies in Canada* [2] makes the comment that "case law requires that all information be disclosed that a reasonable investor would consider important in deciding whether to vote." He refers to the philosophy and standard of disclosure discussed as long ago as 1934 in *In re Dorman, Long and Co.* [3] where Maugham J noted: "It is perhaps not unfair to say that in nearly every big case not more than five percent of the interests involved are present in person at the meeting. It is for this reason that the Court takes the view that it is essential to see that explanatory circulars sent out by the board of the company are perfectly fair and, as far as possible, give all information reasonably necessary to enable the recipients to determine how to vote." What is true for a board circular is equally applicable to a

[2] D. Peterson, *Shareholder Remedies in Canada* (Toronto" Butterworths, 1989), para 6.15
[3] [1934] Ch. 635(ch) at p. 665

dissident information circular. Shareholders must have all the information they need in order to make an informed decision about voting.

[15] Blair J. in *First Marathon Inc.*[4] set out the tension between having an Information Circular that provides insufficient disclosure and thus fails to convey the substance of the material information to shareholders, and one that buries "the shareholder in an avalanche of trivial information." This latter approach, he said, creates its own kind of risks for making an informed decision. He went on to say, "the Courts should not be quick to interfere with such decisions, unless it is plain that there are good reasons to be concerned about the adequacy of the disclosure."

[16] In essence, then, an information circular must contain full, fair and plain disclosure, that has sufficient information concerning the pertinent matters set out "in sufficient detail to permit shareholders to form a reasoned judgment concerning the matter."[5]

[17] The issue, then, is whether the dissident proxy circular was materially misleading in the sense that it deprived shareholders of sufficient information to form a reasoned and informed judgment. In my view it was.

[18] The dissident proxy circular highlights the dissident's proposed board's plan to maximize the value of the company's inventory, and "ensure only reasonable fees are paid". This statement is linked to the statement referring shareholders to a review of fees paid to Zayma Realty and Vista Hospitality, which they note are owned or controlled by Mr. Visram, Griffin's current president and CEO. This creates the distinct impression that there is something untoward about the fees paid; it does not, however, particularize the concerns in any way. An unpleasant innuendo is simply left to permeate the circular.

[19] The difficulty with the reference to fees goes further than that. What the circular fails to mention in relation to these fees is that they were to be approved at a shareholders' meeting on December 22 2005. Mr. Keenan, Mr. Arnold, Mr. Kluwak and another shareholder named Jay Phipps initially indicated they would not vote in favour of the transaction. Mr. Kluwak then approached Mr. Visram, and said he could deliver sufficient votes to obtain shareholder approval if an agreement could be reached among Zayma Realty, Visram, Kluwak, Keenan and Arnold. This agreement would include specific benefits for Kluwak.

[20] Kluwak, Zayma, Visram, Keenan, and Arnold entered into a letter agreement on December 16, 2005. The agreement recites that in consideration of "Keenan, Arnold and Kluwak delivering sufficient shareholder support ... in favour of the

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[4] *First Marathon Inc.* [1999] O.J. No. 2805 at para 17
[5] Ibid.

proposed transaction (scheduled to close on December 22nd 2005)", Zayma Realty Holdings and Visram in his personal capacity would do certain things. The material aspects of this agreement were that Zayma/Visram would call a special shareholders' meeting, and vote their shares to elect Keenan, Kluwak and Arnold to the Board.

[21] Then, Mr. Visram would support a resolution to elect Kluwak as Chairman. Mr. Visram undertook personally to use his efforts to get Mr. Pasternak to resign. In addition, Mr. Kluwak would be given a role in management, and a remuneration package.

[22] Lastly, the December 16 agreement also provided that all agreements currently in place with Zayma, Vista Hospitality or Visram would "remain in place and not be disturbed by the Board".

[23] None of this was disclosed in the dissident proxy circular.

[24] The dissident proxy circular simply refers to the December 16th agreement as providing that Kluwak and Arnold had "agreed to act as directors ... *so long as an additional director independent of the then current management was also appointed and so long as Mr. Kluwak would be appointed as the Chair of the Board and to a managerial position with the Company"* [emphasis added]. This statement is not true. Nowhere in the agreement is there any mention of an outside director. Nowhere in the agreement is there any suggestion that Kluwak and Arnold becoming directors was conditional upon either an independent director, or Kluwak's becoming Chairman of the Board. To the contrary, the consideration for Kluwak's appointment to the board was Kluwak's and the others delivering their votes on the proposed transaction, which would approve the fees to Visram's companies. The new board would then ensure that the fees arrangement remained in place in the future.

[25] Not only does the agreement say nothing about an independent board member, it says that Zayma/Visram would support a resolution to change the Board to six members, with the Chair (anticipated to be Kluwak) having "a tie-breaking vote in the event of a deadlock". This was not made clear in the dissident proxy circular. The agreement was not appended to the circular. If it had been, shareholders would have seen that the actual terms of the agreement itself are quite different from how they were described in the dissident proxy circular. With accurate information, shareholders would also have been aware that Kluwak and Mr. Arnold had promised to be instrumental in obtaining shareholder approval for the very fees the dissident proxy circular seemed to attack. Shareholders would also be aware that Kluwak and Arnold had agreed to ensure the fees agreements remained in place in the future.

[26] Pursuant to the December 16 agreement, Kluwak, Arnold and Keenan voted to support the transaction. This is not disclosed in the dissident proxy circular

either. Surely that would have been an important fact to shareholders, when the circular itself gives the impression that the transaction was for excessive fees. Kluwak and Arnold were then appointed to the Board. Keenan did not want to become a director. Thus, the dissident proxy circular is misleading when it says, "the appointment of the third director has not occurred." This statement seems to suggest that Griffin failed to meet its obligations. In actual fact, Mr. Keenan was not prepared to act as a director, and Griffin was not a party to the agreement.

[27] When taken together, these omissions from the dissident proxy circular created a very different view of important events in the recent past of the corporation than what really occurred. The omissions create innuendoes of dishonesty, or perhaps breach of contract, when the true factual record is quite different. As a result the dissident proxy circular is misleading in many material aspects.

[28] I am satisfied that as a result of the misleading nature of the dissident proxy circular there is a substantial likelihood that a reasonable shareholder would have been misled by the circular. The missing or misstated facts would be considered important by reasonable shareholder in deciding on how to vote for the board of directors.

Was the Chair correct in disallowing the proxies?

[29] I was referred to no authority to suggest that the course taken by the Chair was correct. It was suggested that the Chair exercised "quasi-judicial" authority. In considering this issue, the Supreme Court of Canada in *Blair v. Consolidated Enfield Corp.*[6] described a chair's duty in a slightly different way, stating that "the duty under which chairmen labour is 'one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company'". In assessing whether a chair has met this standard, the court muse use a contextual approach and focus "on the actual conduct of the chairman instead".

[30] In *Blair,* the chair's actions "gave all the shareholders an opportunity to make a fully informed decision regarding the election of the directors, thereby promoting the integrity of Enfield's voting procedures." [7] In *Blair,* a new shareholders' meeting was requisitioned in order to do so.

[31] When looking generally at the best interests of the company, it must be that it is in the company's interests for shareholders to make a fully informed decision regarding the election of directors. To accomplish that here, management should have reviewed the dissident proxy circular prior to the meeting, (as they obviously did, given

[6] [1995] 4 S.C.R. 5, at paragraph 47, affirming [1993] O.J. No 2300 (Ont. C.A.)
[7] Ibid, paragraph 72

Mr. Sheldon's submissions at the meeting), and then either requested that the circular be redrafted and recirculated, or applied to the court for directions. This is precisely the course followed in *AnorMED Inc. v. Baker Bros. Investments LP*[8]. There, the court ordered the proxy circular to be corrected, before a vote was held. In that way, the shareholders were afforded the opportunity to make a fully informed decision. In my view, the Chair's actions here, while not made *mala fides*, and made with the assistance of legal advice, did not promote the integrity of Griffin's voting procedures. The Chair's actions were incorrect.

[32] That being said, what is the proper way to remedy the twin problems of the misleading dissident proxy circular, and the Chair's error in simply striking those proxies and declaring management's slate of directors elected?

What is the proper remedy?

[33] The application was argued primarily on the basis of s.107(1) of the *OBCA*. It says: "A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation."

[34] Subsection 107(2) permits the court to make any order "it thinks fit, including, without limiting the generality of the foregoing:

(a) an order restraining a director or auditor whose election or appointment is challenged from acting pending determination of the dispute;

(b) an order declaring the result of the disputed election or appointment;

(c) an order requiring a new election or appointment and including in the order directions for the management of the business and affairs of the corporation until a new election is held or appointment made; and

(d) an order determining the voting rights of shareholders and of persons claiming to own shares."

[35] Section 107 gives the court extremely broad discretion in "determining any controversy" regarding an election. Here, a shareholder has applied for relief from what he says was an improperly concluded election. He asks that the dissident slate of directors be elected. The respondents say the election was proper, and Mr. Pasternak's actions were appropriate. They say the election results should stand, or alternatively, there should be a new election to be held with fresh information circulars. Clearly, on the broad wording of s.107(2), any of these options is open.

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[8] (2006), 53 B.C.L.R. (4th) 107 (BCSC)

[36] I am concerned that management raised no concerns with the dissident proxy circular prior to the AGM. The fact that Mr. Sheldon appeared at the meeting armed with case law suggests to me that at least he and his client, the CEO Mr. Visram, had addressed the adequacy of the circular before the meeting. It was manifestly unfair to "wait in the weeds" until the meeting itself to raise the objections. A better course would have been to request the dissidents to correct their circular and adjourn the AGM if necessary, or to apply to the court for a determination of whether the proxy was materially misleading, and, if it was, to give an opportunity to the dissident group to correct it.

[37] This is the course that was followed in *AnorMED*.[9] There, although the context was slightly different, the applicant complained of the contents of a "Concerned Shareholder Circular". It applied to the court for a remedy. The court reviewed the issue of "materiality" and found the circular omitted pertinent facts. The court ordered the circular to be corrected. I recognize that in *AnorMED*, the application was made pursuant to s. 154(1) (b) of the *Canada Business Corporations Act* [10], which makes specific provision for an application to have a proxy corrected. I view s. 107 of the *OBCA* to be broad enough to permit the same process and remedy. That appears to me to be the appropriate course to follow here. In this way, the shareholders will have complete information on which to make an informed decision. The shareholders have the right to make a fully informed choice. They should not be deprived of it.

Disposition:

[38] For these reasons then, the election is invalidated, and a new election is to be held at a new AGM. The AGM is to be held at a date that will give sufficient time for the dissident group to correct the material misstatements in the dissident proxy circular, and for management to amend the management circular if they wish, and have both disseminated to the shareholders according to the provisions of the OBCA and *Securities Act*. The dissident group is to bear the cost of its new dissident proxy circular.

[39] If management takes the position that there remain material misrepresentations in the new dissident proxy circular, they are to advise the dissident group forthwith, so that they can either be corrected, or a fresh application brought to the court to have the matter determined. Management's circular should make reference to the reasons for the new solicitation of proxies, and the new shareholders' meeting, namely, this judgment.

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[9] note 6, above
[10] RS 1985, c. C-44

[40] In the circumstances of this case, with each side having done something I view as improper, I do not see this as an appropriate case for costs. If counsel have a different view, or if there are offers that might bear on the issue of costs, they may make brief written submissions to me within 15 days.

MESBUR J

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