IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Merks Poultry Farms Ltd. v. Wittenberg, 2008 NSSC 277

Date: 20080806
Docket: SH 296583
Registry: Halifax

Between:

Merks Poultry Farms Limited, a body corporate, Andre Merks, Janie Merks, Valley Transfer (1990) Limited, a body corporate and Merks Farms Limited, a body corporate

Plaintiffs

and

Richard Wittenberg, Ron teStroete, Wittenberg Poultry Farm Limited, a body corporate, 3058480 Nova Scotia Limited, a body corporate, and Synergy Agri Group Inc., a body corporate

Defendants

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard:	August 6, 2008, in Halifax, Nova Scotia
Written Decision:	September 30, 2008 (Oral Decision given August 6, 2008)
Counsel:	Michelle Awad, and Ian Dunbar for the plaintiffs John Rafferty, Q.C. and Brian Stilwell, for the defendants, Richard Wittenberg, Ron teStroete, Wittenberg Poultry Farm Limited and 3058480 Nova Scotia Limited Randall P.H. Balcome and Adam Church, for the defendant, Synergy Agri Group Limited

By the Court: Orally

[1] The plaintiff, Merks Poultry Farms Ltd., is a body corporate. The applicants, Andre Merks and Janie Merks, are the principal shareholders. They are primarily chicken farmers.

[2] The respondents, Richard Wittenberg, Ron teStroete and their related companies are also chicken farmers. In early 2002 Mr. Merks approached Mr. Wittenberg and Mr. teStroete with a proposal to construct a feed-mill to supply feed to each of their farms. All three agreed to proceed.

[3] A feed-mill was constructed. A company, Synergy Agri Group Inc. ("Synergy"), was incorporated to carry out these purposes with common shareholdings allocated among the plaintiffs, Wittenberg and teStroete. The initial shareholdings were 60-20-20, with the higher percentage being held by the plaintiffs. These percentages were determined initially by the anticipated feed purchase volumes. Capital was invested based on these percentages.

[4] Shortly after the incorporation of Synergy, Andre Merks, Janie Merks, Richard Wittenberg and Ron teStroete were appointed as Directors of Synergy. Since neither Richard Wittenberg nor Ron teStroete wanted to be involved in the day-to-day operations, Andre Merks and Janie Merks were appointed as officers and were responsible for day-to-day operations and remained so until relatively recently. It was initially agreed that Merks Transport, a company owned by the Merkses, would be used for all transportation required for the new feed-mill and to transport chickens for processing. The Merkses also provided some staff members during the set-up of the company and while the feed-mill was being constructed. They also used their office space for company purposes.

[5] In 2004 Martin Porskamp Family Trust and Peter John Porskamp were added as shareholders of Synergy. In 2005 Warren Cox was added as a shareholder. A Shareholders' Agreement was entered into by all of the shareholders in the fall of 2006. The agreement included provisions regarding voting rights for classes of shares and appointment of directors of the company. It is these provisions that now appear to be in dispute. The Shareholders' Agreement was signed by the then shareholders Andre Merks, Janie Merks, Richard Wittenberg, Ron teStroete, Martin Porskamp, Peter Porskamp and Warren Cox.

[6] In 2007 relations among the directors became strained and Andre Merks resigned as president but continued as a director. From that point it appears that Merks Poultry Farm Ltd. began decreasing its purchases from Synergy. At a shareholders' meeting on January 30, 2008 the shareholders, by majority vote, decided to reduce the number of directors to six. Andre Merks was dropped as a director and Janie Merks became the director on behalf of her own and her husband's interests. A further shareholders' meeting was scheduled for June 26, 2008 which was later postponed.

[7] Traditionally, voting was done on percentages set as a result of feed purchases from the prior year. The parties now disagree as to how these percentages should be calculated. The plaintiffs/applicants seek to have their percentages for voting determined on the basis of the last fiscal year ending February 28, 2007. The respondents say the percentages should be calculated on the basis of the period subsequent to February 28, 2007. The issues then are:

1. Should Andre Merks be reinstated as a Director of Synergy Agri Group Inc.?

2. What is the proper percentage of voting shares to be used at the shareholders' meeting to be held in late August 2008?

Issue # 1 - Should Andre Merks be reinstated as a Director of Synergy Agri Group Inc.?

[8] The parties entered into a Shareholders' Agreement effective December 1, 2005. The relevant provisions are in ss. 8(a) and (b):

> 8. DIRECTORS
>
> ...
>
> b. Until their successors are appointed the following shall be the directors of the Corporation:
>
> i. Andre Merks,
>
> ii. Janie Merks,

iii. Ron teStroete,

iv. Richard Wittenberg,

v. Martin Porskamp,

vi. Peter Porskamp, and

vi. Warren Cox.

[9] Paragraph 8(a) provides that there will be a minimum number of directors, equal to the number of shareholders. However, there can be a greater number of directors than shareholders.

[10] Clause 10 of the agreement provides that certain shareholders' resolutions require a two-thirds majority by "poll vote":

10. SHAREHOLDERS' RESOLUTIONS

a. The following actions must be approved by a two thirds (2/3) majority of all Shareholders by poll vote:

...

ii. appointment of Directors;

[11] The applicants point out that cl. 10(a)(ii) states that a two-thirds majority will be required for any shareholders' resolution providing for the appointment of directors. The applicants say that the meeting in which the number of directors was reduced, Merks Poultry Farms Ltd. had a 42.3% allocation based on the February 2007 year end, therefore, there was not a two-thirds majority as required to deal with the appointment of directors when the vote was held.

[12] According to the respondents, the authority for the respondents to proceed is that the shareholders made a decision to the effect that it was fair to return to the original wording of the agreement and have a board consisting of one nominee for each shareholder. Therefore, this vote did not require a two-thirds majority as it was a decision to follow the wording of the original Shareholders' Agreement. Mr. Rafferty argues that the actions of the shareholders are not caught by s. 10 of the

agreement and the reduction of the number of directors is authorized by the articles. With respect, I disagree.

[13] The agreement was signed by all the shareholders. The Shareholders' Agreement provides in s. 8(a) that the number of directors may exceed the number of shareholders. Seven directors were appointed, including Mr. Merks, who holds office under s. 8(b) until his successor is appointed.

[14] The applicants argue that there has been no variation from the wording of the Shareholders' Agreement in that the agreement specifically names Andre and Janie Merks as directors. The agreement was signed by all the shareholders and s. 8(a) provides that the number of directors may exceed the number of shareholders.

[15] I am satisfied that the intent under s. 10(a)(ii) is that any appointments of directors, including a reduction in the number of directors, must be approved by a two-thirds majority of all shareholders. I am satisfied, in this instance, that this procedure was not followed and that the reduction was authorized by less than two-thirds. The effect of this action by the shareholders was to remove Mr. Merks from the board. No successor was appointed.

[16] If I am wrong in my determination that a two-thirds majority was required to reduce the number of directors, in the alternative, I find that under s. 25 of the Shareholders' Agreement no amendment or variation of the agreement, including the reduction of the number of directors, is binding on the shareholders unless it is in writing and signed by all of the shareholders. There was no such consent.

[17] Clearly, the number of directors was stated to be seven and this was a term of the agreement. Section 25 states that a term of the agreement cannot be changed unless all of the directors agree. Reducing the number of directors was a violation of s. 25.

[18] Mr. Rafferty notes the provisions in the articles as authorizing a reduction in the number of directors by less than a majority vote. I would point out that s. 25(c) stipulates that the Shareholders' Agreement overrides any term found in the articles of association.

[19] For these reasons I order the reinstatement of Mr. Merks as a director. There will be seven directors as set out in the agreement signed by all of the parties.

Issue #2 - What is the proper percentage of voting shares to be used at the shareholders' meeting to be held in late August.

[20] The relevant provisions of the Shareholders' Agreement dated December 1, 2005 are as follows:

> 6. The proportionate number of votes to be cast by the holder of a sub-class of Tracking common shares in a particular Fiscal Year will be determined by the percentage of Profit allocation to that sub-class of Tracking common shares for that particular Fiscal Year.

[21] Further, cl. 4(b)(1) of the Shareholders' Agreement states:

> 4. TRACKING COMMON SHARES
>
> ...
>
> b. The Shareholders intend to
>
> i. determine the percentage of Profit to be allocated to each sub-class of Tracking common shares for each Fiscal Year while this Agreement is in effect based on the Shareholders' relative Farm Purchases in that Fiscal Year; and

[22] There were other sections referred to by the applicants to support their position, as well as sections referred to by the respondents.

[23] The applicants submit that the Shareholders' Agreement contemplates the yearly allocation of profit percentages to be used in shareholder voting for the following year. The applicants submit that nowhere does the agreement contemplate any allocation of profit other than at the end of the fiscal year.

[24] Counsel for Synergy suggests that the figures to be used in calculating the voting percentages for purposes of a shareholders' meeting are the most recent figures available. The reason proffered is that the voting section of the agreement states that the percentages are to be determined at the time of the vote. To use the figures from fiscal year ending February 27, 2007, according to the respondent

disregards the activities of the shareholders for the past year/year and a half and does not provide an accurate reflection of the percentages at the time of the vote. According to the respondents, the relevant provision is as follows:

> 4(o) The issued and outstanding Tracking common shares from time-to-time shall have a total aggregate number of one hundred votes. The number of votes to which a sub-class of Tracking common shares shall be entitled at a particular vote shall be determined by the percentage of Profit or Loss allocated to that sub-class of Tracking common shares when the vote is taken. ....

[25] The key, according to the respondents, is the phrase "when the vote is taken."

[26] With respect, upon reading of the whole of the agreement, I find that the proffered percentages to be determined to be used for the purposes of voting are those percentages for the last fiscal year which has been determined. The Shareholders' Agreement continually refers to profit and recital #6 at the beginning of the agreement provides:

> 6. The proportionate number of votes to be cast by the holder of a sub-class of Tracking common shares in the particular Fiscal Year will be determined by the percentage of Profit allocated to that sub-class of Tracking common shares for that particular Fiscal Year.

[27] Profit would be determined at the end of a fiscal year. To accept the respondents' argument that a determination of profit or loss has to be made "when the vote is taken" would lead to an absurdity because every time a vote was taken, be it twenty or thirty times per year, such a determination would have to be made.

[28] The reference to "when the vote is taken" in 4(o) would logically refer to the last year end fiscal year. In this case, the fiscal year ended February 27, 2007.

[29] On the whole of the agreement, I am not satisfied that the agreement provides for a calculation to be done each time a vote is taken. The reference in s. 4(o) to "when the vote is taken", can be read to mean the percentage of fiscal year end profit allocated to the respective shareholders at the time the vote is taken.

[30] To use the last fiscal year calculation (February 27, 2007) is consistent with the evidence contained in the supplementary evidence of Andre Merks filed June 16, 2008 where he states at para. 34:

> Since the Shareholders' Agreement was signed in October, 2006, voting percentages for SAGI shareholders' votes have been based on the previous fiscal year's results once those results have been approved by the shareholders.

[31] I am satisfied that the proper percentages to be used to determine a vote are those reflected in the last fiscal statement for the year ending February 27, 2007 that being the last statement that was prepared. To use part of a year would not reflect an overall fiscal year determination. Looking at the agreement as a whole, the allocation of profit is relevant to voting but it is also relevant to determine the shareholders' entitlement to the overall profits and, therefore, it is logical to conclude that only the figures obtained by a final accounting determination at fiscal year end would be appropriate. The only available figures appear to be for the fiscal year ending February 2007. I order that these percentages be used until a further determination is made of the fiscal year and profit for the next period.

Costs

[32] I order costs in the amount of $2000.00 payable forthwith.

Pickup, J.