

SUPREME COURT OF YUKON

Citation: *Hartter Holdings Inc v Orian Inc*
2026 YKSC 90

Date: 20260928
S.C. No. 25-A0067
Registry: Whitehorse

BETWEEN

HARTTER HOLDINGS INC

PLAINTIFF

AND

ORIAN INC. and DOUG GILDAY

DEFENDANT

Before Justice J.S. Little

Counsel for the Plaintiff

James R. Tucker

Counsel for the Defendant

Jordana Cytrynbaum, Danielle DiPardo and
Logan Rogers

REASONS FOR DECISION

Introduction

[1] By Notice of Application filed February 18, 2026, Orian Inc. and Doug Gilday (collectively, Orian) apply to strike a Statement of Claim filed May 14, 2025, by Hartter Holdings Inc. (Hartter)¹

¹ This is the second application by Hartter in relation to the business venture between the parties. Particulars of the first may be found in *Orian Inc v Hartter Holdings Inc*, 2025 YKSC 42 (*Orian Inc*), in which the Court dismissed Hartter's application for the liquidation of KSDI. That decision is currently before the Court of Appeal of Yukon.

[2] Briefly, the parties² entered into a Joint Venture Agreement (the Agreement) dated May 21, 2021, for the development of a condominium project in Whitehorse. Details of the Agreement are discussed below. One key term of the Agreement was the incorporation by the parties of a corporation, Keish Street Developments Inc. (KSDI), the shares of which were to be held 40% by Orian and 60% by Hartter with the respective principals of each, Mr. Gilday and Mr. Trotter, as directors. KSDI was to undertake actual construction of the project, with Orian, through its subsidiary NGC Builders Ltd. (NGC), being responsible for project management and Hartter, through its subsidiary Arcrite Northern Ltd. (Arcrite), being responsible for electrical work.

[3] In addition, Orian was to contribute \$500,000 for the operation of KSDI. Hartter was to contribute all remaining capital

[4] The condominium project was completed, with the residential units sold and a commercial unit retained by KSDI. In its statement of claim, Hartter pleads that Orian breached various of its obligations under the Agreement and that Orian breached certain fiduciary obligations owed to Hartter

[5] More specifically, Hartter pleads that Orian failed to make its \$500,000 contribution, that Orian caused NGC to improperly expense costs related to other projects, and that the costs paid by Hartter exceeded an agreed upon budget by about \$3.5M. Hartter seeks an accounting of the revenue and expenses of KSDI and damages consisting of the profit that Hartter should have received under the Agreement

Rules and Legislation

[6] Rule 20(26) of the Supreme Court of Yukon *Rules of Court* reads, in part:

(26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an

² Orian is often referred to as Orion in the Agreement.

endorsement, pleading, petition, or other document on the ground that:

(a) it discloses no reasonable claim or defence as the case may be;

...

(d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[7] Orian applies to strike the statement of claim on the basis that it discloses no reasonable claim and is an abuse of the process of the court. It argues that the fiduciary obligations pled against Mr. Gilday pursuant to the Agreement do not exist, that the relief Hartter seeks is available only to KSDI, that a derivative action is therefore the proper course, and that Hartter has not sought leave as required for such an action, which is an abuse of process.

[8] While pursuant to Rule 20(29) ordinarily no evidence may be admitted on an application under subsection (a) above, there is authority from other jurisdictions that courts interpreting a similar rule may consider the contents of documents that are integral to the pleadings.³ In any event, Orian's counsel does not object to reliance by Hartter's counsel on the terms of the Agreement in relation to Orian's argument respecting Rule 20(26)(a).

[9] Orian does rely on an affidavit of Mr. Gilday with respect to the Rule 20(26)(d) abuse of process component of its application. The affidavit includes correspondence

³ *Shoppers Drug Mart Inc. v Mang*, 2021 BCSC 928 at para. 14, *Keltic (Prior) Development Limited Partnership v Van Renesse Investment Company Ltd.*, 2026 BCSC 883 at para. 15,

from Orian's counsel to Hartter's counsel about the impropriety of ignoring the need to seek leave to commence a derivative action.

[10] With respect to the derivative action issue, s. 241 of the Yukon *Business Corporations Act*, RSY 2002, c 20 reads, in part:

241 Commencing derivative action

- (1) Subject to subsection (2), a complainant may apply to the Supreme Court for leave to
 - (a) bring an action in the name and on behalf of a corporation or any of its subsidiaries
 - ...
- (2) The Supreme Court may grant leave, on terms it considers appropriate, if satisfied that
 - (a) the directors of the corporation or its subsidiary will not bring, diligently prosecute, defend, or discontinue the action;
 - (a.1) reasonable notice of the application has been given to the corporation or its subsidiary and to any other person the Supreme Court may require;
 - (b) the complainant is acting in good faith; and
 - (c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended, or discontinued.

Litigation History

- November 13, 2024: Hartter filed a petition (the Hartter Petition) seeking leave to file a statement of claim respecting the Agreement.
- November 18, 2024: Orian filed a petition (the Liquidation Petition) seeking liquidation of KSDI on the basis that its management was deadlocked.

- December 6, 2024: Orian filed a response to the Hartter Petition opposing the relief sought on the basis, among others, that it failed to identify a reasonable cause of action and was premature given the existence of the Litigation Petition.
- May 14, 2025: Hartter filed the statement of claim now in dispute.
- June 18, 2025: Hartter discontinued the Hartter Petition.
- July 11, 2025: This court dismissed the Liquidation Petition.
- February 18, 2026: Orian filed this application.

The Agreement

[11] Terms of the Agreement relevant to Orian's arguments that Hartter has no reasonable claim include:

1. An acknowledgement in the Recitals and Schedule D: Roles and Responsibilities, that the parties were each part of a corporate group and would cause their wholly owned subsidiaries (NGC for Orian and Arcrite for Hartter) to provide certain specified services required to complete the project and that the parties would "ensure that the Joint Venture Corporation engages the necessary third party expertise" required for matters not provided by NGC and Arcrite.
2. Article 1.13. This Agreement constitutes the entire agreement between the Parties pertaining to its subject matter. It supersedes all prior or other agreements, understandings, representations, warranties, proposals, negotiations and discussions, whether oral or written.
3. Article 3.1. Orion and Hartter agree to incorporate a Joint Venture Corporation under the *Business Corporations Act*, Yukon (the "Joint

Venture Corporation”) in order to purchase from the Vendor all of the right, title and interest in Lot 23, Block 316, City of Whitehorse, YT, Plan No. 2008-0034 (the Property) described in Schedule A, on those terms more particularly outlined in Article 8. The Property shall be wholly owned by the Joint Venture Corporation.

4. Article 3.2. Orion and Hartter agree that the Joint Venture Corporation will construct the condominium building described in Schedule B on the Property. The construction of the condominium building shall be undertaken in accordance with the Property Development Plan, the roles and responsibilities of each party described in Schedule D and otherwise in accordance with the terms and conditions of this Agreement. The Joint Venture Corporation shall have all right, title and interest in the condominium building constructed on the Property.
5. Article 3.3. The Joint Venture Corporation shall purchase services from Orian and Hartter by means of purchase orders for the same.
6. Article 5.1. For the operation of the Joint Venture Corporation, Orian shall contribute \$500,000 and Hartter shall contribute all remaining capital to complete the Development, which capital contributions shall be recognized as shareholder loans...
7. Article 7.1. The relationship between Orian and Hartter shall be solely one of principal and independent contractor...Each party has no liability whatsoever to the other Party except as described in this Agreement.

[12] In addition, Article 11 of the Agreement deals with distribution of the earnings of the Joint Venture Corporation, Articles 12 and 13 deal with rights of first refusal and

restrictions on sales of shares of the Joint Venture Corporation to third parties, and Articles 14 and 15 deal with the sale of shares and debt of the Joint Venture Corporation.

[13] Orian argues that the clear terms of the Agreement must be interpreted such that KSDI is not a mere trustee but an active participant in the project; its terms prevent Hartter from bringing a claim for the relief it seeks and that such a claim must be made by way of derivative action by KSDI.

[14] Hartter argues that this is a contractual dispute between two shareholders who chose to set up a corporation to facilitate their contractual arrangement and that there is no need to resort to a derivative action to resolve the dispute.

[15] Hartter's focus is on the *Hunt* test for striking pleadings, namely that it must be "plain and obvious" that the pleading discloses no reasonable cause of action (*Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 (*Hunt*) at 979).

[16] Further, Hartter argues that *Sidhu v Canada (Attorney General)*, 2015 YKSC 53 (*Sidhu*), stands for the proposition that pleadings are to be given a generous interpretation and need not be perfect.

Orian Arguments

[17] Orian's arguments, that any obligations of Orian are to KSDI and not to Hartter, include the following claims in the Statement of Claim (paras. 50-53):

50. Orian breached Article 7.1 by failing to provide Hartter with all documents (the Agreement actually states "such further documents") related to the cost of construction of the Development. Orian argues that its obligation under Schedule D of the Agreement is only to cause its subsidiary NGC to perform its obligations.

51. That Orian breached Article 5.1 by failing to contribute \$500,000 for the operation of KSDI. Orian argues that under Article 5.1, that contribution was to be by way of a shareholder loan to KSDI such that only KSDI can enforce it.
52. That Orian breached a number of its obligations under Article 9.1 for the construction of the Development. Orian argues that under Schedule D, its only obligation is to cause NGC to perform those obligations.
53. That Orian misrepresented that it would perform the Services honestly and in good faith. Orian argues again, that pursuant to Schedule D, the obligations were those of NGC.

[18] As to the breach of fiduciary duties, in paras. 55 and 56 of the Statement of Claim, Hartter pleads that Orian, in its actions as set out above, breached its fiduciary duties owed to Hartter and that Mr. Gilday, in directing Orian, breached the fiduciary duties he owed to Hartter.

Hartter Arguments

[19] As to Hartter's arguments respecting *Hunt*, the case of course, is binding, but it was concerned more with the novelty of a pleading than its compliance with the rules and corporate legislation.

[20] Similarly, *Sidhu* is a case in which substantial portions of a statement of claim were struck largely on the basis of imprecise claims without facts alleged to support them. That is not the case here where the applicant argues not that the claims are imprecise but that they cannot be made by the plaintiff, in the case of those which must be made through a derivative action, or that the law does not support the claim, in the case of the breaches of fiduciary duties.

[21] As to the specific defects Orian alleges in the Statement of Claim:

- At para. 50: A trial judge could determine that Orian as principal failed to direct its wholly owned subsidiary, which was merely its agent.
- At para. 51: The Agreement, however, states that the \$500,000 would be “recognized” as a shareholder loan, not that it need be categorized as such for corporate law purposes. Failure to make payment, if that is proven, would be a breach of Orian’s direct obligation.
- At para. 52: Again, failure to direct NGC could be found to be a breach of its obligation to cause NGC to perform.
- At para. 53: But does Orian’s argument mean that Orian has no obligations to compel its subsidiary or agent to preform? That would leave the Agreement largely unenforceable.

[22] Accordingly, it is not “plain and obvious” to me that all of the claims made by Hartter in its statement of claim disclose no reasonable cause of action.

[23] Orian argues that shareholders as such have no fiduciary obligations to other shareholders (*Donnelly v Steward*, 2001 BCSC 1398 at para. 23) because the requirements from *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, beginning at para. 27, necessary to create a fiduciary relationship do not exist in the relationship between Orian and Hartter. Further, even if, as Hartter argues, there may be an exception for closely held corporations, Article 7.1 of the Agreement specifically negates this being one of those exceptions.

[24] It is trite law that generally a director’s fiduciary duty is to the corporation and not individual shareholders. But depending on how the evidence is accepted at trial, there may be cases where, as discussed in *Valastiak v Valastiak*, 2010 BCCA 71 (*Valastiak*)

at paras. 46-50, characteristics of a particular relationship expand a director's fiduciary obligations. The fiduciary claims by Hartter may be tenuous, but they are not hopeless and can be fleshed out in a trial.

[25] I note parenthetically that Hartter cites *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 141 for the proposition that a "contractual relationship and a joint venture partnership can give rise to a fiduciary duty". I do not read that particular paragraph that broadly, but given the Court of Appeal for British Columbia decision in *Valastiak*, the point is at least arguable.

Derivative Action respecting a Joint Venture Corporation

[26] Because the parties defined KSDI in the Agreement as the Joint Venture Corporation, and because the parties to this litigation take diametrically opposed positions on the consequences of using such a corporation, it is useful to determine whether there is an easy categorization of the role of KSDI. In *Amneet Holdings Ltd. v 79548 Manitoba Ltd. et al.*, 2004 MBCA 32 (*Amneet*), the Court of Appeal of Manitoba discussed such categorization:

13 While the term "joint venture corporation" has no definitive meaning, the concept is not unknown. In Barry J. Reiter & Melanie A. Shishler, *Joint Ventures: Legal and Business Perspectives*, (Toronto: Irwin Law, 1999), the authors state (at 19-20):

Joint venturers can pursue their business goals using a corporate, partnership or contractual vehicle. ...

For lawyers and judges, using the term "joint venture" ... without any legal context is a very imprecise and dangerous exercise. The loose use of the term, and the assumption that it has some defined legal meaning, have caused many ... interpretive problems Where a collaborative business arrangement is housed in a corporation ... the joint venture is more properly called a "joint venture corporation" ... it is the corporate ... designation that is the defining element of the legal relationship.

14 If the investors in the Project had decided to make their investment in shares of the numbered company, thus funding that entity so that it would then acquire and beneficially own the Project, the numbered company might logically be referred to as a “joint venture corporation.” In such cases, from a legal perspective, it would be no different than any other privately held corporation functioning under and governed by the *Act*. But that is not at all what happened here. As the Agreement, and all related documents, make clear, the investors put their money directly into the Project and not into the numbered company. That is how they acquired their undivided interests in the Project. Legal title in the trustee numbered company does not alter the substance of the arrangement.

15 Reiter and Shishler (*op. cit*) identify the two methods other than by a “joint venture corporation,” to structure a joint venture. One is to utilize a partnership, and the other is to establish a contract among the joint venturers, which the authors describe as a “contractual joint venture.” It is clear, I think, that what was created here was such a contractual joint venture.

[27] In *Amneet*, the agreement among the investors was that the numbered company would be a bare trustee. In the Agreement, KSDI is required to purchase the land for the development including payment of a deposit and the case to close (Article 8), is defined as having all of the right, title and interest in the Property (Article 3.2), is required to purchase Services from Orian and Hartter (Article 3.3), is required to construct the condominium building (Article 3.2), and is required to sell the units on terms it determines to be commercially reasonable (Article 3.4). These obligations are more expansive than those which the Court of Appeal of Manitoba found the numbered company in *Amneet* to have and may make KSDI closer to the kind of “joint venture corporation” that Orian argues is “no different than any other privately held corporation functioning under and governed by the *Act*” (at para. 7). But that determination is better made after evidence is tested at trial.

[28] A trial court can better determine the nature of the joint venture here and in what capacity the parties intended to use KSDI, namely whether it was intended to be a bare trustee or whether it is a “joint venture corporation” such that it must enforce obligations in its own right.

[29] In my view, Hartter bears the risk that, ultimately, KSDI is the proper party to have made certain of the claims it pleads in its Statement of Claim and to be entitled to relief therefor. But if Hartter is prepared to accept that risk instead of treating KSDI as an “independent” corporation and applying for leave to commence a derivative action on its behalf, I do not consider that to be an abuse of process.

[30] Orian relies on *Anthony v NPV Management Ltd.*, 2003 NLCA 41 (*Anthony*), where the Court of Appeal of Newfoundland and Labrador overturned an application judge’s refusal to strike a pleading on the ground that it should have been brought as a derivative action. Briefly, the court explained that the historical rationale for requiring derivative actions in cases of shareholders seeking recourse against the actions of directors or managers is that a corporation is a legal entity distinct from its shareholders and that wrongs done against a corporation must be dealt with by the corporation. Among other things, it avoids a multiplicity of actions by large numbers of shareholders. The situation in *Anthony*, however, was the more conventional complaint by shareholders that certain action taken by directors and officers reduced the value of their investments. That was a wrong against the corporation and is very different from Hartter’s contractual action against another shareholder and its director for alleged breaches of specific terms of a contract.

[31] Indeed, as Hartter argues, certain of the relief it seeks for breaches by Orian arose before KSDI came into existence and could not be made by KSDI by way of a

derivative action. Some of those claims may be tenuous, such as those related to pre-contract representations when the “Entire Agreement” clause at Article 1.13 of the Agreement purports to negate those. But a tenuous claim is not one destined to fail.

Conclusion

[32] I do not find that the Hartter action discloses no reasonable claim as contemplated in Rule 20(26)(a). Certain of its claims may be tenuous. But they are not unreasonable.

[33] Nor do I find it to be an abuse of process as contemplated in Rule 20(26)(d). That is because it is not abundantly clear to me that a derivative action is the only means by which Hartter might obtain relief.

[34] I will say as well that my reasoning in this application must of necessity be coloured by the conclusion I reached in the earlier application by Orian. It will be remembered that I dismissed its application to liquidate KSDI, which would have involved a subsequent determination by a liquidator of payments due to and from Orian and Hartter and/or their subsidiaries. Part of my reasoning was that there was other litigation between the parties and that it would be “... in the course of that litigation that the parties will have an opportunity to compel each other to produce the documents that each needs to assess its claim against the other or defend its claim from the other” (*Orian Inc* at para. 37). If I were now to strike Hartter’s Statement of Claim, I will effectively have prevented the efforts of each party to seek recourse for its claims against the other without either one commencing a third action or application. That kind of determination does not promote litigation efficiency.

[35] If following conclusion of the action Orian is successful in defending the claim for the reasons that it brought this application, that can be dealt with by an award of costs.

But in the interim, Hartter should be permitted to pursue its claim and should not be at this early stage “driven from the seat of judgment” (*Hunt* at 973, citing *Dyson v Attorney-General*, [1911] 1 KB 410 (CA) at 418-419).

[36] Counsel are free to contact me within 30 days of issuance of these reasons if they cannot agree on costs.

[37] Thank you to all counsel for their helpful briefs and concise oral arguments.

LITTLE J.