

SUPREME COURT OF YUKON

Citation: *Re: Provest Markets Ltd.*, 2015 YKSC 41

Date: 20150929
S.C. No. 15-A0065
Registry: Whitehorse

PROVEST MARKETS LTD., SAM & JOEY'S MARKETPLACE LTD. and
SAM JUROVICH

Petitioners

Before: Mr. Justice R.S. Veale

Appearance:

Paul W. Lackowicz

Counsel for the Petitioners

AMENDED REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for the rectification of the Articles of Incorporation of Provest Markets Ltd. (“Provest”) and Sam & Joey’s Marketplace Ltd. (“Sam & Joey’s”) pursuant to s. 245(3) of the *Business Corporations Act*, R.S.Y. 2002, c. 20, to include Class “A” Preferred Shares.

[2] The Registrar of Corporations and the Canada Revenue Agency have been advised of the Petition and take no position in the matter.

FACTS

[3] 47041 Yukon Inc. purchased all of the Class “A” shares of Provest on June 6, 2013, on the agreement that a debt owing to Provest (the “Calista Debt”) would be removed from Provest and transferred to Sam & Joey’s. Sam Jurovich, the former

owner of Provest, incorporated Sam & Joey's to hold the Calista Debt. The value of the Calista Debt was therefore not part of the share sale and would be retained by Sam & Joey's.

[4] To achieve this transaction, the accountants recommended the following:

- (a) The authorized capital for Provest and Sam & Joey's would include a class of fixed value preferred shares;
- (b) Provest would declare a stock dividend on the Class "A" shares held by Sam Jurovich and issue fixed value preferred shares to Sam Jurovich the ("Provest Dividend Shares");
- (c) Sam Jurovich would sell the Provest Dividend Shares to Sam & Joey's (Sam Jurovich's corporation) for an equal number of Sam & Joey's Preferred Shares with the parties agreeing to file a s. 85 tax election to have the sale occur on a tax-deferred basis;
- (d) Provest would then redeem the Provest Dividend Shares and issue a promissory note to Sam & Joey's;
- (e) Sam & Joey's would then purchase the Calista Debt and issue a promissory note to Provest;
- (f) Provest and Sam & Joey's would then agree to set-off and cancel their promissory notes.

[5] The Directors of both Provest and Sam & Joey's passed resolutions issuing their respective Class "A" Preferred shares but neither Corporation's authorized capital included any preferred shares.

[6] The sale of Provest shares closed on June 19, 2013, with June 8, 2013, as the effective date of closing. The accountants filed a Section 85 Election (CRA Form T-2057) in relation to the sale of the Provest Dividend Shares to Sam & Joey's and Provest issued to Sam & Joey's a T5 Information Slip showing a deemed dividend which arose on the redemption of the Provest Dividend Shares.

[7] The mistake of not creating the preferred shares for both Provest and Sam & Joey's leads to the following problems:

- (a) The Calista Debt may still be owned by Provest contrary to the share sale agreement; and
- (b) Sam & Joey's could face punitive tax consequences.

DISPOSITION

[8] The petitioners apply under s. 245 of the *Business Corporations Act* which states:

245(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation or in any notices or other documents sent to the registrar, the corporation, a security holder of the corporation or any interested person may apply to the Supreme Court for an order that the registers or records be rectified and any necessary notices sent to the registrar.

...

(3) In connection with an application under this section, the Supreme Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following

- (a) an order requiring the registers or other records of the corporation to be rectified and any necessary notices sent to the registrar;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or directors or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have their name entered or retained in, or deleted or omitted from, the registers or records of the corporation, or in any notices or other documents sent to the registrar, whether the issue arises between two or more security holders or alleged security holders, or between the corporation and any security holders or alleged security holders, or among directors or officers;

(d) an order compensating a party who has incurred a loss. S.Y. 2010, c.8, s.156; S.Y. 2002, c. 20, s.245

[9] Similar orders of rectification have been made in *Dale v Canada*, [1997] 3 F.C. 235 (F.C.A.) and *Re Amalgamation of Aylwards (1975) Ltd.* (2001), 203 Nfld. & P.E.I.R. 181 (T.D.). Both cases consider sections similar to s. 245.

[10] While the wording of s. 245(1) in the Yukon *Business Corporations Act* is somewhat narrow in that it does not refer to shares but names, there is no question that the names of the owners of the preferred shares have been wrongfully omitted from the records of the corporations. The Court has been granted a broad remedial power in s. 245(3) to “make any order it thinks fit including” an order requiring the records of the corporations to be rectified and any necessary notices sent to the Registrar. I am prepared to order the required rectification.

[11] In any event, in the alternative, I am satisfied that the Court should exercise its inherent jurisdiction to do substantive justice between the parties, where there is no opposition from the Registrar of Corporations and the Canada Revenue Agency.

[12] I therefore order following:

1. The records and registers of Provest and Sam & Joey’s, including their

Articles of Incorporation, are hereby rectified to reflect the intention of the parties by:

- a. Amending, as of June 6, 2013, the Articles of Incorporation of Provest to include an unlimited number of Class “A” Preferred shares with the rights and restrictions set out in Appendix “A” to this Order; and
 - b. Amending as of June 6, 2013, the Articles of Incorporation of Sam & Joey's to include an unlimited number of Class “A” Preferred shares with the rights and restrictions set out in Appendix “A” to this Order.
2. The Registrar of Corporations is directed to:
- a. Place a copy of this Order on the Corporate Affairs file maintained by the Registrar of Corporations for each of Provest and Sam & Joey's; and
 - b. Enter a note on the Corporate Affairs file maintained by the Registrar of Corporations for each of Provest and Sam & Joey's that the Articles of Incorporation and related documents for each corporation are rectified as of June 6, 2013 to include Class “A” Preferred Shares.

[13] The detailed rights and restrictions set out in Appendix “A” shall be included in the Court order.

VEALE J.

Appendix "A"

Class "A" Preferred shares, which shall have attached thereto the following preferences, rights, conditions, restrictions, limitations, or prohibitions:

a. Voting

Holders of Class "A" Preferred shares shall not be entitled to receive notice of or attend any meeting of the shareholders of the Corporation and shall not be entitled to vote at any such meeting, except:

i) for a meeting of shareholders called for the purpose of authorizing the dissolution of the Corporation or the sale of its undertaking or a substantial part thereof; or

ii) as otherwise specifically provided in the Yukon Business Corporations Act.

b. Dividends

Holders of Class "A" Preferred shares shall be entitled to receive, out of all profits or surplus available for dividends, any dividend declared by the Corporation on the Class "A" Preferred shares from time to time, which right to receive such dividends shall be exclusive of all other classes of shares in the Corporation.

c. Redemption Amount

The "Redemption Amount" of the Class "A" Preferred shares shall be shall be the sum of \$1,000.00 per share.

In the event that Canada Revenue Agency or any other competent taxing authority ("CRA") determines that the fair market value of any property sold or transferred to, or exchanged with the Corporation in exchange for non-share consideration, if any and the Class "A" Preferred shares is greater or less than the non-share consideration, if any, and the Redemption Amount of all the Class "A" Preferred shares so issued as agreed and determined by the Corporation and the holders of the Class "A" Preferred shares, the Redemption Amount shall be increased or decreased to reflect the value as ultimately determined for the Class "A" Preferred shares. The adjustment to the Redemption Amount per share shall be equal to the total increase or decrease so determined divided by the number of Class "A" Preferred shares so issued. The Redemption Amount of the Class "A" Preferred shares so adjusted shall be deemed retroactively to the date of first issuance to have been its Redemption Amount. In the event that any of the Class "A" Preferred shares have been redeemed prior to the date of the ultimate determination, cash settlements will be

made by the holder of said shares or the Corporation as the case may be. Reference to value as ultimately determined herein shall have the following meaning:

- a. such amount as may be agreed by CRA, the Corporation and the holders of the Class "A" Preferred shares, to have been the fair market value of the property sold, transferred to or exchanged for such Class "A" Preferred shares; or
- b. in the absence of an agreement, such amount as shall be determined by a court having jurisdiction in the matter (after all appeal rights, have been exhausted or all times for appeal have expired without appeals having been taken) to be the fair market value of the property sold, transferred or exchanged for such Class "A" Preferred shares.

The Redemption Amount for each Class "A" Preferred Share as determined by this section, together with any declared and unpaid dividends are collectively hereinafter referred to as the "Class "A" Preferred Redemption Amount".

d. Redemption

Subject to the provisions of subsection 37(2) of the Yukon Business Corporations Act, the Corporation shall have the right at its option, at any time or times, to redeem all or any portion of the Class "A" Preferred shares, on payment of the Class "A" Preferred Redemption Amount. If only part of the outstanding Class "A" Preferred shares are to be redeemed, the Class "A" Preferred shares to be redeemed shall be selected in such manner as the Directors determine and need not be selected either in proportion to the number of shares registered in the name of each shareholder or from every or any particular holder of the Class "A" Preferred shares. In all cases of redemption thirty (30) days' notice ("Notice of Class "A" Preferred Redemption") shall be given by letter directed to the respective shareholders whose shares are to be redeemed at their respective addresses appearing on the books of the Corporation. The thirty day notice requirement may be waived in writing by all of the Class "A" Preferred shareholders whose shares are to be redeemed, with the consent of the Corporation. The Notice of Class "A" Preferred Redemption shall set out:

- i) the number of shares to be redeemed, if only part of the shares held by the shareholders to whom such notice is addressed are to be redeemed;
- ii) the date on which the redemption is to take place ("Class "A" Preferred Redemption Date");

- iii) the place where such shares will be redeemed; and
- iv) the name and address of the chartered bank, in which unclaimed redemption monies will be deposited.

On or after the Class "A" Preferred Redemption Date, the Corporation shall pay the Class "A" Preferred Redemption Amount to holders of Class "A" Preferred shares to be redeemed, on presentation and surrender of the certificate or certificates for such shares, duly endorsed, at the place specified in the Notice of Class "A" Preferred Redemption. The Corporation shall have the right on or after the Class "A" Preferred Redemption Date to deposit any unclaimed redemption monies to a special account in the chartered bank named in the Notice of Class "A" Preferred Redemption, to be paid upon presentation and surrender of the share certificate or certificates as have not at the date of such deposit been surrendered by the holders thereof, to or to the order of such holders.

e. Participation in Assets on Dissolution

In the event of liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, holders of Class "A"

Preferred shares shall be entitled to receive the Redemption Amount for the shares on a pro rata basis and then the holders of [Class "A" shares (for Provest)] [Common shares (for Sam & Joey's)] shall be entitled to receive the remaining property of the Corporation.