CITATION: Arend v. Boehm, 2017 ONSC 3582
COURT FILE NO.: CV-16-11653-00CL
DATE: 20171114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KARSTEN AREND, HANSJOERG WAGNER AND BITRUSH CORP.	*Alistair Crawley*, *Clarke Tedesco* and *April Engelberg*, for the Applicants
Applicants	
– and –	
WERNER BOEHM, ALFRED DOBIAS AND MEZZACAP INVESTMENTS LTD. AND ELFRIEDE SIXT	No one for the Respondents, although properly served.
Respondents	
	HEARD: May 31 and June 5, 2017

L. A. PATTILLO J.:

Introduction

[1] The Applicants, Karsten Arend ("Arend"), Hansjoerg Wagner ("Wagner") and BitRush Corp. ("BitRush") (collectively the "Applicants"), seek various relief in this Application pursuant to s. 248 of the *Business Corporations Act*, R.S.O. 1990 c. B.16 (the "OBCA") including:

1) A declaration that the respondent Werner Boehm ("Boehm"), in his capacity as CEO of BitRush has acted oppressively, in breach of his fiduciary duty to BitRush;

2) Orders transferring shares of BitRush from the respondent MezzaCap Investments Ltd. ("MezzaCap Investments") to Dr. Joachim Dr. Kalcher ("Dr. Dr. Kalcher") and HSRC Investments Pte. Ltd. ("HSRC") to whom the shares are owed; and

3) An order that MezzaCap Investments' remaining shares in BitRush be cancelled.

[2] At the outset of the hearing of the Application, the Respondents Boehm, Alfred Dobias ("Dobias") and Elfriede Sixt ("Sixt") (collectively the "Individual Respondents") each brought motions to stay or dismiss the Application on the ground that an Ontario court has no jurisdiction to hear the matter or, in the alternative, is not the most appropriate forum. They also sought to set aside service of the Amended Notice of Application and stay the proceedings on the basis that it was not authorized by the *Rules of Civil Procedure* and the Application was frivolous or vexatious or otherwise abusive (the "Jurisdiction Motions").

[3] Although the Individual Respondents were not represented by counsel, they each filed material in respect of their respective Jurisdiction Motions and participated in the hearing before me by conference telephone call. Following submissions, I reserved my decision on the Jurisdiction Motions and directed that the argument proceed on the Application. In that regard, neither the Individual Respondents nor MezzaCap Investments filed material in the Application. Further, the Individual Respondents advised during the Jurisdiction Motions that they intended to make no submissions on the Application. They did, however, listen to the completion of the argument by conference telephone.

[4] By written reasons released June 12, 2017 and reported at 2017 ONSC 3424, I dismissed the Jurisdiction Motions. For the reasons that follow, I allow the Application in part.

The Facts

[5] The Applicants have filed affidavits from Arend, Wagner, Dr. Dr. Kalcher and Peter Lukesch, the former CEO of BitRush and the CEO of Streetwear Corporation ("Streetwear"). As noted, none of the Respondents filed any responding material in the Application. The following is a factual overview from the material filed by the Applicants, which I accept as true.

1) The Parties

[6] BitRush is an Ontario corporation with its head office in Toronto. BitRush is engaged in the development and implementation of various cryptographic technologies and blockchain based solutions. While its principal focus is on implementing a cryptographic payment system for the internet, it is also involved in developing online advertising services and gaming technologies for the internet. BitRush was publically traded on the Canadian Securities Exchange

and the Frankfurt Exchange. On December 2, 2016, the Ontario Securities Commission issued a cease trade order against its shares.

[7] Arend is a Canadian who resides in Ontario and is engaged in the business of consulting and investing in mining and technology companies. He is a shareholder of BitRush and has been a member of its board of directors (the "Board") and its president since April, 2016.

[8] Wagner is a Permanent Resident of Singapore and is an experienced former senior executive and investor in the hi-tech industry. He is a shareholder of BitRush and has been a director of the company since June 2016. Wagner is also a director and part owner of HSRC, a Singapore corporation, which also owns shares in BitRush. HSRC is reported in BitRush's public filings as owning 21% of its shares.

[9] MezzaCap Investments is a United Kingdom corporation which is owned and controlled by some combination of Boehm and/or Dobias. Boehm is the sole director of MezzaCap Investments. The evidence establishes and I find that Boehm is the directing mind of MezzaCap Investments. MezzaCap Investments owns approximately 51% of BitRush's shares as at September 30, 2016.

[10] Boehm is an Austrian citizen but resides in the United Kingdom. He is a former marketing manager of IBM and has been involved in internet technology companies since at least 1998. Boehm was the directing mind behind the formation of BitRush in July 2015. He was Chief Executive Officer of BitRush from December 24, 2015 until his termination on December 7, 2016. As noted, Boehm is also the sole director of MezzaCap Investments.

[11] Dobias is a resident of Austria and was a member of BitRush's Board until he resigned in on February 22, 2017.

[12] Sixt is also a resident of Austria. She is an accountant and has acted as BitRush's accountant from 2015 until she was terminated on December 13, 2016.

2) BitRush

[13] BitRush was formed in July 2015 through a reverse takeover ("RTO") initiated and implemented by Boehm through MezzaCap Investments. Streetwear, an Ontario public corporation, acquired 100% of the shares of MezzaCap GmbH, from MezzaCap Investments, in exchange for approximately 2/3 of the shares of Streetwear (83,287,265 shares). Streetwear subsequently changed its name to BitRush on or about September 2, 2015.

[14] The main driver behind the RTO was the representation by Boehm to representatives of Streetwear that MezzaCap GmbH owned a universal payment service based on cryptocurrency payment system called ANOON (the "ANNON Technology") and it had cryptocurrency websites which generated advertising revenues through various bitcoin related strategies which were valued in excess of $2 million.

[15] BitRush is publically traded on the Canadian Securities Exchange and the Frankfurt Exchange. It has 127 million shares outstanding and approximately 2,000 shareholders.

[16] BitRush has three main businesses that are or will be built around the ANOON Technology: the ANNON payment processing service; gaming technologies and online advertising services operated by its subsidiary AdBit Efficient Marketing Limited ("AdBit").

3) Dr. Kalcher

[17] Dr. Kalcher is an Austrian citizen. ANOON and its predecessors, BitCore, P2Nex, BlockNexus and ANON were developed by Dr. Kalcher. Dr. Kalcher became the Acting Chief Technology Officer of BitRush.

[18] In 2013, Dr. Kelcher who had been developing a platform to be used for crowdfunding and crowd investing on the internet called CrowdLauncher, entered into an agreement with Boehm to set up a company for the development, marketing and sale of CrowdLauncher. The company, which became MezzaCap GmbH, was to be owned 20% by Dr. Kalcher through his company kb-spirit, 20% by Dobias and 60% by MezzaCap Investments. As part of the agreement, Dr. Kalcher agreed to license the CrowdLauncher technology to MezzaCap GmbH. The agreement was never reduced to writing. Subsequently and despite repeated assurances to him from Boehm, no share transfers ever took place to Dr. Kalcher and MezzaCap GmbH never obtained a license from Dr. Kalcher for the technology.

[19] At the time that BitRush was formed, Boehm advised Dr. Kalcher that he would be provided with 5,000,000 shares of BitRush which was approximately 4% of the company's shares. Dr. Kalcher's understanding was that it was to secure his support for the BitRush initiative. He was told by Boehm that the shares had been placed in escrow with BitRush's transfer agent in Toronto but only 500,000 were immediately tradable and the balance would be released to him at the rate of 15% every six months. Dr. Kalcher subsequently received only 500,000 shares and learned that no shares were ever deposited into escrow in his name and that the shares he did receive came from MezzaCap Investments. Once again the agreement was never reduced to writing.

4) Wagner and HRSC's Investment in BitRush

[20] In August 2015, Wagner purchased and received 2 million shares of BitRush. Those shares are not in issue. In February 2016, Boehm approached Wagner for a further investment in BitRush or MezzaCap Investments. It was subsequently agreed between HSRC, MezzaCap Investments and BitRush that HSRC would invest in BitRush on the following terms:

a) MezzaCap Investments would sell to HSRC 18 million shares of BitRush for consideration of $1 CAD and HRSC's commitment to support the development of BitRush through the provision of technical and infrastructure support;

b) BitRush would sell to HSRC a private placement of 7 million BitRush shares for $700,000 CAD; and

c) Wagner would be appointed to the BitRush Board.

[21] In late February 2016, HSRC signed a subscription agreement with BitRush for 7 million BitRush shares for $700,000.00 CDN (approximately $500,000 US).

[22] On March 8, 2016, HSRC wired $500,000 USD to BitRush. On March 17, 2016, BitRush transferred 6,650,000 BitRush shares to HSRC. The reduced number of shares resulted from BitRush only receiving $665,000 CDN based on the then current exchange rate. Wagner testified that Boehm assured him that MezzaCap Investments would provide HSRC with the outstanding 350,000 shares but it never did.

[23] Further, although HSRC also provided the promised technical and infrastructure support to BitRush, MezzaCap Investments only transferred 12,493,090 of the agreed 18 million BitRush shares leaving a shortfall of 5,506,910 shares from what was agreed to.

[24] Further, it was not until June 20, 2016 and substantial effort on his part that Wagner was appointed to BitRush's Board.

[25] In an email dated November 29, 2016, Boehm purported to unilaterally terminate BitRush's and MezzaCap Investments obligations to provide HSRC with the outstanding BitRush shares "for several reasons we have already discussed."

5) The Events of the Fall of 2016

a) Dr. Kalcher

[26] On October 28, 2016, Arend had a conversation with Dr. Kalcher to better understand the ANOON technology. During the conversation, Dr. Kalcher asked about the 4,500,000 shares of BitRush that he'd been promised by Boehm and asked when they would be transferred to him, and if Arend had been instructed to transfer them. Arend responded that he had no knowledge about the shares or the transfer. Dr. Kalcher also became extremely upset when he learned that Sixt was closely involved with BitRush as he had had a very negative business experience with her in the past and Boehm had promised him at the outset that she would not be involved in the MezzaCap GmbH venture.

[27] Shortly thereafter, Dr. Kalcher confronted Boehm about his outstanding 4,500,000 shares in BitRush and his concealment of Sixt's involvement. On November 2, 2016, Dr. Kalcher wrote to Boehm and advised him that he was resigning from BitRush and proposed that BitRush make him a proposal if it wanted to continue using the ANOON technology. Boehm did not advise the Board of this development. On November 4, 2016, Dr. Kalcher sent an email to the Board advising them of his resignation.

[28] On November 25, 2016, Dr. Kalcher sent a further email to BitRush's Board providing it with two options: BitRush could purchase the ANOON technology for €875,000 or he would shut the ANOON technology down on December 23, 2016.

[29] On November 28, 2016, Boehm sent an email to the Board alleging that Dr. Kalcher had never previously made claims to be compensated for the ANOON technology and that his sudden fallout with Dr. Kalcher was because Boehm was unwilling to work with various individuals who he felt were involved in money laundering (a potential investment opportunity that Boehm had originated). In fact the Board had already decided not to work with the individuals in question.

[30] By email dated November 24, 2016, Sixt advised the Board that BitRush's third quarter financial statements as of September 30, 2016 were due on November 29, 2016 and that if the financials were not filed on or before that date, BitRush's shares would be cease traded by the OSC.

[31] On November 29, 2016, Sixt emailed draft third quarter financial statements she had prepared to the Board. The statements were to be filed, as certified by the CEO and CFO, that day. Note 1 to the financial statements, entitled "Nature of Operations and Going Concern" briefly set out the company's business, its intended focus and the fact that as at December 31, 2015, it had not yet achieved profitable operations and continued to be dependent on external financing to meet its financial obligations. The note then stated:

> These conditions indicate the existence of material uncertainty that may cost [*sic*] significant doubt upon the ability of the company as a going concern. This doubts [*sic*] are substantially increased by a failed private placement effort announced as of 6th September 2016 and due to the fact the Corporation has been experiencing a blackmailing effort since end of October 2016 by its former CTO Joachim Dr. Kalcher. There are severe indications that HSRC Investments Inc. – a minor shareholder of the Corporation – are in close contact with Joachim Dr. Kalcher and that the purpose of this blackmailing effort is to use ANOON for money laundering activities. These incidents have induced BitRush's major shareholder, MezzaCap Investments Ltd, to terminate its shareholder agreement with HSRC Investment Inc. and to take the necessary legal actions against them. Appropriate legal steps have already been taken.

[32] Arend was extremely concerned about the impact of the proposed disclosure concerning Dr. Kalcher and HSRC on BitRush. He viewed Dr. Kalcher's position concerning the use of the ANNON Technology as a legitimate business issue and not blackmail. Further, BitRush had terminated any discussions with the individuals Boehm was alleging were involved in money laundering. Accordingly, he edited Note 1 of the draft financial statements to remove the allegations against both Dr. Kalcher and HSRC and indicated that there was a dispute over the ownership of the technology. He then sent the revised draft financial statements by email later on November 29, 2016 to the Board and Boehm and Sixt requesting, despite his concerns about her

performance, that the Board appoint Sixt CFO for the purposes of certifying the financial statements and that Boehm and Sixt certify them. Wagner agreed to Sixt's appointment but there was no response from Dobias.

[33] Despite frequent email correspondence between Arend, Boehm and Sixt on November 29, 2016, neither Boehm nor Sixt responded to Arend's request for them to sign the revised financial statements. Arend filed the revised third quarter financial statements, uncertified, at 9:44 p.m. on November 29, 2016. As a result of BitRush's failure to file certified financial statements, the OSC issued a Cease Trade Order against BitRush on December 2, 2016.

[34] On December 6, 2016, MezzaCap Investments filed a criminal complaint against Dr. Kalcher with the prosecutor's office in Austria alleging the same improper conduct against him as Boehm and Sixt had raised in the notes to the financial statements. The complaint was dismissed on January 19, 2017, following a preliminary investigation.

b) AdBit

[35] In the fall of 2016, BitRush was contemplating a venture between its subsidiary AdBit and a third party software supplier to raise capital for the development of the business. Unbeknownst to the Board, Boehm was acting behind the scenes to appropriate AdBit for the benefit of MezzaCap Investments. On November 18, 2016, without the authorization or knowledge of the Board, Boehm amended AdBit's company register in the UK to transfer the shares of AdBit from BitRush to MezzaCap Investments.

[36] Also on November 18, 2016, Bohem advised the principals of the third party that he, Sixt and some new investors were running AdBit and that they were ready to proceed.

[37] On November 20, 2016, without advising the Board of any of his actions concerning AdBit, Boehm proposed to the Board that BitRush sell AdBit to MezzaCap Investments for $100,000 CAD in order to resolve its short term cash situation until the issues with Dr. Kalcher were "cleared". The Board rejected Boehm's proposal as being completely inappropriate and not a realistic proposal.

c) The Special Committee

[38] On December 7, 2016, BitRush's Board formed a Special Committee comprised of Arend and Wagner to investigate the circumstances leading to the Cease Trade Order and the ownership of the ANOON technology. The Board also terminated Boehm as CEO for acting in a manner that was contrary to the interests of BitRush. On December 13, 2016, the Board terminated Sixt.

[39] As a result of its investigation, in addition to Boehm's actions concerning his dispute with Dr. Kalcher leading to the Cease Trade Order, the Special Committee also learned:

i. Boehm had failed to fulfil agreements to provide MezzaCap GmbH and subsequently BitRush shares to Dr. Kalcher in exchange for a license to

use the ANOON Technology and to compensate him for the development of the ANOON Technology resulting in BitRush having no rights to the ANOON Technology and putting the very core of BitRush's business at risk;

ii. That between August 2015 and September 2016, there were a number of largely unsupported transfers of funds from BitRush to MezzaCap GmbH (an Austrian company controlled by Boehm and subsequently renamed BitRush GmbH in June of 2016), totaling $561,373 CAD;

iii. In October/November 2016, Boehm had taken steps to misappropriate AdBit for MezzaCap Investments, as detailed above;

iv. Subsequent to his termination from BitRush, Boehm maintained an active presence on the former BitRush website and associated blogs and chat boards. He also has taken steps to form a new company in the UK called BitRush Limited and appears to be operating the website www.bitrush.org which is described as a "new online trading platform".

The Relief Requested

[40] The Applicants' Amended Notice of Application seeks multiple relief against the Respondents pursuant to the oppression remedy in s. 248 of the OBCA. Besides orders requiring Boehm and Sixt to return certain BitRush property, cease dealing with BitRush's assets and cease operating certain websites, the principal relief requested is as follows:

a) Orders pursuant to s. 248(3)(d) of the OBCA requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher and 5,865,910 shares in BitRush to HRSC as was agreed between the respective party, BitRush and MezzaCap Investments (Boehm).

b) An Order for the issuance of 350,000 shares from BitRush's treasury to HRSC, also as agreed between HRSC, MezzaCap Investments and BitRush (Boehm).

c) An Order, based on the "material misrepresentations" of Boehm and MezzaCap Investments at the time of the formation of BitRush, cancelling MezzaCap Investments' remaining shares in BitRush;

d) In lieu of an order requiring the respondents to return $561,373 CAD to BitRush which was improperly transferred to MezzaCap GmbH (now BitRush GmbH), cancellation of 6,237,478 shares of BitRush owned by the respondents constituting $561,373 worth of BitRush shares at today's market price.

[41] The Applicants have obtained interim orders from this court dated March 20 and April 12, 2017 requiring the respondents to deliver to BitRush the corporate assets and property that

continues to be in their possession and control and to cease dealing with BitRush's assets, communicating with BitRush's customers or holding themselves out as an officer or director of BitRush and its subsidiaries. None of the respondents have complied with the orders.

The Oppression Remedy

[42] The oppression remedy is set out in s. 248 of the OBCA. In particular, s 248(2) provides:

> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
>
> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
>
> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[43] An oppression claim is to be brought by "complainant" (s. 248(1)) which is defined in s. 245 of the OBCA as follows:

> "complainant" means,
>
> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[44] Section 248(3) of the OBCA gives the court broad remedial powers to remedy oppressive conduct. It sets out in a non-exhaustive list, a number of remedies available to the court if oppression is found.

[45] In *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the Supreme Court of Canada set out what is required to establish the oppression remedy in s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, the wording of which is identical to s.

248 of the OBCA. At para. 56, the court stated that in considering whether an oppression claim has been made out, it is necessary to determine whether the reasonable expectations of the claimant have been breached and, if so, whether the breach is oppressive, unfairly prejudicial or unfairly disregarded the interests of the claimant.

[46] The reasonable expectations of the claimant are to be determined both objectively and contextually: *BCE*, para. 62. Not all breaches of a claimant's reasonable expectations will give rise to the oppression remedy. The court must be satisfied that the conduct resulting in the breach falls within the concepts of "oppression", "unfair prejudice" or "unfair disregard" of a claimant's interest: *BCE*, para. 89; s. 5(2) of Schedule 3 of the Act.

[47] In *BCE*, at paras. 90 to 94, the court discusses the concepts of oppression, unfair prejudice and unfairly disregarding relevant interests. The concepts are on a scale of wrongful conduct extending from abusive behavior at one end to unfair conduct at the other. Oppression is a "wrong of the most serious sort." It involves wrongful or improper conduct in respect of the corporation's affairs which smacks of bad faith: para. 92. Unfair prejudice is less serious than oppression and involves conduct that results in unfair consequences: para. 93. Unfair disregard is less serious again and involves, for example, ignoring shareholder interests as being of no importance: para. 94.

i. Complainant

[48] The first issue to determine is whether the Applicants meet the criteria of "complainant" as defined in s. 245 of the OBCA. The acts complained of in the Application by Boehm and MezzaCap Investments concern the business and affairs of BitRush. Arend is a director and officer of BitRush and Wagner is a director and shareholder. They qualify as "complainants" under subsections (a) and (b) of the definition. As will become apparent, however, when I come to discuss reasonable expectations, the reasonable expectations of both Arend and Wagner are no different than those of all shareholders.

[49] Can BitRush qualify as a complainant? Subsection (3) of the definition provides that the court has a discretion to permit that status to any other person who is a "proper person" to make an application.

[50] In *Olympia & York Developments Ltd. (Trustee of) v. Olympia* (2003) 180 O.A.C. 158, [2003] O.J. No. 5242 (C.A.) at para. 45, Goudge J.A. on behalf of the Court stated:

> 45 It may be that the finding in that case is simply that in the circumstances there the trustee in bankruptcy would not be given a remedy under s. 248 and therefore ought not to be accorded standing as a complainant. If, however, that case sets out the absolute prohibition contended for by the appellants, as I tend to think it does, then despite the great respect due its author I would disagree. The simple reason is that s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence

> oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. Given the clear language of s. 245(c) and its purpose, I think that where the bankrupt is a party to the allegedly oppressive transaction, the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

[51] Two Alberta decisions, considering a similar definition of "complainant" have held that a corporation may be a complainant in an oppression action: *Gainers Inc. v. Pocklington*, September 10, 1992, Alta. Q.B. Action No. 9103 14818; *Calmont Leasing Ltd. v. Kredl*, [1993] 7 W.W.R. 428 (Alta. Q.B.) at paras. 127-128.

[52] In *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 3899 (S.C.J.), the court rejected the respondent's submission that a corporation should not be considered a "complainant" because "the interests of the Corporation are not mentioned" in s. 248. Finally, in *Pantheon Inc. v. Frank*, 2009 CarswellOnt 9046 (S.C.J.), Wilton-Siegel J. dealt with a Rule 21 motion to strike an oppression claim for no cause action on the ground that the corporate plaintiff had no status as a complainant. After reviewing *Olympia & York*, *Calmont* and *Gainers*, the learned judge concluded at para. 125 that the common rationale for permitting a corporation to bring an oppression action was because it was in substance a representative action on behalf of all shareholders (except the defendants) or creditors in the case of a bankruptcy. He then continued at para. 128:

> 128 However, while I strongly incline to the view that the cases reflect a requirement that a corporate plaintiff prosecuting an oppression remedy must have actual authority to represent all of the shareholders (or creditors in the case of a trustee in bankruptcy) other than the defendants, I cannot say that, on the current state of the law, it is plain and obvious that a corporate plaintiff must satisfy this requirement in order to qualify as a "proper person". The fact that an alternative remedy is available under securities legislation is not, as a matter of law, sufficient to exclude the corporation as a possible complainant. Accordingly, the motion for relief striking the oppression claim against the JLL Nominees in its entirety is dismissed. It is not plain and obvious that, as a matter of law, Patheon cannot be a "proper person" for the purposes of the definition of "complainant" in section 238 of the CBCA. This question is one that is properly left to be determined on a full factual record at trial or on a summary judgment motion.

[53] Given the circumstances of this case and the relief being sought, I am satisfied that BitRush is a "proper person" to bring an oppression claim under s. 248 of the OBCA. The Application seeks to remedy certain acts directly caused by Bohem (and MezzaCap Investments) for the benefit of all shareholders. Further, and while "actual authority" from all shareholders as mentioned by Wilton-Siegel J. may be required in some cases, in my view it will depend on the circumstances. In this case where the shares are widely held, MezzaCap Investments, which is controlled by Boehm, owns the majority of BitRush's shares and where Arend and Wagner, the remaining members of the Board, are also Applicants, I do not consider actual authority to be required.

ii. Oppression

[54] The Applicants submit that the business and affairs of BitRush have been carried on by Bohem, in a manner that was oppressive, unfairly prejudicial to and disregarded the interests of the shareholders of BitRush and in breach of his fiduciary duty to BitRush.

[55] There is no question that Boehm, who is the directing mind of MezzaCap Investments, was the driving force behind the RTO and the creation of BitRush in July 2015. Although he never became a director of BitRush and only became CEO in December 2015, the evidence establishes that at all material times he was the directing mind of BitRush, operating the company with impunity by intimidating and threatening BitRush's former directors who eventually resigned due to his conduct. The delay in Boehm becoming CEO was only because of criminal proceedings against him in Austria which were dismissed in December 2015.

[56] I am satisfied from the facts that I have found that the business and affairs of BitRush as directed by Boehm both before and after he became CEO, were carried on in a manner which was oppressive, unfairly prejudicial and/or disregarded the best interests of BitRush and its shareholders. Further Boehm's actions were a breach of his fiduciary duty to BitRush.

[57] Boehm's conduct in failing to provide BitRush with the ANOON technology, attempting to transfer the shares of AdBit to MezzaCap Investments in November 2016 and transferring monies from BitRush to companies controlled by him in Austria was conduct of the most serious sort. It was clearly oppressive within the meaning of that term. Further, Boehm's conduct clearly breached the reasonable expectations of BitRush and its shareholders which were that as the person in charge of running BitRush, he would direct the business and affairs of BitRush and conduct himself in a proper and legal manner.

[58] The ANNOON technology is fundamental to BitRush's existence. As Wagner deposed, "The ANOON Technology is, effectively, the entire business of BitRush". Not only did Bohem fail to ensure that BitRush was entitled to use the ANOON technology from the very inception of BitRush, he never took any steps to ensure that was done (by completing his agreements with Dr. Kalcher) nor did he ever advise the Board that was the case. Further, when the Board learned of the problem from Dr. Kalcher, Boehm attempted to shift the blame to Dr. Kalcher.

[59] Similarly, AdBit was an important part of BitRush's business. Boehm's actions in fraudulently amending the company's register to transfer the shares of AdBit to MezzaCap Investments, carrying on negotiations with third parties on the basis that he was running AdBit and then, without advising the Board of any his actions, making a low ball offer to purchase AdBit allegedly to provide BitRush with cash until the Dr. Kalcher matter was resolved were improper and wrong. He attempted to fraudulently misappropriate BitRush's property.

[60] Finally, Boehm's actions in transferring a total of CDN $561,373 from BitRush to companies controlled by him and subsequently refusing to account for the transfers or return the money when requested constitutes further misappropriation of BitRush's property.

[61] I am also satisfied that Boehm's conduct in refusing to complete share transactions that he agreed to on behalf of BitRush and/or MezzaCap Investments with both Dr. Kalcher and HRSC and his refusal to certify the 2016 3rd quarter financial statements were unfairly prejudicial to and unfairly disregarded the interests of BitRush and its shareholders.

[62] Bohem entered into a number of share transactions both on behalf of BitRush and MezzaCap Investments providing for the provision of BitRush shares in exchange for monies and/or services or technology to for BitRush in order for it to obtain capital and assist it in its development. Boehm subsequently failed to complete and/or reneged on those agreements for no apparent reason. BitRush and its shareholders have a reasonable expectation that BitRush will fulfill its agreements, particularly when it has received the consideration agreed to. The ability to raise capital is crucial to BitRush's ongoing existence. Boehm's conduct in failing to fulfill the agreements in issue unfairly disregards the interests of BitRush and its shareholders by threatening its existence.

[63] Finally, Boehm's actions (and those of Sixt) in refusing to certify the 3rd quarter 2016 financial statements on the basis of their characterization of BitRush's dispute with Dr. Kalcher as blackmail on Dr. Kalcher's part and also because Boehm was allegedly unwilling to work with certain individuals who he said were involved in money laundering had no basis in fact at the time and were improper. Bohem was clearly aware at the time that Dr. Kalcher's dispute with BitRush was a legitimate business dispute caused solely by Boehm's failure to honour his prior agreements with Dr. Kalcher. Further, the individuals who Boehm accused of money laundering were part of a business opportunity that had been introduced to BitRush by Boehm and he knew the Board had previously decided not to deal with the individuals.

[64] As is clear from the emails that circulated prior to November 29, 2016, Boehm knew that in refusing to certify the 3rd quarter financial statements, BitRush's shares would be cease traded by the OSC. His actions in refusing to certify the financials for no legitimate reason and in influencing Sixt in that regard were clearly contrary to the interests of BitRush and its shareholders because BitRush's shares ended up being cease traded and they remain that way.

iii. Remedy

[65] The real issue in this case concerns the remedy that should follow from my finding that Boehm's conduct as set out herein was oppressive, unfairly prejudicial and unfairly disregarded the interests of BitRush's shareholders. As noted, the Amended Notice of Application seeks a number of remedies. Before me, the remedies sought were primarily to eliminate MezzaCap Investments' shareholdings in BitRush in order that Boehm would no longer have any involvement in BitRush, permitting it to regularize its affairs and proceed with its business without any interference from Boehm.

[66] The Applicants seek to regularize the share transactions in respect of BitRush concerning Dr. Kalcher and HSRC. Further, they seek to eliminate MezzaCap Investments remaining shares in BitRush based on its failure to provide any of the promised assets at the time of the RTO. Finally, they seek to recoup the misappropriated money by cancelling the dollar equivalent of MezzaCap Investments shares in BitRush.

Dr. Kalcher

[67] The Applicants seek an order pursuant to s. 248(3)(d) of the OBCA (directing an issue or exchange of securities) requiring MezzaCap Investments to transfer a total of 21,157,453 shares in BitRush to Dr. Kalcher made up of 4,500,000 shares being the balance of the shares promised by Bohem at the time BitRush was formed and 16,657,453 shares arising from Dr. Kalcher's original agreement with Bohem in 2013.

[68] As noted, Boehm promised Dr. Kalcher 5,000,000 shares in BitRush at the time it was formed to secure his support in the venture. Dr. Kalcher only received 500,000 shares and those shares came from MezzaCap Investments. There is no evidence as to why Bohem failed to complete the agreement with Dr. Kalcher. Dr. Kalcher's technology is important to BitRush. In my view, Dr. Kalcher should receive the balance of the shares owing which were promised by Bohem. Further, it is in BitRush's best interests to complete the agreement. Dr. Kalcher's technology is important to BitRush and BitRush has an interest in seeing that the agreement with Dr. Kalcher be completed to assist in securing the ANOON technology.

[69] Given that Boehm initially provided Dr. Kalcher with shares from MezzaCap Investments, it follows that the remainder of the promised shares should come from MezzaCap Investments, which at all material times Boehm controlled. Therefore, in order to complete the agreement, I order that BitRush issue 4,500,000 shares to Dr. Kalcher and at the same time cancel 4,500,000 of its shares held by MezzaCap Investments and amend its share registry accordingly. That completes the agreement between Dr. Kalcher and Boehm on behalf of BitRush and MezzaCap Investments without affecting the overall issued shares in BitRush.

[70] The Applicants also seek an order that Dr. Kalcher be awarded 16,657,453 shares of BitRush based on his original agreement with Bohem at the time of the formation of MezzaCap GmbH in 2013 that in exchange for providing the CrowdLauncher technology, Dr. Kalcher's company, kb-spirit would receive 20% of MezzaCap GmbH. MezzaCap GmbH subsequently became part of the RTO, resulting in MezzaCap Investments receiving 83,287,265 shares in

Streetwear which became BitRush. The Applicants seek 20% of MezzaCap Investments initial shareholding in BitRush or 16,657,453 shares for Dr. Kalcher.

[71] I am not prepared to make the order requested. In my view, the agreement in question is not connected to the oppressive conduct found. It predates BitRush and has nothing to do with the conduct of the business and affairs of BitRush. Nor does the relief requested arise from a breach of the shareholders reasonable expectations which in this case are to ensure that BitRush lives up to its obligations. While it coincides with Dr. Kalcher's expectations, he is not a party to the Application. Nor is it clear on the evidence that the agreement was with Dr. Kalcher as opposed to his company. Dr. Kalcher's claim is against MezzaCap Investments.

HSRC

[72] The Applicants also seek orders for the issuance/transfer of a total of 6,215,910 shares of BitRush to HSRC pursuant to agreements entered into by HSRC and Bohem on behalf of BitRush and MezzaCap Investments made up of 350,000 shares from BitRush's treasury and the balance of 5,865,910 from MezzaCap Investments.

[73] The Applicants submit the 350,000 shares make up the balance which remains owing to HSRC in respect of a subscription agreement for 7 million shares entered into between BitRush and HSRC in February 2016 for a subscription price of CDN $700,000 (the agreement noted in brackets that it was approximately US $500,000). HSRC provided US $500,000 which at the then current exchange rate was CDN $665,000. As a result, HSRC received 6,650,000 shares. Although Bohem assured HSRC that MezzaCap Investments would provide the additional 350,000 shares, it never did.

[74] Through the fluctuation of the exchange rate, HRSC ended up paying less than was agreed for the shares. However, it received the number of shares it paid for based on the subscription price. While Bohem unilaterally amended the subscription agreement to reflect the lesser amount, in my view, the initial agreement governs and HSRC is entitled to receive the remaining 350,000 shares upon payment of the balance owing of CDN $35,000.

[75] In light of the agreement Boehm made on behalf of both BitRush and MezzaCap Investments, the remaining 350,000 shares of BitRush due to HRSC upon its payment of CDN $35,000 to BitRush should come from MezzaCap Investments. Therefore, upon HRSC's payment of CDN $35,000 to BitRush, BitRush shall issue 350,000 shares to HRSC and cancel the same number of its shares owned by MezzaCap Investments and amend its share registry accordingly.

[76] Turning next to the 5,865,910 shares remaining due to HRSC, the agreement, which was between HRSC, BitRush and MezzaCap Investments provided, among other things, that HSRC would obtain 18 million shares of BitRush from MezzaCap Investments in exchange for CDN $1 and HSRC's provision of technical and infrastructure support. HSRC paid the $1 and provided

the technical and infrastructure support. It received 12,493,090 BitRush shares from MezzaCap Investments but not the remaining 5,506,910 shares.

[77] I do not consider that Boehm's purported termination of the agreement on November 29, 2016 to be of any effect. HSRC had already provided the consideration required. In my view, Boehm's purported termination of the HRSC agreement is further evidence of his unreasonable conduct in respect of the business and affairs of BitRush. In that regard, BitRush and its shareholders have a reasonable expectation that BitRush will honour its agreements.

[78] MezzaCap Investments was a party to the agreement in question and Boehm acted on behalf of both BitRush and MezzaCap Investments in respect of the agreement. Given that the obligation to provide the BitRush shares was MezzaCap Investments, in order to complete the agreement, I order that BitRush issue 5,506,910 shares to HSRC and at the same time cancel the same number of BitRush shares held by MezzaCap Investments and amend the share registry such that the impact on BitRush's overall issued shares is nil.

BitRush

[79] The Applicants submit that as a result of misrepresentations by Boehm on behalf of MezzaCap Investments prior to the RTO concerning the extent and value of the assets owned by MezzaCap GmbH, MezzaCap Investments provided no value in return for the shares it received in BitRush at the time of the RTO. They seek the cancellation of all of MezzaCap Investments remaining shares in BitRush.

[80] I am not prepared to make the order requested. In my view, Boehm's oppressive conduct concerning the business and affairs of BitRush has nothing to do with misrepresentations that occurred prior to the RTO. Further, the representations were made on behalf of MezzaCap Investments, in respect of its subsidiary MezzaCap GmbH. The order requested does not arise from Boehm's oppressive conduct that I have found.

$561,373

[81] The Applicants seek an order that 6,237,478 shares of BitRush (the share equivalent of $561,373 at current market price) held by MezzaCap Investments be cancelled in lieu of an order requiring the respondents to return the CAD $561,373 which Boehm and Sixt misappropriated.

[82] The money has been clearly misappropriated by Boehm. Further, although requested, neither he nor Sixt have accounted for it or returned any of the funds to BitRush. Nor would a judgment for the money have any chance of being realized on. The respondents have already demonstrated that they will not respond to court orders.

[83] In my view, BitRush is entitled to the order requested. Boehm's misappropriation of the money without any explanation is part of the affairs of BitRush. Further, the loss of that money is extremely prejudicial to BitRush. BitRush was not in good financial shape at the time the

monies were transferred. The 3rd quarter financial statements for 2016 (which were never certified) show a net loss for the nine month period of $1,193,658.

Conclusion

[84] For the above reasons, therefore, the following orders shall issue:

a) A declaration pursuant to s. 248 of the OBCA that Boehm caused the affairs of BitRush to be conducted in a manner that was oppressive, unfairly prejudicial and unfairly disregarded BitRush and its shareholders and in breach of his fiduciary duties to BitRush;

b) An order that BitRush shall issue 4,500,000 shares from treasury to Dr. Kalcher and at the same time cancel 4,500,000 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

c) An order that BitRush shall issue 5,856,910 shares from treasury to HSRC and at the same time cancel 5,856,910 of MezzaCap Investments shares in BitRush and amend its share registry accordingly;

d) An order that BitRush shall cancel 6,237,478 of MezzaCap Investments shares in BitRush and amend its share registry accordingly.

e) The balance of the relief requested is dismissed without prejudice to BitRush raising it at some future time if it considers it appropriate.

[85] While the Applicants did not obtain all the relief they sought on this Application, they were successful in establishing oppression. They are entitled to their costs. In that regard, they have submitted a bill of costs claiming partial indemnity costs (including disbursements) totaling $225,956.87 and substantial indemnity costs totaling $338,935.46.

[86] The Application involved a significant amount of work. The record comprises four large volumes. The issues were complex and even though the respondents did not appear it required the better part of two days to hear. In addition to the main Application, the Applicants had to respond to the respondents' jurisdiction challenge.

[87] In my view, notwithstanding my findings in respect of Boehm's conduct, I think the appropriate scale is partial indemnity. Having reviewed the bill of costs, I am satisfied that the both the time spent and the rates charged are reasonable. Given the issues and the result, I consider that the amount claimed of $225,956.87 is fair and reasonable.

[88] The Application was really directed at Boehm and MezzaCap Investments. No claims were asserted against Dobias and no relief was sought against him apart from return of property. Sixt was added as a respondent later with respect to return of property. No substantive claim was asserted against either of them and no relief sought against either of them on the motion before me. Accordingly, I would not award costs against Dobias or Sixt.

[89] Costs to the Applicants, fixed at CDN $225,956, payable by Boehm and MezzaCap Investments.

L. A. Pattillo J.

Released: November 14, 2017

CITATION: Arend v. Boehm, 2017 ONSC 3582
COURT FILE NO.: CV-16-11653-00CL
DATE: 20171114

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KARSTEN AREND, HANSJOERG WAGNER AND BITRUSH CORP.

Applicants

– and –

WERNER BOEHM, ALFRED DOBIAS AND MEZZACAP INVESTMENTS LTD. AND ELFRIEDE SIXT

Respondents

REASONS FOR JUDGMENT

PATTILLO J.

Released: November 14, 2017