IN THE MATTER OF AN ARBITRATION PENDING

B E T W E E N:

DMITRI TEREKHOV

Claimant

and

CHEMICAL VAPOUR METAL REFINING INC., CVD MANUFACTURING INC., CVMR CORPORATION, CVD CONSOLIDATED ACCOUNTS MANAGEMENT INC., NET PROCESS TECHNOLOGIES HOLDING INC., REPROTECH LIMITED and KAMRAN KHOZAN

Respondents

Interim Award

Overview

1. This motion is brought by the Respondents in this Arbitration seeking an award for the following relief:

a) An award dismissing the claims set out in the Statement of Claim that are statute-barred under the *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, sections 4 and 5;
b) A declaration that the Claimant, Dmitri Terekhov ("Claimant"), owns no Shares of the Respondent, Chemical Vapour Metal Refining Inc. ("CVMR");
c) In the alternative, a declaration that the Claimant is the owner of 175,000 Preference Shares of the Respondent, CVMR, having the terms and conditions described in a Special Resolution of Shareholders and Directors dated April 11, 2005.

2. This Arbitration is directed to me by the Order of the Superior Court dated 19th November 2014. The Order was made on consent of the parties and directs the arbitrator to deal with all of the allegations in the statement of claim except the claim by the Claimant for damages for wrongful dismissal. That claim remains to be dealt with in the litigation in the Superior Court.

3. Subsequent to the Order and with the consent of the parties, pleadings were amended but the subject matter of the dispute before me remains the same in substance
4. There is no cross motion by the Claimant.
5. The Parties agreed to bifurcate the arbitration. On this motion each party filed affidavit material and then cross examined the affiants before me. The Claimant called 2 additional witnesses via Skype. Following viva voce evidence counsel made submissions and my decision was reserved. Additional submissions were made by email.

The Parties.

6. The Claimant is a scientist who holds a doctorate in chemistry from York University and has a Masters Degree in chemistry from the state university in St Petersburg, Russia in 1985.
7. He arrived in Canada in 1990. He is 52 years old. While attending York University and working as a research scientist, he worked part time for Mirotech Ltd. (Mirotech).
8. In 1997, after graduation, the Claimant was hired by that company full time as a research scientist.
9. Khozan is a business man and the directing mind of the respondent corporations.
10. Khozan bought the assets of Mirotech out of bankruptcy in about 1999 through a nominee company he owned beneficially and controlled, namely the Respondent Net Process Technologies Holding Inc. (Net Process).
11. Chemical Vapour Metal Refining Inc. (CVMR) was incorporated by Khozan through his nominee Net Process. Khozan personally financed the new entity. CVMR employed the Claimant pursuant to a contract for professional services dated July1, 2000, which describes the Claimant as experienced in the fields of "chemistry and chemical vapour deposition technology".
12. Khozan agreed to give the Claimant common shares in CVMR. In addition, Khozan agreed with the Claimant that one Vladmir Popik (Popik) should have shares as well.
13. CVMR was incorporated by a law firm under the Canada Business Corporations Act in Nov. 1999. The company's Articles of Incorporation authorizes the company to issue an unlimited number of one class of shares, namely common shares.
14. At the outset 100 common shares were issued by CVMR, 80 to Khozan, 20 to the Claimant. Subsequently, each of these 2 shareholders gave 2 1/2 shares to Popik so that Popik had 5 common shares in CVMR. Later additional shares were issued to each of the shareholders.

15. At no time were preference shares issued or formally authorized by any amendment to the the articles of incorporation of CVMR.
16. The Claimant was employed by CVMR from its inception to 2014.
17. Khozan, and the Claimant were the original officers and directors of CVMR.
18. The other respondents are companies beneficially owned by Khozan and controlled by him.

The Business

19. The business of CVMR was the production of industrial moulds. Connected with that is the chemical vapour deposition process. The purpose of the incorporation of CVMR was to continue to develop a process for the extraction of metals, particularly nickel, either from ore or from concentrates.
20. A customer, Falconbridge, expressed an interest in certain technology and process in which the Claimant had expertise.
21. Khozan recognized the Claimant's technical talent and value to his enterprise.
22. The Claimant and Khozan by his nominee, Net Process entered into a shareholders agreement (USA) dated Jan. 1, 2000.
23. The USA states, Net Process owns 775,000 common shares, Terekhov owns 175,000 shares and Popik owns 50,000 shares.
24. The USA provides that certain actions by CVMR requires directors' approval. One such action is the declaration and payment of a dividend. The USA also provides for the right of any shareholder to purchase the shares of a non-incorporated shareholder if the former ceases to be employed by the company at fair value (see s.3.05).
25. The USA also provides for arbitration for the resolution of all disputes (see s. 4.09)
26. The USA is executed by the 3 shareholders, including Net Process by Khozan. For my purposes, Khozan and Net Process are interchangeable. He is the directing mind and the company is his alter ego.

Facts

27. In April 2005, certain corporate documents were drawn by someone and executed by which both the Claimant and Popik purport to convert their shares to preference shares. Both the Claimant and Popik acknowledge signing these documents.
28. There have been no steps taken since that time to amend the articles of incorporation to permit the issuance of preference shares and no preference shares have been issued by CVMR.

29. The certificate which evidences the common shares owned by the Claimant remains in his possession
30. The Claimant says the whole subject of converting his common shares to preference shares arose amidst some concerns over the use of certain equipment by CVMR to solicit business from a Chinese customer. Khozan represented that CVMR might be sued and Khozan persuaded both the Claimant and Popik to accept his plan to "protect" the 2 shareholders from personal liability to Falconbridge in the event CVRM was sued.
31. The Claimant and Popik said they naively went along with the plan but had no understanding of the significance of these acts. Both testified that they knew nothing about the differences between common and preference shares, knew nothing about the finances of CVMR, and followed the direction of Khozan believing him and his stated motive to protect them from potential liability.
32. Khozan contradicts this narrative and says he asked for the return of the common shares for 2 reasons: 1) At about the same time, Khozan and the Claimant were working on a very substantial contract for the Chinese customer and Khozan contemplated "an IPO" and didn't want to share the profits with the Claimant or Popik, and 2) the Claimant and Popik hadn't fulfilled their promise to develop business in the Soviet Union. He stated he gave the Claimant and Popik only the latter reason. This is emphatically denied by the Claimant. Both the Claimant and Popik state they never held out any promise of obtaining business from the Soviet Union. Both state they were hired and presumably given equity because of their expertise in the manufacturing process CVMR wished to pursue. Neither the Claimant nor Popik were marketing people and never suggested they were to Khozan.
33. On issues of credibility, I find the narrative told by the Claimant and largely corroborated by Popik is much more credible. Both the Claimant and Popik, in a very credible manner state they knew nothing about finances and even less about marketing. They both stated they never promised to solicit business in the Soviet Union. They both stated they were hired for their technical knowledge. While they were both grateful for receiving equity in CVMR, they assumed it was as an incentive to develop new processes which could be used commercially
34. Shortly after signing the documents for converting their shares, the Claimant says Khozan told the Claimant a dividend was declared by CVMR and that his share of the dividend was $1 million. The Chinese contract was very lucrative and was performed over the period 2005 to 2007.
35. Later, the Claimant says Khozan told him his $1 million was invested with Khozan's investment advisor at Credit Suisse. Khozan told him that his

investment was safe from any fluctuations in the market. Khozan introduced the Claimant to his financial advisor with Credit Suisse.

36. The Claimant says that over time and from time to time when the Claimant asked when he would get his money, Khozan suggested it would be better for him to get his money in small tranches and to make it payable to Claimant's wife to avoid tax consequences. Claimant says he trusted Khozan , took his advice, and received one payment of $5000 payable to his wife from one of Khozan's companies
37. This narrative is also contradicted by Khozan. Khozan denies ever telling the Claimant about a dividend, about investing his money with Credit Suisse and about promising to retrieve the Claimant's money from Switzerland. The cheque for $5000 was produced in evidence; Khozan said it was given as a one time payment to assist Khozan's wife.
38. I had the opportunity to see the 3 men in the witness box, under cross examination and to view the documents. I accept the narrative told by the Claimant.
39. The Claimant's version of the reason for the conversion of the shares is corroborated by the evidence of Popik, who is also a scientist and holds a PH.D
40. With respect to the dividend and the investment in Credit Suisse, the Claimant produced 2 emails he sent to Khozan which are consistent with his testimony that Khozan told him his $1 million was invested with Khozan's money in Switzerland.
41. The 1st email dated Dec 12/07 and sent to Khozan states:"This email is authorization to invest $500,000 according to your proposal. Thank you for opportunity"
42. Khozan acknowledged receiving this email but denied it had anything to do with money invested for the Claimant.
43. The Claimant's evidence was that Khozan asked for the Claimant's written authorization to deal with the funds in Switzerland because the advisor was switching firms and he, Khozan would give instructions to the advisor on behalf of the Claimant to transfer his money as well. The evidence of the Claimant was that this email was sent to Khozan to give him written authority to carry out the transfer and was sent at Khozan's request.
44. The 2nd email dated Jan 17/08 states: "this email is authorization to invest second half of money from account according to your proposal. Thank you for opportunity".
45. According to the Claimant's evidence this was the written authority requested by Khozan to invest the second half of the $1million dividend.
46. Khozan had no explanation for the 2nd email

47. The Claimant continued to work for CVMR until 2014.
48. There is much controversy over the Claimant's departure from CVMR which I have no mandate to resolve. However, the circumstances of the departure may have some bearing on the rights of the parties under the USA. There is no need for me to deal with these issues on this motion.
49. The Claimant did not know that Khozan denied the existence of the dividend, and the investment in Switzerland until pleadings were delivered in this proceeding. Whether there was a dividend declared and whether money was invested for the Claimant, I leave open for present purposes. However, Khozan testified, it did not happen.

Issues

50. The Claimant in the arbitration seeks a declaration that he remains a holder of common shares; that the conversion of his common shares to preference shares in the 2005 transaction is null and void; that he is entitled to remedies against CVMR and the other Respondents; that he is entitled to the balance of the dividend; he seeks oppression remedies, damages for misrepresentation and payment of appropriate dividends.
51. In this motion, the Respondents argue, even if the facts are as alleged by the Claimant he cannot succeed in his claim by reason of:

a) the limitation period set out in the Limitations Act ;
b) he is not a shareholder within the meaning of the USA, ie, he does not own common shares and therefore has no status to claim relief as shareholder.

Position of the Parties

52. The Respondents submit the burden rests with the Claimant to show that his claims are not statute barred.
53. The Respondents says a dividend can only be authorized by the board of directors and no such act took place. Further, they state, no dividend was paid and no money was invested on behalf of the Claimant.
54. Further, the Respondents say both the claim for the dividend and the claim to set aside the purported conversion of the common shares to preference shares arose well over 2 years ago; it is argued that all the facts relevant to these claims were known or were readily discoverable well before any claim for that relief was extinguished by the limitations period.
55. Khozan gave evidence that the books and records of CVMR were open and available to the Claimant; that the Claimant knew everything about the financial affairs of CVMR; and therefore any complaint he had about the conversion of shares or the absence of a dividend of $1 million in his favour

was easily discoverable by him well before the expiration of the limitation period.

56. The Claimant testified that he knew nothing about the company's finances, that he may have signed corporate documents but only did so relying on the direction of Khozan who was his employer and the owner of the majority of the company's shares.
57. The Claimant argues the limitation period does not run where there is fraud and fraudulent concealment; that the Respondents' position is unconscionable; that the majority shareholder failed to give the minority shareholder proper notice and proper information on which to give his consent; and that the relationship between the majority shareholder and the minority shareholder was one of employer/employee which gives rise to special duties certainly not observed in the circumstances. Further, the Claimant submits the so called conversion of shares remains executory, in that the articles of the corporation have never been amended to permit the issuance of preference shares and no preference shares have ever been issued. The Claimant remains in possession of the share certificate for common shares which was never surrendered.
58. I accept the Claimant's evidence that he did not have any real knowledge of CVMR's finances; he did not understand the corporate documentation and relied on what he was told by Khozan about the meaning and effect of those documents.

Discussion and analysis

59. It should be remembered that this motion is brought on the basis that even if the Claimant's evidence is believed, he cannot succeed.
60. I have already indicated I accept the evidence of the Claimant and Popik on those matters where their evidence conflicts with Khozan.
61. In my view, the 2 issues are connected.
62. The Claimant can rely on the representation made by Khozan that a dividend was declared and $1million was invested in Switzerland to explain why no action was taken sooner. Khozan's representation was confirmation that the Claimant's rights as a shareholder were not affected by the alleged conversion of shares. Khozan misled the Claimant in 20005 as to the purpose and effect of that transaction, and misled him again with regard to the declared dividend.
63. As for the failure to sue for the invested dividend, there was no need to do that. The Claimant was assured by Khozan from time to time that the money

was safely invested in Switzerland with Credit Suisse, and then with the new financial manager.

64. If no dividend was paid out of CVMR and no investment was made for the Claimant, as claimed by Khozan, then Khozan deceived the Claimant and cannot rely on a limitation period to defeat the claim. He has misrepresented the state of CVMR's affairs to his minority shareholder and employee intending it to be relied upon. It was relied upon by the Claimant.
65. In those circumstances, the limitation period defence is not available and does not afford the Respondents with any defence. Equity will not permit a statute to be used as an instrument of fraud. See Giroux Estate v. Trillium Health Centre 2005 Carswell Ont.241 (Ont. Court of Appeal) at para 28 and following.
66. I see the 2005 so called corporate resolutions as part and parcel of the deception perpetrated by Khozan.
67. Furthermore, even at this time, there are no preference shares either authorized or issued. The conversion contemplated by the impugned documents never took place. The articles of incorporation were never amended to permit the issuance of preference shares. In these circumstances, I find that the Claimant is the owner of common shares as represented by the share certificate he holds.
68. I make no findings with respect to the relief claimed by the Claimant, save that I declare him to be the owner of common shares and that his claims are not defeated by the Limitations Act.
69. The Motion is dismissed and the Claimant is allowed to proceed with the arbitration.
70. I am directed by the Order of the Superior Court to continue with this arbitration and to dispose of the claims made. I will wait for Counsel to agree on next steps but I am available to give directions if necessary.
71. If the parties are unable to settle costs of this motion, I invite submissions in writing. The Claimant will have 3 weeks from today's date to deliver his submissions and the Respondents will have 2 weeks thereafter to respond. The Claimant will have 1 week from the receipt of the Respondents' submissions for any reply.

I wish to thank Counsel for their cooperation, civility and able advocacy in dealing with the motion.

Dated at Toronto, this 10th day of December, 2015

Stan Fisher, Q.C.