ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-25-00742665-00CL **DATE: September 16, 2025**

NO. ON LIST: 1

TITLE OF PROCEEDING: Nemetz, Ari / YYBay Investments Limited VS. Sturm, Hanan / Headns Corporation / NJS Capital Management

BEFORE: JUSTICE CAVANAGH

PARTICIPANT INFORMATION

For Applicant:

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For c: Respondent

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ENDORSEMENT OF JUSTICE CAVANAGH:

Introduction

[1] In this application, the Applicants, Ari Nemetz and his company YYBAY Investments Ltd. (together, "Ari") seek a *de novo* decision under s. 17(8) of the *Arbitration Act, 1991* (the “Act”) following a ruling made by Arbitrator Peter Roy (the "Arbitrator") who determined that he had jurisdiction to hear the arbitration claims of the Respondents, Hanan Sturm and HEADNS Corporation (together, "Hanan").

[2] In his Amended Fresh as Amended Notice of Application, Ari seeks:

a. A declaration that the Arbitrator lacks jurisdiction to determine Hanan's allegations in respect of the business of the 20 properties underpinning Hanan's $35 million damages claim and other claims, pursuant to this Court's authority under s. 17(8) of the *Arbitration Act, 1991* (the "Act").

b. A declaration that the Arbitrator lacks jurisdiction to determine the enforceability and scope of Article 2.04 of the 2014 Agreement, pursuant to this Court's authority under s. 17(8) of the Act.

c. A declaration that Article 2.04 of the 2014 Agreement constitutes an unlawful restraint of trade and is thus unenforceable. In the alternative, a declaration limiting the prohibited time under Article 2.04 to the period up to April 1, 2022. In the further alternative, a declaration limiting the territory envisaged under Article 2.04 of the 2014 Agreement to the Greater Toronto Area and the prohibited activities to acquiring, owning and managing real estate properties.

d. An order setting aside the arbitrator's ruling on jurisdiction dated February 26, 2025 and the arbitrator's ruling on Ari's pleading motion dated April 2. 2025, pursuant to s. 6(2), 6(3), 19 and 46(1) of the Act and directing the arbitrator to strike out certain paragraphs of Hanan's Counter-Notice of Arbitration.

[3] Ari's counsel advised the Court at the hearing of this application that Ari is not pursuing his application for an order setting aside the Arbitrator's ruling on jurisdiction dated February 26, 2025 and the Arbitrator's ruling on his pleading motion dated April 2, 2025.

[4] For the following reasons, this application is dismissed.

Background Facts

[5] NJS Capital Management Inc. ("NJS Capital") was formed in 2014.

[6] Ari is a director, president and 50% indirect shareholder of NJS Capital through his personal holding company, YYBAY Investments Limited. Hanan is a director, secretary and 50% indirect shareholder of NJS Capital through HEADNS Corp.

[7] Ari and Hanan entered into a shareholders agreement dated July 31, 2014 (the "2014 Agreement"). The 2014 Agreement, in a recital, describes the business of NJS Capital as the business of "home renovation, residential real estate investment and multi-unit residential rental portfolio, and such activities as are ancillary thereto".

[8] Each of Ari and Hanan, through their respective holding companies, acquired interests in certain properties. The properties were acquired through either a single purpose entity or a limited partnership set up to hold title to each property. NJS Capital never acquired an ownership interest in a property. NJS Capital received income through fees for services provided for the properties. NJS Capital had employees who provided services for the benefit of these properties and were paid by NJS Capital.

[9] Ari initiated an arbitration proceeding on December 4, 2024, seeking various orders. On January 13, 2025, the parties agreed to appoint the Arbitrator to arbitrate the disputes in Ari's Notice of Arbitration.

[10] On January 17, 2025, Hanan served a Response to the Notice of Arbitration and a Counter Notice of Arbitration (the "counterclaim").

[11] In the counterclaim, Hanan alleges that, in respect of NJS Capital, Ari engaged in oppressive conduct toward him and/or caused NJS Capital to engage in such conduct. Hanan seeks:

a. a declaration under s. 248 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA") that Ari has engaged in conduct and/or caused NJS Capital to engage in conduct that is oppressive of, unfairly prejudicial to, or unfairly disregards the interests of Hanan.

b. an order under s. 248(3)(f) of the Act requiring Ari to purchase Hanan's interest in NJS Capital for fair market value on a date to be determined.

c. an order under s. 248(3)(j) of the Act requiring Ari to compensate Hanan as one or more "aggrieved persons".

d. damages of $35,000,000, or in an amount to be determined at the Arbitration, for oppression, breach of the Agreement and/or breach of fiduciary duty.

e. in the alternative, and in any event, the disgorgement of all profits that Ari has earned or may earn in breach of his fiduciary duty.

[12] In the counterclaim, in addition to other claims, Hanan claims that Ari breached the 2014 Agreement and statutory and fiduciary duties owed to him by Ari by competing with NJS Capital through the acquisition of properties outside of NJS Capital.

[13] On January 27, 2025, Ari commenced this application seeking (a) a declaration that Article 2.04 of the 2014 Agreement constitutes an unlawful restraint of trade and is thus unenforceable; (b) in the alternative, a declaration limiting the prohibited time under Article 2.04 to the period up to April 1, 2022; (c) in the alternative to (a), a declaration limiting the territory envisaged under Article 2.04 of the 2014 Agreement to the Greater Toronto Area and the prohibited activities to acquiring, owning and managing real estate properties.

[14] Ari brought a motion before the Arbitrator seeking orders that (a) Hanan's claims for $35 million in damages and the balance of the allegations relating to the business of the limited partnerships, and (b) Hanan's claim that Ari breached the 2014 Agreement and his statutory and fiduciary duties by competing with NJS Capital, be stayed for lack of jurisdiction. Ari also moved for an order that certain portions of Hanan's Counter Notice of Arbitration be struck on the basis they plead no reasonable cause of action or otherwise contain bald and irrelevant allegations and/or lack particulars.

[15] Hanan brought a motion before the Arbitrator to strike out certain parts of Ari's Notice of Arbitration on the grounds that they plead privileged settlement discussions.

[16] The Arbitrator released his decision on jurisdiction on February 26, 2025. He found that:

a. Article 2.04 of the 2014 Shareholders' Agreement does not give exclusive jurisdiction to the Ontario Superior Court of Justice to determine its applicability. This Tribunal has the authority to deal with the non-competition clause in the context of the oppression claim.

b. He has jurisdiction over Hanan's claims for $35 million in damages and the balance of the oppression claims, including the allegations that Ari's conduct relating to the business of the limited partnerships violated the non-competition clause. The Arbitrator dismissed Ari's motion with respect to those two matters .

[17] The Arbitrator released his decision on the pleadings motions on April 2, 2025.

[18] Ari amended his Notice of Application to seek relief under s. 17(8) of the Act and other relief as claimed in his Amended Fresh as Amended Notice of Application. This application is before me.

Analysis

Does the Arbitrator have jurisdiction over Hanan's claim of damages for statutory oppression, breach of the 2014 Agreement, and breach of fiduciary duties in the amount of $35 million or by way of an order that Ari buy out Hanan's interests in various limited partnerships for $35 million?

[19] Section 17(8) of the Act provides:

> (8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter.

[20] An application under s. 17(8) of the Act is a hearing *de novo*. It is not a review of the decision of the arbitral tribunal. The matter referenced in s. 17(8) of the Act is the issue of the tribunal's jurisdiction. See *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894, at paras. 21-24.

[21] The 2014 Agreement includes an arbitration provision that reads, in part:

> **12.01** ***Arbitration***. In the event of any dispute, claim, or question (each, a "Dispute") arising out of or relating to this Agreement or any of the transactions contemplated therein or relating thereto which cannot be resolved by agreement between the parties, the determination of such Dispute shall be finally settled by arbitration in accordance with the provisions of the Arbitration Act, 1991 (Ontario), on the following terms: …

[22] In his Response to the Notice of Arbitration, Hanan asserts that between late 2016 and 2022, he and Ari, as part of the NJS Capital venture and through corporations or limited partnerships, acquired an interest in numerous properties. These properties were owned by limited partnerships or special purpose vehicles in which Ari and Hanan had interests.

[23] In the prayer for relief in the counterclaim, Hanan claims damages of $35,000,000, or in an amount to be determined at the Arbitration, for oppression, breach of the Agreement and/or breach of fiduciary duty. In the counterclaim, Hanan asserts that his interest in the properties acquired as part of the NJS Capital venture was worth $34.7 million as of March 2023 (or $32.4 million as of January 2024). He asserts that these values are the basis upon which he seeks $35 million in damages "by way of an order that Nemetz and/or YYBAY buy out Sturm and/or HEADNS' carried interest in all properties within the NJS Portfolio".

[24] Ari submits that the Tribunal lacks jurisdiction over the dispute involving Hanan's claim seeking an order compelling Ari to buy out Hanan's interests in various limited partnerships for $35 million or pay $35 million in damages.

[25] In *Haas v. Gunasekaram*, 2016 ONCA 744 (CanLII), the Court of Appeal decided an appeal from the decision of the motions judge refusing to stay an action under s. 7 of the Act.

[26] The Court of Appeal in *Haas* held that the language of section 7 of the Act strongly favours giving effect to an arbitration agreement. The Court of Appeal, at para. 17, set out the analytical framework to be followed on a motion under s. 7(1) of the Act which includes determining the subject matter of the dispute and the scope of the arbitration agreement. The Court of Appeal held

that the motion judge did not err in following what he called the "pith and substance" approach to characterizing the claims for the purpose of determining the proper scope of the arbitration agreement.

[27] This application is not brought under s. 7(1) of the Act. It is brought under s. 17(8) of the Act. However, in order to determine whether the Arbitrator has jurisdiction over Hanan's claim for damages for oppression in respect of NJS Capital based on the value of his interest in properties owned by limited partnerships or special purpose vehicles, including by way of an order that Ari buy out his interest in such properties, I need to determine the subject matter of the dispute and whether it falls within the scope of the arbitration agreement.

[28] Ari submits that Hanan's damages claim of $35 million is premised on the alleged value in early 2023 of his interests in the relevant properties. He notes that Hanan seeks damages by way of an order from the Arbitrator that Ari buy out Hanan's interests in the limited partnerships. Ari notes that these properties and the ownership interests in them are governed by separate limited partnership agreements with their own limited partners and other parties that are not referenced in Hanan's claim or before the Arbitrator. Ari submits that since this remedy arises from business relationships that are distinct from NJS Capital and its shareholder agreement, the claims are not subject to arbitration under the 2014 Agreement.

[29] In the counterclaim, Hanan alleges that the business of NJS Capital involved acquisition of properties to be owned by limited partnerships and special purpose vehicles where NJS Capital would (a) provide property, asset management and construction management services to the properties; (b) assist with the entitlements and zoning process for properties; (c) maintain and pay for the payroll associated with these functions; and (d) for and maintain a physical office at which this work was performed. Hanan alleges that NJS Capital financed this arrangement by charging acquisition fees on the purchase of properties, and by charging property or asset management fees. He alleges that, in this way, the continued acquisition and management of properties funded NJS Capital.

[30] Hanan alleges in his counterclaim that as a result of this arrangement, it was never intended that Ari and Hanan would be remunerated directly from NJS Capital's day-to-day operations. He alleges that, rather, they were each remunerated for their work through their share of disposition fees and through their carried interest in the projects in which NJS Capital was involved. He alleges that, as such, their reasonable expectations as NJS Capital shareholders was, among other things, that they would share equally in all "upside" arising out of NJS Capital's dispositions, refinancings and holdings.

[31] Hanan alleges that Ari engaged in oppressive conduct in respect of the business of NJS Capital including by, among other things, (i) rendering it insolvent, (ii) using funds of NJS Capital to acquire properties outside of NJS Capital in competition with NJS Capital, and (iii) making unilateral decisions in respect of the properties that harmed Hanan.

[32] One issue on this application is the interpretation of the 2014 Agreement.

[33] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada held that the overriding concern in interpretation of contracts is the determination of the intent of the parties and the scope of their understanding. To make this determination, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[34] As I have noted, the 2014 Agreement, in a recital, describes the business of NJS Capital as the business of "home renovation, residential real estate investment and multi-unit residential rental portfolio, and such activities as are ancillary thereto". Recitals to the 2014 Agreement read that "Ari shall be responsible for research and development, including but not limited to site evaluations, portfolio management and surveying of future projects" and "Hanan shall be responsible for securing funds by way of private investors to fund projects and/or acquire real property".

[35] When I give these words their ordinary and grammatical meaning, I conclude that the business of NJS Capital within the meaning of the 2014 Agreement includes real estate investment and portfolio management activities, and activities ancillary thereto, in respect of a portfolio of real estate projects to be acquired. This is consistent with statement made in Ari's Notice of Arbitration in which he states, at paragraph 41, that NJS Capital engaged in the business of acquiring, owning and managing real estate properties. The 2014 Agreement does not specify the ownership structure of the real properties to be acquired.

[36] In *Woolcock v. Bushert*, 2004 CanLII 35081 (ON CA), the Court of Appeal for Ontario decided an appeal concerning whether an action should be stayed in favour of arbitration. The agreement was in respect of a company of which there were two directors who were equal shareholders. The agreement included a mandatory arbitration clause which provided that "[a]ny dispute or controversy between the parties hereto relating to the interpretation or implementation of any provision(s) of this Agreement shall be resolved by arbitration". The Court of Appeal held that the words "relating to" enjoy "wide compass" and so long as the matter in dispute is referable to the interpretation or implementation of some provision of the Agreement, it is arbitrable.

[37] Hanan's claim for statutory oppression relates to the business of NJS Capital which includes its activities in respect of the portfolio of real estate projects owned by limited partnerships or special purpose vehicles in which Hunan and Ari held interests. This claim relates to the 2014 Agreement because it involves a dispute between shareholders of NJS Capital and involves allegations that Ari acted oppressively toward Hanan in respect of NJS Capital. This claim is not a claim of oppression in respect of any other entity. I find from the plain language of the 2014 Agreement that the acquisitions of real estate properties comprising a portfolio of projects to be managed by NJS Capital are transactions contemplated by the 2014 Agreement.

[38] The Arbitrator has jurisdiction under the 2014 Agreement to decide Hanan's claims in respect of NJS Capital for oppression, breach of the Agreement, and breach of fiduciary duty because these claims relate to the business of NJS Capital and fall squarely within the arbitration clause in article 12.01 of the 2014 Agreement. The availability of the remedies claimed by Hanan for these claims, that is, damages determined by the value of his interest in the separately owned properties and a buy-out of his interest in these properties, is a matter to be determined by the Arbitrator as a part of his determination of these claims.

[39] The fact that these properties are the subject of separate limited partnership agreements with their own dispute resolution provisions involving recourse to the courts, to which other investors are parties (who are not parties to the arbitration and may be affected by the relief sought), may affect the availability of the remedies sought by Hanan. These remedies may or may not be available to Hanan based on the evidence to be adduced at the arbitration and the application of proper legal principles. This fact does not, however, deprive the Arbitrator of jurisdiction under the 2014 Agreement over Hanan's oppression claim in respect of NJS Capital and the remedies sought.

[40] I conclude that the Arbitrator does not lack jurisdiction over the dispute involving Hanan's claims for statutory oppression, breach of the 2014 Agreement or breach of fiduciary duty for which he

seeks remedies of damages of $35 million or an order compelling Ari to buy out Hanan's interests in various limited partnerships or other entities for $35 million.

Does the Arbitrator lack jurisdiction to determine the enforceability and scope of Article 2.04 of the 2014 Agreement?

[41] Section 2.04 of the 2014 Agreement provides:

> ***2.04 Non-Competition***. No Shareholder, while it or any of its Permitted Transferees is a Shareholder and for a period of six (6) months thereafter, may, either individually or in partnership or jointly or in conjunction with any Person, as principal, agent, trustee, shareholder, employee, or consultant, or in any manner whatsoever, whether directly or indirectly, carry on or be engaged in or concerned with or interested in, or advise, lend money to, guarantee the debts or obligations of, or permit its name or any part thereof to be used or employed by or associated with, any Person engaged in or concerned with or interested in any business that competes with any business carried on by the Corporation during the time that such Party was Shareholder, anywhere in Canada.
>
> In the event that a court of competent jurisdiction determines that the territory, capacities, activities, or period specified in this paragraph is unreasonable, such court shall have the power and authority to, and is hereby requested to, limit such territory, capacities, activities, or period to such territory, capacities, activities, or period as such court deems reasonable in the circumstances, and, in its modified form, the provisions hereof shall then be enforceable and will be enforced.

[42] Ari submits that article 2.04 of the 2014 Agreement expressly provides for a court of competent jurisdiction (i.e. the Ontario Superior Court of Justice) to have the exclusive authority to determine the reasonableness of the territorial application and time of restraint of the provision and, if requested, to limit such territory as it deems reasonable in the circumstances. Ari submits that this clause does not give the court jurisdiction to resolve the merits of the non-compete allegations raised by Hanan, nor to determine any other dispute between the parties.

[43] Ari submits that article 2.04 and article 12.01 of the 2014 Agreement must be read together. He submits that if a dispute over the scope or enforceability of the non-compete clause could be arbitrated, then there would be no room for a court to determine the enforceability in 2.04 and the language of 2.04 about the role of the court would be meaningless because all such disputes would need to be arbitrated. Ari submits that this interpretation should be rejected because it gives no meaning or effect to the second paragraph of Article 2.04.

[44] In support of his submissions, Ari relies on *Allied Accounting et al v. Pacey*, 2017 ONSC 4388. In *Allied*, a shareholder agreement contained an arbitration clause providing that any dispute pertaining or under the agreement shall be determined by arbitration. Some parties to the agreement commenced an action seeking remedies including an accounting, damages and injunctions. They relied on provisions in the agreement concerning the subject matter of the claims which refer to "court" or "a court of competent jurisdiction". The other party, relying on the arbitration provision, moved to stay the action. This party submitted that the reference to "court" in the provisions using this word includes an arbitrator.

[45] In *Allied*, the motion judge decided that s. 7(1) of the Act had not been triggered and the action should not be stayed. One of the reasons given by the motion judge was that the agreement was written with the former *Arbitration Act* in mind, which did not give an arbitral tribunal the authority

to order injunctions and other equitable remedies. The motion judge found that the provision in the agreement providing for the right of a shareholder to obtain equitable relief in "any competent court having jurisdiction over the Shareholder" was necessary to fill a legislative gap. This reasoning is not applicable on this application. The 2014 Agreement was not drafted with the former Act in mind, and there is no legislative gap to be filled where the dispute could not be resolved by arbitration. I regard this to be a material point of distinction between *Allied* and the application before me.

[46] Article 12.01 provides that any unresolved dispute arising out of or relating to the 2014 Agreement shall be finally settled by arbitration. Article 12.01 does not say that the mandatory language is qualified by article 2.04. If the parties intended to carve out a particular dispute as being outside the mandatory jurisdiction otherwise conferred by article 12.01, such as the scope and enforceability of the non-competition provision, clear language would be necessary.

[47] Article 2.04 of the 2014 Agreement does not expressly confer exclusive jurisdiction to the Ontario Superior Court of Justice to decide whether the territory, capacities, activities, or period specified in article 2.04 is unreasonable. Article 2.04 addresses only the consequence of such a decision by a court of competent jurisdiction.

[48] The Westlaw Canadian Encyclopedic Digest notes that an agreement may provide for alternative methods of dispute resolution:

> Where an agreement contains a clause providing that all questions or differences arising out of the agreement are to be referred to an arbitrator as well as a clause providing that, in the event of a breach of the contract, either party might bring an action in court, and that all remedies under the agreement are cumulative, there is no repugnance between the clauses. The parties intend that there should be two alternative ways of resolving disputes: the two remedies can exist side by side and independently of each other, Accordingly, a stay of the court proceedings granted by a judge in chambers will be vacated.

[49] When I read article 12.01 and article 2.04 of the 2014 Agreement together in the context of the 2014 Agreement as a whole, I conclude that the broad, mandatory language in article 12.01 applies to confer jurisdiction on an arbitral tribunal to decide questions relating to the non-competition provision in article 2.04, including whether the territory, capacities, activities, or period specified in article 2.04 is unreasonable. The second paragraph of article 2.04, without limiting the jurisdiction of the arbitral tribunal, and by reasonable implication, confers additional, independent, jurisdiction on a court of competent jurisdiction to decide whether the territory, capacities, activities, or period specified in article 2.04 is unreasonable.

[50] I do not agree with Ari that such an interpretation would leave no room for a court to determine the enforceability in 2.04 or that the language of 2.04 about the role of the court would be meaningless because all such disputes would need to be arbitrated. If a dispute arose with respect to the non-competition provision in article 2.04 of the 2014 Agreement, a party could seek the determination in a court of competent jurisdiction that the territory, capacities, activities, or period specified in this paragraph is unreasonable. In such circumstances, there would not necessarily be a need for an arbitration and, where the dispute was determined by the court and not in an arbitration, the role of the court would not be meaningless.

[51] I conclude that the Arbitrator does not lack jurisdiction to determine the scope and enforceability of Article 2.04 of the 2014 Agreement.

[52] Here, Ari commenced an arbitration and Hanan responded in the arbitration with a counterclaim that included the allegation that Ari had breached the non-competition provision in article 2.04 of the 2014 Agreement. Hanan also relies on his allegations in this respect as oppressive conduct for which he seeks remedies. Only after Hanan made his claims in the arbitration did Ari commence an application in this court for determination of issues relating to the scope of the non-competition provision in article 2.04. This dispute is properly before the Arbitrator, may relate to other disputes to be arbitrated, and should be decided by him.

[53] As a result of this conclusion, it is not necessary, nor would it be appropriate, for me to determine whether the territory, capacities, activities, or period specified in article 2.04 is unreasonable.

Disposition

[54] For these reasons, this application is dismissed.

[55] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon (with reasonable page limits) and approved by me.

Released: September 22, 2025