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92-year old minority shareholder obtains oppression remedy

By James R.G. Cook

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In *V.M. Koury Investments Ltd. v. Bolton Steel Tube Co. Ltd.*, 2021 ONSC 3408 (CanLII), the 92-year old applicant owned 30% of the shares of the respondent corporation, where her late husband had worked until 2008. After her husband stopped working, the majority shareholder began operating the company in a manner that was oppressive to, unfairly prejudicial to and that unfairly disregarded the interests of the applicant and her husband.

Justice M. Koehnen agreed. In finding that the majority shareholder had essentially operated the corporation as his private company, Justice Koehnen noted that:

- He failed to produce financial statements notwithstanding court orders requiring him to do so;
- He failed to provide any explanation as to how financial records for the fiscal years before 2018 were somehow "erased" from the company's computer system
- He paid himself approximately $3.3 million as shareholder advances which he then wrote off as being uncollectible;
- Those shareholder advances were obtained by incurring debt which was secured by high-interest mortgages on real estate that he owned;
- He paid over $4.1 million in interest costs on those high-interest mortgages, approximately $2.1 million more than he would have paid on a bank mortgage;
- Between 2012 to 2018, the company's expenses for "travel and entertainment and advertising and promotion" increased to 2.5% of its sales ($275,210 in fiscal 2018) notwithstanding consistent annual losses in those years, and he refused to provide access to the associated expense reports;

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- Between 2011 to 2019, the company paid $2.8 million in professional fees, apparently related to a tax assessment for the deduction of his personal expenses for purchase and maintenance of horses from the company's corporate accounts (this was not entirely clear because he refused to provide any details of the expenses);

- He refused to provide information that would allow the applicant or the court to determine whether he has been using company funds to pay for his personal defence of this proceeding.

The majority shareholder had little defence to these allegations. He argued that the applicant had received over $2,000,000 in dividends, but that was irrelevant to the issue of whether he had engaged in the financial misfeasance as alleged. He justified the write-offs of shareholder advances as being implemented on the advice of his auditors, but the auditor's view of whether something should be written off turned entirely on its collectability and had nothing to do with the validity or propriety of the initial advance. Further, collectability depended entirely on the majority shareholder.

The majority shareholder also referred to the challenges of the business affected by the steel industry in Canada in recent years. Of course, that too was irrelevant to the propriety of taking corporate assets for personal use, failing to provide audited financial statements, failing to comply with court orders and failing to provide financial information that might demonstrate the validity and propriety of the advances at issue.

Lastly, the majority shareholder argued that shareholder advances were compensation in lieu of salary, and that he had discussed a salary for himself of between $300,000 and $400,000 per year with the applicant's late husband. However, he provided no support for that salary, historically, or as being an appropriate salary for a business that has almost consistently lost money over the last 10 years.

There was no question that the applicant's reasonable expectations as a shareholder of the corporation were breached and that the majority shareholder's conduct amounted to oppression, unfair prejudice, and unfair disregard of the applicant's interests under the *Ontario Business Corporations Act* ("*OBCA*"), based on the Supreme Court of Canada's test for a finding of oppression: *BCE v. 1976 Debentureholders*, 2008 SCC 69 at paras. 56-59 and 95.

There was also no question that the applicant's shares needed to be bought out. However, the parties disagreed on the mechanism to do so.

Given that the company was operated entirely by the majority shareholder, Justice Koehnen determined that it would be warranted to appoint a receiver under section 101 of the *Courts of Justice Act* and section 248(3) of the *OBCA*.

Courts have appointed receivers in oppression cases where it was necessary to preserve the company's assets and protect the interests of the shareholders: *Adshade v TDCI Bracebridge Inc*. 2015 ONSC 1275 at para 26; *DBDC Spadina Ltd. v. Walton*, 2014 ONCA 428 (CanLII).

While the appointment of a receiver involves considerable intrusion into the corporation's affairs, any prejudice resulting therefrom was entirely of the majority shareholders' own making.

However, Justice Koehnen was cognizant of the considerable expense of a receivership which would quickly devour whatever equity remained

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in the business and decrease the amount available for distribution to the shareholders.

As a result, using the imperfect valuation evidence of the business and real estate holdings that had been filed by both parties, Justice Koehnen calculated a "rough and ready" buyout value for the applicant's share of the corporation at just over $3.9 million.

In the result, and in keeping with the court's flexible approach to fashioning remedies for oppression, Justice Koehnen gave the parties three options:

a) The majority shareholder could buy out the applicant's interest with payment of the $3.9 million buyout calculation;

b) If the parties disagreed on the court's assessment of the real estate valuation, then the receiver could conduct its own valuation of the real estate holdings and the parties could return to court if they contested the calculation;

c) If the majority shareholder contested the court's real estate valuation but the applicant did not, then the applicant could pursue the valuation of any other claims for oppression and the receiver would be directed by the court to investigate and arrive at a damage figure as best it can for such misfeasance.

The applicant was also awarded costs for the application in the amount of $316,449.68, payable by the majority shareholder or by the receiver upon the sale of the company's assets if the costs were not paid before that time.

The decision reflects the types of self-dealing and other financial misconduct that may arise when a closely held corporation is managed almost entirely by its majority owner without any involvement by the minority shareholders. The oppression remedy is intended to protect the minority shareholder's expectations in such circumstances, but the appointment of a receiver is almost always a remedy of last resort, signalling the imminent demise of the corporation as a going concern.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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