Torkin Manes LegalWatch

RECENT DEVELOPMENTS & TRENDS IN CASE LAW

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Using the Oppression Remedy to Recognize Beneficial Shareholder Interests

The oppression remedy is a broad power used by the Courts to enforce agreements and expectations between commercial parties. In many ways, oppression is the Courts' remedy of last resort. It is an equitable tool, employed to give effect to the parties' reasonable expectations, even in the absence of written agreements or specific contractual clauses.

A recent decision of the Ontario Divisional Court, *Behr v. 2305136 Ontario Inc*., 2016 ONSC 5039, per R.J. Smith J. ("*Behr*"), affirms that Courts will exercise their broad discretion under section 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c.B.16 (the "*OBCA*") to do justice between the parties. This includes the ability to recognize beneficial shareholder interests in a corporation where there is no written agreement between the shareholders.

Behr involved an oral agreement between the individual plaintiff and defendant. The parties agreed that the plaintiff would become a shareholder in the defendant corporation and was entitled to a shareholder loan of $2.8 million for his assistance in the restructuring of the individual defendant's company, Vikeda International Logistics and Automotive Supply (the "VIL").

At no time was the individual plaintiff an actual shareholder of the defendant corporation. Accordingly, the trial judge used the oppression remedy to recognize the plaintiff as a beneficial owner in the shares, based on the parties' conduct and their reasonable expectations. This decision was affirmed on appeal by the Divisional Court.

Facts

In August, 2011, the individual defendant approached the plaintiff when VIL, an automotive parts supplier, was in dire financial circumstances. The plaintiff had experience in realizing on distressed assets and in corporate restructuring.

Following significant efforts by the plaintiff to negotiate supply deals with VIL's creditors, VIL and the defendant corporation were able to

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recover approximately $10 million. The plaintiff did not invest capital in either the defendant company or VIL. Instead, it was through his efforts that VIL was successfully restructured.

The trial judge accepted the plaintiff's evidence that at a meeting which took place on December 10, 2011, the individual plaintiff and defendant orally agreed that from the anticipated $10 million that would be recovered by the defendant corporation, any "windfall" funds would be split 50-50 between them. In reaching this conclusion, the trial judge relied on emails and other representations by the individual defendant in which he referred to himself and the plaintiff as "equal partners".

In the action, the individual defendant disputed that he and the plaintiff had ever agreed that the plaintiff had a beneficial shareholder interest in the defendant company or that the plaintiff was entitled to a shareholder loan of $2.8 million in return for restructuring VIL. The plaintiff argued that the individual defendant did not "give any consideration" to the defendant company that would allow him to receive 50% of the shares in the company or to receive the shareholders loan.

This argument was flatly rejected by the trial judge. Instead, the trial judge employed the flexibility of the oppression remedy to give effect to the oral agreement between the parties. The Divisional Court upheld this exercise of the trial judge's discretion.

Recognizing Beneficial Ownership Under the Oppression Remedy

The Divisional Court began its analysis by recognizing that an appellate Court would rarely interfere with a trial judge's use of discretion under the oppression remedy. Emphasizing the language of section 248(3) of the *OBCA*, the Court noted that under the oppression remedy, the Court has the broad power to make any order "it thinks fit".

In this case, the oppression remedy was properly used by the trial judge to give effect to the beneficial ownership the plaintiff had in the defendant company, even if the plaintiff had never been issued his 50% shares in the company and even if the plaintiff had not contributed capital towards the company.

In effect, the Divisional Court held that recognizing the plaintiff's beneficial ownership as compensation for his efforts in restructuring VIL would affirm the parties' reasonable expectations:

> The trial judge found that [the individual defendant] agreed with [the plaintiff] that he would receive 50% of the shares in 2305 [i.e. the defendant corporation] in addition to a shareholder loan of $2.8 million in return for the services he provided in assisting [the individual defendant] with the financial restructuring of his VIL business. The fact that [the individual defendant] did not take steps to actually have 2305 issue 50% of its shares to [the plaintiff] in accordance with their agreement, does not affect the fact that [the plaintiff] met the definition of complainant under section 245 of the OBCA and as a result, he was a proper person to make an application [under the oppression remedy]….
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> [With respect to the shareholders loan], [t]he trial judge did not find that [the plaintiff] had actually advanced $2.8 million of capital to 2305, but rather that through his efforts, 2305 acquired a windfall of $7 million after paying [the individual defendant] $3 million. He found that [the individual defendant] and [the plaintiff] agreed to split this amount equally and they were entitled to receive shareholder loans of $3.5 million….

On this basis, the Divisional Court upheld the plaintiff's interest as a beneficial shareholder in the defendant corporation and as a recipient of the shareholder loan.

Conclusion

The *Badr* case illustrates the breadth of the oppression remedy and the Courts' willingness to use it in order to achieve equity between commercial parties. The plaintiff's beneficial interest in the defendant corporation always existed, though it was never recognized by the defendant, nor codified in a written contract.

Upon a review of the evidence, both the trial judge and the Divisional Court came to the conclusion that the parties' reasonable expectations had to be given effect and that the plaintiff's efforts could not go unrewarded. The oppression remedy provided the means for the Court not to rewrite the agreement between the parties, but to affirm the parties' intentions as reflected in their conduct.