IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1043325 Ontario Ltd. v. CSA Building Sciences Western Ltd.,* 2015 BCSC 1160

Date: 20150706
Docket: S118825
Registry: Vancouver

Between:

1043325 Ontario Ltd.

Petitioner

And

CSA Building Sciences Western Ltd., Ralph Jeck, and Maria Jeck

Respondents

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment on Remedy

Counsel for Petitioner:	Robert S. Fleming
Counsel for Respondents:	Michael B. Morgan; Lauren E. Cook
Place and Dates of Hearing:	Vancouver, B.C. June 22 and 23, 2015
Place and Date of Judgment:	Vancouver, B.C. July 6, 2015

Background

[1] On June 30, 2014, I delivered reasons for judgment in which I found that certain proven and non-limitation-barred conduct of the respondent majority shareholder of CSA Building Sciences Western Ltd. ("CSA Western") cumulatively established oppression and unfair prejudice to the petitioner. [2014 BCSC 1197]

[2] I directed the respondents to purchase the petitioner's shares pursuant to s. 227(3)(g) and (h) of the *Business Corporations Act*, S.B.C. 2002, c. 57. I agreed to hear further submissions on the appropriate terms of the buy-out order, including which respondent should be directed to purchase the shares and the possible joint retention of a valuator.

[3] The parties jointly retained the firm of Blair MacKay Mynett Valuations Inc. to opine on the value of CSA Western as of two dates: December 22, 2011 (the date the petition was filed) and April 30, 2013 (the date of the most-recent audited financial statement of the respondent company).

[4] According to the report of the valuator the *en bloc* fair market value of the issued and outstanding shares of CSA Western as at December 22, 2011 was in a range from a low of $1,120,000 to a high of $1,190,000. The value of the 44% shareholding interest of the petitioner, before any minority discount, was in a range from $493,000 to $524,000.

[5] The valuator valued the *en bloc* fair market value of the issued and outstanding shares of CSA Western as at April 30, 2013, from a low of $590,000 to a high of $660,000 and the value of the 44% share interest, again before any minority discount, was between $266,000 and $290,000.

Positions of the Parties

Petitioner's position

[6] The petitioner's position is that unless the result is unfair in the circumstances, the valuation date should be the date of the petition, which should be the starting point in this case. The petitioner also argues that there is no basis for a minority discount, since that would effectively reward the majority shareholder respondent Mr. Jeck for his oppressive conduct and since the shares are being acquired by the majority shareholder or the company, not a third party purchaser who would be left with a minority position.

[7] As to the price for the shares, the petitioner says that while fair market value is a factor, the price should be what is fair in all the circumstances, and should compensate the petitioner for the oppressive conduct with the goal of putting the petitioner in the same position it would have been in if the oppression had not occurred. The petitioner says that a later date for valuation is not fair or appropriate as any change in value, given the delay in the litigation, was the result of tactics of the respondent majority shareholder.

[8] The petitioner urges that as a starting point the higher value for the 44% share value as at December 2011, $524,000, should be preferred as it is based on what the petitioner asserts is a conservative report. However, in order to determine a just and equitable price for the shares of the oppressed minority, the petitioner says that the Court should add back to the value of the assets what the petitioner says are oppressively excessive management fees, excessive rent beyond commercial rates, among other things, and legal fees spent by CSA Western to defend this litigation. The petitioner says with these adjustments the value of its 44% interest as at December 2011 would be $1,028,499 and as at April 2013 would be $930,641.

[9] The petitioner says that the order should be made jointly and severally against the

respondents Mr. Jeck and CSA Western or, failing that, the order should be made against Mr. Jeck who has benefited from the oppressive conduct. The petitioner says that since the respondents have raised the spectre of recent poor financial circumstances and performance, an order against the personal respondent would avoid the possibility of payment by the company not being made or being stalled should the company become insolvent.

Respondents' position

[10] The respondents agree that the general rule is that the date of the petition is the valuation date unless the result would be unfair in the circumstances. However, the respondents argue that the appropriate date for valuation in these circumstances is the later date because there has been a downward trend in revenues attributable to competition in the marketplace and an upward trend in wages such that, for example, employee wages are now 40% of revenue rather than 25% in 2009. They argue that decline in revenue and profitability and consequent deterioration of the financial circumstances of the company over time is more a function of the market and industry than a decline that is attributable to the time and resources required by this litigation.

[11] The respondents say that there should be a minority discount of 20% as the petitioner never had a reasonable expectation of a value attached to the minority shares without such a discount. The petitioner says that with a minority discount of 20% the value of the 44% interest of the petitioner would be in the range of between $394,000 and $419,000 as at December 22, 2011 and in the range of $208,000 to $232,000 as at April 30, 2013.

[12] The respondents say that none of the adjustments proposed by the petitioner to arrive at a price should be countenanced, given that in my direction ordering a buyout I declined to order that Mr. Jeck repay management fees over $175,000 per year or that he repay rent. (The petitioner says my direction that there not be repayment of excessive management fees was in response to a direct claim but did not purport to limit the Court's discretion in making adjustments to arrive at a fair price to compensate the petitioner for oppression when high management fees were part of the conduct found to be oppressive.)

[13] Finally, the respondents say that Mr. Jeck's personal circumstances are now such that he does not have sufficient liquidity or value to satisfy the purchase price on a quicker schedule than CSA Western and that the appropriate order is that the respondent CSA Western redeem the petitioner's shares for a value of $232,000 (the value as at April 30, 2013 with a 20% minority discount) at a rate of $10,000 per month until the value of the shares has been paid for.

Law

[14] In determining the price to be paid for the shares in circumstances where oppression or unfairly prejudicial conduct has been found, the question is not necessarily what is the market value

of the shares but rather what is a fair price or value in the circumstances: *Diligenti v. RWMD Operations Kelowna Ltd. (No. 2)*, [1977] B.C.J. No. 1331 (S.C.) [*Diligenti*], paras. 83-89.

[15] As to the appropriate date for valuation, Pitfield J. noted in *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 2002 BCSC 1236 at para. 228 that:

> It is settled law that unless the result is unfair in the circumstances, the appropriate date for the valuation of relief is the date of filing the petition seeking relief under [then s. 200] of the *Company Act*.

[16] The purpose of the order that I made was to bring the matters complained of by the petitioner, that I found amounted to oppression and were established, to an end.

[17] In *Safarik v. Ocean Fisheries Ltd.*, [1993] B.C.J. No. 1816, varied on appeal [1995] B.C.J. No. 1979, Harvey J. discussed the appropriate date for valuation at para. 348:

> In the S. 224(1) remedies, it appears that the courts consider the petition date to be a fair point for valuation, since that is the time the oppressed or prejudiced member requested relief, and he or she should not be subject to any reduction in value that results during the time it takes to resolve the action. Mr. Justice Lambert acknowledges this reality when he says that allowance must be made for the future prospects as seen from the date of the petition, and the petitioner must not be penalized in the valuation where the share value has decreased at any time prior to the petition as a result of the oppression or benefit where share value has gone up.

[18] With regard to whether a minority discount should be applied to the valuation, the authorities I was referred to tend not to take a minority discount into account in oppression proceedings. That seems to accord with the fact that the majority shareholder or the company is acquiring the shares, and as such the question is not what the shares would have fetched in the marketplace on a sale to a third party who would receive only a minority stake in the company. For example Tarnopolsky J.A. in *Re Mason and Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631, following *Diligenti* and *Re Bird Precision Bellows Ltd.*, [1984] 3 All E.R. 444, held:

> … I am of the view that majority shareholders, who have created an intolerable situation for a minority shareholder sufficient to justify the invocation of s. 247, must, except in unusual circumstances, expect to pay for the shares of the minority shareholder at their fair value without minority discount.

[19] The reasoning of Tarnopolsky J.A. in *Re Mason* was accepted by Mackenzie J. (as she then was) in *Payne v. Memex Software Inc.*, [1998] B.C.J. No. 111:

> [45] The defendants submit that the value of the plaintiff's 10% interest should be discounted to reflect the fact that it is a minority interest. The plaintiff here is being awarded damages in lieu of specific performance for the shares to which he was properly entitled and is not selling the shares in a transaction in which a minority discount might be appropriate. The effect of the judgment will be to extend the majority interest of Mr. McKay in Memex and there is no reason to distinguish between this interest and the balance. In Mason and Intercity Properties Ltd. (1987), 59 O.R. (2d)

631 at 646 the Ontario Court of Appeal held that in a shareholder oppression situation the majority shareholder was required to pay for the minority shares without a discount except in unusual circumstances. The Court of Appeal followed a decision of Fulton J. of this court in Diligenti v. RWMD Operations Kelowna Ltd. (1977), 4 B.C.L.R. 134. I think the same reasoning applies in the circumstances of this case and the defendants should not benefit from a minority discount in the assessment of damages here. The value of the plaintiff's 10 per cent interest is therefore $325,000 before adjustment.

Discussion

[20] There are four questions that must be addressed in order to determine a fair price for the shares and resolve the issues before me. The first question is whether I should take into consideration and make adjustments for what the petitioner says are the excessive management fees of the majority shareholder above the normalized salary provided by the valuator, rent payments, and golf club dues that the majority shareholder removed from the company in the years prior to the petition being commenced. The second question is whether, due to subsequent circumstances affecting the prospects of the company, the later of the two possible dates is the appropriate date at which to determine the value. The third question is whether a minority discount should be applied to the valuation. The fourth question is who should be directed to purchase the shares.

[21] Let me start with the first question, and in particular the management fees paid to Mr. Jeck. In my reasons for judgment I declined to order that Mr. Jeck repay management fees over $175,000 per year in fixing the valuation date. I did say however in my reasons for judgment that the question arose whether very high compensation to the majority shareholder in 2010 and 2011 particularly, if not oppressive or unfairly prejudicial on its own, was a factor to be taken into account when considering whether the petitioner had demonstrated oppressive or unfairly prejudicial conduct. I held that it was and I made these findings at paras. 277 and 278 of my reasons for judgment:

> [277] Although I did not find the management fees taken by the majority shareholder were in themselves oppressive as excessive in comparison to some norm, I have found that the payments made to Mr. Jeck were high – particularly, very high in the years 2010 and 2011, which were the fiscal years just before the petition was launched.
>
> [278] Overall, I have found that the failure to fulfil the requirement to provide audited financial statements or hold annual meetings, the misleading information about the company's performance coupled with the payment to Mr. Jeck of management fees that were high, and in the years 2010 and 2011 very high, were cumulatively contrary to the reasonable expectation of both shareholders. They demonstrate the operation of the company's affairs in a manner that was oppressive and unfairly prejudicial to the minority. While the minority did not have a unfettered right to dividends or the right to set the manager's remuneration – that was Mr. Jeck's as the sole director – the petitioner was entitled to accurate financial information and at any meeting try to protect its proprietary interest.

[22] In determining a fair price for the buyout, I have considered Mr. Fleming's submissions that I should "add back" to the share value some amounts, in particular the amount that he says I can now hold, based on the valuator's report, are excessive management fees. Although the argument has some attraction, I have on reflection decided not to give effect to it. I had taken into account that there were high, and in some years very high, fees paid to Mr. Jeck, and that formed part of my determination that there was oppression in all the circumstances and my conclusion that there should be a buyout. Moreover, I was asked specifically to order that the buyout be on the basis as that the fees of Mr. Jeck were set at a market rate of no more than $175,000 per year and the excess management fees over the period from 2004 to 2012 be repaid. In my reasons I declined to make an order that Mr. Jeck repay management fees over $175,000. Although Mr. Fleming asserts that the issue before me is somewhat different – the fair price of the shares – and that the factual basis is different – now including the information in the valuator's report – I do not think that it is appropriate to revisit a question I essentially decided in finding oppression and in crafting the remedy of a buyout. Accordingly, I decline to make the adjustments that Mr. Fleming seeks.

[23] I turn now to the second question. The respondents say that the later date should be the starting point for the determination of a fair price for the shares. The respondents argue this should be the case because the fortunes of the company have changed and the litigation was extended and delayed because of claims brought by the petitioner that failed. However, I think that in all the circumstances the fair value for the shares finds its starting point in the valuation at the time of the petition.

[24] Generally, I would think that the oppressive majority should be bound by the valuation as at the petition date where the appropriate remedy is a buyout and that any increase or decrease should generally not accrue to the petitioner.

[25] I think that is particularly so in this case. While the petitioner seeks to have prior excessive fees taken into consideration and shared, the respondents say that financial downturns should also be shared. Both arguments in this case suggest that the usual date at the time of the petition is the fair one.

[26] The respondents also argue that the delay in completing the litigation and the continued cost and the change to the company should be on the petitioner's shoulders because if the petitioner had not sought amendments related to the forgery of the shareholders' resolutions and engineering documents, this case would have completed much earlier and in any event the limitation defence and the defence that the claim was a personal claim of Mr. Skene's prevailed.

[27] However, the matter of the delay in completing this litigation was more complicated than the respondents' arguments suggest. Although the petitioner may have failed in the amended claims, I

nevertheless found that the engineering documents were forged by the majority shareholder and I also made the following comments at para. 285 from the trial reasons:

> [285] In all of the circumstances I have concluded the hope of Mr. Jeck was that he would be able to acquire the shares of Mr. Skene for a very modest amount. While it was argued that he went to lengths to have the petitioner reinstated, I expect that was done as part of his goal to acquire the minority interest of the petitioner at a very reasonable cost. However, when that failed and the minority attempted to assert its rights, the petitioner was met with positions in this litigation which were time-consuming and costly for the petitioner but were then abandoned by the respondents. In this respect, I am referring to the position that the consent resolutions "appear to bear Mr. Skene's signature" and the cross-examination of the writing expert for a lengthy period, then the suggestion much later it was never disputed the signatures were applied by Mr. Jeck. The same type of conduct appeared in the defence of the allegation that Mr. Skene's signature was improperly applied to engineering reports and documents. After indicating that the accuracy of that allegation would be established by the production of files, and after Mr. Skene spent over eight days looking at files in a boardroom, the respondents said that Mr. Jeck had applied the signatures and that Mr. Skene knew of this all along.

[28] Accordingly I have concluded that the fair date is the date of the petition and, after having considered all of the petitioner's requested adjustments, I have concluded that the amount to purchase the petitioner's shares is the sum of $508,000 - the mid-point of the valuator's estimated values without any further adjustments sought by the petitioner's counsel. I have considered all of the adjustments proposed by Mr. Fleming in his written submission.

[29] With regard to the third question, I am satisfied that this situation is similar to the authorities that I have outlined above and I have concluded that there should be no minority discount applied to the valuation of the shares. This is not a situation where a third party purchaser of the shares is receiving a minority position in the company. The effect of the share purchase in this case will only be to increase the majority position of the respondent purchaser, and I am satisfied that there is no reason in this case to reward a party's oppressive action with a discounted purchase price.

[30] I turn to the last issue and that is who will be directed to purchase the shares. It is not in dispute that under the legislation, I have the jurisdiction to order that either respondent buy the shares, but Mr. Morgan says that the normal order is that the company buys the shares and he submits that I do not have the jurisdiction to make the respondents, the company and Mr. Jeck, responsible jointly and severally.

[31] Given the argument that the obligation to buy the shares may render the company insolvent and operate as a bar to payment, and given the substantial benefit that was realized by the majority shareholder that was part of the oppressive conduct, I think the appropriate order is that the shares be purchased by the majority shareholder. I am satisfied that that is the fair result in the circumstances.

[32] The parties will appear before me on July 14, 2015 to argue the question of costs.

[33] I will settle the form of order at that time.

"The Honourable Mr. Justice J. Sigurdson"