CITATION: Basegmez v. Akman, 2018 ONSC 812
DIVISIONAL COURT FILE NO.: DC-594/17
DATE: 20180206

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

WILTON-SIEGEL, MYERS, and CHARNEY JJ.

BETWEEN:	)	
	)	
VOLKAN BASEGMEZ, CEM BLEDA, BASEGMEZ ANIL RUKAN BASEGMEZ, BA&B CAPITAL INC., SERDAR KOCTURK and KAAN HOLDINGS INC.	)	
	)	
Applicants (Respondents in Appeal)	)	*E. Patrick Shea and Christopher Stanek*, lawyers for the Respondents
	)	
– and –	)	
	)	
ALI AKMAN, SAMM CAPITAL HOLDINGS INC. and TARN FINANCIAL CORPORATION	)	
	)	
Respondents (Appellants)	)	*Geoff R. Hall and Adam Goldenberg*, lawyers for the Appellants
	)	
	)	*G. Azeff*, lawyer for KPMG Inc., in its capacity as liquidator of Tarn Financial Corporation
	)	
	)	**HEARD at Toronto:** January 30, 2018

F.L. Myers J.

Background

[1] The appellants appeal from the order of Lederman J. dated September 15, 2017 in which the court ordered the liquidation of Tarn Financial Corporation.

[2] The parties Ali Akman, Serdar Kocturk, and Volkan Basegmez agreed to invest together in an operating hotel and a condominium development project. Tarn is the corporate vehicle for their business. The three investors agreed that Volkan Basegmez would contribute $6 million to Tarn in exchange for a 40% interest in the corporation; Serdar Kocturk would contribute $3 million for a 20% interest; and Ali Akman would contribute $4.3 million for a 40% interest. Akman was contributing proportionately less cash than the others. But he also agreed to contribute sweat equity by managing the investment on a day-to-day basis.

[3] All of the shareholders' funds were advanced to Tarn by way of shareholder loans.

[4] Justice Lederman accepted the claims made by Messrs. Kocturk and Basegmez that Mr. Akman had acted in a manner that was unfairly prejudicial to them or unfairly disregarded their interests by: (a) purporting to issue shares to himself to give him voting control of the corporation without the consent of the other shareholders; (b) causing Tarn to enter into transactions with Akman-controlled entities; and (c) using Tarn's funds for his own purposes. Justice Lederman ordered that Tarn be liquidated pursuant to the winding-up provisions of the *Business Corporations Act*, RSO 1990, c B16.

[5] For the reason that follow, I agree with the findings and remedy ordered by Lederman J. Therefore, I would dismiss the appeal.

Jurisdiction

[6] An appeal lies to this court under s. 255 of the *OBCA*.

Standard of Review

[7] In *Wilson v. Alharayeri*, 2017 SCC 39, the Supreme Court of Canada discussed the standard of appellate review under analogous oppression provisions of the *Canada Business Corporations Act, RSC 1985, c C-44*,

> Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact. Second, an appellate court may intervene and substitute its own decision for the trial court's if the judgment is based on "errors of law ... erroneous principles or irrelevant considerations". Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust. [Citations omitted.]

[8] The court is granted very broad remedial authority to make such order as it thinks fit to remedy oppression under the *OBCA*. I accept Mr. Hall's legal submission that, in applying a remedy after finding oppression, the court is exercising a statutory discretion that is to be exercised on a principled basis. The goal is to remedy the oppressive acts found. The frequently repeated admonition from the leading case is that the court is to use a scalpel to tailor carefully the relief ordered to do no more than is necessary to remedy the

oppressive conduct. The court is not wielding a battle axe to cleave the parties. See *Wilson,* at paras. 23 to 27 and *Naneff v. Con-Crete Holdings Ltd.*, 1995 CanLII 959 (ON CA) at para 32. I also agree with Mr. Hall that winding-up and liquidation are considered only as a last resort when other less drastic remedies will not suffice. See *Wilson,* at paras. 23 and 57 and *Tilley v. Hails*, 1992 CanLII 7563 (ON SC) at para. 45.

Fresh Evidence

[9] As a preliminary matter, the respondents proffer as fresh evidence two recent reports of the liquidator appointed pursuant to Justice Lederman's order and a short affidavit. The reports discuss operational issues within the corporation and discuss the status of liquidation efforts. Mr. Goldenberg fairly concedes that information reported by the liquidator concerning the status of the liquidation is properly admitted as matters of public record that arose post-liquidation. They are not fresh evidence. However, he argues that information relating to the operations and financial position of Tarn in the pre-liquidation period is fresh evidence that is not properly admitted on this appeal.

[10] Mr. Shea does not ask us to admit the pre-liquidation information for the purpose of the appeal itself. Rather, he says that, if we allow the appeal, the appellants are asking us to exercise afresh the discretion to craft an appropriate remedy. Should the court undertake that exercise, he argues, the extra information is highly relevant, was not reasonably available to the respondents before Lederman J., and may well affect the outcome. As we have decided to dismiss the appeal, there is no basis for admitting this fresh evidence and I have therefore disregarded the proposed fresh evidence in reaching my conclusions.

The Grounds of Appeal

[11] Recognizing the need to identify an error of law or principle in the judge's exercise of his discretion, Mr. Hall argues that Lederman J. erred in principle by,

a. failing to recognize and exercise the full scope of his remedial discretion. The appellants argue that Lederman J. wrongly believed himself to be bound by the all-or-nothing, binary choice of remedies presented to him by counsel. Instead, the appellants submit that Lederman J. was required to explore the entire panoply of options available to the court to remedy the oppression as found and that, had he done so, he would have ordered the appellants to purchase the respondents' investments in Tarn; and

b. ordering a winding-up and liquidation that was not narrowly tailored to remedy the oppression found but was punitive in this case.

[12] The appellants also submit that Lederman J. erred in finding as a fact that Mr. Akman looted Tarn for personal purposes. I turn first to this ground.

Justice Lederman's Findings of Fact

[13] Among the appellants' arguments on this issue is the fact that in paras. 14 to 27 of his reasons, Lederman J. drew liberally from the respondents' factum below without attribution or noting that the facts that he recited were just the respondents' submissions. However, Lederman J. recited those facts under the heading "**ALLEGED FACTS OF OPPRESSION**." In my view, this was sufficient to advise readers that what followed were the respondents' allegations rather than the court's findings. The next section of the reasons was headed "**POSITION OF THE RESPONDENTS**" which contrasted to and reinforced the nature of the contents that preceded.

[14] Mr. Akman takes umbrage at Justice Lederman's specific findings, in para. 42 and 43 of the reasons, that Mr. Akman used Tarn "as a personal bank account" and that he "diverted millions of dollars out of Tarn Financial for his personal benefit." However, Mr. Goldenberg fairly conceded in argument that the accounting evidence before Lederman J. established that, at minimum, Mr. Akman moved money in and out of Tarn to meet the liquidity needs of his other investments and businesses. That was, or was at least analogous to, the use of Tarn's operating, current account for loans to other corporations controlled by him in which the respondents had no interest. Moreover, there is evidence that Mr. Akman caused Tarn to pay his company SAMM over $1 million in alleged development fees when Mr. Akman's efforts to develop the project were supposed to be part of his sweat equity contribution to the business. In addition, there was other evidence of Mr. Akman depositing Tarn's funds in a European bank account and retaining the interest earned.

[15] There was plainly evidence before Lederman J. to support both of the findings of fact to which Mr. Akman objects. It is not the role of this court to re-weigh the evidence on appeal. Absent a palpable and overriding error, this court must defer to the findings of fact made by the application judge. In any event, I agree with both findings.

Remedial Discretion

[16] The appellants argue that Lederman J. should not have ordered a complete liquidation of Tarn. They say that it would have remedied the unfairness found if Mr. Akman had been required to buy the respondents' shares at fair value. This would have required a process to determine a fair valuation of the business pending the mandatory acquisition. The appellants argue further that if the court believed that some greater oversight of management was required pending the valuation and share acquisition, the court should not have given the business over to a liquidator. It ought rather to have maintained the *status quo* by enforcing the parties' agreement that Mr. Akman would manage the corporation. They argue that the appointment of a monitor to oversee Mr. Akman would have provided sufficient protection of the parties' interests pending a neutral valuation and mandatory buyout. Requiring a full liquidation, they argue, was value-

destroying and likely leaves less value available for all of the shareholders at the end of the day.

[17] I do not agree.

Replacement of Management

[18] Lederman J. found as fact that the appellant Akman,

> "...abused his powers by engaging in self-dealing transactions that have diverted millions of dollars out of Tarn Financial for his personal benefit and has indicated a clear intention to continue to operate the company without any regard to the interests of Serdar and the Basegmez Family or his statutory obligations.

[19] In light of Justice Lederman's express finding that Mr. Akman intends to continue to ignore the rights and interests of his co-investors, it was well within the scope of the judge's discretion to remove Mr. Akman from management and control of the business pending the separation of the parties. I see no error in principle in doing so. Whether a court official is styled a receiver, a liquidator, or a monitor, in any case, it was prudent and necessary that Mr. Akman be removed from control of the business to prevent him from implementing his intention to continue his misdeeds as found.

Ordering Liquidation Rather than a Forced Buyout

[20] No one disagrees that the parties need to be separated. Once he found that the fox could not fairly be left in charge of the henhouse, it was proper to see if the parties might agree on a less intrusive alternative than requiring a court appointed officer to sell the assets of Tarn and wind-up the corporation. The parties could not agree.

[21] The appellants did not ask Lederman J. to order Mr. Akman to buy out the respondents' shares at fair market value. Instead, they argued that the court should not interfere with the Akman's control of Tarn. They did not address any process for separating the parties' respective investments in the corporation. Lederman J. noted that he was faced "only with the choice of continuing the *status quo* or ordering that there be a winding up. No other option was provided by [the appellants]..."

[22] Mr. Hall argues forcefully that Lederman J. erred in principle by failing to consider a different outcome despite his clients' tactical decision to leave a stark all-or-nothing choice to the judge below. It is not an error for the judge to fail to impose an outcome that the appellants never sought.

[23] In any event, I disagree with the submission that Lederman J.: (a) failed to consider alternatives; (b) that he fettered his discretion by inviting the parties to agree on a manner to separate consensually to avoid liquidation; and (c) that Lederman J. inappropriately

considered his findings concerning Mr. Akman's misuse of funds to "penalize" Mr. Akman in his decision to order a winding-up.

[24] Justice Lederman expressly rejected a late offer by Mr. Akman to purchase the respondents' shares. Justice Lederman found that if Tarn remained under Mr. Akman's management, the respondents would have no ability to obtain the information required to set a fair value of the business. I agree with this finding.

[25] A compulsory sale can only ensure that fair market value is realized where there is confidence in the underlying financial statements. This requires that a third party review the current financial statements and conduct an investigation to reconcile the various inter-corporate transfers and loans implemented by Mr. Akman.

[26] Given Mr. Akman's continuing intention to ignore the rights of the respondents and his belief in his entitlement to divert corporate assets to his personal benefit, there is no assurance that he will not take steps to obscure or remove value during a valuation process. There is much reason to fear that he will seek to frustrate the ability of the respondents to require him to pay fair value for their investments.

[27] By contrast, a liquidation sale provides an assurance that the parties will realize fair market value by exposing the business to the test of the market place.

[28] In addition, in light of the fact that the shareholders' funds were contributed by loan, a purchase of the respondents' shares by Mr. Akman would leave the loans outstanding. Mr. Akman would remain in control of the timing, willingness, and ability of Tarn to re-pay the respondents' investments. A purchase might have been constructed to include the shareholders' loans so as to catch the full value of the parties' investments. But that is a much more complex matter that was not fleshed out before Lederman J. or before us. But it is clear that a share purchase alone, which does not deal with the parties' shareholder loans, would not provide fair value to the respondents on their investments.

[29] Lederman J. recognized that liquidation is a drastic remedy. A liquidator has the powers required to investigate the financial affairs of the corporation and to run a sale of the business that will yield fair market value including paying the shareholders' loans and equity as appropriate. Justice Lederman found expressly,

> "Although a court is reluctant to order a winding-up, no other less disruptive order is appropriate in these circumstance."

[30] In finding that there was no appropriate "less disruptive order" it cannot fairly be said that Lederman J. failed to consider alternatives. Nor did he fetter his discretion by limiting his considerations as argued.

[31] The appellants ask the court to choose between two mechanisms to realize fair market value for the business. One gives Mr. Akman the ability to delay and try to avoid

paying fair market value in a process that will see the parties locked into litigation to-and-fro for years. The other is expeditious, independently run, and measures fair market value in the market place. Therefore, I do not agree with Mr. Hall's submission that a valuation and mandatory purchase will remedy the oppression as found or that a liquidation is not tailored to the specific nature of the oppression in this case.

[32] I agree with Lederman J., that on the facts, as he found them, liquidation was the most appropriate order to remedy the oppressive conduct. A forced buyout would not be well-tailored to remedy the oppressive conduct in these circumstances.

[33] In light of the finding that winding-up is well-tailored to the facts of the case, it cannot be considered to be a punitive remedy. In any event, there is no indication in the reasons of Lederman J. that he ascribed inordinate weight to the misbehaviour of Mr. Akman in deciding to order a winding-up. The misbehaviour was relevant to the questions of how the corporation could be managed pending a separation of the parties and in comparing the likely costs, efficiency, and outcomes of separation alternatives.

[34] Mr. Hall's argument, that a valuation and mandatory buyout avoids the risk that a liquidation will destroy value, is always the case. Yet the law recognizes that a closely held corporation can often be analogized to a partnership that requires trust and confidence among the investors. If "one of the partners has been excluded from his entitlement to management participation, the company must be wound up." *Tilley*, at para 45.

[35] Here, Lederman J. was appropriately reluctant and considered alternatives. In all, I see no palpable and overriding error of fact or law and no error of principle in the exercise of discretion by Lederman J.

[36] The appeal is therefore dismissed.

[37] The parties agreed that costs fixed at $30,000, all inclusive, should follow the event. Therefore, the court orders the appellants, jointly and severally, to pay the respondents, jointly and severally, costs, on a partial indemnity basis of $30,000 all-in forthwith.

E.L. Myers J.

I agree

Wilton-Siegel J.

I agree

Charney J.

Date of Release: February 6 , 2018

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Applicants
(Respondents in Appeal)

– and –

ALI AKMAN, SAMM CAPITAL HOLDINGS INC. and TARN FINANCIAL CORPORATION

Respondents
(Appellants)

REASONS FOR JUDGMENT

F.L. MYERS J.

Date of Release: February 6, 2018