

CANADA / JUDGMENT

Esposito v. 304768 B.C. Ltd.

2021 BCSC 961

COURT

Supreme Court of British Columbia

DECIDED

20 May 2021

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2021 BCSC 961 Esposito v. 304768 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Esposito v. 304768 B.C. Ltd.,

2021 BCSC 961

Date: 20210520

Docket: S2013779

Registry: Vancouver

Between:

Tullio Vito Franceso Esposito

Petitioner

And

304768 B.C. Ltd., Glenmerry Market Ltd., and

Demitria Loraine Esposito

Respondents

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Petitioner via videoconference:

P. Sullivan

N. Chang

Counsel for the Respondent Demitria Loraine Esposito via videoconference:

Y. Gershony

W. Thiessen

No other appearances

Place and Dates of Hearing:

Vancouver, B.C.

April 14-15, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 20, 2021

I. OVERVIEW

- [1] As many of the persons involved in this case share a surname, to avoid confusion at times I will refer to them by their first names, without meaning any disrespect in doing so.
- [2] The petitioner, Tullio Esposito ("Tullio"), and the respondent, Demitria Esposito ("Dee"), are brother and sister (the "Siblings"). The Siblings inherited an equal beneficial interest in the two corporate respondents (the "Companies") via an alter ego trust following the death of their father in 2013. Their interests constitute the entirety of the corporate corpus. The Companies own real estate, including income generating properties, in and around Trail, BC.
- [3] After the Siblings' father died, their uncle, Paul Esposito, was appointed as the director of the two Companies and began managing the properties. In December 2018, Tullio and Dee became the corporate directors. Dee currently manages the Companies through a contractual arrangement entered into approximately two and a half years ago.
- [4] The Siblings have determined they are unable to work together. Sadly, their inability to agree on how to separate their corporate interests has adversely impacted their relationship. The Siblings have tried for more than two years to resolve the dispute themselves, without success.
- [5] The petitioner applies for an order directing the Companies be liquidated and dissolved under s. 324 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCBCA], on the basis that it is just and equitable to do so. In the alternative, he seeks liquidation and dissolution under s. 227 of the BCBCA on the basis that affairs of the Companies are being and have been conducted in a manner oppressive to him.

- [6] Dee cannot afford to buy out Tullio's interest personally. She argues the appropriate remedy is an order that the Companies purchase Tullio's interest so she can continue to operate and fully own the Companies. She asks the Court to order a corporate share repurchase based on fair market value as determined by an independent evaluator. Tullio argues the tax consequences of a corporate repurchase would result in a net unequal treatment of the two Siblings whereas liquidation and dissolution would ensure both Siblings net an equal division.
- [7] Tullio and Dee are deadlocked. The two Siblings have equal interests and equal control in the Companies, and there has been a serious and persistent disagreement on how to effect the division of their respective interests. Both Tullio and Dee recognize the need to separate their respective interests in the Companies but they do not agree on the value of those interests or the structure that should be implemented to divide them.
- [8] For the reasons that follow, I have concluded it is just and equitable to order the Companies be liquidated and dissolved.

II. LEGAL FRAMEWORK

- [9] Section 324 of the BCBCA permits the court to grant relief where it is satisfied it is "just and equitable" to do so. The words "just and equitable" contained in s. 324(1)(b) are of the "widest significance and confer a broad discretion on the court": *Boffo Family Holdings Ltd. v. Garden Construction Ltd.*, 2011 BCSC 1246 at para. 120, citing with approval *Re Rogers and Agincourt Holdings Ltd. et al.*, (1976), 74 D.L.R. (3d) 152 at 156, 14 O.R. (2d) 489 (C.A.). The just and equitable test represents a lower threshold than what is required to obtain an oppression remedy under s. 227 of the BCBCA: *Boffo* at para. 121. What is just and equitable must be judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play: *Boffo* at para. 109; *Kular v. Wahlla*, 2011 BCSC 61 at para. 16; *Callahan v. Callahan*, 2011 BCSC 40 at para. 53.
- [10] If a court concludes it is just and equitable to dissolve up the Companies, it can make any order available under s. 227 of the BCBCA: *Golden Pheasant Holding Corp. v. Synergy Corporate Management Ltd.*, 2011 BCSC 173 at para. 59. The objective is to resolve each case justly and remedies should be focussed on that goal: *Golden Pheasant* at para. 59. In *Wilson v. Alharayeri*, 2017 SCC 39 at paras. 49-57, the Court provided guidance in the shape of four general factors that ought to be considered in fashioning a fit remedy under s. 227 of the BCBCA, although the list is not exhaustive:
- a) the remedy must be for a fair way of dealing with the situation;
 - b) the remedy should go no further than necessary to rectify the oppression;
 - c) the remedy may only vindicate the reasonable expectations of parties in their capacity as corporate stakeholders; and

d) the remedy must take into account the general corporate law context.

[11] Although Wilson dealt with the oppression remedy pursuant to s. 241(3) of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, I am satisfied the principles apply equally to the oppression remedy under s. 227 of the BCBCA. I also observe that reasonable expectations may arise from the personal relationships between an applicant and other corporate players and it has been recognized that relationships between shareholders based on ties of family or friendship may give rise to different standards than relationships between arm's length shareholders: Boffo at para 111, citing BCE Inc. v. 1976 Debentureholders, 2008 SCC 69 at para. 75.

[12] The inquiry into what constitutes reasonable expectations is fact-specific and an exhaustive list of factors for determining whether a reasonable expectation exists is neither possible nor preferable. However, in BCE at para. 72, the Court identified a number of factors that have emerged from the case law, namely:

- general commercial practice;
- the nature of the corporation;
- the relationship between the parties;
- past practice;
- steps the claimant could have taken to protect itself;
- representations and agreements; and
- the fair resolution of conflicting interests between corporate stakeholders.

[13] A finding that it is just and equitable to make an order liquidating and dissolving the Companies does not require me to find Dee acted in a way that was oppressive or unfairly prejudicial towards Tullio: Samra v. Bel-Air Taxi Ltd., 2009 BCSC 548 at para. 92. It is sufficient for me to be satisfied the parties are in a deadlock: Palmieri v. A.C. Paving Company Ltd. (1999), 48 B.L.R. (2d) 130 at paras. 26-30, 16 B.C.T.C. 7 (S.C.); Boffo at para. 122.

III. STANDING

[14] Based on his beneficial interest in the shares of the Companies, I find Tullio has standing to apply for relief under ss. 324 and 227 of the BCBCA.

IV. THE PARTIES' POSITIONS

[15] Tullio submits an equal division of the Siblings' inherited interests is a reasonable expectation which can most effectively and equitably be accomplished by liquidating and dissolving the Companies. He submits liquidation and dissolution is the most reliable way of ascertaining the value of the corporate assets, and creates an alignment of the Siblings' interest because both will want to realize a higher sale price, whereas in a repurchase their

interests would be in conflict, with Tullio seeking to secure the highest price and Dee seeking to achieve the lowest. Further, Tullio argues liquidation will achieve equality from a tax perspective, since the tax treatment of both Siblings in executing the transactions would be the same, and they may even be able to agree on tax structuring that could benefit them both. Tullio also argues that liquidation would be consistent with what the Siblings' father wanted for his children, namely for them to benefit equally from the assets he had acquired and left to them equally.

- [16] In her responding material, Dee argued the appropriate remedy would be an order that the Companies repurchase Tullio's interest after permitting the parties a further opportunity to obtain updated valuation evidence and directing the parties to engage in one last good faith attempt to reach an agreement with those evaluations in hand. However, her position evolved and at the hearing Dee argued the Court should order the Companies to repurchase Tullio's interests at fair market value, as determined by an independent valuator, without adjustment for any tax burden or benefit. Dee argues liquidation and dissolution would be a harsh, unnecessary, and the most intrusive of remedies and would disregard what she submits are her reasonable expectations that the "family business" would continue to operate under her ownership and management so she could "continue her father's legacy", as evidenced by her move to Trail, BC, and her undertaking the management of the Companies after becoming a director.

V. ANALYSIS

- [17] The evidence satisfies me that the Siblings can no longer work together, are deadlocked, and that the deadlock between them must be resolved. I find that both parties' reasonable expectations require a remedy that frees them, fully and finally, from being bound together through the Companies.
- [18] Dee cannot afford to purchase Tullio's interests, and neither party seeks a shotgun clause as a remedy. The two options being advocated are liquidation and dissolution or corporate repurchase of Tullio's interests. However, with respect to a corporate repurchase, the Companies do not have adequate retained earnings to buy out Tullio's interests without financing. The evidence provided with respect to potential financing by the Companies is dated, and, at least with respect to CIBC, contemplates a corporate restructuring. By contrast, liquidation and dissolution requires no corporate restructuring, can be undertaken without delay, and is not contingent on the Companies acquiring financing.
- [19] Although the parties signed a document at one point in their negotiations, neither Sibling argues there is an enforceable contract with respect to the division of their corporate interests. Based on the evidence of their negotiations, I am satisfied all options for dividing their interests were on the table and discussed and that no one structure was ever the focus of discussion. Contrary to Dee's assertions that Tullio only brought up the idea of liquidation as a "pressure tactic" during negotiations, it is clear that both parties had previously brought up the option of "winding up" or liquidating the Companies during the multiple years they

have attempted to find a resolution.

- [20] Dee argues Tullio has no basis to reasonably expect the price he would receive for his interest in the Companies would be adjusted to account for the tax consequences of a corporate repurchase, citing *Murray v. Pier* 21, 2020 ONSC 2153 [Pier 21]. However, as I interpret Pier 21, the Court did not conclude a tax efficient transaction structure could not form the basis of a reasonable expectation, but rather that the tax efficiency of one transaction structure, standing alone, was insufficient to establish a reasonable expectation that that particular structure would be implemented: Pier 21 at para. 9.
- [21] The Court in Pier 21 viewed the question of whether there would be an inequitable distribution of the tax burden between the parties as a relevant consideration: at para. 16. Other cases referred to by Dee similarly reveal it is not unusual for parties to consider a tax-effective disposition of assets, or for the court to consider the tax consequences of the various potential remedies in determining which remedy is appropriate in resolving a deadlock or remediating oppressive conduct: *Gold v. Rose*, 2001 CarswellOnt 5, [2001] O.J. No. 12 (S.C.) at paras. 22, 24, 28 and 32; *Callahan* at paras. 31 and 57.
- [22] In *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134 at 170, [1977] B.C.J. No. 1331, Justice Fulton expressed the view that the Court should have regard to the tax impact when assessing what remedy is just and equitable, although it is only one factor to consider. I do not interpret the cases that are silent on tax consequences to be an indication that such a factor, if raised by the parties, would not be a relevant consideration.
- [23] Dee objects to the evidence of Donald Smetheram, one of Tullio's legal advisors, which includes information about the application of various provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) and their impact on Tullio vis-à-vis tax consequences flowing from the purchase of his corporate interests by the Companies. Dee argues the affidavit is not proper reply evidence, that it is expert opinion that does not comply with this Court's rules respecting expert evidence, and that it contains argument rather than evidence.
- [24] First, I do not view Mr. Smetheram's evidence as improper reply. His affidavit responds to and provides information regarding the consequences for Tullio of the remedy proposed by Dee in her response to petition. With respect to Dee's second and third objections, as Tullio pointed out in argument, the calculations with respect to tax consequences are illustrative only, since the precise tax consequences would not be discernible until a final corporate valuation is completed. Mr. Smetheram's affidavit was not offered as expert opinion evidence. I agree with Dee that the portions of Mr. Smetheram's affidavit dealing with the interpretation and application of various provisions of the Income Tax Act are argument and not properly the basis of expert opinion evidence, and I consider his affidavit accordingly.
- [25] In this case, both Siblings acknowledge there must be a corporate divorce. In the particular circumstances of this case, it is a reasonable expectation that the cost of that divorce, including tax consequences, be equally born by both parties.

- [26] The evidence satisfies me that Dee has no particular sentimental attachment to the Companies. Although the Companies were started by the Siblings' father, the evidence does not satisfy me that there is any intrinsic "legacy" inherent in the Companies as currently constituted. Dee's own evidence is that she wants to be free to sell the properties the Companies hold in the future, which I find to be inconsistent with any sentimental attachment to them, or a reasonable expectation that such an attachment would be preserved.
- [27] As noted earlier in these reasons, Tullio and Dee are both Siblings and co-beneficiaries under the trust through which they hold their interests in the Companies. They acquired their interests as equal inheritances from their father. The evidence establishes that Dee sought to achieve a greater level of control over the Companies during their father's lifetime (she asked for 51% of the shares), a request her father rejected. That evidence supports a conclusion that the Siblings' father intended their interests to be, in fact and in effect, equal. Dee herself says in her affidavit that her father "wanted everything 50/50."
- [28] Dee argues there are no cases before me where liquidation and dissolution has been ordered where the parties are deadlocked. However, as noted by Justice Marchand (now J.A.) in *Dais v. Virvilis*, 2018 BCSC 459 at para. 94:

It is not uncommon for the management of companies owned by families to become deadlocked. In such cases, there are many examples where courts have found that it would be just and equitable to dissolve and liquidate the companies under s. 324(1)(b) of the BCA, its predecessor in British Columbia or its equivalent in other jurisdictions. Examples include: *Safarik v. Ocean Fisheries Limited*, (1995) 12 BCLR (2d) 342 (CA) ("Safarik No. 1"); *Gallelli Estate v. Bill Gallelli Investments Ltd.*, 1994 CanLII 8914 (ABQB); *Mahood v. High Country Holdings Inc.*, 2000 BCSC 1755; *Brooks v. Brooks*, 2013 SKQB 325 and *Sohi [v. Best Choice Blueberry Farms Limited.]*, 2018 BCSC 36].

- [29] I am satisfied on the evidence that Tullio had a reasonable expectation that the equality of interests achieved by the Siblings' father through his chosen inheritance structure would be maintained in the division of the Siblings' respective interests. For multiple years the parties have been attempting to reach an arrangement that supports this objective and avoids dissolution of the Companies. They have been unable to do so, despite assistance from financial advisors, counsel, and Paul Esposito acting as a mediator. I find that liquidation and dissolution is the most effective means by which to support that objective.
- [30] In the circumstances of this particular case, I find it is just and equitable to resolve the deadlock between Tullio and Dee by granting relief under s. 324 of the BCBCA, and that the most appropriate manner by which to break the deadlock is to order consequent relief under s. 227 of the BCBCA in the form of an order that the Companies be liquidated and dissolved.

VI. INTERIM RELIEF

- [31] From the time the Siblings were teenagers, they each received \$1,000 monthly in dividends from the Companies, initially at the direction of their father and later under the direction of Uncle Paul. This continued until Dee, without Tullio's agreement, cancelled the ongoing payment of dividends in December 2019[1].
- [32] Similarly, the Siblings agreed that the Companies previously distributed monthly dividends of \$2,500 to each of them, which they in turn provided to their mother for her care. Again, these dividends were discontinued in 2019 on Dee's unilateral decision. The Siblings disagree on why the dividends were cancelled, but the evidence satisfies me that Tullio demanded both dividends be reinstated, and that Dee disagreed, even though there was sufficient retained earnings to declare such dividends.
- [33] In addition, Dee's employment contract requires her to provide the Board of Directors an operational summary at the end of each month providing information including occupancy rates of each complex, a monthly statement of cash flow, monthly bank reconciliations, and notice of contingent liabilities or any pending litigation. However, she has provided some of the required information late and completely stopped providing monthly reports in April 2019. While Dee began to provide some monthly information in August 2020, not all of the required information has been provided, although Dee has continued to receive her full salary.
- [34] Tullio seeks an interim order, pending liquidation and dissolution of the Companies, reinstating both forms of monthly dividends and compliance with the reporting requirements as set out in Dee's employment contract. I am satisfied Tullio's application for such relief was brought in a timely manner, and that his expectations that the dividends would continue and that Dee would comply with her employment requirements, were reasonable. Accordingly, pursuant to s. 227(3) of the BCBCA, I order on an interim basis the reinstatement of the declaration of both forms of monthly dividends and Dee's compliance with the reporting requirements of her employment contract.

VII. COSTS

- [35] I find Tullio is the successful party and would normally be entitled to his costs. However, if there are matters relevant to costs the parties wish to bring to my attention they may do so, either by filing written submissions or by arranging for a brief oral hearing, and I shall make a decision about costs after having considered those submissions. If no written submissions or request for an oral hearing have been received within 30 days of the date of these reasons, the order shall include a term that Tullio shall have his costs from Dee fixed at Scale B to be assessed by the Registrar.

"Jackson J."

- [1] The Siblings have resolved the issue of past undeclared dividends.

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