SUPREME COURT OF NOVA SCOTIA
Citation: *Bledin v. Landsburg*, 2013 NSSC 418

Date: 20131217
Docket: Hfx No. 404339
Registry: Halifax

Between:

Lori Bledin and Martin Kaelble

Applicants

v.

Brent Landsburg, Jo-Anne Landsburg, Tylomar Landscaping Inc. and Black Horse Construction Inc.

Respondents

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 22, 23, 24, 2013, in Halifax, Nova Scotia
Final Written Submissions:	May 27, 2013
Counsel:	Lori Bledin and Martin Kaelble, Self-represented James D. MacNeil, for the Respondents

By the Court:

[1] The applicants, Lori Bledin ("Bledin") and Martin Kaelble, also known as Martin Graf ("Kaelble" or "Graf"), began discussions about entering the landscaping business with the individual respondents, Jo-Anne Landsburg and Brent Landsburg (“Mrs. Landsburg” and "Mr. Landsburg", respectively; collectively, “the Landsburgs”) in or around December 2011. At that time, Mr. Landsburg was employed by PCL Construction. As a result of their discussions, the individual parties agreed to form a landscaping company, which would also do snowplowing during the winter. John Dillon Q.C. ("Dillon"), of the law firm Crowe Dillon Robinson, was retained to set up the company and provide legal advice. Dillon incorporated Tylomar Landscaping Inc. ("Tylomar" or “the company") on April 18, 2011.

[2] Bledin and Graf advised that they did not want shares registered in their names, due to Bledin’s involvement in litigation in Ontario. Consequently, shares were only issued in the names of the Landsburgs. Mr. Landsburg became the sole director and president of Tylomar, while Mrs. Landsburg became corporate secretary. In an e-mail to Dillon dated April 15, 2011, Graf referred to a cheque to

Mrs. Landsburg for $1,000.00 to open the corporate bank account. Graf wrote that this amount was to go towards options on 50% of shares to be exercisable within five years. He asked Dillon to draw up a form to be signed in respect of this. He also wrote that he and Bledin wished to remain off the company's books at that time.

[3] In her affidavit of March 18, 2013, Mrs. Landsburg stated that the applicants advised her that they "did not initially want an ownership interest in the business, as they wanted to hide assets in said business, to keep them out of touch of a potential judgment creditor in Ontario" (para. 13). Mrs. Landsburg then referenced Graf's e-mail of April 15, 2011, wherein he stated that he and Bledin wanted to remain off the books "for now" (para. 14).

[4] The intention was for Mr. Landsburg to leave his employment with PCL construction and perform any contracts obtained by Tylomar. Mrs. Landsburg, at least initially, would deal with office administration and financial accounts. The applicants would provide funding, including startup capital, and take financial responsibility for certain government remittances in the event that the company lacked sufficient funds. As the company required a vehicle, a Ford F-350 ("the

truck") was purchased and registered in the name of the company with the financing agreement for the purchase guaranteed by Bledin. Bledin also provided the sum of $65,000.00, which was paid to Mr. Landsburg. The respondents say this was a gift, with no obligation on the part of themselves or Tylomar to repay it. The respondents did, however, indicate an intention to do so by having the company pay the first $65,000.00 of its profits to Bledin. The applicants say it was agreed that the $65,000.00 would be paid by Tylomar and that if Tylomar was unable to repay this amount, Mr. Landsburg would be personally liable.

[5] The advance of the $65,000.00, and the conditions under which it was advanced, is one of the areas of dispute between the parties. In an e-mail to Mrs. Landsburg dated May 25, 2011, Graf stated:

> We are not at all uncomfortable with our contributions. Until you brought it up, they were never mentioned.
>
> Deal is as follows, and it follows the agreement we formed in the attorney's office.
>
> Brent $65,000 gift, truck paid.

> Lori & I are then entitled to the same amount out of the company, and additional profits split 50/50.
>
> Nothing has changed, it has been 50/50 since the beginning, and in order to get all of us more money, we need Brent to be out of PCL.
>
> The benefit to Brent and yourself for all the running around that you guys are doing is that you won't have to pay for the truck, the $65,000 will be a gift to Brent and therefore not taxable. So you are saving the taxes on $65,000, as well as a $1400 per month bonus.
>
> I think that is fair compensation, and I think in the long run will make us all a lot more money.

[6] Graf testified that Bledin was unhappy with the wording of this email, apparently due to his description of the $65,000.00 advance as a "gift." He acknowledged that he never indicated to the respondents that the email of May 25, 2011, contained an error in respect to the payment of the $65,000.00. It also appears that the reference to the $1,400.00 monthly bonus to be paid by the applicants related to the monthly payments on the truck.

[7] In an affidavit dated March 27, 2013, Bledin deposed:

> 6. I was not in a position to gift Mr. Landsburg $65,000, nor would I gift $65,000 to someone I had known for such a short period of time. The $65,000 was classified as a gift for CRA purposes so as to not attract tax consequences to Mr. Landsburg.

> 7. It was understood, and agreed to that the first $65,000 of profits from Tylomar would flow to me, and in the event Tylomar ... did not make it, then Mr. Landsburg would repay the loan.
>
> 8. Brent Landsburg ... makes reference to an e-mail sent on May 25th, from Martin Kaelble. The loan to Mr. Landsburg was made on June 20th, 2011. Much discussion took place between May 25th, 2011, and June 20th, 2011 as I was not comfortable with the contents of Mr. Kaelble's e-mail. ...

[8] The respondents maintain the $65,000.00 was intended as an incentive for Landsburg leaving his job at PCL construction. At one point Kaelble enquired of Mrs. Landsburg as to the annual salary received by Mr. Landsburg from PCL construction, which amount was $65,000.00. The respondents say there was no obligation by Mr. Landsburg to repay this money. Counsel references correspondence of July 19, 2011, forwarded by Dillon to Kaelble and Mr. Landsburg:

> With reference to our meeting regarding the various financial matters of Tylomar Landscaping Inc., I believe the following is the situation and the potential matters that should be discussed in relation to the handling of the various transactions:
>
> It is my understanding that Martin and Lori do not wish to be part of the Company due to certain personal matters that hopefully will be rectified within the next couple of years. However, Martin and Lori do wish to help Brent and Joanne with the Company, and in that regard have personally lent funds to Brent and Joanne for the purchase of certain equipment and assets for the Company. I believe the funds to be approximately $24,000.

> Our idea was to have Brent and Joanne sign a Promissory Note to Martin for these funds, then Brent and Joanne would lend the funds to the Company as a Shareholders' Loan. My understanding is that payments from the Company to Brent and Joanne would then be tax free as it is simply a re-payment of the loan, and then they could in turn re-pay the loan they owe to Martin.
>
> The more complex matter would be the fact that Martin gifted $65,000 to Brent and Joanne to allow Brent to terminate his employment and work full-time for the Company. As this was a gift, Brent and Joanne are not legally obligated to re-pay the funds so gifted, however it is my understanding that they do wish to some day re-imburse Martin these funds. The difficulty I see is how to have funds flow to Brent and Joanne to allow them to re-imburse the gift without attracting taxes.

[9] The characterization of the $65,000.00 payment as a gift was made by Dillon, the company's solicitor, in his correspondence of July 19, 2011. The Dillon letter contains two suggestions to enable payment of the $65,000.00 by the company to the applicants, as well as discussion of the potential tax consequences of each alternative and a suggestion to speak to tax accountant John Oakey.

[10] There was other correspondence from Dillon to the parties, including draft agreements. He asked for comments on the draft agreements. He received no comments in reply, and the agreements were never signed. There is no shareholders' agreement, no written option to purchase shares, nor any written agreement between the parties setting out their relationship in reference to the company and their respective obligations. The terms of any agreement must

therefore be deciphered from the correspondence, primarily e-mails, between the parties, the solicitor's letters, and the affidavits and oral evidence.

[11] In his affidavit of March 18, 2013, Mr. Landsburg states that he received the $65,000.00 as a gift, not a loan. By his account, he considered repaying it as a goodwill gesture, but was never under the impression that he was required to do so. He said this money was an incentive for him to leave PCL and devote his time to Tylomar. The amount represented his annual salary and benefits at PCL. He references the Dillon letter, and an e-mail from John Oakey, a tax accountant, to Mrs. Landsburg, Mr. Kaelble and Dillon on August 23, 2011. Mr. Landsburg stated that the description by Mr. Oakey was correct, except that the gift was only to himself and did not include Mrs. Landsburg. He further deposed that if it had been a loan, rather than a gift, he would not have accepted it.

[12] Mrs. Landsburg stated in her affidavit that the $65,000.00 paid to Mr. Landsburg was a personal gift to him and was never the property of either herself or the company. However, in an e-mail dated July 28, 2011, Mrs. Landsburg wrote the following to Graf:

> After thinking about our conversation this morning, and thinking and thinking...it appears to me that you guys are angry with Brent and I for Brent's continued involvement with PCL. If Brent and I both remember correctly, it was said by both you and Lori that Brent should "milk it" with PCL as long as we could in regards to income. Since the 65K Brent has never taken one second of his time away from Tylomar and given it to PCL. In fact, He [sic] has been busting his ass for Tylomar. So I'm left wondering why this little bit of "free money" from them has changed our agreement and made it "unfair". Before Tylomar, Brent made 65K plus he supported his income with side jobs which helped us out a great deal. I was also on a pension then which added to our income. Now, He [sic] is not allowed to do side jobs and is bound to his 65K debt to Lori. I am also wondering why the agreement of cash jobs has changed. Even more so, I'm wondering when We [sic] were going to be told.
>
> Where did the money go from the walkway job in Bedford? Did that go towards Brent's debt? I think that for now on, Brent and I should work as employees and pay off the debt asap. In addition the IOU's need to be done. I cannot have this debt hanging over our heads and you guys bitter as to when it will be paid. In fact, I'm starting to believe this was not a good idea.
>
> ...
>
> Brent will give you the money He [sic] owes you. We will also work diligently to repay the 65 back as I think it was a bad business idea. Brent just phoned and He [sic] is through with PCL as they wanted him to work days again.

[13] Mrs. Landsburg testified that when she wrote this e-mail she was frustrated with the applicants. Nevertheless, the message referred to a debt owed to Bledin. In addition, however, there is a reference to "free money," although it was suggested that the following phrase, "from them", indicated that this was not meant to refer to the applicants, but to the monies that Mr. Landsburg had been

receiving from PCL while also working full time for Tylomar. However, Mrs. Landsburg's testimony that this e-mail was written in frustration does not detract from her references to it as a debt. In Graf's May 25 e-mail to Mrs. Landsburg, after referencing the $65,000.00 gift and the payment on the truck, Graf stated that he and Bledin were "entitled to the same amount out of the company, and additional profits split 50/50." He did not refer to any obligation by Mr. Landsburg to repay the $65,000.00. Since Graf referred to the payment as a gift, the absence of any obligation on the part of Mr. Landsburg to repay it is apparent.

[14] I am satisfied that there was no commitment by Mr. Landsburg to repay the $65,000.00 he received from Bledin. What was agreed, and what was referred to in the e-mail of May 25, 2011, was that the company would pay the applicants the amount of the gift given to Mr. Landsburg. It is in this context that Dillon, in his letter of July 19, 2011, suggested two alternatives by which this could be effected. Any additional profits would be divided 50/50. Despite Bledin's assertions in her affidavit and similar statements by Kaelble in both his affidavit and oral testimony, I am satisfied that the $65,000.00 was a gift intended to induce Mr. Landsburg to leave his employment with PCL and to undertake responsibility for Tylomar's

landscaping work. It is noteworthy that in 2011 Mr. Landsburg received no salary, while the gift equalled the salary he had received in his previous employment.

[15] Initially the majority of Tylomar's work involved landscaping or related construction, such as building decks. It was also expected that there would be snowplowing work in the winter. However, as landscaping work became rarer the company ventured into additional areas of construction, including installing windows and doors. By the fall of 2011, it appears, construction comprised the bulk of Tylomar's work, there being neither landscaping nor snowplowing work sufficient to keep the company busy.

[16] During the 13 months Tylomar operated, it appears Bledin advanced three payments in respect to the truck. She apparently also advanced money for payroll and provided $4600.00 to Mr. Landsburg in November 2011. However, it appears that the company's accounts were not kept up-to-date and no payroll remittances were made. As a consequence, according to Mrs. Landsburg, the company is indebted to various government agencies in an amount more than $30,000.00. The respondents note that Mr. Landsburg, as the sole director, may have personal liability for some or all of this indebtedness. This is not a matter before this Court.

For purposes of this proceeding I am only prepared to recognize it as a potential liability, rather than an existing liability of Mr. Landsburg.

[17] The relationship between the parties deteriorated between the fall of 2011 and the spring of 2012. In early 2012 the applicants requested that shares be issued in their names equivalent to the shares held by the Landsburgs. Mrs. Landsburg instructed Dillon that there were to be no shares issued to the applicants. In her affidavit she stated that the instruction to Dillon was the result of a suggested unauthorized withdrawal by the applicants from the company's bank account, as well as the continuing deterioration of their relationship with the applicants. She deposed that she and Mr. Landsburg decided not to sell the applicants any shares because it "would not be in the best interest of the company."

[18] It is apparent that for some time the Landsburgs regarded Tylomar as their company and the applicants as mere investors by way of periodic loans and advances. This perception did not reflect the agreement between the parties. The absence of a written agreement does not disentitle the applicants from the benefit of that agreement. In this regard the following excerpts from Mrs. Landsburg's affidavit are telling:

11. The Applicants, myself and my husband, Brent Landsburg, had a meeting with legal counsel, Mr. John Dillon, to discuss the corporate structure and the flow of monies and responsibilities in advance of incorporation.

12. During these meetings the Applicants made assurances, which we verily believed to be true, that they would cover all of the business's expenses such as vehicle payments, tax installments, equipment costs and any other fees related to the business, and that they would ensure that payroll was covered in the event that the business did not have sufficient funds to pay same.

13. I was further informed by the Applicants and verily believe to be true that the Applicants did not initially want to have any ownership interest in the business, as they wanted to hide assets in said business, to keep them out of touch of a potential judgment creditor in Ontario.

14. The Applicants intention was further reiterated by Martin Kaelble's email to Mr. John Dillon, dated April 15, 2011, which stated in part:

> ..Lori and I would like to remain off the books for now...
>
> ...

15. In or about early April, 2011, I alone met with John Oakey, CA, tax accountant at Collins Barrow, to discuss the business' prospective corporate structure. It was decided that the company would be set up to have four identical classes of common shares, Class A, Class B, Class, C, and Class D.

16. Class A and Class B shares were to be issued to myself and my husband, respectively.

17. Email correspondence from Mr. Oakey to Mr. Kaelble and I dated April 14, 2011, confirms this structure....

18. The above-mentioned email from Mr. Oakey, further contained the following advice:

> I would also suggest a shareholder agreement be prepared, and you must [sic] also wish to put a share issuance agreement in place to state Martin, his wife or family trust are allowed to purchase 50% of the company for $50 at a later date.

19. At no time was any share holder agreement or share issuance agreement ever put in place.

[19] Clearly the parties intended to be equal shareholders in Tylomar. The applicants' decision to delay taking shares in their names, for whatever reason, does not detract from the parties' agreement that Tylomar's shares would be held by the four of them equally. Mrs. Landsburg's position, as evidenced in both her affidavit and oral testimony, appears to be that the applicants have no right to any involvement in Tylomar and since they are not shareholders have no shareholder rights. However, instructions to the company solicitor, Dillon, not to issue shares to the applicants, primarily because of the deterioration in their relationship, had no basis in law.

[20] Mrs. Landsburg deposed that the company is insolvent and owes significant amounts to the Canadian Revenue Agency and the Worker's Compensation Board. These amounts include deficiencies in payroll remittances and HST payments of more than $33,000.00, and more than $2,100.00 to the Worker's Compensation Board. She further deposed that for the 2012 fiscal year, up to and including July 2012, there was a net loss of $19,015.46. She concluded her analysis by stating that Tylomar was insolvent, with significant debts owing to CRA and WCB, "in addition to general creditors, such as the Applicants."

[21] By mid-May 2012 the Landsburgs decided to have Tylomar cease operations, considering it a failing business. Mr. Landsburg testified that by the spring of 2012 there was little landscaping work. The company's ledger and financial records indicated that, whereas initially the majority of Tylomar's work was landscaping, by the spring of 2012, there was more construction activity. In his affidavit, Mr. Landsburg stated:

> 40. There was difficulty in obtaining a sufficient work load in the landscaping industry. Therefore, from time to time I would use my knowledge in the construction business to secure construction contracts on behalf of Tylomar in an effort to subsidize Tylomar's landscaping jobs. These construction jobs would include construction related to landscaping, such as constructing decks and fences, as well as some general carpentry work.

41. When Tylomar became insolvent, my wife and I decided to use my construction knowledge and open a construction company entitled Black Horse Construction.

42. Black Horse Construction does not do landscaping projects.

[22] In 2011 the applicants and the Landsburgs both withdrew $13,000.00 from the profits of the company. Mr. Landsburg received no salary, having received the $65,000.00 gift from Bledin. The general ledger shows that in April 2012 Mr. Landsburg withdrew $4,924.80; in May, $6,187.50; and in June, $2,245.46. This total withdrawal of $13,357.76 was made without the knowledge or approval of the applicants. The evidence did not establish that Mr. Landsburg was being reimbursed for expenses incurred. As to the suggestion that this might have represented salary, the agreement reflected in the email of May 25, 2011, only contemplated that the parties were to share the profits, with no provision for Mr. Landsburg to receive a salary over and above his share of the profits.

[23] In April 2012 the Landsburgs incorporated "Black Horse Construction Inc" (Black Horse), intending it to be a construction company, and they began advertising around the middle of May. Mr. Landsburg testified that although Black Horse was a construction company, the nature of its business was different than Tylomar's. He said Tylomar's construction work consisted primarily of residential

construction work, such as window and door installation. Black Horse, by contrast, did commercial construction.

[24] In December 2011, Tylomar signed an agreement for the purchase of a Ford Edge motor vehicle, intended for Mrs. Landsburg's personal use. Bledin guaranteed the financing, as she had done in respect to the purchase of the F-350 truck. Both vehicles were transferred out of Tylomar in the spring of 2012, the F-350 to Black Horse and the Ford Edge to Mrs. Landsburg. These transfers were not approved by the applicants.

[25] After the hearing the applicants filed a Notice of Motion to require the respondents to “deliver the Ford F-350, and Ford Edge originally registered to Tylomar” to Bledin. The court scheduled to hear the motion directed the hearing be included as part of this hearing. As a consequence, this application was re-opened to permit the parties to address this further claim by the applicants.

Issues

[26] In their notice of application the applicants request an order pursuant to s. 5 of the Third Schedule to the *Companies Act*, R.S.N.S. 1989, c. 81, s. 1, as follows:

> I. Directing the Respondent, Brent Landsburg, as sole director of Tylomar, to issue common shares to the Applicants;
>
> ii. Directing Tylomar to provide a financial accounting to the Applicants commencing from the date of its incorporation on April 18, 2011;
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> iii. Directing Black Horse to provide a financial accounting to the Applicants commencing from the date of its incorporation on April 23, 2012;
>
> iv. Requiring the Respondents Brent Landsburg and Jo-Ann Landsburg to personally compensate the Applicants such that the Applicants are placed in the same position they would have been in were it not for the actions of the Respondents. Jo-Anne Landsburg and Brent Landsburg.
>
> v. Directing that Black Horse disgorge any profits to Tylomar.
>
> vi. Restraining the Respondents Brent Landsburg and Jo-Ann Landsburg from using any Tylomar assets in any business other than Tylomar.
>
> vii. Restraining Black Horse from competing with Tylomar.

[27] In addition, the applicants seek judgement in favour of Bledin against Mr. Landsburg and Tylomar, jointly and severally, for the loans totalling $69,600.00. Further, the applicants seek to recover for Bledin the two vehicles previously registered to Tylomar.

The law

[28] As noted, the applicants rely on s. 5 of the Third Schedule to the Nova Scotia *Companies Act*. Section 5 provides for the so-called oppression remedy:

> 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

...

(d) an order directing an issue or exchange of securities;

...

(h) an order varying or setting aside a transaction or contract to which a company is a party and compensating the company or any other party to the transaction or contract;

(I) an order requiring a company, within a time specified by the court, to produce to the court or an interested person financial statements in the form required under the Act or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a company required under the Act;

...

> (5) A company shall not make a payment to a shareholder under clause (f) or (g) of subsection (3) of this Section if there are reasonable grounds for believing that (a) a company is or would after that payment be unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the company's assets would thereby be less than the aggregate of its liabilities.

[29] Also relevant is the definition of "complainant" as it relates to the application of s. 5, found in s. 7(5)(b) of the Third Schedule:

> (b) "complainant" means
>
> > (I) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a company or any of its affiliates,
> >
> > (ii) a director or an officer or a former director or officer of a company or of any of its affiliates,
> >
> > (iia) a creditor of a company or any of its affiliates,
> >
> > (iii) the Registrar, or
> >
> > (iv) any other person who, in the discretion of the court, is a proper person to make an application under this Section.

[30] Initially the respondents took the position that although the applicants might have been creditors of Tylomar, they had no standing to seek a remedy under s. 5. They relied on *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.,* 2008 ONCA 183, where it was held that the oppression remedy was not intended for use by creditors who failed to protect themselves in the course of their business transactions with the company. However, the relevant provisions of the Nova Scotia legislation include creditors among the classes of potential complainants: Third Schedule, s. 7(5)(b)(iia). In *Directors ands Officers in Canada: Law and Practice*, (Carswell,Volume 3), Carol Hansell observes, at 16-15, that the Nova Scotia legislation is an exception to the rule in most Canadian jurisdictions that creditors do not have automatic standing to seek an oppression remedy. As such, if the applicants are creditors of Tylomar they are entitled to maintain a proceeding for oppression.

[31] The applicants seek an issue of Tylomar shares equivalent to the number of shares the Landsburgs hold in the company. This raises the question of whether they are entitled to maintain an oppression action in the character of security holders, pursuant to s. 7(5)(b)(I) of the Third Schedule, which includes within the definition of "complainant" a "registered holder or beneficial owner, and a former

registered holder or beneficial owner, of a security of a company...” The applicants are not shareholders at the present time, since no shares have been issued to them. The issue is whether they are beneficial owners.

[32] The applicants cite *Fedel v. Tan* (2008), 93 OR (3d) 274, 2008 CanLII 46697 (Ont. Sup. Ct. J.), where Cumming J. undertook an extensive analysis of the scope of the definition, particularly as it related to alleged beneficial shareholders. Cumming J. observed that the oppression remedy is remedial, and that “the term ‘security holder’ is to be read expansively to protect a ‘complainant’ who has a reasonable expectation by reason of an agreement to become a shareholder (para. 207). Cumming J. continued, at paras. 209-217 (some citations omitted):

> [209] The case law has adopted an expansive interpretation. *Csak v. Aumon* reflex, (1990), 69 D.L.R. (4th) 567 at p. 570 (Ont. H.C.), involved the Respondents' refusal to issue the shares that the applicants were contractually entitled to receive. Allowing the oppression claim, the court held that a beneficial shareholder is one who has an equitable claim to shares whether or not they have been issued and appropriated to him.
>
> [210] In *Mackenzie v. Craig* (1997), A.R. 363 (Q.B.), rev’d 1999 ABCA 84 (CanlII), 171 D.L.R. (4th) 268 (Alta C.A.), the question was whether parties claiming to be entitled to shares under a Memorandum of Understanding were beneficial shareholders and therefore complainants in a derivative action under the Alberta *Business Corporations Act*, S.A. 1981, c. B-15. The trial court found, at para. 24, that the definition of beneficial owner should be broadly interpreted to include anticipated shareholders if there is some evidence that the party has a

legitimate claim to those shares. The Court of Appeal reversed on procedural grounds, finding that the plaintiffs should first have proven that they were anticipated shareholders before seeking leave to launch a derivative action. It did not, however, disagree with the trial judge's finding that anticipated shareholders could have beneficial ownership.

[211] *Evans v. Facey*, [2000] O.J. No. 2276 (Sup. Ct.) is a case analogous to the one at hand, where the parties agreed that Evans, the plaintiff, would be a shareholder, but where the required formalities were never completed by the defendant. Allowing the plaintiff's oppression claim, the court found that there was a contract between the parties that this contract was partly performed and entitled Evans to the shares, and that as a result of this contractual entitlement, the plaintiff had beneficial ownership sufficient for an oppression claim.

[212] *Anthopoulos v. LaPalme*, [2003] O.J. No. 5452 (Sup. Ct.), aff'd 2004 CanlII 42925 (ONCA), (2004), 192 O.A.C. 163 (C.A.) also involved an agreement providing that the plaintiffs would receive shares. The agreement was breached and they never received those shares. Finding oppression, the court held, at para. 89, that "there really is no issue that the plaintiffs are complainants within the definition of [*CBCA*] s. 245" and found that they were beneficial shareholders of the corporation.

[213] In *Abdalla v. Skalin*, [2004] O.J. No. 2981 (Sup. Ct.), the plaintiff alleged that he was a beneficial shareholder because, based on a contractual agreement for the purchase of shares, he had a reasonable expectation of becoming a registered shareholder. The court found that the core nature of his claim was an oppression claim within the meaning of s. 248(2) of the OBCA.

[214] In *Smith v. Dawgs Canada Distribution Ltd.*, 2008 SKQB 219 (CanLII), 2008 SKQB 219, the plaintiff claimed that he had contributed $23,000 in exchange for a promise of shares in a corporation to be created. The defendant established the corporation, but did not issue the shares. The court held, at para. 16, that "[it] seems incongruous to suggest that a person who has not been issued shares due to alleged oppressive conduct cannot bring an action or a remedy against oppressive conduct simply because the oppressive conduct prevented him from being issued the shares". The court subsequently denied the plaintiff's request for interim relief on the facts.

> [215] It is not enough to simply have reasonable expectations to become a shareholder based upon a general sense of fairness. Reasonable expectations must be tied to legal or equitable rights as a security holder, whether as a registered owner or as a beneficial owner... These reasonable expectations must also arise from an agreement that specifies the exact nature of the shares that a party would receive; a promise of shares made during negotiation of an agreement is not enough when no agreement pertaining to the shares was ever reached...
>
> [216] These authorities establish that the term "beneficial owner" is to be interpreted broadly and expansively. It is not limited merely to ownership through a trustee or legal representative, agent or other intermediary. In my view, the evidentiary record establishes a contractual obligation upon Mr. Tan to give effect to Mr. Fedel's claim to a shareholding interest in GPI and BVI/WW. Mr. Fedel acted upon, and relied upon, the oral agreement that he was to have an ownership interest in GPI and BVI/WW. He provided both financial consideration and services in reliance upon the agreement. Mr. Tan is in breach of his contractual obligation.
>
> [217] Given the evidentiary record, Mr. Fedel has equitable rights because of the oral agreement between Mr. Tan and Mr. Fedel and the promise made (and repeated) by Mr. Tan that his partner, Mr. Fedel, had an equity interest. Mr. Fedel relied upon the promise in making significant contributions to the business. GPI and BVI/WW were essentially incorporated partnerships, albeit with Mr. Fedel having a minority, 40 per cent, interest. In such instances, the statutory oppression remedy will afford redress...

[33] Cumming J. went on to find that the authorities indicated that oppression does not require actual illegality. In the circumstances, the appropriate remedy was an order compensating Fedel, and ensuring that the relationship between the two men was severed (paras. 218-220). On appeal, at 2010 ONCA473, the Ontario Court of Appeal said, at paras. 52-56 and 69:

[52] Tan argues that the application judge erred in finding that Fedel was entitled to a remedy under s. 248 of the OBCA. He makes two arguments.

[53] First, Tan argues that if the application judge was correct in finding that Fedel had a contractual right to a 40 per cent ownership interest in GPI, Fedel was limited to suing Tan for breach of contract. He argues that the application judge, in effect, impermissibly granted Fedel equitable relief under s. 248 on the basis of a finding of a breach of contract. He submits that a court must give full effect to a contract without recourse to s. 248 when there is an unambiguous contract on which a party can sue. Several of the application judge's awards for compensation would not have been available in an action for breach of contract.

[54] In making these arguments, Tan relies on the decision of this court in *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 (CanLII, (2008), 234 O.A.C. 59, which held that an oppression remedy was not intended to be a substitute for an ordinary right of action in contract. Where the sole complaint is that of a breach of contract, the contract action should be pursued.

[55] The difficulty with Tan's argument is that Fedel's complaints against Tan and the corporate respondents exceeded a simple breach of contract claim. The application judge found that Tan and Fedel's businesses were essentially "incorporated partnerships". Fedel had a reasonable expectation that Tan was operating the businesses of GPI and WW in a proper manner and that he was protecting Fedel's 40 per cent ownership interest in those companies. The remedies that Fedel sought under s. 248 of the OBCA went well beyond remedies that were available to him for Tan's breach of his agreement to deliver 40 per cent of the shares to him. To succeed, however, Fedel needed to establish that he had a sufficient interest in GPI to entitle him to remedies under s. 248.

[56] In my view, *J.S.M*. does not assist Tan. In that case, the court held that a contractual remedy should be sought where the sole complaint is that of a breach of contract. It does not, however, suggest that the mere fact that a claim could be brought for breach of contract precludes the application of the oppression remedy where its application is otherwise appropriate. In *J.S.M.*, at para. 66, the court reasoned that the oppression remedy is not intended to give a creditor after-the-fact protection against the risks assumed when entering into an agreement with a corporation, but is an appropriate remedy in situations where a

> creditor finds its "interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself". In my view, that reasoning applies equally to a case such as the present, where the interest asserted by the applicant is an ownership interest rather than that of a creditor and where the applicant establishes that its interest has been harmed by conduct that is protected by s. 248 of the OBCA.
>
> ...
>
> [69] Section 248 protects the interests of a "security holder, creditor, director or officer of the corporation". The application judge found that Fedel was a security holder within the meaning of the section. A "security holder" is not defined in the OBCA. However, it is well established that a security holder includes a beneficial owner of shares: see, e.g., *Joncas v. Spruce Falls Power and Paper Co.*, 2001 CanLII 6156 (ONCA), (2001), 144 O.A.C. 289 (C.A.), at paras. 9 and 10; *Csak*, at p. 570; *Evans*, at paras. 99-103. Although the application judge did not specifically use the term "beneficial owner" in describing Fedel's interest in GPI, it is implicit in his findings that Fedel was one. "Beneficial ownership", defined in s. 1 of the OBCA, includes "ownership through a trustee, legal representative, agent or other intermediary" – situations in which a person's interest in a company is held by another.

[34] The respondents argue that *Fedel* is distinguishable on the basis that all of the shares had been created and issued. I see no relevant distinction. Whether all of the authorized share capital of the company has been created and the shares issued, or whether shares remain to be issued, is irrelevant in determining whether a complainant is “entitled” to own shares in the company. The applicants are "security holders"for the purpose of seeking relief under the Third Schedule of the *Companies Act*.

“Clean hands” and equitable relief

[35] The respondents also argue that since accounting and disgorgement of profits are equitable remedies, it is necessary that the party seeking relief come to court with "clean hands". In *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, Deschamps J. said, at para 22:

> At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge's discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as "Equity follows the law", "Delay defeats equities", "Where the equities are equal the law prevails", "He who comes to equity must come with clean hands" and "Equity acts in personam" (*Hanbury & Martin Modern Equity* (17th ed. 2005), at paras. 1-024 to 1-036, and I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the social fabric. As Spry puts it:
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> > ... the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise.

[36] In arguing that the applicants lack “clean hands”, the respondents point to their alleged refusal to return to Tylomar certain landscaping equipment. Although

Mrs. Landsburg appeared to assert a claim for its return in one of her affidavits, the respondents' oral testimony suggested that they were making no claim. As such, I see no basis to treat this as a basis for finding "unclean hands" on the part of the applicants.

[37] The respondents raise a second alleged basis to find "unclean hands" on the applicants' part. The Dillon letter referenced Graf transferring his Porsche to the company. Title to the Porsche was transferred back to Graf in early 2012 at the request of the respondents. Mr. Landsburg stated in his affidavit that, upon learning that Kaelble did not have a driver's license, he told Kaelble to remove his motor vehicle from the company's insurance coverage. He further stated that the Porsche is no longer registered in the company's name, nor is it covered by the company's insurance policy. The respondents claim that the vehicle was placed in Tylomar's name in order to hide assets from potential judgment creditors. Even if this were the case, given that the individual respondents were the only registered shareholders, officers, and director, it can hardly be said that the applicants engaged in the alleged misconduct on their own. I cannot conclude that this was anything but an agreement between the parties, whatever its purpose may have been.

[38] The respondents go on to describe other incidents that allegedly point to "unclean hands" on the part of the applicants; for instance, an occasion when Graf, using another name, inquired about having work done, supposedly to determine the nature of the work being carried on by Mr. Landsburg at the time. As well, the respondents allege that the applicants treated corporate assets as their own, such as by transferring funds from the company's bank account to Bledin's personal account.

[39] On the other hand, there was the evidence that Mrs. Landsburg directed the solicitor to refuse to issue shares to the applicants; that the Ford Edge purchased by Tylomar with Bledin's guarantee was transferred to Mrs. Landsburg; and that the F-350 truck was transferred to the Landsburgs' new company, Black Horse. Moreover, it is evident that, over time, the respondents shut the applicants out of any information respecting the performance of Tylomar.

[40] In the circumstances, neither party has come to this Court with "clean hands". In *Belliveau v. Belliveau*, 2011 NSSC 397, Duncan J. observed:

> "While a finding that the plaintiff does not come to court with clean hands carries some weight, it is not necessarily determinative of the final issue. It may be possible

> for a plaintiff without clean hands to yet obtain equitable relief. The clean hands doctrine serves to deny equitable relief only where the misdeeds or misconduct has "an immediate and necessary relation to the equity sued for": *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, 1993 CanLII 148 (SCC), [1993] 1 S.C.R. 167*; DeJesus v. Shariff* 2010 BCCA 121 (CanLII), 2010 BCCA 121, at paras. 84 to 86.

[41] While the respondents submit that the applicants' misconduct had such an "immediate and necessary" relation to the equity they are now suing for that their actions had direct implications for the very business in which the applicants now claim an interest, having regard to the conduct of all the individual parties, I see no convincing basis to preclude the applicants from seeking the remedies provided for under the Third Schedule of the *Companies Act*.

Oppression

[42] The issue with respect to the oppression remedy is whether the evidence establishes that any act or omission of the company or its directors, or the manner in which its business affairs were carried on or conducted, was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the applicants. The individual respondents shut the applicants out of Tylomar, denied them information about its operations, refused to issue shares to the applicants, transferred assets of the company for their own benefit, and eliminated the

company's cash holdings, while also terminating its operations. Whether other laws were breached is not, however, before the Court at this time; the question is whether this conduct amounted to oppressive conduct within the Third Schedule of the *Companies Act*. Having regard to the evidence, both oral and documentary, I conclude that this question must be answered in the affirmative.

Remedies

[43] As noted earlier the applicants are entitled to shares in Tylomar equivalent to the shares now held by the individual respondents.

[44] A further remedy sought by the applicants was for the accounting of Tylomar and of Black Horse and directing Black Horse to disgorge any profits to Tylomar. Although such a remedy could be available, I have determined that in these circumstances it is not appropriate.

[45] There was no agreement, written or oral, preventing the individual respondents from creating and operating Black Horse. To the extent it may have been in competition with Tylomar, there was no agreement that prevented any

party from engaging in a similar line of work, particularly upon the failure of Tylomar. There was no non-competition clause.

[46] Secondly, the applicants did not meet their own obligations. The agreement summarized in the Graf email of May 2011 included a commitment to pay $1400 monthly, which apparently represented the amount of the monthly payment on the F-350 truck. In the 13 months of Tylomar's operations, the applicants made only three such payments, either by advancing the funds to the company or making the payment themselves. The applicants were in breach of their own commitment under the agreement between the individual parties.

[47] The applicants have not challenged the Tylomar financial records that are before the court, and the evidence has not pointed to any impropriety in the records themselves. As such, nothing would be served by requiring a further accounting or financial investigation of the company.

[48] As to the applicants' claim for an accounting and disgorgement of any Black Horse profits to Tylomar, I am satisfied that such a remedy is not justified. There was no non-competition agreement. Nothing prevented Mr. Landsburg from

creating a construction company to do types of construction work not undertaken by Tylomar. Kaelble acknowledged that the landscaping business had not been successful. Neither Tylomar nor the applicants are entitled to an interest in Black Horse or its profits.

Tylomar assets

[49] The applicants submit that, being the only shareholders of Tylomar, and Mr. Landsburg the only director, and in view of the lack of value in the vehicles over and above the secured financing, they were entitled to transfer the vehicles to Black Horse and Mrs. Landsburg respectively. I would note, however, that I have previously determined that the applicants were entitled to shares in Tylomar.

[50] Additionally, it is not enough for the Landsburgs to say that CRA and WCB have no interest in these vehicles, and that they are consequently within their rights to transfer them for their own benefit. Although Mrs. Landsburg testified there were no trade or supplier creditors, in her affidavit she deposed that "Tylomar is an insolvent business with significant debt owing to the CRA, WCB, in addition to general creditors, such as the Applicants." Recognizing the

applicants as being among a class of general creditors, the respondents were not entitled to transfer the only significant assets of Tylomar to their own company. Additionally, there was no satisfactory evidence of the value of the two vehicles. It is not sufficient for the Landsburgs to simply assert that there was no equity. More than this is required in order to justify the transfer of the vehicles to their own company and to Mrs. Landsburg. The vehicles being assets of Tylomar, and there being no satisfactory evidence as to their value and whether it exceeded the amounts owing to the financing institutions, they belong to Tylomar.

[51] The applicants submit that the return of the two vehicles to Bledin was required by the agreements whereby she guaranteed the financing of each vehicle. The email dated April 15, 2011, from Graf to Dillon concludes:

> Also, would you draw up a side agreement as we discussed whereby in the event of company dissolution the truck is to be returned to Lori & I. Also, that any and all equipment is to be returned to Lori & I. Also, perhaps a generic promissory note for Jo & Brent to sign when we give them funds for the company as amounts will change each time depending on circumstances. And, also that we are preferred creditors to the company

[52] There was no agreement by Tylomar for the transfer of its assets to Bledin. These are Tylomar's vehicles, subject only to the secured claims of the financing

institution. Private agreements between shareholders of a company do not determine title to assets owned by the company. Any equity belongs to the creditors; it is only any surplus that would belong to the shareholders.

[53] Accordingly, the two vehicles must be returned to Tylomar, and any expenses relating to the registration of these vehicles in the name of Tylomar are the responsibility of Black Horse (for the F-350 truck) and Mrs. Landsburg (for the Edge), respectively. If not for the evidence of Mrs. Landsburg that the return of the Porsche was at the request of the Landsburgs, a similar direction would have been made in respect of the Porsche. However since it is the individual respondents who requested that the Porsche be removed from the company, there will be no similar order for its return to Tylomar.

[54] Although not directly raised by the applicants, the cash withdrawals by Mr. Landsburg in April, May, and June 2012, while Tylomar was in the process of ceasing activities and Black Horse was being set up, must be returned to Tylomar. These withdrawals were not authorized by the agreements by which Tylomar was established and operated.

[55] In respect to the $65,000.00.00 advanced by Bledin I am satisfied it was a gift to Mr. Landsburg, although there was an understanding between the parties that prior to any division of profits, the applicants would receive an equivalent sum. However, in 2011 the profits, presumably by agreement, were distributed equally between the parties. There were no subsequent profits. There are thus no profits from which to pay Bledin the agreed $65,000.00. The applicants are not entitled to a judgment for $65,000 as against Tylomar. There was no agreement by the company to pay this amount to the applicants, other than the parties' understanding that there would be an equivalent amount paid from profits before dividing any profits among themselves. Dillon suggested possible mechanisms by which an obligation could be created for the company to make the payment. There is no evidence that any of these were put in place, and therefore no record of any obligation by the company to the applicants in respect to this $65,000.00. The monies were advanced to Mr. Landsburg, not to the company. They were a gift to him, although, as earlier noted, they were apparently intended as an inducement for him to leave PCL Construction and work for Tylomar.

[56] The applicants may have also been creditors for monies advanced by Bledin to the company during the course of its operations. In one of their written

submissions, the applicants say that they paid the legal and accounting fees to incorporate the company, paid payroll on three occasions, and made payments on the F-350 truck. They also assert that they gave the respondents $1,000 to open a bank account for the company and that the respondents opened the account with a balance of zero, yet had cashed their $1,000 cheque. The respondents did not dispute these assertions. However, the evidence is that the applicants received certain monies from the company, over and above sharing the $26,000.00 in profits with the respondents. There was no accounting or other evidence provided as to whether amounts that were received from the company by the applicants equalled the amounts allegedly advanced by Bledin. There was evidence of some payments made to Bledin, as well as the landscaping equipment purchased by the company with funds advanced by Bledin, which equipment was retained by the applicants. On the evidence before the court, it is not possible to determine the extent of any debt owed to the applicants by the company.

[57] There is no claim by the respondents or the company for the applicants to return any company assets. As noted, the applicants advanced funds for the purchase of certain landscaping equipment, which is now in their possession. The respondents suggested that the applicants' retention of this equipment represented

the repayment of the advances the applicants made for its acquisition by the company. However, at law, if the equipment was purchased by the company, or was placed in the company's name, it belongs to the company. The applicants would be creditors for the amount they advanced. If title to this equipment was never held by the company, then it is the applicants' equipment, notwithstanding its use by Tylomar, and the applicants are entitled to retain it.

[58] In their trial brief the respondents state that the applicants provided capital in the amount of $38,234.25, including $20,136.25 worth of landscaping equipment. They further submit that Tylomar paid back $13,383.00. Counsel also references two other payments, totalling $1,960.00, made by Tylomar to the applicants in 2012. The written submission therefore appears to assert a claim by Tylomar to the equipment, and recognition of an indebtedness to the applicant of $22,891.25 ($38,234.25 minus payments of $13,383.00 and $1,960.00.) However, neither the individual respondents nor Tylomar claim return of this equipment in their Notice of Contest, and their counsel advanced no such claim in the hearing. It is unclear whether their position is that any indebtedness owing to Bledin should be offset by the landscaping equipment, now retained by the applicants.

[59] In their rebuttal brief, the applicants refer to the equipment which they have retained. They submit that Bledin lent Mr. Landsburg $65,000.00 from a tax-free home equity line of credit on her home. The applicants were then entitled to the first $65,000.00 in profits; in the event the company failed, Mr. Landsburg would be liable. The equipment was allegedly placed in Tylomar's name as a shareholder loan carrying no tax consequences, to help offset the loan of $65,000.00 to Mr. Landsburg. In short, they submit, the equipment was purchased by the applicants, registered to Tylomar, with the intention that the proceeds would help set off the loan to Mr. Landsburg.

[60] Unclear is why placing this equipment in the company's name would assist in the company's repayment of the loan to Mr. Landsburg. Regardless, the applicants acknowledge that the equipment was in the company's name. Absent some lien or charge on the equipment, it would belong to the company and be available to its creditors. The evidence does not appear to establish any legal entitlement by the applicants to this equipment. I note that the applicants filed a further Notice of Motion claiming entitlement to the F-350 truck and the Ford Edge. They could also have advanced a claim to include the landscaping equipment.

[61] In her March 18, 2013, affidavit, Mrs. Landsburg stated that the landscaping equipment was purchased by Tylomar, though it was in the applicants' possession. She then deposed that the applicants refused numerous requests for its return; she asserted that the absence of this equipment had "further disrupted" Tylomar's ability to carry out landscaping work or to use the equipment to pay off the company's debts (para. 105). However, as I have noted, there was no claim for return of this equipment in the respondents' Notice of Contest. Notwithstanding the apparent entitlement of Tylomar to the equipment, the applicants will remain entitled to its possession. However, in retaining this equipment, their claim for monies advanced to Tylomar to purchase the equipment is rejected on the basis that they now have this equipment in their possession.

[62] To summarize, the applicants may retain this equipment, but in doing so, they are no longer entitled to be reimbursed for the monies advanced to the company for its purchase. What is unclear is whether the applicants remain creditors of Tylomar, and, if so, in what amount. Consequently, I am not able to set any specific amount as owing by the company to the applicants. I am, however,

satisfied that they are creditors, as deposed to by Mrs. Landsburg, but in an undetermined amount.

[63] Kaelble testified (and it was suggested in submissions) that if the applicants had known that Mr. Landsburg had previously operated a company that went bankrupt, they would not have gone into business with the respondents. Obviously they failed to make proper inquiries. The applicants also state that the individual respondents had advised that creditworthiness was an issue, and this was the reason that Bledin would have to guarantee the loan for the truck. Obviously they were aware of some credit issues involving the individual respondents. The failure to make further inquiries is not a basis for any claim against the individual respondents or the company.

[64] Mr. Landsburg acknowledged that a loan of $4,600.00 which the respondents initially alleged was to the company was, in fact, to him personally, and that he accepted responsibility for its repayment. The applicants shall therefore have judgment against Mr. Landsburg for the sum of $4,600.00.

Conclusion

[65] The applicants have established an oppression claim. They are not, however, entitled to judgment for $65,000.00 as against Tylomar or Mr. Landsburg. The F-350 truck and the Ford Edge must be returned to Tylomar. There was no request for recovery of the landscaping equipment by Tylomar. The applicants are entitled to judgment against Mr. Landsburg for $4,600.00.

Costs

[66] Neither party is entitled to costs. Although each of the individual parties was partially successful, the decision to deny costs is principally based on their respective misconduct in carrying out their obligations under the agreements they entered into with each other. The applicants failed to make the monthly “bonus” payments they had undertaken. The respondents’ failures include their refusal to cause the company to issue shares to the applicants. Regardless of the applicants’ conduct, they were entitled by the original agreement between the parties to equivalent shares in the company. Additionally, the transfer of assets and

withdrawal of much of the cash balance of the company, shortly before termination of its activities, disentitles the respondents to costs.

[67] Judgment accordingly.

MacAdam J