THE LITIGATOR

MARCH 6, 2009

Recent Ontario cases highlight the scope of the oppression remedy – and its limitations

BY KENNETH A. DEKKER, AFFLECK GREENE MCMURTRY LLP.

The corporate oppression remedy found in almost all Canadian corporate statutes has been characterised by many as the common law world's broadest and most comprehensive remedy available to shareholders, creditors and certain other stakeholders of a corporation. It gives courts seemingly unfettered discretion to address past wrongs and prevent future harm caused to complainants by corporations and their management. Central to the oppression remedy are the reasonable expectations of a corporation's stakeholders and whether the actions of the corporation have run contrary to those expectations. Last year was a high profile year for the oppression remedy, largely due to the Supreme Court of Canada's decision in *BCE Inc. v. 1976 Debentureholders,* 2008 SCC 69 on whether it would permit the largest leveraged buy-out in history to go forward. Aside from the *BCE* decision, however, there have been several less publicised decisions in Ontario courts that could nevertheless be important to the development of the oppression remedy.

A key aspect of the oppression remedy is that it can provide relief to creditors who may have been treated unfairly by a corporation - not just shareholders. In a decision released last July, Justice Colin Campbell of the Ontario Superior Court of Justice extended that protection to cover even those creditors who do not yet know how much they are owed. In *1413910 Ontario Inc. (c.o.b. Bulls Eye Steakhouse & Grill) v. McLennan*, [2008] O.J. No. 2762 (SCJ), Bulls Eye obtained partial summary judgment for breach of a lease agreement against a shopping plaza owner, Select Restaurant Corporation. However, before a trial could be held to quantify damages, Select sold the plaza, its only asset, and paid the net proceeds to its sole shareholder. Bulls Eye sued that shareholder for oppression and sought a portion of those proceeds to pay its judgment debt. The defendant denied liability, saying that Bulls Eye was not a creditor at the time of the payment, because the quantum of its judgment had not yet been established. Justice Campbell disagreed. While he accepted that a proper complainant under the oppression remedy must have been a creditor at the time of the impugned conduct, he went on to find that "creditor" includes "any person having a legal right to damages," whether or not the quantum is known. In this case, Bulls Eye became a complainant when it initially obtained judgment against Select and it was entitled to expect that Select would not dissipate its assets until the quantum was decided. The breach of this reasonable expectation was oppressive and, as such, Bulls Eye was entitled to compensation.

In another Ontario Superior Court decision, released last September, the oppression remedy was further extended to persons *promised* shares in a corporation who may not yet be actual shareholders. In *Fedel v. Tan*, [2008] O.J. No. 3585 (SCJ), Justice P. A. Cumming granted an oppression remedy in favour of a person who acknowledged that he was not a registered shareholder but nevertheless had been promised a 40 per cent ownership in the corporation. Justice Cumming found that persons who have contracted to become shareholders in a corporation are proper complainants under the oppression remedy provisions of the Ontario *Business Corporations Act* and the applicant was awarded more than $1.3

Affleck
Greene
McMurtry

365 Bay Street, Suite 200, Toronto, Canada M5H 2V1
Telephone: 416.360.2800 Fax: 416.360.5960
www.agmlawyers.com

million as compensation for his financial contributions to the corporation, lost future profit and other conduct harmful to him as an intended shareholder.

It is important to keep in mind, however, that the oppression remedy is no substitute for an old-fashioned breach of contract claim where there is a contract to be enforced. In particular, a recent Ontario Court of Appeal decision made it clear that, where two parties have reduced their understanding to a written contract, a remedy should be sought for breach of contract and not oppression. In *J.S.M. Corporation (Ontario) Ltd. v. The Brick Furniture Warehouse Ltd. et al.*, [2008] O.J. No. 958 (CA), J.S.M. sued three affiliated Brick corporations, a parent and its two subsidiaries, for breaching a lease agreement in its shopping plaza. J.S.M. also claimed that the actions of the parent corporation (the only defendant with assets) that led to the breach of the lease agreement by all three defendants were oppressive. At trial, the parent corporation was held liable under the oppression remedy.

The Court of Appeal upheld the result but instead found the parent liable for breach of its contract with the plaintiff and not oppression. In doing so, the Court of Appeal warned against courts being too quick to use the oppression remedy to re-write contracts based upon what the court thinks is "just and equitable" in the circumstances or to "relieve the party to a contract of the consequences of an improvident agreement." In other words, the reasonable expectations of contracting parties are contained in the terms of their contract and the oppression remedy should not be used to change those terms.

In summary, while the oppression remedy is a broad remedy that can provide relief to a wide range of shareholders and certain other stakeholders harmed when a corporation is run contrary to their reasonable expectations, it will not provide relief to arm's length contracting parties who later find that their contract does not give them the protection they want.

This article first appeared in the January 30, 2009 issue of *The Lawyer's Weekly*, published by LexisNexis Canada Inc.

For more information contact:

Kenneth A. Dekker, Affleck Greene McMurtry LLP
Tel: 416-360-6902
Email: kdekker@agmlawyers.com