

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ANTHONY ZANARDO in his capacity as) *Christopher Trivisonno*, for the Applicant
the Estate Trustee for the ESTATE OF) (Respondent in Appeal)
LUIGI GAMBIN)
)
Applicant (Respondent in Appeal))
)
- and -)
)
DI BATTISTA GAMBIN) *Sheila R. Block and Jonathan Silver*, for the
DEVELOPMENTS LIMITED, RAY DI) Respondents (Appellants)
BATTISTA, ANTHONY DI BATTISTA,)
JULIA BABENSKY, WHITWOOD) *Edmond F.B. Lamek*, for Zeifman Partners
DEVELOPMENTS LTD. and) Inc. in its capacity as Monitor for the
GREYSTAR DEVELOPMENTS INC.) Respondent Di Battista Gambin
) Developments Limited
Respondents (Appellants))
)

HEARD: January 23, 2019

REASONS FOR DECISION

DIETRICH J.

Overview

[1] Ray Di Battista and Luigi Gambin formed Di Battista Gambin Developments Limited (“DBG”), in which they were equal partners. Through DBG, they successfully developed and managed real properties in the City of Toronto. Following Luigi’s untimely death, there was a rupture in business relationship between Luigi’s estate and the Di Battista family. Luigi’s estate trustee brought an application seeking a remedy for oppression. This court found oppressive conduct by the Di Battista family and ordered a winding-up of DBG on terms that included a fairly tight timeline.

[2] The Appellants are appealing the winding-up order. They also appealed to the Divisional Court to stay the winding-up order pending their appeal. The requested stay was granted and the Divisional Court directed that DBG shall continue to carry on business in the ordinary course, and appointed a monitor to prevent surreptitious dissipation of assets.

[3] This court then issued its decision on costs relating to the oppression application. The costs order includes a shareholder loan mechanism to ensure that Luigi's estate would not indirectly pay fifty percent of the costs it was awarded in the litigation and fifty percent of the Di Battista respondents' costs of litigation – a result that would occur if DBG were simply ordered to pay the costs.

[4] The court-appointed monitor brings this motion for directions and seeks the court's advice on whether the payment of the Appellants' legal fees incurred in pursuing their appeal of the winding-up order should be paid by DBG.

[5] The monitor raises a novel question requiring a reconciliation of the ruling staying the winding-up order and the ruling on costs to determine who should pay the Appellants' legal costs relating to the appeal.

[6] For the reasons that follow, I find that the Appellants' costs of appealing the winding-up order should be paid by the Di Battista respondents and not by DBG.

Factual Background

[7] When Ray and Luigi formed DBG Luigi owned 50% of the shares and Ray's wife, Julia Babensky, owned the other 50%. There was no shareholders' agreement, but when Luigi was diagnosed with cancer, the partners and their respective wives entered into a memorandum of agreement that provided for the succession of the business in the event of the death of one of the partners.

[8] Mr. Gambin died in 2010 and, unfortunately, his wife died very shortly thereafter. In accordance with the memorandum of agreement, these deaths left the Di Battista respondents (Ray, Julia and their son Anthony Di Battista) in charge of the ongoing business of DBG, though Luigi's estate remained a fifty percent shareholder. Anthony Zanardo is the estate trustee for Luigi's estate.

[9] Over time, Mr. Zanardo began to question the management of DBG and a related company Whitwood Developments Ltd. ("Whitwood"). He was concerned that the directors of DBG, Julia and Anthony, were not acting in the best interests of both shareholders. In 2014, Mr. Zanardo brought an application seeking a remedy for oppression. That matter was contested but ultimately settled in 2015.

[10] Subsequent to the settlement, a number of events took place, including a significant non-arms-length transaction involving the Di Battista respondents. This transaction caused Mr. Zanardo to bring the within oppression-based application in 2017 seeking a wind-up of DBG or a purchase by the Di Battista respondents of the interests held by Luigi's estate in DBG and Whitwood.

[11] Justice Dunphy heard the application. In his August 16, 2018 reasons for decision, he found that Ray was the effective director of DBG, since the actual directors, being his wife Julia and his son Anthony, looked to Ray for direction and guidance and exercised little if any independent judgment or oversight over the affairs of DBG. Ray acted as property manager of the five properties owned by DBG, and both his children were employed by DBG on a full-time basis.

[12] Justice Dunphy also found that, following Luigi's death, the Di Battista respondents incorporated Greystar Developments Inc. ("Greystar"), the sole shareholder of which was Julia. Greystar was created for the purposes of pursuing a potential condominium development opportunity brought to the attention of DBG and in respect of which DBG provided 75% of the funding by way of a mortgage loan. The mortgage interest rate was determined unilaterally by Ray and the mortgage was subordinated to another lender with no fee or other consideration to DBG. Further, Justice Dunphy found that Greystar relied on DBG staff, premises and office equipment to co-ordinate sales of the condominium project owned by Greystar with no compensation to DBG. No mention of DBG's involvement in the Greystar project was made during the meeting of DBG shareholders at which Mr. Zanardo raised specific questions about Greystar. Accordingly, Justice Dunphy held the Di Battista respondents and Greystar liable for any benefits arising from their breaches of fiduciary duty to Luigi's estate, qua shareholder, and ordered the mortgage to be repaid. Justice Dunphy also found that the conduct of the Di Battista respondents amounted to oppression and/or unfair and prejudicial conduct that disregarded the interests of Luigi's estate, qua shareholder of DBG.

[13] By way of remedy, Justice Dunphy ordered a constructive trust in favour of DBG over the shares of Greystar and any other benefits received by any of the Di Battista respondents from the transaction. He also ordered a full accounting of the benefits received by them. In addition, Justice Dunphy ordered a winding-up of DBG and Whitwood to be supervised by Zeifman Partners Inc. as liquidator at the expense of DBG. However, Justice Dunphy's order provided that the relief would be stayed until further court order if the Di Battista respondents elected to purchase the interests of Luigi's estate within two weeks of the winding-up order, on prescribed terms, including a valuation process.

[14] The Appellants are appealing Justice Dunphy's winding-up order on the basis that it is unnecessary, disproportionate and punitive.

[15] On August 24, 2018, Justice Myers, of the Divisional Court, granted the Appellants a stay of the winding-up proceedings pending the appeal. Justice Myers' stay order specifically provides, at para. 2, as follows:

THIS COURT ORDERS that Di Battista Gambin Developments Limited ("DBG") and Greystar Developments Inc. ("Greystar") (collectively the "Companies") shall continue to carry on business in the ordinary course and in a manner consistent with the preservation of the Companies business and assets, undertakings and property, real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "Property").

[16] Subsequent to the stay order, on October 25, 2018, Justice Dunphy made a costs order in which he took care to ensure that Luigi's estate, qua shareholder of DBG, would not be paying, indirectly, fifty percent of the costs it was awarded, and the costs of the Di Battista respondents, who were unsuccessful in defending against the oppression claim.

[17] The costs order provides as follows at paras. 21, 22 and 32:

[21] ... *DBG has been the object of this litigation more than an active player in it. It would make no sense to award the applicant its costs on a substantial indemnity basis as I have done and then to order 50% of such costs to be borne by the applicant indirectly and then to further provide that the winner should also indirectly pay 50% of the losing parties' costs as well. While I have no evidence before me as to what costs, if any, have been paid by the corporations to date, the individual respondents control them absolutely. The costs playing field should be levelled and the true economic interests at stake should be recognized when making my costs disposition.*

[22] *I am directing that in calculating and distributing proceeds of the winding-up of the corporate respondents all amounts paid to or to be paid by any of the corporate respondents in respect of this litigation shall be treated as loans made to Ms. Babensky as shareholder of Greystar or DBG, that such deemed shareholder loans shall be repaid by way of offset from any distributions to be made pursuant to the winding-up and that the costs award that I am making shall similarly be paid out of Ms. Babensky's share of any distributions to be made during the winding-up process to the extent not already paid.*

[32] ... *As indicated, this amount shall be the joint and several responsibility of the respondents, but the obligation shall be paid to the applicant out of Ms. Babensky's share of the proceeds of liquidation in the winding-up process if not already paid and the proceeds of liquidation shall be adjusted such that the costs of this litigation are borne solely by the individual respondents and not charged directly or indirectly to the proceeds of liquidation to be distributed to the applicant. For greater certainty, by "costs of this litigation" I do not include the costs of the actual liquidation as overseen by the liquidator-those costs are borne by the corporation and thus indirectly by the shareholders pro rata.*

Position of the Appellants/Respondents

[18] The Appellants submit that DBG has incurred significant legal expenses on its appeal and that the monitor can pay its past and future legal expenses, which they consider to be expenses in the ordinary course. Specifically, they assert that the stay order directs that business is to be carried on in the ordinary course "in a manner consistent with the preservation of the Companies business." They argue that the appeal is aimed at preserving DBG's business by setting aside the order to wind it up.

[19] They further assert that the reference to the carrying on of the business in the ordinary course in the stay order does not block the payment of legal fees. They argue that, in granting the stay to allow the appeal, the Divisional Court could have barred DBG from paying its appeal counsel, but it did not, and that relief was not specifically sought by Luigi's estate trustee.

[20] The Appellants further submit that the costs order did not amend the stay order and that Luigi's estate trustee had specifically asked Justice Dunphy to enjoin DBG from paying its counsel on appeal, but that relief was not granted. In paragraph 19(d) of Luigi's estate trustee's Costs Submissions, he seeks an order, among other things, "that the Personal Respondents account for and repay any legal costs in respect of these proceedings which have been paid by Di Battista Gambin Developments Limited ("DBG"), and/or Greystar Developments Inc. ("Greystar"), and that they be enjoined from causing the companies to pay their legal costs going forward in respect of these proceedings (including any appeal)" [Emphasis added]. The Appellants assert that in his costs award against the Appellants, Justice Dunphy did not find that the payment of these costs was inappropriate, but rather did not want to see Luigi's estate having to bear 50% of the costs of litigating against itself. Thus, they conclude that costs order applies only to the calculation of the costs in the context of the wind-up for the purposes of determining what litigation costs would be treated as shareholder loans to offset Julia's distribution.

[21] Finally, the Appellants submit that Luigi's estate will not be prejudiced by DBG paying its appeal counsel because it has more than sufficient assets to cover these costs, as evidenced by the monitor's reports to the parties. If DBG is unsuccessful on appeal, liquidation payouts will be adjusted to ensure that Luigi's estate will not bear any cost of the legal fees on the appeal.

Position of Luigi's Estate Trustee

[22] Luigi's estate trustee submits that the Appellants are using DBG's funds to bankroll an appeal that is solely for the benefit of the Di Battista respondents. He asserts that this conduct is in breach of the stay order that prohibits DBG and Greystar from engaging in activities outside the ordinary course of business.

[23] The estate trustee further submits that the Di Battista respondents have caused DBG to pay nearly \$160,000 in legal fees relating to the appeal of a decision in which Justice Dunphy found oppressive conduct and breach of fiduciary duty, including misappropriation of a corporate opportunity, deception, concealment, and abdication of directors' duties.

[24] Accordingly, Luigi's estate trustee seeks the return of all legal fees paid by DBG in respect of the appeal since the appointment of the monitor. He asserts that DBG is not an active player in this litigation and its funds should not be used to pay the legal fees of the Appellants' appeal. The Di Battista respondents have admitted that they have not, personally, paid any legal fees in respect of the appeal.

[25] Pointing to the provisions of the stay order that state that the ordinary course restriction is to "ensure that management does not abuse its power to surreptitiously or improperly dispose of assets", Luigi's estate trustee asserts that this is precisely what the Di Battista respondents are doing. They are using funds from DBG to fund litigation for the Di Battista respondents who have the greater stake in the appeal than does DBG, which was found by Justice Dunphy to be the "object of this litigation more than an active player in it."

[26] Luigi's estate trustee further asserts that the aim of the costs order is to ensure that Luigi's estate does not indirectly bear the costs of the litigation. Despite this clear aim, Luigi's estate has

continued to subsidize the legal fees of the Appellants as they continue to pay legal fees out of DBG to the lawyers representing them on an appeal, which is solely for their benefit.

Analysis

[27] In my view, Justice Myers' stay order and Justice Dunphy's costs order, when read together, are aimed at maintaining a level playing field between the Di Battista respondents and Luigi's estate. In the costs order, Justice Dunphy specifically states, at para. 21: "[t]he costs playing field should be levelled and the true economic interests at stake should be recognized for legal costs incurred in the ongoing litigation." In the stay order, Justice Myers specifically states, at para. 2, that the ordinary course restriction is required to "ensure that management does not abuse its power to surreptitiously or improperly dispose of assets." I find that the net result of both orders is an instruction to the monitor to pay the legal fees of DBG for services rendered solely in the ordinary course of business to maintain a level playing field between the shareholders.

[28] I am not persuaded that the legal expenses incurred by the Appellants in pursuing their appeal to set aside the winding-up order are consistent with the preservation of DBG's business for the mutual benefit of the shareholders, as the Appellants assert. Rather, on the evidence before the court, the appeal proceeding appears to be brought solely for the benefit of the Di Battista respondents, whose conduct has already been found by Justice Dunphy to be oppressive to Luigi's estate. Under these circumstances, it is in keeping with the aim of each of the stay order and the costs order that DBG should not be responsible for fronting the legal costs of the Appellants' appeal. These are not costs incurred in the ordinary course of DBG carrying on business. Rather, they are costs incurred for the benefit of the Di Battista respondents, who hope to prevent a wind-up of the company they exploited to the detriment of Luigi's estate as shareholder.

[29] As noted by Justice Dunphy in his costs order, at para. 21, DBG is the "object of this litigation more than an active player in it." Accordingly, the Di Battista respondents were ordered to bear the costs of the litigation. This approach is consistent with costs orders in other oppression proceedings where corporations are mere vehicles for the oppressive conduct of individual respondents: *Nanef v. Con-Crete Holdings*, 1993 CarswellOnt 157 (Gen. Div.) at para. 171. It follows that DBG, which is more the object of the appeal than an active player in it, should not be responsible by funding it.

[30] Accordingly, an order shall issue: i) requiring the Di Battista respondents to return to DBG, within 30 days of the date of this order, all legal fees paid by DBG in respect of the Appellants' appeal of Justice Dunphy's August 16, 2018 order directing a winding-up of DBG; and ii) directing the monitor not to make any payment from DBG for legal fees incurred by the Appellants on account of such appeal unless court-ordered or agreed to by the parties.

Costs

[31] The monitor shall be entitled to its costs on this motion payable from the property of DBG.

[32] The Respondent, having succeeded in this motion, shall be entitled to have its costs paid by the Appellants.

[33] The parties are encouraged to agree on costs, failing which the Respondent in Appeal may make written submissions not exceeding three pages in length (excluding a costs outline or bill of costs) by April 22, 2019. The Appellants may make written submissions not exceeding three pages in length (excluding a costs outline or bill of costs) by May 6, 2019. The Respondent in Appeal may make written reply submissions, not exceeding one page in length, by May 20, 2019, if so advised.

A handwritten signature in cursive script, reading "Dietrich J.", is written above a horizontal line.

Dietrich J.

Released: March 29, 2019

CITATION: Zanardo v. Di Battista Gambin Developments Limited, 2019 ONSC 1632
COURT FILE NO.: CV-17-11812-00CL
DATE: 20190329

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

ANTHONY ZANARDO in his capacity as the Estate
Trustee for the ESTATE OF LUIGI GAMBIN

Applicant (Respondent in Appeal)

– and –

DI BATTISTA GAMBIN DEVELOPMENTS
LIMITED, RAY DI BATTISTA, ANTHONY DI
BATTISTA, JULIA BABENSKY, WHITWOOD
DEVELOPMENTS LTD. and GREYSTAR
DEVELOPMENTS INC.

Respondents (Appellants)

REASONS FOR DECISION

DIETRICH J.

Released: March 29, 2019