CITATION: Gambin Estate v. Di Battista Gambin Developments Limited, 2018 ONSC 4905
COURT FILE NO.: CV-17-11812-00CL
DATE: 20180816

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ANTHONY ZANARDO in his capacity as the Estate Trustee for the ESTATE OF LUIGI GAMBIN	*Matthew P. Sammon* and *Chris Trivisonno*, for the Applicant
Applicant	
– and –	
DI BATTISTA GAMBIN DEVELOPMENTS LIMITED, RAY DIBATTISTA, ANTHONY DIBATTISTA, JULIA BABENSKY, WHITWOOD DEVELOPMENTS LTD. and GREYSTAR DEVELOPMENTS INC.	*Robert D. Malen*, for the Respondents
Respondents	
	HEARD at Toronto: June 28, 2018

REASONS FOR JUDGMENT

S.F. DUNPHY J.

[1] Luigi Gambin and Ray DiBattista are a Canadian success story. Unfortunately, the succession planning put in place while Luigi was stricken with cancer has been far less successful.

[2] This is the second time Luigi's trustee has resorted to litigation in the eight years since Luigi died. The first proceeding (commenced in 2014) resulted in a settlement on the eve of a contested hearing and a consent dismissal order. This second application was commenced in 2017 after the applicant learned of a very significant non-arm's length transaction that he alleges was a clear case of self-dealing and misappropriation of a corporate opportunity.

[3] I am granting this application and requiring either a winding-up of the corporation or a purchase by the DiBattista defendants of the applicant's interests, in either case after accounting in full for any benefits derived from the impugned transaction (known as the "Greystar" transaction).

[4] While it is clear that the breach of fiduciary duty and self-dealing evidenced by the Greystar transaction must be accounted for in full, that remedy alone would be insufficient. The deceased chose to place a great deal of trust in his business partner Ray DiBattista to protect the interests of his estate within their joint business enterprise. Time has shown that trust to have been misplaced. Ray has demonstrated resentment and hostility towards the 50% shareholder of a corporation he is charged as a fiduciary with managing. He has blatantly preferred his family's interests to those of the corporation as a whole. The other individual respondents have utterly failed to act independently of Ray and cannot be relied upon as guarantors of the due and fair administration of this corporation in future. A separation of interests is the only fair and reasonable course of action at this point. My more detailed order and reasons follow.

<u>Background facts</u>

[5] This case concerns the interest of the parties in Di Battista Gambin Developments Limited. DBG is a real estate holding and development company founded by Luigi Gambin and Ray DiBattista in 1988. The applicant, Anthony Zanardo is the trustee of the estate of Luigi Gambin who died in 2010.

Founding of DBG

[6] Ray and Luigi were both electricians by training. They began building homes "on the side" in 1985 and before long their sideline became their passion. DBG was founded as the vehicle to house their growing joint business venture.

[7] The overall division of labour between the two was that Ray was mainly the "office" person who negotiated and supervised contracts while Luigi was the "field" person who supervised and oversaw construction projects. Luigi also appears to have been the one with a flair for identifying and pursuing development opportunities. Such things are of course never cut and dried in small business where partners have to be able to multi-task.

[8] Theirs was a close partnership – they never had a shareholders agreement or other formal arrangement governing their relationship until just before Luigi's death. Ray's wife Julia DiBattista Babensky has held 50% of the shares in DBG since inception while Luigi held a 50% interest in his own name. Each understood the contributions of the other and always managed to work out issues when they arose.

[9] While Luigi was alive, DBG's business focus was on securing raw land, arranging to develop it and managing the projects once developed. At the time of Luigi's death,

DBG was in the process of completing the development of what has become its last commercial project known as "Northview Downs".

[10] Following Luigi's death and lacking his expertise in the development side of things, DBG has not engaged in any new developments. The Northview Downs project already underway was completed, but no new ones have been undertaken. Ray maintains that he has continued to scour the market for opportunities, but for a variety of reasons has not done so. Much of Ray's evidence on that subject was contested by the applicant as Ray sought to introduce it after affidavits and examinations were completed by way of an answer to an undertaking that did not actually raise the issue – at least not directly. I have not found the issue to be so central to the case or any determinations I must make as to require further inquiry.

[11] However serious DBG's efforts to locate new development projects, the fact remains that DBG continued to accumulate cash each year from more than $1 million per year in income derived from managing its real estate investments. It has no material third-party debt.

Current operations and management of DBG

[12] Since Luigi's death, the operations of DBG have been strictly a DiBattista family affair.

[13] Ray is employed as President and Secretary of DBG and its affiliates. At 70 years of age, he is still active in the business. Although he did arrange to receive a significant bonus in 2012, his salary is otherwise the same as it was in 2010 when Luigi passed away. The bonus issue was raised in the 2014 litigation and Ray has not sought or received a bonus since.

[14] While Ray is not formally a director, his authority within DBG and the family is such that he is effectively the sole director of DBG. The two actual directors made it quite clear that they look to Ray for direction and guidance when the directors are required to sign documents and that they exercise little if any independent judgment or oversight over the affairs of DBG.

[15] Ray's wife Julia holds 50% of the shares of DBG. She has never played an active role in the business. She is however a long-time director of DBG and currently draws a salary of $102,000 per year – the same salary she drew when Luigi was alive. Julia also candidly admitted on cross-examination that she relies entirely upon Ray to make all decisions. She does not review financial statements and relies upon Ray to advise her when and what documents to sign.

[16] Ray and Julia's children (Anthony and Tracy) are both employed full-time by DBG. Anthony was first employed while Luigi was still alive and Tracy joined later.

[17] Anthony, now 40 years old, is the other director of DBG and also serves as its Treasurer. Similar to his mother, he has effectively delegated substantially all of his

authority as director to his father Ray. Ray's duties within DBG include acting as property manager and being responsible for managing the maintenance and leasing activities of the five properties owned by DBG. Anthony has worked for DBG since 2006.

[18] Tracy is a Chartered Accountant by training and works in DBG's office as a bookkeeper and internal accountant. She is not a party to this proceeding and does not act as a director or officer of DBG in name or in fact.

[19] DBG owns and manages:

a. A small commercial plaza it built;

b. Two low-rise office buildings purchased and renovated by DBG;

c. A small retail plaza purchased and remodelled by DBG; and

d. A 50% interest in a shopping centre managed by DBG.

[20] These five properties generated $3.9 million in rental income in 2017 against direct expenses (before DBG overhead) of $1.94 million.

[21] The October 31, 2017 year-end financial statements of DBG reveal a company with $4.63 million in cash and term deposits and a $3 million mortgage receivable from a related party (Greystar) and net income of $1,373,952. Retained earnings of $10,414,490 are recorded. Obligations include $2 million in mortgages (held by related parties) and $8,156,629 in various shareholders advances.

2010 MOA and Luigi's will

[22] Luigi was diagnosed with cancer in late 2009. He was then 64 years of age (Ray was a year his junior). On June 4, 2010, Luigi entered into a Memorandum of Agreement to deal with succession issues. The signatories to this MOA were Ray, Luigi, Sergina Flumian (Luigi's wife) and Julia Di Battista Babensky. Ray and Luigi also signed variously for each of DBG, Whitwood Developments Ltd, D.B. Luwin Developments Limited, Morista Properties Limited and Queenline Developments Inc. (Queenline is not a party to this application).

[23] The MOA was prepared by DBG's legal counsel. The document contains Luigi's acknowledgment that he had been given an opportunity to seek independent legal advice although there is no evidence he actually chose to do so. The purpose of the MOA was stated to be "to form a binding agreement whereby the parties agree upon the following terms to govern succession issues resulting from the occurrence of a "Triggering Event", namely the passing or incapacity of either Ray DiBattista or Luigi Gambin with a view to preserving and maintaining the ongoing success of their real estate business interests". The same MOA acknowledges that the likelihood of a "Triggering Event" had become more real by reason of Luigi's serious illness.

[24] The principal provisions of the MOA include:

a. No sales – no party shall be entitled to sell, transfer or encumber their interests in any of the companies listed without consent;

b. No redemptions or demands for payment – no party shall be entitled to call for redemption of shares or payment of shareholder loans, all loans to be extended from time to time if required for funding;

c. No proceedings – no party shall bring any action or proceeding to compel any dissolution or winding-up "so long as there is no default in this Memorandum of Agreement by the other parties which has not been cured within a reasonable time after notice thereof";

d. Directors and officers – following a Triggering Event involving Luigi, the right to nominate the directors shifts to Ray;

e. Management – "The Companies will be financed and managed ... consistent with the manner in which they have been financed and operated in the past";

f. Employees and Salaries – The companies shall be entitled to employ members of either family "for *bona fide* services at industry standard rates and terms" and "No shareholder or related party shall have any entrenched right to be engaged or employed or compensated by any of the Companies";

g. Corporate Distributions – decisions shall be made by the directors "based on annual net income, business plans for acquisitions and divestitures and the need for reserves and liquidity", but the companies "will use all reasonable efforts to generate annual returns to shareholders aggregating $400,000";

h. Additional Capital – No party shall be required to advance additional capital subject to Ray and Luigi's prior agreement that each would advance in equal shares a total of $4,000,000 to fund Northview Downs on the same terms as existing shareholder loans and within thirty days of demand being made;

i. New Opportunities – "All parties will endeavour to avoid any conflicts of interest involving themselves. However, it is recognized that each party may have other business interests which may be competitive to the business of the Companies, and each party shall hereafter have every right to proceed with new real estate or other business opportunities without the involvement of the other";

j. Access to Records – all parties to have reasonable access to all financial statements and similar information; and

k. Term – the MOA remains in force until the last to die of Luigi, Ray, Sergina Gambin or Julia Babensky.

[25] Luigi executed his two wills on September 11, 2010 (just over a month prior to his death on October 26, 2010). The details of his primary and secondary wills are of only peripheral relevance to this case. The wills made a number of specific bequests, including a large gift to a community charity he was instrumental in founding (and named for his father) and cash bequests to his two sons. The residue of his estate was left to his wife Sergina.

[26] Importantly, the wills provided that should Sergina predecease him or fail to survive him by thirty days, the residue would go to Luigi's two sons. Sergina was named executor with the applicant Mr. Zanardo being named executor should she be unable to act.

Luigi and Sergina's death

[27] Although only 53 years of age and in apparent good health at the time of Luigi's death, tragedy struck the family only ten days later when Sergina herself died quite unexpectedly. The result was that (i) a "Triggering Event" under the MOA occurred by reason of Luigi's death; and (ii) Mr. Zanardo became the surviving executor of a will that left the residue of Luigi's estate to his two sons instead of his wife. In the space of a few days, what seemed only a theoretical possibility became a concrete reality.

[28] Mr. Zanardo's appointment as trustee of Luigi's estate was confirmed on February 14, 2011. Four days before the Certificate of Appointment was formally delivered, DBG demanded in writing that Luigi's estate (as shareholder of DBG and successor in interest to Luigi's interests under the MOA) make an immediate advance of $2 million.

[29] Sergina's unexpected death left the estate in a difficult position. While Luigi's wills had provided for the possibility of Sergina not surviving Luigi by at least 30 days, it soon became clear that the consequences of such a double tragedy had not been thought all the way through in a systematic way. The principal assets of the estate were its shareholdings in DBG and the various shareholder loans receivable. All of these were governed by the MOA and none could be turned to cash. In addition to the $2 million cash call, the estate had substantial income taxes due upon Luigi's death. There were no material liquid assets available to satisfy these very material and immediate cash demands.

[30] Whatever plans Luigi had based on the assumption of Sergina surviving him, her untimely death left Luigi's estate cash-flow insolvent from the very beginning. Ultimately, the estate was required to borrow the necessary funds to make the cash contribution demanded by DBG.

[31] The financial status of the estate has not changed fundamentally since that time with the exception that the limited distributions that DBG began to make following the

settlement of the 2014 application have enabled some progress to be made in whittling down the very significant debt owing to the CRA. Luigi's bequests, including his charitable gifts, continue to wait for creditor claims to be satisfied first.

[32] Relations between the applicant and Ray have been strained from the very beginning. Ray has made no effort to hide his quite negative views regarding the worth and merit of Luigi's two sons.

[33] I have little difficulty in concluding that Ray's judgments about Luigi's two sons have very fundamentally coloured his approach to the MOA, management of DBG and his strained relationship with the applicant as shareholder and creditor.

2014 Application

[34] Ray and Mr. Zanardo have conducted discussions about the sale of the estate's interest in DBG. I do not consider the evidence of those discussions – beyond the mere fact that they occurred – to be relevant to this case and I have disregarded entirely any evidence about the offers made by either side in those discussions.

[35] Despite the language in the MOA requiring DBG to pay $200,000 in distributions to each side on a "best efforts" basis, no distributions were made in 2011 or 2012. The reason given was the cash needs of the company. However, in early 2013, Mr. Zanardo received the 2012 financial statements for DBG. These revealed a very significant increase in payroll despite Luigi's death. Further inquiry revealed that the cause was a bonus paid to Ray in the amount of $257,000.

[36] At Mr. Zanardo's insistence, a shareholders meeting was convened for the first time since Luigi's death on October 17, 2013. Mr. Zanardo sought to ask a number of questions regarding the management of the company many of which were refused by Ray.

[37] Mr. Zanardo sought clarification as to why the $4 million Northview Downs advance (including $2 million from Luigi's estate) was not appearing on any of the financial statements since 2011 and was not satisfied with the answers received. It soon appeared the reason was that DBG was arranging to repay DiBattista shareholder loans each year and then to re-borrow the funds in the following year to avoid having the funds appear as cash on the balance sheet. Mr. Zanardo took a dim view of this because, among other things, DBG had required the estate to honour a $2 million cash-call for Northview Downs at a time when it was actually flush with cash whereas the estate was struggling with solvency.

[38] These and other complaints led to the first oppression application issued on October 1, 2014.

[39] The 2014 oppression application was vigorously contested. Among other positions strongly advanced by Ray in that proceeding was that DBT needed to build cash reserves to be in a position to pursue future acquisitions.

[40] The 2014 application was settled on February 23, 2015. The terms of the settlement included the following:

a. DBG would make an immediate distribution of $450,000 to each of the shareholders;

b. Going forward, DBG would make the $400,000 distribution contemplated by the MOA ($200,000 to each side);

c. Financial statements would be prepared annually;

d. T4's to DiBattista family members would be provided for review each year;

e. The MOA was confirmed to remain in force; and

f. The Application was dismissed without costs.

[41] Despite the efforts of both sides to qualify this settlement as a victory for their side, it was a settlement and not a surrender. Following this settlement, the parties returned warily to their corners. The result was not so much peace as it was an armed truce. Annual shareholders meetings were an opportunity for Mr. Zanardo to ask questions and for Ray to go to lengths to avoid answering them. Ray also clearly resented the questions raised about his own bonus – resentment that readily surfaced in this proceeding.

Events leading to 2017 Application: Corporate re-organization

[42] Mr. Zanardo attended a shareholders meeting on April 27, 2016. As shall be seen, this meeting was held less than two months after Greystar purchased the Markham property discussed below – a transaction that the applicant was then in ignorance of.

[43] During the course of this meeting, Ray indicated that he wanted to dissolve the respondent Whitwood Developments Ltd. Whitwood had no active business and Ray wished to be rid of the cost of maintaining it. However, it had loans outstanding of $937,479 (owed equally to its two shareholders Julia Babensky and the Estate) which loans payable were matched by loans receivable from DBG. Mr. Zanardo suggested that the Estate as shareholder would agree to the dissolution of Whitwood if the shareholder loans were repaid and Mr. Zanardo refused. Ray felt that Mr. Zanardo should have approved this step to simplify the corporate structure and save money without seeking an advantage. He expressed his views strongly and suggested that other corporate changes would be made as well.

[44] As predicted, changes were not long in coming. On August 17, 2016, DBG's counsel wrote to the Estate asking for consent to the dissolution of Whitwood and also to the dissolution of two other related corporations, Morista Properties Limited and D.B. Luwin Developments.

[45] Luwin Developments was a company owned as to 50% by the trustees of the Edward J. Winter Family Trust with the other half owned by DBG's shareholders (25% held by each of Julia and the Estate). Luwin's only material asset was a $2.6 million receivable – half owed by each of its two related party groups (DBG and the Winter Family Trust). This asset was also closely matched by a loan payable to another related company, Morista.

[46] The shareholdings of Luwin were such that a wind-up could proceed with or without the approval of the Estate as shareholder. The Winter family plus Julia Babensky together controlled 75% of the vote and thus had the votes to wind up Luwin if they wished.

[47] The Estate had no greater voice in the proposed wind-up of Morista. The Estate was not a shareholder of Morista (it was owned 50% by Luwin and 50% by DBG). Morista's only assets consisted of the $2.6 million loan receivable from Luwin and an identical loan due to DBG. The Estate's interests in Morista were entirely derivative of DBG's interests.

[48] In May 2016, Morista paid dividends (both capital and "regular" to its two shareholders DBG and Luwin. These were funded by way of offset against the shareholder loans receivable from those same two shareholders. Morista's accountants expect that once final dividend tax refunds are received in 2018, the company will be finally wound up in accordance with the shareholder resolution dated September 30, 2016.

[49] Luwin's wind-up was a more complex affair. Dividends were declared payable to the shareholders, 25% of which were owned by the Estate. Nominally, the Estate "received" a dividend of $650,413.38. However, the dividend was not paid in cash. Rather, the dividend was in kind paid by way of assignment by Luwin of a like amount of its accounts receivable from DBG.

[50] Half of Luwin's accounts receivable were owed by Winter family interests (a corporation and the family trust) and the other half was owed by DBG. Rather than divide all of the accounts receivable from each and distributing them *pro rata* to all of the shareholders, Luwin chose to distribute the accounts receivable by family grouping. The Winter Family Trust trustees received their dividend in the form of an assignment of the amounts payable by the Winter family trust and a related corporation while each of Julia and the Estate received an assignment of the receivable due from DBG. The amounts of the assigned obligations were proportional, but the assigned obligations were from different parties. In acknowledging itself to be indebted to the estate for the assigned debt, DBG took the position that the newly-assigned debt was also subject to the MOA such that the Estate had no right to demand payment. No such restriction applied to the debts assigned to the trustees of the Winter Family Trust.

[51] Morista was dissolved by special resolution dated September 30, 2016. Luwin was dissolved at a special meeting on October 12, 2016. The dissolution resolution was

supported by 75% of the shareholders. Morista's winding-up is awaiting processing of the final dividend tax refund claims.

[52] Whitwood was never formally wound up because the necessary shareholder support could not be obtained without the Estate's consent. Nevertheless, DBG has purported to assume Whitwood's shareholders loan payable to the Estate.

Events leading to 2017 Application: Greystar

[53] Greystar Developments Inc. was incorporated on January 27, 2016. Ray, Anthony and Tracy are the sole officers and directors; Julia Babensky is its sole shareholder. Its registered head office is the same as DBG's office. Greystar was incorporated to pursue the acquisition of a property located at 46 Main Street North in Markham. The chronology of relevant events relevant to Greystar is largely uncontested:

a. In 2015, Anthony received an email at his DBG email while in the office from a broker suggesting the Markham property as a potential development opportunity;

b. DBG was known to the broker community as a developer with a potential interest in such acquisition opportunities and the receipt of such sales pitches was not uncommon;

c. Anthony forwarded the email to his father Ray who proceeded to investigate the matter and, eventually, to negotiate to purchase the property;

d. Although Ray testified that DBG had been looking for a development opportunity for about five years at that point, when he saw it he decided that he was interested in the property for his own account and not for DBG's account;

e. DBG had the funds on hand to purchase the property at the time if it so desired;

f. Greystar was incorporated to pursue the Markham property opportunity;

g. Greystar purchased the Markham property on March 3, 2016 for $3,980,000, $3,000,000 (or approximately 75%) of which was provided by way of mortgage from DBG and the balance provided from Julia's own resources;

h. The terms of the mortgage – simple interest at 4% and a one year term – were simply decided by Ray without any independent legal or financial advice about whether the terms were market terms;

i. On June 27, 2016, DBG agreed to subordinate its mortgage to Trisura Guarantee Insurance Company who registered a $3.5 million mortgage

against the property, Greystar paid no fee or other consideration to DBG for the subordination agreement and Ray did not seek independent legal or financial advice;

j. On January 31, 2017, DBG agreed to extend the mortgage on the same terms until March 31, 2019 without fresh consideration, again without independent legal or financial advice;

k. The two directors (Anthony and Julia) continued to look to Ray's advice on these matters to the extent their decisions as directors were required;

l. Gryeystar is in the process of developing a low-rise condominium project on the Markham property the sales of which are being co-ordinated by DBG's own personnel working out of DBG's offices;

m. Greystar pays nothing to DBG for use of its premises, office equipment or employees;

n. No mention of the DBG loan to Greystar or related matters was made during DBG's meeting with shareholders on April 27, 2016, including in answer to direct questions about the company's plans for use of surplus cash; and

o. The applicant first learned of Greystar and DBG's financial support of the transaction upon receipt of the 2016 financial statements in February 2017.

Issues to be decided

[54] This application raises the following issues:

a. Have the individual respondents breached their fiduciary duties or statutory obligations owed to DBG in relation to the Greystar/Markham Property matter?

b. Have the acts of the DBG or its affiliates effected a result; the business or affairs of DBG or its affiliates been carried on or conducted in a manner; or the powers of the directors of DBG or any of its affiliates been carried on or exercised in a manner that is oppressive or unfairly prejudicial to the interests of the applicants as security holder of DBG and its affiliates?

c. If required, what is the appropriate remedy?

Discussion and analysis

(i) Have the individual respondents breached their fiduciary duties or other obligations owed to DBG in relation to the Greystar/Markham Property matter?

[55] The applicant portrays the acquisition of the Markham property by Greystar as a corporate opportunity that was appropriated by the individual respondents for Greystar's benefit in breach of the fiduciary duties they owed DBG as directors and officers of DBG.

[56] The applicant also submits that the $3 million mortgage granted by DBG to Greystar in March 2016 was undertaken in breach of the mandatory conflict avoidance provisions of s. 132 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. in that:

a. Each of the DiBattista respondents were variously directors, officers and/or had a material shareholding interest in the recipient of the mortgage, Greystar;

b. The mortgage was a material contract for DBG;

c. The DiBattista respondents thus had a conflict of interest in relation to the mortgage loan to Greystar and subsequent dealings with it;

d. None of the DiBattista respondents disclosed their conflict in writing as required by OBCA s. 132(1) nor did any of them enter such disclosure into the minutes of DBG;

e. All DBG directors being conflicted, no shareholder approval of the mortgage was sought as required by OBCA s. 132(5.2); and

f. Section 134(3) of the OBCA provides that the statutory duties of the directors under the Act, including those imposed by s. 132, are not subject to waiver or contracting out.

[57] The respondents acknowledge what they characterize as a "technical breach" of the mandatory obligations of the OBCA. They submit however that the Greystar/Markham property investment was a "New Opportunity" that they had authority to pursue for their own account pursuant to the MOA s. 2(j). They further submit that the mortgage given by DBG was at market rates and advantaged DBG in that its cash was otherwise earning a much lower rate of interest on deposit at the bank.

[58] There can be no question that each of the three DiBattista respondents owed fiduciary duties to DBG at the relevant time. Among the fiduciary duties each owed was a duty not to appropriate corporate opportunities of DBG.

[59] I have no hesitation in concluding that the Markham property was an opportunity that belonged to DBG. The initial unsolicited sales pitch came in to DBG's offices and to Anthony's DBG email address. Greystar did not then exist. DBG was in the development business and, through Ray, has reiterated on multiple occasions that it was building up a significant cash holding to be in a position to pursue development opportunities. DBG had cash on hand sufficient to purchase the property. The negotiation and closing of the purchase and the great bulk of the financing was accomplished by DBG employees using

DBG facilities and DBG cash. There was simply no reason why DBG could not pursue this acquisition and development opportunity.

[60] I do not find convincing any of the evidence offered by Ray as to why DBG did not pursue the Markham property opportunity. In substance, it amounted to little more than a bald assertion that DBG did not pursue it because Ray decided he would pursue it for himself instead. The idea that it would somehow be inappropriate for DBG to pursue an "apartment-style" development despite the cash hoard that was years in the building while a new, freshly-incorporated company funded by DBG could do so, using DBG's employees and facilities beggars belief.

[61] Ray's cross-examination was continually, interrupted – and quite improperly so - by his own counsel. It was suggested that I ought to draw negative inferences arising from that conduct. I am not sure that I need go so far – the answers he did give were often inconsistent in any event and strongly suggest that Ray bore resentment towards the applicant arising from the 2014 application and, in particular, the questions directed at his own bonus payment. I have no difficulty in concluding that this resentment played a role in the decision to arrange for the acquisition of the Markham property for his wife's account.

[62] Ray's pointedly evasive answers to Mr. Zanardo's direct questions at the 2016 shareholders meeting speak volumes as to his disregard of his fiduciary duties. He was directly asked about the company's plans for use of surplus cash, an issue he knew Mr. Zanardo to be vitally interested in. Even though $3 million of that surplus had just been committed to a one-year mortgage for the benefit of his wife's company, he chose to give an answer that was at best intentionally misleading saying only that plans were not yet firm. Disclosure of the Greystar matter was concealed for as long as possible, not by accident but by conscious design.

[63] The DiBattista defendants' submission that the "New Opportunities" provisions of para. 2(j) of the MOA justified their actions is not tenable:

a. The directors cannot contract out of their statutory duties: OBCA s. 134(3);

b. The MOA does not purport to contract out of new opportunities where DBG *is* involved by providing 75% of funding;

c. The DiBattista respondents took *no* steps to avoid the clear conflict of interest arising from Ray's decision to pursue this venture, showing no sign of even recognizing it as a problem; and

d. Ray's evasiveness at the 2016 shareholders meeting and failure to disclose is evidence of bad faith.

[64] The question of whether the mortgage loan granted was or was not "at market" has no bearing on the existence of the breach of fiduciary duty generally or of OBCA s. 132 in particular. The recognition and zealous enforcement of fiduciary duties is

designed quite deliberately to discourage the "ask for forgiveness not permission" approach to self-dealing.

[65] At all events, I cannot conclude there were no damages. Ray made no effort before or since the transaction to obtain independent evidence of market financing terms. His own non-expert and self-serving impressions about what terms were market at the time cannot carry any material weight before me.

[66] Ray's evidence on this subject raised more questions than it answers. What was the loan to value ratio on this mortgage? Was there a "bankable" appraisal of the Markham property? Is there evidence of the terms demanded by an arm's length lender prepared to deal with a newly incorporated company having neither credit history nor material assets to speak of and without outside credit support?

[67] I do not conclude that DBG's mortgage loan to Greystar was on "market terms" as alleged. The evasive manner in which questions dealing with DBG's cash on hand were dealt with less than two months later at the shareholder meeting and the failure to adhere to the most rudimentary standards of corporate governance in entering into this transaction all point to the opposite conclusion.

[68] The DiBattista respondents *chose* to assume a very significant fiduciary responsibility to the corporation when they agreed to became officers and/or directors of DBG. The DiBattista respondents were not required by the MOA to exclude Mr. Zanardo from the Board of Directors even if the MOA allowed Ray to nominate all of the directors. The MOA was no bar to Ray nominating a director suggested by Mr. Zanardo along with the two directors from his own family he did nominate. It was also no bar to consulting with the 50% shareholder on material transactions even if that shareholder was not actually represented on the Board.

[69] The choice of the DiBattista respondents to assume sole stewardship both of management *and* supervision of management at DBG was a choice Ray was permitted by the MOA to make. However, it was certainly not an obligation. The potential vulnerability of the Estate arising from that choice was obvious as was the need for a scrupulous regard to the fiduciary obligations undertaken. The MOA in no way excuses the breach of fiduciary duty that occurred here.

[70] By taking steps to incorporate Greystar, to acquire the Markham property for Greystar's account and to cause DBG to finance the purchase, the DiBattista respondents placed their family's self-interest ahead of the fiduciary and statutory duties owed by each of them to DBG.

[71] I must also conclude that the financing of granted to Greystar was the product of clear breaches of the avoidance of conflict of interest rules in s. 132 of the OBCA. The only way in which the contracts entered into by DBG in relation to the Greystar mortgage could validly have been entered into would have been with shareholder approval. Far

from seeking shareholder approval, Ray concealed the transaction from the applicant as long as he could.

[72] The DiBattista respondents and Greystar must account to DBG for any benefits received as a result of these breaches and the Greystar mortgage must be repaid forthwith.

(ii) Have the acts of the DBG or its affiliates effected a result; the business or affairs of DBG or its affiliates been carried on or conducted in a manner; or the powers of the directors of DBG or any of its affiliates been carried on or exercised in a manner that is oppressive or unfairly prejudicial to the interests of the applicants as security holder of DBG and its affiliates?

[73] There was no material dispute between the parties as to the legal principles to be applied by me in considering the application of the oppression remedy to the facts of this case. Both sides relied principally upon the 2008 decision of the Supreme Court of Canada in of *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 (CanLII). Unsurprisingly, the main differences between the parties can be traced to the very different ways in which they see the facts and findings they urge me to make in consequence.

[74] By way of synthesis, the applicable legal principles of particular relevance to the facts of this case are as follows:

a. The oppression remedy is an equitable remedy designed to seek an outcome that is just and equitable by vesting the court with broad discretion to examine the business realities of the situation and not merely the narrow legalities: *BCE* at para. 58 (CanLII);

b. In exercising that discretion, the court must consider whether the evidence supports the existence of the reasonable expectations asserted by the claimant and whether those reasonable expectations have been violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest: *BCE* at para. 68;

c. "Oppression" carries the sense of abusive conduct or bad faith; "unfair prejudice" admits of a less culpable state of mind that nevertheless has unfair consequences and "unfair disregard" of interests extends to ignoring an interest as of no importance contrary to reasonable expectations: *BCE* at para. 67;

d. The nature and size of the corporation may be relevant to assessing reasonable expectations and more latitude may be extended to directors of small, closely held corporations to deviate from strict formalities: *BCE* at para. 74;

e. Past practice may also create reasonable expectations, particularly in connection with closely held corporations: *BCE* at para. 76; and

f. Shareholder agreements may also be viewed as reflecting reasonable expectations of the parties: *BCE* at para. 79.

[75] I shall therefore commence the two-part analysis by considering the question of the reasonable expectations of the parties relevant to this case before considering the conduct of the respondents relied upon by the applicant.

[76] The task of establishing the baseline reasonable expectations of the parties requires an inquiry into the totality of the circumstances. In the present case, that means a recognition of the origins of DBG as arising from the close business partnership between two strong individuals (Ray and Luigi), a recognition of the closely-held nature of the business (two shareholders only) and the relatively loose way in in which the affairs of the business were managed in the past as regards what might be characterized as the "legal niceties".

[77] However, this context was intentionally altered quite significantly in 2010 with the MOA. In my view, it would be a mistake to view the MOA as establishing an unswerving devotion to past practices without regard to present realities. The whole purpose of the MOA was to address the transition of the business upon the death of one or the other of the founders, recognizing that Luigi's death was a particularly imminent and serious possibility.

[78] While Luigi and Ray were both alive and active in the business, the checks and balances of their informal arrangements were more organic and natural. They were bound together by a long partnership. Matters such as remuneration, finance and corporate policy were hashed out in discussion among equals where the destabilizing consequences of disagreement and failure to compromise were self-evident. The MOA attempted to describe their mutual philosophy while addressing the question of how to replace the checks and balances that had formerly served them so well.

[79] The MOA refers to past practice as a guideline and not an iron-bound rule. Further, it is a guideline that is modified to some degree by the terms of the MOA itself. For example, management and finance was to be "managed in the manner determined by the board of directors consistent with the manner in which they have been financed and operated in the past": MOA s. 2(e). However, even this broad license was qualified by "see also below".

[80] Whereas both owners were responsible for management prior to Luigi's death, that basic element of "past practice" was fundamentally altered by the MOA. In establishing the exclusive right of the survivor to nominate directors of the company, the MOA did not (nor could it) absolve the directors so appointed from discharging their fiduciary responsibilities.

[81] The checks and balances that emerge from a fair and purposive reading of the MOA that must inform my consideration of the reasonable expectations of the beneficiaries of the deceased partner include the following:

a. While the "continuing person" (in this case, Ray) is authorized to appoint the board of directors, his authority is nevertheless constrained by the board of directors so appointed since "the companies will be financed and managed by the board of directors": MOA s. 2(e);

b. "no shareholder or related party shall have any entrenched right to be engaged or employed or compensated by any Company": MOA s. 2(f);

c. Decisions regarding the distribution of corporate income are not left to the unfettered discretion of the "continuing person", but are made "*solely* by the board of directors based on annual net income, plans for acquisition and divestitures and the need for reserves and liquidity": MOA s. 2(g) [emphasis added]; and

d. The license to pursue new opportunities is conditioned by the requirement that "all parties will endeavour to avoid any conflicts of interest" and even then such opportunities may proceed "without the involvement of any other": MOA s. 2(h).

[82] The applicant's position is that each of the first four of these reasonable expectations of Luigi's estate have been materially frustrated by the actions of the respondents. The applicant relies upon the following facts:

a. The wind-up of Luwin and the payment of a dividend in kind to the Estate as shareholder in the form of a loan payable by DBG that was declared to be subjected to the MOA and indefinitely deferred;

b. The complete abdication by the directors of DBG of their obligations to the corporation and their *de facto* delegation of those obligations to Ray;

c. Related to the failings of the board of directors generally, the inaction that has led to a continued building up of cash within DBG notwithstanding the lack of any *bona fide* pursuit of development opportunities that alone would justify the level of cash reserves maintained;

d. The evident self-dealing demonstrated by the Greystar transaction and the utter non-compliance with s. 132 of the OBCA; and

e. The inference of bad faith arising from the facts and from the resentment and animus so clearly displayed by Ray towards the applicant particularly in the case of the non-disclosure of Greystar at the 2016 DBG shareholder meeting.

<u>Effect of 2015 consent dismissal order</u>

[83] As a preliminary matter, the respondents relied very strongly on the consent dismissal of the first application in February 2015. That application questioned the

decision of DBG not to make distributions to the shareholders and the current application very largely focusses on the same issue. The applicant takes no issue with the binding nature of the judgment issued in 2015 and submits the repetition of any facts pleaded there is for no purpose other than context in the present application.

[84] The matters resolved by the 2015 consent judgment are those issues of fact and law that are necessary for the determination made when the judgment was issued. In the context of this case, the most important resolved issues are:

a. No subsequent claim can be advanced arising from the alleged failure to make distributions *prior to the date of the consent order*;

b. No subsequent claim can be advanced arising from any payments of management bonuses or remuneration paid to DiBattista family members *prior to the date of the consent order*.

[85] The foregoing being said, the facts underlying the current application do not exist in a vacuum and the discretion required to be exercised in an oppression case cannot be exercised in a vacuum either. While this application is founded upon actions taken or not taken *after* the date of the consent order, the context of those actions (or failures) must be taken into account. This necessarily involves a consideration of the circumstances then existing.

[86] By way of simple example, the 2015 settlement required $900,000 of accumulated cash to be distributed forthwith. This does not imply that none of the remaining cash on hand at that time need *ever* be considered for distribution in future. Clearly, future distribution decisions would have to be made in function of the circumstances as they present themselves, including a consideration of the cash on hand remaining after the agreed-upon distribution. The MOA was re-affirmed as part of the settlement and it too contains injunctions relating to the process of considering distributions.

[87] The 2015 settlement did *not* excuse the respondents from breaches of fiduciary duty or breaches of the MOA occurring after the date of the settlement. There is nothing in the consent judgment that operates as a prospective license to breach fiduciary duties owed to DBG. No binding determination of disputed questions of construction of the MOA were made.

[88] I accept the respondents' basic premise that the 2014 application cannot be revisited in this proceeding, but that conclusion is of only limited utility in this case.

<u>The Luwin Reorganization</u>

[89] The Estate was a 25% shareholder of Luwin and – in that capacity at least – was *not* a creditor of DBG. The shareholders of Luwin, being Julia Babensky and the Winter Family Trust, voted to wind up Luwin and did so without the support of the applicant Estate. The assets of Luwin consisted of receivables from DBG and from either the Winter Family Trust or a related company. Luwin was wound up by way of a dividend in

kind. However, instead of distributing all of the accounts receivable in kind to all of the shareholders, the parties (excluding the Estate) so arranged their affairs as to distribute the Winter-related payable to the Winter Family Trust and the DBG payable to Julia Babensky and the Estate while DBG unilaterally decided that the MOA applied to such payable once assigned (involuntarily) to the applicant.

[90] The Winter Family Trust as shareholder of Luwin received a release (by way of offset) of a large payable and an assignment of a related-party payable that it received sole authority to deal with. Both of these were of immediate benefit.

[91] The Estate received no similar benefit. It was compelled to accept an indefinitely deferred obligation over which it had no control whatsoever. It may not have been worse off that prior to the wind-up (both the equity and the debt were illiquid), but it certainly received less than its due once a wind-up was decided upon. There would have been no obligation upon the Estate to defer demand upon the Winter family payables had the applicant received a *pro rata* share of these.

[92] Was this a breach of the MOA or the reasonable expectations of the parties? In my view it was at a breach. The MOA has an express prohibition against *any* party bringing a winding-up proceeding against any other party. The applicant was a non-consenting party to the wind-up and Luwin. Furthermore, the wind-up was arranged in such a way that the applicant was treated differently from the Winter shareholders who received obligations that were not subjected to the MOA.

[93] While perhaps not the most serious act of oppression or breach of the MOA if viewed in isolation, the lengths gone to in order to avoid making even a minor distribution to the Estate from excess cash on hand are indicative of the unwillingness of the DiBattista respondents to maintain an even hand or to consider their fiduciary responsibilities dispassionately.

Abdication of responsibilities as directors

[94] Julia Babensky and Anthony were both directors of DBG while Anthony was also an officer of the company. Both were cross-examined in connection with this proceeding.

[95] Julia's admissions include:

a. She was not involved in the decision making process whereby DBG loaned $3 million to Greystar or the decision of DBG not to acquire the Markham property – both decisions were made by Ray;

b. While she is named a director of the company, she does not go to directors meetings, is not consulted about decisions that are made regarding the business and has no real involvement in the management of the business;

c. Whatever Ray tells her, she's okay with; and

d. She has little understanding of fiduciary duties and "all the duties that I have as director, I pass on to Ray and he carries them out".

[96] Anthony's admissions include:

a. In the seven years he has been a director, there have been no meetings with the other director to review business plans and the need for liquidity in order to decide on what distributions the shareholders would get;

b. Ray would make the decision and simply tell Anthony and his mother after the fact what the decision was;

c. He and his mother are not really exercising any ongoing managerial authority;

d. Ray makes the key decisions and keeps Anthony apprised of what he thinks Anthony needs to know; and

e. His father did not have discussions with him about what reserves were needed for acquisitions or the range of values being examined in that connection.

[97] Ray's evidence did not seriously contradict the evidence of his wife and son in this regard.

[98] I am of course conscious of the scale of the business in question. All allowances being made for the nature and scale of this business as well as the relatively informal way in which it had historically been run, the evidence of these two establishes a breathtakingly complete abdication of the responsibilities of a director.

[99] It must be recalled that the informal corporate governance practices habitually followed when Luigi was alive developed and were tolerated in a dynamic where authority was evenly divided. That was no longer the case after a "Triggering Event". Past practice is a guide for many things under the MOA, but it is no justification for the wholesale abdication that has occurred here.

[100] I find that both Julia and Anthony abdicated their obligations as directors utterly and delegated these in fact to Ray. The Estate as shareholder had a clear and reasonable expectation that such a total abdication of those obligations would not occur or persist. Such an abdication is a clear breach of s. 134(1)(b) of the OBCA. It is also a breach of the MOA that imposes specific responsibilities upon the directors.

Directors inaction in relation to building cash

[101] In the clearest possible terms, the MOA directed that "decisions as to distribution of corporate income *shall be made solely by the board of directors*" [emphasis added]

and directed those decisions to be arrived at "based on annual net income, business plans for acquisitions and divestitures and the need for reserves and liquidity".

[102] DBG has not made a single acquisition since Luigi's passing in 2010. Neither director had any material understanding of DBG's acquisition or divestiture plans. Neither had any understanding of the need of DBG for reserves or liquidity. Anthony was generally aware of the level of cash reserves growing and I am prepared to make the assumption that Julia at least saw the figures when she was asked to sign off on the financial statements each year. DBG has generated a very significant level of income each year only a fraction of which is distributed.

[103] DBG's directors have never seriously turned their minds to their obligations in relation to that building reserve of cash. The applicant had a reasonable expectation that the directors would do so both as a matter of corporate law and the specific injunctions of s. 2(g) of the MOA.

[104] The same (and related) critique can be made in relation to the shareholder loans more broadly.

The Markham Property/Greystar matter

[105] I have already made findings in relation to the breach of fiduciary duty of the DiBattista respondents in causing Greystar to acquire the Markham property as well as the clear conflict of interest arising from the financing of that purchase provided by DBG. I have also concluded that these transactions were in no way excused by the "new opportunities" provision of the MOA.

[106] This transaction was a clear breach of the reasonable expectations of the Estate and a breach of s. 2(i) of the MOA. The conflict between the self-interest of the DiBattista respondents and their fiduciary duties to DBG ought to have been plain and obvious.

Bad faith or oppressive conduct?

[107] Having found that there have been identified breaches of the MOA, of the statutory and fiduciary obligations of the DiBattista respondents and of the reasonable expectations of the applicant, I must now consider whether such breaches have attained a level of gravity as to amount to oppressive or unfairly prejudicial conduct to or that unfairly disregards the interests of any security holder or creditor of the corporation.

[108] I am of the view that the conduct of the respondents in this case is clearly material and rises beyond the standard required by s. 248(2) of the OBCA.

[109] The breaches I have found were neither minor nor technical in nature. The self-dealing and breach of fiduciary duty occurring in connection with the Markham property and Greystar resulted in the casual appropriation to the benefit of the DiBattista respondents of almost half of the cash reserves of DBG and the appropriation to the DBG respondents of the *only* acquisition undertaken during the eight years that earnings have

been banked and reserves built up for the stated purpose of undertaking an acquisition. These actions ran counter to some of the most fundamental principles of corporate governance in our system. Further, the circumstances of the breach strongly suggest that the respondents' conduct was aimed in significant part at the applicant:

- Ray's comments under cross-examination confirm that his resentment of the applicant arising from, among other sources, the 2014 application, played a significant role in his decision to pursue the Markham property for himself; and

- Far from attempting to secure shareholder consent, Ray actively evaded disclosure of the transaction to the applicant for as long as possible.

(iii) What is the appropriate remedy?

[110] I have broad discretion under s. 207, s. 209 and s. 248 of the OBCA to fashion an appropriate remedy in all the circumstances of this case.

[111] There can be no doubt that the breaches of duty in relation to the acquisition of the Markham property by Greystar and the funding of Greystar require a firm response. A constructive trust in favour of DBG shall be imposed upon the shares of Greystar and upon any other benefits received, directly or indirectly, by any of the respondents from this transaction. All of the respondents must be directed to provide a full accounting of any such benefits. The Greystar mortgage transaction must be set aside and the loan repaid in full forthwith.

[112] The more difficult question is whether it is appropriate to go further as the applicant requests and accomplish a full separation of interests.

[113] The MOA does not bind me in the exercise of my discretion even if does inform it. However, it pulls that discretion in two directions depending upon where emphasis is placed.

[114] On the one hand:

[115] The MOA demonstrates the great faith Luigi clearly placed in Ray. By the terms of the MOA, Ray ended up with effective control over the most material assets of Luigi's estate. Luigi vested this trust in Ray as a man with whom he had dealt with on the basis of trust and handshakes alone for more than thirty years. That is a circumstance that should weigh heavily in my considerations.

[116] On the other hand:

[117] Luigi's plans fell apart almost immediately after he made them. His wife tragically died only a few days after his own death. Whatever funds he thought would be available to fund the cash call for the Northview Downs development while he was alive were not available to his estate after he died and the cash call was actually made. If Luigi thought Ray would feel bound to protect his wife Sergina, he could not reasonably have expected

any such ties of affection to apply vis-à-vis his two sons when they emerged as the beneficiaries of Luigi's estate. Ray's antipathy to them is clear and it is reasonable to infer that Luigi was at least somewhat aware of this circumstance. The MOA regime of corporate governance started off on the wrong foot almost immediately.

[118] One overriding fact is clear. The confidence placed in Ray has proved by experience to be misplaced. The breaches of fiduciary and breaches of the MOA found by me are grave ones. The "no proceedings" clause of the MOA is no bar to a winding-up of DBG and Whitwood given the serious and un-corrected breaches of the MOA I have found.

[119] It is abundantly clear that the MOA regime is no longer feasible and cannot be repaired. Ray is quite unrepentant and convinced he has done nothing wrong. His resentment of the applicant and the interests he represents is palpable and there is no reason to expect that the experience of this litigation will soften that. Anthony and Julia have shown near total deference to Ray and have not shown themselves inclined or capable of supervising Ray. Keeping these two families and their capital joined in a long-term partnership on the terms of the MOA is a recipe for continued if not constant litigation.

[120] I am also mindful of the fact that the focus of DBG's business has changed. While Luigi may have hoped that DBG would continue to grow and possibly attain still greater levels of success, the situation has evolved. Ray's protestations to the contrary, DBG is no longer a development company in anything but name. DBG is essentially managing a discrete portfolio of commercial and retail developments. None of these are particularly difficult to value or dispose of. DBG is also a company with essentially no debt. It has the capacity to be used as a vehicle to raise the funds necessary to retire the interests of one of the shareholders if need be.

[121] In all of the circumstances, a winding-up of DBG and Whitwood and an orderly process for the sale of their assets is the most appropriate remedy. The nominated receiver of the applicant should be appointed as liquidator to undertake that process. However, I think it appropriate to provide the DiBattista respondents with a reasonable opportunity to elect to purchase the applicant's interests at fair market value following an objective valuation process if they desire to keep the business and its assets intact.

Disposition

[122] There will be an order:

a. Declaring that each of the respondents (other than DBG) holds as constructive trustee for the benefit of DBG any benefit of any kind derived directly or indirectly from Greystar, the loan from DBG to Greystar or the investment by Greystar in the Markham property;

b. Ordering each of the respondents (other than DBG) to make a full accounting to DBG of all such benefits forthwith;

c. For greater certainty, the mortgage to Greystar by DBG shall be set aside and repaid in full and the constructive trust applies to all of the shares of Greystar held by any of the respondents providing that the setting aside of the mortgage transaction shall not affect adversely the security held by DBG until such payment in full is received;

d. Ordering a winding-up of DBG and Whitwood to be supervised by Zeifman Partners Inc. as liquidator at the expense of DBG; and

e. Authorizing the liquidator or any party to apply to the court for directions regarding the means of carrying out the wind-up of both corporations.

[123] The order in the preceding paragraph shall be effective immediately however the liquidator shall confine its activities to preparatory steps only for a period of two weeks and the relief ordered in this paragraph shall be stayed until further order if the DiBattista respondents irrevocably elect to purchase the interests of the Estate in accordance with the paragraph next following.

[124] The DiBattista respondents shall have a period of two weeks from today's date to determine whether they wish to elect to purchase all of the interests of the Estate (shares and shareholder loans) in DBG and Whitwood on the following terms:

a. A qualified valuator shall be appointed by the court to value the shares and loans as follows:

   i. If the parties have not agreed on the name of the valuator, each shall nominate one qualified valuator who shall have certified his or her ability to act impartially and independently of the parties, such nomination to be made within two weeks of the date of the election by the DiBattista respondents;

   ii. The parties shall forward to my attention within three business days of the end of such two week period the names of the two valuators so nominated along with a copy of the certification of independence and a brief summary of qualifications (CV or similar) to the court jointly and presented in such a fashion as not to reveal which valuator was nominated by which party;

   iii. I shall advise the parties of my selection as soon as practicable in writing and without reasons;

b. The valuator named shall determine the fair market value of the shares and shareholder loans owned by the applicant and such determination shall be final;

c. Fair market value of the applicant's shares shall be determined without minority discount as being 50% of the value of all equity subject to the following adjustments:

   i. Other than the loan due to Whitwood by DBG, shareholder loans due to any respondents shall only be considered in the valuation to the extent symmetrical to shareholder loans due to the applicant – all other shareholder loans (if any) shall be disregarded for valuation purposes;

   ii. Greystar shall be separately valued, but the $3 million mortgage receivable shall be valued at par for the purposes of the valuation of DBG; and

   iii. Any payments made by or charged to DBG in respect of this litigation shall be reversed for the purposes of the valuation;

d. The DiBattista respondents and Greystar shall fully account for any and all benefits derived from the Greystar/Markham property transactions, and any value so determined shall be attributed to DBG for purposes of the valuation of the applicant's equity interest;

e. The fair market value of the applicant's shareholder loans shall be the par value of such loans without discount or adjustment on account of term or interest rate;

f. The valuator shall deliver his or her opinion of fair market value within forty-five days of being nominated and for that purpose will be given full access to the books and records of the respondent companies and the full co-operation of the parties as same may be reasonably required;

g. Costs of the valuator shall be borne equally by vendor and purchaser and be paid by the purchaser no later than the time of closing (the vendor's portion to be credited against the purchase price otherwise payable);

h. Closing shall occur within thirty days of such opinion being delivered and payment for the shares and loans shall be made by certified cheque;

i. On closing, the Estate shall assign to the purchaser all of its shares and its interest in all of the shareholder loans; and

j. On closing, the applicant and the respondents shall exchange mutual releases of all claims arising out of or related to matters raised in this application.

[125] The applicant is entitled to its costs which costs shall not be considered in the valuation of DBG or Whitwood. While the respondents will be jointly liable for the costs

of the applicant, as between the DiBattista respondents and the corporate respondents, the liability shall be that of the DiBattista respondents.

[126] If the parties are unable to agree on the amount of costs, I shall receive written submissions of the parties as to amount and scale on the following timetable:

a. Applicant – written submissions, outline of costs by September 14, 2018;

b. Respondents – written submission, outline of costs if any by October 5, 2018

[127] All such costs submissions to adhere to the following guidelines:

a. Five pages exclusive of attachments (Offers, outlines of costs)

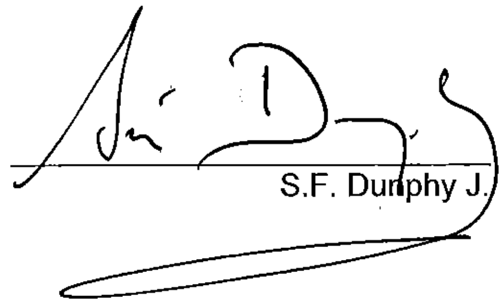
b. No need to expand upon first principles;

c. Cases should not be attached unless not available electronically;

d. Delivered in electronic format - the last to deliver (in this case, the respondents) to assemble submissions of both parties and deliver them to the court together via email thumb drive via my assistant (daisy.ng@ontario.ca) or to judge's administration Rm 107, 361 University Avenue (disk or thumb drive); and

e. Reply only with leave and leave to be granted rarely.

[128] This matter was case managed prior to hearing with the enthusiastic co-operation of counsel. The result was an efficiently conducted hearing with a co-operatively prepared Joint Compendium. Counsel are to be congratulated for their exemplary work.



S.F. Dunphy J.

Released: August 16, 2018

CITATION: Gambin Estate v. Di Battista Gambin Developments Limited, 2018 ONSC 4905
COURT FILE NO.: CV-17-11812-00CL
DATE: 20180816

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicant

– and –

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

Respondents

REASONS FOR JUDGMENT

S.F. Dunphy J.

Released: August 16, 2018