CITATION: Zanardo v Di Battista Gambin Developments Limited, 2019 ONSC 1376
DIVISIONAL COURT FILE NO.: DC-18-523
DATE: 20190227

ONTARIO SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

DAMBROT, EMERY, and MYERS JJ.

BETWEEN:	
ANTHONY ZANARDO in his capacity as Estate Trustee for the ESTATE OF LUIGI GAMBIN Applicant/Respondent	*Matthew Sammon and Chris Trivisonno* for the Respondent
– and –	
DI BATTISTA GAMBIN DEVELOPMENTS LIMITED, RAY DIBATTISTA, ANTHONY DIBATTISTA, JULIA DIBATTISTA, WHITWOOD DEVELOPMENTS LTD. and GREYSTAR DEVELOPMENTS INC. Respondent/Appellants	*Sheila Block, Jeremy Opolsky, and Jonathan Silver* for the Appellants

HEARD at Toronto: February 19, 2019

F.L. Myers J.:

REASONS FOR JUDGMENT

BACKGROUND

[1] This appeal involves the affairs of Gambin Di Battista Developments Limited. The corporation operated for almost 30 years as an incorporated 50/50 partnership between Ray DiBattista and the late Luigi Gambin. The respondent in this appeal is the estate trustee of Mr. Gambin's estate. The residuary beneficiaries of the estate, who effectively own Mr. Gambin's half of the company, are Mr. Gambin's two adult sons.

[2] The appellants appeal the decision of Dunphy J. dated August 16, 2018 reported at 2018 ONSC 4905. They have limited their appeal to challenging the remedy of liquidation of Gambin Di Battista Developments Limited ordered by the motions judge and the brief period granted by the motions judge for the appellants to elect to purchase the business to stave off liquidation.

[3] The appellants are not contesting the findings that they engaged in oppression and committed "grave" breaches of fiduciary duty towards the Gambin side. Nor do they challenge the judge's finding that they improperly usurped for themselves a corporate opportunity worth several million dollars. They do not challenge the imposition of a remedial constructive trust under which they now hold the opportunity in trust for Gambin Di Battista Developments Limited.

[4] The appellants argue instead, that the remedy of constructive trust imposed upon them has resolved the issues between the shareholders so that a further order of a liquidation of the corporation is punitive and a breach of the principles applicable to oppression remedies. But the appellants do not challenge the finding of fact that they committed their breaches of duty and took the corporate opportunity due to overt hostility and resentment held by Ray DiBattista against the estate trustee and the Gambin brothers. The motions judge found as a fact that Mr. DiBattista's *animus* is both palpable and continuing. He found that the trust and confidence underpinning the relationship among the shareholders in this closely-held, small, private company was misplaced and is no longer feasible.

[5] The motions judge summarized his reason for exercising his discretion to require liquidation as follows:

> 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.

[6] In my view, the motions judge properly considered the facts and circumstances on the evidence before him and exercised his remedial discretion in accordance with the appropriate legal principles. Accordingly, the appeal is dismissed for the reasons that follow.

THE FACTS

[7] The motions judge gave very thorough and complete reasons. It is only necessary here to provide a brief synopsis of the facts to flesh out the issues.

In the Beginning

[8] Mr. DiBattista and Mr. Gambin were both electricians by trade. They began building homes together in 1985. Gambin Di Battista Developments Limited was their corporate vehicle.

[9] As found by the motions judge, the overall division of labour between the two partners was that Mr. DiBattista was mainly the "office" person who negotiated and supervised contracts while Mr. Gambin was the "field" person who supervised and oversaw construction projects. The focus of the business while Mr. Gambin was alive was on securing raw land, arranging to develop it, and managing the projects once developed. The motions judge found that Mr. Gambin had a recognized flair for identifying and pursuing new development opportunities.

[10] Gambin Di Battista Developments Limited was managed by the two founding shareholders like a partnership. There was no shareholders' agreement, no board meetings, nor any formal arrangement for managing the affairs of the business. The partners knew and trusted each other. They worked things out.

Succession Planning

[11] In 2009, Mr. Gambin was diagnosed with cancer. He and Mr. DiBattista turned their minds to succession. In 2010, they entered into a memorandum of agreement ("MOA") to govern the affairs of the business until the death of the last of the two partners and their respective spouses.

[12] The MOA recites the years of struggle endured by the partners to build the largely debt-free business and their desire that it continue to be financed and operated as it had in past notwithstanding the impending death of Mr. Gambin. Ms. Block criticized the motions judge for not mentioning this recital in his reasons, as she submits that it sets out the expectations at play among the shareholders at the time.

[13] Under the MOA, consent is required before either side can sell their shares. There can be no redemptions or demands for repayment of shareholder loans. Moreover, as long as no party breaches the MOA, neither side can bring a legal proceeding for the liquidation of the corporation.

[14] The power to appoint the members of the board of directors is given exclusively to Mr. DiBattista if Mr. Gambin should die. The company was to be managed as determined by the board of directors in a manner consistent with past practice. Dividends or other distributions were to be determined by the board of directors, "based on annual net income, business plans for acquisitions and divestitures and the need for reserves and liquidity." No calls on the shareholders for capital were permitted apart from an initial $2 million each that was needed for an existing project.

[15] Ms. Block argues that under the MOA, Mr. Gambin recognized and wanted the corporation to be run completely by Mr. DiBattista. Mr. Gambin left his spouse liquid assets that were to defray tax liabilities that would arise on his death. Mr. Gambin's spouse was supposed to execute a new will to complete Mr. Gambin's tax efficient plan. Unfortunately, Ms. Gambin passed away unexpectedly just ten days after Mr. Gambin's own passing. She had not executed her new will by the time that she passed away. As a result, the Gambins' tax planning efforts failed. Mr. Gambin's

estate has a significant tax liability and only its illiquid investment in Gambin Di Battista Developments Limited as an available asset.

[16] Mr. DiBattista called on the estate trustee to pay the $2 million capital call immediately despite the fact that the estate had no liquid assets. Friction developed between the estate trustee and Mr. DiBattista right away and has continued ever since. Moreover, with Ms. Gambin's passing, instead of Mr. DiBattista feeling duty-bound to protect Ms. Gambin as Mr. Gambin trusted, the beneficiaries of the Gambin 50% interest are the Gambin children. There is some evidence that one or both of the children were estranged from Mr. Gambin and it is clear that Mr. DiBattista felt no need to recognize them as his partners.

[17] I pause to note that I do not agree with Ms. Block that the MOA simply ceded control of the business to Mr. DiBattista to operate at his whim. It is true that the founding shareholders had no corporate formalities between them. But the MOA was signed with both parties understanding their history of informality. And yet, the board of directors plays an important role under the MOA. Although the members are to be appointed by Mr. DiBattista, they are to supervise his management guided by consistency with past practice concerning financing and operations. Of greater significance, decisions on dividends and distributions are for the board of directors and the considerations which they are to take into account are expressly set out and quoted above. Mr. Gambin did not leave the fundamental issue of divvying up the cash to Mr. DiBattista's whim at all. The board members remain subject to their statutory and fiduciary duties to the corporation no matter who appoints them.

The Shareholder Disputes

The 2014 Oppression Proceedings

[18] In 2014, the estate trustee brought an oppression remedy as a result of Mr. DiBattista taking a bonus for himself without paying a like amount to the estate trustee. The application settled. I do not recite it for any suggestion of wrongdoing. As one would expect, the settlement was made without any admission of liability. But it deserves noting that the estate trustee has once already felt it necessary to bring proceedings to limit self-dealing and, to the extent that one might hope that oppression proceedings might help educate the parties as to their duties and temper their conduct in future, the 2014 proceeding had no such effect here. In fact, as will be discussed below, Mr. DiBattista supports his recent unlawful self-dealing by reference to his resentment at the estate trustee for having brought the 2014 proceedings to deny him a unilateral bonus.

The Winding-Up of Subsidiaries

[19] More recently, two events formed the subject matter of the oppression complaints brought by the estate trustee. First, Mr. DiBattista wound-up subsidiaries in a manner that he claimed avoided the need for the estate trustee's consent and which distributed the subsidiary's assets in a manner that differentiated among the shareholders so as to ensure that the estate trustee would not receive any cash.

Greystar

[20] Second, in 2015 a development opportunity in Markham, Ontario was offered to Gambin Di Battista Developments Limited. Mr. DiBattista determined to take the opportunity for his own family and they incorporated a company known as Greystar through which to make the investment. The MOA contemplated that each side might have their own separate businesses even if they competed against Gambin Di Battista Developments Limited. But the motions judge found that Gambin Di Battista Developments Limited had ostensibly been looking for an opportunity such as this one for five years. It had funds on hand to participate. The purchase price ostensibly paid by Greystar was actually funded by way of a mortgage advanced by Gambin Di Battista Developments Limited for $3 million at 4% interest. Mr. DiBattista did not obtain any independent information as to whether 4% was priced at market. Moreover, he agreed to subordinate the mortgage behind a third party lender who advanced a further $3.5 million with no independent advice and for no consideration. Employees of Gambin Di Battista Developments Limited, operating out of the corporation's premises are coordinating the development of the Greystar site.

[21] If Mr. DiBattista believed that he was entitled to take the Greystar opportunity on his own, using corporate funds and employees to do so, he did not say so to the estate trustee. Rather, Mr. DiBattista did not show the Greystar loan on the financial statements of Gambin Di Battista Developments Limited. He did not mention the fact that the funds had already been advanced when expressly asked about uses of corporate cash by the estate trustee at the annual shareholders' meeting. In cross-examination, Mr. DiBattista tried to justify his decision to take the opportunity because he objected to the estate trustee's inquiries. He was evasive under cross-examination - trying to claim that he was only required to disclose long term advances whereas the term of the Greystar loan was not finally settled at the time of the shareholders meeting. He was quite clear that he viewed the estate trustee's inquiries at the shareholders' meeting as intrusions into his operations. He said that the estate trustee would receive disclosure of financial statements if and when prepared and that was all that he was entitled to as a shareholder.

[22] Rather than forthrightly disclosing the Greystar transaction and asserting his entitlement to compete under the MOA, Mr. DiBattista testified that the board of directors determined that the company should not enter into the project because the estate trustee had objected to management bonuses previously in the 2014 oppression remedy. This evidence is outrageous on several levels. First, the board of directors that Mr. DiBattista appointed consisted of his son and his wife. They both admitted that they engaged in none of the statutory duties and functions of a board of directors. They just left the company to be run by Mr. DiBattista. His evidence that the board of directors made a determination to decline to invest in the Markham development was not truthful. The board never met. It never considered the opportunity. It never decided to decline because the estate trustee objected to paying Mr. DiBattista bonuses. In addition, the ground offered, that Mr. DiBattista would not allow the company to engage in developments unless he was paid a differential bonus was itself, at minimum, a conflict of interest. It certainly did not reflect a corporate officer carrying out his duties to the corporation as a whole or with an eye to the rights and interests of the other 50% shareholders. It may well be that with some negotiation or proper corporate structure a fair bonus process could be implemented. But that requires Mr. DiBattista first to recognize that the other 50% shareholder holds a legitimate interest in the business and to deal with the estate trustee or the Gambin brothers on that basis. This he is not willing to do.

THE JUDGE'S DECISION

The Findings of Oppression and Breaches of the MOA

[23] The motions judge assessed the evidence and the arguments of both sides on the merits. He found that Mr. DiBattista breached his fiduciary duties to the corporation. He rejected Mr. DiBattista's evidence concerning the decision to exclude the corporation from the Markham opportunity taken by Greystar. He found that Mr. DiBattista's resentment against the estate trustee's 2014 oppression proceeding played a role in the decision to exclude the company and make the acquisition only for his own family's account. The motions judge found that Mr. DiBattista gave intentionally misleading information to the estate trustee that spoke volumes as to his disregard for his duties.

[24] The motions judge also considered and rejected the argument that the MOA authorized Mr. DiBattista to proceed as he did:

> [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.

[25] The motions judge then considered whether the manner by which Mr. DiBattista carried out the winding-up of subsidiaries amounted to oppression:

> [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.

[26] The motions judge found further that the members of the corporate board of directors, the appellants Julia and Anthony DiBattista, "abdicated their obligation as directors utterly" and that this too was a breach of the reasonable expectations of the parties under the MOA.

[27] He also found that the board members violated their obligations under the MOA to deal with the company's reserve of cash. The corporation had not made a single acquisition since Mr. Gambin become ill in 2010. The company had hoarded its cash and the board never considered the factors expressly set out in the MOA to guide distributions.

The Findings concerning the Remedy

[28] In assessing the remedy, the motions judge noted that the MOA demonstrated the great faith that Mr. Gambin placed in Mr. DiBattista by essentially vesting control of his estate in his partner. Mr. Gambin also knew that the ties of affection that he expected Mr. DiBattista to have for his wife, would not reasonably be expected to continue to his sons. But no one expected Ms. Gambin to pass away so suddenly. The motions judge found that "[t]he MOA regime of corporate governance started off on the wrong foot almost immediately."

[29] The judge assessed the estate trustee's liquidation request as follows:

> [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.

[30] In laying out his formal order, the motions judge gave Mr. DiBattista two weeks in which to determine whether to elect to buy the estate trustee's shares at fair market value following a valuation process. Mr. DiBattista argues that he should have been entitled to defer exercising his election until after the valuation was conducted.

JURISDICTION

[31] An appeal lies to this court under s. 255 of the *Business Corporations Act*, RSO 1990, c B.16

STANDARD OF REVIEW

[32] In *Wilson v. Alharayeri*, 2017 SCC 39 (CanLII), the Supreme Court of Canada discussed the standard of appellate review under analogous oppression provisions of the *Canada Business Corporations Act*, RSC 1985, c C-44,

> Three principles govern the applicable standard of review. First, absent palpable and overriding error, an appellate court must defer to the trial court's findings of fact. Second, an appellate court may intervene and substitute its own decision for the trial court's if the judgment is based on "errors of law ... erroneous principles or irrelevant considerations". Third, even if it was not so based, an appellate court may intervene if the trial judgment is manifestly unjust. [Citations omitted.]

[33] As discussed by this court in *Basegmez v. Akman*, 2018 ONSC 812 (CanLII),

> [8] The court is granted very broad remedial authority to make such order as it thinks fit to remedy oppression under the *OBCA*. I accept Mr. Hall's legal submission that, in applying a remedy after finding oppression, the court is exercising a statutory discretion that is to be exercised on a principled basis. The goal is to remedy the oppressive acts found. The frequently repeated admonition from the leading case is that the court is to use a scalpel to tailor carefully the relief ordered to do no more than is necessary to remedy the oppressive conduct. The court is not wielding a battle axe to cleave the parties. See *Wilson*, at paras. 23 to 27 and *Naneff v. Con-Crete Holdings Ltd.*, 1995 CanLII 959 (ON CA) at para 32. I also agree with Mr. Hall that winding-up and liquidation are considered only as a last resort when other less drastic remedies will not suffice. See *Wilson*, at paras. 23 and 57 and *Tilley v. Hails*, 1992 CanLII 7563 (ON SC) at para. 45.

ANALYSIS

The Underpinnings of the MOA No Longer Exist

[34] Ms. Block argues that there are two fundamental facts driving the parties' reasonable expectations that must be considered in constructing a proper remedy in this application:

a. The MOA was a pact reached as an exercise of trust and confidence between the two founding shareholders as partners; and

b. Both Mr. Gambin and Mr. DiBattista wanted the business to continue until the last of them and their spouses dies.

[35] I agree. But I do not see how that helps the appellants. Both of those principal objectives underlying the MOA no longer exist. The motions judge found that there is no longer any trust and confidence as between Mr. DiBattista and the estate trustee/Gambin brothers (if there ever was). In addition, he found that the business is no longer continuing as it had in past as a development company. It seems that the development business could not survive the loss of Mr. Gambin's flair for deals. The business is now a property manager kicking off a good income on a small number of static investments with few employees.

[36] Not only are the underpinnings of the MOA gone, but the appellants have committed material, grave breaches of the agreement. Were the court to terminate the agreement, recognizing that its *raison d'etre* no longer exists, the company would be thrown into immediate deadlock 50/50. Ms. Block argues that Mr. Gambin intended for Mr. DiBattista to run the business. But that ignores the terms of the MOA that he has breached. If there was an expectation, it is that the MOA would be followed; that a board would oversee Mr. DiBattista; and that distributions be considered on business-like terms set out in the MOA itself. There is no evidence to support an argument that partners or the MOA anticipated Mr. DiBattista operating the corporation as a fiefdom to the prejudice of the Gambin interests, stopping development, hoarding cash, and actively structuring affairs to selectively prevent any distributions to the Gambin side.

Issues of legal Principle

[37] Ms. Block raised four issues of law to support the appellants' argument that the motions judge erred in ordering a winding-up remedy:

a. The motions judge erred in granting a remedy that did more than simply remedy the oppressive acts found;

b. The motions judge erred in granting a remedy that was punitive because it did more than remedy the oppressive acts found;

c. The motions judge erred by granting a remedy that did not accord with the reasonable expectations of the shareholders set out in the MOA; and

d. The motions judge erred in granting a remedy that sought to predict future oppression rather than just remedying the existing oppressive acts found.

[38] The essence of all of these arguments is that the remedies of disgorgement and constructive trust were sufficient to remedy the oppressive acts found against the appellants. Ms. Block relies on cases such as *Naneff* for the well-understood proposition that the oppression remedy only applies to shareholder expectations. It is not to be used to try to fix extraneous problems like family relationship issues.

[39] As expressed by Galligan JA in *Naneff* at para. 25:

> Landry J. held that the Act protected a person's interest as a shareholder "as such". Basing his opinion on the judgment of Jenkins L.J. in *Re H.R. Harmer Ltd.*, [1958] 3 All E.R. 689 at p. 698, [1959] 1 W.L.R. 62 (C.A.), Landry J. said at p. 305:
>
> > [34] It must be remembered, and it is very important in this case, that it is only the interest of a shareholder as such, or of a director or officer as such that is protected by this section.
> >
> > [35] The applicant must establish that his interest as a shareholder has been affected. He may of course have other interests, such as being a prospective purchaser of the assets of the company. But it is only the applicant's interest as a shareholder which we must be concerned with in applying s. 166.
>
> [26] I agree with and adopt Landry J.'s analysis as a correct statement of the law.

[40] The difficulty faced by the appellants is that the motions judge was aware of the proper scope of the oppression remedy. He considered whether the other remedies were sufficient to remedy the oppression and held that they were not. Ms. Block argues that the motions judge wrongly relied on the existence of acrimony among the parties when, at law, the mere existence of acrimony among shareholders is not in itself a sufficient basis to order a liquidation. She relies upon, among other things, the decision of Wilton-Siegel J. in *Animal House Investments Inc. v. Lisgar Development Ltd.*, 2007 CanLII 82794 (ON SC). But in discussing the existence of acrimony in that case, at para. 61, Wilton-Siegel J wrote

> On the other hand, where the acrimony does not prevent a majority of the directors from continuing to make business decisions for the corporation, as in *McKeough*, a court should be reluctant to find the parties intended that the business relationship among them would terminate.

[41] That is, where the corporation is still able to function lawfully, respecting all parties' rights, interests, and reasonable expectations, acrimony will not necessarily be a basis for a liquidation. But that is not what the motions judge found was happening or was likely to happen here.

[42] Ms. Block then points to Justice Farley's caution against making predictions as to future conduct as it would be, "a foolhardy oppressor who, once having been chastised, would embark upon a further course of wrongdoing." *820099 Ontario Inc. v Harold E Ballard Ltd.,* 1991

CarswellOnt 142 (ON SC) at para. 147. She submits that there is an educational component to oppression relief. Parties learn what is expected of them and the court should be assume that they will self-correct once they know the law. The arguments once again runs into the evidence in this case. The motions judge was properly entitled to take into account that Mr. DiBattista admitted that his current *animus* is linked to the prior oppression proceeding brought by the estate trustee and Mr. DiBattista's resentment of the estate trustee's complaints against self-dealing and requests for transparency. It seems that Mr. DiBattista did not read Justice Farley's manual for corporate behaviour.

[43] As Justice Dunphy held that the corporation is holding a discrete number of readily valued and fungible properties, the only purpose in staying together is for Mr. DiBattista to maintain access to the Gambins' illiquid capital. The oppression remedy is not available just because a minority shareholder wants access to illiquid capital. But here, as the motions judge discussed, the MOA contemplates a winding-up and liquidation remedy being sought on breach of the agreement. That is, the parties expected to stay together only for so long as each complied with the MOA. As noted previously, once the MOA is removed, the shareholders are in 50/50 deadlock for which liquidation is an obvious outcome.

The Appellants' Two Week Election Right

[44] Finally, the appellants argue that the motions judge ought to have allowed them to obtain a third party valuation of the corporation's assets prior to being required to exercise the election to purchase the Gambins' shares that the judge felt it appropriate to award. In denying a stay pending appeal in relation to the election on August 24, 2018, I wrote:

> The Appellant says it is unfair to be forced to elect without knowing the price. He says he cannot assess his ability to purchase or finance a purchase. There are two answers to this. First, Dunphy J. did not order or find it just and convenient to order a buyout at FMV [fair market value] once known. He did not order an auction. He ordered a liquidation. He gave Mr. DiBattista a quick opportunity to buy. On the facts, Mr. DiBattista runs the company. He knows the assets. Moreover, the assets are a small number of real estate holdings. *There is no debt.* There is substantial cash in the bank. Mr. DiBattista knows the income thrown off by each property. As Dunphy J. found at para. [120] the assets are not hard to value. If Mr. DiBattista is not comfortable electing to buy knowing that even if he finances, he has cash and needs no more than 50% of the equity of the properties to do so, then Dunphy J. expected the liquidation to proceed. The quick aspect of the election is by design. It is not caused by the appeal.
>
> On the other hand, to stay the election changes its entire underpinning. If Mr. DiBattista gets to elect in 6 months or a year, he can affect the business between now and then and he will then be armed with valuation and other market information that he may seek. That moves the thrust of the relief from a liquidation (unless Mr. DiBattista knows right now that he wants to buy and "puts his money where his mouth is") to being a lengthy option with Mr. DiBattista holding all the cards.

[45] There is no principle of law that a party offered an opportunity to buy shares as part of an oppression remedy must first have an opportunity to have a third part evaluation performed. To the contrary, under s. 248 (3) of the *OBCA*, the motions judge could make such order as he saw fit, including ordering a buyout at a fixed price or at a subsequently determined fair value, with no election or option at all. There is no error in principle to give a brief election right especially given the facts relevant to the ease of valuation and the cash-rich position of the corporation on which the judge relied.

OUTCOME

[46] As noted at the outset, in my view, the motions judge properly considered the facts and circumstances on the evidence before him and exercised his remedial discretion in accordance with the appropriate legal principles. Accordingly, the appeal is dismissed

[47] The parties ought to be able to agree on costs. Both sides have sophisticated counsel who understand that the successful party is entitled to costs on a partial indemnity basis under the normative approach. There is a question so of how costs of the Monitor are to be dealt with. In the unlikely event that counsel cannot lead their clients to agreement on costs, the respondent may make no more than three pages of submissions by March 8, 2019. The appellants may respond with no more than three pages of submissions delivered by March 22, 2019. In addition to their submissions, both sides may file any offers to settle on which they rely and each *shall* deliver a Costs Outline. No copies of any case law or statutory material shall be delivered. Rather, any reference to case law or statutory material shall be made by hyperlinks to CanLII or another publicly available source embedded in their submissions. All submissions and other materials shall be delivered as attachments to an email to the registrar's office in searchable PDF format.

Myers J.

I agree

Dambrot J.

I agree

Emery J.

per

Release Date: February 27, 2019

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