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The Oppression Remedy Tests: Oppression v Unfair Prejudice & Unfair Disregard

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Case commented on: *Wisser v CEM International Management Consultants Ltd*, 2022 ABQB 414 (CanLII)

This blog broadly addresses how creditors can utilize the oppression remedy. It includes a specific discussion on the three tests in the oppression remedy. It will not address the issue of severance.

In *Wisser*, the court found the defendant directors liable under the oppression remedy, though only under the tests of unfair prejudice and unfair disregard, and not oppression. The issue with this finding is that throughout the decision the court laid out facts which raise a strong presumption of bad faith or improper purpose, the required mental elements for a finding of oppression. Its conclusion that the defendants had not acted in bad faith does not flow from the facts, and its failure to acknowledge that these facts raise a strong presumption of bad faith or improper purpose leaves a discernable gap in an otherwise well-reasoned decision.

The remedy for oppression must rectify the oppression, not punish the oppressor (*McGovern-Burke v Martineau*, 2016 ABQB 514 (CanLII) at para 58), meaning motive or intention should not factor into the assessment. For that reason, finding unfair prejudice or disregard and not oppression should not have a significant impact on the remedy for the complainant. The finding is, however, consequential for oppression remedy jurisprudence. The oppression remedy has long suffered from a lack of clarity. Failure to provide an explanation for the decision denies parties a clear understanding of precisely what they did wrong and prevents the development of principles and jurisprudence on how to properly analyse oppression. It also risks inconsistency in judicial decision-making.

Facts

CEM provided consulting services to its clients. Its VP Operations, Mr. D'Ailly, and its VP Sales & Marketing, Mr. Ascah, were also directors and shareholders of CEM.

Mr. Wisser briefly worked for CEM in 2005, then was rehired in 2007. From then until 2015, Mr. Wisser worked at CEM as an employee and an independent contractor. CEM terminated him not for cause in March 2015 and paid a total of 4 weeks' severance, which did not include the period in which he had worked as an independent contractor. Mr. Wisser filed a statement of claim in May 2015, arguing that he was effectively an employee throughout his time at CEM and that his severance should have been based on 7.5 years of service.

Prior to resolving Mr. Wisser's claim, Messers D'Ailly and Ascah transferred CEM's assets to themselves, and ceased CEM's operations. Within a few months of this occurring, the directors also began a new business venture with a new corporation that was performing essentially the same services as CEM, 1994992 Alberta Ltd ("199 Alberta").

At the time CEM ceased operating, the only outstanding claim was Mr. Wisser's. Mr. Wisser believed that the defendant directors had removed the assets from CEM in order to avoid paying his claim. He therefore commenced another claim for oppression against the directors jointly and severally, and against the newly formed legal company.

Decision

Justice M. H. Hollins determined that Mr. Wisser's length of service was 7.5 years and that CEM was liable to him for damages. She also determined that Mr. Wisser was entitled to seek the oppression remedy against 199 Alberta and against the individual defendant directors jointly and severally.

My Analysis of the Oppression Remedy

Courts will grant an oppression remedy when the corporation or its directors acted, or refrained from acting, in a way that was oppressive or unfairly prejudicial to, or that unfairly disregarded the interests of, any security holder, creditor, director, or officer.

In order to establish a claim for oppression under s 239 of the *Alberta Business Corporations Act*, RSA 2000, c B-9 (*ABCA*), an applicant must establish three things:

1. That the applicant is a "complainant";
2. That the applicant's reasonable expectations of the defendant(s) were not met; and
3. That the breach of those reasonable expectations was oppressive, unfairly prejudicial, or unfairly disregarding of the applicant's interests.

If the applicant is seeking a personal claim for oppression against a director of the company, in addition to the above, the applicant must also establish that the individual director should be personally liable for the oppression.

1. Was Mr. Wisser a "Complainant"?

Mr. Wisser was a creditor seeking the oppression remedy to collect on the debt owed to him by CEM and the individual directors. Under the *ABCA* (and under the business corporations legislation in other provinces and federally), persons who fit under the definition of "complainant" can seek an oppression remedy. Some complainants have standing as of right and some, including creditors, must be found by the courts, at their discretion, to be "proper persons" to bring a remedy (see my earlier post on creditors seeking complainant status).

As a general matter of policy, creditors cannot pursue the oppression remedy for simple debt collection. As the Alberta Court of Appeal said in *PricewaterhouseCoopers Inc v Perpetual Energy*

Inc, 2021 ABCA 16 (CanLII) (*Perpetual Energy*), "[t]he mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression" (at para 126). Rather, creditors should be protecting themselves in their contracts (see *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd*, 2008 ONCA 183 (CanLII) (*JSM*) at para 65).

However, creditors will be unable to protect themselves against "internal and unlawful corporate maneuvers" (*JSM* at para 66). For that reason, creditors *can* seek oppression when they have a "direct financial interest in how the corporation is being managed" but "no legal right to influence or change what they see to be abuses of management or conduct contrary to the company's interests" (see *PRW Excavating Contractors Ltd v Louras*, 2016 ONSC 5652 (CanLII) at paras 17-19). This position is one the court has identified as being in a position analogous or akin to a minority shareholder, as in, "by virtue of their relationship to, or dealings with, the company, [creditors] have an interest that is not dissimilar to that of a shareholder" (*N'Quatua Logging Co Ltd v Thevarge et al*, 2006 BCSC 1122 (CanLII) at para 19).

One of the situations in which creditors cannot protect themselves is when the defendants remove assets from the corporation for less than fair market value, known as asset stripping, judgment proofing, or transferring assets beyond creditors' reach. CEM ceased operating, divested itself of its assets and transferred them to a new corporate entity, all while Mr. Wisser's claim remained outstanding. This would qualify as judgment proofing, and Mr. Wisser was accordingly granted complainant status to seek the oppression remedy.

2. Were Mr. Wisser's Expectations Reasonable?

Once complainant status is established, the complainant must satisfy the two-step test from *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 (CanLII) (*BCE*) at paras 58-59. Under the first part, the complainant must show that their reasonable expectations were breached.

The Supreme Court laid out several factors to determine whether the complainant's expectations are reasonable (see *BCE* at paras 73-82). In addition to these, creditors can reasonably hold additional expectations. These expectations do *not* extend to expecting the debtor to "be managed and operated in a way that would ensure that it was paid for its debt" (*Ndex Systems Inc v Aquino*, 2011 ONSC 6654 (CanLII) at para 15) but do include having the corporation consider their interests (*BCE* at paras 113-14) and refrain from unfairly restructuring its business and assets in such a way that payment of its debts becomes impossible (*Perpetual Energy* at para 129).

In this case, Hollins J noted that CEM was a closely held corporation with only two shareholders. These shareholders were sophisticated businesspeople who had managed other businesses and who were aware of Mr. Wisser's claim when they wound down CEM, transferred the assets to themselves, and started a new company to carry on the same business. The judge noted that there were no competing interests to be considered here and concluded that Mr. Wisser "had a reasonable expectation that the corporation's business and assets would not be unfairly re-structured to benefit management at his expense" (at para 74).

3. Was Breach of Mr. Wisser's Reasonable Expectations Oppressive, Unfairly Prejudicial or Unfairly Disregarding of his Interests?

After establishing breach of their reasonable expectations, the complainant must show that the breach was oppressive, unfairly prejudicial, or unfairly disregarding of their interests. Not every breach of reasonable expectations will meet one of the tests (*BCE* at para 67).

a. Oppression v Unfair Prejudice & Unfair Disregard

The difference between oppression and unfair prejudice and disregard is the different mental elements. Oppression captures behaviour that is "burdensome, harsh and wrongful", "a visible departure of fair dealing", or "an abuse of power" (*BCE* at paras 92-94). This is intentional behaviour undertaken with an improper purpose. For unfair prejudice and unfair disregard, the Supreme Court described the required mental element as a "less culpable state of mind" than bad faith (*BCE* at para 67). This would put us in the realm of wilful blindness, recklessness, indifference, and possibly carelessness (see my earlier post about fairness and the corporate oppression remedy).

b. Applied to This Case: Why Was Bad Faith Not Found?

In this case, the court found, on the evidence, that the defendants had not acted in bad faith (at para 100), and therefore declined to find their conduct to be oppressive. Rather, the court found that in having "treated Mr. Wisser's interests as being of no importance", the acts had met the other two oppression tests: unfair prejudice and unfair disregard (at para 81).

This failure to find bad faith does not follow from the court's overall findings. Not only did the court find restructuring to be "unnecessary and very detrimental" to CEM's interests, it also expressly found that the defendants had restructured the company with the sole intention of "shed[ding] liability for Mr. Wisser's severance" (at para 79).

The court also made several other findings, all of which raise a strong presumption that these activities were undertaken with the improper purpose of avoiding paying Mr. Wisser's severance.

First, it found that the new company, 199 Alberta, was offering the same consulting services as the restructured company, CEM. In early 2016, CEM experienced financial difficulties and had to cease operations due to the market downturn. Later that year, there was an upturn in the market, but the directors did not revive CEM. Instead, they incorporated a new company, 199 Alberta, named themselves as directors and held 95% of the shares. They hired many of the former CEM employees, and they purchased the branding and methodology for themselves, took title in it, and agreed to lease it back to the company for a nominal amount. At the time of the litigation, CEM did not have any assets to satisfy judgments against it (at para 52).

The defendants attempted to show they had not simply started the new company to thwart Mr. Wisser's collection efforts, but the court was not convinced. It found that although the defendants "took great pains to try and differentiate the services offered" by the two companies, "the fact is that [the companies were] substantially the same" (at para 77). The judge called their attempts to

differentiate the services "new mythology", implying dishonesty, finding that it "may have allowed [them] to describe their offerings as 'new' to prospective customers" but that "objectively, the core services and objectives of [the two companies] were the same" (at para 77).

Second, the court found that the defendants, the only two shareholders of CEM, knew what they were doing, as they were "sophisticated businesspeople, having managed this and other businesses along the way" (at para 72). And yet, despite being "well aware of Mr. Wisser's claim, [they] made no attempts to deal with it as part of moving on to their next business venture" (at para 72).

Third, combining the defendants' sophistication with the fact that Mr. Wisser's claim "was the only claim outstanding at the time CEM ceased doing operations" (at para 70), shows these actions were not done in an attempt to balance competing interests. In fact, the court specifically found, "[t]his was not a situation in which other stakeholders with competing interests, other than their own, needed to be considered" (at para 72).

Had the court found that the defendants restructured CEM in pursuit of other goals, and that one of the unintended side effects was the avoidance of Mr. Wisser's claims, then a finding of unfair prejudice or disregard may have been justified. In that case, it could have been argued that the defendants had not intended to harm Mr. Wisser, but that in pursuing other interests they were reckless as to the effects of their actions on him, or possibly wilfully blind. However, the above findings point to a strong likelihood that the defendants undertook these activities with the purpose of avoiding paying Mr. Wisser's severance. In fact, the court found that "no other logical reason was ever provided" for CEM's restructuring (at para 89).

The combination of these findings shows that by winding down CEM while commencing a new business conducting essentially the same business activities with the same employees, the directors ensured Mr. Wisser's claim would go unpaid. There were other options available to them, such as statutorily winding up CEM or continuing to conduct business through CEM, but those would have required them to account for Mr. Wisser's outstanding claim (at para 80). In fact, the court expressly found, "the only thing accomplished by restarting their business under a new corporate identify was to shed any liability for Mr. Wisser's severance" (at para 79, emphasis in original).

Despite these incriminating findings, the court concluded, "avoiding Mr. Wisser's claim may not have been the driver of the restructuring from CEM to 199 Alberta" (at para 89) and declined to find the defendants' actions to be "malicious or high-handed" (at para 100). This conclusion does not follow. There was undoubtedly a reason the court declined to find bad faith, but after laying out facts that raise a strong presumption of bad faith or improper purpose, and making the findings it did, that reason needed to be clearly set out.

4. Are the Defendant Directors Personally Liable for Oppression?

The Supreme Court, drawing on the two-prong approach developed in *Budd v Gentra Inc*, 1998 CanLII 5811 (ON CA), maintained that to pursue individual directors in a claim for oppression, the oppressive conduct must be properly attributable to the directors and the imposition of personal liability must be "fit in all the circumstances" (*Wilson v Alharayeri*, 2017 SCC 39 (CanLII) at para 48).

The court here found the directors jointly and severally liable as they "were clearly acting in their capacity… when they transferred [CEM's] assets to themselves, ceased operations of CEM, started up the same operations under the same name but with a new corporate identify…" (at para 97).

Conclusion

If courts clearly address why and how they arrive at their conclusions, oppression remedy jurisprudence can become clearer, and provide parties with much needed guidance as they consider whether the oppression remedy is a viable option.

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