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— Franks & Zalev - This Week in Family Law

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NOTE: We'll be off for next week, but will be back with the next edition of *TWFL* on Monday, August 8th.

Pay No Attention to That Trust Agreement Behind the Curtain

Vo v. Tran (2021), 52 R.F.L. (8th) 368 (Ont. S.C.J.) — Engelking J.

In *Vo v. Tran*, Justice Engelking considered whether the wife, as a partial equitable owner, could compel the sale of a property under the *Partition Act*, R.S.O. 1990, c. P.4, that was *not* a matrimonial home.

During the marriage, using the equity in the matrimonial home, the parties purchased a rental property ("Bandelier").

The matrimonial home was purchased years earlier in the husband's sole name. This was done because, at the time, the wife did not qualify for financing. However, although title was in the husband's sole name, the parties always treated the property as if it were jointly owned — they shared expenses and worked together to pay down the mortgage.

The parties mortgaged the matrimonial home to pay for Bandelier. The wife also contributed \$24,000 to cover the HST (it was a new build). The husband wanted title to Bandelier in his name alone — just as it was on the matrimonial home. The real estate lawyer at the time did not feel comfortable, and insisted that the wife's interest be protected. A trust agreement was drafted by the lawyer, and the parties executed it. It stated that while the wife was not on title she had a 50% beneficial interest in the property.

After the parties separated in 2018, the husband tried to sell the matrimonial home without the wife's consent. That did not go over so well, litigation ensued. However, the matrimonial home was ultimately sold, and some of the net proceeds were paid out equally to both parties, with the balance held in trust. The husband moved into Bandelier, and the wife was forced to find rental accommodations.

The wife brought a motion to sell Bandelier under the *Partition Act*. The husband counter-claimed for a declaration that he was the sole legal and beneficial owner of Bandelier and that the Trust Agreement should be ignored. The Court made quick work of the husband's argument — likely because he offered no evidence or legal principle as to how or why the Trust Agreement could be set aside. The Court then considered the wife's claim.

Sections 2 and 3(1) of the *Partition Act* set out who may bring a claim to compel the sale of land:

2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, **and all parties interested in**, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable

or equitable only. **[Maybe it's time to bring this language into at least the 19th century? — emphasis (and snarky comment) added]**

3(1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

By virtue of the Trust Agreement, the wife was a "person interested" in Bandelier, and was able to bring an application for partition and sale. The general principles were set out in the 1953 case of *Davis v. Davis*, 1953 CarswellOnt 106 (C.A.) where the Court of Appeal stated:

There continues to be a *prima facie* right of a joint tenant to partition or sale of lands. There is a corresponding obligation on a joint tenant to permit partition or sale, and finally the Court should compel such partition or sale if no sufficient reason appears why such an order should not be made.

The operation of the *Partition Act* was also described by Justice Perell in *Brienza v. Brienza*, 2014 CarswellOnt 16820 (S.C.J.):

[23] The onus is on the party resisting partition or sale to demonstrate sufficient reasons for refusal: *Davis v. Davis*, *supra*; *Silva v. Bettencourt*, [2002] O.J. No. 1878 (S.C.J.).

[24] In cases after *Davis*, the Act has been interpreted to mean that the court has a very limited discretion to refuse an application for partition or sale: *Silva v. Silva*, [1990] O.J. No. 2183 (Ont. C.A.), *supra*; *Hay v. Gooderham* (1979), 24 O.R. (2d) 701 (Ont. Div. Ct.); *Garfella Apartments Inc. v. Chouduri*, [2010] O.J. No. 2900 (Ont. Div. Ct.).

[25] Only in exceptional circumstances will a joint tenant or tenant in common be denied his or her request that the property be partitioned or sold. The court's discretion to refuse partition and sale is narrow, and there must be malicious, vexatious or oppressive conduct to justify the refusal to grant partition and sale: *Silva v. Silva*, *supra*; *Osborne v. Myette*, [2004] O.J. No. 3383 (Ont. S.C.J.); *Latcham v. Latcham*, [2002] O.J. No. 2126 (Ont. C.A.), *aff'g* [2001] O.J. No. 5291 (Ont. S.C.J.); *Fellows v. Lunkenheimer* (1998), 21 R.P.R. (3d) 142 (Ont. Gen. Div.); *Kalita v. Freskiw Estate*, [1998] O.J. No 5180 (Ont. Gen. Div.); *Jakubiszyn v. Tekielak*, [1991] O.J. No. 2362 (Ont. Gen. Div.); *Garfella Apartments Inc. v. Chouduri*, *supra*.

As the husband had not adduced a sufficient (or any) reason as to why the Trust Agreement should be ignored or set aside or why Bandelier should not be sold, Justice Engelking granted the wife's motion for sale.

While the decision does not discuss this point, this result was only obtained because the Trust Agreement was clear that the husband/trustee was holding an interest in this *specific* property in trust for the wife. Unless the terms of the trust expressly so provide, a beneficiary has no property interest in any specific asset of the trust: *Spencer v. Riesberry* (2012), 17 R.F.L. (7th) 94 (Ont. C.A.), *aff'g* (2011), 17 R.F.L. (7th) 73 (Ont. S.C.J.).

Some Lessons on Oppressions

Fuentes v. Camino Construction Inc., 2021 CarswellOnt 6861 (S.C.J.) — Dietrich J.

Berman v. 905952 Alberta Ltd (2021), 59 R.F.L. (8th) 183 (Alta. Q.B.) — Labrenz J.

Oppression is one of those causes of action that does not come up daily in family law (especially when dealing with closely-held private corporations).

Fuentes v. Camino Construction Inc.

Fuentes dealt with an oppression claim in the context of a small family-run business.

In 2002, the husband and wife had started a company, Camino Construction Inc. ("Camino Construction"). Camino was in the business of concrete forming. The wife ran the business from the matrimonial home, taking calls, dealing with invitations to tender, drafting and submitting bids for jobs, managing payroll, doing bookkeeping — the majority of the "back-office" tasks.

The husband worked "in the field" getting requests for proposals, assessing bid prices, securing contracts, managing construction projects, and working at job sites. The husband was also the director of Camino.

All was grand with Camino Construction. At least it was until the parties' marriage started faltering in 2017. When that happened, the husband incorporated a new concrete forming company — "Camino Construction 2016 Incorporated" ("Camino 2016") — failing grade for originality. Of course, the husband did not tell the wife he had done this.

Camino 2016 used the same logo, trades, subtrades, contractors, WSIB consultants, suppliers, business methods, and techniques as Camino Construction. And, of course, the husband funnelled all of the business he could to Camino 2016. The only real difference was that wife was wholly excluded.

Shortly after he incorporated Camino 2016, the husband sold 25% of it to a third party.

The husband claimed that the wife had suffered a nervous breakdown and was no longer fulfilling her role at the company. As a result, he had "no choice" but to incorporate Camino 2016 and to exclude her to protect the family business for the benefit of their son. How noble.

Both Camino Construction and Camino 2016 were incorporated under the Ontario *Business Corporations Act*, R.S.O. 1990, c. B. 16 ("*OBCA*").

The wife argued that the husband had acted oppressively towards her, and sought an order granting her 50% of the shares in Camino 2016. The husband did not deny that his behaviour was oppressive. Rather, he argued that the wife was only entitled to half the value of Camino Construction, and that they could not be shareholders in Camino 2016 because they no longer trusted one another and could not work together.

Even though the husband did not deny that he had acted oppressively, the Court still had to determine for itself whether or not oppression had taken place. Section 248 of the *OBCA* provides that if a court is satisfied that the business affairs of a corporation have been conducted in a manner that is oppressive or unfairly prejudicial or in a manner that unfairly disregards the interest of any shareholder, the court may make an order to "rectify the matters complained of." And, to determine whether there has been oppressive conduct, the court must consider the reasonable expectations of the aggrieved party, in accordance with the arrangements that existed between the principals: *Nanef v. Con-Crete Holdings Ltd.*, 1995 CarswellOnt 1207 (Ont. C.A.) at para. 19.

The Court set out a number of examples of oppressive conduct:

- Situations where a principal forms a new corporation and moves corporate customers and/or assets to the new corporation. This occurred in this case.
- Situations where the principal establishes a competing business leading to the financial ruin of the initial corporation. This also occurred in this case.
- Situations where the principal diverts work from a joint venture to a secret personal corporation. This also occurred in this case.

The Court easily determined that the reasonable expectation of the wife was that the parties were 50/50 partners — they both contributed to the work of the corporation, and they would both equally benefit from its success.

The husband's actions were, *unquestionably*, oppressive towards the wife and further represented a breach of his fiduciary duty towards Camino Construction as the director.

The Court then had to consider an appropriate remedy. The Court agreed that the parties could not work together any longer — they were in the process of separation and there was absolutely no trust between them (can't imagine why). As a result, making the wife a shareholder of Camino 2016 was not practical. However, the Court could not simply order the husband to buy the wife's shares in Camino Construction, as by that point all of the value had been drained and moved to Camino 2016. Consequently the Court ordered that the wife be bought out of Camino Construction with her shares to be valued as of December 31, 2015 — *prior* to the husband's oppressive conduct. The wife was also entitled to the lost income she would have received from Camino between December 31, 2015 and the trial (April 2021).

Berman v. 905952 Alberta Ltd

Berman was somewhat more complicated than *Fuentes*, and dealt with an oppression claim in a particularly unique set of circumstances.

The companies in question were owned by the husband and a third party, Mr. S, as 50/50 partners. At one point, there had been as many as six companies that they owned together, but by the time of trial, only two remained. The husband and Mr. S had always been in the real estate management business.

At the time of trial, the companies' primary assets were two commercial properties in Calgary worth \$4.3 million and \$4.75 million. They were rented, but were not generating a profit due to market conditions from COVID. The husband argued that the companies were holding onto the properties until market conditions improved.

The wife brought a claim for, among other things, a beneficial interest in the husband's interest in the company. During the action, the husband ignored a number of court orders regarding disclosure, and a court order requiring him to place his corporate shares with the wife's counsel. He also engaged in a "roll and redeem" transaction that did not impact his ownership in the companies, but which may have generated significant tax savings for the companies, and all parties involved.

At the end of the matrimonial trial, the Court valued the husband's interest in the companies at \$2,075,515. The wife was owed an equalization payment of \$917,816, \$307,788 in retroactive child and spousal support, and \$153,828 in prospective child and spousal support, for a total of \$1,379,342. The wife argued that the husband should be forced to transfer his shares to her instead of forcing her to count on the husband paying what he owed, given his historic conduct.

The Court agreed with the wife and found that she held an equitable interest in the husband's shares of the two companies up to the value of the amount owing to her under the Order. The cost order from the trial of \$128,339.97 was also to be secured against any remaining value in the husband's shares.

The Court then *directed* the wife to commence an oppression action under the Alberta *Business Corporations Act*, R.S.A. 2000 c. B-9 ("*ABCA*"), to resolve her interests in the corporations in an equitable manner.

In early 2020, after the trial, the wife called an Annual General Meeting for the companies. She was provided with financial statements and minute books for the companies as a consequence of this meeting. Upon receipt, the wife became concerned that the husband had understated the value of the companies.

The wife put the following items on the agenda for the Annual General Meeting:

- i. A review of all past transactions by directors and shareholders;
- ii. Sale of shares in the husband's name to Mr. S;
- iii. A review of intercompany transactions; and

iv. Listing and sale of assets of the companies.

At the Annual General Meeting, the husband took the position that the wife was not entitled to vote. The wife's counsel, on the other hand, took the position that the *husband* was not entitled to vote because he no longer had beneficial ownership of his shares, and had not taken instructions from the wife as to how to vote. Ultimately, the vote proceeded without the wife. The first three items were rejected and the fourth resulted in a mixed vote. Mr. S, tired of being stuck between warring spouses, also raised the issue of selling the assets of the companies. The husband refused, stating that he was "not interested" in selling the assets of the companies.

After the Meeting, the wife brought the oppression claim against the husband and Mr. S. She argued that her interests had been oppressed, unfairly prejudiced and/or unfairly disregarded by the husband and Mr. S on four grounds:

1. The failure of the husband to follow court orders in 2017 and 2018 for disclosure and holding his shares in trust;
2. The "roll and redeem" transaction in June 2019;
3. The husband's disregard for the wife's interests as a beneficial owner at the Annual General Meeting in March 2020; and
4. The husband's continued refusal to sell the companies' properties, resulting in a deadlock in the corporation.

Mr. S argued that he had not engaged in any oppressive conduct toward the wife. He characterized himself as an innocent bystander — he had not been involved in the divorce, had not been aware of any court orders (which were personal against the husband), and had taken no part in anything that the wife had called "oppressive." The Court ultimately agreed, noting that Mr. S was willing to sell the properties (despite it being an inopportune time to sell) just to extricate himself from the situation.

The Court noted that the oppression remedy is often used after a matrimonial relationship has ended in situations where spouses can no longer agree on running their family owned and operated corporation. In this case, however, it was being invoked to resolve the distribution of matrimonial property.

First, the Court helpfully set out the general principles of oppression:

- Oppression is an equitable remedy (albeit codified by statute) that gives the court a broad discretion to ensure the fair treatment of corporate stakeholders. The goal of the *ABCA* (or the *CBCA*) is to settle internal corporate disputes premised on equitable principles rather than reliance on strict legal rights.
- In order for a complainant to establish oppression or unfairness, a two-part test must be met: first that a reasonable expectation has been breached; and second, that the breach amounts to "oppression", "unfair prejudice" or "unfair disregard."

The Court noted that determining whether a shareholder's expectation is reasonable or not can be complicated. Stakeholders might have different reasons for entering into a relationship with a corporation and those reasons can conflict. While corporate decisions will not always satisfy every shareholder or benefit them all equally — shareholders are entitled to expect to be treated fairly. This is an important distinction drawn by Justice Labrenz: *fair* treatment does not necessarily mean *equal* treatment.

Beyond this general statement regarding "fair treatment," whether or not an expectation is reasonable will depend on a number of case-specific factors, including:

- General commercial practice;
- The nature of the corporation;
- The relationship between the parties;

- Past practices;
- Steps the claimant could have taken to protect themselves;
- Representations and agreements; and
- The fair resolution of conflicting interest between corporate stakeholders.

The breach of a reasonable expectation will not always constitute oppression. Instead, the breach of the expectation must amount to oppression, unfair prejudice or unfair disregard. The meaning of these terms was discussed in one of the leading cases on oppression, *BCE Inc., Re*, 2008 CarswellQue 12595 (S.C.C.):

[67] . . . Even if reasonable, **not every unmet expectation gives rise to claim under s. 241** [of the *CBCA*]. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations: see Koehnen, at pp. 81-88. . . . [emphasis added]

To assist in determining "reasonable expectations", the court should apply a "modified objective standard" — that is, what would a shareholder in the claimant's position reasonably expect: *Urquhart v. Technovision Systems Inc.*, 2002 CarswellBC 140 (S.C.), aff'd 2003 CarswellBC 103 (C.A.); *Nanuff v. Con-Crete Holdings Ltd.*, 1995 CarswellOnt 1207 (C.A.).

If a complainant satisfies the two-part test, a court then has very "broad discretion to make whatever orders it deems necessary to rectify the oppression or unfairness." These powers — to craft a "just and equitable" remedy — are extremely broad: *Marshall v. MMV Financial Inc.*, 2013 CarswellOnt 3449 (C.A.).

The wife requested an order that the shares of the companies be sold. The Court confirmed that under s. 215 of the *ABCA*, the court has that power in the case of oppressive conduct or based on a finding that it would be "just and equitable" to do so.

The Court then considered the four grounds of oppressive conduct put forward by the wife.

The failure of the husband to follow Court Orders

The Court determined that the wife could not rely on this ground as a basis for oppression because at the time of the breaches she was *not* a shareholder in the companies. Her success at trial was not sufficient to allow her to claim oppression when she was not a shareholder at the time. She did not gain a beneficial interest until the trial in April 2019, and the breaches took place in 2017 and 2018:

[72] . . . the case law makes it clear that a shareholder's reasonable expectations arise at the time the shareholder acquires their shares:

Allowing a shareholder to obtain compensation for past oppression is also inconsistent with reasonable expectations, which is the touchstone to entitlement to compensation for oppression. Reasonable expectations by their nature are forward looking. See *LSI Logic Corp. of Canada, Inc. v. Logani*, [2001] A.J. No. 1083, 204 D.L.R. (4th) 443 (Q.B.), at paras. 126-27. I agree with the trial judge's comments at para. 231 in reference to the *LSI* case: [page123]

In *LSI, supra*, Fruman J. emphasized that the date of acquiring shares is particularly relevant to determining whether a shareholder is a proper complainant. This seems appropriate and fair from a policy standpoint. The oppression remedy is protective of reasonable expectations by shareholders while considering the relevant circumstances. A shareholder should not be able to claim oppression in respect of an asserted reasonable expectation if it did not exist at the time of his or her share purchase. Arguably, the reasonable expectations

of a new shareholder generally pertain to the future decision-making of management unless there are past and continuing misrepresentations, which create false expectations at the point of purchase of the shares.

Ford Motor Co of Canada v. Ontario Municipal Employees Retirement Board(2006), 79 OR (3d) 81 (Ont. CA), at para 122.

[73] See also *Lucas v. Rockcrest Estates Ltd*, 2013 BCSC 285, at para 61: "The question of whether an expectation is reasonable is to be assessed as of the date the shareholder acquired his shares: *Callahan v. Callahan*, 2011 BCSC 40, para. 24 . . .".

Here, the wife was out of luck. One cannot be oppressed at a time one is not a shareholder.

The roll and redeem transaction in June 2019

As for this ground, the wife was not able to establish that her interests were compromised by the transaction. The evidence before the Court was that the wife had known about the transaction in March 2019 (it took place in June 2019). There was no evidence that the wife's interests were infringed, and both counsel at trial seemed to agree that there had actually been a tax savings for the companies.

The husband's disregard for the wife's interests as a beneficial owner at the Annual General Meeting in March 2020

The wife argued that she had a reasonable expectation that the husband would act in her best interests as a trustee of her shares at the Annual General Meeting. While the husband was voting as a shareholder, he was doing so knowing that he was holding his shares in trust for the wife. The husband argued that he had taken steps that were in the companies' best interests. As a director he claimed that his duty to the company superseded his duty to the wife.

Here, the Court agreed with the wife. While companies must always balance competing interests and market forces, in this case, the key stakeholder, the wife, needed to be treated fairly. The husband, in particular, was obligated to act as the wife's trustee in relations to the shares he held in trust for her. Mr. S also *wanted* to sell the companies' assets and it was the husband that prevented it. The Court determined that the wife's expectations were reasonable, and that the husband had acted oppressively towards her. The Court emphasized that Mr. S did *not* act oppressively — he did not have the same obligations towards the wife as did the husband. The Court made a point of stating that only the husband had acted oppressively — not Mr. S or the corporation itself. The problematic conduct was not "corporate conduct" but rather the husband's personal conduct.

Remedy

In an interesting twist, the Court determined that liquidating the companies would be too prejudicial to Mr. S. As he did not engage in oppressive conduct, the Court declined to make an order that would negatively impact his interests. The Court noted that liquidation is a "drastic" remedy that should not be engaged in lightly. While surely not what the wife was hoping to hear, the Supreme Court of Canada has been clear that, where oppression has been found, the court must "use a scalpel" to carefully tailor the relief to do no more than is necessary to remedy the oppressive conduct: *Wilson v. Alharayeri*, 2017 CarswellQue 5230 (S.C.C.).

As the parties had not adduced evidence as to what other remedies might be suitable, they were sent away to either agree on a new remedy or to make further submissions in the future.