REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-04604

BETWEEN

TSIDKENU INVESTMENT CORPORATION

AND

NEIL SEEPERSAD

CLAIMANTS

AND

MOHAN JAIKARAN

AND

WIN TV LIMITED

DEFENDANT

BEFORE THE HON. MADAME JUSTICE JOAN CHARLES

Appearances:

For the Claimant: Mr. Avory Sinanan S.C.
Leads Ms. Ekta Rampersad

For the Defendant: Mr. Jagdeo Singh

Date of Delivery: **27th March 2013**

DECISION

BACKGROUND

[1] By Claim Form and Statement of Case filed on the 24th November, 2008, the Claimants alleged that the business or affairs of the Second-named Defendant have been and are being carried on or conducted by the First-named Defendant, as the Chairman and/or de facto controlling Director and majority shareholder, in a manner that is oppressive and/or unfairly prejudicial to, or that unfairly disregarded the interests of, the Second-named Claimant as a Director of the Second-named Defendant.

[2] On the 30th January, judgment was given in favour of the Claimants against the Defendants. I reserved my decision as to what would be the appropriate remedy to award the Claimants pending written submissions by the parties. I will now deal with this issue.

ANALYSIS

[3] In determining an appropriate remedy in an oppression action, the proper approach to be taken by a court is to award a remedy that least interferes with the operations and affairs of the company. This should only be done to the extent necessary to redress the oppressive conduct. Farley J. in **Ontario Inc. v Harold E. Ballard Ltd.**[1] opined:

> *"The court should not interfere with the affairs of a corporation lightly. I think that where relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe … The job for the court is to even up the balance, not tip it in favour of the hurt party."*

[1] (1991) 3 BLR (2d) 113, 197

[4] The parties have both submitted that the First-named Defendant should purchase the shares held by the First-named Claimant in the Second-named Defendant at a fair market value in accordance with **SECTION 242(3)(g)**[2] of the **COMPANIES ACT, CHAP. 81:01**. While it is a general rule that a court should not make a "buy out order", it has been recognised that in certain circumstances this is often the only effective way of remedying oppression.[3]

[5] The common factor in cases where a buy-out was ordered is where there exists a lack of trust and confidence between shareholders - as is the case in the present circumstances. Counsel for the Claimants, in support of this remedy, submitted that the personal relationships between the parties have deteriorated to the point that there is no communication between them regarding the business of the Second-named Defendant and there is no possibility of future cooperation between them.

[6] The following factors should be taken into account by a Court in determining whether a buyout Order be made. Whether:

i. The majority has diverted assets or opportunities to themselves;
ii. The majority has seriously departed from legal and normal business practices;
iii. The majority has made it clear that it does not wish to work with the minority;
iv. Relationships between the parties have deteriorated to such an extent that continued cooperation is not possible;

[2] In connection with an application under this section, the Court may make any interim or final order it thinks fit, including – an order directing a company, subject to subsection (6), or any other person, to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures.
[3] Markus Koehnen, Oppression and Related Remedies, p. 351-352

v. The claimant had a reasonable expectation of participating in management and has been excluded; and,

vi. The defendant has sold its shares without notifying the claimant of its ability to exercise a right of first refusal.[4]

In **Wright v Donald S. Montgomery Holdings Ltd.**[5], Sedgwick J. found in favour of the Applicant with respect to allegations of oppressive conduct against the Defendant. In the course of his judgment he opined:

> "*In my view, the buyout remedy is the appropriate remedy in the circumstances of this case. There are irreconcilable differences between the majority and minority shareholders of Holdings, reflecting personal differences within the family and differing views as to the function and operations of Holdings.*"

[7] In the unchallenged Witness Statement of the Second-named Claimant, he stated that:

i. He was not informed of Board Meetings[6]; and,

ii. The First-named Defendant made unilateral decisions such as the:

   a. Refusal to have an arms' length agreement drawn up despite the decision to do so at the Board Meeting of 22nd May, 2007[7];

   b. Cancellation of the Pearl & Dean Contract and the plasma screen televisions without consulting the Second-named Claimant and without compensating him for his investment of US$30,000.00 to purchase the said televisions[8];

[4] *Ibid*., p. 353
[5] (1998) 39 BLR (2d) 266, para. 49
[6] Para. 33
[7] Para. 8-9
[8] Para. 12-13

c. Removal of Neil Prashad as authorised signatory on the bank account of the Second-named Defendant[9];
d. Termination of the services of Roy Mitchell, Business Consultants;
e. Changing the program content of the Second-named Defendant; and,
f. Carrying on discussions and/or negotiations with a third party regarding sale of and/or strategic alliance with the Second-named Defendant with a view to affecting ownership of the Second-named Defendant.

[8] Based on the foregoing, I am of the view that it would be in the best interest of the parties if the First-named Defendant purchased the shares held by the First-named Claimant in the Second-named Defendant at a fair market value in accordance with **SECTION 242(3)(g)**[10] of the **COMPANIES ACT, CHAP. 81:01**. Accordingly, I so order.

[9] I will now deal with the issue of the Broadcasting Licence. Counsel for the Claimants submitted that by the very nature of its operation the Second-named Defendant – WIN TV – can only operate whilst having a broadcasting licence and as such it would be in the best interests of the Second-named Defendant to have the said licence in its own name, instead of that of the First-named Defendant.

[10] Counsel further contended that the said licence is the "lifeblood" of the broadcasting operations of the Second-named Defendant and without the said

[9] Para. 23-25
[10] In connection with an application under this section, the Court may make any interim or final order it thinks fit, including – an order directing a company, subject to subsection (6), or any other person, to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures.

licence the Second-named Defendant would be virtually crippled. Therefore, it cannot be in the best interest of the Second-named Defendant and the shareholders to have the Broadcasting Licence remain in the name of the First-named Defendant in light of the Court's finding of oppression. The Defendants did not address this issue in their submissions.

[11] In **C.I. Covington Fund Inc. v White**[11], the claimant invested in a company called Delta, of which the defendant was the President, Chief Executive Officer and controlling shareholder. Delta was engaged in designing and engineering snowmaking and waste water treatment systems. The defendant developed a particular technology which he gave Delta an exclusive licence to use. However, this licence agreement between the defendant and Delta was never disclosed to the claimant; instead it was suggested that Delta owned all the technology it utilized. Delta subsequently went into bankruptcy and the defendant began operating through another company employing the technology he developed and which was licensed to Delta. The issue arose in these proceedings as to whether in the circumstances, the patent and intellectual property in the technology belonged to Delta or whether the defendant held the same on trust for Delta.

[12] The court held that the defendant held the patent and intellectual property in the technology on trust for Delta and he was ordered to transfer same to the claimant. Swinton J. opined[12]:

> *"… White's failure to put the patents in the name of the company is analogous to the diversion of assets … because it constitutes a form of self-dealing, when all the facts are considered. He chose to use the corporation to solicit funding and to use*

[11] [2000] BLR 173
[12] Ibid., paras. 42-43

that funding to develop the Snowfluent technology, but having done that, he sought to keep for himself personally the benefit of that corporate investment in the technology despite his duty of good faith to the corporation … Delta should properly be regarded as the owner of the patents and patent applications … White's failure to assign the intellectual property to Delta is an unfair disregard of Covington's interest as a creditor and shareholder that is unfairly prejudicial, as Covington had a reasonable expectation that Delta owned the technology and related intellectual property.

The fact that White personally invested funds in the corporation does not give him any right to claim as his, what is properly a corporate asset. Nor can the licence agreement protect White's claim to ownership … It is a further example of conflict of interest where White preferred his personal interests over those of the corporation to which he had a fiduciary duty."

[13] Based on the foregoing, I am of the view that the Broadcasting Licence for the Second-named Defendant should be in its own name and not that of the First-named Defendant. Accordingly, I order that the First-named Defendant is to take all necessary steps to effectively transfer the Broadcasting License granted in his name by the Telecommunications Authority of Trinidad and Tobago, dated the 1st March, 2006, to the Second-named Defendant.

[14] Finally, the Claimants have submitted that they should be granted a Compensation Order pursuant to **SECTION 242(3)(j)** of the **COMPANIES ACT** for the following reasons:

i. The Claimants were denied the benefit they sought to obtain when they invested in the Second-named Defendant by the oppressive conduct of the First-named Defendant;

ii. The Second-named Claimant was prevented from participating in the management of the Second-named Defendant as a Director;

iii. The Second-named Claimant lost his investment of US$30,000.00 for the purchase of twenty-five (25) plasma screens;

iv. Monies totalling the sum of TT$9,252,849.27 spent by the Claimants on behalf of the Second-named Defendant to cover its operating expenses[13];

v. Loss of loan to the Second-named Defendant to defray expenses such as salaries and other recurrent expenses; and

vi. Non-payment of dividends.

[15] In support of this contention, Counsel for the Claimants relied on the cases of **Raymond Budd v Gentra Inc. *et al***[14], **Danylchuk *et al* v Wolinsky *et al***[15] and **Mason v Intercity Properties Ltd.**[16]. In **Raymond Budd v Gentra Inc. *et al***, Doherty JA cited with approval the *dicta* of Spence J in **Gottlieb v Adams**[17]:

> "*The compensation order should be made against the respondent, as the person whose conduct was oppressive and caused the loss to the applicant … I do not think the order should be made against the corporation, since that would affect unfairly other security holders.*"

Doherty JA went on to opine[18]:

> "*The further question whether the director or officer should be required to rectify that oppression personally is determined by all of the circumstances including the*

[13] Exhibited as NS7 to the Witness Statement of Neil Seepersad
[14] 43 BLR (2d) 27, para. 43
[15] 2007 MBCA 132
[16] (1987) 22 OAC 161
[17] (1194) 21 OR (3d) 248 (Gen. Div.)
[18] *Op. cit.,* para. 44

nature of the oppression, the gain if any which flowed to the director or officer, and the effects of other possible orders on other security holders."

With specific reference to the compensation order which can be given to an aggrieved person, Doherty JA opined[19]:

"*When the power of the director is exercised in a fashion which causes an act or omission of the corporation which effects an unfairly prejudicial result, or a result which unfairly disregards the interests of the complainant – or which causes the business or affairs of the corporation to be conducted in a manner which has the same effect … Liability therefore lies directly with the director, under this section …* "

[16] Additionally, the Learned Authors of **The Law and Practice of Canadian Business Corporations, Mc Guiness 1999 at 9.280 [TAB 5]** state,

"The Court's exercise of its discretion in the selection of the appropriate remedy must take into account the reasonable expectations of the complainant ***on the basis of the original arrangements and understandings between the parties****. In addition, in tailoring the remedy to the requirements of a particular case, a clear goal for the court is to* ***resolve the problem finally, as to great an extent as possible****, rather than to rely upon a remedy that may lead to further disputes in the future. In Re Enterprise Gold Mines N.L. Murray J articulated a minimalist approach towards judicial intervention in the internal affairs of the corporations, stating that any order made by the court should be directed clearly to provide a remedy of appropriate character and that the court should approach the matter conservatively, favouring the least meddlesome approach in the affairs of the company that will result in justice to the parties.* ***Similarly, it has been***

[19] *Op. cit.*, para. 45

held that the evidence required to support the grant of one remedy need not be sufficient to support the grant of other more intrusive remedies."

[17] In the circumstances, I am of the view that compensation should be paid to the Claimants by the First-named Defendant, given the fact that the latter, in his capacity as director was the source of the oppressive conduct complained of by the Claimants. Following **Gottlieb v Adams** supra, the remaining security holders of the Second-named Defendant should not be punished for the act(s) of the First-named Defendant.

[18] However, I will limit this award to the recovery of the monies expended on the twenty-five (25) plasma screens and those sums referred to in Exhibit NS7 of the Witness Statement of the Second-named Claimant.

CONCLUSION

[19] In the circumstances, I make the following orders:

i. The First-named Defendant do purchase the shares held by the First-named Claimant in the Second-named Defendant at a fair market value in accordance with **SECTION 242(3)(g)**[20] of the **COMPANIES ACT, CHAP. 81:01**;

ii. The First-named Defendant do take all necessary steps to effectively transfer the Broadcasting License granted in his name by the Telecommunications Authority of Trinidad and Tobago, dated the 1st March, 2006, to the Second-named Defendant; and,

iii. The First-named Defendant do pay to the Claimants the sum of:

[20] In connection with an application under this section, the Court may make any interim or final order it thinks fit, including – an order directing a company, subject to subsection (6), or any other person, to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures.

a. US$30,000.00 for the purchase of twenty-five (25) plasma screens; and,
b. TT$9,252,849.27 expended by the Claimants on behalf of the Second-named Defendant.

Joan Charles
Judge