COURT FILE NO.: 13/05
DATE: 20050425

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LANE, JENNINGS AND SWINTON JJ.

B E T W E E N:	
448048 ONTARIO INC.	*Kevin D. Sherkin*, for the Applicant (Respondent)
Applicant (Respondent)	
- and -	
FIRST UNITED REAL ESTATE INVESTORS INC., ALAIN CHECROUNE and 1428203 ONTARIO LIMITED	*Theodor Kerzner, Q.C.*, for the Respondents (Appellants)
Respondents (Appellants)	
	HEARD at Toronto: April 5, 2005

SWINTON J.:

[1] First United Real Estate Investors Inc., Alain Checroune and 1428203 ("142") appeal from the judgment of Cumming J. dated May 4, 2004, wherein he ordered Mr. Checroune and 142 to pay 448048 Ontario Inc. ("the Respondent") $1,075,000 plus interest at 4% per annum from August 9, 2002 and costs on a substantial indemnity basis in the amount of $51,609.25.

[2] The issues in this appeal are whether he made palpable and overriding errors in assessing the evidence, whether the matter was *res judicata*, whether the proceeding should have been by trial, and whether the amount awarded and costs on a substantial indemnity scale were made in error.

Background Facts

[3] From June 15, 1999 to July 19, 1999, the Respondent and Co-Operators Insurance Association were each beneficial owners of an undivided one-half interest in the property at 4211 Yonge Street, Toronto. On July 19, 1999, First United purchased Co-operators' interest. Mr. Checroune is the sole shareholder and director of First United.

[4] On November 11, 1999, First United agreed to purchase the interest of the Respondent. When it failed to complete the purchase, the Respondent commenced legal proceedings, which were settled. Pursuant to a Consent Order, dated February 9, 2000, First United was to purchase the Respondent's interest on June 30, 2000 for $14 million, unless the property was otherwise marketed in the interim.

[5] First United failed to close the purchase on June 30, 2000, which led to further litigation. Backhouse J. found in favour of the Respondent on September 27, 2000, declaring that First United breached the agreement of purchase and sale and the Consent Order and referring the assessment of the damages suffered by the Respondent to the Master. The Court of Appeal dismissed an appeal on June 8, 2001.

[6] The parties entered further Minutes of Settlement dated January 23, 2002, which required First United to purchase the Respondent's interest by July 31, 2002 for $11.5 million, unless another buyer were found, and to pay $2,000,000 in damages.

[7] Again, First United failed to purchase the Respondent's interest. A quit claim deed was registered on August 8, 2002 in accordance with the Minutes of Settlement, and judgment was entered for the outstanding amount of $1,575,000.

[8] This proceeding was commenced by application, in which the Respondent claimed for relief under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 and the oppression remedy provision in s. 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). At the time of the application, $1,075,000 remained outstanding under the judgment.

[9] In the course of a judgment debtor examination in June, 2003, Mr. Checroune stated that First United was insolvent and had been so for some time. However, at the time that it entered into the agreement of purchase and sale with the Respondent on November 11, 1999, it owned a building known as 4 and 4A Antrim Crescent, Toronto. On June 30, 2000, the day that the monies were to be paid by First United under the Consent Order, Mr. Checroune incorporated 142. On July 13, 2000, First United sold Antrim for $4,275,000. The profit from the sale was $1,476,248.60.

[10] On July 18, 2000, 142 purchased an undivided one-half interest as tenant in common in a property on Moatfield Drive, holding title as bare trustee for Mr. Checroune as beneficial owner.

The Findings of the Application Judge

[11] The application judge found, based on the documentary evidence, that the $1,476,248.60 realized by First United from the sale of Antrim went from First United toward the purchase of the Moatfield property and to the indirect benefit of Mr. Checroune. He concluded (at para. 60):

> In my view, and I so find, the evidentiary record establishes that Mr. Checroune stripped First United of the $1,476,248.60 profit from the sale of Antrim, knowing that First United was indebted to 448 such that the $1,476,248.60, if left with First United, would quite probably be required to satisfy the indebtedness of First United to 448. Mr. Checroune appropriated without consideration the corporate asset of First United for his own personal benefit through using the $1,476,248.60 for the purchase by 142 of Moatfield. He did so improperly and unlawfully to

> defeat First United's creditor, 448. Grounds of oppression have been established by the complainant, 448, within the meaning and requirements of s. 248 of the *OBCA*.

The application judge then found Mr. Checroune and First United jointly and severally liable to the Respondent for $1,476,248.60, and 142 jointly and severally liable for that amount to the extent of Mr. Checroune's one half interest in the corporation. The formal order amends the amount payable to $1,075,000 to reflect payments made.

The Issues

[12] The Appellants argue that the application judge made a palpable and overriding error in considering the evidence of shareholder advances. As well, they argue that the issue of oppression was *res judicata*; that he erred in considering the Flomen affidavit and in proceeding by application; and that he erred in the sum awarded and the order of costs on a substantial indemnity scale.

Overriding and Palpable Errors

[13] The Appellants argue that the application judge wrongly found, from the shareholder loan account printout, that First United owed Mr. Checroune nothing in February, 2000 and that the payment of the Antrim proceeds was a loan to him of $1,476,248, when that printout, read correctly, disclosed that First United owed Mr. Checroune $850,019 as of February 29, 2000 and, immediately before the Antrim payment in July, owed $943,428. They also argue that the application judge erred in concluding that Mr. Checroune advanced $920,019 in fiscal 1999, forgetting that any year end balance is the net sum of all monies advanced and repaid in the 12 month period. In addition, they argued that these propositions should have been put to Mr. Checroune in cross-examination.

[14] In paragraph 45 of his reasons, the application judge does state that the shareholder's loan account in the corporate records indicates a nil balance at the end of

February, 2000. To be fair to him, the way that the document is set up suggests that to be the case. However, he was in error, as the document shows further on that there were shareholder's advances of $902,019 at the closing of the fiscal year ending October 31, 1999, which had not been repaid as of February, 2000.

[15] While the application judge erred on this point, in my view, this did not affect his conclusion that Mr. Checroune acted oppressively in transferring the $1,476,248.60 to 442 for the purchase of Moatfield. Mr. Checroune filed four affidavits before the hearing. In three of those affidavits, he stated that no money from the Antrim sale was used to purchase Moatfield. At first, he took the position that the profit was used to partially repay a line of credit of $2.8 million owing to the TD Bank, obtained by First United to allow it to purchase 4211 Yonge in 1999. In his second affidavit, he stated that the funds to purchase Moatfield came from his personal funds, a vendor take back mortgage and advances from his partner, and funds from First United were not given to 142 to enable it to purchase Moatfield. In a later affidavit dated March 22, 2004, he stated that he obtained a personal line of credit from TD in 1999, which he drew on to obtain funds which he advanced to First United for the purchase of 4211 Yonge. The payment from the sale of Antrim was then used to repay the line of credit with TD.

[16] The application judge made findings, based on the bank records produced by Mr. Checroune, that the establishment of the line of credit with TD and the advance on it were made after the purchase of 4211 Yonge Street by First United. Therefore, he did not accept the position of Mr. Checroune that the funds from First United were paid out to cover monies advanced from TD to make the purchase. He also made findings, based on the documents, that the profit received by First United was used to purchase Moatfield. Finally, he concluded that Mr. Checroune had appropriated First United's corporate asset for his personal benefit, knowing that the funds, if left with First United, would probably be required to satisfy the debt to the Respondent. All those findings were fully supported by the evidence. In my view, the error with respect to the shareholder's loan account does not affect the soundness of his conclusion with respect to oppression.

[17] In this appeal, the Appellants have changed their position from that put forth during the application. Before the application judge, they argued that the monies were used to repay a line of credit at the TD (either in the name of the company or in Mr. Checroune's name, depending on the affidavit), and none of the money went to the purchase of Moatfield. Now they state, in the second paragraph of their factum, that the sale proceeds were paid to or at the direction of Mr. Checroune on account of his shareholder's loans, and he then used the funds for 142's purchase of the interest in Moatfield. In other words, they are not taking issue with some of the application judge's key findings of fact about the use of the sale proceeds.

[18] In the appeal, the Appellants take issue with the remedy ordered, arguing that the application judge erred in ordering the payment of $1,075,000 to the Respondent, because they say that Mr. Checroune was owed "approximately" $932,000 prior to the making of the impugned payment to 142. Now they argue that the most that the application judge should have awarded to the Respondent was $532,820. Otherwise, the Respondent, an unsecured creditor, would be given a position of priority over other First United creditors, including Mr. Checroune.

[19] The application judge found that there had been oppression. Section 248(3) of the *OBCA* empowers a court, after finding oppression, to make any order "it thinks fit". This confers a broad discretion on the court of first instance in fashioning a remedy, and an appellate court should only interfere if there is an error in principle or the decision is unjust (*Sidaplex-Plastic Suppliers Inc. v. Elta Groups Inc.* (1998), 40 O.R. (3d) 563 (C.A.) at p. 5 (Quicklaw)).

[20] Here, the application judge found that Mr. Checroune, the sole shareholder and director of First United, stripped it of funds to benefit himself and to defeat First United's creditor, the Respondent. The effect of his conduct was to prevent the Respondent from executing its judgment, either against the Antrim property or the profit from the sale. In my view, there was no error on the part of the application judge in holding the Appellants liable for the full amount of the sum owing to the Respondent. While the Appellants

have expressed concern about a possible priority over other creditors, there is no evidence of creditors of First United, other than the claim now raised on behalf of Mr. Checroune.

[21] On this appeal, the Appellants are, in effect, asking this Court to make a finding that Mr. Checroune is a creditor, and that he is owed "approximately $932,000 prior to the making of the impugned payment" (para. 28 of the factum). This position was not advanced before the application judge. As an appellate court, we are not in a position to make findings of fact as to whether Mr. Checroune is a creditor and what amount is owed to him. Indeed, the application judge found that the corporate records did not reliably support a conclusion about the state of any shareholder's loans, and Mr. Checroune did not provide supporting documentation to explain the account, despite a request from the Respondent during cross-examination. Therefore, it would be unjust to the Respondent to address this issue on appeal, as the position taken is, in effect a new response to its claim which was not raised before the application judge (see *Canadiana Towers Ltd. v. Fawcett* (1978), 21 O.R. (2d) 545 (C.A.) at p. 3 (Quicklaw)).

[22] In my view, there was no error of principle nor any injustice in the order made by the application judge, given the facts that he found. Other courts have found that payments to directors or shareholders in respect of directors/shareholders loans were oppressive in light of a creditor's claim and ordered that the creditor be compensated by the director/shareholder (*SCI Systems Inc. v. Gornitzki Thompson & Little Co.*, [1997] O.J. No. 2115 (Gen. Div.), aff'd [1998] O.J. No. 2299 (Div. Ct.); *Gignac, Sutts and Woodall Construction Co. v. Harris*, [1997] O.J. No. 3084 (Gen. Div.); *Heap Noseworthy Ltd. v. Didham*, [1996] N.J. No. 8 (S.C.)).

[23] The Appellants have raised other issues, as well. They argue that the application judge erred in failing to require a trial in this matter. In my view, there was no error. The *OBCA* allows an oppression proceeding to commence by way of application. The decision in this case turned largely on the documents, and there were no issues of credibility demonstrated which required a trial.

[24] The Appellants also argue that the application judge improperly relied on the Flomen affidavit, having said that he would not do so. In my view, he did not rely on this affidavit in making his factual determinations. Indeed, he repeated that he had not done so in his endorsement on costs.

[25] The Appellants also argue that the issue of oppression was *res judicata* because it should have been raised before Backhouse J. in the 2002 proceeding. However, as the application judge correctly pointed out, the issues of oppression before him were different from those raised before Backhouse J., as they arose from the sale of the Antrim property in July, 2000. The proceedings relate to alleged oppressive conduct seeking to defeat the Respondent's interest as a creditor. The Respondent did not have details of the transactions surrounding that sale until a judgment debtor examination in June, 2003. Therefore, the issues raised in this proceeding could not have been raised with reasonable diligence in the earlier proceeding.

[26] Finally, there was no error on the part of the application judge in awarding costs on a substantial indemnity basis. Costs are within the discretion of the application judge, and courts have ordered costs on the higher scale in oppression cases (see, for example, *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.)). The application judge stated that not only were the impugned acts oppressive in result, but "they were committed in bad faith and to intentionally deprive the Applicant of the benefit of its claim against First United". He also stated that Mr. Checroune had sought "to confuse the issues by advancing various positions sequentially in protracted responses to the Application, that are without any merit." Given his findings, the award of costs on a substantial indemnity basis was a reasonable exercise of his discretion.

Conclusion

[27] For these reasons, the appeal is dismissed.

[28] If the parties cannot agree with respect to costs, they may make brief written submissions within 21 days of the release of this decision.

Swinton J.

D. Lane J.

Jennings J.

Released: April , 2005

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- and -

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REASONS FOR JUDGMENT

Swinton J.

Released: April 25, 2005