IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Madam Justice Lori T. Spivak

B E T W E E N :

GARRY WILLIAM CAUGHLIN and PACE MANAGEMENT CORP.	)	***D. G. Hill***
	)	*for the Appellants*
(Applicants) Respondents	)	
	)	***R. A. McFadyen***
- and -	)	*for the Respondents*
CANADIAN PAYROLL SYSTEMS INC., LYLE WILLIAM SCAMMELL, CURTIS GLEN SCAMMELL, CHERIE DAWN SCAMMELL, TRACY KIM SCAMMELL, CAN-PAY COMPUTER SOFTWARE LTD. and CANPAY SOFTWARE INC.	)	*Appeal heard:* ***November 5, 2019***
	)	*Judgment delivered:* ***February 27, 2020***
(Respondents) Appellants	)	

On appeal from 2019 MBQB 6

BURNETT JA

[1] This is an appeal of a judgment granted in favour of the applicants against three of the respondents, Canadian Payroll Systems Inc. (CPS), Lyle William Scammell (Scammell) and CanPay Software Inc. (CanPay) (collectively, the respondents), in proceedings taken pursuant to section 234 of *The Corporations Act*, CCSM c C225 (the *Act*).

[2] Scammell and members of his immediate family own a majority of the issued common shares in CPS. The applicants, Garry William Caughlin

(Caughlin) and Pace Management Corp. (Pace), hold the remaining common shares and are minority shareholders in CPS. CanPay is a separate entity controlled by Scammell and owned by him and members of his family.

[3] In his decision, the application judge details the history of the relationship between CPS, Scammell, CanPay and the applicants and the basis for his finding that "the conduct and actions of [Scammell] and CPS, taken together, were oppressive, unfairly prejudicial and unfairly disregarded the interests of Caughlin"(at para 68). (At para 3 of his reasons, the application judge indicated that references to Caughlin included Pace.) Simply put, the application judge found that Scammell used CPS to improve the financial health of CanPay, in which Caughlin had no interest, by allocating expenses incurred by CanPay to CPS and diverting income generated by CPS to CanPay without directors' approval.

[4] The application judge determined that the appropriate remedy to rectify the oppression required payment of three amounts totalling $808,941.43 and the redemption or transfer of the applicants' shares in CPS to one or more of the individual respondents for a nil value.

[5] On appeal, the respondents raised six grounds of appeal which can be summarised as follows:

1. the application judge erred in his findings of fact;

2. the application judge erred by relying on a spreadsheet (the spreadsheet) that was not properly in evidence or part of the record;

3. the application judge erred by ordering judgment against CanPay when he found only the conduct of Scammell and CPS to be in violation of section 234(2) of the *Act*; and

4. the monetary award was excessive, disproportionate to the conduct giving rise to a finding under section 234(2) of the *Act* and went beyond the powers of rectification provided for in the legislation.

[6] To the extent that these issues involve questions of fact or mixed fact and law, the standard of review is palpable and overriding error (see *Cholakis v Cholakis et al*, 2007 MBCA 156 at para 15). With respect to the remedy ordered pursuant to section 234(3) of the *Act*, the standard of review is deferential (see *Cholakis* at para 30) and this Court "should not intervene unless there has been an error in principle or the decision is otherwise unjust" (*63833 Manitoba Corporation v Cosman's Furniture (1972) Ltd et al*, 2018 MBCA 72 at para 47; see also *Danylchuk et al v Wolinsky et al*, 2007 MBCA 132 at para 50).

[7] There is no basis for appellate intervention.

[8] The application judge concluded that the reasonable expectations of the applicants had been violated and that liability under section 234 for oppression had been established. As was the case in *Cholakis*, "no palpable and overriding error has been demonstrated in any of the findings of the [application] judge or inferences drawn from the facts as [he] found them" (at para 28).

[9] The spreadsheet was not evidence. It was provided to the application judge as a tool or aid to assist him in understanding the

mathematical basis for the applicants' submissions. The figures described in the spreadsheet clearly identify the amounts disclosed in the evidence and the amounts which the applicants estimated. The estimated amounts were required because the respondents did not provide adequate or timely financial information. It is noteworthy that, although the application judge used the spreadsheet as a guide, he did not accept all of the amounts proposed by the applicants. In my view, there was no prejudice to the respondents related to the use of the spreadsheet, and the application judge did not err in accepting the spreadsheet as an aid to explain the applicants' submissions.

[10] While the application judge erred when he said that the spreadsheet was prepared by counsel, applicants' counsel made it clear in the course of his oral submissions to the application judge that the spreadsheet was in fact prepared by Caughlin. In my view, this error is insignificant and is certainly not overriding.

[11] As the application judge correctly noted, a court has a very broad discretion when fashioning an order to remedy oppressive conduct (see *Wilson v Alharayeri*, 2017 SCC 39 at para 23 commenting on section 241 of the *Canada Business Corporations Act*, RSC 1985, c C-44 (as it then appeared)). It was not disputed that CPS paid a significant portion of CanPay's expenses and that royalty revenues from an important client of CPS were being diverted by Scammell from CPS to CanPay, all without input from or the approval of the applicants. It is evident from his reasons (see, for example, para 75) that the application judge granted judgment against CanPay, a party to these proceedings, because CanPay was the beneficiary of such payments. In so doing, he did not err (see, for example, *Pitney Bowes v Belmonte et al*, 2011 ONSC 3755 at para 26; and *63833 Manitoba Corporation* at para 45).

[12] Quantification of the amount due as a consequence of oppressive conduct is often extremely difficult. This case was no exception. Significantly, while the respondents argued that the monetary award was excessive and disproportionate to the conduct giving rise to the finding of oppression, they did not take issue with the methodology used by the application judge to determine the three components of that award. I agree with the applicants' submission that, while the monetary award is significant, it is rationally connected to rectifying "the matters complained of" (at section 234(2) of the *Act*).

[13] In summary, I have not been persuaded that, in granting the relief which he did, the application judge made any error in principle or otherwise or that his decision is unjust.

[14] The appeal is therefore dismissed with costs.

Burnett JA

I agree: Beard JA

I agree: Spivak JA