

## **COURT OF QUEEN'S BENCH OF MANITOBA**

**APPLICATION PURSUANT TO:** Section 234 of *The Corporations Act*,  
C.C.S.M. c. C225

### **B E T W E E N:**

BRENT GLESBY,	)	<u>Counsel:</u>
	)	
applicant,	)	<u>ROBERT L. ZAPARNIUK</u>
	)	for the applicant
- and -	)	
	)	
MARC GLESBY, FAYE GLESBY and	)	<u>ROSS A. McFADYEN</u>
FRANCINE GLESBY, as Executors of the	)	for the respondents
Estate of ZENITH GLESBY and ZENITH	)	
GLESBY LTD.,	)	
	)	<u>JUDGMENT DELIVERED:</u>
respondents.	)	JULY 12, 2017

### **HANSSEN J.**

### **INTRODUCTION**

[1] The applicant, Brent Glesby ("Brent"), is seeking:

- (a) a declaration that the respondent, Zenith Glesby Ltd. ("ZGL") and Zenith Glesby ("Zen"), deceased, breached their obligations to him in a manner which was oppressive or unfairly prejudicial to him or unfairly disregarded his interests as a shareholder of ZGL;

- (b) a declaration that the respondents, Marc Glesby ("Marc"), Faye Glesby ("Faye") and Francine Glesby ("Francine"), as executors of the Estate of Zenith Glesby ("the Estate"), are liable for the conduct of Zen, which was oppressive or unfairly prejudicial to him or which unfairly disregarded his interests as a shareholder of ZGL;
- (c) an order that the Estate pay ZGL all funds which have been wrongfully, improperly, oppressively or unfairly prejudicially paid out of ZGL to any party whatsoever, including, but not limited to, Zen, by way of management fees, management salaries or otherwise, and including funds which ought to have been paid to ZGL by third parties who received interest-free loans from ZGL at the direction of Zen;
- (d) an order authorizing an accounting and tracing of funds relating to the financial affairs of ZGL from October 1, 2001 through to the date of the hearing of this application;
- (e) an order that ZGL, after having received all funds from the Estate or otherwise, redeem the shares of ZGL held by Brent and pay him the full value of the shares after having met all income tax and other legal obligations of ZGL or to pay dividends to him with respect to the shares held by him;
- (f) pre and post-judgment interest;
- (g) punitive damages;

(h) costs on a solicitor and own client basis.

## **FACTS**

[2] Zen was married to Faye. They had three children, Brent, Marc and Francine. ZGL was incorporated by Zen in 1975 as a family holding company. At all times material to this proceeding, Zen was the sole director of ZGL and he retained full voting control over it. Zen and Brent had a falling out in late 1999 and there were no communications between them after the year 2000. Faye and Brent also became estranged around 2003. Zen died on December 16, 2008. Faye, Marc and Francine are the executors of the Estate. This application is being brought against them in their capacity as executors.

[3] Zen's father was William Glesby ("William"). William owned a corporation called William Glesby Holdings Ltd. ("WGHL"). Zen worked for WGHL between 1981 and 1999. He served as the president for approximately 13 years.

[4] In 1976, William transferred shares in WGHL to holding companies owned by his three children, Zen, Harley and Erla. ZGL was one of these holding companies. ZGL was incorporated by Zen in 1975 as the family company. At the outset, ZGL was set up with authorized capital of 20,000 Class A voting common shares and 20,000 Class B non-voting common shares. At the time of incorporation Zen received 200 Class A voting common shares and Faye, Brent, Marc and Francine each received 200 Class B non-voting common shares. The shares of Marc, Brent and Francine were held in trust by Zen. Zen had sole voting control over ZGL.

[5] The share structure of ZGL was changed by articles of amendment on a couple of occasions but Zen continued to retain full voting control. Between May 26, 1998 and a subsequent reorganization of ZGL in 2000, the shareholdings in ZGL were as follows:

- Zen – 40,750 Class A preferred shares, 1,000 Class B voting preferred shares, 200 Class B non-voting common shares;
- Faye – 200 Class B non-voting common shares;
- Brent – 200 Class B non-voting common shares;
- Marc – 200 Class B non-voting common shares;
- Francine – 200 Class B non-voting common shares.

[6] In or about 1999, a dispute arose between the shareholders of WGHL. That dispute was settled by ZGL's shares in WGHL being purchased for \$12.5 million. As a result of this payment the value of the assets in ZGL increased from \$193,545 to \$12,770,676 during the 2000 fiscal year.

[7] On November 15, 2000, D. Kerry Hrabinsky of Fillmore Riley wrote to Brent, Marc and Francine on behalf of Zen and proposed a corporate reorganization of ZGL. Zen proposed that new corporations be created for Brent, Marc and Francine and that their proportionate shares of the assets of ZGL be transferred into these new corporations. Mr. Hrabinsky's letter stated:

It is currently contemplated that the value of assets to be transferred into each of your new corporations will be between, \$2,000,000 - \$2,500,000. Your father's current intention is to involve each of you in certain decision making with respect to each of your companies, and to allow all of the interest and other income earned on the assets held by each of your companies to be withdrawn from your corporation at your discretion, or alternatively be left to accumulate in your corporation.

. . . .

As a result of the reorganization, each of you will gain access to the income earned on your proportionate interest of the assets of Glesbyco [ZGL] at this time without having to wait for one or both of your parents to pass away before gaining access.

[8] Brent chose not to participate in the reorganization. He claims he did so because of the falling out he had with his father and a mistrust which he developed of him over the years. Accordingly, he advised Mr. Hrabinsky he would not be attending the proposed reorganization meeting.

[9] On December 1, 2000, Mr. Hrabinsky wrote to Zen, Faye, Marc, Brent and Francine, stating:

At the meeting, the writer outlined the proposed reorganization and a general discussion took place with respect to the reorganization. It was agreed at the meeting that the proposed reorganization of [ZGL] proceed essentially as outlined in our earlier letter for the benefit of all those in attendance at the meeting, and that the reorganization be accomplished, if possible, in such a fashion that would allow Brent to choose to participate in the future if he decides to do so on terms mutually agreeable. ...

. . .

As a result of the transactions, each of Marc, Francine, Zen and Faye will own all of the equity shares in the capital stock of their respective new corporations, and each of these new corporations will own approximately one-fifth of the assets currently owned by [ZGL]. Brent will then be the sole equity shareholder of [ZGL] which will own one-fifth of the assets currently held by it. Zen will continue to own preference shares in all of these corporations such that he will retain voting control of each of these corporations. ...

[Emphasis added]

[10] As a result of the reorganization, the assets of ZGL were reduced from \$12,142,013 in 2001 to \$2,451,195 in 2002. The shareholdings of ZGL were modified as follows:

- Zen – 40,750 Class A preferred shares;  
– 1,000 Class B voting preferred shares;
- Brent – 200 Class B non-voting common shares.

Zen continued to retain full voting control over ZGL after the reorganization. Through his preferred shares he also retained the right to receive preferential non-cumulative cash dividends.

[11] In 1996 William passed away. On his death he left approximately \$7 million to his wife Freda Fimi Glesby ("Fimi"). Fimi's will provided for an equal sharing of her estate amongst her children Erla, Harley and Zen. In 2001 or 2002, after she had made her will, Fimi made three gifts of \$1 million each to Harley, Erla and Brent. These gifts had the effect of substantially reducing the value of Fimi's estate when she died and thereby reducing Zen's inheritance from her. The gifts were subject to related litigation which has since been resolved by way of a consent judgment. During the fiscal year ending September 30, 2006, ZGL appears to have made an interest-free loan to Zen Glesby Holdings Ltd., a related corporation. In the 2008 financial year, ZGL paid Zen a management salary in the amount of \$2,293,963. As a result, the assets of ZGL were reduced from \$2,304,289 to \$41,761. This effectively wiped out all of the equity in ZGL.

[12] Faye, Francine and Marc are the current directors of ZGL. The sole officer and director is Marc. Brent has never had any involvement in the business activities of ZGL.

### **POSITION OF THE PARTIES**

[13] Brent claims that Zen and ZGL contravened both s. 234(2) and s. 117(1)(a) of *The Corporations Act*, C.C.S.M. c. C225 (the "**Act**"), by making the interest-free loan to Zen Glesby Holdings Ltd. and paying Zen the large management salary. He argues that notwithstanding the corporate decision-making power held by Zen, Zen owed an obligation to ZGL and him to conduct the affairs of ZGL in a reasonable and businesslike manner so as to protect the value of ZGL and Brent's shares. Brent also argues that Zen had an obligation to him personally to conduct the affairs of ZGL in his best interests as Zen was the trustee of his shares in ZGL.

[14] The respondents take the position that since Zen was the sole controlling shareholder of ZGL he could essentially do as he saw fit. In particular, they say that he was not precluded from accessing the remaining assets of ZGL for his personal use.

### **ISSUES**

[15] The main issues are:

1. Whether the payment of the management salary from ZGL to Zen and/or the granting of the interest-free loan by ZGL to Zen Glesby Holdings Ltd. violated s. 234(2) of the **Act**.
2. Whether Zen breached his duty of care as a director and officer of the ZGL under s. 117(1)(a) of the **Act**.
3. Whether Zen breached his duty as a trustee of the shares he was holding in trust for Brent.
4. What is the appropriate remedy if there is a finding that Zen and/or ZGL breached s. 234(2) of the **Act** or any of their duties to Brent?
5. Whether there should be an order authorizing an accounting and tracing of funds relating to the financial affairs of ZGL.
6. Whether there should be an order requiring ZGL to redeem Brent's shares in ZGL.

**DID ZEN AND/OR ZGL VIOLATE S. 234(2) OF THE ACT?**

[16] Section 234(2) of the **Act** provides that a court may make an order to rectify the matters complained of where:

- (a) any act or omission of the corporation or any of its affiliates effects a result; or
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;

that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder ...

[17] In dealing with the equivalent section in the ***Canada Business Corporations Act***, R.S.C. 1985, c. C-44, the Supreme Court of Canada in ***BCE Inc. v. 1976 Debentureholders***, 2008 SCC 69, [2008] 3 S.C.R. 560, stated:

[67] ... 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. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.

[18] The Supreme Court went on to state that a court ought to conduct two related inquiries in dealing with such a claim:

[68] ... (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[19] The claimant must identify the expectation he claims has been violated by the conduct at issue, and establish that the expectation was reasonably held. In ***BCE***, the Supreme Court identified the following factors to be considered in determining a claimant's reasonable expectation: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect himself; representations and agreements; and a fair resolution of conflicting interests between the corporate stakeholders (see para. 72).

[20] To establish a claim under s. 234(2), the claimant must also show that the failure to meet his reasonable expectation involved unfair conduct and prejudicial consequences within the meaning of that section. The court must be satisfied that the conduct falls within the concepts of oppression, unfair prejudice or unfair disregard of the claimant's interest.

**(a) What were Brent's reasonable expectations?**

[21] Brent maintains that he had a reasonable expectation that Zen and ZGL would conduct the business activities of ZGL in a reasonable and businesslike manner to preserve his equity in it.

[22] The respondents contend that the most important factors to be considered in determining whether Brent had such a reasonable expectation are:

- the nature and structure of ZGL;
- the relationship between Brent and Zen; and
- the steps Brent could have taken to protect himself.

[23] They point to the following comments made by the Supreme Court in ***BCE*** with respect to these factors:

The Nature of the Corporation

[74] ... Courts may accord more latitude to the directors of a small, closely held corporation to deviate from strict formalities than to the directors of a larger public company.

Relationships

[75] ... Relationships between shareholders based on ties of family or friendship may be governed by different standards than relationships between arm's length shareholders in a widely held corporation. As noted in *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d)

718 (Ont. C.A.), "when dealing with a close corporation, the court may consider the relationship between the shareholders and not simply legal rights as such" (p. 727).

....

#### Preventive Steps

[78] In determining whether a stakeholder expectation is reasonable, the court may consider whether the claimant could have taken steps to protect itself against the prejudice it claims to have suffered. ...

[24] The respondents argue that special considerations come into play in oppression proceedings where a closely held family corporation is being utilized for estate planning purposes, which they say was the case here. In support of this position, they rely on the decision of the British Columbia Supreme Court in ***de la Giroday v. Giroday Sawmills***, [1983] B.C.J. No. 79 (QL). In that case, a corporation was set up by the petitioner's father for the purpose of distributing his estate among members of his family. Shares were issued to his wife and children without consideration. Mr. de la Giroday retained voting control of the corporation. The corporation passed a resolution that would allow it to distribute certain company assets immediately among some of his children, but not the petitioners. Taylor J. dismissed the oppression claim. In doing so, he stated:

10 In the case of an ordinary commercial corporate enterprise it seems likely that such a resolution as this, enabling the directors to favour some members only within a class in the manner proposed, would be viewed as unfairly prejudicial, and even oppressive.

11 But in the present case the court cannot, I think, disregard the fact that the petitioners received their shares without charge and as a part of a scheme through which their father intended to benefit members of his family. Can these petitioners say that they are unfairly dealt with, prejudiced or oppressed when their father desires to use the scheme he

has so created in such a way as to benefit other members of the family without also giving a similar benefit to them?

12 To say the petitioners have already been given certain benefits in the form of shareholders' rights, and that the donor of those rights ought not to be permitted now to take any of them back, is I think, to overlook the true nature of the rights which they have been given as shareholders in this company.

13 The gift of these shares is not the same as a gift of money or tangible property, a gift which once complete may be incapable of undoing. The shares carry rights which are known to be capable thereafter of change under the amending power provided for by the Company Act and memorandum and articles of the company. The gift of these shares involved the granting of rights subject to change at any time by 75% vote of the affected shareholders. To the extent that he could acquire the necessary shareholder support, the donor was able in law to alter the rights which the petitioners would thereafter enjoy by virtue of the gift which he had made to them.

...

15 Whatever might be the position if the father were no longer in control of the company, it seems to me that so long as the company is his, and continues to serve as an instrument for distribution of his estate, any change which he wishes to make in the rights attaching to the shares, and for which he obtains necessary shareholder consent, cannot thereafter be attacked on equitable grounds by one of the donee shareholders. ...

[25] The respondents argue that just as Zen would be free to change his will during his lifetime to reflect a change in family circumstances, he ought to be permitted to use the corporate structure of ZGL to carry out his estate planning.

[26] They submit that Brent had no reasonable expectation of receiving the assets of ZGL subsequent to his refusal to participate in the reorganization in 2000. Marc claims that Brent told him he did not expect to receive any money from Zen or ZGL given the falling out and estrangement that had taken place

between himself and his father. He also maintains that Brent explained this was why he felt justified in accepting the \$1 million gift he received from Fimi.

[27] The respondents argue that if Brent had a reasonable expectation that he would be entitled to the assets of ZGL, he ought to have taken steps to protect his interests by participating in the reorganization in 2000 or by taking up the invitation to participate subsequent to 2000.

[28] While it is true that in closely held corporations the court may consider the relationship between shareholders and not simply legal rights as such, the fact that this was a family business does not oust the provisions of s. 234(2) of the **Act**. Zen, in his corporate capacity as a director, was required to act in good faith and in the best interests of ZGL. See **Nanef v. Con-Crete Holdings Ltd.** (1995), 23 O.R. (3d) 481 (Ont. C.A.), at p. 486.

[29] I am satisfied Brent had a reasonable expectation Zen and ZGL would act in a manner to preserve his equity in ZGL. From the time he was very young Brent was told by Zen he owned one-fifth of ZGL and that Zen was holding the shares in trust for him. Brent acknowledges that because of his falling out with his father he did not expect to receive an inheritance from him. However, he denies telling Marc he did not expect to receive his equity interest in ZGL. Based on the December 1, 2000 letter from Fillmore Riley, which stated "Brent will then be the sole equity shareholder of [ZGL] which will own one-fifth of the assets currently held by it", Brent had every reason to believe he would ultimately

receive the equity in ZGL. He had no reason to believe he had to take any further steps to protect his interest.

**(b) Was there conduct violating s. 234(2) of the Act?**

[30] I am satisfied the fact that Zen stripped all of the equity from ZGL was unfairly prejudicial to Brent and unfairly disregarded his interests contrary to s. 234(2) of the **Act**. The taking of the management salary was unjustified. ZGL was not carrying on an active business. There appear to be no time sheets, invoices, resolutions or anything else to substantiate the salary. The purpose of paying the management salary to Zen appears to have been to deprive Brent of the equity in ZGL.

**DID ZEN BREACH HIS DUTY OF CARE AS A DIRECTOR AND OFFICER OF ZGL?**

[31] Section 117(1)(a) of the **Act** provides:

**Duty of care of directors and officers**

117(1) Every director and officer of a corporation in exercising his powers and discharging his duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; ...

[32] I am satisfied that Zen breached his duty of care as a director and officer of ZGL by taking an unjustified management salary. The payment of this management salary was clearly not in the best interests of ZGL.

**DID ZEN BREACH HIS DUTY AS A TRUSTEE OF BRENT'S SHARES?**

[33] A trustee is required to act in the best interests of the beneficiary of a trust. I am satisfied that Zen breached his duty as a trustee of Brent's shares by taking the unjustified management salary, as in doing so he was not acting in Brent's best interests.

**REMEDY**

[34] The appropriate remedy is to require the Estate to repay the management salary in the amount of \$2,293,963 to ZGL together with interest at the Court of Queen's Bench prescribed rate from September 30, 2006. I am also making an order removing Faye, Francine and Marc as directors of ZGL and Marc as the president and secretary. I am appointing Brent as sole director and officer of ZGL. This will enable Brent to obtain access to the equity in ZGL, subject, of course, to the rights of the current preferred shareholders.

[35] I am declining to make any order with respect to the interest-free loan as the evidence before me with respect to the loan is scant. I agree with the respondents that interest-free loans to related corporations are common. While in certain circumstances they might be viewed as improper, there is insufficient evidence to make such a finding in this case.

[36] I am also declining to make an order authorizing an accounting and tracing of funds related to the financial affairs of ZGL. The request for such an order is premature. At this stage, there is no reason to believe the respondents

will not satisfy this judgment. Moreover, it would appear that the more appropriate jurisdiction in which to enforce the judgment is the Province of British Columbia where Zen's will was probated.

[37] As well, I am not making an order requiring ZGL to redeem Brent's shares. Such an order is unnecessary as Brent will now have sufficient control to deal with his interest in ZGL.

[38] The matter of costs may be spoken to, if necessary.

\_\_\_\_\_ J.