

CASE COMMENT-- *LIBFELD V. LIBFELD*: CRAFTING JUSTICE IN A BREAKDOWN OF A HYBRID BUSINESS

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I. INTRODUCTION

This case commentary presents one of the thorny problems that judicial officers often face in their fact-finding role of wading through a highly complex web of business arrangements checkered by disputes, suspicions, distrust, inability to cooperate, and emotion-laden allegations. Out of the morass, they must identify the main legal issue or issues and pin them to applicable laws before crafting an appropriate remedy that does justice for the parties. The case of *Libfeld v. Libfeld*¹, a trial decision of the Ontario Superior Court of Justice, is a particularly thorny case of this nature given the involvement of parties who are all members of the same family in a valuable, decades-old business started by their late patriarch. The four Libfeld brothers could no longer cooperate or work together in the business because their relationships had broken down irretrievably. The task for the Court was the determination of the most just,

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¹ 2021 ONSC 4670 [*Libfeld*].

fair, and workable solution under the law for untangling their affairs so that they could go their separate ways.

Generally, the concept of a partnership being wound up is not significantly different from that of a corporation, although “winding-up” as a term is more commonly used for corporations. In an unusual situation, as in this case, where a complex set of business arrangements has the attributes of a partnership with assets in the form of a large number of corporate holdings and special-purpose entities, a similarly unusual approach may be adopted in dealing with the issues that it presents. With this in mind, the judge in the *Libfeld* case looked to the jurisdictions of both the Ontario *Partnerships Act*² (OPA) and the Ontario *Business Corporations Act*³ (OBCA) to effect the winding-up. This commentary explores the merit of the decision. It also provides thoughts on its regulatory and socio-economic ramifications at both the institutional and personal levels. But the factual background, issues, and ruling will be reviewed first.

II. FACTUAL BACKGROUND

A Holocaust survivor, Theodore Libfeld, who immigrated to Canada from Poland in 1951, had established a huge and successful enterprise in the Greater Toronto Area, known as The Conservatory Group (the “Group”).⁴ The Group, valued at several billion dollars, carried on the business of buying virgin land to develop and sell low-rise residential homes and high-rise condominiums.⁵ It also owned residential and commercial income-yielding properties.⁶ Theodore had his four sons, Sheldon, Mark, Jay, and Corey, join him in the business.⁷ Mark was given the responsibility of overseeing the construction of low-rise residential homes.⁸ Sheldon took

² RSO 1990, c P5.

³ RSO 1990, c B16. The Conservatory Group’s corporations are believed to be OBCA corporations hence the reference to the OBCA as the applicable corporations’ statute.

⁴ *Libfeld*, *supra* note 1 at paras 1, 2, 18.

⁵ *Ibid* at para 3.

⁶ *Ibid*.

⁷ *Ibid* at paras 1, 18. For ease of reference, I will refer to all the members of the Libfeld family, including their father and mother, by their first names.

⁸ *Ibid* at para 20.

charge of the Group's finance, accounting, and banking relations.⁹ He also was in charge of project acquisition and development.¹⁰ Jay managed the Group's high-rise condominium division and portfolio of rental properties.¹¹ Corey, the youngest of the sons, became responsible for managing the Group's TARION warranty obligations, after-sale service, and home décor centre.¹²

In 1983, Theodore incorporated Shelfran Investments Ltd. ("Shelfran") as part of the Group.¹³ Edith, his wife and the mother of his four sons, held 10% of Shelfran's common shares, while the remaining 90% were initially held by the Theodore and Edith Libfeld Family Trust, but were subsequently distributed equally among the four brothers as beneficiaries of the Trust.¹⁴ Theodore was the Group's principal decision-maker until his death in 2000, after which the brothers made decisions based on consensus before their relationships broke down.¹⁵ The Group had another operating corporation, Viewmark Homes Ltd. ("Viewmark"), apparently incorporated after Theodore's death.¹⁶ Apart from Edith's common-shares interests, the Group was owned equally by the four brothers who, at all material times, referred to themselves as partners.¹⁷ As of 2017 when this case was initiated, the Group was estimated to be worth in the range of \$2.5 to \$4 billion and comprised complex business relations, having over 350 single-purpose corporate entities and joint ventures, but never maintained consolidated financial accounting records and statements.¹⁸ Accounting was kept on a

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid* at para 23.

¹² *Ibid* at para 24.

¹³ *Ibid* at para 21.

¹⁴ *Ibid* at paras 21, 25.

¹⁵ *Ibid* at para 26.

¹⁶ *Ibid* at para 30.

¹⁷ *Ibid* at paras 28, 264.

¹⁸ *Ibid* at paras 27, 30.

project-by-project or asset-by-asset basis.¹⁹ The brothers never formally reduced their business relationship to writing.²⁰

While it may be difficult to pinpoint when the relationship of the brothers began to develop cracks, it is obvious that, as early as 2005, they had started to engage the services of professional advisors to attempt to bring some order in the ways they handled cash distributions, estate planning, life insurance, and the payment of tax.²¹ Eventually, the relationship moved from disagreements to acrimony resulting in dysfunction and confrontations between the brothers, with Edith, the Group's staff, and business partners drawn into the skirmishes, thus creating a toxic environment within the Group.²² Mark particularly pressed for an increase in the cash distributions made to the brothers considering that the Group had a large cash reserve running into hundreds of millions of dollars.²³ He also pressed for an increase in their Group life insurance policy.²⁴ This was of huge importance to him given his underlying health conditions.²⁵

Seeing that the brothers could agree upon nothing because their relationship had been completely damaged, Mark brought an Application in 2017 against the three other brothers, seeking a wind-up and sale of the Group under the supervision of a monitor, with the realized funds to be distributed equally among the brothers.²⁶ He also sought a Modified Restructuring Protocol ("MRP") as an alternative.²⁷ Later in the same year (2017), Sheldon, Jay, and Corey brought their own Application against Mark, Edith, and other Group corporations seeking a Buy-Sell of the Group or, in the alternative, a Structured Buy-Out ("SBO").²⁸ Subsequently, Corey took sides with Mark after having a falling out with Sheldon and Jay, and

¹⁹ *Ibid* at para 31.

²⁰ *Ibid* at para 27.

²¹ *Ibid* at para 33.

²² *Ibid* at paras 34-35.

²³ *Ibid* at para 34.

²⁴ *Ibid*.

²⁵ *Ibid*.

²⁶ *Ibid* at para 5.

²⁷ *Ibid* at para 10.

²⁸ *Ibid* at paras 6, 9.

the brothers became pitched, two on one side and two on the other side of the case.²⁹

III. ISSUES AND RULING

The main issue that McEwen J. considered was the fairness and appropriateness of the remedies sought by each side, in respect of which they each made claims of oppression as a key ground for the remedies.³⁰ It is interesting to note that the oppression claims, which are corporate-law remedies, were made and considered under the OBCA and associated jurisprudence, notwithstanding that the brothers admitted to being in a partnership. This alludes to the difficult task the judge faced in this case.

The Court discountenanced the oppression claims made by Sheldon and Jay for lack of merit and for not being pursued in their closing arguments.³¹ On the other hand, the oppression claims of Mark and Corey were treated as having more merit but, ultimately, the Court ruled against them as well.³² Crucial among the issues were, first, that Sheldon, supported by Jay, refused to agree to Mark's request for an increase in periodic cash distributions made to the brothers in light of the Group's huge cash reserves.³³ The Court ruled against them, noting that Sheldon and Jay had not acted oppressively as they insisted on the cash-distribution policy that had always been the practice of the Group even under Theodore.³⁴ Second, that Mark had been oppressed by Sheldon and Jay's refusal to upgrade the Group's life insurance policy on the basis that it was insufficient to fund his family's tax liabilities if he died.³⁵ Again, the Court ruled that the failure to obtain an agreement with his brothers on enhancing the insurance did not

²⁹ *Ibid* at para 6.

³⁰ *Ibid* at para 143.

³¹ *Ibid* at para 154.

³² *Ibid* at para 152. The Court relied on the Supreme Court of Canada decision in *BCE Inc v 1976 Debentures*, 2008 SCC 69 at para 68 [BCE], where the apex court held that for the oppression remedy to be engaged, there must be a breach of the claimant's reasonable expectation and the breach must be of a sufficiently serious nature, and also set a two-part test or inquiry for the oppression remedy.

³³ *Libfeld*, *supra* note 1 at paras 155-161.

³⁴ *Ibid* at paras 162-166.

³⁵ *Ibid* at paras 167-168.

constitute oppression by Sheldon and Jay.³⁶ The Court agreed that the existing insurance was in accordance with Group's historical practice.³⁷ Third, that Mark and Corey's access to Group information was not equal to that of Sheldon and Jay.³⁸ Again, the Court rejected the oppression claim, noting that although Sheldon had more knowledge and control of the Group's information, all the brothers had access without restrictions to all the Group's records, which were kept at the Group's office.³⁹ The Court hinged the dismissal of all the oppression claims on the application of sections 207 and 248 of the OBCA and the two-part test for an oppression remedy enunciated by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*.⁴⁰

Having concluded that there was no oppression by any side, McEwen J. went on to consider whether the law permitted him to grant remedies in the circumstances of this case notwithstanding that nobody had succeeded in their oppression claims. For the judge, the jurisdiction to "intervene in the breakdown of partnerships and corporations where it is just and equitable to do so" and order their dissolution or winding-up can be derived from both para 35(1)(f) of the OPA and subpara 207(1)(b)(iv) and para 248(3)(l) of the OBCA.⁴¹ He also relied on case law, particularly *Landford Greens Ltd. v. 746370 Ontario Inc.*⁴² where Ground J. noted that the just and equitable grounds to wind up an entity under either the corporate or partnership legislation only require that the trust and confidence between the parties have broken beyond repair.⁴³ To fend off a controversy over the application of the OPA to the case, he also relied on section 2 of the OPA, which defines a partnership. He also relied on the fact that each of the Libfeld brothers owned a quarter of the business empire and referred to

³⁶ *Ibid* at para 172.

³⁷ *Ibid.*

³⁸ *Ibid* at paras 177-178.

³⁹ *Ibid* at paras 179, 181, 186.

⁴⁰ *BCE*, *supra* note 32 at para 68.

⁴¹ *Libfeld*, *supra* note 1 at paras 249-252.

⁴² 1993 CarswellOnt 163 at para 22, 12 BLR (2d) 196 (Ct J (Gen Div)).

⁴³ *Libfeld*, *supra* note 1 at para 253.

themselves as “partners” in their historical documents and throughout their evidence at trial.⁴⁴

Upon considering the remedies sought by the brothers, the Court ultimately adopted Mark and Corey’s stand, ordering a court-supervised winding-up and sale of the Group, but with the brothers being permitted to participate in the process as potential buyers, and Ernst & Young Inc. (“EY”) acting as the Sales Officer.⁴⁵ The Court reasoned that, in the circumstances of this case, protecting the business as the family legacy was not a factor to be given any substantial consideration, given that the brothers’ relationship had been completely tarnished with no prospects for them to cooperate trustfully.⁴⁶ A winding-up and sale would further prevent keeping the brothers’ rancorous feud from continuing with chances of them returning to the Court every now and then.⁴⁷ The Court thus rejected an MRP, which was the primary remedy sought by Mark and Corey.⁴⁸ The MRP would have entailed the division of the Group into four equal parts to be distributed to the brothers under the supervision of a court-appointed monitor.⁴⁹ The inability of the brothers to work together and the need to avoid wasting further time in separating them were the reasons offered by the Court in rejecting this remedy proposal.⁵⁰

The Court also rejected a Buy-Sell remedy sought by Sheldon and Jay, which essentially would have involved one side offering the other to buy (or sell) the Group, and vice versa.⁵¹ The Court reasoned that the Buy-Sell was not within the reasonable expectations of the parties, particularly Mark and Corey who, despite being aligned on one side against their brothers, never intended to be in business together after the winding-up.⁵² The Court also

⁴⁴ *Ibid* at para 264.

⁴⁵ *Ibid* at paras 474-475. Note that Mark and Corey made this as an alternative remedy claim without the brothers being permitted to participate in the process. See paras 436-437.

⁴⁶ *Ibid* at paras 138, 141, 459.

⁴⁷ *Ibid* at paras 452, 456, 459.

⁴⁸ *Ibid* at paras 393-396.

⁴⁹ *Ibid* at para 10.

⁵⁰ *Ibid* at paras 426-435.

⁵¹ *Ibid* at paras 9, 294.

⁵² *Ibid* at paras 330-334.

explained that the Buy-Sell would be onerous to implement, would not be cost-efficient, and would be vulnerable to execution risk.⁵³ An SBO, the alternative remedy proposed by Sheldon and Jay, was also rejected.⁵⁴ It would have basically entailed Sheldon and Jay buying out Mark and Corey.⁵⁵ In rejecting it, the Court reasoned that it was not within the parties' reasonable expectations that Mark and Corey would be excluded from the Group.⁵⁶ It would result in inequitable tax consequences and minority discounts.⁵⁷

IV. ANALYSIS

Credit must be given to the judge for the painstaking manner and care he gave to the case, from assessing the credibility and reliability of the brothers' evidence, to dealing with the many allegations made about dysfunction in the Group, to addressing the "family legacy" issue, and to giving the brothers ample time and opportunity to fully advocate for the various remedies they were seeking. However, four features of the decision are particularly worthy of note.

The first is the Court's analysis in determining that the Group was primarily a partnership. The Court merely referred to the definition of a partnership in section 2 of the OPA, without making further effort to bring to the fore the three elements of a partnership that the case law has enunciated to be embedded in that definition or to explain how this case meets the requirements of those elements.⁵⁸ The Supreme Court of Canada in *Continental Bank of Canada v. R.* noted that the statutory definition of a partnership encapsulates the following three elements: (1) a business, (2) carried on in common, and (3) with a view to profit.⁵⁹ While it is often the best practice for parties wishing to engage in business as partners to formalize their relationship by reducing it to writing, sometimes, in the

⁵³ *Ibid* at paras 339-355.

⁵⁴ *Ibid* at paras 356, 384.

⁵⁵ *Ibid* at paras 356-359.

⁵⁶ *Ibid* at paras 386-392.

⁵⁷ *Ibid* at paras 390-391.

⁵⁸ *Ibid* at para 262.

⁵⁹ [1998] 2 SCR 298 at para 22, 163 DLR (4th) 385.

absence of a written agreement, the existence of a partnership can be inferred from the conduct or intention of the parties. In such a scenario, as in this case, the court may determine that a partnership exists by doing a three-part analysis hinging on the three elements of the section 2 definition. The reasons for the Court adopting a more cursory approach appear to be threefold: first, the issue of whether or not the brothers were in the business as partners was not vigorously contested. Second, the brothers had already openly admitted to being in a partnership. Third, the Court cited compelling authority for the proposition that a partnership is not restricted to pursuing a singular means for doing business, i.e., it can (as in this case) consist of several different and unrelated activities executed in a number of separate wings.⁶⁰

The second is to note the importance of this decision in further developing the law in this area. It does so by clarifying that there is a role for both partnership law and corporate law when dealing with the deterioration of relationships within a highly complex web of business arrangements. The Court found that the Group was a partnership. But many of the key assets of the partnership were corporate entities, including Shelfran and Viewmark. Those entities, together with a large number of related special-purpose corporate entities and joint ventures, comprised the bulk of the partnership's assets. A winding-up under the OPA alone would have created additional and unnecessary roadblocks for accessing the assets within the corporate entities in the Group. To make access to those corporate assets easier in the context of the winding-up, the Court used the winding-up authority available under the OBCA, i.e., in addition to the OPA.⁶¹ The winding-up authority under both statutes (the OPA and OBCA) was necessary to craft an appropriate remedy in the circumstances.

The third is the irony of the Court ordering a court-supervised wind-up and sale of the Group given that it wished to fashion a remedy that would allow the feuding brothers to part ways and get on with their lives. Indeed, the winding-up and sale, as ordered by the Court, is a global remedy, the details of which were not provided in the decision. The transfer of every asset within the Group will require careful consideration of the legal, tax, and accounting issues of both the seller and buyer relating to that asset.

⁶⁰ *Libfeld*, *supra* note 1 at para 263, citing Roderick l'Anson Banks, *Lindley & Banks on Partnership*, 20th ed (London, UK: Sweet & Maxwell, 2017) para 2-07.

⁶¹ *Ibid* at para 259.

Where an asset is held by a corporate entity, the winding-up rules under the OBCA will need to be consulted and followed as well.⁶² It will likely take months (if not years) for EY to manage this process given the complex nature of the Group's assets. The complexity and time frame involved increased the prospects of the brothers returning to the Court every now and then to seek some form of order and direction from the Court relating to the winding-up, with the result that the feud in court between the brothers may persist. With this in mind, query whether the remedy that the Court ordered is the most equitable in the circumstances of this case.

The fourth relates to the Libfeld family legacy. While a court-supervised winding-up and sale may indeed be the best option for separating the brothers expeditiously and avoiding further acrimony, it sadly portends the end of the Libfeld family legacy. This is unfortunate, particularly as it pertains to one of the main issues asserted at trial on behalf of Edith, the family matriarch.⁶³ Consider whether a middle ground could have been struck. Perhaps, the Group could have been divided into four equal parts with the assistance of experts, with only those assets that were difficult to divide being sold off. This may have been a way for the legacy to have survived intact, at least in part.

V. ADDITIONAL THOUGHTS

In addition to the foregoing, there are regulatory and socio-economic lessons to take away from this case, both at the institutional and individual levels. At an institutional level, this case exposes the regulatory or policy gaps in the way the Canada Revenue Agency ("CRA") collects taxes from Canadian businesses. It is important that an appropriate status be ascribed to every business entity so that proper tax law and processes be applied to the entity. A partnership is taxed differently from a corporation, and both are taxed differently from a sole proprietorship. This should be of paramount importance to the CRA, and it is particularly interesting that the CRA allowed the Group to trade for the entirety of its lifespan without ensuring that its proper status was identified for tax purposes. Perhaps, the reason that the Group continued in a complex form is for tax purposes. Evidence showed that deferring tax payments as far into the future as

⁶² OBCA, *supra* note 3 at ss 191-244.

⁶³ *Libfeld*, *supra* note 1 at paras 134-142.

possible had been one primary objective of the Group.⁶⁴ An institution that is scrupulous in its role ought not to tolerate this practice because, at the end of the day, either some taxes may not be collected, or they may be under-collected. On the other hand, this case raises the issue of whether the CRA should be given the authority to mandate that businesses of a certain nature or size be formally incorporated and reject a hybrid entity for tax purposes. In the alternative, the CRA may create a special tax system for such a hybrid business enterprise.

At the individual level, this case clearly brings to mind the wisdom of Mr. Aaron Salomon in the popular 1897 decision of the English House of Lords⁶⁵ in taking a crucial step to formally incorporate his sole proprietorship as a corporation to accommodate the interests and demands of his children who became involved with him in the business. By failing to formally structure his growing business empire as a corporation, the patriarch of the Libfeld family essentially provided the foundation for the dispute that rocked the legacy he laboured for all his life.

It is hoped that family businesses out there would learn from this bitter case. The importance of taking professional counsel in every human endeavour cannot be over-emphasized. While one may be tempted into believing that the bond of family blood will be strong enough to overcome the desire to advance personal interests, it is also sensible and cost-effective to provide a formal and dispassionate buffer for disagreements by way of proper structure and written agreement.

These lapses in the creation and continuation of the Libfeld Group created a working environment that engendered distrust, acrimonies, and ruined family relationships, leading to costly litigation and other huge professional fees.⁶⁶

⁶⁴ *Ibid* at para 31.

⁶⁵ *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).

⁶⁶ With that being said, note that while the incorporation of a family enterprise may likely reduce the risk of this manner of costly litigation, it will not completely eliminate the possibility that it will arise.