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Extreme Family Disfunction: Unintended Consequences in a Winding-Up Case

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By Ken Prehogan

Some cases are noteworthy for the precedent they set. Others for the story they tell. *Libfeld v. Libfeld* 2020 ONSC 4670 has both.

The Court has broad jurisdiction to intervene in the breakdown of partnerships and corporations where it is just and equitable to do so, and a broad discretion to determine the methodology of the dissolution. It is common to appoint an independent receiver to sell the business. [1] While there is nothing ground-breaking in that the Court ordered the business in this case to be sold, it is unusual that the Court granted this relief even though it was not the preferred outcome of any of the parties.

Theodore Libfeld, a Holocaust survivor, immigrated to Canada from Poland in 1951. He founded and carried on a real estate development and building business known as the Conservatory Group (the "Group"). He was joined by his four sons who continued the business as equal owners after Theodore died in 2000.

The Group's business structure consists of over 350 single purpose entities and joint venture interests. Its holdings include income-producing residential and commercial properties, and a significant mortgage portfolio. The Court found that the likely value was in the range of $2.5 to $4 billion, including $250 to $500 million in cash. There was no shareholder or partnership agreement to govern the relationship between the brothers. Justice McEwen described the group as a "huge financial success". All the brothers wished to continue to carry on the business, albeit not in partnership with each other.

Beginning in 2005, the brothers made efforts to bring some semblance of order to their business relationship with respect to cash distributions, estate planning, life insurance and the payment of tax. They engaged capable professionals to assist them but were not able to come to any agreement on any of the issues. The relationship devolved from disagreement to acrimony, morphing into significant dysfunction and confrontations between the brothers.

One of the brothers, Mark Libfeld, brought an application to wind up the business against his three brothers. By the time the case got to trial, Mark was joined by Corey, with Sheldon and Jay on the other side. Remarkably, at trial, there was no dispute that the overall business relationship between the brothers had completely broken down and that the damage done was irreparable, such that an order to wind up the Group was inevitable. During the 21-day trial, there was much evidence led in support of competing allegations of oppression, but the Court made no finding of oppressive conduct by any of the parties. Justice McEwen stated that many of the disputes between the brothers were petty in nature and solidified his conclusion that they could not carry on working together. The main issue to be determined was the methodology of the dissolution.

Sheldon and Jay's primary submission was that the Court order a buy-sell remedy, or alternatively a strategic buy out, both of which would have resulted in Sheldon and Jay owning 100% of the Group, with the power to divest classes of assets as part of the transaction. Mark and Corey proposed that the Group be divided into four portions, with each brother being allocated one portion. Alternatively, they proposed a total liquidation, wind-up and sale of the Group, on condition that none of the brothers be permitted to

purchase any of the assets. In the result, Justice McEwen ordered that the Group be wound up and sold under the supervision of a Court-appointed sales officer, with the Libfeld brothers being permitted to participate in the sales process as potential purchasers.

In his analysis, Justice McEwen reviewed each remedy proposed by the parties, and rejected them all. For example, he found that the buy-sell was not within the reasonable expectation of the parties. It would be unfair in that it would have forced Mark and Corey to act together as buyers, which they did not want to do, and was really a buy opportunity for Sheldon and Jay only, who proposed it and did want to work together. This proposed remedy had tight timelines, an information divide and, due to the sheer volume and value of the assets, a need for financing which led to execution risk. The Court found that all these factors favoured Sheldon and Jay, and prejudiced Mark and Corey, having regard to the specific roles historically played by each. The judge found that the Modified Restructuring Protocol proposed by Mark and Corey, whereby a Court appointed restructuring monitor would divide the Group into four equal interests, was "doomed to fail". The ongoing projects are high-rise and low-rise developments and plans of subdivision cannot be divided so that the brothers could receive lots in the same project. The build out of these projects would require cooperation between the brothers, which was proven to be impossible to achieve, and would lead to ongoing litigation.

In coming to his conclusion as to the appropriate remedy, Justice McEwen was influenced by the extreme nature of the disfunction in this case. He stated at paras. 452-454:

This case, however, goes far beyond what has been described in the aforementioned case law as being necessary to wind-up a business. None of the factual patterns in the case law provided by the parties came close to matching the dysfunction that exists here. The unfortunate reality is that the Libfeld brothers' relationships with each other have been totally and likely irretrievably destroyed.

The acrimony has grown to the point where, to summarize, the last 6 years have seen the following:

- The Libfeld brothers have been unable to enter into written agreements which would allow them to collectively operate the Group. There is no reasonable prospect that they be able to do so given this historical failure and the current situation.
- There has been a significant, ongoing and likely permanent breakdown in communication between Sheldon and Jay on the one hand and Mark and Corey on the other.
- There have been physical altercations, accusations and cruel insults.
- The Libfeld brothers have engaged in secretive dealings.
- The Group failed to pay hundreds of millions of dollars in tax, while the Libfeld brothers have received significant financial benefits over the last 16 years alone.
- Employees have been, at times, unfairly dragged into the middle of the dispute.
- Relationships with their business partners have been adversely affected.
- Family relationships have been significantly, perhaps irreparably damaged.
- The Libfeld brothers have dragged their mother into this litigation and are unable to agree upon the amount of money she is owed. This has damaged her relationship with some of her sons.
- There is no succession plan.
- The Group has not been able to enter into any new transactions since 2017, which best demonstrates the devastating effect of the aforementioned dysfunction.

All of this has occurred notwithstanding the fact that the Libfeld brothers are owners of the Group which has been an enormous financial success.

Key Takeaways

What lesson is to be learned from this decision? Businesspeople themselves are best equipped to determine the way forward when

relationships break down. Aided by capable counsel and experts, as the parties were here, they can structure a settlement in a tax advantageous manner, avoiding the costs of litigation, and of the Court appointed sales officer and his or her counsel. They lose control once they enter the courtroom, and the outcome might be very different from what they anticipated. On a positive note, once the sale process is complete, the parties can have an opportunity to take advantage of a fresh start.

[1] Ontario *Business Corporations Act*, s. 207(1)(b)(iv); *Partnership Act*, s. 35(1)(f).

For more information or inquiries:

Ken Prehogan

Toronto
416.947.5028

Email:
kprehogan@weirfoulds.com

Ken Prehogan is known for his uncompromising representation of clients involved in some of Canada's most challenging business and real property disputes.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035