

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gierc Jr. v. Wescon Cedar Products Ltd.*,
2023 BCSC 272

Date: 20230224
Docket: S160716
Registry: Victoria

Between:

Frank Gierc Jr. and 628578 B.C. Ltd.

Petitioners

And

**Wescon Cedar Products Ltd., Wescon Holdings Ltd.,
and Thomas Gierc**

Respondents

Before: The Honourable Madam Justice Murray

Reasons for Judgment re: Remedy for Oppression

Counsel for the Petitioners:

G.N. Harney

Counsel for the Respondents:

P.J. Roberts, K.C.

Place and Date of Summary Trial:

Victoria, B.C.
January 18, 2023
February 8–10, 2023

Place and Date of Judgment:

Victoria, B.C.
February 24, 2023

Introduction

[1] In Reasons for Judgment dated January 8, 2021 and indexed at 2021 BCSC 23, I found that the respondents, including the petitioner’s brother Thomas Gierc have run Wescon Holdings Ltd. (“Holdings”) and Wescon Cedar Products Ltd. (“Cedar”) in a manner that is oppressive and unfairly prejudicial affairs to petitioner Frank Gierc Jr., and that it would be just and equitable to provide a remedy under s. 227(3) of the *Business Corporations Act*, S.B.C. 2002, c. 57 [BCA]. This judgment concerns the remedy for the oppression.

[2] The background of the dispute is detailed in the oppression remedy judgment. I will not repeat it here. Throughout these reasons I will refer to the petitioner, Frank Gierc Jr., as Frank and the respondent, Thomas Gierc, as Tom. I do so for ease of reference and not out of disrespect to the parties. I will refer to Cedar and Holdings, together as Wescon.

[3] The sole issue to be determined is what is a fair and appropriate remedy.

[4] I accept that there is urgency to Frank in receiving this decision. In an effort to release this decision to the parties as soon as possible I have not provided a full legal analysis. I have taken into consideration all of the submissions made by counsel and the cases referred to by them.

The Law

[5] Oppression is an equitable remedy available to shareholders of a company, that seeks to ensure fairness, that is, that which is just and equitable. It gives the court a broad discretion to enforce not only what is legal, but what is fair: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 58.

[6] Under s. 227(3) of the *BCA*, the court has vast powers to make any orders it sees appropriate, interim or final, to remedy or bring to an end oppressive conduct. These orders include:

- (a) directing or prohibiting any act,
- (b) regulating the conduct of the company’s affairs,

- (c) appointing a receiver or receiver manager,
...
- (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
- (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
- (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
...
- (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
- (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
...
- (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security.
- (p) directing that an investigation be made under Division 3 of this Part,
...
- (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[7] In this case, although the option of liquidation was threatened throughout submissions by Frank’s counsel, the only remedy sought in Frank’s pleadings and the appropriate remedy in the circumstances is to direct the respondents to purchase Frank’s shares.

[8] In addition to compensation for the oppression, Frank seeks payment for 13 months of salary/compensation over and above the 11 months he was paid following his termination. Frank’s counsel argues that Frank is entitled to 24 months as that is the “usual” amount of time. No authorities were proffered in support of this proposition.

[9] It is clear on the evidence that the monthly payments were for work done—“no work, no pay”. Frank therefore brings this claim qua employee not qua

shareholder. Oppression remedy pertains to shareholders of a company, not employees. Accordingly, I find no merit in Frank's claim for additional wages.

[10] The question of remedy is therefore focussed on Frank's shares.

[11] The questions that must be answered are as follows:

1. What is the fair value of the shares;
2. Is Frank entitled to interest on the value of the shares and if so from what date;
3. Should Frank be liable for half of the costs of the audited financial statements;
4. What are the terms of the payout?

[12] I will consider these questions in turn.

1. What is the Fair Value of the Shares?

[13] The only valuation before the court was prepared by business valuator, Josh Matte of XPS Group Inc. ("XPS") dated July 13, 2022 (the "XPS report"). Frank agreed to XPS performing the valuation. Although Frank takes issue with some aspects of the XPS report, he has not proffered a report or opinion to the contrary. As a consequence, I accept the XPS Report as the valuation of the shares. Given that conclusion, I must still decide where the value lies on the scale of value provided by XPS – Frank says it should be at the high end; the respondents argue that the midpoint is appropriate.

[14] XPS provides the following advice regarding the ranges:

1. The low value (\$3.49 million) reflects the price an arm's length purchaser would pay for the shares if the respondents were intending to immediately dispose of Wescon's assets (primarily the Polkey Road property). In such

a disposition, the respondents would incur disposition costs and taxes of about \$454,000;

2. The high value (\$3.74 million) reflects the purchase price an arm's length purchaser would pay for the shares, if the respondents never planned to sell the property. In such a case, the respondents would not incur any related disposition costs or corporate capital gains tax;
3. Where there is uncertainty around the timing of the sale of the property (i.e. a sale of the property is likely to occur anywhere from one to 20 years from the valuation date of January 31, 2016), it is recommended that the midpoint be used (\$3.61 million).

[15] After much consideration, I conclude that I cannot predict the future of the assets of Wescon with any certainty. While the company was formed by the brothers with the help of their parents, with the apparent intention that it would be kept in the family for generations, much has changed since then. The parents have passed away, and the brothers have had a falling out. The economy has changed dramatically.

[16] Tom is not a young man. He deposes that his workload has increased significantly since Frank left. The business has been affected by inflation and rising interest rates. I have no information upon which I can draw a conclusion about Tom's plans for his future or the future of the company.

[17] Left with uncertainty around whether the assets will be sold in the next 14 years, I accept the midpoint as the value of the shares. Given this value, relying on the XPS report, and the uncontroverted evidence of Mr. Olsen, the long-time accountant of Wescon, I find that the aggregate median *en bloc* fair market value of the shares to be \$4,646,500. Frank is entitled to one-half of that, \$2,323,250.

2. Is Frank Entitled to Interest on the Value of the Shares and If so From What Date?

[18] As indicated in court during the hearing, I am satisfied that Frank is entitled to interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [COIA] from January 31, 2016, the date specified in the July 29, 2016 interim settlement agreement. I have come to that conclusion for the following reasons:

1. Frank is entitled to a remedy for the oppression;
2. He has not been fully paid out;
3. Regardless of the reasons for the delay, he should not suffer a loss of interest from the date of his entitlement;
4. The interim settlement agreement provides that Frank's future entitlement to payment for the value of shares in Wescon "will be calculated on the value of those shares as at January 31, 2016" (the "Valuation Date").

3. Should Frank be Liable for Half of the Costs of the Audited Financial Statements?

[19] In my January 2021 judgment, I ordered that the respondents are responsible for the cost of the audited financial statement. The respondents seek a reconsideration of this finding, as in 2016, Frank had waived the necessity of audited statements. It is the respondents' position that the parties should split the cost.

[20] I disagree. As I made clear in my ruling, the order was made in preparation for the remedy hearing following a finding that Frank had been oppressed by the respondents. I stated as follows:

[103] In the interim, I make the following orders which are designed to serve two purposes- first, to provide fundamental information for the remedy stage and second, to preserve the status quo pending final determination of the issues:

- (1) The respondents shall appoint an auditor by February 1, 2021 and produce to Frank and his counsel audited financial statements for the period January 1, 2015 to present by March 31, 2021. If required, an extension of this date may be agreed to between the parties or by

further order of this court. The cost of the audited financial statements shall be borne by the respondents.

...

[Emphasis added.]

[21] That Frank agreed to waive audited financial statements in the 2016 as part of the mediated interim settlement agreement is, in my view, irrelevant. The audited financial statements were useful in valuing the shares which was essential for formulating the appropriate remedy. As the audited financial statements pertain to remedying the oppression, it is only just that the respondents bear the cost.

4. What are the Terms of the Payout?

[22] The respondents seek time to purchase Frank's shares stating that they are unable to pay in one lump sum without risking Cedar's ability to continue as an operating concern, and without risking insolvency.

[23] Pursuant to ss. 227(5) and (6) of the *BCA*, the court will not require immediate payment of a share purchase where there are reasonable grounds to believe that paying the full amount might render the company insolvent.

[24] In seeking allowance under these subsections, the respondents rely on an affidavit of Tom, in which he attests that since 2016 Cedar has been able to accumulate capital with the intention to use the funds on equipment upgrades and to maintain the workforce. If the accumulated funds have to be used to purchase Frank's interests in the company rather than continue to be reinvested in current operations, Cedar's ability to operate would be "handcuffed". Tom notes that the cost of borrowing has risen significantly. Tom further attests that with inflation and rising interest rates he expects sales to decline. If Cedar was required to make a single payment to Frank, it would render Cedar insolvent.

[25] In order to avoid that scenario, the respondents propose paying the award in three installments over approximately two years, as follows:

1. One-third within 10 days of this judgment;

2. The second installment twelve months after the first payment; and
3. The remainder twelve months after the second payment.

[26] Wescon is a business of consequence. It has significant sales. It owns a valuable property, unencumbered by debt. In fact, neither Cedar nor Holdings has any debt. There is no evidence supporting Tom's contention that to pay Frank out in a timely way would put the company at risk.

[27] Considering all of the evidence, I am not satisfied that there are reasonable grounds to believe that Wescon will be rendered insolvent if ordered to pay the full amount of the award within a year of this judgment. I order that the respondents pay to Frank the total award within one year of the date of this judgment, with the first \$750,000 to be paid within 10 days of this judgment.

Conclusion

[28] I make the following orders:

1. Pursuant to s. 227(3) of the *BCA*, Wescon shall purchase from Frank all shares in Wescon registered in his name or that are otherwise held for him (the "Frank shares") for the total sum of \$2,323,250 plus interest pursuant to the *COIA* from January 31, 2016 (the "award").
2. I leave it to counsel to calculate the amount owing under the award after making allowances for payments previously made to Frank or made on Frank's behalf. If counsel are unable to agree, they may contact scheduling to return before me remotely any morning at 9 a.m.;
3. The award shall be paid as follows:
 - i. \$750,000 is to be paid within 10 days of this judgment; and
 - ii. The remainder is to be paid in full within one year of this judgment;

4. Once payment of the award has been made in full, Frank shall surrender the Frank shares to Wescon for cancellation; and
5. The remaining relief sought in the petition filed February 19, 2016 is dismissed.

[29] Frank, as the substantially successful party, is entitled to costs of this application to be paid by March 10, 2023.

“The Honourable Madam Justice Murray”