CITATION: Dalios et al v. Price et al, 2023 ONSC 4179
COURT FILE NO.: CV-20-84595
DATE: 2023/07/14

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DR. DEMETRIUS DALIOS and DR. MAHMOOD KHEDMATGOZAR Applicants	Charles M. Gibson and Ian Houle, lawyers for the Applicants
– and –	
DR. DANA PRICE and DR. DANA PRICE DENTISTRY PROFESSIONAL CORPORATION Respondents	G. James Thorlakson and Julia Dales, lawyers for the Respondents
	HEARD: September 19-20, 2022

<u>REASONS FOR JUDGMENT</u>

<u>JUSTICE MARC R. LABROSSE</u>

OVERVIEW

[1] In early 2018, the Applicants and the Respondent discussed the possibility of purchasing the Blue Heron dental practice. Initially, the three dentists were going to be equal partners in the venture. It was agreed that they would purchase the dental practice through a corporation and the agreement was that they would become equal shareholders in the corporate entity which was to be used to purchase the subject dental practice.

[2] At some point prior to closing the purchase, the Applicant, Dr. Khedmatgozar, gave notice to the other two proposed shareholders that he was unable to proceed with his purchase of a one third interest in the dental practice. As a result, Dr. Price and Dr. Dalios proceeded with the

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purchase of the dental practice as 50% shareholders of the purchasing corporation (the "Dental Corporation"). Initially, the purchase price was to be secured by personal guarantees provided by each of the parties. When Dr. Khedmatgozar withdrew from the purchase, the other two had to assume the value of Dr. Khedmatgozar's share of the personal guarantee required by the bank.

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[3] Dr. Khedmatgozar made various promises and statements about when he would be prepared to join the Dental Corporation as an equal shareholder. He did not however, meet his obligations or put himself in a position to acquire a one third interest in the Dental Corporation. He did not take the necessary steps to have his proposed personal guarantee approved by the bank that financed the transaction.

[4] For a period of over one year, the parties worked on or negotiated the terms of a Shareholders' Agreement that was never signed. The purchase of Dr. Khedmatgozar's interest in the Dental Corporation was to coincide with the finalization of the Shareholders' Agreement. As the parties were in the final steps of arriving at an agreed Shareholders' Agreement, Dr. Price became aware that Dr. Khedmatgozar had a significant liability against him resulting from litigation, in which he had been found to have lied to business associates. Shortly thereafter Dr. Price requested a fixed date within seven days from Dr. Dalios for the process to be concluded. She did not give notice of this ultimatum directly to Dr. Khedmatgozar, but Dr. Dalios said he would communicate it to Dr. Khedmatgozar. The seven days passed, and Dr. Price lawyered up, taking the position that Dr. Khedmatgozar was in breach of his obligations and that she was no longer willing to have him become an equal shareholder.

[5] To this day Dr. Khedmatgozar has failed to demonstrate an ability to meet the requirements of the financial institutions that have financed the purchase of the dental clinic. He has never put himself in a position to receive the one third interest in the Dental Corporation that had been originally discussed by the three dentists. Dr. Khedmatgozar's opportunity to purchase his one third interest in the Dental Corporation has now passed and it is not for this Court to fulfill his obligations for him. Dr. Khedmatgozar has not yet, in three years, demonstrated that he can comply with the key requirement of being approved by the bank before receiving a one third interest in the Dental Corporation.

[6] This leaves in question the status of the Dental Corporation. It has been acknowledged by both Dr. Price and Dr. Dalios that they are unable to work together, that they do not trust each other, and that the Dental Corporation is effectively deadlocked in its operation. I am satisfied that the requirements of s. 207 of the *Business Corporations Act (Ontario),* R.S.O., 1990, c. B.16, have been met and that the Court must intervene to determine a fair process to resolve the deadlock. I have concluded that the fair process must be a buy-sell arrangement between Dr. Price and Dr. Dalios which would allow each an opportunity to purchase the interests of the other without any outside interference by interested third parties in accordance with sections 7.1 and 7.2 of the final draft of the Shareholders' Agreement. The parties will have 30 days from the date of this decision to determine amongst themselves the exact terms of that buy-sell arrangement. In the absence of such an agreement the Court will first embark on a process to hear submissions from the two shareholders and then adjudicate that issue.

[7] Otherwise, Dr. Khedmatgozar's application for a one third interest in the Dental Corporation or damages in lieu thereof is dismissed.

FACTUAL BACKGROUND

[8] The facts surrounding this application are largely undisputed given that almost all of the communications between the parties took place in writing via e-mail communications. There are very few oral discussions that are relied upon that could involve credibility issues. I provide the following summary of the relevant facts.

[9] In early 2018, Dr. Price was an associate dentist at a dental clinic in which Dr. Dalios was a part owner. They discussed purchasing a separate dental practice together and Dr. Dalios recommended that they do so with a third dentist, the Applicant Dr. Khedmatgozar.

[10] In 2018, Dr. Dalios and Dr. Khedmatgozar were already partners in three dental clinics. The purchase of an interest in a dental clinic was facilitated by the fact that banks would finance 100% of the purchase price and as such, the risk involved in such purchases was deemed to be low.

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[11] In early 2018 Dr. Price had been a dentist for approximately three years and she did not own any interests or shares in any dental clinics or in any other type of business. Dr. Price relied heavily on both Dr. Khedmatgozar and Dr. Dalios with regards to the acquisition and operation of a dental clinic.

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[12] Initially, the three dentists contemplated the purchase of a dental practice in Manotick, Ontario but this venture did not materialize. In the spring of 2018, the parties decided to bid on a dental practice called the Blue Heron Dental Group through a corporation to be incorporated in the name of Dr. Price in which they would become equal shareholders and they agreed to finance the acquisition through the National Bank.

The Agreement to Purchase Blue Heron

[13] The Applicants allege that prior to creating the Dental Corporation that eventually purchased Blue Heron, they entered into a partnership and that it was agreed that each partner would become a one third owner of the Dental Corporation. Dr. Price disputes that any partnership was ever created. Regardless, the parties moved forward with the following steps:

a. Incorporated the Dental Corporation for the purposes of holding the assets of the Blue Heron dental practice;

b. Made the offer, as drafted by Dr. Khedmatgozar and Dr. Dalios, after Dr. Khedmatgozar played a role in analyzing the financial numbers for the acquisition of the Blue Heron dental practice;

c. Agreed that Dr. Price would be the face of the clinic and, as such, she signed a Letter of Intent, a Tenant Credit Information and a Fact Sheet;

d. Each paid one third of the deposit for the acquisition price;

e. Each paid one third of the lender’s fees, the lender being National Bank;

f. Agreed to the premiums for the life insurance policy required by National Bank over the life of Dr. Price because she was to be the main dentist at the Blue Heron clinic. The insurance was to be paid by the Corporation; and,

g. Dr. Dalios and Dr. Price executed personal guarantees for the loan from National Bank, along with a promissory note.

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[14] In order to proceed with the financing of the transaction, the National Bank requested information from each party to finance the purchase price. On August 17, 2018, the National Bank sent a discussion paper to the three dentists setting out the terms of the financing which involved the following:

a. Collateral security, including a first ranking GSA on all the borrower's movable and immovable property, present and future;

b. A personal guarantee of $2,000,000 from each shareholder;

c. Assignment of a life insurance policy from Dr. Price for $2,000,000.

[15] In a document titled *Discussion Paper*, under "documentation required for analysis", is listed:

a. Personal net worth statement of Dr. Khedmatgozar;

b. Copy of the CRA 2017-T1 Notice of Assessment from all shareholders;

c. Two year forecast prepared by an accountant having expertise in the dental health sector.

[16] On August 27, 2018, National Bank emailed the group to notify them that while Dr. Dalios and Dr. Price had provided the requested personal information, the following was outstanding from Dr. Khedmatgozar:

a. Completed and signed personal net worth statement;

b. 2017 Notice of Assessment from the CRA;

c. Signature on the Discussion Paper;

d. Financial forecast with assumptions/explanations (i.e. salaries, specialization internal).

[17] There is some dispute between the parties as to which requirements of the National Bank were met by Dr. Khedmatgozar. However, there does not seem to be any dispute that leading up to the purchase of the Blue Heron clinic, Dr. Khedmatgozar never did fulfill the requirements of the National Bank in order to be able to be considered as a one third shareholder of the Dental Corporation.

[18] On September 24, 2018, Dr. Khedmatgozar informed the National Bank that he was no longer proceeding with the acquisition of his share the Dental Corporation. By text message in or about late September 2018, Dr. Khedmatgozar informed Dr. Price that due to his mother requiring care for an illness, he no longer felt comfortable buying into Blue Heron for another year because he would not have enough time to commit to the practice.

Closing of the Purchase of Blue Heron

[19] Dr. Khedmatgozar told Dr. Price that he would still guarantee the loan and buy into the Dental Corporation within a year of the acquisition. Various statements were made whereby he would buy in within a year, or within five to six months, or formerly join within a few months. He indicated that those terms would be set out in writing in the partnership agreement.

[20] On November 8, 2018, each of the parties made an equal contribution to the $100,000 deposit for the acquisition of the Blue Heron Dental Clinic. The dental practice was acquired by the Dental Corporation on November 15, 2018. On that date Dr. Price and Dr. Dalios were 50% equal shareholders of the Dental Corporation and they were the only two guarantors for the loan of the Dental Corporation. Nothing was formalized in writing or otherwise about Dr. Khedmatgozar's interest in the Dental Corporation.

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[21] By November 8, 2018 each of the parties had paid $35,666.66 which consisted of one third of the $100,000 deposit and an equal share to pay for the National Bank's legal fees of the transaction. Dr. Khedmatgozar was repaid this amount by December 4, 2018.

[22] While Dr. Khedmatgozar offered to the National Bank to guarantee the loan to the Dental Corporation, no formal steps were taken either by the bank or by Dr. Khedmatgozar to move forward with his personal guarantee. In the end, both Dr. Price and Dr. Dalios provided a personal guarantee in the amount of $3.1 million. This was $1,100,000 more that had been previously contemplated when Dr. Khedmatgozar was going to be an equal shareholder. As such, both Dr. Price and Dr. Dalios took over Dr. Khedmatgozar 's financial commitment. Both Dr. Price and Dr. Dalios also executed a $500,000 promissory note for the acquisition. Dr. Khedmatgozar provided no guarantees or other security in relation to the purchase of Blue Heron.

[23] In the 14 months following the closing of the purchase of Blue Heron, the parties failed to negotiate the final version of the Dental Corporation's Shareholders' Agreement. As of the end of 2019, Dr. Price continued to have the expectation that Dr. Khedmatgozar would eventually join the Dental Corporation. This is evidenced by the steps she took to register him as an owner of the Dental Corporation with the Royal College of Dental Surgeons and in the fact that she emailed the National Bank to request the paperwork required to add Dr. Khedmatgozar to the loan in anticipation of him becoming a co-owner of the Dental Corporation.

Termination of the Agreement by Dr. Price

[24] Dr. Price's willingness to wait for Dr. Khedmatgozar to take the necessary steps to join the Dental Corporation seemed to change in December 2019 when she learned of the significant judgment against Dr. Khedmatgozar and seemed to be developing trust issues.

[25] In mid-January 2020, Dr. Price met with Dr. Dalios and indicated that she wanted to finalize the Shareholders' Agreement in the next seven days and indicated that she was putting a hard date on the next step being completed. Dr. Dalios then responded that he would push Dr. Khedmatgozar that night on the Shareholders' Agreement and documents for the bank.

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[26] Once again, Dr. Khedmatgozar did not fulfill those requirements with the bank and on January 29, 2020 Dr. Price, through her lawyer, confirmed to the corporate lawyer preparing the Shareholders' Agreement that Dr. Khedmatgozar would not be joining the Dental Corporation due to his failure to take the required steps.

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[27] It is at this point that Dr. Khedmatgozar's unwillingness to meet the requirements of the bank to become an equal shareholder of the Dental Corporation became evident. By January 29, 2020 he was on notice that Dr. Price would no longer wait for his failure to act and he still took no steps to satisfy the bank's requirements and put himself in a position to become an equal shareholder and equal guarantor of the Dental Corporation debt.

[28] While the Applicants focus on Dr. Price's failure to give proper notice of her revised position, the Court is of the view that it is really of no moment because from a legal standpoint Dr. Khedmatgozar would have had the opportunity to satisfy the requirements of the bank within a reasonable time. Enforcement of the deal between the parties at that point would have been easy to accomplish. After January 29, 2020, Dr. Khedmatgozar used Dr. Price's refusal to proceed with his buy-in as justification for his inaction by suggesting that there was no purpose after that date to comply with the bank's requirements.

[29] Dr. Khedmatgozar 's inaction with respect to the requisite guarantee to the bank to become an equal shareholder of the Dental Corporation was complicated by the fact that Dr. Price learned of a finding by the Ontario Superior Court of justice that Dr. Khedmatgozar had misappropriated trust funds for his own purpose and was liable for a judgement of $1.2 million. This knowledge clearly had an impact on her willingness to continue waiting for Dr. Khedmatgozar and would have created a cloud of doubt surrounding his ability to meet the bank's requirements.

[30] In or about this time, Dr. Price raised a number of legal issues to try to justify the withdrawal of her consent to Dr. Khedmatgozar becoming an equal shareholder in the Dental Corporation such as Dr. Khedmatgozar 's failure to take the necessary steps within one year of the closing of the purchase of Blue Heron. These were litigation positions.

Offers to Purchase Blue Herron

[31] In January 2020, Dr. Price first learned that Dr. Dalios and Dr. Khedmatgozar were seeking to sell the Dental Corporation to a third party, MCA Dental, a dental conglomerate in which Dr. Dalios and Dr. Khedmatgozar were minority shareholders. In March 2020, MCA offered to purchase all of the shares of the Dental Corporation for $8.4 million being roughly 8 x EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), a known measure of a company's financial health and ability to generate cash. That Letter of Intent also had a non-competition element, a requirement that Dr. Price would remain for five years and a working capital requirement.

[32] In November 2021, MCA also offered to purchase all of the issued and outstanding shares held by Dr. Dalios (and Dr. Khedmatgozar) in the Dental Corporation for $4,193,000 with a requirement that Dr. Price would sign a non-competition agreement and had a working capital adjustment.

[33] Further, in December 2021, MCA made another offer to purchase 100% of the Dental Corporation for $8,386,000 and this offer was contingent on Dr. Price working for MCA for a period of five years following the acquisition and agreeing to a five-year non-competition clause. Dr. Price made it clear that she had no interest in selling the Dental Corporation to MCA as she has no desire to be part of a larger dental conglomerate.

[34] At some point Dr. Price contacted MCA to ascertain the value of the offer if she were not to remain working at Blue Heron. MCA advised the offer would only be 6.5 x EBITDA rather than 8 x EBITDA and this was even if Dr. Dalios stayed on. This reflected the value of Dr. Price remaining as the practitioner running the practice.

[35] On January 7, 2022, MCA offered to buy the shares of the Dental Corporation for $6,800,000 being 6.5 x EBITDA. There was no employment agreement requirement for Dr. Price but there was a five-year non-competition agreement within a radius of 15km and a working capital adjustment.

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[36] On January 14, 2022 Dr. Dalios made an informal offer to buy Dr. Price out of the practice at 6.3 x EBITDA. Dr. Price then counter-offered to purchase Dr. Dalios' share in the Dental Corporation 6.3 X EBITDA and received no response.

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ISSUES

[37] At the outset of the hearing, the Applicants raised the following issues:

a. Prior to the purchase of Blue Heron through the Dental Corporation the parties had entered into a partnership where each partner was entitled to a one third interest in Blue Heron and that Dr. Price's refusal to give effect to that partnership is a breach of fiduciary duty;

b. That there was an agreement that both Dr. Price and Dr. Dalios would transfer one sixth of their shares to Dr. Khedmatgozar and that the refusal by Dr. Price is a breach of that agreement;

c. That Dr. Price's refusal to transfer one third of the shares of the Dental Corporation to Dr. Khedmatgozar is oppressive. Alternatively, damages should be awarded at the current value of one sixth of the value of the Dental Corporation on the basis of unjust enrichment;

d. The Applicants are prepared to buy 50% of the shares of the corporation from Dr. Price for 4.2 million. Alternatively, Dr. Dalios should be allowed to sell his 50% shares as there is a deadlock within the corporation which warrants a remedy under section 248 of the *Business Corporations Act (Ontario)* ("OBCA").

[38] The issues for adjudication were summarized as follows by the Respondent:

a. Did the parties form a partnership? If they did form a partnership, did Dr. Price expulse Dr. Khedmatgozar from the partnership in contravention of the *Partnerships Act,* R.S.O. 1990, c. P.5?

b. Did Dr. Price engage in oppressive conduct pursuant to the *Business Corporations Act (Ontario)*?

c. Has Dr. Price being unjustly enriched at Dr. Khedmatgozar 's expense?

d. Is Dr. Khedmatgozar entitled to equitable remedies?

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[39] The parties' have expressed the issues differently, but their arguments all flow from these four issues. The Court will address each of these issues in order.

Existence of a Partnership

[40] The Applicants advance the position that when the parties began the planning process of purchasing the Blue Heron clinic, they had formed a partnership at that point. At various points in their materials, the Applicants confound the references to *partners* with the term *shareholders*.

[41] The Applicant's advance the notion that based on the jurisprudence established in *Matthews v. Maurice,* (1923) 54 OLR 64, partners can enter into a partnership agreement with the term being that a company will be incorporated to operate the business of the partnership and that it is only upon the company being incorporated that the partnership ends. The Applicants' reliance on *Matthews* is an incorrect application of its principles. In that case, the parties actually operated the business for some time and a corporation was never incorporated. Accordingly, the Court found that a partnership existed because it had been in operation.

[42] In the present case, the evidence is clear that while the communications between the parties referred to the term "equal partners" and "partnership agreement", it was never the intention of the parties to operate Blue Heron in any manner other than through the Dental Corporation as the purchaser of the Blue Heron Dental Group. At no point was the Blue Heron clinic operated by the parties with a view to a profit by the three parties as partners in a partnership.

[43] While individual messages between the parties demonstrate the use of terminology which is consistent with a partnership agreement, an overall review of the correspondence between the parties demonstrates that it was never the intention of the parties to operate as a partnership, whereby the individuals themselves would be the owners of the Blue Heron clinic. The discussions

between the parties and the submission of an offer to purchase the dental practice does not create in my view a partnership in the context of the *Partnerships Act*. It was simply an agreement between three parties to incorporate a company which would allow for the purchase and operation of the Blue Heron Dental Group.

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[44] This conclusion is supported by a review of the provisions of the *Partnerships Act*. Section 2 states:

> Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act. R.S.O. 1990, c. P.5, s. 2.

[45] The evidence is clear that prior to the incorporation of the Dental Corporation that the three parties were not *carrying on business in common with a view to a profit*. These three individuals were dentists, and the business of Blue Heron was a dental practice. At no point prior to November 15, 2018, did the parties carry on business as a dental practice with a view to a profit.

[46] A review of the Letter of Intent for the purchase of Blue Herron also supports that there was no partnership created prior to the purchase. The Letter of Intent is solely in the name of Dr. Price "either personally or on behalf of a company currently or to be incorporated by Dr. Dana Price." Neither Dr. Dalios nor Dr. Khedmatgozar are mentioned. There is no suggestion that a partnership was in place at the time the Letter of Intent was signed.

[47] It would be an error to suggest that anytime individuals intend to incorporate a corporation, that they have created a partnership from the date their discussions begin to the date that the corporation is actually incorporated. The Applicants seek to establish that prior to the incorporation of the Dental Corporation, Dr. Price had a fiduciary obligation to Dr. Khedmatgozar. This is simply not the case, and this is clearly reflected in the intention of the parties which was always to create a corporation for the purchase of the Blue Heron clinic. Such is the case regardless of the terminology used by the parties in their communications.

[48] I conclude that prior to November 15, 2018, there was no partnership created between the parties. Their relationship was one of three individuals who were organizing themselves to incorporate a corporation with a view to operating that corporation as a dental practice.

Agreement to transfer shares

[49] There is no dispute that until a certain point, all parties expected Dr. Khedmatgozar to join the Dental Corporation. At different times, it is expressed as a *partnership* but as previously stated, the term was used interchangeably with *corporation* and it is clear that the only intent was to form a corporation to purchase the Blue Heron Dental Group.

[50] The question remains whether or not there was an agreement of some kind? There clearly was and this agreement existed in some form at least until the end of December 2019 and likely until late-January 2020. However, that agreement included various conditions, some that were clearly expressed and some that were not. For example, the agreement contained certain expectations on a timeline during which Dr. Khedmatgozar would obtain his shares in the Dental Corporation. At times, it was expressed in terms of a few months, it was expressed as a year, and it was expressed to coincide with the finalization of the Shareholders' Agreement. There was certainly a condition that a Shareholders' Agreement would be done within a certain timeline.

[51] The agreement for Dr. Khedmatgozar to join was also conditional on Dr. Khedmatgozar assuming his share of the debt assumed by the other two shareholders in the purchase of Blue Herron. For this condition to be fulfilled, Dr. Khedmatgozar had to provide all the necessary information to the bank and have his financing application approved by the bank.

[52] Prior to the purchase of Blue Heron, the bank sent correspondence setting out what it required from each of the prospective shareholders. While Dr. Khedmatgozar argues that he provided information to the bank and that the bank did not ask for anything further, this is of no moment. Dr. Khedmatgozar withdrew his application to the bank to be a shareholder and as such, whatever information he provided to the bank prior to November 15, 2018 is irrelevant. He had already declined to participate.

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[53] Later, Dr. Price took steps in November-December 2019 to respect her part of the agreement. As stated previously, she even went so far as to have Dr. Khedmatgozar added as an owner of the Dental Corporation with the Royal College of Surgeons of Ontario in anticipation of Dr. Khedmatgozar becoming a shareholder of the Dental Corporation. It was clear at this point that the negotiations on the Shareholders' Agreement were essentially completed and the next step was for Dr. Khedmatgozar to fulfill his obligations.

[54] Dr. Price continued to act in good faith and respect her part of the agreement on December 8, 2019 and emailed the National Bank to request the paperwork required to add Dr. Khedmatgozar to the loan in anticipation of his joining the Dental Corporation as a shareholder. On December 9, 2019, Dr. Khedmatgozar said he would provide the National Bank with the information. This was another promise made by Dr. Khedmatgozar that he did not fulfill. By December 27, 2019, the National Bank confirmed that Dr. Khedmatgozar had still not fulfilled his part of the agreement to be entitled to join the Dental Corporation as a shareholder.

[55] On or about December 16, 2019, Dr. Price learned of the judgment against Dr. Khedmatgozar. It is not clear what information she learned and if it was simply the knowledge of the 1.2 million dollar liability or if it was also the findings of the Court about Dr. Khedmatgozar's dishonesty. Regardless, it is clearly understandable that Dr. Price would have been shaken by learning of this undisclosed liability. Furthermore, she testified that as of January 16, 2020, she had no contact with Dr. Khedmatgozar. The evidence suggests that all communications went from Dr. Price to Dr. Dalios and that it was Dr. Dalios who was communicating with Dr. Khedmatgozar. Thus, it was not unreasonable for Dr. Price to have sought a deadline from Dr. Dalios while relying on the fact that he would advise Dr. Khedmatgozar. That is how the parties had chosen to communicate. However, it does not constitute valid or reasonable legal notice and seven days was clearly insufficient.

[56] As such, on January 14, 2020, Dr. Price advised Dr. Dalios that she wanted a firm deadline on completing the process and purported to suggest a hard deadline of seven days. I agree with the Applicants that this deadline was neither reasonable or valid as a proper notice of termination of the agreement between the parties. The same can be said of the formal letter from Dr. Price's lawyer which purported to terminate the agreements on January 29, 2020. I have no difficulty in

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concluding that the timeline set out in the Notice of Termination of January 29, 2020 was invalid. Had Dr. Khedmatgozar promptly taken the steps to meet the bank's requirements for him to become a shareholder, Dr. Price could not have refused and Dr. Khedmatgozar could have required her to comply with the agreement between the parties. I do not agree with the position brought forward by the Applicants that there was no purpose for Dr. Khedmatgozar to comply with the National Bank's requirements after January 29, 2020. This position is without merit given that Dr. Price had not given reasonable notice of her termination of the agreement. The Shareholders' Agreement was negotiated and ready to conclude. I find that if Dr. Khedmatgozar had obtained the approval of the bank, despite his 1.2 million dollar liability, and if a signed version of the Shareholders' Agreement had been presented to Dr. Price, she would have been in a very difficult position to refuse.

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[57] This was entirely within the control of Dr. Khedmatgozar, and he had the obligation under the agreement between the parties to satisfy the condition of obtaining the bank's approval to be added as a guarantor to the debts of the Dental Corporation and be in a position to acquire shares in the Dental Corporation. As of the date of this Application, he had still not done so. Actually, the record suggests that after November 15, 2018, Dr. Khedmatgozar took absolutely no steps to fulfill this essential condition of the agreement between the parties. He is the author of his own misfortune, and it is not for this Court to surmise the reasons for his failure to do his part. It is unknown if he would have ever been accepted as a guarantor by the bank given his liabilities. However, it is not unreasonable to assume that the bank may have never approved him as a potential shareholder and guarantor given that a creditor could have potentially seized his assets, which could have included his shares of the Dental Corporation.

[58] I conclude that but for the lack of proper notice of her termination of the conditional agreement for Dr. Khedmatgozar to acquire shares of the Dental Corporation, Dr. Price's actions are beyond reproach. She acted in good faith throughout the period from November 15, 2018 to January 29, 2020 and acted reasonably in facilitating Dr. Khedmatgozar's fulfilling of the conditions to becoming a shareholder.

[59] Furthermore, the fact that at some point Dr. Price had enough of Dr. Khedmatgozar's failure to meet his obligations to the parties to the conditional agreement is of no surprise. The Court is even surprised that she left the door open to Dr. Khedmatgozar to comply after learning of the undisclosed liability until the end of January 2020. While her purported termination and failure to give reasonable notice was not a valid termination from a contract law perspective, it was certainly a clear written notice of her purported termination, and this meant that Dr. Khedmatgozar had to act post-haste. To have then taken the position that there was no purpose in pursuing anything at that point is again evidence of Dr. Khedmatgozar's approach to this litigation in blaming Dr. Price for everything and then seeking orders from the Court that he is entitled to something that he has never put himself in the position of receiving.

[60] Dr. Khedmatgozar 's position that the Court should enforce a conditional agreement when he never put himself in a position to satisfy the essential conditions for joining the Dental Corporation is without merit.

[61] The Court concludes that there was an agreement between Dr. Price, Dr. Dalios and Dr. Khedmatgozar for Dr. Khedmatgozar to become a shareholder of the Dental Corporation once certain pre-conditions were met. The need to conclude a Shareholders' Agreement was essentially met. However, the sole reason that Dr. Khedmatgozar could never join the Dental Corporation is because he never took the steps to meet the conditions related to bank approval and this was entirely his fault. He had formal notice from Dr. Price on January 29, 2020 that she would not entertain any further delay. While the deadline in that notice was not reasonable, it was a valid notice and it was up to Dr. Khedmatgozar to put himself in a position to force Dr. Price to honour the agreement. He never did and as such, this Court will not enforce an agreement that he has never complied with.

[62] In concealing the existence of the judgment for misappropriating assets, Dr. Khedmatgozar failed to provide full disclosure to his partners as to his ability to provide a guarantee on the loan from the National Bank. As previously noted, his 1.2 million dollar liability was known to him in June 2019. He appealed to the Court of Appeal and his appeal was dismissed in 2020. While he may have taken to position that his liability was not certain until his appeal was disposed of, the reality is that by becoming a shareholder in the Dental Corporation, he would have been putting

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the Dental Corporation at risk of having his shares seized by his creditors. It is something that the National Bank would not have likely permitted. The only reason that we don't have the answer to that question is because Dr. Khedmatgozar never asked and never fulfilled his pre-condition to becoming a shareholder.

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Oppressive Conduct

Oppressive Conduct towards Dr. Khedmatgozar

[63] While the Applicants claim that Dr. Price's refusal to transfer shares in the Dental Corporation to Dr. Khedmatgozar constitutes oppression under the OBCA, that argument has no merit. How could Dr. Price's refusal be oppressive when it is Dr. Khedmatgozar who never met his obligations to qualify as a shareholder despite all of Dr. Price's efforts?

[64] Contrary to the argument put forward by the Applicants, Dr. Price's refusal is not based simply on Dr. Khedmatgozar's failure to provide missing information or his failure to sign the banking documents. It is clearly because he has never met the condition of qualifying as a shareholder. He has never been approved to assume his part of the debt of the Dental Corporation and has never demonstrated that the bank would accept him as a shareholder given his liabilities.

[65] While the Applicants advance that Dr. Khedmatgozar has a beneficial interest in the Dental Corporation, I disagree. Firstly, he made no attempt to crystalize any interest, beneficial or otherwise prior to the acquisition of the Blue Heron clinic. At best, he had a conditional agreement that if he was approved and became personally responsible for his share of the debt, he could become a shareholder in the Dental Corporation. I specifically reject the Applicants' argument that there is *ample evidence* to support the conclusion that Dr. Khedmatgozar has an equity or ownership interest in the Dental Corporation. The evidence is that he has been paid what he put into the business (see below on Unjust Enrichment). A conditional agreement to participate when the conditions are not fulfilled does not result in an equity interest. There is no equity interest and there is no right to damages.

[66] As previously indicated, Dr. Price's letter of January 29, 2020 was notice to Dr. Khedmatgozar that his ongoing delay and failure meet the requirements of the conditional agreement to acquire shares would no longer be tolerated. Dr. Khedmatgozar had rights at that point to reasonable notice and any court would have afforded him a reasonable amount of time to act promptly and fulfill his conditions. He did nothing, other than come to this Court claiming that he should get the benefit of an agreement that he did not comply with. He has no beneficial interest in the Dental Corporation.

[67] I have already stated that Dr. Price's notice of January 29, 2020 did not afford reasonable notice. However, in the face of Dr. Khedmatgozar's inaction, the failure to move the Shareholders' Agreement forward and the failure to provide the bank with the necessary information, it was certainly not oppressive by Dr. Price to have drawn the line in the sand. In the face of knowledge of a significant undisclosed liability of 1.2 million dollars, it was time for Dr. Khedmatgozar to demonstrate that he had the ability to satisfy the bank that he would not be a liability to the Dental Corporation as a shareholder. He was unable or unwilling to do so.

[68] When considering the entire timeline and all the efforts made by Dr. Price to give effect to the conditional agreement between the parties, it is remarkable that she gave Dr. Khedmatgozar as much time and consideration to fulfill his conditions. While I appreciate that various positions were argued by Dr. Price such as the expiration of the agreement on November 15, 2019 and the validity of the seven-day notice on January 14, 2020, these are simply legal positions taken through counsel. Her actions are far from oppressive.

Oppressive Conduct Toward Dr. Dalios

[69] Turning to Dr. Dalios and his claim for oppression as against Dr. Price, it must be put into context. Dr. Dalios agreed to become an equal shareholder with Dr. Price in a situation where there existed a tenuous and conditional agreement for the addition of Dr. Khedmatgozar, who's involvement was uncertain at best and in a situation where he had no Shareholders' Agreement to rely upon in the event that things went sour. This was clearly not a well thought out arrangement. Dr. Dalios now seeks to have this Court complete the Shareholders' Agreement that was never signed.

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[70] Dr. Dalios' position is that it is oppressive of Dr. Price to have refused the two offers by MCA. The first offer in March 2020 was to purchase all the shares of the Dental Corporation for $8,386,000, being 8 x EBITDA. The Applicants proposed to move forward with the sale on the basis that one sixth of the purchase price would be held in trust pending a determination of Dr. Khedmatgozar 's rights.

[71] The second MCA agreement was a Purchase Agreement entered into by Dr. Dalios and Dr. Khedmatgozar on November 9, 2021 for the sale of Dr. Dalios' 50% interest in the Dental Corporation. It is interesting to note that Dr. Khedmatgozar signed the agreement as a director of the Dr. Dana Price Dentistry Professional Corporation.

[72] In the context of the second MCA agreement, Dr. Dalios and Dr. Khedmatgozar were already minority shareholders of the purchasing entity Capital Dentistry Group Limited and had additional benefits to them if the sale of Dr. Dalios' shares went through.

[73] MCA then proceed with a third offer to purchase, this time for all the shares in the Corporation on December 18, 2021 and it only involved Dr. Price and Dr. Dalios. The purchase price was $8,386,000 and included a non-competition clause and that Dr. Price would remain a dentist of the Corporation for a period of five years. The agreement also had a requirement that the Dental Corporation had to maintain its current level of production.

[74] In what the Court deems to be further good faith by Dr. Price, she entered into direct discussions with MCA to explore terms that would be acceptable to her. MCA then made an offer to Dr. Price and Dr. Dalios to sell the shares for $6,800,000, namely 6.5 x EBITDA. The reduction in price was due to the removal of the non-competition agreement and the removal of the requirement that Dr. Price continue to work at Blue Heron. Although the Applicants suggest that Dr. Price negotiated the 6.8 million dollar price, there is no evidence that she ever committed to that price.

[75] It was Dr. Price's evidence in this proceeding that she has no interest in selling the Dental Corporation to MCA as she has no desire to be part of a larger dental conglomerate. Dr. Price also testified that she contacted MCA to find out what would be the purchase price if she did not remain working at Blue Heron. I cannot fault Dr. Price in her actions.

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[76] Both Dr. Price and Dr. Dalios have made offers to the other to buy the other out at 6.3 x EBITDA. These offers have not moved forward.

[77] Oppressive conduct is "burdensome, harsh and wrongful" and may include appropriation of corporate property and breaches of fiduciary duty, typically arising from an abuse of corporate power. It is however not the only conduct that may warrant the exercise of the remedial power of s.248 of the OBCA. Where it is "unfairly prejudicial" to, or "unfairly disregards" the interests of, inter alia, a shareholder, oppression remedies may be imposed. Further, conduct which disregards the interests of any shareholder and not simply a shareholder's legal rights will infringe s.248 of the OBCA: see *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 51-94.

[78] When considering a finding of oppression, I conclude that Dr. Price has not acted in an oppressive manner by refusing to sell her shares in the Dental Corporation. I agree with Dr. Price that if such were the case, any shareholder could create oppression by soliciting offers of sale and arguing that they ought to be accepted.

[79] In the present case, the Applicants are seeking to require Dr. Price to become an employee for 5 years of a corporation that she never asked to be a part of. She has a right to take the position that she does not want to be an employee in a dental conglomerate and then have to meet financial targets to get all her money when she may not fully control the new Blue Heron business entity. Furthermore, she cannot be faulted for refusing to sell her interest for a significantly lower amount if she does not have to remain.

[80] There was no evidence as to the reasonability of Dr. Price refusing a walk-away offer of 6.8 million dollars. It must be considered that the Dental Corporation was purchased for approximately 6.3 million dollars on November 15, 2018. Is a $500,000 profit for the Dental Corporation (her share would be $250,000) a good return on the investment? It is assumed that Dr. Price, if she intended to start working again, would have to start over by either starting up her own practice or finding another practice to purchase. There is no evidence that Dr. Price's refusal to accept the 6.8 million dollar walk-away offer was unreasonable or that she was favoring her own interests over those of the Dental Corporation or even Dr. Dalios.

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[81] There is jurisprudence which suggests that oppression can be argued where a shareholder refuses to accept a proposal which is so favorable to the shareholder that the decision to refuse can be seen as unreasonable. This is not one of those cases. It is perfectly understandable that Dr. Price did not want to accept a proposal which required her to remain involved with Dr. Dalios and Dr. Khedmatgozar as minority shareholders of the purchasing company. There is also nothing unreasonable with the fact that she did not want to sell if: the purchase price was contingent on performance, she had to continue as an employee or that she was subject to a non-competition agreement which could restrict her ability to work elsewhere.

[82] While I accept that these are normal features for a sale/purchase of a dental practice, there is nothing oppressive in the decision by Dr. Price to refuse to be subject to those circumstances.

Other remedies

[83] The Applicants have advanced other arguments to support their position and in particular, they rely on a claim that Dr. Price has been unjustly enriched.

[84] The starting point for such an allegation is the contribution made by Dr. Khedmatgozar to the Dental Corporation and what he expected to receive in return.

[85] The first observation is that Dr. Khedmatgozar made no arrangements when he notified the parties that he would not participate in the Blue Heron acquisition. He did not establish a firm timeline or specific terms of his buy-in to the Dental Corporation or his allocation of shares. He contributed to the deposit for the purchase of Blue Heron and was promptly reimbursed for the deposit. He was also paid $18,682.50 from the Dental Corporation as remuneration for his assistance to Dr. Price and Dr. Dalios which was equal to all payments that they had each received from the Dental Corporation. He was also paid for all his work as a practicing dentist.

[86] The notion of unjust enrichment fails at every level. Firstly, Dr. Price obtained a 50% interest in the Dental Corporation as was agreed after Dr. Khedmatgozar withdrew. But this was not a gratuitous increase to her shareholdings as she was required to increase her personal liability by guaranteeing 50% of the purchase price.

[87] Accordingly, Dr. Price was not unjustly enriched because she got what she paid for through her personal guarantee. Also, Dr. Khedmatgozar did not suffer a corresponding loss because he chose not to participate and was paid up for his contributions.

[88] Finally, there is a juristic reason that Dr. Price has acquired a greater share ownership in the Dental Corporation and that is simply because it was exactly what all the parties agreed to, and she has retained that additional interest because Dr. Khedmatgozar never fulfilled his obligations to become a shareholder. As such, she continues to be liable for 50% of the debt. Furthermore, Dr. Price notified Dr. Khedmatgozar of her termination of the agreement to allow Dr. Khedmatgozar to acquire shares of the Dental Corporation and he has continuously failed to meet his obligations to qualify as a shareholder with the bank.

[89] The Applicant's allegation of unjust enrichment is without merit.

Deadlock

[90] Both parties have advanced arguments for and against a deadlock. Dr. Dalios argues that the Dental Corporation is not making required operational decisions. Also, Dr. Price admits that she no longer wants to continue working with Dr. Dalios and Dr. Khedmatgozar and that the business relationship between the Applicants and herself is no longer feasible. Further, they cannot agree on a scenario where one of them will be allowed to sell their shares to put an to end the situation.

[91] Conversely, Dr. Price argues against a deadlock. Clearly, she is doing this to force the hand of the Applicants to make her a better offer. This is the only reasonable conclusion that can be reached by the fact that she acknowledges that the business relationship is fractured beyond repair but that she does not want to lose control of the process to end the impasse. In argument during the hearing, Dr. Price advanced certain options but each had her maintain an element of control on how the eventual purchase or sale price would be arrived at. Dr. Price wants the best of both worlds.

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[92] Although it can be argued that the circumstances of deadlock that form part of the record may not be fatal to the Dental Corporation, there is no doubt that the relationship between the two shareholders is fractured beyond repair. This litigation has certainly added to the level of animosity between the parties to the extent that they both readily admit that they do not want to continue working together. As such, not only has the quarrelling or incompatibility reached the point of a breakdown in the personal relationships between Dr. Price and Dr. Dalios, neither of them wants to continue working together.

[93] In such circumstances, it can be justifiable for a court to exercise its discretion under s. 207 of the OBCA. That section deals with the wind up of the corporation but also allows for orders to be made under section 248 of OBCA which allows for various orders to be made. Here, neither party has requested that the Dental Corporation be wound up. I agree that it would not be appropriate to wind up the Dental Corporation as this is well known to be a draconian measure to be used as a measure of last resort. Such is not the case given that the Dental Corporation is a going concern, operating successfully with employees and it simply needs to be operated by shareholders who want to work together in a productive manner.

[94] In the present case, I conclude that a deadlock exists and the remedy of a wind up under s. 207 of the OBCA is not warranted. In *Hicks v. Pacific Canada Resources Inc.*, 2011 ONSC 3720, Pepall J., as she then was, made the following comment:

> Here deadlock does exist and it is just and equitable to exercise my discretion pursuant to section 207 of the *OBCA*. However, the company need not be wound up. In the face of deadlock and the exercise of the court's just and equitable jurisdiction, resort may be had to the remedies contained in section 248 of the *Act*.

[95] Here, the Court has not found oppression. In such circumstances, it is just and equitable for the Court to look at the reasonable expectations of the parties, as it would do in the case of an oppression remedy and "such remedies would include, for instance, an order that all shares be sold, or all assets be sold, or that the corporation or other shareholders purchase the shares of the shareholder making application, or that an unanimous Shareholders' Agreement be amended": see *Clarfield v. Manley* (1993), 14 B.L.R. (2d) 296 (Ont. Gen Div.).

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[96] In this case, it was discussed at the hearing of the Application that the Court could order a form of buy/sell. To determine what the just and equitable result would be, the Court will take into consideration the terms of the last draft of the Shareholders' Agreement that the parties negotiated as an indicator of the reasonable expectations of the parties in the event of a breakdown of the relationship.

[97] When turning to the last version of the draft Shareholders' Agreement, both parties have referred to Exhibit 51 of the Affidavit of Dr. Khedmatgozar dated September 25, 2020. It also seems to be the same as Exhibit "U" to the affidavit of Dr. Price dated January 11, 2021.

[98] Section 6 deals with a Right of First Refusal on the sale of shares of the Corporation. However, at the time, there seemed to be disagreement due to Dr. Price's desire to have an overriding Option to Purchase. There were also other provisions of the Right of First Refusal section which were not agreed to.

[99] However, section 7 of the draft Shareholders' Agreement deals with a Buy-Sell. This allows one of the shareholders to provide the option to the other to either buy or sell the Offeror's shares in the Dental Corporation. This represents the clearest expression of the reasonable expectations of the parties of what should happen in the event of a breakdown of their relationship. It brings an end to the business relationship based solely on the price per share and does not incorporate such terms as revenue targets, non-competition provisions or the requirement for ongoing employment with the Dental Corporation.

[100] However, the reality is that in order for the potential buy-sell provision to be fair to both parties, it may have to contain some form of restrictive covenant that would limit the selling shareholder from opening up a new clinic next door to the Blue Heron clinic location. This is particularly relevant for Dr. Price given that she is really the face of the Blue Heron clinic and she could really do the most damage by setting up a competing practice.

[101] It may also be necessary to include other provisions such as a right to advise patients of a pending move or some form of restriction on the purchase price.

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[102] While it may be easy for Dr. Dalios to advise patients of his relocation if he is the seller, it will not be so easy for Dr. Price as she will likely not have a new location established. Provisions must be put in place to determine how the seller can advise/advertise their relocation. I will seize myself of these additional conditions which are not included in section 7 of the draft Shareholders' Agreement.

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[103] In the end, this is the mechanism that is the most just and equitable to bring an end to the business relationship. Both parties will have the opportunity to submit a buy-sell notice in conjunction with sections 7.1 and 7.2 of the draft Shareholders' Agreement which will include a reasonable restrictive covenant on the ability for the selling dentist to set up a new clinic within a certain geographical area and such other provisions as the parties can agree. If they cannot agree, the parties will appear before me, and I will determine the exact terms of the buy-sell process.

[104] If the parties are able to finalize the terms of the buy-sell without Court assistance, they can move on to the issue of costs and if they are unable to resolve that issue, they may make costs submissions in writing, maximum five pages plus attachments. I will assume that they will be able to determine a timetable for costs submissions failing which they can write to me.

CONCLUSION

[105] For the reasons set out herein, the Court concludes:

a. There was no partnership;

b. There was an agreement for Dr. Khedmatgozar to become an equal shareholder of the Dental Corporation and Dr. Khedmatgozar failed to meet his obligations. That agreement has been terminated by Dr. Price.

c. There was no oppressive conduct by Dr. Price.

d. There is no unjust enrichment.

e. The Dental Corporation is in a deadlock and the deadlock shall be remedied by the way of the buy-sell provisions of the draft Shareholders' Agreement as more specifically determined by the parties or the Court. The Court shall remain seized of the buy-sell process.

f. Otherwise, the Applicants' claims are dismissed.

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JUSTICE MARC R. LABROSSE

Released: July 14, 2023

CITATION: Dalios et al v. Price et al, 2023 ONSC 4179
COURT FILE NO.: CV-20-84595
DATE: 2023/07/14

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DR. DEMETRIUS DALIOS and
DR. MAHMOOD KHEDMATGOZAR

Applicants

– and –

DR. DANA PRICE and DR. DANA PRICE
DENTISTRY PROFESSIONAL CORPORATION

Respondents

REASONS FOR JUDGMENT

Labrosse J.

Released: July 14, 2023