COURT OF APPEAL FOR ONTARIO

CITATION: Marketology Media Inc. v. DGA North American Inc., 2024 ONCA 799
DATE: 20241031
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Lauwers, Zarnett and Pomerance JJ.A.

BETWEEN

Marketology Media Inc.

Plaintiff (Respondent/

Appellant by way of cross-appeal)

and

DGA North American Inc.*, Altaris Investments Holding Inc.*, DGA Fulfillment Services Inc.*, John R Finley, Jennifer Peng and Pauline Peng Skinner (aka Pauline Peng)*

Defendants (Appellants*/

Respondents by way of cross-appeal*)

John J. Adair and Kathleen Glowach, for the appellants/respondents by way of cross-appeal

Ryan Breedon and Jeff Kemp, for the respondent/appellant by way of cross-appeal

Heard: September 18, 2024

On appeal from the judgment of Justice Andra Pollak of the Superior Court of Justice, dated July 31, 2023.

REASONS FOR DECISION

OVERVIEW

[1] The appellant DGA North American Inc. (“DGA NA”), and the respondent, Marketology Media Inc. (“Marketology”), were parties to a contract to provide “inserts” into Sears catalogue brochures. In August 2010, DGA NA terminated that contract. In November 2010, Marketology sued DGA NA claiming $27 million from DGA NA in connection with the termination of the contract. The dispute eventually proceeded to arbitration.

[2] Shortly after Marketology served DGA NA with the statement of claim, the appellant, Pauline Peng, the directing mind of DGA NA, its holding company, the appellant Altaris Investments Holding Inc., and its sister company DGA Fulfillment Services Inc., began to transfer assets from DGA NA to Altaris and DGA Fulfillment Services. These transfers continued for some time, variously described as dividends, payments for expenses, and repayments of shareholder loans.

[3] On May 6, 2014, the arbitrator found DGA NA liable for breach of contract and issued an award in favour of Marketology in the sum of $878,638.36 (inclusive of costs and disbursements). DGA NA refused to pay the arbitral award. The appellants claim it did not have the funds to do so. The parties take the position that by the time of the award DGA NA was insolvent, although Marketology claims it was the transfers that left DGA NA insolvent. Due to DGA NA’s refusal to pay,

Marketology brought an application to recognize the award. On March 4, 2015, Newbould J. granted judgment recognizing the arbitrator's award as binding and enforceable in the same manner as a judgment of the Superior Court of Justice.

[4] Marketology then brought an action alleging that the transfers were fraudulent conveyances, and that they were oppressive. The two claims were linked. Marketology's primary position was that the conduct was oppressive because the transfers to Altaris and DGA Fulfillment Services were for the purpose of defeating, hindering, delaying, or defrauding creditors.

[5] The trial judge did not decide whether the transfers were fraudulent conveyances but allowed the claim of oppression, doing so on a basis that was neither pleaded, nor explored in the evidence.

[6] The trial judge's reasons are legally insufficient in that they do not disclose a clear and intelligible path to the result. Before us, the parties agree that the reasons are deficient. The appellants argue that the trial judge properly dismissed the fraudulent conveyance claim and that the judgment for oppression cannot stand because it was premised on a ground not advanced by the respondent. Alternatively, they submit that a new trial is required. Marketology asks this court to enter a finding of fraudulent conveyance and to uphold the judgment based on the evidence that was before the trial court.

[7] We do not agree that the trial judge's findings were dispositive of the fraudulent conveyance claim as the appellants suggest. As well, we are unable to step into the shoes of the trial judge in the manner requested by Marketology. The reasons are internally inconsistent. We cannot be confident that any of the findings are sufficiently cogent to withstand scrutiny. It is beyond this court's proper role to conduct a *de novo* analysis. Therefore, the only available remedy is a new trial.

BACKGROUND

[8] The principal of DGA NA, Pauline Peng, testified that DGA NA began to face operational difficulties in 2010. Its prospects diminished further when in December 2011 Sears gave notice that it was terminating DGA NA's contract, effective March 10, 2012. Ms. Peng testified that by the summer of 2013 it was apparent that the company was no longer viable.

[9] Between 2010 and 2015, DGA NA transferred funds through a series of transactions to its parent company, Altaris. In total, it appears a net amount of $924,038 was transferred from DGA NA to Altaris between the date Marketology delivered its statement of claim to DGA NA and the date of the arbitration award.[1] During this time DGA NA also transferred $600,000 to its sister company, DGA Fulfilment Services, for "administrative expenses" and "administration fees".

[1] During this period, DGA NA also paid at least $24,237 of Altaris's expenses.

[10] Marketology brought an action against the appellants alleging fraudulent conveyance and oppression. Marketology claimed that the transfers were made for the purpose of circumventing its ability to collect the award. This was the basis for both the claim of fraud and the allegation of oppression.

[11] Marketology sought repayment from the appellants of the amount owing to it under the arbitration award on a joint and several basis. Marketology also sought punitive damages in the amount of $100,000.

[12] The trial judge did not give judgment on the claim of fraudulent conveyance but allowed the claim on the basis of oppression. She ordered that the appellants pay Marketology the amount of $1,119,097.27 plus pre-judgment interest. She dismissed the claim for punitive damages, finding that the appellants' conduct did not meet the test for such an award.

[13] The appellants argue on appeal that the trial judge erred in granting an oppression remedy. They say the trial judge attributed a reasonable expectation to the respondent that was not the subject of pleadings, not supported by the evidence, and inconsistent with the rejection of the claim of fraudulent conveyance. The respondent cross-appeals, alleging that the trial judge erred in failing to find that the transfers met the test for fraudulent conveyance.[2] On this basis, rather

[2] The respondent also alleged in its notice of cross-appeal that the trial judge erred in failing to award punitive damages. However, the respondent did not pursue this in its factum.

than the one the trial judge articulated, the respondent also asks this court to uphold the finding of oppression.

ANALYSIS

(1) Fraudulent conveyance

[14] The trial judge did not give effect to the claim of fraudulent conveyance, though her reasons for refusing to do so are unclear. In some passages, the trial judge stated that she accepted Ms. Peng's evidence that she had no intention to defraud creditors when transferring the funds and that her motivation was to keep the DGA NA business afloat. As the trial judge put it in para. 31 of her reasons:

> I accept Ms. Peng's evidence that her intent was to keep the businesses afloat and eventually pay all creditors back. I do not find that the Plaintiff has proven fraudulent intent on Ms. Peng's part. Rather, I accept that she believed she could continue to pay all of the Defendant's outstanding expenses without accounting for the Marketology award. This is supported by the Defendants' "business as usual" defence.

[15] The trial judge also accepted, at para. 19, Ms. Peng's assertion that she initially believed Marketology's claim to be frivolous. This would imply that the trial judge accepted that the payment of the $408,000 dividend, shortly after service of the statement of claim, had nothing to do with the pending action. The appellants rely heavily on these passages, especially the statement in para. 31 of the trial judge's reasons, to say that the trial judge conclusively found that none of the payments were fraudulent conveyances.

[16] However, in other passages the trial judge took a different approach. In para. 43, after setting out the chronology of transfers from DGA NA to Altaris and DGA Fulfillment Services, she referred to it as “evidence of DGA NA’s intention to avoid or delay payment to its creditors, including Marketology”. This finding was made in connection with the claim of oppression. But if the intention was to avoid or delay payment to creditors, that would support a finding of fraudulent conveyance.

[17] In the very next paragraph, para. 44, the trial judge, took pains to note that DGA NA’s “intent was not to harm” Marketology. However, this was contradicted by a later passage, at para. 45, in which trial judge found that “the acts of the Defendants were made at the direction of Ms. Peng and for her benefit, to protect her by preserving the corporate Defendants’ assets against creditors.”

[18] In yet another passage, at para. 48, the trial judge asserted that it was unnecessary to determine whether one or more of the payments were fraudulent. As she put it:

> In light of the remedy requested by the Plaintiff, the evidence and the finding that the oppression claim should succeed, it is not necessary for this court to determine whether the $408,000 dividend, made shortly after service of the Plaintiff’s claim, was made for the purpose of defeating Marketology or whether the transactions made by DGA NA were fraudulent conveyances.

[19] It is difficult to reconcile these findings with one another. Nor does the legal analysis shed any light. The trial judge expressly referred to the “badges of fraud” that are relevant in assessing fraudulent intent, but she failed to apply those criteria

to the facts, or otherwise engage with the legal test. Her reasons on the issue of fraudulent conveyance are more conclusory than explanatory. We will return to this when discussing the sufficiency of reasons.

(2) Oppression

[20] Based on the pleadings, there was arguably no path by which the trial judge could reject the allegation of fraudulent conveyance yet accept the allegation of oppression. The two were inextricably linked; they were alternate characterizations of the same act of wrongdoing. Marketology argued that the transfers of funds were fraudulent conveyances and, for that reason, oppressive.

[21] This is apparent from the written closing submissions filed by Marketology, which argued: “The inescapable conclusion from the evidence before the court is that the $408,000 Dividend [the first impugned transfer] was made for the purpose of defeating Marketology. For the same reason, it was oppressive” (emphasis added).

[22] The trial judge, on her own initiative, offered a different theory of oppression, one that had not been pleaded or argued. She began by describing the question as “whether Marketology had a reasonable expectation and if that expectation was violated by conduct which is ‘oppressive’, ‘unfairly prejudicial’ or that ‘unfairly disregards’ its interest”. She noted DGA NA’s explanations for the transfers as loan

repayments to Altaris, payments for expenses, and administrative payments to DGA NA's sister company.

[23] She went on to state the following, at para. 44:

> I find that the Plaintiff had a reasonable expectation that DGA NA would act to protect its interests in having the Arbitrator's Award, and the court order recognizing that award as an order from the court, enforced. Although I have found that the Defendant's intent was not to harm the Plaintiff, which is now in the position of not being able to enforce its court order against DGA NA, no reserve was created for this debt, resulting in unfair prejudice to the Plaintiff. I have considered whether the acts of DGA NA were unforeseeable, and whether the Plaintiff could reasonably have protected itself from these acts. The evidence shows, in my view, that it could not have done so.

[24] As is apparent in the above passage, the trial judge found that the respondent had a reasonable expectation that DGA NA would "act to protect its [the respondent's] interests in having the Arbitrator's Award … enforced." She ruled that DGA NA violated that expectation by failing to create a reserve for the award.

[25] The appellants argue that these findings reflect error. The onus was on the respondent to identify the expectation it claimed was violated, especially when this expectation was said to apply in particular circumstances: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 70. The respondent did not identify the expectation the trial judge found. There is no evidence that Marketology expected DGA NA to create a reserve to cover the Arbitrator's award,

or when this expectation would have arisen. By the time of the award, most of the payments by DGA NA to Altaris and DGA Fulfillment Services had already been made.

[26] Other questions remain unanswered on the trial judge's analysis, given that to ground oppression relief, the expectation must be reasonable: *BCE*, at para. 70. When did the expectation that DGA NA would set aside a reserve to pay Marketology's claim reasonably arise, given that the claim was contested, and at least for some period of time, considered by Ms Peng and her professional advisors to be unmeritorious? How much should DGA NA have set aside in the reserve fund, and when should it have done so? How would setting up the reserve have affected other unsecured creditors, including those not operating at arms-length?

[27] As noted above, DGA NA claimed that most of the payments were for administrative expenses or to repay loans. Although the trial judge noted that the expense payments to DGA NA's sister company were "suspicious", she did not make a finding that the expenses were fictitious or that the Altaris loans were illegitimate. The appellants argue that by giving judgment against them for the full amount owed to Marketology, the trial judge effectively gave Marketology priority over other unsecured creditors.

[28] The trial judge focused, not on the transfers, but rather on a reasonable expectation that a reserve fund be created. However, a reserve was not an issue raised in the pleadings in argument, and the parties were not given an opportunity to address the issue. She did not identify the nature, timing, or quantum of such a fund, with the result that the remedy rested on a notional, abstract expectation with no concrete evidentiary support.

[29] Therefore, we find that the trial judge committed an error of law, and proceeded in a manner that was procedurally unfair, by deciding the case on a basis that was not “anchored in the pleadings, evidence, positions or submissions of any of the parties". That type of error displaces deference and by itself warrants appellate intervention: *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677, at para. 5; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.), at para. 62; *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401, at para. 13.

[30] That same error makes it difficult to assess the nature and proportionality of the remedy. As with the reasons dealing with fraudulent conveyance, the reasons addressing the oppression claim were more conclusory than explanatory. We turn now to a discussion of the sufficiency of reasons.

(3) Sufficiency of Reasons

[31] The appellants and respondent agree on one thing: the reasons of the trial judge are deficient. We agree. The reasons fail to chart a logical path from premise to conclusion. There are inconsistent findings. Because it is not clear how the trial judge arrived at certain conclusions, the reasons do not permit meaningful appellate review. They are legally insufficient.

[32] It is trite to observe that reasons for judgment setting out a logical path to the judge's conclusion are integral to the proper administration of justice. Reasons serve various purposes. They explain the decision to the parties, they foster public accountability, and they permit effective appellate review: see *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 11. They lead to "better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out": see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39.

[33] Reasons need not, and should not, chronicle the entire deliberative process. They are not to be an exercise in "watch me think": *R.E.M.*, at para. 17. They must, however, chart a path from the evidence to the factual findings to the legal conclusions: *R.E.M.*, at para. 20. They must explain not only what the decision is, but why. Reasons need not be of any particular length – the issue is quality, not quantity. Nor should they be subject to an abstract or unrealistic standard of

review. The Supreme Court of Canada has discouraged appellate courts from engaging in a technical search for error, or artificially parsing language used to convey a point: *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at paras. 5, 69. What is necessary is an examination as to whether the reasons, considered in the context of the entire record, show that the trial judge has "seized the substance of the matter": *R.E.M.*, at para. 43; *Sagl v. Chubb Insurance Company of Canada*, 2009 ONCA 388, 249 O.A.C. 234, at para. 91, leave to appeal to refused, [2009] S.C.C.A. No. 303.

[34] We accept that restraint is appropriate when evaluating the sufficiency of reasons. We have applied that measure in this case but are compelled to conclude that we must intervene. The reasons are not sufficient to achieve the purposes they are designed to serve.

[35] While the respondent acknowledges that the trial judge's reasons are "obviously deficient", it argues that this court should substitute findings that the impugned transfers were fraudulent conveyances and were oppressive. The respondent says that "[w]hile the trial judge's reasons fail to address the real issues in the case, her conclusion – that the Appellant's conduct was oppressive – is inescapable."

[36] We do not agree. First, it is not our role to try the case afresh. Doing so would require us to step into the shoes of the trier of fact. Second, this case turns,

at least in part, on findings of credibility. Those are uniquely within the realm of the trier of fact, and the reasons do not disclose how the trial judge reconciled the conflicting evidence. Third, it cannot be said that any factual or legal conclusion is inescapable on the record before the trial court. The transfers raised questions. The appellants offered explanations. Whether those explanations are accepted or not is to be determined by a trier of fact upon consideration of the whole of the evidence.

DISPOSITION

[37] In short, the record does not inevitably yield a particular outcome. We find that the only proper remedy in this case is to set aside the judgment of the trial judge, including her decision on costs, and remit the matter back for a new trial.

[38] As for the appeal, we order costs in favour of the appellants in the amount of $40,000, the amount agreed upon by counsel for the parties. Costs of the first trial are reserved to the judge hearing the new trial.

“P. Lauwers J.A.”
“B. Zarnett J.A.”
“R. Pomerance J.A.”