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Docket: CI 19-01-22125
(Winnipeg Centre)
Indexed as: Nolin v. Nolin
Cited as: 2021 MBQB 120

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:)	APPEARANCES:
)	
DEBRA RAE NOLIN,)	<u>Michael Gerstein</u>
)	for the applicant
)	
applicant,)	<u>Tristan Smith</u>
- and -)	for the respondents
)	
DALE NOLIN AND 6644083 MANITOBA LTD.,)	
)	
respondents.)	<u>Judgment delivered:</u>
)	May 28, 2021

BOCK J.

Introduction

[1] This is an application under s. 234 of *The Corporations Act*, C.C.S.M. c. C225 (the "**Act**"). The applicant, Debra Rae Nolin, alleges that she is the victim of oppressive conduct committed by her husband, Dale Nolin, and 6644083 Manitoba Ltd., the company in which the Nolins are equal shareholders.

[2] A complicating factor in this dispute is the dissolution of the Nolins' marriage. Mr. and Ms. Nolin were married in 1979. They separated on January 1, 2015. The Court of Queen's Bench Registry informs me that on April 5, 2017, Ms. Nolin filed a petition for

divorce. Those divorce proceedings (FD 17-02-07709) continue as of the date of these reasons.

[3] Ms. Nolin complains that Mr. Nolin caused 6644083 Manitoba Ltd. to issue dividends to her every year from 2014 to 2019 without her consent or knowledge, and without ever delivering payment of those dividends directly to her. She calculates the total amount of those dividends to be \$295,222.75 from 6644083 Manitoba Ltd. and \$34,633 from MDN Financial Corporation, another jointly-owned company. This is taxable income in her hands, and has given rise to a corresponding tax liability she calculates to be \$87,201.11.

[4] Mr. Nolin admits the dividends were issued in favour of Ms. Nolin. He asserts the resulting dividend income was used by him for Ms. Nolin's benefit, to cover some of her personal expenses. He says prior to their separation, he and Ms. Nolin had established a practice of dividending income from 6644083 Manitoba Ltd. and MDN Financial Corporation and applying it to some of their personal expenses. He says he simply continued this practice after January 1, 2015, and applied Ms. Nolin's share of the dividend income for her benefit to some of her personal expenses.

[5] For the reasons that follow, I am dismissing Ms. Nolin's application.

Background

[6] The Nolins are shareholders, officers and directors of two companies, 6644083 Manitoba Ltd. and MDN Financial Corporation. MDN Financial Corporation is not a party to this application. Despite that, Ms. Nolin invites the court to consider her treatment as a shareholder of that corporation as part of this application. Until 2015, Mr. Nolin

prepared and filed his own and Ms. Nolin's tax returns. After their separation in 2015, Ms. Nolin engaged a professional accounting firm to prepare and file her tax returns.

[7] According to Ms. Nolin, in spring 2017 she received a notice of assessment from Canada Revenue Agency informing her of a tax balance due of \$3,952.08. Upon making further inquiries, she learned that 6644083 Manitoba Ltd. had issued a dividend to her in 2016. Canada Revenue Agency included the amount of that dividend in its assessment, hence the outstanding balance of tax payable. She was both surprised and confused by her discovery of this dividend, because she had not received notice from the company that a dividend had been declared, a T5 statement of investment income, or direct payment of the dividend itself.

[8] Ms. Nolin testifies that in 2018 and 2019 "the same situation occurred and the CRA contacted me to inform me that I owed taxes on my personal income taxes due to alleged dividends issued to me" by 6644083 Manitoba Ltd.

[9] In May 2019, Ms. Nolin retained counsel (different counsel than she had retained with respect to her marital proceedings) to assist her in connection with the issuance of these dividends. Further communications between counsel for Ms. Nolin and corporate counsel for Mr. Nolin and 6644083 Manitoba Ltd. confirmed that dividends had been issued in the years in question in favour of Mr. and Ms. Nolin at the direction of Mr. Nolin.

[10] Mr. Nolin explains that after 2015, he was instructed by counsel in their marital proceedings not to contact Ms. Nolin. For that reason, he did not cause T5 statements to be sent directly to her, nor did he otherwise inform her about the dividends declared in her favour. But, he says, Ms. Nolin ought to have known about these dividends

because: (a) that had been their practice prior to their separation; (b) her notices of assessment and other information on file with Canada Revenue Agency, including the T5 statements, contained that information and were accessible by her; and (c) some of her personal expenses were obviously being paid.

[11] Exhibit "A" to Mr. Nolin's affidavit sworn October 4, 2019, contains a summary of the expenses Mr. Nolin says he paid on behalf of Ms. Nolin using her dividend income. For the purposes of this application, Ms. Nolin does not dispute the accuracy of the information contained on Exhibit "A". According to Mr. Nolin these expenses were incurred for a variety of purposes, for example: to preserve marital assets that have yet to be evaluated and divided (such as the marital home in which Mr. Nolin continues to reside), for the benefit of the Nolins' adult daughter Megan, and to pay the loan on Ms. Nolin's car.

[12] Ms. Nolin submits Mr. Nolin's conduct in this regard has unfairly disregarded her interests. She therefore seeks an order by which Mr. Nolin and 6644083 Manitoba Ltd. be required to pay directly to her either the full amount of all dividends previously declared in her favour from 2014 to 2019, or an amount equal to the tax payable in respect of those dividends.

The issue

[13] At issue is whether Mr. Nolin has engaged in conduct that is oppressive or unfairly prejudicial or that unfairly disregards Ms. Nolin's interests within the meaning of s. 234(2) of the *Act*.

The parties' positions

[14] The parties both cite *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560 (QL), in which the Supreme Court held that a claim for oppression involves two related inquiries: first, "Does the evidence support the reasonable expectation asserted by the claimant?"; second, "Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?" (at para. 68)

[15] Ms. Nolin bases the existence of her reasonable expectations on the legal rights conferred on her as a shareholder under the *Act*. She submits she had a reasonable expectation as a shareholder that she would receive any dividend declared by the board in accordance with s. 24 of the *Act*. Mr. Nolin violated her reasonable expectations by causing dividends to be declared without her knowledge or consent, and by withholding those dividends and applying them to the expenses listed in Exhibit "A" to Mr. Nolin's affidavit.

[16] Mr. Nolin counters that Ms. Nolin's reasonable expectations must be considered in their proper context and with regard to the Nolins' relationship. He notes that Mr. and Ms. Nolin were both shareholders, directors and officers of 6644083 Manitoba Ltd., and that it is a small family company. Prior to their separation in 2015, dividends had been issued to both of them, and Ms. Nolin's dividends had been applied to pay some of her expenses and to support their adult daughter, Megan. In the circumstances, Ms. Nolin should have reasonably expected that this practice would continue, as it did, after their separation in 2015. Thus, Ms. Nolin's reasonable expectations were met. Alternatively,

if Ms. Nolin's reasonable expectations were violated, they were violated only to the extent that she was not included in, or explicitly informed of, the decisions to declare and issue the dividends about which she complains.

Discussion and disposition

[17] Without intending any disrespect to either Mr. or Ms. Nolin, I find their respective positions to be shaded by a degree of disingenuousness.

[18] For her part, Ms. Nolin says she was "confused" by her discovery in 2017 of the dividend that had been issued to her in 2016. But she took no real steps to investigate the situation until 2019, even after learning of another dividend in 2018, and despite having ready access to professional legal and accounting advice. The obvious explanation for the situation which Ms. Nolin says confused her in 2017, and one that ought to have occurred to her at the time, is the explanation ultimately proffered by Mr. Nolin in this application: 6644083 Manitoba Ltd. had continued to issue dividends to the Nolins after their separation on January 1, 2015, just as it had prior to their separation, and Ms. Nolin's dividends had continued to be used to pay some of her expenses.

[19] For his part, Mr. Nolin pleads his conduct in respect of the dividends in question, both in causing the corporation to issue them and in using the proceeds to pay for some of Ms. Nolin's expenses, simply followed past practice. His failure to inform Ms. Nolin of the issuance of those dividends was nothing more than his innocent attempt to respect counsel's request not to communicate with Ms. Nolin after their separation. Mr. Nolin's position strikes me as a bit cute, given that he, too, had retained counsel to advise him in the marital proceedings. After their separation on January 1, 2015, it should have

been obvious to Mr. Nolin that he ought to keep Ms. Nolin appropriately involved and informed with respect to decisions concerning 6644083 Manitoba Ltd., particularly with respect to the issuance of any dividends. Mr. Nolin could have accomplished this easily by communicating with Ms. Nolin through their respective counsel. It should have been equally obvious to Mr. Nolin that it was up to Ms. Nolin to decide how dividends issued to her would be used by her.

[20] In short, this application could have been avoided had the parties acted reasonably in the circumstances. This is especially true of Mr. Nolin, because it was he who exercised control over 6644083 Manitoba Ltd. during the period in question, and who used the dividends issued in favour of Ms. Nolin on her behalf.

[21] In my opinion, in the context of this particular company and having regard to the relationships at play within that company – a small family business, owned equally by husband and wife, which had paid dividends to them equally to pay personal expenses both before and after their separation on January 1, 2015 – Ms. Nolin’s reasonable expectations were met.

[22] If I am wrong, and Ms. Nolin’s reasonable expectations in respect of the issuance of dividends to her were not met, then I am mindful that the purpose of the equitable remedy provided by s. 234 is to ensure “fairness” (See *BCE* at para. 58). The remedy sought by Ms. Nolin is, in effect, a second payment of dividends that have already been paid on her account and spent on her behalf and for her benefit. Judgment on the terms she proposes would result in a double recovery, which is neither fair nor justified in this particular situation. Had I found Ms. Nolin to be the victim of Mr. Nolin’s unfair disregard

under s. 234, I would have ordered that henceforth Mr. Nolin and 6644083 Manitoba Ltd. strictly comply with the requirements of the **Act** with respect to the issuance and delivery of any further dividends declared by that corporation, so correcting the unfair conduct about which Ms. Nolin complains. Such a decision would be consistent with the admonition of the Manitoba Court of Appeal in **63833 Manitoba Corp. v. Cosman's Furniture (1972) Ltd.**, 2018 MBCA 72, [2018] 11 W.W.R. 232 (QL), to " ... grant the least obtrusive form of relief that will satisfy the need to rectify the matters complained of" on an oppression application (at para. 44).

[23] In coming to this decision I have not ignored Ms. Nolin's complaint that Mr. Nolin, by his conduct, has deprived her of her right to choose how to spend the dividend income allocated to her in the years in question. But counsel for both parties acknowledged in the course of their submissions that the court in the marital proceedings now underway has the authority to make any necessary financial adjustments to ensure a fair outcome. If Ms. Nolin has concerns with respect to any particular expense enumerated in Exhibit "A" to Mr. Nolin's affidavit, she is free to raise those concerns in that proceeding. I understood her concession with respect to the accuracy of the information contained in Exhibit "A" to have been made for the purpose of this application only, and no more.

[24] Finally, I find this observation by Greenberg J. in **Lopes v. M.R. Lopes Investments Inc.**, 2018 MBQB 5, 80 B.L.R. (5th) 233 (QL), to be especially apt: this case, " ... as many involving small companies, is really more a family dispute than a business dispute and an applicant cannot reasonably expect that the remedies available under s. 234 will resolve those issues." (at para. 89).

[25] Ms. Nolin's application is therefore dismissed. However, I order Ms. Nolin and Mr. Nolin's costs shall be borne by each of them personally, or, subject to their agreement and as may be permitted by law, by the corporation. In other words, the respondents' costs are to be treated as incurred entirely for the benefit of Mr. Nolin, and should be paid by him personally unless the parties can agree on payment of their respective legal fees by the corporation.

_____ J.