COURT OF APPEAL FOR ONTARIO

CITATION: Libfeld v. Libfeld, 2023 ONCA 128
DATE: 20230228
DOCKET: C69714, C69751, C70031 & C70032

Roberts, Miller and Nordheimer JJ.A.

DOCKET: C69714

BETWEEN

Mark Libfeld, 1331081 Ontario Inc., 2091170 Ontario Inc.
and Vitanna Construction Ltd.

Applicants (Respondents)

and

Sheldon Libfeld, Corey Libfeld, Jay Libfeld,
Shelfran Investments Ltd. and Viewmark Homes Ltd., and their respective
affiliates and subsidiaries as set out on Schedule “A” to the Notice of Application

Respondents (Appellant)

AND BETWEEN

Sheldon Libfeld, 1331088 Ontario Inc., Corey Libfeld,
1331078 Ontario Inc., Jay Libfeld and 1331091 Ontario Inc.

Applicants (Appellants/Respondents)

and

Mark Libfeld, 13318081 Ontario Inc., Edith Lorraine Libfeld
and The Conservatory Group Companies (as listed in schedule A)

Respondents (Respondents)

DOCKET: C69751

AND BETWEEN

Mark Libfeld, 1331081 Ontario Inc., 2091170 Ontario Inc.
and Vitanna Construction Ltd.

Applicants (Appellants)

and

Sheldon Libfeld, Corey Libfeld, Jay Libfeld, Shelfran
Investments Ltd. and Viewmark Homes Ltd., and their respective
affiliates and subsidiaries as set out on Schedule “A” to the Notice of Application

Respondents (Respondents)

DOCKET: C70031

AND BETWEEN

Mark Libfeld, 1331081 Ontario Inc., 2091170 Ontario Inc. and
Vitanna Construction Ltd.

Applicants (Respondents)

and

Sheldon Libfeld, Corey Libfeld, Jay Libfeld, Shelfran
Investments Ltd. and Viewmark Homes Ltd., and their respective
affiliates and subsidiaries as set out on Schedule “A” to the Notice of Application

Respondents (Appellants/Respondent)

DOCKET: C70032

AND BETWEEN

Sheldon Libfeld, 1331088 Ontario Inc., Corey Libfeld, 1331078 Ontario Inc., Jay Libfeld and 1331091 Ontario Inc.

Applicants (Appellants/Respondent)

and

Mark Libfeld, 1331081 Ontario Inc., Edith Lorraine Libfeld and The Conservatory Group Companies (as listed in Schedule A)

Respondents (Respondents)

Paul Steep, Holly Kallmeyer and Ian Hull, for the appellants (C69714) and respondents (C69751, C70031 and C70032), Corey Libfeld and 1331078 Ontario Inc.

Peter H. Griffin, Kathleen Glowach and Sarah Bittman, for the appellants (C69751) and respondents (C69714, C70031 and C70032), Mark Libfeld, 1331081 Ontario Inc., 2091170 Ontario Inc., and Vitanna Construction Ltd.

David Chernos, Patrick Flaherty and Bryan MacLeese, for the appellants (C70031 and C70032) and respondents (C69714 and C69751), Sheldon Libfeld and 1331088 Ontario Inc.

Gary Luftspring and Andrea Sanche, for the appellants (C70031 and C70032) and respondents (C69714 and C69751), Jay Libfeld and 1331091 Ontario Inc.

Harvey Chaiton, for the Court-Appointed Sales Officer

Heard: September 29, 2022

On appeal from the judgment of Justice Thomas J. McEwen of the Superior Court of Justice, dated October 25, 2021, with reasons reported at 2021 ONSC 4670.

B.W. Miller J.A.:

[1] This set of appeals originates from the breakdown of a business relationship of the four Libfeld brothers. The brothers – Sheldon, Mark, Jay, and Corey – are equal owners of The Conservatory Group ("the Group"), a Toronto-based real estate development business.

Background

[2] The Conservatory Group is a partnership. Although it is a complex and substantial enterprise – operating through hundreds of incorporated entities – there is no written partnership agreement that governs the decision-making of the Group, including the terms of its dissolution. The absence of such an agreement is rooted in the history of the Group, which originated as the sole proprietorship of Theodore Libfeld, the father of Sheldon, Mark, Jay, and Corey. Each of the brothers joined the family business as they came of age and worked under the direction of their father. Each brother came to specialize in a different aspect of the business, with Theodore remaining as the primary decision maker until his death in 2000.

[3] After the death of Theodore, the four brothers continued the business, more or less following the pattern of affairs established under Theodore and without any formal mechanisms for governance. The Group operated on a "project" or "asset" basis, without maintaining consolidated financial statements, budgets, or business plans. Sheldon was generally responsible for the Group's finances and was the most involved with the overall management. He correspondingly has a unique

understanding of the workings of the Group. The assets of the Group are owned in equal shares by the four brothers, with the exception that Edith Libfeld – Theodore's wife and the mother of the four brothers – owns 10% of the common shares of Shelfran Investments Ltd., the most substantial of the corporate entities within the Group.

[4] Conflicts among the brothers began to surface in 2005, relating to the Group's practice of cash distribution. The longstanding practice of the Group was to retain profits within the Group, minimizing cash distributions to each brother, and deferring income tax liability. The Group's high retention of cash has been of strategic importance, allowing it the option of self-financing and providing flexibility in the timing of its acquisition and sale of properties. At the time of the hearing of the applications, the cash holdings of the Group were estimated to be between $250 and $500 million.

[5] The brothers each received the same monthly cash distribution. Their financial priorities differed, however, and this generated conflict. After Mark, the eldest, suffered a heart attack, he became more acutely aware of the tax liability that his estate would face on his death, and the difficulty this would cause his wife and children. He proposed that the Group significantly increase the life insurance it provided for each of the partners. The other brothers were unwilling. Additionally, Corey, the youngest, found the monthly distribution inadequate to support what he viewed as a reasonable standard of living.

[6] By 2015, the relationship between the brothers had descended into open conflict affecting not only each other but their respective families and their employees and business partners. The particulars of the conflicts, which are chronicled by the trial judge, are unedifying and for the most part do not bear on any of the issues on appeal. There is therefore no need to recount them in any detail. It is sufficient to note the trial judge's findings that there was "extreme dysfunction" among the brothers, they do not trust each other, and they are unable to work together.

The proceedings below

[7] Mark and his related companies commenced an application in 2017 against the other three brothers and their related companies. Among other relief, he sought a declaration winding up the Group under the supervision of a monitor. Thereafter, each of Sheldon, Jay, and Corey, together with their related companies, initiated applications against Mark, his related companies, Edith, and other Group corporations. After a falling out with Sheldon and Jay in 2018, Corey formally switched sides in the litigation in January 2019 to support Mark.

[8] Their respective positions at trial were essentially this. Sheldon and Jay sought to remain as partners with each other and allow the Group to carry on in some form. Mark sought to dissolve the Group entirely and carry on business alone. So did Corey.

[9] To effect their ends, Sheldon and Jay proposed a Buy-Sell transaction where they would either be the buyers or sellers of the Group with Mark or Corey or both having the first opportunity to elect to be the purchasers. As an alternative, they sought a structured buyout of Mark's and Corey's interests in the Group.

[10] Mark proposed a Modified Restructuring Protocol which would divide the Group into four parts, with each brother allocated one part. In the alternative, he sought a total liquidation, wind-up, and sale of the Group on the condition that none of the brothers be permitted to purchase any of the assets of the Group. The assets would be sold to arm's-length purchasers. Each of the proposed remedies would require the appointment of a court officer to supervise the transactions.

[11] Corey supported Mark's proposals.

[12] Additionally, Mark sought a declaration that lands in Caledon, Ontario owned by Shanontown Developments Inc. ("Shanontown") – itself owned by Sheldon, Jay, and Corey – are assets of the Group, such that Mark would be entitled to a 25% partnership interest in the Shanontown lands.

[13] At trial, the two sides also made claims of oppression and breach of fiduciary duty against each other.

[14] The trial judge made no findings of oppression or breach of fiduciary duty against any party, and dismissed Mark's application for the declaration that Shanontown be included as an asset of the Group.

[15] Most significantly, the trial judge ordered that the Group be wound up and sold under the supervision of a court-appointed Sales Officer, with all of the brothers being permitted to participate in the sales process as potential purchasers ("the Judgment"). The trial judge concluded that this would be "the only reasonable option given the extreme dysfunction that exists, both personally and professionally, between the Libfeld brothers." He noted the "complete lack of trust and mutual respect" between the warring factions, amid the accusations of "dishonesty, in addition to verbal and physical abuse."

The issues

[16] Each brother appealed an aspect of the Judgment.

[17] In appeal C69751, Mark appealed the trial judge's determination that he was not a partner in the Shanontown transaction, and that the trial judge erred by not finding that Sheldon and Jay breached their fiduciary duties and acted in bad faith in excluding him from the Shanontown transaction. He sought an order that the Shanontown transaction be included in the wind-up order, with the proceeds divided equally among the four brothers.

[18] In appeal C69714, Corey similarly appealed the exclusion of the Shanontown transaction from the wind-up order.

[19] Appeals C70031 and C70032 were brought by Sheldon and Jay, with each seeking to set aside para. 7 of the Judgment, which requires each brother to certify

compliance with the terms of the Judgment and the related Data Room Order that created an electronic repository of Group documents. These terms were requested by the court-appointed Sales Officer. Mark and Corey opposed the appeal of these orders, as did the Sales Officer.

Analysis

[20] Each appeal is addressed below.

1. C69751 and C69714 – Mark and Cory

[21] At the hearing of the appeal, the panel announced that appeals C69751 and C69714 with respect to Shanontown were dismissed with reasons to follow. These are those reasons.

The Interim Arrangement and the Shanontown development

[22] Mark had become frustrated with many of the Group's decisions, including its cash distribution policy, its refusal to increase life insurance coverage, and its failure to develop succession plans and partnership exit strategies. He had advised the others that given these concerns, he would be unwilling to vote in favour of any new transactions until the Group made what he believed to be a reasonable cash distribution to the partners. This position effectively prevented the Group from taking on new development projects.

[23] At a meeting on August 15, 2016, Sheldon made a proposal to address the governance impasse Mark had created. Under the proposed "Interim

Arrangement", where an opportunity came to the Group, any brother would have the option of not participating in that transaction in exchange for a cash distribution equal to the money that each of the other brothers required from the Group to invest in the project. Any brother who opted for a distribution in lieu of participation would not participate in the project in any way and would not share in its profits.

[24] The Interim Arrangement was not reduced to writing, and at trial Mark contested its existence. However, the trial judge found that "the Libfeld brothers did enter into a valid agreement concerning the Interim Arrangement, which was to deal with transactions where one or more of the brothers would decline to participate and receive a cash distribution." He further found that "none of the brothers acted oppressively in reaching this compromise."

[25] Shanontown was the only transaction carried out under the Interim Arrangement. In September 2016, Sheldon initiated discussions with his brothers about the acquisition of land in Caledon, Ontario for low-rise development. Mark was told that Shanontown would be financed half through a cash contribution, and half through a vendor takeback ("VTB") mortgage. He was told that if he chose not to participate, he would receive a cash distribution of $15 million and his brothers would contribute $45 million to the project ($15 million each) from funds held by the Group. Mark chose not to participate and to take the $15 million distribution instead. The trial judge found that Mark's decision not to participate in Shanontown had nothing to do with the merits of the transaction, but rather his

desire not to work with his brothers. As Mark stated in his evidence at trial, his opposition to participating in Shanontown had to do “with the partners and the partnership.”

[26] As it turned out, the Shanontown transaction did not proceed on the financing terms that had been proposed to Mark, but on a blending of cash contribution, bank financing, and a VTB mortgage. The cash contribution was reduced from $45 million to $17 million, meaning that each participating brother was only required to put in $5.7 million. Mark’s distribution was accordingly reduced from $15 million to $5.7 million. Mark was not pleased with this development. He nevertheless accepted the $5.7 million distribution and Sheldon, Jay, and Corey proceeded with the transaction without him. The trial judge found that the transaction was outside the partnership. This finding is significant, as it means that no fiduciary duty was owed to Mark with respect to the transaction.

[27] Shanontown did not unfold exactly as planned. The vendor refused to extend the VTB mortgage and litigation ensued. At this time, in 2020, Sheldon and Jay extended a further offer (which they referred to as the “Mulligan”) for Mark to invest in the development. The terms of the Mulligan were that Mark would contribute his $5.7 million and participate in Shanontown as a silent partner. He would not be provided with any information about the deal either at the time of the transaction or going forward. Mark nevertheless sought further information, was rebuffed, and declined the offer to participate.

[28] What Mark did not know, because Sheldon and Jay did not tell him, was that the partners' equity in Shanontown had already been written down to negative $15.4 million. Neither was Mark informed – nor was his consent sought – when Sheldon, Jay, and Corey transferred $64 million from Group proceeds to pay off the vendor take-back mortgage. (Mark was given a distribution of $21.7 million as compensation, which he received under protest.)

Mark's appeal

[29] Mark argued at trial that the brothers oppressed him and breached their duties as fiduciaries by: (i) unilaterally changing the terms of equity participation in Shanontown (diluting the equity investment with bank financing) without inviting his participation on the new project terms; (ii) failing to disclose the project was in a negative equity position when they offered the Mulligan; and (iii) unilaterally reaching into the assets of the Group to pay down the Shanontown VTB mortgage in a manner not contemplated by the Interim Arrangement. The trial judge found to the contrary.

[30] On appeal, Mark argued that the trial judge erred by (i) failing to apply the principles of partnership law in analyzing the Shanontown transaction and (ii) misapprehending the evidence related to Shanontown. The argument, essentially, is that Sheldon, Jay, and Corey, as Mark's partners in the Group, owed Mark a fiduciary duty and both breached this duty and engaged in oppression.

[31] I am not persuaded that the trial judge made the errors identified by Mark. Essentially, Mark is seeking to set aside factual findings of the trial judge and argue the appeal as a trial *de novo*. The key factual findings are that the Shanontown transaction was undertaken outside of the Group, and its relationship to the Group was governed by the Interim Arrangement. Accordingly, after Mark made the fully informed election not to participate, he was not entitled to any further information about the project.

[32] The terms of the Interim Arrangement were a factual matter to be determined by the trial judge. His findings as to whether there was an agreement, what its terms were, and whether the brothers abided by those terms are entitled to deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. The following finding of the trial judge is key: “[w]hen a transaction came into the Group, any brother had the option of not participating in that transaction in exchange for a cash distribution equal to the money the other brothers would require from the Group to invest in the project.”

[33] This is exactly what happened. The fact that the quantification of the cash distribution changed three times over the course of the project is irrelevant. Mark elected not to participate. Mark’s refusal, as found by the trial judge, was part of his strategy to attempt to exercise leverage over the Group to extract greater cash distributions. His objection was not to the merits of this particular project but to participating in any project with his brothers. Although he objected to the

reduction of the initial distribution, he did not as a consequence seek admission to the project. When the distribution was later increased, it was to an amount greater than that to which he had initially agreed. The facts that he was treated as a stranger to the project and not a partner, not informed of the negative equity in the project, not offered a right of participation on terms he found acceptable, and not consulted about the payout of the VTB mortgage are irrelevant. The trial judge's findings that Mark was not a partner in Shanontown, that he was not owed fiduciary duties with respect to Shanontown, and that the payout of the VTB mortgage was governed by the Interim Arrangement are supported by the evidence – including the contemporaneous emails between Mark and the other brothers and cited by the trial judge – and are dispositive of this ground of appeal.

[34] Appeal C69751 is dismissed.

Corey's appeal

[35] Corey took no position on whether Shanontown was rightly constituted by three partners or four. But he joined with Mark in arguing that Shanontown ought not to have been excluded from the winding up order. He argued that a complete separation of the brother's business interests was necessary and entailed by the trial judge's findings that the brothers' relationships had become completely dysfunctional and lacked the requisite degree of trust to work together.

[36] I do not agree that the trial judge erred in not ordering a winding up of Shanontown. The choice of remedy was a matter for the trial judge's discretion, which he exercised reasonably. He was not faced with an all or nothing scenario. The finding of extreme dysfunction among the brothers did not necessitate treating Shanontown in the same manner as the Group assets, particularly given that Mark is not a part of Shanontown. Although Corey took the position that the trial judge simply overlooked Shanontown in ordering the wind-up of the Group, this is not apparent on the face of the record. In a heavily case managed proceeding of this nature, with sophisticated parties represented by counsel, if Corey and Mark believed the trial judge to have simply overlooked Shanontown in granting the wind-up remedy, the correct procedure would have been to return to the trial judge to seek a clarification of the order. That was not done.

[37] For these reasons, Appeal C69714 is dismissed.

2. C70031 and C70032 – Sheldon and Jay

The certification provision of the Judgment

[38] After the trial judge released his reasons, the parties and the court appointed Sales Officer made submissions regarding the form of order. In addition to ordering the wind-up and sale of the Group, and appointing the Sales Officer, the resulting Judgment sets out some of the mechanics of the sales process. The trial judge had previously issued a separate Data Room Order, intended to remedy the

informational asymmetry among the brothers resulting from Sheldon's role in the financial management of the Group. The Sales Officer sought the inclusion of a certification provision in the Judgment, which would require each of the brothers to provide written certification that they had complied with the terms of both the Judgment and the Data Room Order. This was not only to warrant to each of the brothers that the others had complied, but to provide confidence in the sales process to any third party who might bid.

[39] Sheldon and Jay were opposed to the provision, while Mark and Corey supported it as necessary to remedy their informational disadvantage. The trial judge included the certification requirement in para. 7 of the Judgment:

> 7. THIS COURT ORDERS that upon request by the Sales Officer, each of the Libfeld brothers shall provide their written certification, in a form satisfactory to the Sales Officer, of their compliance with the terms of this Judgment and the Data Room Order, including their obligation to provide the Sales Officer with all relevant documents and information in their possession or control relating to the Group's businesses and the Property. If the Sales Officer and the Libfeld brothers cannot agree on the form of certification, the parties may return to Court for directions or a determination as to the form of certification.

[40] Sheldon and Jay argued on appeal that the provision ought to be struck on the basis that (1) it is insufficiently clear, legally unnecessary, and impermissibly broad; and (2) it was not relief sought by any party and there is not a sufficient basis in the reasons to justify it.

[41] Although the trial judge did not provide reasons for including this term in the Judgment, the issue was fully canvassed in oral submissions and the rationale is clear both from a review of those submissions and from findings made by the trial judge in his reasons for judgment.

[42] The Sales Officer proposed the certification provision because he was reliant on the brothers to provide all relevant documentation and information concerning the property and business of the Group, and because the onus ought to be on the brothers to identify and provide this information without it being specifically requested. This recommendation was based on the findings of the trial judge, particularly that: there was a lack of trust and respect among the brothers; none of the brothers could be expected to deal honestly with each other; and Sheldon (and through him, Jay) had an informational advantage over the others due to Sheldon's historical role in the Group. Due to these findings, and notwithstanding that the Sales Officer did not know of any non-disclosure of information or documents relevant to the sales process, the Sales Officer concluded the certification provision was necessary to maintain the fairness, transparency, and integrity of the process.

[43] Mark and Corey similarly argued that the certification provision is necessary to provide the Sales Officer with a mechanism to monitor the parties' compliance with their obligations under the Judgment and Data Room Order, given the low trust environment among the brothers.

[44] Sheldon and Jay opposed the inclusion of a certification provision on the basis that it is unwarranted, its vagueness would unavoidably result in uncertainty as to whether the terms had been complied with, and – given the low-trust environment between the brothers – would almost certainly result in a multiplicity of unnecessary enforcement proceedings with baseless allegations of contempt of court.

[45] Although the genesis of the compliance provision is unusual in that it was not proposed by any of the parties, there is nothing improper about the process the trial judge followed. This was a heavily case managed proceeding and the parties had ample opportunity to make submissions on the suitability of including the provision. The issue was thoroughly canvassed in oral argument, the rationale of the provision was clear from the submissions of the Sales Officer and the findings made by the trial judge in his reasons. I am, accordingly, unpersuaded by this ground of appeal.

[46] That said, there is merit to the first ground of appeal advanced by Sheldon and Jay: that the certification provision, through its vagueness and in the circumstances of acrimonious on-going relationships, threatens to leave all parties vulnerable to revolving contempt proceedings at the hands of each other. For the reasons that follow, I would allow the appeal in this respect only and strike para. 7 of the Judgment.

[47] As explained below, although a certification requirement is not inherently problematic, and although a degree of linguistic vagueness that would be unwise in some litigation contexts can be acceptable in others, the circumstances of this litigation and the mutual antagonism of these litigants makes the combination of the certification requirement and the vagueness of certain obligations imposed by the Judgment untenable.

[48] The ultimate sanction for non-compliance with a court order is a finding of contempt, which can be punishable by incarceration or other sanctions such as the imposition of a fine or community service. It also carries a heavy social stigma. The severity of these sanctions is one reason why courts have required orders to be sufficiently clear such that parties can understand what is needed to comply, and can arrange their affairs accordingly. Another reason has to do with efficiency and avoiding the allocation of court resources to resolve proceedings that could have been avoided with clearer orders: *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at paras. 24, 35-36.

[49] Sheldon and Jay have no objection to any terms of the Data Room Order or the Judgment, except for the certification provision. They object that, at its heart, the certification provision is a form of injunctive relief granted *quia timet*, and it is not justified by the proceedings to date: despite all of the negative history among the brothers, there has been no allegation that any of them have been less than

forthcoming with production and disclosure to the Sales Officer as the Data Room has been set up.

[50] The Judgment and the Data Room Order are complex. They extend to 60 pages with 40 operative clauses. Although many of the clauses are quite specific, others apply vague standards. With these latter clauses, there may well be reasonable disagreement about whether or to what degree the parties have satisfied their obligations. For example, the Judgment requires the brothers to carry on the business of the Group "in a manner consistent with the preservation and maximization of the value of its business and the Property pending their sale" and to provide the Sales Officer with such assistance as in the Sales Officer's opinion is necessary or desirable.

[51] None of the brothers have any objection to being bound by any of the terms of the Judgment. None of them object to providing the Sales Officer with such assistance as the Sales Officer believes necessary. What Sheldon and Jay object to is being required to *certify* that they have provided the degree of assistance the Sales Officer believes necessary.

[52] If Sheldon and Jay have no objection to carrying out the obligations imposed on them by the Judgment and Data Room Order, why should they object to certifying that they have done so? The answer is in the different nature of the two types of legal obligation. With respect to carrying out one's obligations under an

order, one can, in good conscience, carry out obligations that are expressed using vague standards of performance, based on one's best understanding of what that standard requires in context. In doing so, one knows that it might be contestable whether one has, for example, acted to maximize the value of a business, and that others who are guided by the same provision may have acted differently, but that such matters are subject to a margin of appreciation.

[53] Certification stands on a different footing. It is akin to providing a warranty. Where an obligation to certify compliance is made part of a court order, it hazards the extension of the obligation to a matter of warranting that one has satisfied every conceivable interpretation of what the vague criteria used could require. It places the certifying party in a potentially untenable situation.

[54] In the context of this litigation – where there has been no allegation that anyone has been uncooperative with the Sales Officer or non-compliant with the established procedures – a requirement of certification would seem to provide no additional benefit beyond the obligations already imposed by the Judgment and Data Room orders. But it would place the parties in the invidious position of having to certify compliance with terms that are by their nature uncertain, where compliance will always be a matter of degree, and always contestable. Added to this instability, in an environment that is not merely low trust but actively hostile, is the prospect and indeed likelihood that certifications will be met with allegations of non-compliance and even contempt. It would be unwise to set up such a scenario.

[55] I am further confirmed in my view of this matter by the prospect that such an order, if it were allowed to stand, would quickly escape from the very unusual circumstances of the present litigation to become a standard demand in the very many litigation settings characterized by on-going and low-trust relationships, particularly in family law.

[56] For these reasons, appeals C70031 and C70032 are allowed with respect to para. 7 of the Judgment.

DISPOSITION

[57] The appeals of Mark and Corey are dismissed. The appeals of Sheldon and Jay are allowed, para. 7 of the Judgment is struck out, and the remainder of the Judgment remains in force.

[58] If the parties are unable to come to an agreement on costs of the appeals, they may each make written submissions not to exceed three pages, exclusive of bills of costs, within three weeks of the release of these reasons.

Released: February 28, 2023 “L.R.”

“B.W. Miller J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. I.V.B. Nordheimer J.A.”