

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE VINCENT CORPORATION, Applicant

AND:

PROVIS INC., BIOMED HOLDINGS LIMITED, JACOB P. (SUNNY) JACOB, RFG CORPORATION, SHIA RUBINOFF, 2028066 ONTARIO LIMITED, PETER ANGLIN, PROVIS INFUSION CLINIC INC., PROVIS ENDOSCOPY SERVICES INC., RUDD SERVICES LTD., PROVIS ENDOSCOPY MISSISSAUGA INC., PROVIS ENDOSCOPY OTTAWA INC., PROVIS ENDOSCOPY OAKVILLE INC., PROVIS INFUSION NETWORK INC., PG CLINICAL TRIALS INC., DICTASOLUTIONS INC., ENDOTECH (CANADA) LTD., and 2207958 ONT INC C.O.B. as HEALTHQUEST, Respondents

BEFORE: Karakatsanis J.

COUNSEL: Harvey S. Dorsey, Counsel, for the Applicant

G. Alexiou, Counsel for the Ottawa Doctors

J. Heller, Counsel, for Dr. W Rudd and Rudd Services Ltd.

Richard P. Quance, Counsel, for the remaining Respondents

HEARD: January 18, 2010

ENDORSEMENT

[1] This is an application for an interim relief in an application under the oppression remedy provisions (and alternatively the wind up provisions) of the *Ontario Business Corporations Act*, 1990 ("OBCA.") Counsel for the respondents conceded that there well may be sufficient evidence for a finding of oppression for the purposes of this motion. The respondents are unopposed to the remedies sought in paragraphs 1 (g) an accounting; (j) business in the ordinary course; and (k) financial disclosure of the application. The contentious issues between the parties are paragraphs 1(h) and (i), whether an appointment of a receiver or, alternatively a monitor, is appropriate in these circumstances.

[2] The applicant and Dr. Warren Rudd and the Ottawa Doctors, have lost confidence in the continued management by the Majority Partners of the various Provis companies, alleging numerous examples of oppressive conduct and significant mismanagement. They are

concerned about the continued viability of the Provis companies and believe that it is in the best interest of the Provis companies to have a Receiver appointed to conduct the operations and investigate the financial transactions. Alternatively, they request a monitor.

- [3] The respondents take the position that there is no evidence of significant mismanagement, a need to preserve property or that the clinics are not viable. They submit that the appointment of a Receiver is not justified and would have devastating impact on the ability to manage cash flow, public confidence in the clinics and their ability to seek an arm's length purchaser.

Background

- [4] The applicant is a holding company for Graham Vincent and holds a 25% interest, in the Respondent Provis Inc. ("Provis"). The defendants Sunny Jacob ("Jacob"), Shia Rubinoff, ("Rubinoff") and Peter Anglin ("Anglin") each hold a 25% interest in Provis through their holding companies and are referred to as the majority partners.
- [5] Provis is a holding company that owns 100% of the Provis Infusion Clinic Inc. (PICI) a company that operates an infusion clinic for chemotherapy treatments. Provis also owns 75% of Provis Endoscopy Services Inc. ("PESI") which in turn owns companies operating four endoscopy clinics; Rudd Services Ltd ("RSL") in Toronto, PES Ottawa, PES Mississauga and PES Oakville. The other 25% of PESI is owned by Skyberry, an off shore passive investor represented in Canada by Jacob's son.
- [6] PESI holds 100% interest in PES Mississauga, PES Oakville, 80% in PES Ottawa and 75% in RSL ("the Rudd Clinic.") The Rudd Clinic was the first endoscopy clinic acquired and Vincent and the other partners each signed a personal guarantee in the amount of \$500,000 for PESI to acquire (through a subsidiary) its 75% share of RSL. Dr Warren Rudd, the founder, retained a 25% interest and is to be bought out at fair market value in 2011. PES Ottawa was 20% owned by three Ottawa Doctors who provided their services to the Ottawa clinic but who have now tendered back their shares as a result of a dispute that arose between them and the majority partners; they have resigned from the clinic effective the end of January, (unless a receiver or monitor is appointed).
- [7] The investors Skyberry and Lift Capital have taken no position. Rudd claims he is owed \$131,000 and is guarantor of the bank draft for the Rudd Clinic. The Ottawa doctors claim debts of about \$200,000.
- [8] Vincent and Jacob were founding partners of Provis in 2004 for the purpose of exploring business opportunities in the health care field in Ontario. Anglin was brought in for his expertise in oncology and Rubinoff was brought in for his financial expertise for the expansion of their operations. All four partners participated in the direction of Provis and Vincent was actively involved in management. Vincent was President of Provis, Vice President of RSL and the Chief Operating Officer of PICI, although he did not draw a salary because of start up costs.

- [9] In November 2007 Vincent was removed by the majority partners from all positions with the Provis companies except as a director of PESI. He retained that position presumably because that would have triggered remedies under the partnership agreement with the 25% passive offshore investor in PESI. Vincent's \$100,000 management salary from PESI was stopped and he did not receive a severance package or a record of employment. Vincent is no longer actively involved in the companies.

Usurping Corporate Opportunities

- [10] Jacob, Anglin and Rubinoff subsequently set up and own most, if not all, of three companies providing services to the various Provis clinics, including the securing of clinical trials conducted within the infusion clinic (PG), the call centre for patient referrals and transcription services formerly done in-house at the Rudd Clinic (Dicta), and the repairing and obtaining of endoscopy equipment and medical supplies formerly managed directly by the clinics (Endotech). A fourth company, HealthQuest, provides pre-screening assessments for the endoscopies and is owned by Jacob and Rubinoff. These companies are profitable and Vincent and Rudd were not asked to participate in these opportunities. The companies are respondents in this application.
- [11] Further there is evidence that assets, including patient data belonging to the Rudd Clinic, were transferred to HealthQuest without compensation and that Provis paid leasehold improvements for the HealthQuest premises. Healthquest appears to be paying above market rent as a subtenant to PESI.
- [12] In addition, any non-arm's length contract had to be approved by Rudd under the RSL Shareholder Agreement and he was not asked to approve the arrangements with Dicta, Endotech and Healthquest or the hiring of Jacob's wife as the manager.
- [13] Although there is a dispute about how broad the mandate of Provis was originally intended to be, and a suggestion that this outsourcing of services has resulted in greater efficiencies for the clinics, nonetheless it is obvious that the profits flowing from those four companies relate to services provided directly to the Provis clinics and the respondents could not provide any reasonable commercial purpose why those services are operated separately and could not have been provided within the Provis companies or by subsidiaries.
- [14] This is strong prima facie evidence of oppression; that the majority partners have created business opportunities to prefer their own interests over the interests of Provis and have unfairly disregarded the interests of Mr. Vincent and Mr. Rudd. Although it was suggested that any profit has been loaned back to the Provis companies to assist with cash flow, the majority partners retain the interests created by the loans.

Dilution of Ownership Interest

- [15] The majority partners issued a convertible debenture for \$80,000 in March 2009, convertible for a 20% share in RSL. Based upon the value as reflected in the purchase price two years previously, a 20% share would have been \$525,000. There was no independent evaluation of RSL to determine the fair market value of the option price. The convertible

debentures were offered to Rudd and Vincent on short notice: Rudd objected and Vincent, who had no current financial information, declined. A further convertible debenture has been discussed but its status is unknown.

- [16] The convertible debenture would have the effect of diluting the ownership interest of PESI (and thus Vincent) and Rudd in RSL and is strong prima facie evidence that the majority partners were oppressive, unfairly prejudicial and disregarded the interests of Vincent and Rudd.

Majority Partners take Vincent's share of profits

- [17] Vincent's evidence is that the partners all agreed that 50% of the profits of PICI would flow up to the partners' holding companies. Initially the profits were distributed by dividends. In 2007 these were distributed by way of management salaries, in lieu of dividends, without consultation or agreement, although Vincent was advised and raised no objection. He received a partial salary for the fiscal year ending August 2007 (converted in part to shareholder loans) and no salary for the fiscal year ending August 2008; instead his 'salary' was divided among the majority partners.

- [18] Although Vincent testified that he did not expect his salary (from PESI) to continue after he was terminated, he reasonably expected an equal share of the value and profit of Provis and its companies. The taking of Vincent's share of the PICI profits is evidence that Vincent's reasonable expectations that he would share equally in the profits as agreed was breached to his prejudice and is prima facie evidence of oppression.

Failure to disclose financial information

- [19] Contrary to the provisions of the OBCA, Vincent did not receive the financial information regarding the Provis subsidiaries. Rubinoff testified that they did not have to provide Vincent with financial information because he was an 'indirect' shareholder. Furthermore, the internal financial statements and the unedited financial statements prepared by the accountants differ significantly; Rubinoff was unable to explain why.

- [20] Dr Rudd and the Ottawa doctors also complain of a lack of transparency and a failure to disclose financial information.

- [21] The refusal to provide financial information as required by law is oppressive and unfairly prejudicial conduct.

Acts of oppressive, unfairly prejudicial conduct

- [22] As a result, there is strong prima facie evidence on this motion to establish that the reasonable expectations of Vincent, Rudd (and the Ottawa doctors) in this closely held corporation have not been met because of conduct that is oppressive, unfairly prejudicial and unfairly disregards their interests pursuant to s. 248 of the OBCA because:

- (a) The majority partners have usurped Provis' corporate opportunities and thus unfairly disregarded the interests of Vincent and Rudd (and the Ottawa doctors);
- (b) The majority partners have unilaterally and unfairly diluted the ownership interest of Vincent (through RESI) and Rudd in RSL;
- (c) The majority partners have taken Vincent's share of profits in PICI as management salaries; and
- (d) The majority partners have failed to disclose financial information to Vincent and Rudd and the Ottawa doctors.

Viability of the Provis companies and clinics

[23] It is clear that there have been financial difficulties and disputes between the doctors and by the majority partners in the management of the clinics.

Financial difficulties

[24] The profitable chemotherapy clinic operated by Provis Infusion was very successful in its first two years. While it is still profitable, it has suffered significant financial losses as a result of OHIP's decision in the past year to pay for a chemical used in 50% of the procedures, which resulted in dramatically reducing the need to access a clinic.

[25] The companies operating both the Rudd and Ottawa clinics clearly have had significant cash flow problems. Dr Rudd has advanced money to meet payroll and other obligations, which loan is still outstanding. He advises that some suppliers have not been paid and he was specifically aware of one Small Claims Court law suit. The Ottawa Doctors testified that as a result of non-payment of a supplier, needed equipment had been removed and was not available for 2 days.

[26] RSL had pre-tax income of more than \$400,000 in 2007 which decreased to about \$50,000 in 2008. Rubinoff testified it was due to extensive renovations in 2008, although Rudd testified the renovations occurred mainly at night. (The internal financial statements for the 11 months, November 2007 to September 2008 show a significant loss of more than \$100,000 and the internal financial statements for November 2008 to September 2009 show a profit of \$54,000.)

[27] The respondents concede that there have been financial challenges as a result of the rapid expansion, increased start-up costs, increased competition, and the downturn in the economy in 2009. Jacob, Rubinoff and Anglin all testified that the companies are now meeting financial expectations. Anglin testified about the changing challenges of setting up clinics in the province with higher start-up costs and longer break-even periods. He testified that the cash flow of the clinics is now stabilizing and was turning around, becoming positive so that in terms of the business plan the clinics are now much more on the mark. He said he would have grave concerns about the appointment of a receiver. As well after reviewing the

financial information relating to Rudd Services, Lift Capital advanced further monies in August 2009.

- [28] I am not prepared to find on the basis of the evidence filed that the clinics are not financially viable. While I am concerned about the respondents' inability to explain the discrepancies between the internal and external financial statements, the order for financial disclosure will provide the applicant with further information in this regard.

Mismanagement

- [29] Dr Rudd complains that Rudd Clinic has gone from a world class clinic to a second rate facility with a resulting decrease in patients, procedures and referrals. He complains of low staff morale, high staff turnover rates, a hostile and non-productive management style, resulting in poor quality of service to patients. Unfortunately, the source of many of the sweeping and broad statements is not clear from his affidavit or cross-examination and it is apparent that he has reached some of his conclusions based upon assumptions or incomplete information.

- [30] Dr Rudd clearly disagrees with the management style of Jacob and Jacob's wife who are now operating the Rudd Clinic. He alleges complaints made to the Labour Board for breaches of the *Employment Standards Act*, lawsuits against former doctors, and patient complaints against the replacement doctors, although it is apparent from the cross-examination that he was basing his statements upon incomplete and unsubstantiated information. It is also evident that his views about the medical efficacy of some of the initiatives (such as the manner in which the HealthQuest medical pre-assessments are conducted) differ from the views of the other doctors involved. As a further example, he complains that the change in laxatives and client preparation has 'dangerous risks' for patients. The responding evidence is that the change was made to provide uniformity between the clinics and was based upon medical advice.

- [31] Both Rudd and the Ottawa doctors complain of the quality of equipment. Dr Sekar complained about the scopes in the Ottawa clinic; however, notwithstanding their extensive daily use, they do not appear to have resulted in problems relating to the patients. Similarly, Dr Rudd disagreed with management's decision to change supplier and the arrangements regarding the equipment; his views that the equipment was sold for below market value is based upon the oral estimate of the previous supplier after the fact.

- [32] The Ottawa doctors make similar complaints of a hostile management style. Dr Sekar complains his salary as Medical Director has not been paid. The Ottawa doctors allege that their shareholder agreement was breached by Provis, in refusing the Ottawa doctors' holding companies to purchase additional shares in PES Ottawa. They claim debts of about \$200,000. They claim that their resignation will jeopardize the operations of the clinic. The respondents deny many of these claims.

- [33] There is no question that Dr Rudd and the Ottawa Doctors have strong disagreements with the management decisions and conflict with the management style of the majority

partners. Clearly there has been a dispute between Dr Arne Sekar, his two Ottawa associates with respect to their interest in PES Ottawa.

[34] However, I am not satisfied that the evidence on the motion establishes that the clinics are significantly mismanaged or are no longer viable. Dr Anglin did not agree that the departure of the three Ottawa doctors would result in the closure of the clinic as there were other doctors working there.

[35] Although Dr Rudd has the impression that there has been a decrease in procedures, patients and referrals, and in the quality of patient care, this is not borne out by the records. Patient surveys indicate high satisfaction with the clinic, with between 88% and 96% of the patients rating the services as 'excellent' in spring and early summer of 2009. The records disclose that the number of colonoscopy procedures has increased significantly since the Rudd Clinic was purchased. The number of referrals has also increased significantly in 2008 and 2009. Dr Rudd conceded that he had not based his comments upon any records and made no efforts to look at any figures.

[36] In his cross-examination, Vincent conceded that he was primarily concerned with respect to financial management and disclosure as opposed to complaints about the management of the clinics. In the application he seeks to be bought out, relieved of his guarantee and damages for the usurpation of business opportunities.

[37] For these reasons, I am not satisfied on the material before me that the clinics are no longer viable or that there is significant mismanagement.

Remedy

[38] Section 248 of the OBCA provides that where the respondents have conducted themselves in a manner that is oppressive, unfairly prejudicial or that unfairly disregards the interests of any shareholder, the court may make any interim or final order that it thinks fit in order to rectify the matters complained of. The oppression remedy has evolved into an instrument of the Court to protect the "reasonable expectations" of shareholders of corporations, irrespective of the intent or bona fides of any decision made by officers or directors of the responding corporation.

[39] In *Nanoff v Con-Crete Holdings Ltd.*, [1995] 23 O.R.(3d) 481 at paras 23-25, the Court of Appeal made clear that the remedy ordered should be directed to the rectification of the oppression and should not go beyond that. In *Le Maitre Ltd. v. Segeren* 2007 CarswellOnt 3226, 33 B.L.R. (4th) 224, Pepall J dealt with the requirements of interim relief in the nature of an injunction and concluded that generally the principles for the granting of interlocutory injunctive relief should apply to s.248(3) subject to the requirements of fairness in exceptional circumstances.

[40] In *Walker v. Betts* 2006 CarswellBC 1877 para 13, the Court decided that it was just and equitable to appoint a receiver manager on an interim basis in the context of an oppression claim:

In these escalating adverse conditions, I am not satisfied the assets...are secure, that its continued operation is being managed prudently, and that the interests of the [company] are being served before those of [the majority shareholder]. The classic reasons for court intervention through the appointment of a receiver manager appear to exist in this case; waste, the improper disposition of property, improper management, a lack of proper accounting and improper profiting personally.

However, it is clear in that case that the parties in control had done nothing to purge the previous finding of oppressive conduct, including a continued denial of access to financial records.

[41] In *Stroh v. Millers Cove Resources Inc.* 1995 CarswellOnt3551; *Stroh v. Millers Cove Resources Inc.* 1995 CarswellOnt 275 (Ont Div. Ct). Farley J found an overwhelming continuation of a pattern of self-dealing without shareholder protection and sought submissions on the appointment of a receiver, monitor or inspector to fashion a neutral remedy for the purpose of maintaining the status quo, pending an independent review by a court-appointed officer of the alleged improper conduct including an accounting. The Divisional Court noted that this was not a drastic remedy for a non-operating company.

[42] In these circumstances the remedies to which the respondents are unopposed are a reasonable first step with dealing with this oppression application. While there was some indication, or at least questions raised, with respect to the disposition of equipment for less than fair market value and the transfer of valuable information from the Rudd Clinic to HealthQuest, I am not satisfied that the evidence justifies the intrusive remedy of a receiver or monitor. It would create enormous costs which could well be disastrous to the cash flow of Provis just when positive cash flow results are being achieved and the clinics have reached their break-even point. Accordingly, I do not appoint a receiver or monitor. This is without prejudice to the applicant to return in the event the disclosure raises issues or there is evidence of further concerns about mismanagement or transfer of assets.

[43] I am however satisfied that there is strong prima facie evidence of oppressive, unfairly prejudicial conduct. The applicant shall have interim relief as follows:

- for an accounting of all monies and other benefits received from the Provis companies by the Respondents Biomed Holdings Limited, Jacob, RFG Corporation, Rubinoff, 2028066 Ontario Limited, and Anglin;
- for an accounting of all monies and other benefits received from the Provis companies by the Respondents by Provis Infusion Network Inc, PG Clinical Trials Inc, Dictasolutions Inc., Endotech (Canada) and HealthQuest;
- Jacob, Rubinoff and Anglin shall conduct the business affairs of the Provis companies, Provis Infusion Network Inc., PG Clinical Trials Inc, Dictasolutions Inc., Endotech (Canada) and HealthQuest in the normal course, pending the hearing of this application and to not take

any steps out of the ordinary course of business, pending the hearing of this application without the consent of the applicant or further Order;

- Jacob, Rubinoff and Anglin shall cause the Provis companies, Provis Infusion network Inc., PG Clinical Trials Inc, Dictasolutions Inc., Endotech (Canada) and HealthQuest, to deliver up for the inspection the financial records, as set out in the Zysman Report, within 2 weeks, or such time with the consent of the applicant.

[44] The parties may make brief written submissions (2 pages) together with a Bill of Costs and any Offers to Settle within two weeks; any reply shall be no more than one page within 5 days thereafter.

KARAKATSANIS J.

Date: