Court File No. 09-8302-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT
RULE 14.05(2) OF THE ONTARIO *RULES OF CIVIL PROCEDURE*, R.R.O. 1990, Reg. 194
AND SECTION 35 OF THE *PARTNERSHIPS ACT*, R.S.O. 1990, c. P.5

IN THE MATTER OF AN APPLICATION PURSUANT
TO SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, c. C. 43

BETWEEN:

JAMES HAGGERTY HARRIS

Applicant

- and –

BELMONT DYNAMIC GROWTH FUND,
an Ontario Limited partnership

Respondent

BRIEF OF AUTHORITIES OF THE APPLICANT
(returnable October 21, 2009)

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[COURT OF APPEAL]

Re Rogers and Agincourt Holdings Ltd. et al.

EVANS, BROOKE AND LACOURCIERE, JJ.A. 30TH NOVEMBER 1976.

Corporations — Winding-up — Court empowered to order winding-up if "just and equitable" — Relationship of confidence between two principal shareholders — Whether breakdown of relationship ground for winding-up — Business Corporations Act, R.S.O. 1970, c. 53, s. 217(d).

On an application for an order winding up a company under s. 217(*d*) of the *Business Corporations Act*, R.S.O. 1970, c. 53, on the ground that it is "just and equitable ... that it should be wound up", the Court will consider the relationship of the principal shareholders. Where the enterprise depends on a relationship of trust and confidence between the two principal shareholders, the situation being akin to a partnership, and the relationship breaks down, an order will be made winding up the company.

[*Ebrahimi v. Westbourne Galleries Ltd. et al.*, [1972] 2 All E.R. 492; *Re Yenidje Tobacco Co., Ltd.*, [1916-17] All E.R. 1050, apld; *Re Jury Gold Mine Development Co. Ltd.* (1928), 63 O.L.R. 109, [1928] 4 D.L.R. 735, 10 C.B.R. 303; *Re Hugh-Pam Porcupine Mines Ltd.*, [1942] O.W.N. 544, 24 C.B.R. 60; *Re Shipway Iron Bell & Wire Mfg. Co. Ltd.* (1926), 58 O.L.R. 585, [1926] 2 D.L.R. 887; *Re Imperial Steel & Wire Co. Ltd.* (1919), 17 O.W.N. 324; *Re Noden Hallitt & Johnson Ltd.* (1924), 26 O.W.N. 269 and 330, distd; *Re R.J. Jowsey Mining Co. Ltd.*, [1969] 2 O.R. 549, 6 D.L.R. (3d) 97; affd [1970] S.C.R. v; *Re Davis & Collett, Ltd.*, [1935] Ch. 693; *Re Dominion Steel Corp. Ltd.*, [1927] 4 D.L.R. 337; *Re Blériot Mfg. Aircraft Co.* (1916), 32 Times L.R. 253; *Re R.C. Young Ins. Ltd.*, [1955] O.R. 598, [1955] 3 D.L.R. 571, 35 C.B.R. 72; *Re Martello & Sons, Ltd.*, [1945] O.R. 453, [1945] 3 D.L.R. 626, 27 C.B.R. 204; *Re Pre-Delco Machine & Tool Ltd.*, [1973] 3 O.R. 115, 36 D.L.R. (3d) 50; *Symington v. Symington's Quarries, Ltd.* (1906), 43 Sc. L.R. 157, 13 S.L.T. 509; *Re Bondi Better Bananas Ltd. et al. and Bondi et al.*, [1951] O.R. 845, [1952] 1 D.L.R. 277, 32 C.B.R. 171, refd to]

APPEAL from a judgment of the Divisional Court, 12 O.R. (2d) 386, 69 D.L.R. (3d) 62, allowing an appeal from a judgment of Callon, J., dismissing an application for the winding-up of a corporation.

P. J. Pape, for appellants.
C. E. Woollcombe, Q.C., for respondent.

The judgment of the Court was delivered by

LACOURCIERE, J.A.:—This appeal raises in a modern context the difficult considerations appropriate to the exercise of the Court's equitable jurisdiction in relation to the winding-up of solvent business corporations. The appellant companies are presently the subject of a winding-up order made by the Divisional Court, which set aside the judgment of Callon, J., who had dismissed an application by Roy Pritchard Rogers for that relief. In order to appreciate the background leading up to that application and the reasons for our disposition of this appeal it is necessary to set out at some length the facts as we have found them.

Rogers is a minority shareholder in the appellant companies, holding approximately 30% of the common shares of each, the substantial balance being held or controlled by Campbell C. Holmes. Rogers and Holmes, who are both businessmen with long experience in real estate development projects, had been friends for 20 years and both had been directors of the Toronto Home Builders Association. In the fall of 1960, they entered into discussions concerning a co-operative effort to acquire and develop lands. Their intention was that Rogers would find suitable prospects for development and devote his energies to them, whereas Holmes would provide the necessary capital. Stock in the development company would be divided equally between them, and Rogers would receive a salary. Several prospects were discussed and finally it was agreed that Rogers would inquire into the feasibility of developing a motor hotel on Highway 401 at Kennedy Rd. in the Borough of Scarborough, in the County of York.

Pursuant to this agreement, Rogers arranged for the acquisition of the land on which the motor hotel was to be constructed and conducted the necessary negotiations with the Scarborough Planning Board and with the Department of Highways. He also conducted negotiations with various lending institutions, including the Manufacturers Life Insurance Company, which ultimately advanced $750,000 of the funds necessary for the construction of the motor hotel. He also obtained cost estimates and directed the architects and the engineers in the preparation of plans and sketches. After construction started, he was directly involved in all phases of the construction work which commenced in the autumn of 1961, and was completed for opening in October, 1962, in the name of "Canadiana Motor Hotel".

Some time prior to September 25, 1962, Holmes approached Rogers and said that he had been discussing the partnership arrangement with friends of his and had come to the conclusion that a 50/50 split was not fair inasmuch as he was putting up the risk capital. Holmes proposed to Rogers that a 70/30 split in Holmes' favour would be more equitable. Although Rogers was upset about this at the time, he eventually agreed to accept it.

Subsequently, the appellant companies were incorporated and a memorandum of agreement dated March 22, 1963, was drawn up which provided as follows:

> RE: AGINCOURT MOTOR HOTEL
>
> This hotel has been built and the land acquired and all expenses to date incurred by Anndale Investments Limited and Campbell C. Holmes. It is possible that additional expenses in connection with either the construction or operation of the hotel will be incurred in future by Anndale Investments Limited and/or Campbell C. Holmes.
>
> Our arrangement with respect to this operation is that the land and build-

> ings and the business would be owned by Anndale Investments Limited and Roy P. Rogers in the relation of 70/30, after all the costs aforesaid and any costs in the future have been deducted.
>
> This memorandum is signed by us with the intention that it might subsequently be embodied in a more formal document, but so as to serve as a written record in the meantime.

This memorandum was prepared by Holmes' solicitor at Rogers' request and both Holmes and Rogers signed it. Rogers requested this memorandum because Manufacturers Life was requiring that he personally guarantee the mortgage being given by Anndale, the company controlled by Holmes which took title to the land for tax purposes.

Rogers continued to act as managing director of the motor hotel until December, 1963. At that time, largely through Rogers' efforts, and following a liquor vote in Scarborough, the motor hotel obtained a liquor licence. A few days later Holmes instructed Rogers to vacate his office in the motor hotel by the end of the year. This was done. However, it would appear that Holmes was not thereby intending to exclude Rogers from all aspects of management. The letters dated December 26 and December 31, 1963, indicate that Holmes' motive was simply to save the immediate financial burden of Rogers' salary, but that he would have been content to have Rogers continue to assist as an unpaid advisor.

From 1964 to the present Holmes has acted as the managing director of the motor hotel, drawing a relatively modest yearly salary every year since 1965. Rogers continued as a director and vice-president of the two companies during the initial post-1963 period. At the same time the two directors had several discussions regarding a possible purchase by Holmes of Rogers' interest in the hotel business, along with the lands and buildings, or alternatively, a sale by both Holmes and Rogers of their interest to a third party. No agreement was ever reached, but Holmes told Rogers he would like to keep him as a partner.

In 1967, Rogers had discussions with another party regarding a possible sale by Rogers of his interest in the lands and buildings, and the hotel business. It was at this time that Rogers first learned that Holmes took the position that Rogers did not have a 30% interest in the lands and buildings, which were still being held by Anndale. In fact Holmes took the position that there never was a joint venture, but rather that Rogers had merely been a salaried employee. Rogers' 30% shareholding in the operating company (Agincourt Motor Hotel Limited) was explained away by Holmes as a "gift or bonus".

As a result of this position and the ensuing dispute, Rogers commenced action to establish his interest in the realty. Stark, J., on March 12, 1970, concluded that Anndale held the real property in

trust for Agincourt Holdings Limited and that Rogers was entitled to have issued to him 30% of the issued and outstanding common shares of Agincourt Holdings Limited. Pursuant to that judgment, the real property was conveyed by Anndale to Agincourt Holdings Limited and 30% of that company's shares were issued to the applicant, though not until long after the order was made.

The learned trial Judge found as a fact that Rogers and Holmes had embarked on a joint venture for the construction and operation of the motor hotel. The following four points essentially paraphrase the relevant terms of the agreement as found by Stark, J.:

1. That a motor hotel venture would be undertaken whereby the two would share equally in the profits and ownership, which was later altered to a 30/70% basis of division.
2. Rogers would supply his labour, experience and knowledge while Holmes, through his holding company, Anndale Investments Limited, would supply the risk capital.
3. The venture would require two companies: Agincourt Holdings Limited to hold the land, buildings and equipment; and a second company, Agincourt Motor Hotel Limited, to operate the motor hotel.
4. In the first year or two of operations, when losses were to be expected, the property could remain in the name of Anndale Investments Limited (which company could benefit by tax losses) but the transfer to the Agincourt Holdings Limited would take place as soon as the hotel was on a paying basis. In Stark, J.'s view that time had long since arrived.

An appeal by the defendants was argued on December 17, 1970, and was dismissed with costs and a further appeal to the Supreme Court of Canada was abandoned early in 1971.

Largely, it would appear, because of Holmes' unwillingness to accept the result ordered, there was a subsequent reference in December, 1972, before the Master to determine the basis on which Anndale would account to Agincourt Holdings Limited. Thereafter, in an effort to resolve the differences between them, Rogers proposed that Holmes purchase Rogers' interest in both Agincourt Holdings Limited and Agincourt Motor Hotel Limited. That proposal was refused.

Rogers was director and vice-president of the holding company from its inception until the annual meeting of 1972, and similarly of the operating company until the annual meeting of September, 1968. At these respective meetings Holmes used his voting majority to ensure Rogers' exclusion from the two boards. On October 1, 1973, the present application was launched.

I turn now to the questions of law raised by the application on this appeal.

It will be convenient first of all to set out s. 217(*d*) of the *Business Corporations Act*, R.S.O. 1970, c. 53:

> 217. A corporation may be wound up by the order of the court,
>
> . . . . .
>
> (*d*) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

In interpreting this subsection there are two points that appear especially important. Firstly, Courts from time to time have commented that the words "just and equitable" are words "of the widest significance", and must be given a broad interpretation: *vide*, *Ebrahimi v. Westbourne Galleries Ltd. et al.*, [1972] 2 All E.R. 492 (H.L.), *per* Lord Wilberforce at p. 496; *Re R. J. Jowsey Mining Co. Ltd.*, [1969] 2 O.R. 549 at p. 552, 6 D.L.R. (3d) 97 at p. 100 (C.A.), *per* Laskin, J.A.; affirmed [1970] S.C.R. v; *Re Davis & Collett, Ltd.*, [1935] Ch. 693 at p. 701, and *Re Dominion Steel Corp. Ltd.*, [1927] 4 D.L.R. 337, *per* Rogers, J., at p. 354, quoting from *Re Blériot Mfg. Aircraft Co.* (1916), 32 Times L.R. 253 at p. 255. It is quite proper, of course, to draw upon previous cases for general guidance but counsel and the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories, for each case depends to a large extent on its own facts. It is in this light that we must consider the principles and propositions set out by Laidlaw, J.A., in *Re R.C. Young Ins. Ltd.*, [1955] O.R. 598 at pp. 601-2, [1955] 3 D.L.R. 571 at pp. 572-3, 35 C.B.R. 72; Laidlaw, J.A., himself stated at p. 607 O.R., p. 578 D.L.R., that the decision rested "primarily on findings of fact".

Secondly, in cases such as the present, some general guidance can be obtained from an analogy to partnership law. Section 35 of the *Partnerships Act*, R.S.O. 1970, c. 339, provides that:

> 35. On application by a partner, the court may order a dissolution of partnership,
>
> . . . . .
>
> (*f*) when in any case circumstances have arisen that in the opinion of the court render it just and equitable that the partnership be dissolved.

To paraphrase Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd. et al.*, *supra*, commenting on the corresponding sections of English statutes, the common use of the words "just and equitable" provides a bridge between the cases under s. 217 (*d*) of the *Business Corporations Act* and the principles of equity developed in relation to partnerships. The partnership analogy has been used extensively, in Ontario as well as in England, ever since Lord Cozens-Hardy, M.R., described a private company which "can

fairly be called a partnership in the clothes or under the guise of a private company": *Re Yenidje Tobacco Co., Ltd.*, [1916-17] All E.R. 1050 at p. 1051 (C.A.). In our opinion that analogy is applicable in this situation. This company is and was from the commencement essentially a partnership and thus this case is clearly distinguishable from others such as *Re Jury Gold Mine Development Co. Ltd.* (1928), 63 O.L.R. 109, [1928] 4 D.L.R. 735, 10 C.B.R. 303; *Re Hugh-Pam Porcupine Mines Ltd.*, [1942] O.W.N. 544, 24 C.B.R. 60; *Re Shipway Iron Bell & Wire Mfg. Co. Ltd.* (1926), 58 O.L.R. 585, [1926] 2 D.L.R. 887; *Re Imperial Steel & Wire Co. Ltd.* (1919), 17 O.W.N. 324, and *Re Noden Hallitt & Johnson Ltd.* (1924), 26 O.W.N. 269 and 330, which were not so analogous.

We are further of the view that an appellate Court is at liberty to consider all the material in the entire record and give effect to its opinion on the basis of the justice and equity affecting the application: *Re Martello & Sons, Ltd.*, [1945] O.R. 453, especially at p. 465, [1945] 3 D.L.R. 626 at p. 635, 27 C.B.R. 204, *per* McRuer, J.A. In this case we are compelled to make one significant variation to the facts accepted in the Courts below.

Callon, J., came to the conclusion that it was never intended that Rogers would be entitled to participate in the management function of the motor hotel following its completion. He said:

> I find that it was the agreement of the applicant and Holmes that the applicant would play a primary role in bringing the motor hotel into being and into operation for which he was to receive a minority interest in the two companies and that their agreement did not extend beyond that.

The Divisional Court [12 O.R. (2d) 386, 69 D.L.R. (3d) 62] reviewed the facts at great length and quoted extensively from the documentary evidence and the judgment of Stark, J. Although that Court [at p. 393 O.R., p. 69 D.L.R.] found that the relationship between Rogers and Holmes was founded "... as much upon their personal trust and confidence in each other as old acquaintances as upon cold business principles", it did not specifically interfere with the crucial negative finding of Callon, J., with respect to the management function of the motor hotel.

We have carefully examined the lengthy record. Stark, J., accepted Rogers' credibility and described him as " ... an associate in the joint venture", a motor hotel in which the principals " ... would share equally in the profits and ownership" — later altered to a 30/70 division. He found that Rogers would supply his labour, experience and his knowledge to both companies. Rogers, who was not impecunious, personally guaranteed a property mortgage for the very substantial sum of $750,000. It is clear from the correspondence filed that Rogers' managerial background and experience were important to Holmes and that even after December, 1963, Holmes wished to draw on these managerial abilities. Rogers re-

mained on the boards of directors of the companies, and continued to participate in their management, until he was excluded by Holmes. He made suggestions on policy matters and reviewed the financial statements long after December, 1963.

In our view, the inescapable inference from the entire record is that there existed, in fact, an arrangement and understanding with Holmes that Rogers would participate in the conduct and management of the companies' affairs. Both of them had shared trust and confidence in one another. Holmes repudiated the understanding and arrangement by unilaterally excluding Rogers as a salaried managing director, by resisting the action tried by Stark, J., on the basis that Rogers was simply an employee, and by later voting him out of his directorships. Although because of Holmes' majority position this situation could not be characterized as one of deadlock, it clearly is a case of improper exclusion falling within the ambit of *Ebrahimi v. Westbourne Galleries Ltd. et al., supra*, and it bears quite some similarity to the situation in *Re Pre-Delco Machine & Tool Ltd.*, [1973] 3 O.R. 115, 36 D.L.R. (3d) 50 (H.C.J.). Furthermore, such a breach of the original agreement and of the good faith which underlay it might of itself be a sufficient basis to wind up a company to which the partnership analogy is applicable: *Re Yenidje Tobacco Co. Ltd., supra*, at pp. 1052-3.

The Divisional Court referred to the destruction of mutual confidence aspect in the following words [at p. 396 O.R., p. 72 D.L.R.]:

> In our view, the repudiation by Holmes of the agreement that Rogers should hold 30% of the shares of the holding company, as well as the same percentage of shares of the operating company, an agreement found by Stark, J., to have been made, was more than sufficient to destroy the basis of the relationship between them, the confidence each had in the other. In addition, the pressure applied by Holmes to have Rogers leave his office and give up all participation in the management of the hotel was quite inconsistent with the conduct of the parties towards each other to that time and can have done nothing but weaken further the confidence Rogers originally had in Holmes.
>
> In our view, it would be neither just nor equitable to compel the applicant to remain in his present position.

With respect, this was an incomplete statement of the reasons why there existed a justifiable lack of confidence. We venture to suggest two other factors present in this case, both of which also point to a breach of the understanding and arrangement to participate in the management of the companies, and both of which are factors such as have been considered relevant in the decided cases to which we refer.

(1) The incompatibility and quarrelling between Rogers and Holmes, even in the absence of a voting deadlock, is a valid consideration in situations where the Court is entitled to consider the case on an analogous application of the principles governing the dissolution of partnership.

A leading case in Scotland which comments on this aspect of company law is *Symington v. Symington's Quarries, Ltd.* (1906), 43 Sc. L.R. 157, 13 S.L.T. 509, from which the following passage was quoted with approval in *Loch et al. v. John Blackwood, Ltd.*, [1924] A.C. 783 at p. 793, [1924] All E.R. 200 at p. 206 (P.C.):

> "But then this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company. The only real partners are the three brothers of a family, the other shareholders having only a nominal interest for the purpose of complying with the provisions of the Act. In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, and I agree with your Lordship that this is a case in which it would be just and equitable that this company should be wound up, and the partners allowed to take out their money and trade separately if they please."

There was a similar theme in *Re Bondi Better Bananas Ltd. et al. and Bondi et al.*, [1951] O.R. 845, [1952] 1 D.L.R. 277, 32 C.B.R. 171 (C.A.), where the circumstance of quarrelling was considered apart from the deadlock situation. At p. 855 O.R., pp. 281-2 D.L.R., Aylesworth, J.A., speaking for the Court, said:

> In our view, there is a further ground of equal application to this case. We think the principles governing the dissolution of partnerships apply to the circumstances in which these two gentlemen find themselves as equal owners of the capital stock and in equal control of this private company, and if this be so authority is not required for the proposition that "continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation" is sufficient to justify the order ...

(2) The attempted freeze-out or expulsion principle is another significant factor that was only implicitly touched upon in the judgment appealed from. *Ebrahimi v. Westbourne Galleries Ltd. et al., supra*, was a case of expulsion, where the majority shareholder repudiated the personal relationship, and treated the minority shareholder as a mere employee, and voted him out of his directorship. At p. 501 Lord Wilberforce said:

> The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management ... even where under the partnership agreement there is a power of expulsion ...

The same view has been relied upon in other cases: *Loch et al. v. John Blackwood, Ltd., supra*, at p. 794; *Re Davis & Collett, Ltd., supra*, and *Re Pre-Delco Machine & Tool Ltd., supra.*

The present case seems to include all the elements mentioned in *Ebrahimi* to justify resort, as Lord Wilberforce put it at p. 500, to:

> ... equitable considerations; considerations, that is, of a personal character

> arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

As he pointed out, it would be undesirable to attempt to define all the circumstances in which these considerations arise, but the following elements, which all apply in the present case, are illustrative:

> Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The super-imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

Appellants' counsel submits that Rogers' conduct after vacating the premises was in recognition of his minority position and an acknowledgement that he was not entitled to participate in the management function *of the motor hotel.* In our view, this argument is based on a confusion between the active day-to-day managerial function in respect of the motor hotel, in contrast to a right of participation in the conduct of the companies' affairs. It cannot be said, as argued on behalf of the appellants, that Rogers waived his right to participate in the management function of the two companies, or that he acquiesced in his expulsion and was guilty of laches. Rogers has been engaged in negotiations or litigation with Holmes since 1963. He did in fact participate in the management aspect throughout his directorship until his exclusion. While there may have been some lapses in his pressing to the utmost of his rights, we are satisfied that Rogers cannot be charged with such fatal acquiescence in the change of position as would constitute laches. In our view he acted with sufficient promptitude in petitioning, as a last resort, for the winding-up of the companies.

We are all of the opinion that it is just and equitable that the appellant be wound up, and we hereby affirm the order of the Divisional Court and dismiss the appeal with costs.

Appeal dismissed.

Ellerforth Investments Limited v. Typhon Group Limited, 2009 CanLII 46640 (ON S.C.)

COURT FILE NO.: 429/07
DATE: 20090909

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
ELLERFORTH INVESTMENTS LIMITED	*Adrian C. Lang and Mel Hogg*, for the Applicant
Applicant	
- and -	
THE TYPHON GROUP LIMITED	*Arie Gaertner*, for the Respondent
Respondent	

HEARD: August 13, 2009

SWINTON J.:

Overview

[1] Ellerforth Investments Limited ("Ellerforth") brings this application seeking an order under s. 35 of the *Partnerships Act*, R.S.O. 1990, c. P.5 ("the Act") for an order dissolving Ellercyb Investments ("the Partnership"), a partnership between Ellerforth and The Typhon Group Limited ("Typhon").

Background

[2] Ellerforth was incorporated in 1960 by a group of physicians in their forties. These physicians all practised with the Albany Medical Clinic ("the Clinic"), a community-based health care clinic located at 200 Danforth Avenue in Toronto. The Clinic had been opened in 1946 by four physicians who were among the founders of Ellerforth.

[3] Ellerforth was to own the Danforth property where the Clinic operated. It would lease the premises to the Clinic.

[4] The initial shareholders were the spouses of the founding physicians. Over time, these physicians and other physicians and their spouses became shareholders of Ellerforth. Adjoining property was purchased to enlarge the space available. The building located on the property was torn down around 1965 and replaced with a purpose-built medical facility, specially designed to hold the Clinic. That building was expanded in 1969 to its present size of about 26,100 square feet.

[5] In October 1972, Cybermedix, a private medical laboratory, moved into the basement of the building. Dr. Norman Lofchy, president of Ellerforth, deposed that there was a close personal relationship between Will Manelson, one of the principals of Cybermedix, and Dr. Jack Mitchell, one of the initial physician shareholders of Ellerforth.

[6] On August 23, 1983, Ellerforth entered into a Memorandum of Agreement (the "MOA") and a Partnership Agreement with Cybermedix, forming the Ellercyb Investments partnership. By these agreements, Cybermedix acquired a 25% interest in the Danforth property.

[7] Pursuant to the Partnership Agreement, Ellerforth held a 75% interest in the Partnership and Cybermedix 25%. Ellerforth was to act as Managing Partner. In connection with the formation of the Partnership, Ellerforth contributed the Danforth property and Cybermedix contributed $634,000, estimated at the time to be one quarter of the value of the property. The Danforth property is the sole asset of the Partnership.

[8] The purposes of the Partnership are set out in section 1.05 of the Partnership Agreement:

> The purposes for which the Partnership is formed and the business of the Partnership shall be to acquire a fee simple interest in the Project now owned by Ellerforth, and, to develop, the Buildings for the purposes of providing rental space for a first class medical clinic, laboratory, ancillary services and such other uses as the partners shall determine and to mortgage, encumber, charge, and manage the Lands and Buildings.

[9] The Partnership is to continue, unless terminated in accordance with the provisions of the Partnership Agreement, for as long as the Partnership holds any interest in the Project (section 1.07). The Project is defined as the lands, buildings and equipment and all leases pertaining to the Danforth property.

[10] The Partnership Agreement provides for dissolution in limited circumstances, including mutual agreement, an event of default (as defined), and the sale of substantially all the assets.

[11] According to section 2.03, while overall management of the property is vested in Ellerforth as Managing Partner, it can not sell the property or rent to a new tenant without the consent of Cybermedix. Consent is defined to mean, unless otherwise specifically stipulated to the contrary, consent which may be unreasonably or arbitrarily withheld.

[12] In or about the late 1980s, Cybermedix's interest was transferred to a related company, Canadian Medical Laboratories Inc. ("CML"). CML continued to operate a laboratory in the building.

[13] On October 24, 1996, CML informed the directors of Ellerforth that as part of a corporate reorganization, CML was transferring its interest in the Partnership back to Cybermedix. Cybermedix then transferred its interest in the Partnership to Typhon, an affiliated Canadian corporation. This transfer was to take place in connection with an initial public offering of the shares of CML, Typhon's parent company.

[14] In order to effect the necessary corporate restructuring, Typhon and its parent required Ellerforth's consent to an Assumption Agreement, whereby Ellerforth agreed that Typhon would assume the partnership obligations, and it released CML and Cybermedix from any obligations under the Partnership Agreement.

[15] Prior to providing that agreement, Ellerforth sought assurances from the solicitors for Cybermedix and CML that Typhon was not a holding company. The solicitors provided a letter dated November 21, 1996 describing Typhon's activities, stating that Typhon carried on business as an operator of a number of medical clinics in Ontario. The letter specifically stated, "Typhon is not a holding company, in that it carries on an active business of owning and operating medical clinics, all of which are located in Ontario." After receiving the letter, Ellerforth consented to the Assumption Agreement.

[16] The Albany Clinic has grown over the years and now has more than 20 family physicians and more than 35 specialists. It has always been the primary tenant of the building.

[17] In 2006, the Clinic undertook a feasibility study to determine whether the building could be renovated to accommodate its anticipated growth. The Partnership financed 50 per cent of the study. The study resulted in three options for expansion and renovation, with a projected range of cost from $6,510,000 to $9,090,000.

[18] In late 2006, after receipt of the study, the general manager of the Clinic gave notice that the Clinic would not be renewing its lease for the building on expiry in October 2009. The Clinic plans to relocate to a building around the corner, which is currently undergoing renovation. The remaining tenants at the property are a dental office and the CML lab.

[19] The Partnership formed a committee, including Craig Mull, director and secretary of Typhon, to find a replacement tenant in the medical field. Mr. Mull entered into discussions with a representative of a First Nation seeking a location for a clinic, but these discussions were not successful.

[20] Ellerforth made inquiries of the Ministry of Health in an attempt to find a replacement medical clinic as tenant. None was found.

[21] It also contacted Ephraim Diamond, a developer, and Harold Heilbut, a commercial realtor, for advice on finding a replacement tenant. According to Dr. Lofchy, he has been consistently advised there is little chance of finding a replacement medical clinic of the appropriate size to lease the premises.

[22] In July 2007, Ellerforth obtained an Opinion of Value from CB Richard Ellis indicating that the property would require a significant capital expenditure to bring it up to the condition where it would be marketable in its current use as medical offices. Typhon concedes that renovations would be needed for a new tenant, and significant renovations would be required to bring the building into a condition where it could be used for a tenant other than a medical clinic.

[23] Ellerforth is of the view that the property is best suited for redevelopment and wishes to sell it, so that its elderly shareholders can realize their long-term investment in the property. Most of the present physician shareholders of Ellerforth are retired, or they have restricted their medical practice. Only two of the Ellerforth physician shareholders still practise at the clinic, one full time and one part-time.

[24] Typhon has refused to consent to a sale, stating that it prefers to hold the property for an indefinite period. When a sale was first proposed in January 2008, Mr. Mull opposed it, expressing the view that it was too early to conclude that no prospective tenants could be found.

[25] In February 2008, Ellerforth offered to buy Typhon out at fair market value or, alternatively, to sell its 75% interest to Typhon at fair market value. Both offers were refused. Again, Mr. Mull stated that a suitable replacement tenant could be found if Ellerforth made a serious marketing effort. He made it clear, when cross-examined, that he believes the property should be held for investment purposes, and he is opposed to selling it in the current market.

[26] Typhon has suggested that Ellerforth could sell its share of the Partnership, as permitted by the Partnership Agreement. However, Ellerforth takes the position that this is not a viable option, given the limitations of the property and the restrictions on the use and disposition of the property found in the Partnership Agreement.

The Issues

[27] Ellerforth has brought this application seeking an order pursuant to s. 35(c) or (f) of the *Partnerships Act*, which state:

> On application by a partner, the court may order a dissolution of the partnership,
>
> ...
>
> (c) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the

> court, regard having been had to the nature of the business, is calculated to prejudicially affect the carrying on of the business;
> ...
>
> (f) when in any case circumstances have arisen that in the opinion of the court render it just and equitable that the partnership be dissolved.

Conduct of Typhon

[28] Ellerforth points to two aspects of Typhon's conduct to support its claim for an order dissolving the Partnership pursuant to s. 35(c) of the Act: Typhon's refusal to consent to the sale of the property and the alleged misrepresentations about the nature of Typhon's business at the time of the Assumption Agreement.

[29] With respect to the first ground, Typhon is said to have engaged in conduct prejudicial to the carrying on of the business because it refused to consider selling the property, despite a number of unsolicited offers to purchase and the loss of the primary tenant.

[30] I reject this submission. The Partnership Agreement clearly requires the consent of Typhon to the sale of the property and provides that consent can be unreasonably or arbitrarily withheld. Typhon has a different view from Ellerforth about the disposition of the property. That does not constitute conduct prejudicial to the carrying on of the business.

[31] On the second ground, Ellerforth argues that Typhon's conduct in inducing Ellerforth to consent to the transfer of the partnership interest in 1996 is highly prejudicial. Ellerforth submits that it relied on the representation that Typhon was not a holding company when Typhon is, in fact, a real estate holding company and not the partner that Ellerforth was led to believe it was partnering with.

[32] Again, I see no merit to this argument. I note there was no requirement under the Partnership Agreement for Ellerforth to agree to the transfer, as Typhon was an affiliate of Cybermedix within the terms of the agreement.

[33] Moreover, I see nothing misleading in the contents of the letter describing Typhon's business. It may be that the Ellerforth investors misunderstood the nature of Typhon's business when Ellerforth agreed to the Assumption Agreement. However, the solicitors' letter responded to their questions about whether Typhon was a holding company, saying that it was not, and it described what Typhon did. While the letter states that Typhon "carries on an active business of owning and operating medical clinics", in fact, as is clear on the second page of the letter, Typhon is in the business of owning and operating medical buildings. I find nothing misleading in the letter.

[34] Therefore, Ellerforth has not established any basis for relief pursuant to s. 35(c) of the Act.

Just and Equitable Jurisdiction

[35] The words "just and equitable" in s. 35(f) of the Act are of wide significance and are to be given a broad interpretation (*Rogers v. Agincourt Holdings Ltd.* (1976), 14 O.R. (2d) 489 (C.A.) at 493). The determination of what is just and equitable will depend, in large part, on the facts of each particular case. In *Rogers*, the Court of Appeal observed that while previous cases provide guidance, the authorities should not be treated "as setting out a series of restrictive principles which would confine the phrase 'just and equitable' to rigid categories" (at 493).

[36] In *Landford Greens Ltd. v. 746370 Ontario Inc.* reflex, (1993), 12 B.L.R. (2d) 196 (Ont. Ct. (Gen. Div.), Ground J. held,

> It must be established that there is, if not deadlock, at least substantial disagreement on questions of the day to day management of the operation and such a lack of confidence or trust between the parties as to render it virtually impossible for the venture to continue. (at para. 22)

[37] In *P.W.A. Corp. v. Gemini Group Automated Distribution Systems Inc.* reflex, (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), Dubin C.J.O. stated,

> The essence of a partnership is that of mutual confidence and trust in one another, and it is of the essence of that relationship that mutual confidence be maintained. If there is a lack of confidence such that the partners cannot work together in the way originally contemplated, then the relationship should be ended. (at 622)

Although this statement was made in a dissenting opinion, it has been cited as the applicable test for the just and equitable principle for the dissolution of a partnership (*Belman v. Belman* 1995 CanLII 7220 (ON S.C.), (1995), 26 O.R. (3d) 56 (Gen. Div.) at 74).

[38] Ellerforth argues that the parties are completely at odds with respect to the future of the Partnership, and the Partnership is in a deadlock. It submits that Typhon is attempting to force it into a role not contemplated at the outset of the Partnership – namely, to act as an indefinite managing partner of a real estate holding company. It also argues that there are irreconcilable difference between the parties, both because of their disagreement on the future of the property and the lack of mutual trust and confidence between the partners.

[39] Typhon argues that there should be no finding of a deadlock, given the terms of the Partnership Agreement. The agreement specifically requires the consent of both parties to the sale of the property, and that consent may be unreasonably or arbitrarily withheld. Moreover, Typhon argues that there is no evidence of irreconcilable differences between the partners. Finally, it submits that Ellerforth should be denied the equitable relief it seeks because it does not come before the court with "clean hands".

[40] In its factum, Typhon argued that the express provisions of the Partnership Agreement contract out of s. 35 (f) of the Act. Section 4.04 of the agreement, under the heading "Withdrawal and Partition", states,

> Except as otherwise provided herein each partner expressly waives any rights that it might otherwise have ... to petition for a partition of the Partnership's assets.

[41] In oral argument, counsel for Typhon conceded that s. 35(f) allows this Court to exercise its equitable jurisdiction despite such a provision in a partnership agreement (and see *Landford Greens, supra* at para. 5). However, he submitted that in determining whether it is just and equitable to dissolve the partnership, the court should have regard to the terms of the Partnership Agreement.

[42] Having considered all the circumstances, I have come to the conclusion that it is just and equitable to order the dissolution of the Partnership for the reasons that follow.

[43] In coming to this conclusion, I ascribe no fault to Typhon for its refusal to consent to sell the property. Typhon had the right to refuse under the Partnership Agreement. It did so because it has a different view about the benefits of retaining the property as an investment than the Ellerforth shareholders.

[44] The parties are not in a position of deadlock, in the sense that no decisions can be made about the operation of the business. However, there has been a material change of circumstances since the Partnership was formed, which makes it just and equitable to dissolve the Partnership. In coming to this conclusion, I am guided by the following passage from *Lindley & Banks on Partnership*, 17th ed. (London: Sweet & Maxwell, 1995) at p. 726:

> ... an order is likely to be made if, for whatever reason, the objects for which the partnership was formed can no longer be attained, either at all or in the manner originally contemplated by the partners, and a dissolution cannot be obtained on one of the other grounds.

[45] In 1983, when the Partnership was formed, the two partners were closely tied to the medical services being offered at the property. One partner, Cybermedix, operated the medical laboratory; the other, Ellerforth, was owned by shareholders who were physicians practising in the Clinic or their spouses. Their stated purpose, as set out in the Partnership Agreement, was to provide premises for the operation of a first class medical clinic, a laboratory and other ancillary uses. While the purpose clause also permits other uses as agreed by the parties, it is clear that the primary purpose of the Partnership was always to provide premises for a medical clinic and related uses.

[46] The situation is now very different than it was in 1983. The Albany Clinic has given notice that it will not renew its lease at the end of October, 2009 (although it has sought an extension for a few months while renovation of the new premises is completed). Therefore, the primary tenant, a clinic with over 50 physicians, is about to leave.

[47] Dr. Lofchy has received advice that it would be unlikely that a new tenant could be found to take the premises without a major investment in renovations. The building was designed for medical office purposes and is not readily adaptable to other uses, such as retail. Thus, it is reasonable to expect, and I find, that there will be a need for a substantial investment of capital in order to make the premises an attractive rental property, even for medical use. Clearly, in the period in which such renovations would occur, there would be ongoing carrying costs.

[48] According to the Partnership Agreement, Ellerforth would be responsible, as Managing Partner, to find tenants. However, Typhon must give its approval for any new tenant. Ellerforth, as the 75% partner, would also be responsible for 75% of any renovation costs to be paid by the landlord.

[49] That brings me to the changes in the circumstances of the partners. With respect to Ellerforth, most of the shareholders are no longer physicians actively practising at the Clinic. Only two of the Ellerforth physicians continue to practise, one part-time. All are at retirement age. Some of the physicians are deceased and their wives hold the shares. The evidence from Dr. Lofchy is that the shareholders wish to realize on their long term investment for retirement and estate planning purposes. At this stage in their lives, they do not wish to invest the funds into the renovations that will be necessary to attract new tenants, nor do they wish to carry on the business of a real estate holding company.

[50] However, the Ellerforth shareholders are now in a situation where they cannot sell the property, nor, realistically, can they sell their interest in the Partnership, given that the 75% shareholder would be responsible for 75% of any renovation costs payable by the landlord and of the expenses in carrying the property. The Managing Partner must also find new tenants, but Typhon must agree to those tenants.

[51] It is true that Ellerforth got itself into this situation because of the terms of the Partnership Agreement it signed. However, as I noted above, it signed that agreement at a time when the principals of the two partners were actively involved in providing medical and laboratory services, and when they assumed that the property would continue to house a first class medical clinic. Those circumstances have changed dramatically.

[52] Typhon, their present partner, is in the business of owning and renting space in medical buildings, and its interests are very different from those of the Ellerforth shareholders.

[53] Therefore, referring back to the passage from Lindley quoted earlier, I find that the objects for which the partnership was formed can not be attained in the manner originally contemplated by the parties.

[54] In my view, the evidence also demonstrates a lack of mutual confidence and trust between the parties. There has been correspondence between the partners' counsel concerning an extension of the tenancy of the Clinic while renovations of the new space are completed. Those letters, found in the Supplementary Application Record, show the breakdown of the mutual confidence and trust that are so important to a partnership relationship. For example, Typhon has accused Dr. Lofchy of a possible breach of fiduciary duty.

[55] Mr. Mull has also indicated his view that Ellerforth could have avoided losing the Clinic as primary tenant. He also suggests that Ellerforth has not made adequate efforts to find new tenants.

[56] This litigation is also evidence of a lack of mutual confidence and can not have helped the parties' relationship. For example, Mr. Mull, on behalf of Typhon, has accused Dr. Lofchy of making misleading statements in these proceedings.

[57] Whether it is just and equitable to dissolve a partnership depends on the facts of the particular case. This is not a case like *Landford Greens*, *supra*, where Ground J. refused to dissolve the partnership of two parties engaged in the construction of commercial buildings. After a downturn in the real estate market, one partner sought to dissolve the partnership. Ground J. found that there was no evidence of deadlock, nor was there substantial disagreement with respect to the management of the partnership business. As well, he found that there was not such a lack of trust and confidence between the partners that they could not continue working together (at

para. 22).

[58] The present case is different. The parties have very different views as to the future, and they do not have the mutual trust and confidence necessary to continue working together as partners.

[59] Typhon argues that Ellerforth should be denied equitable relief because it does not come to this court with clean hands. It bases this argument on Ellerforth's failure to act reasonably in obtaining an alternate medical tenant at the appropriate point in time, by failing to make reasonable steps to secure the ongoing tenancy of the Clinic, by Dr. Lofchy's lack of candour and by failure to disclose a letter of intent to Typhon in a timely manner.

[60] In my view, none of these grounds show misconduct on the part of Ellerforth. If anything, the complaints about losing the Clinic as a tenant or failing to find alternative tenants is evidence of the parties' inability to work together on the basis of mutual trust and confidence now and in the future.

Conclusion

[61] For these reasons, the application to dissolve the Ellercyb Investments partnership is granted pursuant to s. 35(f) of the Act. I order that the parties' sole asset, the Danforth property, be sold, and the proceeds are to be divided in accordance with the terms of the Partnership Agreement.

[62] No submissions were made to me about the method of sale. If the parties cannot agree on the method of sale, they may bring a further motion for directions before me or another judge to deal with that issue.

[63] I have received costs outlines from both parties, but neither has had an opportunity to make submissions on costs. If the parties cannot agree on costs, they may make brief written submissions to me within 30 days of the release of this decision.

Swinton J.

Released: September 9, 2009

COURT FILE NO.: CV-08-364055
DATE: 20090909

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELLERFORTH INVESTMENTS LIMITED

Applicant

- and -

THE TYPHON GROUP LTD.

Respondent

REASONS FOR JUDGMENT

SWINTON J.

Released: September 9, 2009

JAMES HAGGERTY HARRIS
Applicant

and

BELMONT DYNAMIC GROWTH FUND,
an Ontario Limited partnership
Respondent

Court File No: 09-8302-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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