

CITATION: Basegmez v. Akman, 2017 ONSC 5370
COURT FILE NO.: CV-17-11697-000
DATE: 20170915

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

VOLKAN BASEGMEZ, CEM BLEDA
BASEGMEZ, ANIL RUKAN
BASEGMEZ, BA&B CAPITAL INC.,
SERDAR KOCTURK and KAAN
HOLDINGS INC.

Applicants

– and –

ALI AKMAN, SAMM CAPITAL
HOLDINGS INC. and TARN FINANCIAL
CORPORATION

Respondents

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) *E. Patrick Shea and Christopher Stanek, for*
) *the Applicants*
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) *Bobby H. Sachdeva and Monty Dhaliwal, for*
) *the Respondents, Ali Akman and SAMM*
) *Capital Holdings Inc.*
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) **HEARD:** August 11, 2017
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LEDERMAN J.

NATURE OF APPLICATION

[1] This is an application by Volkan Basegmez (“Volkan”), Cem Bleda Basegmex (“Bleda”), Anil Rukan Basegmez (“Anil” and collectively, the “Basegmez Family”), BA&B Capital Inc. (“BA&B”), Serdar Kocturk (“Serdar”) and Kaan Holdings Inc. (“KAAN”) seeking an Order winding up Tarn Financial Corporation (“Tarn Financial”) and appointing KPMG LLP as liquidator for that purpose. The application is opposed by Ali Akman (“Akman”) and SAMM Capital Holdings Inc. (“SAMM”).

[2] The applicants allege that there has been a fundamental and complete breakdown of trust in the relationship among the shareholders/partners of Tarn Financial arising from the alleged breach by Akman of his duties owing to Serdar and Tarn Financial and his commitment to the Basegmez Family that justifies the appointment of a liquidator and the winding up of Tarn Financial.

BACKGROUND FACTS

[3] Tarn Financial is an “incorporated partnership” among the Basegmez Family, Serdar and Akman. The company owns: (a) the Delta Hotel Toronto East in Mississauga, Ontario (the “Delta Hotel”); and (b) certain lands adjacent to the Delta Hotel on which a condominium project is planned (the “Development Lands”). Tarn Financial also owns all of the shares of Tarn Construction Corporation (“Tarn Construction”). Tarn Construction is involved in developing the Development Lands.

[4] Tarn Financial was incorporated by Akman under the Ontario *Business Corporations Act* (the “OBCA”) in or about July of 2014.

[5] The individual applicants and respondent come from the Republic of Turkey and that is how they came to know each other and agree to participate in a common business venture.

[6] Akman who is a Canadian citizen and resident in Canada, was the driving force behind the acquisition of the Delta Hotel and the Development Lands.

[7] Akman informed Volkan and Serdar about an opportunity to invest in this real estate project in Toronto. Serdar and Volkan agreed to participate as partners in the acquisition by Akman of the Delta Hotel and the Development Lands. It was agreed among Volkan, Serdar and Akman that Volkan would contribute \$6 million to Tarn Financial in exchange for a 40% interest to be held by the Basegmez Family’s company, BA&B; Serdar would contribute \$3 million to Tarn Financial in exchange for a 20% interest to be held by his company, KAAN; and Akman agreed to contribute \$4.3 million in exchange for a 40% interest to be held by his company, SAMM.

[8] There is no shareholders agreement among SAMM, BA&B and KAAN. However, there are communications between the parties which demonstrate their expectations and intent.

[9] Volkan wanted to provide his son Bleda and his nephew Anil an opportunity to immigrate to Canada. In connection with his investment, Volkan wanted to place them under the care and mentorship of Akman so that they could improve their business skills and obtain experience in an international environment. As well, Akman would sponsor them for immigration purposes.

[10] It was agreed that Akman would receive the same amount of shares as Volkan, despite contributing less capital because the balance of Akman’s contribution would be through the management of Tarn Financial and issuance of personal guarantees that may be required by financial institutions. The applicants allege that it was agreed that based on his reduced capital contribution, Akman would not be entitled to receive any management or development fees from Tarn Financial.

[11] The Articles of Incorporation of Tarn Financial provide for only two classes of shares: unlimited number of Class A common shares and unlimited number of Class B preferred shares. The holders of Class B preferred shares were not entitled to vote at meetings of shareholders.

[12] Volkan, Serdar and Akman agreed that each shareholder would have voting rights in Tarn Financial in proportion to their shareholdings and no one shareholder was to have a majority.

[13] Only Class A common shares were issued to BA&B, KAAN and SAMM in accordance with this intention. Akman held Serdar or KAAN's Class A common shares in trust for the benefit of Serdar.

ALLEGED ACTS OF OPPRESSION

[14] In mid-2016, Serdar and the Basegmez Family discovered that Akman created a new class of shares by amending the Articles and issued new 100 Class B shares of Tarn Financial to his company SAMM, with the right to vote at shareholders meetings without the consent of either Volkan or Serdar. No such class of shares was authorized in the original Articles of Tarn Financial. The new Class B shares gave Akman voting control of Tarn Financial.

[15] Akman changed the capital structure of Tarn Financial to give himself voting control by creating these new Class B shares. These shares carried only voting rights and created no economic interest in the company. They were issued for \$1 each thereby giving Akman absolute voting control of Tarn Financial for a total price of \$100.

[16] There had been no prior discussion with Serdar or Volkan about this amendment. Rather than calling a shareholders meeting to explain what he was doing, Akman chose to effect this amendment by way of special resolution.

[17] The special resolution was signed by Anil who had authority to sign on behalf of the Basegmez Family. Akman signed the resolution as trustee for Serdar as he was holding Serdar's interest in trust. Anil stated that he did not realize what he was signing in the circumstances and did not have sufficient background information or knowledge as to what he was signing.

[18] Further, as trustee for Serdar, Akman owed Serdar a positive duty to obtain his informed consent before signing a special resolution on his behalf. Akman did not obtain Serdar's instructions with respect to this Amending Resolution.

[19] The effect of this amendment was to provide SAMM with a 70% voting interest in Tarn Financial as opposed to the 40% interest it was intended Akman would have when Tarn Financial was incorporated and to dilute in half the voting interests of the Serdar and the Basegmez Family.

[20] Once Akman obtained voting control, the applicants allege that he treated Tarn Financial as his own company and totally disregarded the interests of the applicants.

[21] Akman caused Tarn Financial to enter into a management contract with his company, Akman Hospitality Management Inc., under which Tarn Financial pays it a management fee of 4%

of the hotel's gross revenue accrued monthly for a term of 15 years. This management contract would cost Tarn Financial approximately \$12 million over 15 years.

[22] In addition, Akman has used the hotel's capital to finance personal investments and Tarn Financial has entered into a number of deals and loans with other companies controlled by Akman at prices and terms that are unfavourable to Tarn Financial but favourable to the Akman companies. All of this took place without the consent of the other shareholders of Tarn Financial.

[23] Further, there are no effective controls in Tarn Financial in place to review and verify Akman's personal expenses and there is no support for many of the expenses claimed by Akman and paid by Tarn Financial.

[24] Akman created an off-shore account in the name of a company controlled by him into which he funneled surplus cash from Tarn Financial. This was not disclosed to shareholders nor approved by them.

[25] Akman caused Tarn Financial to pay his company SAMM \$1 million for development fees without their being any communication with shareholders. This amounts to self-dealing as the services provided by SAMM are provided by Akman who is also an officer of Tarn Financial.

[26] None of the related-party transactions entered into between Tarn Financial and Akman companies were disclosed to or approved by the other shareholders.

[27] Auditors were to be appointed by shareholders but instead of that, Akman exercised his new Class B shares to give himself sole authority to appoint auditors, thereby taking away appropriate controls.

POSITION OF THE RESPONDENTS

[28] Akman asserts that the applicants chose to participate in the acquisition of the Delta Hotel and the condo development project as silent partners or passive investors. They were to have no involvement in the decision making for Tarn Financial, the management of Tarn Financial or the day to day operations of Tarn Financial. This was the basis upon which Akman agreed to allow Serdar and Volkan to participate in the business venture and in fact that was how the business was run during the first two years following the acquisition of the hotel and vacant adjacent lands. This is evident from the fact that the applicants did not expect, seek or obtain representation on the Tarn Financial board of directors.

[29] The primary motivation for Volkan investing in Tarn Financial was that he wanted to get a sizeable sum of money out of Turkey, given the political and financial instability in the country. He was also interested in having Bleda and Anil acquire business experience and to have them set up outside of Turkey.

[30] Akman submits that the manner in which Tarn Financial operated during the first two years reflected the parties' intentions going into the business venture together. The applicants never expressed any concerns, dissatisfaction or displeasure in the way in which Akman was running the operation. In fact, as a result of Akman's efforts alone, the performance of the Delta Hotel has

improved significantly in the almost three years of ownership by Tarn Financial. Tarn Financial has obtained all of the necessary zoning and severance required to proceed with the condo development and is ready to proceed to construction with 100% of phase 1 of the project having been sold and all the necessary construction financing approved. All of this has significantly increased the value of the adjacent lands.

[31] Akman submits that following the closing of the Delta Hotel purchase, he took steps to give effect to the intention of the parties at the time they made their investment in Tarn Financial regarding control of Tarn Financial. This led to the creation of the new Class B common shares.

[32] Notwithstanding the original corporate structure, Akman submits that the applicants in this case understood their roles as silent partners at the time that the business was created and it was operated under that understanding for two full years. There was no doubt that Akman was to have exclusive control over all decision making, management and operations of Tarn Financial.

[33] There are no detailed agreements by the parties in terms of management fees and development fees. In defies logic, according to Akman, that he would have agreed to indefinitely provide management services free of charge and forego almost \$500,000 a year for an indefinite number of years all in consideration for putting in approximately \$1.6 million less for his shares in Tarn Financial. The same would apply to development fees and all of the work done in that regard by Akman. Akman asserts that, in other words, he would be giving up well over \$10 million to save \$1.6 million up front and that was never the intention.

[34] There is an astounding lack of documentation indicating the intention of the parties. Their arrangement was completely informal and Volkan and Serdar were betting on Akman and his skills and talents in making their investment profitable.

[35] Neither Volkan nor Serdar had any experience with hotels and development and Akman submits that they were quite content to trust in Akman's decision making and not involve themselves in the ordinary day-to-day management of the company.

[36] In fact, the business has done well under Akman's management. The value of the applicants' share has risen significantly. Akman obtained the sale of 100% of the units in the condominium development project and he was the one who obtained the necessary zoning and construction financing on phase 1.

[37] In argument, counsel for the respondents indicated that "the optics may not be great" but everyone knew that Akman would be charging for management and development fees.

[38] Although it is clear that the parties no longer want to do business together the respondents submit that, a winding up of Tarn Financial would be such a draconian measure given that the business operation has been so successful.

[39] As for the allegations of self-dealing, the respondents argue that, there are remedies of disgorgement that are available if that has been established and further, arbitration could be utilized for the issue of management and development fees.

ANALYSIS

[40] There is no real dispute in this case over the governing legal principles with respect to the oppression remedy and what constitutes oppressive conduct. The essential purpose of the oppression remedy provisions vis-à-vis shareholders is to protect the minority from unfair treatment by the majority. It does this by protecting the reasonable expectations of corporate stake holders with respect to the operation of the company.

[41] There is no written shareholders agreement among the parties. But even in the absence of one, the most basic of the expectations of a shareholder is that the company will be operated by its officers and directors in accordance with the OBCA and that they will comply with their statutory obligations. Any shareholder would have a reasonable expectation that a company's directors would fulfill their fiduciary duties and would act honestly and in good faith with a view to the best interests of the corporation. Breach of those duties must be a breach of a shareholder's reasonable expectations. [*D'Antonio v. Monaco* 2013 ONSC 5007 at par. 93 affirmed 2015 ONCA 274].

[42] The reasonable expectation of the parties is set out in communications between the parties and the capital structure of Tarn Financial at the time of the initial investment. That structure prevented Akman from unilaterally passing either an ordinary or special resolution. There is no doubt that if the parties had turned their minds to the matter they would have not accepted a unilateral re-organization of the capital structure of Tarn Financial to provide absolute voting control of the company to Akman. Further, the breaches by Akman of his statutory obligations as sole officer and director of Tarn Financial and in particular his self-dealing and use of Tarn Financial as a personal bank account were not within the expectation of the parties.

[43] Shortly after receiving the investment funds from the applicants, Akman took immediate steps to alter the capital structure of Tarn Financial to secure absolute voting control for himself for only \$100 and established himself as the sole director. He abused his powers by engaging in self-dealing transactions that have diverted millions of dollars out of Tarn Financial for his personal benefit and has indicated a clear intention to continue to operate the company without any regard to the interests of Serdar and the Basegmez Family or his statutory obligations.

[44] Such conduct clearly falls within the meaning of "oppression" to a shareholder under s. 248(2) of the OBCA in that Akman has acted in a manner which is unfairly prejudicial to or unfairly disregards the interests of the shareholders. The court has jurisdiction to provide remedies which include the winding up of the company.

[45] At the hearing of this motion, the court was faced only with the choice of continuing the status quo or ordering that there be a winding up. No other option was provided by way of cross-motion.

[46] While this matter was under reserve, I gave the parties time to discuss other possible alternatives to winding up for disengagement such as a buy-sell arrangement. They could reach no agreement.

[47] Counsel for the respondents indicated that they wished to bring a new motion to approve an offer for the applicants' shares. It was denied because it was too late and moreover, there would be no ability on the applicants' part to assess the offer price and decide whether it was appropriate as they had no access to the requisite financial information of Tarn Financial.

[48] There is no question that this partnership cannot continue. There has been a complete breakdown in trust and the applicants have no means at the moment of assessing the value of the company.

[49] Although a winding-up order is a drastic remedy, there appears to be no alternative that the parties can agree to. Here, the applicant shareholders have a justifiable lack of confidence in the conduct of Akman in his management of Tarn Financial. The breakdown is in confidence, not over any disagreement of policies of the management. The applicants do not want to take over the management of the company. They simply want out because of serious misconduct by Akman in his deliberate violations of the OBCA, blatantly disregarding the rights of the other shareholders, and engaging in improper self-dealing. Although a court is reluctant to order a winding-up, no other less disruptive order is appropriate in these circumstances.

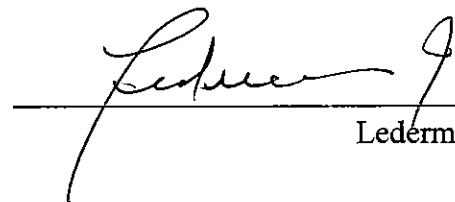
[50] A liquidator has wide powers to take control of the property, including all bank accounts and records of the company and can utilize accountants and appraisers, and other professionals to provide valuations and financial statements and for stability and an orderly liquidation.

[51] A liquidator would be in a position to control expenditures and review what monies have been transferred out. In the absence of any buy-out plan, the liquidator is best situated to deal with this.

[52] A liquidator can give a first opportunity to the parties to acquire, at fair asset value, any asset sought by a party or otherwise sell the assets at the best price obtainable.

[53] Ample time has been given to the parties to attempt to work out alternative arrangements. They have not been able to do so. Accordingly, an order will go under s. 248 of the OBCA for the winding up of Tarn Financial and appointing KPMG LLP as liquidator for that purpose. The terms of the order can be settled on a 9:30 appointment.

[54] If the parties cannot agree as to costs they may make written submissions: the applicants within 15 days; the respondents within 15 days thereafter; and reply, if any, within 7 days thereafter.



Lederman J.

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and TARN FINANCIAL CORPORATION

Respondents

REASONS FOR JUDGMENT

Lederman J.

Released: September 15, 2017