Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al.*

Alouche v. Landing Strip Inc. et al.

[Indexed as: Downtown Eatery (1993) Ltd. v. Ontario]

54 O.R. (3d) 161
[2001] O.J. No. 1879
2001 CanLII 8538
Docket No. C33989

Court of Appeal for Ontario,
McMurtry C.J.O., Borins and MacPherson JJ.A.
May 22, 2001

*Application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 31, 2002 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28744. S.C.C. Bulletin, 2002, p. 155.

Corporations--Oppression--Employee brought successful action for damages for wrongful dismissal--Company which employed him ceased to do business after action commenced--Employee unable to recover judgment--Employee sought oppression remedy on basis that corporate reorganization oppressive or unfairly prejudicial to him--Trial judge erred in dismissing claim on basis that reorganization not undertaken for purpose of depriving employee of recovery of judgment--Oppressive conduct need not be undertaken with intention of harming complainant --Acts of directors in causing company to go out of business were unfairly prejudicial to or unfairly disregarded employee's interests as person who stood to obtain judgment against company--Business Corporations Act, R.S.O. 1990, c. B.16, s. 248.

Actions--Bars--Issue estoppel--Employee brought action for damages for wrongful dismissal--Employer went out of business after action commenced--Employee moved to add directors of company as defendants but withdrew motion to avoid delaying trial--Employee obtained judgment against company but was unable to recover against company--Employee subsequently asserted claim against directors' other companies on basis of common employer doctrine and against directors personally --Employee estopped from asserting claim against directors --Common employer doctrine not litigated in first action --Doctrine of estoppel did not bar claim against companies.

Employment--Wrongful dismissal--Common employers--Employee worked as manager of nightclub--Nightclub owned and operated through consortium of companies--Employee paid by B Inc.--Employee wrongfully dismissed--Employee obtained judgment against B Inc. but was unable to recover on it--B Inc. had ceased to do business--Common employer doctrine applied --Judgment could be enforced against consortium of companies which owned and operated nightclub and against successor or merged companies created by corporate reorganization.

HG and BG owned and operated two nightclubs through a consortium of companies. HG hired A in 1992 as manager of one of the nightclubs. A received his paychecks from B Inc. A was dismissed in 1993. He brought an action for damages for wrongful dismissal against B Inc. Several years after the action was commenced, there was a major reorganization of HG and BG's companies. B Inc. ceased to do business. A moved to add HG and BG as co-defendants to his claim against B Inc. Faced with a potential adjournment of the trial to permit HG and BG to retain counsel, A withdrew the motion. A was successful at trial, and judgment in the amount of $59,906.76 was granted in his favour. B Inc. paid him nothing pursuant to the judgment. Sheriffs attended at the nightclub premises and, in purported execution of the judgment, seized $1,855 in cash. D Ltd., claiming that the money belonged to it, brought an action against A. A defended the action and counterclaimed against all of the companies controlled by HG and BG and against BG and HG personally, basing his claim on the common employer doctrine and the oppression remedy under the Ontario

Business Corporations Act. The trial judge dismissed the counterclaim. On the common employer issue, he rejected A's submissions both on the merits and because A, having been content in his wrongful dismissal action to allege that B Inc. was his employer and to be bound by that conclusion, was estopped from now alleging a different or expanded employment obligation. The trial judge also held that an oppression remedy was not appropriate because the reorganization of the HG-BG companies was not undertaken for the purpose of depriving A of recovery of his judgment against B Inc. A appealed.

Held, the appeal should be allowed.

The issue which A considered on the eve of his wrongful dismissal trial was whether to sue HG and BG in their personal capacities as potential employers because of his concern that B Inc., the corporate entity which he regarded as his employer because it paid him, might have no assets. He made a conscious decision not to join HG and BG in the wrongful dismissal action because it would have delayed the trial of that action. The trial judge did not err in concluding that A was estopped from suing BG and HG personally as potential employers in his subsequent action. However, the common employer issue was not considered by A on the eve of the wrongful dismissal trial. The common employer issue raised by A's counterclaim against the corporations did not constitute relitigating an issue. The common employer issue as it related to the corporations should be determined on the merits.

When A was dismissed in 1993, there was a highly integrated or seamless group of companies which together operated all aspects of the nightclub. While an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. A was wrongfully dismissed, and his employer had to meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures but does not permit that complexity to defeat the legitimate entitlements of

wrongfully dismissed employers. The trial judge's focus on the absence of a contract between A and any of the potential common employers and on the fact that there was no holding out by the employer of joint and several liability of more than one company was too narrow. A's true employer in 1993 was the consortium of HG and BG companies which operated the nightclub.

The 1996 corporate reorganization was undertaken for business reasons unrelated to A's action. However, A's judgment should be enforced against the successor or merged companies which were created by the reorganization.

In dismissing A's claim for an oppression remedy, the trial judge found that the amalgamation and reorganization were not undertaken for the purpose of depriving A of recovery of judgment. The trial judge failed to appreciate that the oppressive conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the complainant. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

There was no question that the acts of HG and BG, as the directors of B Inc., in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in 1996 in the face of a trial scheduled to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, A as a person who stood to obtain a judgment against B Inc. When B Inc. went out of business, it was profitable, and its accumulated profits were available to satisfy any claims arising from employment contracts. HG's evidence indicated that, although he was aware that A's pending claim might result in a judgment against B Inc., he took no steps to ensure that B Inc. retained a reserve to meet that contingency. A was entitled to be protected, and HG and BG had an obligation to ensure that such protection continued. A was

entitled to an oppression remedy against HG and BG.

Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270, 40 C.C.E.L. (2d) 1, 99 C.L.L.C. 210-013 (C.A.), affg (1997), 30 C.C.E.L. (2d) 123 (Ont. Gen. Div.); Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367, 43 B.L.R. (2d) 155 (C.A.), varg (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.); Sinclair v. Dover Engineering Services Ltd. (1988), 49 D.L.R. (4th) 297 (B.C.C.A.), affg (1987), 11 B.C.L.R. (2d) 176 (S.C.), apld

Other cases referred to

Bagby v. Gustavson International Drilling Co. (1980), 24 A.R. 181 (C.A.), varg (1979), 20 A.R. 244 (T.D.); First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1989), 71 Alta. L.R. (2d) 61, [1990] 2 W.W.R. 670, 45 B.L.R. 110 (C.A.), staying (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Q.B.) (sub nom. 315888 v. First Ed. Place); Gray v. Standard Trustco Ltd. (1994), 29 C.B.R. (3d) 22, 8 C.C.E.L. (2d) 46 (Ont. Gen. Div.); Jacobs v. Harbour Canoe Club Inc., [1999] B.C.J. No. 2188 (S.C.); Johnston v. Topolinski (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); Jones v. CAE Industries Ltd. (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.); MacPhail v. Tackama Forest Products Ltd. (1993), 86 B.C.L.R. (2d) 218, [1994] 3 W.W.R. 36, 11 B.L.R. (2d) 19, 50 C.C.E.L. 136 (S.C.); Olson v. Sprung Instant Greenhouses Ltd. (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325, 12 C.C.E.L. 8 (Q.B.)

Statutes referred to

Business Corporations Act, R.S.O. 1990, c. B.16, ss. 245, 248
Employment Standards Act, R.S.O. 1990, c. E.14, s. 12(1)

Authorities referred to

Ball, S., Canadian Employment Law (Aurora: Canada Law Book, 1999)
Nicholls, C.C., "Liability of Corporate Officers and Directors to Third Parties" (2001), 35 C.B.L.J. 1

APPEAL from a judgment of Campbell J. (2000), 2 C.C.E.L. (3d) 66 dismissing a counterclaim for oppression remedy and to recover for an unsatisfied judgment.



J. Gardner Hodder, for appellant.
John Conway, for respondents.

The judgment of the court was delivered by

BORINS and MACPHERSON JJ.A.:--

A. Introduction

[1] In his valuable text, Canadian Employment Law (Aurora: Canada Law Book, 1999), Stacey Ball states, at p. 4-1:

> The courts now recognize that, for purposes of determining the contractual and fiduciary obligations which are owed by employers and employees, an individual can have more than one employer. The courts now regard the employment relationship as more than a matter of form and technical corporate structure. Consequently, the present law states that an individual may be employed by a number of different companies at the same time.

[2] The mechanism whereby the law concludes that an employee may be employed by more than one company at the same time is the common employer doctrine. The doctrine has a well-recognized statutory pedigree in most jurisdictions. For example, in Ontario, s. 12(1) of the Employment Standards Act, R.S.O. 1990, c. E.14, deems associated or related businesses to be "one employer" for the purpose of protecting the benefits to which employees are entitled under the Act.

[3] A major issue in this appeal is the definition and application of the common employer doctrine in a common law context. A dismissed employee sued his employer for wrongful

dismissal. Following a trial, he was awarded substantial damages. Unfortunately, the employer company had no assets and consequently the employee was unable to enforce his judgment. In a subsequent action, the employee sued related companies and the two main principals of all the companies in an attempt to widen its net of potential sources of recovery. His principal legal submission in support of his attempt was, and is on this appeal, the common employer doctrine. In Canadian Employment Law, Mr. Ball states that "[t]he finding that more than one corporation is the employer may be a benefit when parts of the corporate group are more solvent than others . . . ." (p. 4-1). That is precisely the benefit the dismissed employee seeks to achieve in this litigation.

[4] A second important issue in this appeal is the availability of an oppression remedy to a dismissed employee in the context of a corporate reorganization shortly before a wrongful dismissal trial which has the effect of denying the employee any recovery on a judgment he obtains at the trial.

B. Facts

(1) The parties and the events

[5] In 1992, the respondents Herman Grad ("Grad") and Ben Grosman ("Grosman") were in the nightclub business in Toronto. They owned and operated two nightclubs, The Landing Strip at 191 Carlingview Drive and For Your Eyes Only at 557/563 King Street West.

[6] The appellant, Joseph Alouche ("Alouche"), was born in Egypt and came to Canada in 1974. He attended the Toronto School of Business, took courses in hotel management and received a diploma. He also took correspondence courses relating to the hospitality industry and computers.

[7] In December 1992, Grad offered Alouche a position as manager of the nightclub For Your Eyes Only. The only entity specifically identified in the written employment contract was For Your Eyes Only. However, the contract also provided that Alouche would receive the health care and insurance benefits

available "in our sister organization", which was not identified by name.

[8] Alouche commenced work on December 29, 1992. During the next few months, he received his pay cheques from Best Beaver Management Inc. ("Best Beaver"), a company controlled by Grad and Grosman. In May 1993, Alouche was sent a formal Notice of Discipline on the letterhead of For Your Eyes Only for committing several infractions, including:

-- the employee, while soliciting in excess of $1,000.00 gratuity only generated sales of $250.00 for the employer.

-- the employee allowed numerous waitresses to abandon their assigned sections to solicit gratuities in the amount of $2,800.00.

[9] On June 15, 1993, Alouche was dismissed. On October 13, 1993, he commenced an action against Best Beaver. In subsequent proceedings which form the basis for this appeal, Alouche explained the choice of Best Beaver as the defendant in the first action: "I sued Best Beaver . . . because the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc."

[10] In the spring of 1996, there was a major reorganization of the Grad-Grosman companies. Best Beaver ceased to do business. In July 1996, Grad discharged Best Beaver's counsel. Shortly before the start of the trial in his wrongful dismissal action in August 1996, Alouche, worried about recovery if successful in the action, moved to add Grad and Grosman as co-defendants to his claim against Best Beaver. Faced with a potential adjournment of the trial to permit Grad and Grosman to retain counsel, Alouche withdrew the motion.

[11] The trial proceeded with Best Beaver as the only defendant. Grad, a director of Best Beaver, represented it throughout the trial. The trial judge, Festeryga J., found in favour of Alouche. He awarded Alouche damages of $59,906.76, plus pre-judgment interest of $8,608.36 and costs of $15,387.79.

[12] Best Beaver paid Alouche nothing pursuant to the judgment. Two sheriffs, in purported execution of the judgment, attended at the premises of For Your Eyes Only and seized $1,855 in cash. This provoked Downtown Eatery (1993) Ltd., which claimed that the money belonged to it, to commence an action against Alouche. [See Note 1 at end of document] Alouche defended the action and counterclaimed against all of the companies controlled by Grad and Grosman and against Grad and Grosman personally. In December 1997, Kiteley J. ordered that the $1,855 seized by the sheriffs be paid into court to the credit of the action.

[13] There are other facts relevant to the disposition of the appeal, including two reorganizations of the Grad-Grosman companies. However, we find it convenient to describe those facts in the context of the specific issues to which they relate.

(2) The litigation

[14] The trial proceeded before C. Campbell J. in February 2000. The essence of the trial was Alouche's counterclaim in which he sought to recover against any or all of the defendants for his unsatisfied judgment against Best Beaver.

[15] Alouche advanced several bases for recovery of his earlier judgment against the new defendants. The trial judge addressed three of them in his reasons for judgment -- the common employer doctrine, oppression relief under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16, and a tracing remedy associated with a fraudulent conveyance.

[16] The trial judge dismissed Alouche's counterclaim in its entirety. On the common employer issue, the trial judge rejected Alouche's submissions, both on the merits and because of the concept of estoppel. With respect to a potential oppression remedy, the trial judge held that such a remedy would not be appropriate because the reorganization of the Grad-Grosman companies was not undertaken for the purpose of depriving Alouche of recovery of his judgment against Best

Beaver. For similar reasons, he held that the defendants had not made any fraudulent conveyance, and, therefore, a tracing order was not appropriate.

[17] The appellant appeals from the trial judge's decision on the common employer and oppression remedy issues. At the hearing of the appeal, the appellant abandoned his appeal on the fraudulent conveyance/tracing issue.

C. Issues

[18] The issues on the appeal are:

(1) Did the trial judge err in failing to find that some or all of the respondents were a common employer of the appellant? [Se Note 2 at end of document]

(2) Did the trial judge err in failing to find that the conduct of the respondents was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act?

D. Analysis

(1) The common employer issue

[19] The trial judge decided this issue against Alouche for two reasons: (1) Alouche was estopped from raising the issue in his counterclaim action to enforce his previous judgment because he had not raised it in his original wrongful dismissal action; and (2) Alouche had not established the prerequisites necessary to identify any of the respondents as a common employer, along with Best Beaver.

(a) Res judicata/estoppel

[20] It will be recalled that shortly before the wrongful dismissal trial, Alouche brought a motion to add Grad and Grosman as defendants because he was concerned that Best Beaver might not respond to a judgment against it. Because this motion would have resulted in an adjournment of the trial, Alouche

decided to abandon it. The respondents submit that these steps precluded Alouche from raising the issue in the subsequent proceedings. The trial judge briefly reviewed the doctrines of res judicata, cause of action estoppel and issue estoppel. It is not entirely clear which of these doctrines he applied. However, it is clear that he agreed with the respondent's essential submission on this issue. He concluded:

> I am satisfied on the evidence before me that Alouche was content in his wrongful dismissal action to allege that Best Beaver was his employer and to be bound by that conclusion, notwithstanding the possibility of some responsibility on the part of Messrs. Grad and Grosman.
>
> On that basis, Alouche is now estopped from alleging a different or expanded employment obligation when he is now unable to recover on the first judgment.

[21] Let us say candidly that this is a plausible analysis and conclusion. On the eve of the wrongful dismissal trial, Alouche was concerned that the corporate reorganization about which he had recently learned might mean that Best Beaver no longer had assets which could potentially satisfy any judgment he obtained. Alouche's response was to consider, initiate and then abandon adding Grad and Grosman as defendants. In light of these steps, it is plausible to conclude, as the trial judge did, that Alouche considered the general question of whom he should sue and decided to proceed against only Best Beaver.

[22] However, in the end we do not think that this conclusion is correct. A particularly valuable discussion of res judicata and of issue estoppel is found in this court's decision in Minott v. O'Shanter Development Co. (1999), 42 O.R. (3d) 321, 168 D.L.R. (4th) 270 (C.A.) ("Minott"). Laskin J.A. articulated the underlying purpose of the concept of issue estoppel in this fashion, at p. 340 O.R.:

> Issue estoppel is a rule of public policy, and, as a rule of public policy, it seeks to balance the public interest in the finality of litigation with the private interest in achieving justice between litigants. Sometimes these two

interests will be in conflict, or, at least there will be tension between them. Judicial discretion is required to achieve practical justice without undermining the principles on which issue estoppel is founded. Issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue.

[23] In our view, the issue Alouche considered on the eve of his wrongful dismissal trial was whether to sue Grad and Grosman in their personal capacities as potential employers because of his concern that Best Beaver, the corporate entity which he regarded as his employer (because it paid him), might have no assets. Alouche considered this option because, as he testified at the second trial, he regarded them as his employer:

> Q At the time you signed this agreement that appears at Tab 1 [the employment contract], who did you believe to be your employer?
>
> A. It was Herman Grad. I started working at For Your Eyes Only. That's the only place I know there.

However, in the end, Alouche made a conscious decision not to join Grad and Grosman in the wrongful dismissal action because it would have delayed the trial. Taking account of that decision, the trial judge concluded that Alouche was estopped from suing Grad and Grosman personally as potential employers in his subsequent action. We see no reason to interfere with this component of the trial judge's decision.

[24] However, the issue of a potential common employer for Best Beaver, drawn from the stable of Grad-Grosman companies that were closely connected with the operation of the For Your Eyes Only nightclub, was not considered by Alouche on the eve of the wrongful dismissal trial. He did not think about adding other companies at that juncture because the only entities of which he was aware were the nightclub, For Your Eyes Only, with which he had a contract of employment, and Best Beaver, which issued his pay cheques. He decided to sue Best Beaver "because

the paycheque that they gave me in For Your Eyes Only, it says Best Beaver Management Inc." This was a perfectly sensible reason for suing Best Beaver.

[25] Only later, after he had won a substantial judgment at trial and had been unable to collect on it from Best Beaver, did Alouche begin to think of other companies which might have been closely connected with For Your Eyes Only and Best Beaver. That inquiry led him, for the first time, to the respondent corporations.

[26] In summary, we cannot say that the trial judge erred by concluding that Alouche was estopped from pursuing Grad and Grosman personally as potential common employers in the counterclaim relating to the enforcement of the previous judgment in the wrongful dismissal action. However, we do not think that the common employer issue, as it relates to the corporate respondents, constitutes, in the language of Minott, "relitigating an issue". In this appeal, the balance between finality of litigation and achieving justice between litigants should be struck in favour of the latter. The common employer issue relating to the corporate respondents should be determined on the merits.

(b) The merits

[27] For Your Eyes Only was a simple entity, a single site nightclub in downtown Toronto. Yet, beneath the surface of lights, liquor and entertainment, there was a fairly sophisticated group of companies involved in the operation of the nightclub. Twin Peaks Inc. ("Twin Peaks") was the owner and lessor of the nightclub premises. The Landing Strip Inc. ("The Landing Strip") leased the premises from Twin Peaks. It also owned the trademark for For Your Eyes Only and held the liquor and adult entertainment licences. Downtown Eatery Limited ("Downtown Eatery") owned the chattels and equipment at the nightclub and operated it under a licence from The Landing Strip. Best Beaver paid the nightclub employees, including Alouche. In June 1993, all of these companies were owned and controlled by Bengro Corp. and Harrad Corp., the holding companies for Grosman and Grad.

[28] The trial judge considered Alouche's common employer argument on the merits. He concluded that Downtown Eatery was "the most logical of the companies to be treated as a co-employer", but that this did not help Alouche because Downtown Eatery amalgamated with Best Beaver in September 1993, and there was nothing fraudulent or even suspicious about the amalgamation.

[29] The trial judge then considered The Landing Strip:

> Counsel for Alouche suggests that Landing Strip Inc., which held the lounge license and the franchise trademark, would be logical co-employers. There is nothing in the record before me that would suggest that Alouche ever had a contractual relationship with Landing Strip Inc.

Then, speaking more generally, the trial judge observed that "there has been no holding out here by either the employee or the employer of joint and several liability of more than one company".

[30] The common employer doctrine, in its common law context, has been considered by several Canadian courts in recent years. The leading case is probably Sinclair v. Dover Engineering Services Ltd. (1987), 11 B.C.L.R. (2d) 176 (S.C.), affd (1988), 49 D.L.R. (4th) 297 (B.C.C.A.) ("Sinclair"). In that case, Sinclair, a professional engineer, held himself out to the public as an employee of Dover Engineering Services Ltd. ("Dover"). He was paid by Cyril Management Limited ("Cyril"). When Sinclair was dismissed, he sued both corporations. Wood J. held that both companies were jointly and severally liable for damages for wrongful dismissal. In reasoning that we find particularly persuasive, he said, at p. 181 B.C.L.R.:

> The first serious issue raised may be simply stated as one of determining with whom the plaintiff contracted for employment in January 1973. The defendants argue that an employee can only contract for employment with a single employer and that, in this case, that single entity was

obviously Dover.

I see no reason why such an inflexible notion of contract must necessarily be imposed upon the modern employment relationship. Recognizing the situation for what it was, I see no reason, in fact or in law, why both Dover and Cyril should not be regarded jointly as the plaintiff's employer. The old-fashioned notion that no man can serve two masters fails to recognize the realities of modern-day business, accounting and tax considerations.

There is nothing sinister or irregular about the apparently complex intercorporate relationship existing between Cyril and Dover. It is, in fact, a perfectly normal arrangement frequently encountered in the business world in one form or another. Similar arrangements may result from corporate take-overs, from tax planning considerations, or from other legitimate business motives too numerous to catalogue.

As long as there exists a sufficient degree of relationship between the different legal entities who apparently compete for the role of employer, there is no reason in law or in equity why they ought not all to be regarded as one for the purpose of determining liability for obligations owed to those employees who, in effect, have served all without regard for any precise notion of to whom they were bound in contract. What will constitute a sufficient degree of relationship will depend, in each case, on the details of such relationship, including such factors as individual shareholdings, corporate shareholdings, and interlocking directorships. The essence of that relationship will be the element of common control.

See also: Bagby v. Gustavson International Drilling Co. (1980), 24 A.R. 181 (C.A.); Olson v. Sprung Instant Greenhouses Ltd. (1985), 64 A.R. 321, 41 Alta. L.R. (2d) 325 (Q.B.); Johnston v. Topolinski (1988), 23 C.C.E.L. 285 (Ont. Dist. Ct.); MacPhail v. Tackama Forest Products Ltd. (1993), 86 B.C.L.R. (2d) 218, 50 C.C.E.L. 136 (S.C.); and Jacobs v. Harbour Canoe Club Inc., [1999] B.C.J. No. 2188 (S.C.).

[31] In Ontario, the common employer doctrine has been considered in several cases. In Gray v. Standard Trustco Ltd. (1994), 8 C.C.E.L. (2d) 46, 29 C.B.R. (3d) 22 (Ont. Gen. Div.), Ground J. said, at p. 47 C.C.E.L.:

> . . . it seems clear that, for purposes of a wrongful dismissal claim, an individual may be held to be an employee of more than one corporation in a related group of corporations. One must find evidence of an intention to create an employer/employee relationship between the individual and the respective corporations within the group.

[32] In Jones v. CAE Industries Ltd. (1991), 40 C.C.E.L. 236 (Ont. Gen. Div.) ("Jones"), Adams J. reviewed many of the leading authorities and observed, at p. 249:

> The true employer must be ascertained on the basis of where effective control over the employee resides . . . I stress again that an employment relationship is not simply a matter of form and technical corporate structure.

[33] Sinclair, Jacobs v. Harbour Canoe Club Inc. and Jones were all cases involving a "paymaster" company closely connected with another corporate entity, with both being controlled by the same principals. In all three cases, the courts found that the other company was a common employer. Similarly, in the present appeal, Best Beaver served only as a paymaster for the employees of the nightclubs owned and operated by other Grad and Grosman companies. Accordingly, the question becomes, in Adams J.'s language in Jones, "where effective control over the employee resides".

[34] In our view, in June 1993, when Alouche was dismissed, there was a highly integrated or seamless group of companies which together operated all aspects of the For Your Eyes Only nightclub. Twin Peaks owned the nightclub premises and leased them to The Landing Strip which owned the trademark for For Your Eyes Only and, significantly for a nightclub, held the liquor and entertainment licences. Downtown Eatery operated the nightclub under a licence from The Landing Strip and owned the chattels and equipment at the nightclub. Best Beaver served as

paymaster for the nightclub employees. Controlling all of these corporations were Grad and Grosman and their family holding companies, Harrad Corp. and Bengro Corp.

[35] Grad and Grosman could easily have operated the nightclub through a single company. They chose not to. There is nothing unlawful or suspicious about their choice. As Wood J. said in Sinclair, "it is a perfectly normal arrangement frequently encountered in the business world."

[36] However, although an employer is entitled to establish complex corporate structures and relationships, the law should be vigilant to ensure that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law. At the end of the day, Alouche's situation is a simple, common and important one -- he is a man who had a job, with a salary, benefits and duties. He was fired -- wrongfully. His employer must meet its legal responsibility to compensate him for its unlawful conduct. The definition of "employer" in this simple and common scenario should be one that recognizes the complexity of modern corporate structures, but does not permit that complexity to defeat the legitimate entitlements of wrongfully dismissed employees.

[37] The trial judge focused on the absence of a contract between Alouche and any of the potential common employers. With respect, we think this focus is too narrow. A contract is one factor to consider in the employer-employee relationship. However, it cannot be determinative; if it were, it would be too easy for employers to evade their obligations to dismissed employees by imposing employment contracts with shell companies with no assets.

[38] The trial judge also observed that there was no holding out by the employer of joint and several liability of more than one company. Again, with respect, we do not attach much significance to this factor. After all, the contract of employment that Alouche signed was with For Your Eyes Only, which was only a name, not a legal entity.

[39] In these circumstances, when he was wrongfully

dismissed, Alouche did his best -- he sued the company which had paid him. Later, it turned out that that company had no assets. Yet the nightclub continued in business, various companies continued to operate it and, presumably, Grad and Grosman continued to make money. In these circumstances, Alouche decided to try to collect the money to which [the] Superior Court of Justice had determined he was entitled. In our view, the common employer doctrine provides support for his attempt.

[40] In conclusion, Alouche's true employer in 1993 was the consortium of Grad and Grosman companies which operated For Your Eyes Only. The contract of employment was between Alouche and For Your Eyes Only which was not a legal entity. Yet the contract specified that Alouche would be "entitled to the entire package of medical extended health care and insurance benefits as available in our sister organization". The sister organization was not identified. In these circumstances, and bearing in mind the important roles played by several companies in the operation of the nightclub, we conclude that Alouche's employer in June 1993 when he was wrongfully dismissed was all of Twin Peaks, The Landing Strip, Downtown Eatery and Best Beaver. This group of companies functioned as a single, integrated unit in relation to the operation of For Your Eyes Only.

[41] There is a final matter to be considered on the common employer issue. Alouche was dismissed in June 1993. There was a reorganization of Grad and Grosman companies in September 1993. A second reorganization took place in May 1996, three months before the trial in Alouche's wrongful dismissal action. The trial judge found that there was nothing nefarious about these reorganizations; they were undertaken for business reasons unrelated to Alouche's action. We see no reason to disagree with this conclusion.

[42] The question which the reorganizations pose is whether Alouche's judgment, which we have determined should be enforced against all of the companies involved in June 1993 in the operation of For Your Eyes Only, should also be enforced against the successor or merged companies which have been created by the reorganizations.

[43] We have no hesitation answering this question in the affirmative. Grad testified at the trial that he was very careful to protect the positions, seniority and benefits of current employees when he and Grosman were accomplishing the reorganizations. He said:

> Everyone had a job . . . Everyone that worked for one had a job in the other . . . No one would lose anything . . . The employees were not to lose anything, were not to be hurt.

[44] This was, of course, admirable treatment of the current employees of the Grad and Grosman companies. It commends itself, in our view, as a just basis for consideration of Alouche's position after the reorganizations. If, as Grad explained, his current employees were not to be hurt in any way by the reorganizations, it seems obvious and fair that a similar result should flow for Alouche, a man who might also be a current employee but for the fact of his wrongful dismissal.

[45] We conclude, therefore, that the list of the original common employers should be expanded to include the other corporate respondents.

(2) The oppression issue

[46] Alouche contends that the conduct of the respondents, specifically the corporate reorganizations which resulted in Best Beaver ceasing to exist, was "oppressive" or "unfairly prejudicial" as those terms are used in the Ontario Business Corporations Act ("OBCA"). Section 248 of the OBCA provides:

> 248(1) A complainant . . . may apply to the court for an order under this section.
>
> (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
>
> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a

result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

A "complainant", in addition to being a current or former shareholder, director or officer of the company, is defined in s. 245 to include:

. . . . .

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

Although it appears from the pleadings and the factum that Alouche is advancing the oppression argument against all of the respondents, in oral argument counsel made it clear that the focus of Alouche's claim on this issue is the respondents Grad and Grosman.

[47] As a preliminary matter, we note that there is no question of res judicata or estoppel with respect to the appellant's oppression claim. There was nothing about this claim in the pleadings in the first action, the trial judge in the second action dealt with the claim on the merits, and the respondents in this appeal do not contend that the oppression claim was barred by these doctrines.

[48] Turning to the merits, in the Agreed Statement of Facts, facts pertaining to the oppression remedy are sparse. These

facts are: Grad and Grosman were directors and officers of Best Beaver at all material times; in September 1993, there was a corporate reorganization of Best Beaver and several of the other corporate respondents in response to apprehended union activities; and in or about March 1996, Best Beaver ceased operations.

[49] In his trial testimony, Grad stated that because the "union threat" had disappeared in 1996 there was no need to retain Best Beaver as a separate company. This resulted in Best Beaver ceasing operations in March 1996, followed by a corporate reorganization in May 1996. He testified that these events were not influenced by the pending litigation involving Alouche. Indeed, it was Grad's belief that Best Beaver would win the lawsuit. He described what occurred as "a business decision". Grad confirmed that he and Grosman were the owners of Best Beaver and all of the corporate respondents. He also confirmed that "the role and function" of Best Beaver were to pay the employees of the corporations that he and Grosman owned and that the company carried out this role "based on advice from [his] accountants".

[50] Although Grad testified that Alouche's pending claim did not influence his decision to terminate the operations of Best Beaver in March 1996, he acknowledged that at that time a summer trial date had been fixed for the wrongful dismissal trial. He stated that he discharged Best Beaver's lawyer about two weeks before the trial began "because there was no money in the account and [Best Beaver] could not afford to pay" the lawyer. At the trial, Grad acted as Best Beaver's legal representative.

[51] Syd Bojarski ("Bojarski") was a partner in the accounting firm that acted for the corporate respondents and Grad and Grosman. He provided extensive evidence concerning the corporate and financial affairs of these entities. He testified that in each year of its existence, Best Beaver earned a profit. He agreed with counsel for Alouche that Best Beaver's accumulated profits were available to pay "whatever obligations [Best Beaver] had". He further agreed that if that company had continued its operations, its accumulated profit could have

been applied "to satisfy unexpected claims arising from employment [contracts]".

[52] In the following questions and answers Grad was asked to comment on Bojarski's evidence:

> Q. Mr. Bojarski gave evidence that it was the role and function of Best Beaver Management as a corporation to pay employees until, of course, until it ceased to do that. But that was its obligation, correct?
>
> A. Yes.
>
> Q. Do you agree with Mr. Bojarski that its obligation was also to pay any claims that individual employees might have against it as employer?
>
> A. It was responsible for all the employees and the management of those people.

[53] In dismissing Alouche's claim for an oppression remedy, the trial judge accepted Grad's reasons for the corporate reorganizations of September 1993 and May 1996 and for Best Beaver's cessation of operations in March 1996. He provided the following reasons for dismissing Alouche's claim for an oppression remedy:

> In the case before me, if I had been satisfied that the amalgamation of 1993 or the reorganization of 1996 had been undertaken with the intention of depriving Mr. Alouche of the opportunity to recover against Best Beaver, then an oppression remedy might have been appropriate. In the circumstances where the amalgamation and reorganization took place before he obtained the status of a judgment creditor and those actions were not undertaken for the purpose of depriving him of recovery of judgment, then it would appear that the oppression remedy is not appropriate.

[54] At trial, C. Campbell J. also dismissed a claim by Alouche based on the submission that the May 1996 corporate reorganization constituted a fraudulent conveyance resulting in

Best Beaver having no assets in the event that he recovered judgment against it. No appeal was taken from this aspect of the judgment. However, the following findings of fact made by the trial judge in deciding this issue are relevant to the oppression remedy issue:

> As noted previously, I am satisfied on the evidence, the reorganization was not entered into for the purpose or with the intent of depriving Alouche from recovering on an anticipated judgment.
>
> I do recognize, however, that the effect of the reorganization left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment.

[55] In our view, this case is similar to Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc. (1995), 131 D.L.R. (4th) 399, 25 B.L.R. (2d) 179 (Ont. Gen. Div.), varied (1998), 40 O.R. (3d) 563, 162 D.L.R. (4th) 367 (C.A.) ("Sidaplex-Plastics"). As in Sidaplex-Plastics, Alouche, as a judgment creditor of a corporate party, seeks an oppression remedy in the absence of bad faith or want of probity on the part of individuals who were the directors and shareholders of the corporation. As in Sidaplex-Plastics, the corporation, Best Beaver, is no longer in business, having ceased operations in March 1996, at a time when a trial date of August 1996 had been fixed for the wrongful dismissal action against it. Thus, Alouche seeks to invoke the oppression remedy provisions of the OBCA against Grad and Grosman in order to rescue himself from the inability of Best Beaver to pay his judgment which resulted from their decision to terminate its business operations and to render it without assets capable of responding to a possible judgment against it.

[56] The application of the principles governing s. 248(2) of the OBCA to the trial judge's findings of fact and to the evidence in the trial record leads to the conclusion that the trial judge erred in failing to grant an oppression remedy against Grad and Grosman. In our view, the trial judge failed

to appreciate that the "oppressive" conduct that causes harm to a complainant need not be undertaken with the intention of harming the complainant. Provided that it is established that a complainant has a reasonable expectation that a company's affairs will be conducted with a view to protecting his interests, the conduct complained of need not be undertaken with the intention of harming the plaintiff. If the effect of the conduct results in harm to the complainant, recovery under s. 248(2) may follow.

[57] In Sidaplex-Plastics, Blair J. provided a careful and thorough analysis of the principles governing the award of an oppression remedy that was accepted by this court. At p. 403 D.L.R., he stated that it "is well established . . . that a creditor has status to bring an application as a complainant, pursuant to s. 245(c)." At pp. 403-04, he added:

> Moreover, while some degree of bad faith or lack of probity in the impugned conduct may be the norm in such cases, neither is essential to a finding of "oppression" in the sense of conduct that is unfairly prejudicial to or which unfairly disregards the interests of the complainant, under the OBCA.

Blair J. continued, at p. 404 D.L.R.:

> What the OBCA proscribes is "any act or omission" on the part of the corporation which "effects" a result that is "unfairly prejudicial to or that unfairly disregards the interests" of a creditor.

(Emphasis in original)

[58] At p. 404, Blair J. adopted the following factors to be assessed in considering whether an oppression remedy should lie, as described by McDonald J. in First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 40 B.L.R. 28, 60 Alta. L.R. (2d) 122 (Q.B.) at p. 57 B.L.R.:

> More concretely, the test of unfair prejudice or unfair disregard should encompass the following considerations: the

> protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor. The elements of the formula and the list of considerations as I have stated them should not be regarded as exhaustive. Other elements and considerations may be relevant, based upon the facts of a particular case.

[59] In s. 248(2)(c) of the OBCA, the legislature has included the exercise of the powers of a company's directors in targeting the kinds of conduct encompassed by an oppression remedy. In this regard, Blair J. stated, at pp. 405-06 D.L.R.:

> Courts have made orders against directors personally, in oppression remedy cases: see, for example, Canadian Opera Co. v. Euro-American Motor Cars, supra; Prime Computer of Canada Ltd. v. Jeffrey, supra; Tropxe Investments Inc. v. Ursus Securities Corp., [1993] O.J. No. 1736 (QL) (Gen. Div.) [summarized 41 A.C.W.S. (3d) 1140]. These cases, in particular, have involved small, closely held corporations, where the director whose conduct was attacked has been the sole controlling owner of the corporation and its sole and directing mind; and where the conduct in question has redounded directly to the benefit of that person.

[60] Although the trial judge found that the cessation of Best Beaver's operations in March 1996 and the subsequent corporate reorganization were not undertaken with the intention of depriving Alouche of the ability to recover against Best Beaver if he were to succeed in his forthcoming action against the company, he went on to find that the effect of this conduct "left Best Beaver essentially as a non-operating company and that Grad took advantage of this, when faced with the pending trial (by discharging counsel) and by non-payment of the judgment". In our view, there is no question that the acts of Grad and Grosman, as the directors of Best Beaver, in causing the company to go out of business and transferring its assets to other companies within the group of companies they owned and operated in the spring of 1996 in the face of a trial scheduled

to begin a few months later, effected a result that was unfairly prejudicial to, or that unfairly disregarded the interests of, Alouche as a person who stood to obtain a judgment against Best Beaver. Moreover, there was nothing that Alouche could have done to prevent the effective winding-up of Best Beaver.

[61] In our view, the evidence of Bojarski, with which Grad agreed, is relevant to whether an oppression remedy is appropriate. From Bojarski's testimony, it is clear that when Best Beaver went out of business it was profitable and that its accumulated profits were available to satisfy any claims arising from employment contracts. The inference can be drawn from this evidence that even though it was abundantly clear to Grad that Alouche's pending claim might result in a judgment against Best Beaver, he took no steps to ensure that Best Beaver retained a reserve to meet that contingency. Rather, believing that Alouche's action would fail, he discharged the company's lawyer and personally assumed its defence at trial. As in Sidaplex-Plastics at p. 405 D.L.R., it was Alouche who was entitled to be protected, and, in our view, it was Grad and Grosman who had the obligation to ensure that such protection continued. See Christopher C. Nicholls, "Liability of Corporate Officers and Directors to Third Par ties", (2001) 35 C.B.L.J. 1 at pp. 30 et seq.

[62] In our view, there are additional inferences that can be drawn from the trial judge's findings of fact and from the evidence at the trial. It was the reasonable expectation of Alouche that Grad and Grosman, in terminating the operations of Best Beaver and leaving it without assets to respond to a possible judgment, should have retained a reserve to meet the very contingency that resulted. In failing to do so, the benefit to Grad and Grosman, as the shareholders and sole controlling owners of this small, closely held company, is clear. By diverting the accumulated profits of Best Beaver to other companies that they owned, they were able to insulate these funds from being available to satisfy Alouche's judgment.

[63] For the foregoing reasons, it is our opinion that Alouche has demonstrated his entitlement to an oppression

remedy against Grad and Grosman.

E. Disposition

[64] We would allow the appeal against all of the respondents. The appellant is entitled to recover from the respondents the amounts he was awarded in the wrongful dismissal action, namely damages of $59,906.76, pre-judgment interest of $8,608.36 and assessed costs of $15,387.79 totalling $83,902.91, together with post-judgment interest thereon from the date of Festeryga J.'s judgment to the date of this order and post-judgment interest thereafter. He is also entitled to recover his costs of the second trial before C. Campbell J. and his costs of the appeal.

Appeal allowed.

Notes

Note 1: Downtown Eatery (1993) Ltd. also name Her Majesty the Queen in Right of Ontario as a defendant, presumably on the basis of its alleged responsibility for the sheriffs. This component of the action was subsequently discontinued.

Note 2: In his factum, the appellant identifed a separate ground of appeal as the trial judge's failure to permit Alouche to proceed by what he called an "alter ego" action. In oral argument, the appellant suggested that the common employer doctrine is a sub-species of the alter ego doctrine. Like the trial judge, we do not consider the injection of the nebulous concept of alter ego corporations useful. The common employer doctrine is well-recognized in Canadian law and provides a sound and straightforward foundation on which to assess the corporate relationship issue in this appeal.