COURT FILE NO.: 97-CV-122742
DATE: 20021210

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
SAM STABILE	*Ronald Carr* for the plaintiff
Plaintiff	
	Charles Campbell and *Jennie Cunningham* for the defendants
- and -	
LUCIA MILANI, RIZMI HOLDINGS LIMITED, MUCCAPINE INVESTMENTS LTD., L.C.T. HOLDINGS INC. and HIGHLAND BEACH REAL ESTATE HOLDINGS, INC. and MILANI & MILANI HOLDINGS LIMITED	
Defendants	Heard: October 15 - 18, 21, 22, 2002

BLENUS WRIGHT J.:

[1] On May 11, 1992, the plaintiff obtained a judgment in the amount of $153,719.55 against Lucia Milani, Litigation Administrator of the Estate of Cam Milani, Deceased, 473915 Ontario Inc., and Milani & Milani Holdings Limited. The judgment has not been paid.

[2] In 1997, the plaintiff commenced this action against Lucia Milani personally, and against her companies, claiming that she dissipated the assets of the Estate of Cam Milani and Milani & Milani Holdings Limited to the detriment of the plaintiff creditors' 1992 judgment.

Litigation History

[3] The action under which the 1992 judgment was obtained was commenced in 1985. The plaintiff Sam Stabile sought to recover $75,000, which he alleged was owed to him by Cam Milani and two corporations related to Mr. Milani. The plaintiff's claim was based on a written acknowledgement of debt he alleged was signed by Mr. Milani in connection with a real estate transaction. No defence was filed. The plaintiff obtained a default judgment against the defendants on February 10, 1986. Cam Milani died on February 24, 1986. His wife, Lucia Milani was his sole heir and the executrix of his estate.

[4] Mrs. Milani, as litigation administrator of the estate, retained counsel and moved successfully for an order setting aside the default judgment. She then filed a statement of defence and proceeded to defend this action right up to the eve of trial. The case was called for trial on May 11, 1992. Counsel for the plaintiff attended and advised the court that he had been advised by defence counsel that she was under instructions not to attend. The trial judge directed plaintiff's counsel to telephone defence counsel and advise her that the trial would be proceeding at 12:30 that morning. This was done and defence counsel confirmed that nobody would be attending for the defendants. Mrs. Milani acknowledges that she gave those instructions. She had concluded there was no point defending the action because there were no assets left in the estate. She also acknowledges that she understood that the trial would proceed in the absence of the defendants based solely on the evidence of the plaintiff.

[5] The trial proceeded that day on an undefended basis. The plaintiff testified under oath and a number of documents were marked as exhibits (including the written acknowledgement of debt relied on in the statement of claim). The evidence of the plaintiff was essentially in conformity with the allegations in the statement of claim. The trial judge awarded judgment to the plaintiff for $75,000, plus interest at 10% from the date the claim was issued, plus costs fixed at $30,000.

[6] The plaintiff thereafter attempted to collect on the judgment but discovered that, by the time of the 1992 trial, the estate and the defendant corporations were judgment-proof. In the course of enforcement proceedings, the plaintiff obtained information which caused him to commence this second action against Lucia Milani in her personal capacity and a number of corporations allegedly controlled by her. The plaintiff seeks to recover from Mrs. Milani and her companies, the amount of the judgment obtained in 1992 against her husband's estate. Essentially, the plaintiff alleges that after her husband's death, Mrs. Milani (as executrix) dealt with the assets of the estate (which included the assets of Mr. Milani's companies) in a manner that was fraudulent and oppressive and which had both the intent and effect of defeating the rights of creditors. Further, it is alleged that Mrs. Milani and her corporations obtained a benefit, to the detriment of the creditors of the estate.

Applicable Law

[7] The plaintiff relies on the oppression remedy which is set out in s.248 of the *Business Corporations Act*:

> 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.

[8] In *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al.*, 54 O.R. (3d) 161, the Court of Appeal at p.177 stated:

> . . . 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.

[9] At the time the plaintiff obtained default judgment on February 10, 1986, and the setting aside of the default judgment on July 18, 1986, and obtaining the May 11, 1992, judgment, the plaintiff had a reasonable expectation that the affairs of Milani & Milani Holdings Limited, (MMHL), would be conducted with a view to protecting his interests.

[10] At the setting aside of the default judgment on the issue whether terms should be imposed, Master Donkin said, "There is no evidence that the moving defendant is without assets, or attempting to get rid of assets ... . There appears to be ... evidence that the defendant has some other assets ..."

[11] The defendants now say that because of a huge tax debt to Revenue Canada and the provincial government, MMHL was insolvent when the default judgment was obtained. That information, if true, was withheld from the Master.

[12] I conclude that MMHL must have had sufficient assets at the time of the default judgment to satisfy the plaintiff's claim, otherwise, why go to the expense of setting aside the default judgment if there were insufficient assets?

[13] The reason given by the defendants for not attending the trial on May 11, 1992: they alleged that MMHL had no assets and, therefore, there was no money and no sense in defending the action.

[14] However, up until the date of the trial, the litigation had been vigorously contested with several motions and discoveries.

[15] On July 10, 1991, Lucia Milani effected a transaction which had the result of transferring all of the assets owned by MMHL to companies owned or controlled by her. The plaintiff was unaware of that transaction until after he obtained his judgment and he had no ability to prevent that transaction.

[16] The issue to be decided is whether the July 10, 1991 transaction had the effect of unfairly prejudicing or unfairly disregarding the interests of the plaintiff creditor.

Events Leading up to the July 10, 1991, Transaction

[17] On May 31, 1974, C.D. Milani, Trustee, acquired certain lands in the State of Florida ("the trust lands"). On August 9, 1982, Mr. Milani transferred the trust lands to Richard Orman ("Orman") and Robert A. Wutt ("Wutt"), as trustees of the Milani Family Irrevocable Trust ("MFIT"). The beneficiaries of the MFIT were Lucia and her children.

[18] On October 1, 1982, Orman and Wutt, as trustees of the MFIT entered into an agreement with Robert B. Whitley ("Whitley") which agreement granted to Whitley an option to purchase the trust lands. Whitley agreed to make a mortgage loan of $1,000,000 US to Orman and Wutt, as trustees of the MFIT, which mortgage was to be secured against the trust lands, ("the Whitley mortgage").

[19] The $1,000,000 US was entirely funded by December 31, 1982 and was recorded on the books of MMHL as having been received by it in three entries; October, 1982; October 1982 and December 31, 1982. Lucia was aware that the money had been diverted from the MFIT to MMHL and protested to Cam. He assured her that the money would be returned to the MFIT in due course.

[20] From 1979 to January 1, 1985 the trust lands were recorded in the financial statements of MMHL as an asset of MMHL. Likewise, the obligation to repay the $1,000,000 US was recorded as a liability of MMHL on its financial statement.

[21] On or about June 24, 1986, Lucia arranged a mortgage with Flagler National Bank of The Palm Beach ("Flagler National") for $1,400,000 US. The purpose of the mortgage was to repay the Whitley mortgage and retire a loan from Florida National Bank ("Florida National"). The total required was $1,934,237 US which was more than the amount funded by Flagler National.

[22] Lucia arranged for her company Muccapine to fund the shortfall, $534,237 US.

[23] The Whitley mortgage was retired out of these moneys ($1,261,078.34) and the loan from Florida National was paid off ($451,022) together with various other expenses. Lucia regarded these liabilities as having been incurred both for the benefit of MFIT and MMHL. Accordingly, the Muccapine mortgage was registered both as against the trust lands and the lands owned by MMHL in the State of Florida.

[24] In 1987, Lucia sold the trust lands and other Florida lands to the County of Palm Beach. She discharged the Muccapine mortgage as against the trust lands out of the sale proceeds but left the Muccapine mortgage registered as against the Florida lands still remaining in the name of MMHL. All of the interest on the Muccapine mortgage, $602,945, was charged to MMHL.

[25] On July 10, 1991, Lucia effected a transaction that had the result of transferring all assets owned by MMHL to companies owned or controlled by her. The four properties involved were a 40% interest in the Bella Vista lands, City of Vaughan; the Uplands property, City of Vaughan; the Florida East lands, State of Florida and the Florida West lands, State of Florida. The Canadian lands were transferred to Rizmi Holdings Limited ("Rizmi"), a company owned or controlled by Lucia. The Florida lands were transferred to Highland Beach Real Estate Holdings, Inc. ("Highland Beach"), a company owned or controlled by Lucia.

[26] As part of the purchase price for the Florida lands, Highland Beach assumed a mortgage registered in the name of Muccapine against those properties. The balance of the Muccapine mortgage against the Florida East lands was $389,725.41 and the balance of the Muccapine mortgage against the Florida West lands was $146,084.99.

[27] As part of the 1991 transaction the tax authorities apparently approved of the transfer of MMHL assets to Lucia's companies in consideration of receiving the balance of funds on closing after the mortgages were paid.

[28] A letter from Revenue Canada dated November 7, 1986, gives the tax liability of MMHL at $532,085.80 and the Estate tax liability at $1,556,469.52, for a total of $2,088,555.32. The defendants allege, without confirmation from the tax authorities, that the correct amount of taxes owned by the Estate and MMHL at the end of 1986 was $3,940,598.52.

Discussion

[29] The main difficulty with this case is the lack of reliable financial information. There are financial statements for MMHL but the statements are accompanied by a Notice to Reader which is considered the least intensive category of review. It is probable that the MMHL financial statements are not reliable.

[30] There are no financial statements for the MFIT.

[31] The financial aspects of MMHL and MFIT and Lucia and her companies is a mystery.

[32] The defendants allege that MMHL made no money from 1985 to 1988. The only year there was a profit was in 1986, which was attributable entirely to the recovery of the management bonus.

[33] However, the defendants allege that the expenses of MMHL for the years 1985 to 1988 averaged $1,027,842 per year. From 1988 to 1991, the defendants allege that Lucia and her companies advanced cash or credit to MMHL in the amount of $1,308,241.60. On top of these expenses is the alleged tax liability as at the end of 1986 of $3,940,598.52 for the Estate and MMHL. It is my understanding that the only assets of the Cam Milani Estate were the assets of MMHL.

[34] With such a grim financial picture why keep MMHL operating? But, it did keep operating until July 10, 1991, when all the assets of MMHL were transferred to Lucia's companies.

[35] If the trust lands were an asset of the MFIT from and after 1982 and the Whitley mortgage and Florida National loan were liabilities of MFIT from and after 1982, then the borrowings in 1986 from Flagler National and Muccapine should not have been charged to MMHL. The advances made by Flagler National and Muccapine went to and for the benefit of the MFIT because the MFIT was solely responsible for the repayment of the Whitley mortgage and the loan from Florida National.

[36] Accordingly, the Muccapine mortgage should not have been registered against the MMHL lands and MMHL should not have been charged with the interest on the Muccapine mortgage.

[37] The registration of the Muccapine mortgage benefited Lucia or companies controlled by her to the detriment of the creditors of MMHL including the plaintiff. Lucia was a beneficiary of the MFIT and to the extent a party other than the MFIT was charged with the interest on the Muccapine mortgage, the trust and, indirectly, its beneficiaries were better off. The charge of interest on the Muccapine mortgage of $602,945 diminished the assets available to the creditors of MMHL by like amount. In addition, when Highland Beach bought the Florida East and Florida West properties from MMHL in July 1991, the balance due on closing was artificially reduced by the balance of the Muccapine mortgage against those lands, $389,752.41 and $146,084.99. Lucia and her companies paid MMHL less for these lands because these lands should not have been burdened by the Muccapine mortgage. Lucia arranged to have MMHL incur a liability that should only have been incurred by the MFIT.

[38] I find that the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor.

[39] If the July 10, 1991, transaction was not a benefit to Lucia and her companies, why did she agree that her companies purchase the MMHL assets? She could have

allowed the tax authorities to enforce their executions. I can only conclude that Lucia and her companies benefited by the purchase of MMHL assets.

[40] The plaintiff has proven that a rectification order should be made pursuant to the oppression remedy contained in s.248 of the *Business Corporations Act*.

[41] There will be judgment in favour of the plaintiff against all of the defendants in the amount of $153,719.55, plus interest at 9% from May 11, 1992, plus costs.

[42] If counsel are unable to agree on costs they may provide me with written submissions.

Blenus Wright J.

Released: December 10, 2002

cc

COURT FILE NO.: 97-CV-122742
DATE: 20021210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SAM STABILE

Plaintiff

- and -

LUCIA MILANI, RIZMI HOLDINGS LIMITED, MUCCAPINE INVESTMENTS LTD., L.C.T. HOLDINGS INC. and HIGHLAND BEACH REAL ESTATE HOLDINGS, INC. and MILANI & MILANI HOLDINGS LIMITED

Defendants

REASONS FOR JUDGMENT

BLENUS WRIGHT J.

Released: December 10, 2002

cc

DATE: 20040630
DOCKET: C39376

COURT OF APPEAL FOR ONTARIO

WEILER, SHARPE and BLAIR JJ.A.

BETWEEN:

SAM STABILE Plaintiff (Respondent)	)	Ronald Carr, for the respondent
- and -	)	
LUCIA MILANI, RIZMI HOLDINGS LIMITED, MUCCAPINE INVESTMENTS LTD., L.C.T. HOLDINGS INC. and HIGHLAND BEACH ESTATE HODINGS INC. and MILANI & MILANI HOLDINGS LIMITED Defendants (Appellants)	)	Charles Campbell, for the appellants
	)	Heard: February 26, 2004

On appeal from the judgment of Justice Blenus Wright of the Superior Court of Justice dated December 10, 2002.

R. A. BLAIR J.A.:

Overview

[1] In 1985 Sam Stabile sued Cam Milani, and two of Mr. Milani's companies, for $75,000 on a written acknowledgement of debt. That debt – which, with interest, now stands at more than $300,000 – has yet to be paid.

[2] Mr. Milani died in February 1986. His estate is comprised of the shares of Milani & Milani Holdings Ltd. ("MMHL"), one of the two companies sued by Mr. Stabile.

[3] Prior to Mr. Milani's death, Mr. Stabile had obtained default judgment. That judgment was subsequently set aside by Master Donkin, on motion brought by Mr. Milani's widow, Lucia Milani, the Estate Trustee and person who controls MMHL. The action then proceeded as a defended action until the eve of trial in May 1992. Neither Mrs. Milani nor the corporate defendants appeared to defend at trial, however, and on May 11, 1992, Lissaman J. granted judgment against the estate of Mr. Milani, MMHL, and another company, 473915 Ontario Inc., a subsidiary of MMHL. With accumulated interest plus costs, the judgment totalled $153,719.55. There was no appeal. Mr. Stabile attempted to collect, but discovered the defendants were judgment proof.

[4] In 1997, on the basis of information subsequently learned, Mr. Stabile commenced the action in which this appeal is taken against Mrs. Milani personally, and against her companies, claiming relief – amongst other things – pursuant to the "oppression remedy" provisions of the *Ontario Business Corporations Act* R.S.O. 1990, c. B.16 (the "OBCA"). He succeeded. In 2002, Wright J. required the defendants pay him $153,719.55 which with interest amounts to $300,203.05

[5] Mrs. Milani and her corporations appeal that judgment. For the reasons that follow, I would allow the appeal.

Background and History

[6] Mr. Milani was a real estate developer. Generally, he bought raw land and sold developed lots, usually through his company, MMHL.

[7] In 1985, Mr. Milani agreed to pay Mr. Stabile the sum of $75,000 if Mr. Stabile found him a purchaser for certain property at Keele Street and Rutherford Road in the Town of Vaughan. Mr. Stabile alleges that he did so, and that he obtained a written acknowledgement from Mr. Milani that he would be paid the $75,000. When payment was not forthcoming he sued.

The Debt Action

[8] Shortly before Mr. Milani's death in February 1986, Mr. Stabile obtained default judgment. Mrs. Milani succeeded in having that default judgment set aside, however, and the action proceeded as a defended action to the date of trial. In refusing to impose terms as a condition of setting aside the default judgment, Master Donkin made the following remarks, upon which the respondents place considerable emphasis since Mrs. Milani took the position before Wright J. that the Milani Estate and MMHL were insolvent at the time of the default proceedings as a result of outstanding tax liabilities:

> In this case I have given considerable thought to whether I should impose terms. It is not long since the judgment was signed in comparison with some of the other cases. There is no evidence that the moving defendant is without assets, or attempting to get rid of its assets, although there is certainly the acknowledged fact that a sale is to go through next week and in that sale the moving defendant is the vendor. There

> appears to be some evidence that the defendant has some other assets and I take that from the reference to certain terms in an agreement made between the defendant and another firm of solicitors who acted as agent. . . .

[9] Mrs. Milani was not closely involved with her husband's business affairs prior to his death. Although others connected with the business were aware of Mr. Milani's substantial tax liabilities, Mrs. Milani only became aware of them after his death. She continued to retain Mr. Milani's managing director, May Ann Jenkin, to look after the business, and hired a new chartered accountant, Joe Lanno, and a tax specialist, to help her in straightening out the affairs of Mr. Milani and MMHL. Although the parties cannot agree on the amount of the outstanding tax liabilities, the evidence is that they were substantial.

[10] In 1991, the tax issues were settled with the federal and provincial authorities. On July 10, 1991, two of Mrs. Milani's companies, Rizmi Holdings Limited ("Rizmi") and Highland Beach Real Estate Holdings Inc. ("Highland Beach"), purchased the assets of MMHL. Rizmi acquired MMHL's Canadian properties. Highland Beach acquired lands that MMHL held in the state of Florida. These transactions were at prices approved by Revenue Canada, and it is not disputed that they were for fair market value (although the assumption of a mortgage against the Florida lands in favour of another of Mrs. Milani's companies, Muccapine Investments Ltd. ("Muccapine") as part of the purchase price, is hotly contested). All of the proceeds from the July 10, 1991 transaction were paid

directly to Revenue Canada to cover tax liabilities. In spite of this the tax liabilities were not paid in full.

[11] When the action was called for trial, on May 11, 1992, no one appeared for the defendants/appellants. Although she continued to maintain at the oppression remedy trial that Mr. Stabile's claim was not justified, Mrs. Milani felt in 1992 that there was no money in the Milani Estate or in MMHL to pay his claim even if he was successful. She therefore decided not to go through with the trial because MMHL had no funds even to continue the litigation. After hearing Mr. Stabile's evidence, Lissaman J. granted judgment as indicated above.

The Oppression Remedy Action

[12] In the course of examining Mrs. Milani in judgment debtor proceedings, Mr. Stabile discovered that all of the assets of MMHL had been sold in the July 10, 1991 transaction in order to satisfy tax liabilities. It was not until some years later, however, that he learned the MMHL assets had been sold to companies owned by Mrs. Milani. He then commenced this action, seeking initially to set aside the July 1991 transactions under the *Fraudulent Conveyances Act* R.S.O. 1990, c. F.29 and the *Assignment and Preferences Act* R.S.O. 1990, c. A.33, as well as claiming relief under the oppression remedy sections of the OBCA. Only the oppression remedy claim went to trial.

[13] To understand the allegations underlying the oppression remedy claim, it is necessary to understand the history of certain Milani landholdings in the state of Florida.

The Florida Lands

[14] Beginning in 1974, Mr. Milani acquired a number of adjoining Florida properties "in trust". The properties were shown as assets, and the development costs relating to them as liabilities, on the books of MMHL. In 1982, two of these properties were transferred from C.D. Milani "in trust" to two persons who were trustees for the Milani Family Irrevocable Trust ("MFIT"). Mr. Milani had established the trust for the benefit of Mrs. Milani and their three children. A trust deed transferring the lands was signed at that time but was not registered until several years later, when the lands were sold. I shall refer to these properties as the Trust Lands.

[15] In spite of this transfer, however, the lands continued to be shown as assets on the MMHL books, and the related development costs as liabilities.

[16] In 1984, the trustees of MFIT granted to a Mr. Whitely a $2.9 million option to purchase the Trust Lands. Mr. Whitely paid a deposit of $1 million, which was secured by a mortgage against the Trust Lands. This deposit, however, was paid to MMHL. When Mrs. Milani learned of this she protested. Mr. Milani assured her the $1 million would be paid over to MFIT. But it never was. The obligation was recorded on the MMHL books as an obligation to repay Mr. Whitely (or his company).

[17] For reasons having to do with the inability to obtain building permits as desired, Mr. Whitely declined to proceed with his purchase of the Trust Lands. He demanded the

return of his deposit, with interest, from the owner of the Trust Lands, MFIT, as under his agreement he was entitled to do. This happened prior to Mr. Milani's death in February 1986, but the situation was not resolved by that time. MFIT had no funds to pay – its only assets were the Trust Lands – and Mr. Whitely took foreclosure proceedings.

[18] At this point the trustees of MFIT resigned and Mrs. Milani became the successor trustee. She took legal advice. She was also aware that the county of Palm Beach was interested in purchasing both the Trust Lands and some lots owned by MMHL across the road from the Trust Lands. The county wanted to buy both or none. To preserve this opportunity, and to buy some time to raise financing and clear title to the Trust Lands, Mrs. Milani caused MFIT to be "put into Chapter 11". She needed $1,261,078.34 to pay off the Whitely loan, plus $451,022.00 to retire the first mortgage to the Florida National Bank, plus additional expenses relating to the transaction and the default, for a total of $1,934,237.00 (U.S.).

[19] Mrs. Milani raised $1.4 million of these required funds through a loan from the Flagler National Bank on the security of the Trust Lands. The balance of $534,237 she advanced from her own company, the defendant Muccapine. The Muccapine advance was secured by way of a mortgage on both the Trust Lands and the assets of MMHL. The mortgage bore a high late-1980's interest rate for subsequent encumbrances of 20% per annum (24% after maturity), but the rate and terms were similar to other subsequent encumbrances registered against other MMHL lands. Mrs. Milani testified that

Muccapine took a mortgage against the MMHL lands as well as the Trust Lands because it was MMHL that had received the $1 million deposit monies in the first place.

[20] The next year, 1987, Mrs. Milani successfully negotiated the sale of the Trust Lands plus the MMHL lots across the road to the county of Palm Beach. MMHL earned a profit from the sale of its lots. The Flagler National Bank mortgage on the Trust Lands was discharged from the sale proceeds, and $600,000 (U.S.) was paid to Muccapine. This left a balance of $73,399 owing to Muccapine. The Muccapine mortgage on the Trust Lands was discharged – those lands had been sold to the county – but it remained against the MMHL assets.

The Taxation Problem and Resolution

[21] Mr. Milani and MMHL were subject to significant tax liabilities in the period prior to his death. Indeed, Revenue Canada had a substantial lien registered against the MMHL lands at Keele St. and Rutherford Rd. that were the subject matter of the transaction giving rise to Mr. Stabile's $75,000 claim. It is acknowledged, however, that Mr. Milani was a private individual when it came to his business affairs, and Mrs. Milani did not become aware of the tax difficulties until she began to attempt to unravel those affairs following her husband's death.

[22] The July 10, 1991 transaction was the result of a settlement with the taxing authorities. In substance the transaction involved the purchase by Rizmi of MMHL's Canadian properties and the purchase by Highland Beach of MMHL's Florida properties,

for fair market value, and the payment by MMHL of the proceeds of those purchases to the taxing authorities. Releases executed by both the Crown in right of Canada and the Crown in right of Ontario specifically accept that the prices paid for the MMHL properties "are equal to the respective fair market values of each of the Properties." This followed the preparation of appraisals of the properties, the amounts of which are not in dispute. The Crown agreed to make no claims to the properties conveyed and released and discharged Mrs. Milani, the various companies and others from any claims arising in connection with the liability of the Milani Estate and of MMHL for taxes, interest and penalties.

[23] Mr. Stabile does not dispute that the properties were sold for fair market value. However, he takes issue with the fact that part of the purchase price of two of the Florida properties acquired by Highland Beach was satisfied by way of assumption of the Muccapine mortgage. One property was purchased for $675,000, of which $389,752.41 was accounted for by the Muccapine mortgage. The other was purchased for $253,000, of which $146,084.99 was attributable to assumption of the Muccapine mortgage.

[24] The parties do not agree on the amount of the outstanding tax liabilities of the Milani Estate and MMHL. The trial judge accepted a letter from Revenue Canada dated November 7, 1986 indicating the tax liability of MMHL at $532,085.80 and that of the Estate at $1,556,469.52, for a total of $2,088,55.32. The appellants' accountant, Joe Lanno, testified that these amounts did not include taxes owing to provincial authorities

and that there were errors in the calculations of MMHL's previous accountants concerning the company's net tax liability. He stated that MMHL's total tax liability at the end of 1986 was $2,384,129.00, bringing the total taxes owed by the Estate and MMHL to $3,940,598.52. He was not cross-examined on this. The trial judge acknowledged the appellants' assertions in this regard, but observed that they made the allegations "without confirmation from the tax authorities". In any event, Mr. Carr concedes there were tax liabilities remaining that exceeded the amounts paid by Rizmi and Highland Beach for the MMHL assets in the July 10, 1991 transaction. At that time, the taxing authorities would have had priority over Mr. Stabile and other creditors with respect to any additional amounts paid even if the transactions had yielded a higher purchase price.

Other Advances by Mrs. Milani's Companies to MMHL

[25] The evidence is that between 1987 and 1991 the expenses of MMHL were paid out of an account in the name of "Lucia Milani in trust" which was funded entirely by monies received primarily from Mrs. Milani's companies, the defendants Rizmi, L.C.T. Holdings Inc., and Muccapine. The advances were evidenced by promissory notes.

[26] Mr. Lanno testified that in addition to the advances forming the subject of the Muccapine mortgage, Muccapine paid additional funds to MMHL. The Muccapine ledgers show further advances of $250,887 plus accumulated interest of $254,948. As a result, the total amounts owing by MMHL to Muccapine on all outstanding loans and

mortgages in 1991 was $741,347. From this amount Mr. Lanno deducted the credits given to Rizmi and Highland Beach when they purchased the MMHL properties on July 10, 1991, by way of assumption of the Muccapine mortgage. MMHL was still indebted to Muccapine in the amount of $34,132.

[27] After examining the books and records of MMHL, Mr. Lanno decided that the books and records and financial statements needed to be restated to reflect the fact that the Trust Lands were MFIT assets. He did this by making a number of entries in the books and records of MMHL and MFIT, and by preparing a set of statements for MFIT. No statements had previously been prepared for MFIT, as none were required. This work was completed in 1989. As a result, the reconstituted financial records of MMHL and MFIT show the Trust Lands as assets of MFIT, and the obligation to repay the Whitely deposit as an obligation of MFIT. In addition, the development costs respecting the Trust Lands, which had been charged against MMHL, were transferred to MFIT and shown as a liability of MFIT to MMHL.

[28] Mr. Lanno did not alter the financial statements to show a liability on the part of MMHL to repay the $1 million Whitley deposit to MFIT or a receivable in favour of MFIT from MMHL. He testified that he was not told by Mrs. Milani or Ms. Jenkin that the $1 million had been paid to MMHL when it was received from Mr. Whitley.

The Trial Judge's Decision

[29] The trial judge concluded that Mr. Stabile "had a reasonable expectation that the affairs of MMHL would be conducted with a view to protecting his interests", referencing this court's decision in *Downtown Eatery (1993) Ltd. v. Her Majesty the Queen in Right of Ontario et al.*, 54 O.R. (3d) 161, at p. 177. This conclusion was based primarily on the fact that Master Donkin had refused to impose terms when setting aside the default judgment obtained by Mr. Stabile prior to Mr. Milani's death on the basis that "[t]here [was] no evidence that [MMHL] is without assets, or attempting to get rid of assets" and that "[t]here appears to be ...evidence that [it] has some other assets." He observed that if MMHL was insolvent at the time of the default proceedings, as Mrs. Milani now claimed, that information was withheld from the master. The trial judge felt that MMHL must have had sufficient assets at the time to satisfy Mr. Milani's claim, otherwise, it would not have gone to the expense of setting aside the default judgment.

[30] The trial judge also decided that the July 10, 1991 transaction had the result of transferring all of MMHL's assets to companies controlled by Mrs. Milani and that the price for those properties was inappropriately reduced by the assumption of the Muccapine mortgage as part of the purchase. He found that the Muccapine mortgage should not have been registered against the MMHL lands "because the MFIT was solely responsible for the repayment of the Whitley mortgage and the loan from Florida National", and that MMHL should not have been charged with the interest on the

Muccapine mortgage. The registration of the Muccapine mortgage benefited Mrs. Milani and her companies to the detriment of other creditors of MMHL, including Mr. Stabile. The charge of interest on the Muccapine mortgage to MMHL rather than to MFIT (of which Mrs. Milani and her children are beneficiaries) diminished the assets of MMHL available to other creditors, as did the artificial reduction of the purchase price of the properties by the assumption of that mortgage. As a result, the trial judge found "that the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor". This constituted oppression, he concluded, and the proper relief was to grant Mr. Stabile judgment against all defendants for the amount of his judgment ($153,719.55) plus interest, which he fixed at 9% from the date of judgment, plus costs.

The Standard of Review

[31] The standard of review from the decision of a trial judge on a question of law is correctness. The standard of review on a question of fact, or of mixed fact and law, is that of palpable or overriding error. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at 256; *Waxman v. Waxman,* [2004] O.J. No. 1765 (C.A.).

The Statutory Framework

[32] Although the action was originally framed as a claim for relief under the *Fraudulent Conveyances Act* and the *Assignment and Preferences Act*, as well as for relief under the OBCA, only the oppression remedy claim proceeded to trial.

[33] Section 248 of the OBCA provides:

> (1) A complainant and, in the case of an offering corporation, the Commission 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.

Analysis

[34] In my view, respectfully, the trial judge erred in three significant respects in arriving at his decision.

[35] First, his conclusion that the Muccapine meeting should not have been registered against the MMHL lands and that MMHL should not have been charged with the interest due on it is wrong, and flows from a misapprehension of the evidence. Secondly, this conclusion was central to the trial judge's finding that the July 10, 1991 transaction benefited Mrs. Milani's companies to the detriment of creditors, including Stabile, and

was therefore oppressive. That finding is therefore flawed. Thirdly, the finding is flawed in law because it (a) is based on a "reasonable expectation" of Mr. Stabile that is cast too broadly, and (b) fails to recognize that a simple benefit/detriment analysis is not sufficient to establish "oppression" pursuant to s. 248 of the OBCA, which requires that the impugned conduct must be conduct that is "oppressive, or unfairly prejudicial to or that unfairly disregards the interests of" the claimant. That was not the case here.

[36] There was every justification for the Muccapine mortgage being placed against the assets of MMHL, in my view. The Muccapine monies were advanced as part of a refinancing package that led to the repayment of the Whitley deposit of $1 million. MMHL alone had received those monies and had the use of them. Although secured by the Trust Lands – which should have been carried as an asset of MFIT, but were not – those monies were never properly a debt of MFIT. Rather, they were a debt of MMHL and their repayment was at all times an obligation of MMHL. The respondent's own accounting expert, Ronald Smith, agreed that there was nothing wrong with Muccapine obtaining security against the MMHL assets, on the assumption that MMHL got the $1 million and given that the monies were advanced as part of a pot of money to pay off that debt and other expenses. These assumptions were established on the evidence. Mr. Smith agreed as well that it was not improper for MMHL to pay interest on the mortgage, given those assumptions.

[37] The trial judge made no reference to Mr. Smith's evidence. His conclusion that "the Muccapine mortgage should not have been registered against the MMHL lands and MMHL should not have been charged with the interest on the Muccapine mortgage" was based on his view that the $1.9 million raised from the Flagler National Bank and Muccapine "went to and for the benefit of the MFIT *because the MFIT was solely responsible for the repayment of the Whitley mortgage* and the loan from Florida National" [emphasis added]. With respect, this view was contrary to the evidence. MMHL was responsible for the repayment of the Whitley mortgage because MMHL had received and used the monies.

[38] Consequently, the assets of MMHL were appropriately charged with the Muccapine mortgage, and with the payment of interest on that mortgage, representing, as it did, monies raised to defray at least a portion of the Whitley debt.

[39] I observe as well that MMHL was only charged with an amount equal to less than half the amount of the Whitley loan plus interest. MMHL therefore benefited significantly from the Whitley loan and its repayment – as did its creditors, such as Mr. Stabile, therefore – by only assuming responsibility for one-half of the monies it received and for one-half of the interest payable on those monies.

[40] The fact that the Muccapine mortgage was left on the MMHL assets but discharged as against the MFIT Trust Lands at the time of the conveyance to the county

of Palm Beach is explained in this context as well. First, the Trust Lands had been sold to the county. Title to them therefore had to be cleared and the Muccapine mortgage could not remain. All the sale proceeds were expended to pay outstanding encumbrances and other expenses, and on the evidence MFIT does not appear to have had any other assets than the Trust Lands. Secondly, to the extent that the Muccapine mortgage provided security for repayment of the Whitley loan – in reality the sole obligation of MMHL – and a balance remained outstanding on the payment of principal and interest on that mortgage after distribution of the sale proceeds, the mortgage properly remained registered against the MMHL assets.

[41] The foregoing misconception regarding the placement of the Muccapine mortgage against the MMHL assets undermines the trial judge's ultimate finding that "the effect of the July 10, 1991, transaction transferring the assets of MMHL to Lucia and her companies benefited the defendants to the detriment of the plaintiff creditor", and was therefore oppressive. In making that finding the trial judge stated (reasons, para. 37):

> The registration of the Muccapine mortgage benefited Lucia or companies controlled by her to the detriment of the creditors of MMHL including the plaintiff. Lucia was a beneficiary of the MFIT and to the extent a party other than the MFIT was charged with the interest on the Muccapine mortgage, the trust and, indirectly, its beneficiaries were better off. The charge of interest on the Muccapine mortgage of $602,945 diminished the assets available to the creditors of MMHL by like amount. In addition, when Highland Beach bought the Florida East and Florida West properties from MMHL in July 1991, the balance due on closing was artificially reduced by the balance of the Muccapine mortgage against those lands, $389,752.41 and $146,084.99. *Lucia and*

> *her companies paid MMHL less for these lands because these lands should not have been burdened by the Muccapine mortgage. Lucia arranged to have MMHL incur a liability that should only have been incurred by the MFIT* [emphasis added].

[42] The evidence, in fact, is to the contrary. MFIT was made to incur a liability *that should only have been incurred by MMHL.* Thus, the interest was properly chargeable to MMHL and did not represent an inappropriate diversion of obligations from MFIT to MMHL. Moreover, since the Muccapine mortgage constituted a legitimate charge against the assets of MMHL, and a real debt, its assumption by Highland Beach, as part of the purchase price in the July 10, 1991 transaction, amounted to the assumption of a real obligation and not a reduction in the purchase price, as the trial judge held. There has been no suggestion that Muccapine is willing to waive its rights to payment under the mortgage; nor is their any explanation as to how – if that were so – the abandonment of such a valuable asset is a benefit to Mrs. Milani and Muccapine. There was therefore no "benefit" to Highland Beach in this regard as the trial judge concluded.

[43] In applying the oppression remedy provisions of the OBCA the trial judge relied upon the following passage from the decision of this court in *Downtown Eatery (1993) Ltd. v. Ontario* (2001), 54 O.R. (3d) 161 at 177:

> 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.

[44] It is not contended here that the impugned conduct on the part of Mrs. Milani and her companies was done with the intention of harming the respondent. Nor is it argued that the lack of such intention precludes a finding of oppression. Drawing upon the foregoing passage, however, the trial judge held that Mr. Stabile had a reasonable expectation, following the setting aside of his default judgment in July 1986, "that the affairs of [MMHL] would be conducted with a view to protecting his interests." Given his conclusion that the obligations of the Muccapine mortgage had been improperly shifted from MFIT to MMHL, and that the effect of the July 10, 1991 transaction was therefore to denude MMHL of assets that would otherwise have been available to the company's creditors, including Mr. Stabile, this reasonable expectation had been breached. Application of the oppression remedy followed.

[45] Mr. Carr conceded in argument that but for the facts surrounding the default judgment, Mr. Stabile would not have had a reasonable expectation that he would be paid. The trial judge placed some emphasis on this point as well. In my view, however, the trial judge's characterization casts the "reasonable expectations" component of oppression under s. 248 of the OBCA too broadly in the circumstances of this case. Moreover, Mr. Stabile's reliance, and that of the trial judge, on the assumption that the master might have imposed conditions upon the setting aside of the default judgment in

the form of some form of "security" for the payment of an eventual judgment, had he known about the alleged insolvency of MMHL at the time, is misplaced.

[46] Once the default had been set aside, Mr. Stabile was not a judgment creditor. His status was that of a contingent claimant asserting a claim for a liquidated demand against MMHL and the Milani Estate. His position was not analogous to that of a minority shareholder, or of a major lender who might be said to have "some particular legitimate interest in the manner in which the affairs of the company are managed": see *Re Daon Development Corporation* (1984), 54 B.C.L.R. 235 at 243 (B.C.S.C.). His interest and concern were simply those of any remote potential judgment creditor whose potential debtor has exigible assets. He had a reasonable expectation that the affairs of the potential debtor corporation would be conducted honestly and in good faith, based on the reasonable business judgment of its directing minds, and in a manner that did not *unfairly* prejudice or affect his interests. He had no reasonable expectation that MMHL would be managed and operated in a way that would ensure he was paid for his debt (assuming it was established at trial) in priority to others, including the Crown for tax liabilities.

[47] The above-cited quotation from *Downtown Eatery* must be considered in the context of the remarks that follow it. Not every conduct that has *the effect* of harming a complainant gives rise to recovery under s. 248(2). The conduct must of course fall foul of the reasonable expectations of the complainant according to the arrangements existing between the principals: *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481

(C.A.). Moreover, s. 248(2) makes it clear that the oppression remedy involves conduct that effects a result that is "oppressive", or that "*unfairly* prejudices" the complainant, or that "*unfairly* disregards the interests of" the complainant. See *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.* (1995), 131 D.L.R. (4th) 399 (Ont. Gen. Div.), varied on other grounds (1998), 40 O.R. (3d) 563 (C.A.); *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 60 Alta. L.R. (2d) 122 (Alta. Q.B.).

[48] In *First Edmonton Place*, McDonald J. reviewed the authorities that have considered the meaning of these words. At p. 143 he said:

> Three cases merit discussion for their attempts to define the key terms of the legislation. In Scottish Co-operative Wholesale Society v. Mayer [1959] A.C. 324, at p. 342, Viscount Simmonds defined "oppressive" as "burdensome, harsh and wrongful". Numerous cases have subsequently quoted and adopted this definition (see Re National Building Maintenance [1971] 1 W.W.R. 9 (B.C.S.C.), at 21; Re Cucci's Restaurant (1985) 29 B.L.R. 3 (Alta. Q.B.) at 202). In Diligenti v. R.W.M.D. Operations Kelowna (1976) 1 B.C.L.R. 36 S.C., at 45, the court considered the meaning of "unfairly prejudicial". Fulton J. ruled that in adding the words "unfairly prejudicial" to the statute, the legislature must have intended that the courts would give those words "an effect different from and going beyond that given to the word oppressive". Turning to the Oxford Dictionary, he found that "prejudicial" meant detrimental or damaging to the applicant's right or interest and "unfair" meant inequitable or unjust. He concluded that "the dictionary's definition supported the instinctive reactions that what is unjust and inequitable is obviously unfairly prejudicial" (at 46). Finally, in Stech v. Davies, supra, at p. 379, Egbert J. defined "unfairly disregard" as "to unjustly or without cause, in the context of s. 234(2), pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors or officers of a corporation.

[49] The trial judge asked himself the proper question. At para. 16 of his reasons he said: "[t]he issue to be decided is whether the July 10, 1991 transaction had the effect of unfairly prejudicing or unfairly disregarding the interests of the plaintiff creditor". The question he answered, however – see para. 38 of his reasons – was whether the effect of that transaction in transferring the assets of MMHL to Lucia and her companies benefited the appellants to the detriment of the respondent creditor. As demonstrated above, more than a simple benefits/detriment analysis is required under s. 248(2) of the OBCA. The impugned conduct may effect a result that is "harmful" to the complainant, in the sense that he is unable to collect on his judgment debt. More is required, however. The conduct must effect a result that is "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant.

[50] Once the misconception regarding the Muccapine mortgage is corrected, there is nothing in the circumstances of this case to justify a finding that the July 10, 1991 transaction effected a result that was "oppressive" or "unfairly prejudicial" to, or that "unfairly disregards" the interests of the complainant. There is no suggestion that Mrs. Milani or any of her companies acted dishonestly or in bad faith. The trial judge wondered why MMHL was kept operating between 1986 and 1991, given its "grim financial picture". Mrs. Milani apparently exercised her best business judgment in that regard, however. She kept it operating – through funding from her own companies – in order to preserve the assets from foreclosure, maximize their value where possible,

honour mortgage and development obligations, and attempt to resolve the overriding tax exposure of the Milani Estate and Mr. Milani's companies. None of this constituted oppressive conduct in relation to Mr. Stabile.

[51] Finally, even if the master had ordered the Milani group to pay monies into court as a term of lifting the earlier default judgment, Mr. Stabile could not have had a reasonable expectation that his judgment – if he obtained one – would be secured in the event that MMHL became insolvent. Monies paid into court in such circumstances do not place a plaintiff in the same position as a secured creditor; rather, in the event of bankruptcy, they are payable to the trustee to be distributed to creditors in accordance with their claims to priority. As Carruthers J. noted in *Tradmor Investments Ltd. v. Valdi Foods (1987) Inc.* (1995), 33 C.B.R. (3d) 244, at para. 19, "it would be an anomaly if the plaintiff, prior to judgment, was given a greater right to the money in court than it would have following the judgment". This decision was upheld on appeal: (1997), 43 C.B.R. (3d) 135 (C.A.).

[52] I do not understand, therefore, how Mr. Stabile would have been in a better position on the theory that the master would have imposed conditions upon setting aside the default judgment had MMHL been insolvent at that time and had the master been made aware of that state of affairs. If he would not have been in a better position at the time his judgment was obtained, in 1992, then I fail to comprehend how the failure of the master to impose terms could have created a "reasonable expectation" that the affairs of

MMHL would be conducted in such a way that he would be assured such would be the case.

Conclusion

[53] While the palpable and overriding standard demands strong appellate deference to findings of fact and to inferences drawn from those facts (see *Waxman*, *supra*, paras. 292 and 300), I am satisfied the standard has been met on this appeal. Once the trial judge's misconception of the evidence is rectified, his determinations regarding (i) the wrongful placement of the Muccapine mortgage against the assets of MMHL, (ii) the effect of the July 10 1991 transaction, and (iii) the reasonable expectations of Mr. Stabile, are "palpably" in error, in the sense they are "obvious, plain to see or clear" (*Waxman*, para 296; *Housen*, p. 246). In addition they constitute an "overriding" error because they go to the root of the trial judge's determination and are thus "sufficiently significant to vitiate the challenged finding[s]" (*Waxman*, para 297). The conclusion respecting the reasonable expectations of Mr. Stabile was also flawed in law, for the reasons explained above.

[54] For these reasons, the finding of oppression cannot be sustained in the circumstances of this case and the appeal must be allowed.

Disposition

[55] The appeal is allowed, the judgment of Wright J. dated December 10, 2002 is set aside, and judgment is granted dismissing the action.

[56] The appellant is entitled to the costs of the appeal, fixed in the amount of $15,000, inclusive of fees, disbursements and GST. This cost award reflects the fact that the appellant has been successful on this appeal, but was unsuccessful on a less time-consuming but companion appeal respecting the order of Molloy J. The appellant is also entitled to the costs of the trial, on a partial indemnity basis, to be assessed.

Released: JUN 3 0 2004

RA Blair J.A.

I agree K.M. Weiler J.A.

I agree Robert J. Sharpe J.A.