

CITATION: OZ Merchandising Inc. v. Canadian Professional Soccer League Inc., 2024 ONSC 6719

COURT FILE NO.: 04-CV-026293

DATE: 20241202

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

OZ MERCHANDISING INC.

Plaintiff

Chetan Phull, for the Plaintiff

– and –

CANADIAN PROFESSIONAL SOCCER LEAGUE INC., EASTERN ONTARIO DISTRICT SOCCER ASSOCIATION, THE ONTARIO SOCCER ASSOCIATION, CANADIAN SOCCER ASSOCIATION, CANADIAN SOCCER LEAGUE INC., CSL ASSOCIATION INC., IRA GREENSPOON, VINCENT URSINI, CARY KAPLAN and STAN ADAMSON

Defendants

Alastair McNish, for the Defendant Cary Kaplan

HEARD: October 4, 2024

REASONS FOR DECISION

RYAN BELL J.

Overview

[1] Cary Kaplan moves to dismiss OZ Merchandising Inc.’s claim against him. OZ Merchandising opposes the motion; it contends the claim against Mr. Kaplan requires a trial.

[2] The claim for oppression against Mr. Kaplan personally for punitive damages – the only claim against Mr. Kaplan – cannot succeed. The claim against Mr. Kaplan is also statute-barred

under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. Mr. Kaplan’s motion is granted and the claim against him is dismissed, with costs.

Procedural history

[3] A brief review of the procedural history is necessary to explain the timing of this motion and the limited basis on which it was argued.

[4] OZ Merchandising’s claim against certain defendants, but not Mr. Kaplan, was initially commenced in 2004. In December 2012, the claim was amended to seek relief under the oppression remedy provisions of the *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248, and the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23, s. 253. Mr. Kaplan was added as a defendant at that time. OZ Merchandising alleges that by ceasing to operate the Canadian Professional Soccer League Inc. (“CPSL”) and transferring CPSL’s business to the Canadian Soccer League Inc. (“CSL”) and the CSL Association Inc. (“CSLA”), the CPSL, CSL, CSLA, and the personal defendants (defined in the claim as the “Directors”), including Mr. Kaplan, conducted the business of these corporations in an oppressive manner. At the motion hearing, OZ Merchandising confirmed that the only relief sought in the statement of claim against Mr. Kaplan is for punitive damages, in the amount of \$100,000. Mr. Kaplan was the former Commissioner and Chairman of the CPSL and then a director of the CSL.

[5] In April 2019, the claims against the Canadian Soccer Association, Eastern Ontario District Soccer Association, and The Ontario Soccer Association – which did not include claims of oppressive conduct – proceeded to a trial before a jury. Mr. Kaplan had previously been noted in default. At the outset of the trial, Mr. Kaplan moved for an order setting aside the noting in default against him. I granted Mr. Kaplan’s motion, set aside the noting in default against him, and ordered that he would be permitted to file written submissions on the law relating to the claims made against him in the claim. The claim against Mr. Kaplan did not proceed before the jury in April 2019 because issues of fact and the assessment of damages in respect of a claim for equitable relief must be tried without a jury: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(2).

[6] In my reasons for judgment dismissing the claims against the Canadian Soccer Association, Eastern Ontario District Soccer Association, and The Ontario Soccer Association, I directed that I would remain seized for purposes of addressing the claims against the remaining defendants, including Mr. Kaplan: *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2019 ONSC 5017, at para. 179. Mr. Kaplan filed his written submissions on this motion in November 2022, after OZ Merchandising’s appeal to the Court of Appeal for Ontario was dismissed¹ and after its application for leave to appeal to the Supreme Court of Canada was dismissed.²

[7] This motion was originally returnable in February 2023. On the original return date, I dismissed the plaintiff’s motion that I recuse myself from hearing Mr. Kaplan’s motion to dismiss. The plaintiff also asked that Mr. Kaplan’s motion be “linked” with the plaintiff’s proposed motions for default judgment against certain defendants and, as a consequence, delayed. I declined to do

¹ *OZ Merchandising Inc. v. Canadian Professional Soccer League Inc.*, 2021 ONCA 520.

² *OZ Merchandising Inc. v. Eastern Ontario District Soccer Association, et al.*, 2022 CanLII 16723 (SCC).

so. Some of OZ Merchandising’s submissions on this motion that a trial is required to address the issues raised echo its prior request to link Mr. Kaplan’s motion to the proposed default judgment motions.

[8] I adjourned Mr. Kaplan’s motion to April 2023. OZ Merchandising filed its written submissions in March 2023 and Mr. Kaplan filed reply submissions in April, prior to the scheduled return date. The motion was again adjourned because OZ Merchandising advised it was seeking leave to appeal to the Divisional Court from my dismissal of the motion that I recuse myself.

[9] In April 2024, counsel for OZ Merchandising confirmed he had no instructions to proceed with the motion in Divisional Court seeking leave to appeal. In June 2024, OZ Merchandising renewed its request that I “link” Mr. Kaplan’s motion to any motions for default judgment brought by OZ Merchandising. No motions for default judgment had been filed.³ I denied the request and set the date of October 4, 2024 for the return of Mr. Kaplan’s motion.

Preliminary issue: OZ Merchandising’s request to amend its statement of claim

[10] In these reasons I treat OZ Merchandising’s request to amend the claim as a preliminary issue; however, it is important to note that the request was made at the hearing only *after* the submissions on behalf of Mr. Kaplan were completed. Inexplicably, there was no prior notice given to Mr. Kaplan or to the court that an amendment to the statement of claim would be requested. I denied the request to amend the claim, with reasons to follow. These are my reasons.

[11] Paragraph 33 of the statement of claim reads:

The Plaintiff states that the conduct of these Defendants, *as described above*, was wrongful, oppressive, contrary to the Plaintiff’s reasonable expectations, unfairly prejudicial to the Plaintiff, and that it unfairly disregarded the interests of the Plaintiff. (emphasis added)

[12] OZ Merchandising proposed the following amendment:

The Plaintiff states that the conduct of these Defendants, *as described elsewhere in the claim*, was wrongful, oppressive, contrary to the Plaintiff’s reasonable expectations, unfairly prejudicial to the Plaintiff and that it unfairly disregarded the interests of the Plaintiff. (emphasis added).

[13] Paragraph 33 of the statement of claim appears in an 8-paragraph section headed “Conduct of the CPSL, CSL, CSLA and the Directors – Oppression Remedy.” This section is the only section of the claim in which oppressive conduct is alleged on the part of the CPSL, CSL, CSLA and the personal defendants, including Mr. Kaplan. The gravamen of OZ Merchandising’s oppression claim is that the CPSL became judgment-proof because of the alleged decision to “abandon” the CPSL in favour of the CSL. To remedy that oppression, OZ Merchandising requests an order directing the CSL and/or the CSLA to pay to OZ Merchandising any damages awarded against the

³ Nor had any default judgment motions been filed as at the date the motion was heard.

CPSL in the action.⁴ OZ Merchandising further alleges that the conduct of the CPSL, CSL, CSLA and the personal defendants was “so arbitrary, reckless, capricious, malicious, and high-handed, that the Plaintiff is entitled to an award of punitive or exemplary damages as against these Defendants, in the amount of \$100,000.”⁵

[14] Amending the claim in the manner proposed would expand the oppression claim to include all conduct alleged against the CPSL, CSL, and CSLA in the statement of claim, including the claims against these entities for misrepresentation, “breaches of legal duties”, and intentional or negligent interference with OZ Merchandising’s economic interests. To expand OZ Merchandising’s oppression claim in such manner at this late stage would result in prejudice to Mr. Kaplan that could not be compensated for by costs or an adjournment. The oppression claim as pleaded was included in the claim 12 years ago. Five years ago, I set aside the noting in default against Mr. Kaplan, and ordered that he would be restricted to filing submissions on the law in respect of the claim as pleaded against him. Mr. Kaplan filed his written submission on this motion two years ago. At no time during any of the case conferences or adjournment requests associated with this motion did OZ Merchandising provide notice that it would be seeking to amend the statement of claim in the manner now proposed or at all. OZ Merchandising did not even do so at the outset of the motion; instead, OZ Merchandising waited until counsel for Mr. Kaplan had completed his submissions before raising the issue.

[15] It is, quite simply, far too late for OZ Merchandising to seek to amend its claim.

[16] Finally, I note OZ Merchandising’s confirmation at the hearing that the only claim against Mr. Kaplan is for punitive damages as set out in paragraph 36 of the claim. This paragraph, too, uses the “as described above” language to describe the impugned oppressive conduct. It is a clear reference to the conduct described in the 8-paragraph oppression remedy section of the claim. OZ Merchandising’s admission that this is the only claim against Mr. Kaplan cannot be reconciled with the request to broaden the scope of the oppression claim in the manner proposed.

[17] For these reasons, I denied OZ Merchandising’s request to amend the statement of claim.

The alleged oppressive conduct has been remedied

[18] The CSL formally admitted in May 2015, in response to a Notice to Admit delivered by OZ Merchandising, that it was a successor corporation to CPSL and would be responsible for CPSL’s liabilities in the action, if any: *OZ Merchandising Inc. v. Canadian Profession Soccer League Inc.*, 2016 ONSC 352, at para. 1.

[19] I agree with Mr. Kaplan that by this admission, any alleged oppression caused by “rendering the CPSL into a non-operating business” has been rectified. If OZ Merchandising is entitled to damages against the CPSL, the CSL is liable for those damages. Through this admission

⁴ Claim, at para. 35.

⁵ Claim, at para. 36.

by the CSL that it is the successor corporation to the CPSL, OZ Merchandising has secured the very remedy it was seeking to rectify the alleged oppressive conduct.

[20] The nature and scope of the “fit order” a court may impose under s. 248 of the *OBCA* is circumscribed by the requirements that the order “rectify the matter complained of” and address only the aggrieved parties’ interests as corporate stakeholders: *Budd v. Gentra*, 1998 CanLII 5811 (ON CA), at para. 33, citing *Nanef v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (Ont. C.A.), at pp. 489-90.

[21] In this case, the alleged oppressive conduct has been rectified; there is nothing left to remedy through an order under s. 248 of the *OBCA*.

The claim against Mr. Kaplan personally cannot succeed

[22] A director or officer may be personally liable for a monetary order – the only relief sought against Mr. Kaplan – under s. 248 of the *OBCA*,

...if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties: *Budd*, at para. 46.⁶

[23] The court must determine: (i) whether there are acts pleaded against specific directors or officers which, taken in the context of the entirety of the pleadings, could provide the basis for finding that the corporation acted oppressively; and (ii) whether there is a reasonable basis in the pleadings on which a court could decide that the alleged oppression could be properly rectified by a monetary order against a director or officer personally: *Budd*, at para. 47.

[24] OZ Merchandising argues that a trial is required to determine Mr. Kaplan’s involvement in the delay in CSL’s admission that it was a successor corporation to CPSL. OZ Merchandising contends that paragraphs 31 and 32 of the statement of claim incorporate delay as an aspect of the alleged oppressive conduct.

[25] This argument is without merit because there is nothing in either paragraph of the claim that touches on the issue of delay. The only oppressive conduct alleged is “rendering the CPSL into a non-operating business” (paragraph 31 of the claim). In relation to reasonable expectations, OZ Merchandising pleads at paragraph 32 that,

... the Plaintiff had no reason to expect or foresee that the Directors and possibly others would abandon the CPSL, transfer the CPSL’s operating business to the CSL, and later to the CSLA, thereby turning the CPSL into

⁶ See also *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (ON CA), at para. 59.

a non-operating company with no ability to pay a judgment in the event of a successful outcome for the Plaintiff in the within action.

[26] There is nothing in paragraph 32 of the claim that raises the issue of delay as an aspect of the alleged oppressive conduct.

[27] In any event, the consequences of delay were addressed by Hackland J. in his endorsement dealing with “costs thrown away” in respect of OZ Merchandising’s “wasted and unnecessary time” in pursuing the successor company issue against the CPSL and CSL, up to the point when the CSL “finally formally admitted their successor status and their resultant responsibility for the actions of CPSL which are sought to be impugned in this action”; Hackland J. fixed costs thrown away in the total amount of \$30,000: *OZ Merchandising Inc. v. Canadian Profession Soccer League Inc.*, 2016 ONSC 4272, at paras. 5 and 12.

[28] OZ Merchandising’s oppression claim against Mr. Kaplan founders for three reasons. First, as discussed, the alleged oppression caused by the CPSL ceasing operations has been rectified by CSL’s admission that it is the successor corporation and would be responsible for CPSL’s liabilities in the action, if any.

[29] Second, there is no reasonable basis in the pleadings that would allow me to find that the alleged oppression – if it had not already been rectified – could be rectified by an award of punitive and exemplary damages against Mr. Kaplan. Punitive damages are intended “to give a defendant his or her just dessert (retribution)”, to deter the defendant and others from similar misconduct, and to denounce what has occurred: *Whitten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, at para. 94. Achieving these objectives through an award of punitive damages would do nothing to rectify the oppressive conduct alleged in this case.

[30] Third, if Mr. Kaplan were instrumental in the decision to wind down the CPSL and start up the CSL while the lawsuit against the CPSL was ongoing, this conduct did not amount to “high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour” such that an award of punitive damages would be justified: see *Whitten*, at para. 94.

[31] The oppression claim against Mr. Kaplan fails.

The claim against Mr. Kaplan is statute-barred

[32] The alleged oppressive conduct was not of an ongoing nature. An oppression remedy claim under the *OBCA* is subject to the general two-year limitation period prescribed by s. 4 of the *Limitations Act, 2002*: *Maurice v. Alles*, 2016 ONCA 287, at para.43.

[33] OZ Merchandising raises the issue of discoverability in support of its position that the claim against Mr. Kaplan is not statute-barred. OZ Merchandising contends that the issue of its knowledge that Mr. Kaplan “engaged in some conduct that was tortious on its own which took the director out of the role of a directing mind” is an issue that can be better tested at trial with a full evidentiary record.

[34] I disagree. OZ Merchandising has not pleaded that Mr. Kaplan should be held personally liable for tortious conduct that took him out of the role of a directing mind; to the contrary, the only basis on which OZ Merchandising seeks to impose personal liability on Mr. Kaplan is under the oppression remedy in his capacity as a director or officer of the corporation. This is expressly acknowledged by OZ Merchandising in its submission that, “[a]s Commissioner of the CPSL and then the CSL, the oppressive conduct in shutting down the CPSL in the face of litigation and transferring over all of its operations and assets to CSL can clearly be attributed to Kaplan as head of both leagues.” Mr. Kaplan was added to the action more than five years after the CSL was created and the alleged oppressive conduct occurred. The claim against him is statute-barred.

Disposition

[35] The claim against Mr. Kaplan is dismissed, with costs.

[36] Mr. Kaplan has provided his costs outline; OZ Merchandising has not. In the event the parties are unable to agree on costs, Mr. Kaplan may provide any additional submissions, not to exceed three pages, by December 12, 2024. OZ Merchandising is to provide its costs outline and submissions, also not to exceed three pages, by December 23, 2024.

Justice R. Ryan Bell

Released: December 2, 2024

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Ryan Bell J.

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