

**CITATION:** Debono v. JCD Property Ltd., 2025 ONSC 516  
**COURT FILE NO.:** CV-24-00715668-00ES  
**DATE:** 20250122

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**RE:** David Debono and Elizabeth Muscat, Plaintiffs

-and-

JCD Property Ltd., JCD Inc., Joseph Debono and George Debono, Defendants

CV-23-00697858-00ES

**AND RE:** **In The Estate of Carmen Mary Debono (Deceased)**

Joseph Debono, In His Capacity As Estate Trustee for the Estate of Carmen Debono, George Debono, In his Capacity As Estate Trustee for the Estate of Carmen Debono, JCD Inc. and JCD Property Ltd., Plaintiffs

-and-

David Debono / Elizabeth Muscat / Nesci, Jennifer, Defendants

**BEFORE:** FL Myers

**COUNSEL:** *Peter W.G. Carey*, for David Debono, Elizabeth Muscat, and Jennifer Nesci

*Spencer Toole*, for David Debono, Elizabeth Muscat, and Jennifer Nesci in CV-23-00697858-00ES

*Ian M. Hull and Doreen Lok Yin So*, for Joseph Debono and George Debono, in their capacity as the Estate Trustees for the Estate of Carmen Debono, deceased, JCD Inc., and JCD Property Ltd.

*Victor Kim*, for Joseph Debono and George Debono, in their capacity as the Estate Trustees for the Estate of Carmen Debono, deceased, JCD Inc., and JCD Property Ltd.

**HEARD:** January 22, 2025

### **ENDORSEMENT**

#### **Two Lawsuits**

- [1] There are two lawsuits. David Debono and Elizabeth Muscat sue their mother's estate, the estate trustees, and two corporations owned by the estate, for wrongful dismissal and oppression arising from the termination of their employment
- [2] In the second lawsuit, the estate, by its estate trustees, George and Joseph Debono, and the two estate corporations, sue David Debono, Elizabeth Muscat, and Jennifer Nesci to recover debts and to recover losses the estate says were inflicted on the deceased mother due to borrowing, gifting, and misappropriation of the mother's funds by these defendants.
- [3] The two lawsuits are related but raise different issues. Both are just at the pleadings stage. No affidavits of documents have been exchanged.

#### **The Brief Family Narrative**

- [4] All the parties are siblings. They are the children of the deceased Carmen Debono.
- [5] Carmen Debono and her late husband owned substantial residential real estate in Toronto. They leased out the real estate to provide rental revenue. In recent years, the business generated over \$2.5 million in rent revenue per year. Much of the rent is received in cash. The business was run simply. Historically, it had low debt and stuck to its core rental operations.
- [6] David Debono and Elizabeth Muscat worked for their parents in the family business for just about their entire adult lives. Elizabeth Muscat was the bookkeeper. David Debono managed the properties.

- [7] Joseph and George Debono have successful careers independent of the family business. Joseph Debono is a real estate developer. George Debono is partner practising real estate law at a major Canadian firm.
- [8] There are two other siblings (one on each side) who do not figure heavily in the current issues.
- [9] I do not begin to try to understand the underlying disputes between the group of children who worked for their parents (David Debono and Elizabeth Muscat) and the other group who were able to undertake independent businesses (Joseph and George Debono). Suffice it to say that there are decades of discontent among the siblings that have been playing out throughout.
- [10] Starting in 2018, both groups saw fit to have their mother undertake transactions to benefit themselves when the mother was likely incapacitated.
- [11] George and Joseph Debono content themselves by claiming that their mortgage transaction in 2018 was protective and did not cost the mother any money. They encumbered her assets, they say, to protect the assets from the other siblings engaging in transactions like those under review in this litigation. But the 2018 mortgage let David Debono and Elizabeth Muscat convince their mother to distrust George and Joseph Debono and to exclude them from her decision-making. This left the mother open to a subsequent orgy of borrowing and self-dealing by David Debono and Elizabeth Muscat.
- [12] The mother's s. 3 counsel both raised concerns expressly about transactions being conducted due to the undue influence imposed on the mother by David Debono and Elizabeth Muscat. Medical evidence suggests that David Debono and Elizabeth Muscat systematically poisoned their mother to turn against George and Joseph Debono. Carmen Debono may have developed a psychotic overreaction against them. But, their exclusion stemmed from their own acts in relation to the inter-sibling issues that have plagued this family.
- [13] I am sure a trial judge will hear more about why George and Joseph Debono thought it was a good idea to have their mother encumber her assets to try to keep them away from the others. The decades of distrust behind that is not something I need to consider now. This is just the

starting point of the narrative that I need to consider for the purposes of these motions.

## **The Lawsuits**

- [14] Once they were excluded by their mother, George and Joseph Debono started a capacity proceeding to try to have guardians appointed for her. That is how section 3 counsel was appointed for the mother
- [15] The mother passed away in March, 2022. That ended the capacity proceeding.
- [16] George and Joseph Debono are the estate trustees under their mother's will. They appointed themselves directors of her corporations.
- [17] Shortly after their mother passed away, the estate orchestrated the firing of the employee children from the family business that was their livelihood. The estate claims it had cause for the dismissal of David Debono. The estate also claims that it gave Elizabeth Muscat a year's working notice after which she summarily left. The net result is the same. George and Joseph Debono have left their siblings without ongoing income to carry the expensive lifestyles that they lived and with which they supported their families before their mother passed away.
- [18] David Debono and Elizabeth Muscat sue for wrongful dismissal. They seek two year's notice pay. They have also sued for oppression although they now try to correct this tactical misstep as discussed below.
- [19] The estate claims that David Debono and Elizabeth Muscat owe substantial debts to it. At least the quantum of the debts are contested if not their existence. The estate also claims that David Debono, Elizabeth Muscat, and Jennifer Nesci violated their duties to their mother and her companies by having the business borrow heavily while she was incapacitated and then refusing to account for the borrowed funds.
- [20] In the capacity proceeding, before their mother passed away, David Debono and Elizabeth Muscat successfully frustrated efforts by George and Joseph Debono (and the court) to have David Debono and Elizabeth Muscat disclose the whereabouts of the mother's funds.

- [21] But, once the mother died, Dietrich J. ended those efforts and directed documentary disclosure to be sought in the ordinary course in whatever actions the parties chose to bring. The estate's action followed and is before me now with the wrongful dismissal action.

### **These Motions**

- [22] Both sides have brought motions. David Debono and Elizabeth Muscat seek interim distributions from the estate to pay their legal fees and to mimic their salaries. The estate seeks production of documents and a declaration that the oppression remedy commenced by David Debono and Elizabeth Muscat has triggered the *in terrorem* clause in the mother's will. The estate submits that either David Debono and Elizabeth Muscat are estopped from bringing the oppression proceeding or their doing so results in them being deemed to predecease their mother under the will. If that is the result, the inheritance of David Debono and Elizabeth Muscat will pass over to their children.

### **Overview of Conclusions**

- [23] My overall conclusions follow. I will provide more technical bases for my conclusions after that.
- [24] This is a perfect example of tactical litigation. The motions are about improving the parties' strategic positions in the litigation rather than about resolving the disputes on their merits.
- [25] David Debono and Elizabeth Muscat seek a war chest to fight the estate trustee brothers. For the reason that follow, I do not accept that they are entitled to advance payment of their claimed damages or interim payment of their legal fees in their wrongful dismissal action. Moreover, they have *not yet* shown they are entitled to the interim distributions or interim payment of their legal fees in the estate's action against them.
- [26] David Debono and Elizabeth Muscat are also seeking to avoid accountability for the transactions they had their mother undertake before she passed away. Delaying and frustrating the court's process can appear to work for a while. But against well-funded and motivated litigants, it is an expensive and self-defeating strategy. As will be seen tangibly below, efforts to hide documents, funds, and transactions are obvious and often strike at a party's credibility as a witness. Untruths or

evasion on procedural issues can then be used at the trial and lead to a loss of credibility on the real issues of substance.

- [27] David Debono and Elizabeth Muscat are not the only ones trying to use litigation tactics to skew the proceeding however.
- [28] The estate trustees, for their part, seek to hold the sword of Damocles over their siblings for the misstep of the oppression remedy. They continue their push for transparent production to which they are entitled – but not quite yet. Moreover, they have taken aggressive positions to hurt their siblings financially.
- [29] I am not saying that the estate does not have valid defences in the wrongful dismissal action. That will be for the trial judge. But, once again, nothing required George and Joseph Debono to impose and maintain the severe financial consequences on David Debono and Elizabeth Muscat and their families – particularly in light of dissimilar treatment provided to their sister Marilyn
- [30] In all, no one will obtain any relief on these motions and no one will be entitled to costs of these tactical manoeuvres. Costs will be in the cause. Instead of spending years and hundreds of thousands of dollars trying to improve their litigation positioning, they need to just get on with it.
- [31] For their part, David Debono and Elizabeth Muscat need to come clean and produce everything they have to allow the estate to create proper financial statements and tax returns. That means disclosing the truth about the transactions they caused their mother and her companies to conduct. If those transactions turn out to have been wrongful, they may have to pay a price in terms of a reduced share of the estate to them or to their children.
- [32] But make no mistake: transparency is required and will be achieved. The only issues are how deeply the costs of the production process will dig into the parties' inheritance, how long it will take to get the cases settled so that the family can start to enjoy the funds their late parents would have liked them to receive, and how painful it will be for everyone
- [33] The *Rules of Civil Procedure* provide mechanisms to compel the enforcement of disclosure obligations and court orders including costs awards, the striking of pleadings (i.e., ending a party's lawsuit or ending the party's right to defend himself or herself) and, in extreme cases, a

quasi-criminal charge of contempt of court. The *Rules* and court orders will be enforced.

- [34] As discussed by Dietrich J., disclosure is obtained in civil actions (lawsuits like these) by documentary discovery. This is different than the capacity application with its voluminous affidavits and cross-examinations. In these actions, documentary discovery will start soon and will be transparent.
- [35] The parties are now engaged in discussions about Elizabeth Muscat providing greater disclosure and cooperation with the estate's accountants. This is a positive step. Both sides agree that once there is transparency as to the financial affairs of the estate, discussions about resolving the merits can then begin. In my view, the state of discussions is not relevant to the issues before me on these motions. But the parties should be strongly encouraged to proceed with them to get to an endgame sooner rather than later.

### **Enforcing the *in terrorem* clause is premature**

- [36] It is too early to decide if the *in terrorem* clause is valid and enforceable. I disagree with Mr. Hull's submission that this is an application for advice and directions under s. 60 of the *Trustee Act* in which I can make final findings on the interpretation of the will. It is a motion in a larger action in which the entire family history is relevant (at least from 2018 if not before). There is no way for me to assess the equities or to understand the place of the *in terrorem* clause and the Child's Consent in light of the entirety of the facts and issues.
- [37] In their oppression remedy, David Debono and Elizabeth Muscat claimed that they own shares of their mother's corporations. Those shares are currently owned by the estate. One of the companies is a bare trustee holding land for the estate. Owning shares of a bare trustee has no economic value. But the other corporation owns some of the real estate. If David Debono and Elizabeth Muscat own some of the shares of this corporation, they might be able to affect the management of its affairs and perhaps also take a share of the proceeds of sale of the corporation's land.
- [38] In addition, the oppression remedy challenges certain adjustments or reductions from the inheritances of David Debono and Elizabeth Muscat

required by the mother in her will. The amounts of the adjustments seem to relate to the amount of indebtedness owed by David Debono and Elizabeth Muscat at the time of the drafting of the will a decade ago.

- [39] David Debono and Elizabeth Muscat seek to reduce the adjustments as oppressive because they still owe the same debts. They claim the will double counts the debts and they will have to pay twice. But as the will is worded, the adjustments are fixed amounts that do not change in the future. Nor are they tied to the state of the indebtedness expressly then or in future.

- [40] The *in terrorem* clause in the will and the Child's Consents signed by each beneficiary preclude each beneficiary from challenging the will or any part of it so as to change the scheme of distribution. The estate submits that Child's Consent precludes the oppression claims by estoppel. Alternatively, it submits that if the claims remain, then the effort to change the scheme of distribution by claiming to own shares of the estate's corporations and changing the adjustments to the distributions to David Debono and Elizabeth Muscat trigger the *in terrorem* clause. The estate asks me to conclude that David Debono and Elizabeth Muscat are deemed under the will to have predeceased their mother so that their respective inheritances are gifted over to their children.
- [41] During the hearing of the motion, Mr. Carey conceded that David Debono and Elizabeth Muscat no longer seek any shares of the estate's two corporations. In addition, they no longer challenge the adjustments mandated by the will. Instead, they will argue later, when the amount of their indebtedness to the estate is being calculated, that any debt they owe to the estate should be decreased by the amounts of the adjustments. The will is silent on how to calculate the debts of David Debono and Elizabeth Muscat at any given time. Arguably that is simply an accounting issue at common law.
- [42] These concessions need to be reflected in amended pleadings. Mr. Carey confirmed that the prayers for relief and allegations in the body of the statement of claim concerning shares and beneficial title to corporations will be removed as will challenges to the adjustment clause in the will. Doing so will vitiate the existing oppression remedy claim. There will be nothing left of substance in the statement of claim to support a remaining oppression remedy claim unless other amendments are made.
- [43] The concessions made by Mr. Carey were clear and were made in order to be relied upon by the court as part of the consideration of the arguments concerning the *in terrorem* clause and the Child's Consents. The concessions are binding on David Debono, Elizabeth Muscat, and Jennifer Nesci. I was inclined to dismiss the oppression claim on hearing Mr. Carey's concessions. It is apparent that the claims made in the oppression remedy were a misstep as mentioned above. I do not know whether this was a simple slip or perhaps, in light of the tactical nature

of the parties' positions in this litigation, the risk of disinheritance might have been deliberately undertaken for other strategic reasons. It seems to me that as I am not deciding the *in terrorem* clause issue today I should leave this to play out

- [44] In any event, it is not clear to me that the relief initially claimed in the oppression remedy necessarily violates the technical wording of either the *in terrorem* clause or the Child's Consent. I understand that the initial relief claimed sought to alter the distributions from that set out in the will. But, if, for example, these types of documents are to be strictly construed, there is a question as to whether the share ownership sought actually challenged the will or a part of it. That may depend on whether the mother's or the estate's ownership of all shares of the two corporations is seen as a part of the will. Similarly, was the claim involving adjustments an attack on part of the will or just a question of interpreting the will's true meaning?
- [45] Trying to decide this one set of issues today could very easily lead to duplication at trial and possibly inconsistent verdicts. Hypothetically, were I to find that the bringing of the oppression proceeding violated the *in terrorem* clause, that might disinherit David Debono and Elizabeth Muscat in favour of their children. But the judge at trial could still find oppression. The remedy could include, perhaps, an order that the *in terrorem* clause not be invoked. I understand that the oppression remedy relates principally to the affairs of the corporations rather than the estate of the mother. Whether the trial judge finds them hopelessly intertwined or readily severable will be for him or her.
- [46] Or, even without finding oppression, the judge hearing the trial might find the bringing of the oppression proceeding was a misstep that caused no prejudice before the requested relief was withdrawn. The judge may find a form of relief from forfeiture or equitable consideration ought to be available. Apart perhaps from some costs, it is hard to see the harm caused by a misstep from which David Debono and Elizabeth Muscat now seek to resile. Might a court find that the estate trustees are inequitably trying to glom onto the oppression remedy pleading to take advantage of a tactical mistake that had no substance?
- [47] I do not know if at trial I would let the chips fall where they may or whether I might be inclined to relieve parties of the effects of a misstep. But I do not see how it is efficient or appropriate for me to try to

determine these issues now. Barring the claim or enforcing the *in terrorem* clause are final orders. No trial time or costs are saved by trying to decide this now (as required, for example if this is a motion under Rule 21.01 (a)). Certainly, this is not a discrete issue for which partial summary judgment could be available. Considering the litigation as a whole, I do not see how I can make any final finding now on the *in terrorem* clause or the effect, if any, of the Child's Consent.

## Disclosure

- [48] There are two actions in which specific relief is claimed. I have already said that the administration of this estate requires full transparency. That remains true. But this motion is not in an application about how the estate is to be administered. If I am to consider production issues, it will be in conjunction with documentary discovery or as a term of an order under Rule 1.05 of the *Rules of Civil Procedure*.
- [49] In its action, the estate claims that the defendants David Debono, Elizabeth Muscat, and Jennifer Nesci owe it money and that they committed wrongdoing for which they ought to be held liable. In addition, in defending the wrongful dismissal (and oppression) claims, the estate raises the same issues of wrongdoing at least in asserting cause against David Debono if not to the same degree in responding to Elizabeth Muscat's claim of constructive dismissal.
- [50] The net result is that the same documents sought in this motion are properly the subject of documentary discovery. Mr. Carey concedes that his clients have obligations to disclose relevant documents in their possession, power, or control as part of documentary discovery. He also accepts that early delivery of affidavits of documents is a valid consideration in this case.
- [51] But David Debono and Elizabeth Muscat submit that they do not have many of the documents sought by the estate and that the estate has not made diligent efforts to obtain material available to it from others. Dealing with disclosure as a matter of discovery removes the second issue altogether. Parties are required to disclose their documents regardless of whether the other party has them already or can try to get the same material from others. There are valid reasons for this that I do not need to explore in these reasons.

- [52] In order to avoid the continued need for motion after motion, I required counsel to take me through their clients' evidence and submissions with particularity on the 25 categories of documents sought by the estate.
- [53] Generally speaking, I do not accept that David Debono and Elizabeth Muscat have made full and frank disclosure as to the whereabouts of the \$7 million (roughly) borrowed by their mother and her companies under their direction. Millions are unaccounted for. David Debono admitted that he had one \$500,000 loan in the fall and then, suddenly, another \$500,000 loan appeared in his material last month. In neither case does he disclose back-up to show where the cash is or how it was consumed. The purported accounting in the statement of defence is not credible nor complete. The estate's accounting expert exposes numerous concerns and gaps.
- [54] There are no entries in the accounting system for the business for 2022 when Elizabeth Muscat was bookkeeper both in the months before and after her mother passed away and up to the time Elizabeth left the business. The estate's accountants will not sign the estate's financial statements due to a lack of back-up in the records on hand.
- [55] In his July, 2024 affidavit, David Debono explained some of the decline in the business's fortunes with reference to a decline in revenue brought about by the pandemic. That evidence is not supported by the actual financial results for the relevant dates. Under cross-examination, David Debono says that despite his sworn affidavit testimony, he does not know the numbers and does not know to what extent the pandemic impacted the business.
- [56] When asked about the same topic, Elizabeth Muscat's evidence was so evasive as to leave no doubt that she could not support the pandemic excuse as a basis for a decline in her mother's funds.
- [57] In response to a court ordered disclosure about a property, David Debono and Elizabeth Muscat delivered a partial accounting that noted a "projected loss" of exactly \$261,462.10 for 19 properties in the aggregate for fiscal 2021. That is quite a precise number. David Debono and Elizabeth Muscat were represented by prior counsel at the time they delivered this accounting in response to the court's order. Under cross-

examination, David Debono could not begin to support the number. He said it was an approximation and he had no idea how it was calculated. He said he has no notes. He does not know if the number came from records of the business

- [58] None of that evidence is credible. The number was either made up or it was calculated to the penny from some inputs that were available to David Debono, Elizabeth Muscat, and their lawyer from some records. Someone calculated it and someone told the prior lawyer that it was a proper, truthful, and diligent response to the court's order.
- [59] A loan forgiveness in favour of David Debono of \$736,000 remains unexplained. There is a later entry that may or may not reverse the outcome. But it too is unexplained.
- [60] In his initial evidence, David Debono claimed that a company owned by him rented a storage unit in Florida but that he ran the expense through one of the mother's companies so it could deduct the expense for tax purposes. The estate trustees call out "tax evasion" and essentially brand David Debono as a criminal. It may well be that the accounting was improper. It may require the estate to have to re-file prior taxes. The estate trustees fear that when CRA hears about it, they may trigger a much broader audit of years past. All of that may be correct. But I am not especially fazed by improper tax reporting by a small family company. Of course, I do not condone it. It tells me something about the nature of the management reporting systems of the business before the mother's death.
- [61] Much worse however, is that in a later, more recent affidavit, David Debono has changed his story about who owns the company that rented the Florida property. These examples support a submission that David Debono is willing to say things under oath that may or may not be true and then change his testimony when called out.
- [62] Recently, as mentioned above, David Debono disclosed that he owes a new loan of \$500,160 to the estate. That number does not come from any record produced to date. How was it calculated? Under cross-examination David Debono did not know and said that he does not do paperwork. Why wasn't the loan disclosed when Gilmore J. required all

parties to disclose their indebtedness to their mother? Mr. Hull submits that it is apparent that David Debono hid a non-arm's length borrowing while in the midst of the capacity proceeding to avoid the devastating effect of such misconduct.

- [63] There is another loan disclosed in 2024 claimed by David Debono and Elizabeth Muscat from a Mr. Lifshin. It is not to be found in the books and records of the business.
- [64] In correspondence from prior counsel, David Debono admitted to owing the estate \$1.1 million in total. In his recent affidavits that number is \$2.4 million and now that number appears to be another \$500,000 higher at least.
- [65] The estate's accountants also found that entries in the business software were erased and replaced before the mother died. They cannot tell who did it. But they say they cannot determine the state of individual loans, drawings, gifts etc. from the altered business records.
- [66] There is no accounting for pre-death cash rents. There was almost no money in the bank accounts at the time of the mother's death.
- [67] David Debono and Elizabeth Muscat have sworn that they have not taken or kept any documents belonging to the business. That evidence too does not survive scrutiny. They have produced loan ledgers, leases, and other documents when helpful to them. As noted above, they have made and produced as truthful complex calculations to the penny. Most significant, Elizabeth Muscat has not given the estate trustees access to her business email. Only she has access (power if not possession) to the entirety of the business's emails up to and even after she left.
- [68] Elizabeth Muscat also explains some of her ability to produce business records because, she says, they are not records of the business. Rather, she says, they are copies of records and that is different. Apart from being legally wrong, (see Rule 30.02 (b)) it shows the extent to which she is willing to strain credulity to avoid transparent disclosure.
- [69] Not to be outdone, David Debono says that the copies of business records in their possession are not business records but are from their personal files and belong to them. I invite Mr. Carey to give advice to his clients on the requirement for former employees to return records to the employer and the rules regarding documentary disclosure in any event.

- [70] In short, I do not accept that David Debono or Elizabeth Muscat have made disclosure of all relevant documents in their possession, power, and control as they claim.
- [71] The 25 remaining classes of documents sought by the estate are relevant to the issues in this proceeding. Accordingly, they are within the scope of documents to be listed in the parties' affidavits of documents.
- [72] I direct, as a term or condition of the dismissal of the estate's motion for production:
- a. Elizabeth Muscat, David Debono, and Jennifer Nesci shall immediately provide the estate with all access credentials and passwords to the email account elizabethdebonojcd@gmail.com and all other emails accounts any of them used for their mother's business. I prohibit Elizabeth Muscat, David Debono, Jennifer Nesci, anyone acting on their joint or several instructions, on their joint or several behalf, or with knowledge of this order, from making any alteration or deleting any emails from any of these accounts. The sole exception to this injunctive prohibition is that emails directly "to" and "from" Mr. Freedman or Mr. Carey (or anyone in their respective offices) may be moved to a separate database where they shall be maintained for listing and privilege review if necessary.
  - b. All parties' affidavits of documents in both actions shall be sworn and delivered with copies of all documents listed in Schedule "A" by no later than May 31, 2025; and
  - c. David Debono and Elizabeth Muscat shall also each deliver by May 31, 2025, a sworn affidavit providing the particulars of their answers to questions 2 through 26 of the amended list of questions provided by the estate for the motion. If any question is to be answered by reference to disclosure already made or answers already given, the prior answer shall either be repeated or specific reference shall be made to the location of the answer so that anyone reading the affidavit will know precisely where to look to find the answer. Each affidavit shall conclude with the following sentences:

I understand that this affidavit is subject to the rules applicable to affidavits of documents. I swear that I have no additional information and no other documents in my possession, power, or control relevant to any of the topics answered above. I also understand that I will not be able to use any information that is responsive to the issues above except as disclosed in this affidavit except with leave of the court.

### **No Interim Distribution or Interim Costs**

- [73] David Debono seeks interim payment of approximately \$600,000 plus \$19,500 per month going forward to replicate salary he would have earned had he not been fired from the business. Elizabeth Muscat seeks approximately \$330,000 plus \$11,097 per month going forward as if she had remained employed
- [74] In addition, they seek interim payment of their legal fees from the date of death of their mother of approximately \$480,000 plus another \$100,000 approximately to account for activity leading to the hearing of these motions.
- [75] I do not see a basis for an advance payment of damages claimed or interim payment of costs in a wrongful dismissal action. Mr. Carey conceded this point generally. There is no special public interest raised in mundane wrongful dismissal proceedings. Neither, in my view, is there any access to justice issue associated with these types of proceedings generally.
- [76] There is no substance left to the oppression remedy currently. Particularly after the withdrawal of the relief previously claimed, there is no *prima facie* case of any oppressive conduct connected to the management of the affairs of the two corporations owned by the estate. Accordingly, there is no basis for an award of interim costs under the *OBCA*.
- [77] There can be cases where estates pre-pay costs or make interim distributions to beneficiaries. I do not understand a request for, in effect, salary as an interim distribution when David Debono and Elizabeth Muscat do not work for the business, and their wrongful dismissal

actions are ongoing and defended. Moreover, the timing of distributions to beneficiaries generally is at the discretion of the estate trustees. I see no basis on which I can or would consider questioning the discretion of the estate trustees as to the current management of the estate. They have been very transparent in their steps to get the estate's financial affairs in order, to try to understand and pay necessary taxes, and to take steps to ready properties for sale or development as appropriate. David Debono and Elizabeth Muscat objected to an early one-time portfolio sale of the entirety of the estate's assets. That means the assets need to be dealt with on an individualized basis. David Debono and Elizabeth Muscat have been conspicuously silent in response to the voluminous disclosure by the estate trustees of their ongoing steps in the management of the estate.

- [78] It is interesting that Mr. Carey relies on *Mayer v. Rubin*, 2017 ONSC 3498 to discuss the desirability of keeping a level playing field in an estate beset by beneficiary strife. In that case, I replaced the estate trustees with an Estate Trustee During Litigation specifically to protect the assets of the estate from misconduct by conflicted estate trustees. Yet that relief is not sought here. The expertise of the estate trustees is not in doubt. Neither is the diligence and transparency of the steps they have taken to manage the estate's assets.
- [79] Even thinking about replacing George and Joseph Debono as estate trustees would be self-defeating. An ETDL is not going to be able to settle litigation. Practically, if not legally speaking, settlement will require the agreement of the two sets of beneficiaries. An ETDL would just replace expert, cost-effective management of assets by people with a common interest in maximizing value, with a disinterested, expensive professional who may or may not bring the same expertise as the combination of Joseph and George Debono.
- [80] So, unlike *Mayer v Rubin*, this case is not about leveling the playing field as George and Joseph Debono's control of the estate is not unlevelling it. They will always be personally in control of their side of the settlement equation. The estate is paying its own legal fees. But both actions are really estate actions. The wrongful dismissal action names George and Joseph Debono in their personal capacities. Even if that is a valid pleading, there is nothing for them to do (or to personally spend legal fees doing) but to watch the estate defend as the employer.

- [81] So this motion is really just about whether David Debono, Elizabeth Muscat (and Jennifer Nesci) are entitled to interim and ongoing payment of their legal fees in response to the estate's claims against them.
- [82] Elizabeth Muscat says that she is willing to guarantee that in the event that David Debono has liability to the estate that is greater than his inheritance, she will repay from her undoubted inheritance any costs wrongly advanced to David Debono under the order that they seek. But with the *in terrorim* clause being advanced to strip both David Debono and Elizabeth Muscat of their inheritance under the will, the ability of either of them to repay costs from their inheritance is in question.
- [83] The parties agree on the test for payment of interim costs was set out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 (CanLII) as follows:
- a. They party must be impecunious to the extent that they would be deprived of the ability to proceed with the case unless interim costs are ordered;
  - b. The party must have a case that appears meritorious on a *prima facie* basis; and
  - c. There must be special circumstances that transcend the individual interests of the particular litigants and are of public importance.
- [84] Currently David Debono and Elizabeth Muscat fail all three elements of the test.
- [85] As to impecuniosity, there is a vital difference between being cash-constrained and impecunious. Even if David Debono and Elizabeth Muscat are living hand to mouth off credit card debt, that is only the first part of the analysis.
- [86] Elizabeth Muscat has at least \$2 million in equity value in her house in North York. She says that she and her husband cannot carry any more debt. She does not want to sell her house because she asks where she is supposed to live with her three children.
- [87] A finding of impecuniosity is not just about cash in the bank. It includes the ability of a party to raise funds as needed. A person with the ability

to access capital of \$2 million is not impecunious on any definition. I do not question Ms. Muscat's entitlement to set her own investment priorities. She is entitled to decline to sell her house to fund a lawsuit. But that is a different thing than being impecunious.

- [88] David Debono's position is different. He too says he cannot afford to pay costs. He is living in a house in King City. He pays rent of \$8,500 per month. That is \$102,000 after tax per annum. Even if he can no longer afford to pay this rent, where did last year's rent come from? Where are the millions he admits he borrowed or received from his mother's business over the past few years?
- [89] David Debono apparently sold one of his many antique vehicles for over \$180,000 last fall. He then claims that his other seven or eight are worth only \$70,000 altogether.
- [90] David Debono's spouse gives evidence that they are living a very illiquid existence at the moment. Bizarrely, she refused to provide or even to confirm the address at which the family lives in King City however.
- [91] David's evidence concerning his assets is incapable of belief given his positive efforts to avoid disclosing the whereabouts of his mother's funds despite multiple court orders. There is no order currently demanding more from him. I am not denying him relief for being in breach of an order. But I do not believe his evidence that he has no other sources of funds. He does not come to this court with clean hands.
- [92] The outcome could be different had he made transparent disclosure so that all could see the missing funds and that he still has no assets left. Perhaps he can show that he used money obtained from his mother or the business to repay third party debt. He might well be liable for such drawings. But at least it would establish that he has no assets left.

- [93] As Justice Brandeis famously said, “sunlight disinfects.”<sup>1</sup> Put differently, as Jerry Maguire said, “[s]how me the money.”<sup>2</sup> Until David Debono makes a clean breast of his dealings with his mother and her business to account credibly for as much as \$3 million that is currently known to have gone to him over the brief period before his mother passed away, I cannot find that his pleas of impecuniosity are credible or sufficient to base an extraordinary order for interim costs or an interim distribution.
- [94] I note that this may change in the next few months. Perhaps David Debono and Elizabeth Muscat will find the wherewithal to locate the information needed to complete the estate’s accounting exercise and finalize the status of their personal accounts with the estate. At the same time, David Debono may be able to show more credibly the movement of funds through him to establish that he is impecunious if that is indeed so.
- [95] As to the strength of the case, currently there is *prima facie* evidence, including evidence expected to be given by the mother’s former s. 3 counsel and doctors, that undue influence was exerted on the vulnerable mother to enter into extraordinary transactions by David Debono and Elizabeth Muscat at least and there has been insufficient accounting for the proceeds of those transactions. David Debono and Elizabeth Muscat have slowly provided partial information involving admissions of some indebtedness. They have tried to argue that the impugned transactions had good business bases in the ordinary course. But the bases and accounting are unknown. I am as yet unable to understand the business or legal basis for money to be borrowed for an allegedly incapacitated mother essentially to be on-loaned or gifted to those who owed her fiduciary duties. The equity of the business appears to have been stripped. I do not know why or where it is. I do not see that as a *prima facie* defence to the estate’s allegations yet. It is *prima facie* liability that

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<sup>1</sup> “If the broad light of day could be let in upon men’s actions, it would purify them as the sun disinfects.” *Brandeis and the History of Transparency*, online: Sunlight Foundation <https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency>

<sup>2</sup> Jerry Maguire, Directed by Cameron Crowe, 1996, Sony Studios

may come with a costs liability rather than a defence likely to include a costs indemnity and supporting a prepayment of those costs.

- [96] The wrongful dismissal action does make out *prima facie* cases. But as noted at the outset, nothing in that action meets the public interest requirement for an order for interim costs.
- [97] I might be more inclined to consider an order for interim costs in favour of proven impecunious beneficiaries, with seemingly arguable defences, if needed to protect them from a litigation onslaught by a well-funded

estate being directed by adverse beneficiaries (who deny the others severance pay after a lifetime of work so as to keep them from affording to answer the case). Whether that might meet the public interest standard is a question that simply does not yet arise on the facts before me.

**Outcome**

- [98] Both motions are dismissed on the terms and conditions set out in para. 72 above.
- [99] Costs are in the cause.

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FL Myers J

**Date:** January 22, 2025