

CITATION: 2667010 Ontario Limited v. Sadozai Investment Group
COURT FILE NO.: CV-19-00633109
DATE: 20210111

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

2667010 Ontario Limited

Applicant

– and –

Sadozai Investment Group, Kabir Sadozai
and KaZhen Corporation

Respondents

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) *C. Steinburg*, for the Applicant
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) *N. Condotta* and *D. Singer*, for the
) Respondents
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) **HEARD: November 24, 2020, by**
) **videoconference**

CHALMERS, J.

ENDORSEMENT

OVERVIEW

[1] 2667010 Ontario Limited (“266”) brings this Application for the winding up of the KaZhen Corporation (“KaZhen”). The Respondents also seek a winding-up order. Although the parties agree that the corporation should be wound up, they disagree on how the existing assets of KaZhen, as well as its pending transactions, are to be divided between them.

[2] For the reasons set out below I order the liquidation and winding up of KaZhen on the basis of an equal division of its revenue and assets.

BACKGROUND FACTS

Incorporation of KaZhen

[3] Zhen Liang (“Liang”) and Kabir Sadozai (“Sadozai”) are licenced real estate agents. In November 2018, they formed KaZhen, which is the corporate vehicle that operates the real estate brokerage RE/Max Excel First Class. The only shareholders of KaZhen are 266 and Sadozai Investment Group (“SIG”). 266 was incorporated by Liang and SIG was incorporated by Sadozai.

[4] Liang deposes that he and Sadozai agreed to operate KaZhen as follows:

- a) Sadozai would act as broker of record so that KaZhen would realize certain tax benefits. At the time of KaZhen’s incorporation, Liang did not have his broker licence;
- b) Sadozai and Liang would both work as real estate agents for the benefit of KaZhen. Sadozai represented that he earned greater gross commissions than Liang and handled more transactions. It was agreed that Sadozai would generate the majority of the cash flow by way of commission earnings and Liang would build out the brokerage and generate profits in the office, for example, by creating marketing and advertising content;
- c) Commissions earned on real estate deals would be paid to KaZhen’s joint accounts; and
- d) Sadozai would advance capital of \$30,000, which would be treated as a loan.

[5] Sadozai denies making any representation as to gross commissions earned.

[6] The business was operated informally. Some aspects of the business arrangement were put into writing, while others were not. Liang, in his affidavit sworn January 10, 2020, deposes that on November 11, 2018, Sadozai and Liang entered into a unanimous shareholders agreement (“USA”), which was not signed. The draft USA, at paragraph 5, provides that there are 100 common shares of the corporation to be issued equally to 266 and SIG. On November 21, 2018, the parties executed various by-laws and corporate resolutions relating to the operation of KaZhen. The by-laws provide that 50 shares will be issued to each of 266 and SIG.

[7] Sadozai, in his affidavit, states that Liang prepared a document that sets out the roles of Sadozai and Liang (“Roles Document”). The Roles Document is undated and unsigned. It provides that everything would be “split down the middle, 50/50”. The document also refers to equity being 50/50 and states that each of Sadozai and Liang would receive 50 percent of the profit on the sale of the company.

[8] Sadozai states that it was agreed that he would be the broker of record for the brokerage. He also agreed to list the properties for sale under Liang’s name and only seldom added his own. Sadozai believed the name on the listing was irrelevant since it was agreed that the profits of the brokerage would be split 50/50.

[9] Sadozai advanced an initial loan of \$20,000 to KaZhen as start-up capital. After this, Liang asked for a further loan of \$10,000 for additional marketing expenses. Sadozai advanced the second loan. KaZhen opened four accounts with TD Canada Trust. Two of the accounts are for HST and general expenses, and Sadozai and Liang are both signing officers. The other two accounts are trust accounts. Sadozai is the sole signing officer of the trust accounts because he was the broker of record for KaZhen.

Deterioration of the Relationship

[10] Over the course of several months in 2019, the relationship between Liang and Sadozai deteriorated. Both parties claim that the other was not upholding their side of the bargain. Liang claims that Sadozai had represented that he transacted more deals per year than Liang and as a result he would generate the majority of the cash flow through commissions. Liang takes the position that Sadozai failed to perform as he had indicated. Sadozai claims that Liang was responsible for the marketing of the brokerage. Sadozai takes the position that instead of working for KaZhen, Liang spent his time promoting for another one of his companies, Prime Properties TO.

[11] Liang claims that he generated 90 percent of the business of the brokerage. This is based on the fact that he is the listing agent for most of the transactions. Sadozai states that Liang was the listing agent because they did not want to convey to potential agents/employees that they would be in competition with the broker of record if they joined the brokerage. According to Sadozai, it is common for the broker of record to not also act as agent. Sadozai says he listed clients under Liang's name in reliance of their prior agreement.

[12] On August 19, 2019, Liang resigned as a realtor with the brokerage. He did not resign as director or officer of KaZhen. His company, 266 continued to be a 50 percent shareholder in KaZhen. In his resignation letter, Liang states that he enjoyed working with Sadozai, but has made plans to join the parent brokerage, RE/MAX Excel Realty, because he believes it is better suited to help him attain his long-range goals. The resignation letter does not refer to Sadozai not meeting his obligations or suggest that Liang was resigning because he was bringing in most of the business.

[13] After Liang's resignation, Sadozai continued to operate KaZhen. Sadozai takes the position that Liang failed to co-operate in the ongoing operation of the brokerage. According to Sadozai, it became impractical to continue operating KaZhen.

[14] On October 11, 2019, Liang and Sadozai met to discuss how the assets of the brokerage should be distributed. Liang prepared a spreadsheet that purported to indicate which party had incurred expenses or generated revenue. He had determined that the total revenue generated by him was \$122,999.79 and the total revenue generated by Sadozai was \$6,614.81. Liang proposed that Sadozai purchase his shares and continue the brokerage. The cost to Sadozai would have been \$112,802.15, which figure was calculated by deducting the expenses attributable to Liang, in the amount of \$10,197.64, from the total revenue attributable to Liang.

[15] Sadozai was not prepared to purchase Liang's shares. On October 15, 2019, Sadozai advised that if Liang was not prepared to reduce the amount he was seeking for his shares, he would retain legal counsel. Liang did not agree to reduce the cost of his shares. On October 19, 2019, counsel for Sadozai wrote to Liang and stated that Sadozai wished to dissolve KaZhen. The parties exchanged correspondence in an effort to resolve their differences but were unable to reach an agreement.

[16] On November 6, 2019, Sadozai advised Liang that he had decided to close the brokerage. It was Sadozai's intention to liquidate the assets of the brokerage, with 50 percent of all assets less expenses being transferred to Liang. Sadozai consulted with his lawyers and was advised that he could transfer 50 percent of the funds less expenses from the general account to his personal account. He subsequently withdrew \$41,394.18, which he states was 50 percent of the assets of the brokerage less expenses.

[17] When Liang learned of the withdrawal, he instructed TD to freeze all KaZhen accounts, including the two trust accounts. Sadozai argued that the trust accounts were improperly frozen because the funds were not owned by the brokerage, but instead were being held in trust for other parties; the trust accounts were unfrozen. On November 7, 2019, Sadozai withdrew \$3,697.26 from one of the KaZhen trust accounts. He withdrew a further \$2,597.87 from a trust account on November 12, 2019. Sadozai states that these amounts were properly used to pay commissions to third party agents.

[18] On December 11, 2019, counsel for Sadozai wrote to Liang and informed him that Sadozai had decided to close the brokerage by the end of the year. On December 17, 2019, Liang advised Sadozai through counsel of his intention to bring a motion for an injunction restraining the closure of the brokerage pending final determination of this Application. On December 20, 2019, the parties consented to the Order of Justice Dow, which provides that the assets of the brokerage remain frozen and the trust accounts be allowed to operate for the purposes of the brokerage. The Order also restrains the parties from terminating the brokerage until the Application is disposed of.

[19] Sadozai brought a motion in writing to vary the Order of Justice Dow to allow the Respondents to close the RE/Max Excel First Class brokerage and to hold all commission proceeds until the hearing of the Application. The Notice of Motion is dated August 7, 2020. No decision has been rendered by the court with respect to this motion. The Order of Justice Dow continues to be in effect.

Amounts in Dispute

[20] Commissions for completed deals were paid into the KaZhen general account. For the period of January 1, 2019 to August 5, 2020, a total of \$194,975.32 was paid into the general account. Liang says that, of this amount, \$165,775.90 was earned by him and \$29,199.42 was earned by Sadozai. There are seven pending transactions where the commission has not yet been paid. Liang takes the position that he is entitled to the commissions because of his relationship with the clients and the work he performed in each case.

[21] With respect to the pending transactions, Sadozai contacted the various parties, including the parent brokerage. The parent brokerage provided its consent to transfer the pending transactions to the parent brokerage. The commissions on the pending transactions will remain the same as if they were closed through KaZhen.

THE ISSUES

[22] The following issues will be addressed in this endorsement:

- a) Is there a legally enforceable contract that governs how the profits of the brokerage are to be split between the parties?
- b) Was the conduct of either party oppressive and is an oppression remedy or winding up order appropriate?

ANALYSIS

Is there a legally enforceable contract that governs how the profits of the brokerage are to be split between the parties?

[23] The parties agree that the draft USA was not signed. Liang argues that, as a result, there is no enforceable contract as between the parties. Sadozai argues that, although it was not signed, the draft USA serves as evidence of the intentions of the parties.

[24] Liang argues that the draft USA contains an enurement clause that provides for the Agreement to come into effect on the date of its execution (s. 46). The draft USA also includes an entire agreement clause, which provides that there are no conditions, warranties, representations or agreements, express or implied (s. 53). Liang argues that, as a result, the parties did not intend the draft USA to be binding.

[25] I am of the view that the enurement clause is evidence of an understanding or intention of the parties that their legal obligations are deferred until the draft USA has been approved and executed. As a result, the draft USA is a preliminary agreement as to the terms of the contract and is not enforceable: *Alkin Corporation v. 3D Imaging Partners Inc.*, 2020 ONCA 441, at para. 5. I conclude that the draft USA is not binding on the parties.

[26] Although the draft USA was not executed, the parties executed the by-laws and other corporate documents, which provide that KaZhen is owned equally by 266 and SIG. On November 21, 2018, share certificates were issued allocating 50 common shares to each of 266 and SIG.

[27] Sadozai argues that the Roles Document prepared by Liang is further evidence of an intention to split the assets of KaZhen equally. Although it is unsigned, the Roles Document sets out Liang's understanding that the parties would "split everything down the middle – 50/50". It also provides that the equity of the brokerage is split 50/50 and that, on the sale of the company, each of Liang and Sadozai would receive 50 percent of the profits.

[28] Sadozai also argues that the manner of the brokerage's operation is evidence of an intention to split the profits equally. Revenue was accumulated jointly and commissions were deposited into a general account; the brokerage did not maintain separate accounts or records for the commissions earned by each party. Clerical work required for the running of KaZhen's files was done by employees paid through KaZhen. Expenses were paid out of the general accounts and were not attributed to specific transactions.

[29] Liang does not dispute the intention at the outset of the enterprise to share profits equally. However, he argues that the profits of KaZhen should not be split on a 50/50 basis because Sadozai failed to generate the income he said he would. There is very little evidence with respect to any representation made by Sadozai. In his affidavit sworn on January 10, 2020, Liang deposes that Sadozai represented that he earned greater gross commissions than Liang on a yearly basis. As a result, it was agreed that he would generate the majority of the cash flow by way of commission earning and Liang would spend the majority of his time building out the brokerage to generate profits at the back end. Sadozai denies making any representations to Liang. There is no evidence as to Sadozai's actual commissions earned before the parties incorporated KaZhen.

[30] There is no evidence that the parties agreed that commissions would be paid based on the listing agent. In fact, the evidence is to the contrary. As stated by Liang, the commissions earned on real estate deals were paid to KaZhen's joint account. Liang also states that it was the intention of the parties that Liang would spend the majority of his time building out the office rather than generating commission income. As a result, there must have been an understanding that Liang would share in the revenue even if he was not the agent generating the revenue.

[31] Based on the evidence before me, I am of the view that the expectations of the parties were that the profits of the brokerage would be shared equally. Although the Roles Document was not signed, it is evidence that Liang expected the profits of the brokerage to be split on a 50/50 basis. Liang and Sadozai were each issued 50 percent of the shares of the brokerage. There was an agreement that commissions would be deposited in the general account and would not be attributed to particular transactions or to the listing agent.

Was the conduct of either party oppressive and is an oppression remedy or winding up order appropriate?

Winding Up is an Appropriate Remedy

[32] Both parties seek an order winding up KaZhen under ss. 207 and 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"). They do not agree on the terms of the winding up.

[33] Section 207(1) of the *OBCA* provides:

207 (1) A corporation may be wound up by order of the court,

- (a) where the court is satisfied that in respect to the corporations or any of its affiliates,

- (i) any act or omission of the corporation or any of its affiliates effects a result,
- (ii) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (iii) the powers of the directors of the corporation or any of its affiliates are or have been 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, or

(b) where the court is satisfied that,

...

- (iv) it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up; or

...

(2) Upon an application under this section, the court may make such order under this section or section 248 as it thinks fit.

[34] Under s. 207(1)(a), the court may make an order for a winding up if any act of the corporation or its affiliates is sufficiently oppressive or unfair to any shareholder, creditor, officer or director. Section 207(1)(b) provides that a winding up order may be made if it is just and equitable to do so.

[35] Section 248 of the *OBCA* provides:

248 (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.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

...

(l) an order winding up the corporation under section 207;

[36] Under s. 248 of the *OBCA*, a complainant may apply to court for an order if any act of the corporation or the directors is oppressive, unfairly prejudicial or unfairly disregards the interests of a stakeholder. The oppression remedy is an equitable remedy to ensure fairness and provides the court with broad jurisdiction to enforce fair conduct: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 58. Section 248 of the *OBCA* gives the court wide-ranging discretion to fashion a remedy to fit individual cases: *M. v. H.*, 1993 CarswellOnt 365 (Gen. Div.), at para. 31 (WL).

[37] Both parties argue that the conduct of the other was oppressive. Liang argues that Sadozai withdrew \$41,394,18 from the general bank account without authorization. Sadozai argues that Liang failed to devote all of his attention to the brokerage and instead promoted his personal company. He also argues that Liang resigned from the brokerage and did not assist with its ongoing operation.

[38] I am satisfied that there was oppressive conduct on the part of both parties and that an order for a winding up under ss. 207(1)(a) and 248 of the *OBCA* is an appropriate remedy.

[39] I am also of the view that the corporation is to be wound up pursuant to s. 207(1)(b) on the basis that it is just and equitable to do so. There is evidence that neither party has confidence in the other with respect to the conduct and management of the corporation. Both parties agree they will not be able to work co-operatively in the future and will be unable to reach decisions collectively on significant matters: *Animal House Investments Inc. v. Lisgar Development Ltd.*, [2007] O.J. No. 3879, at para. 59 (QL).

Terms of the Winding Up

[40] The parties agree that a winding up of the corporation is appropriate; however, they disagree on the terms of the winding up. Liang argues that it should be on the basis that each party retains the commissions for their own past and pending real estate deals. Sadozai argues that the winding up should be on an even split of the assets and liabilities.

[41] 266 and SIG are equal shareholders of KaZhen. Each received 50 percent of the shares. It is my view that the equal ownership results in a presumption that on a winding up the assets and liabilities of the corporation are to be split equally.

[42] Liang argues that an equal split of the assets is not fair or reasonable because Sadozai did not generate the revenue that he said he would generate. Liang states that he earned most of the commission income on the past and pending transactions of the brokerage and the split of the corporate assets should reflect the actual work done. He says that on an even split, Sadozai would receive a windfall for work he did not bring in. With respect to the seven pending deals

where the commission has not yet been paid, Liang provided evidence with respect to each property, his relationship to the client and the work he performed. He claims that there is no evidence that Sadozai contributed to any of the seven pending deals.

[43] Sadozai argues that it is most fair and equitable that the assets of KaZhen be split on an equal basis. Sadozai denies making any representations to Liang with respect to the work he could generate. He states that the parties agreed to equal ownership of the corporation and he conducted himself accordingly. Sadozai disagrees that Liang generated more business and generally worked harder for the brokerage. He also argues that Liang did not devote all of his energies to the brokerage and was focused on his personal company. After Liang resigned, Sadozai continued to work at the brokerage.

[44] Liang claims the commissions on real estate transactions for which he was the listing agent. Sadozai argues that the fact Liang was the listing agent does not necessarily reflect who was responsible for the client relationship. He says that some of the clients Liang claims as his own were referred to the brokerage and not to Liang personally. Sadozai also argues that he was required to make an infusion of capital in the amount of \$30,000.00, whereas Liang was unable to make a capital contribution to the corporation. The capital funds were used to market the business for the benefit of both parties. Sadozai states that many of the deals Liang claims, came from InfusionSoft (marketing software), Google and Facebook Marketing, all of which were paid for by the capital loan made by Sadozai.

[45] It is my view that it is not appropriate to divide the assets of the corporation based on who was the listing agent. The parties entered into the business on the basis of equal ownership. Each received the same number of shares. Commissions were paid to the general account and expenses were split equally. There is no evidence of any discussions between the parties to change their arrangement from an equal split to one which attributed income to the listing agent. I find that Sadozai reasonably relied on the fact that the parties were equal shareholders when he agreed to be the broker of record and have Liang as the listing agent.

[46] I find that Liang failed to rebut the presumption that on a winding up the assets would be split on the same basis as the ownership of the corporation. I conclude that the winding up of KaZhen on the basis of an equal split of the assets is just and equitable in the circumstances. All commissions for KaZhen, both past and pending, form part of the revenue of the corporation. The \$41,394.18 withdrawn from the general bank account by Sadozai on November 6, 2019 is to be taken into account when determining Sadozai's share of the assets.

[47] If the parties are unable to agree on the distribution of the assets of KaZhen based on an equal distribution, a motion for directions may be brought before me.

DISPOSITION

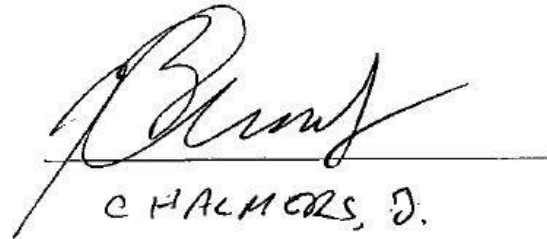
[48] For the reasons set out above, I make the following order:

- a) KaZhen is wound up on the basis of an equal distribution of assets;

- b) The real estate transactions for which KaZhen is the broker, but which have not yet closed, shall be transferred to the parent brokerage. The commissions on the pending transactions shall form part of the revenue of KaZhen;
- c) The \$41,394.18 withdrawn from the general bank account by Sadozai on November 6, 2019 shall be taken into account when determining Sadozai's share of the assets of KaZhen;
- d) After the payment of expenses and the disbursement of the assets of the corporation to the shareholders on an equal basis, KaZhen shall be liquidated and dissolved; and
- e) The Order of Justice Dow dated December 20, 2019 is vacated.

[49] The Respondents were successful on this Application and are presumptively entitled to their costs. If the parties are unable to agree, the Respondents may make written submissions of no more than three pages in length, excluding caselaw and bills of costs, within 20 days of the date of this endorsement. The Applicant may provide submissions in response on the same basis within 20 days of receiving the Respondents' cost submissions.

DATE: January 11, 2021



C HALMERS, J.