STATE OF MICHIGAN

COURT OF APPEALS

EVELYN KHALIL, individually and as trustee of the MONIER KHALIL LIVING TRUST, MELANIE KHALIL as trustee of the Monier Khalil Living Trust, MIKHAIL KHALIL, and TOMMY KHALIL,

Plaintiffs-Appellees/Cross-Appellants,

v

SAMIER KHALIL and KHALIL BROTHERS, INC.,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
April 6, 2001

No. 215267
Wayne Circuit Court
LC No. 95-521498-CZ

EVELYN KHALIL, individually and as trustee of the MONIER KHALIL LIVING TRUST, MELANIE KHALIL as trustee of the Monier Khalil Living Trust, MIKHAIL KHALIL, and TOMMY KHALIL,

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v

SAMIER KHALIL and KHALIL BROTHERS, INC.,

Defendants-Appellants/Cross-Appellees.

No. 215269
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Before: Whitbeck, P.J., and McDonald and Collins, JJ.

PER CURIAM.

Defendants bring this appeal as of right, arguing that the acts of Samier Khalil ("Samier") were not oppressive and that the trial court's remedy was improper. Plaintiffs cross appeal as of right, arguing that the trial court erred in finding valid the ten-share transfer that made Samier a majority shareholder. In these consolidated cases, plaintiffs brought claims alleging that defendants improperly asserted that Samier was the majority shareholder of Khalil Brothers, Inc. and that his acts oppressed the minority shareholder. Samier and his brother, Monier, originally owned equal, fifty-percent shares in the company, but Monier apparently transferred ten of his shares to Samier three days before Monier died. The trial court found that Samier validly obtained a majority of Khalil Brothers Inc.'s shares through the transfer but that he had oppressed plaintiff trust, the minority shareholder. The court ordered the ten shares returned to the trust to restore the historical fifty-fifty ownership, ordered plaintiff Evelyn to be reinstated as a director, and ordered $50,000 paid to Evelyn to remedy underpayments.

The validity of the ten-share transfer is critical to the resolution of this case. We review de novo equitable determinations of a trial court, while the court's factual findings are reviewed for clear error. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). A valid contract requires mutual assent on all essential terms. *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997). Where parties do not explicitly manifest their intent to contract by words, their intent may be gathered by implication from their conduct, language, and other circumstances attending the transaction. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). The trial court found, as a matter of fact, that the ten-share transfer was a piece of an incompletely negotiated, larger transaction. The court found that the contract the parties intended was never finalized on all essential terms. The court based this conclusion on three points: (1) the inherent implausibility of Monier's accepting $3,000 for control of the company, effectively disinheriting his family, (2) Samier's own deposition testimony that the transfer was temporary until a buyout could be arranged in the future, and (3) Swad's letter of April 14 indicating that the price did not reflect the value of the company and that a buy and sell arrangement of type would be considered in the future. These facts provide sufficient evidentiary support for this result, and we find no clear error in the trial court's reasoned determination that more was intended by the parties than a simple sale of ten shares for $3,000.

However, after establishing this fact, the trial court incorrectly severed that transaction from the whole and held it valid and complete on its own. The court's subsequent application of the doctrine of "assumption of the risk of impossibility" was incorrect under either circumstance, because either there was no contract or else the contract was completed. Although the trial court found the ten-share transfer to be "an agreement to agree," such a contract can fail for indefiniteness if the trier of fact finds that it does not include an essential term to be incorporated into the final contract. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982); *Scholnick's Importers-Clothiers, Inc, v Lent*, 130 Mich App 104, 109; 343 NW2d 249 (1983). Clearly the material terms of the later agreement were lacking in this case; the "two parts" identified by the trial court cannot be severed here because there is simply no known substance to the future agreement. *City of Lansing v Lansing Twp*, 356 Mich 641, 658; 97 NW2d 804 (1959).

Next, the trial court applied the "supervening impossibility" and "assumption of the risk" doctrines to the incompletely negotiated contract. Plaintiffs correctly point out that *Bissell v LW Edison Co*, 9 Mich App 276, 284; 156 NW2d 623 (1967), upon which the trial court relied in its discussion of "supervening impossibility," clearly applies that doctrine only to contracts *already in existence* when the condition imposing impossibility arises. Likewise, *Rogers Plaza, Inc v SS Kresge Co*, 32 Mich App 724, 743; 189 NW2d 346 (1971), makes it clear that "assumption of the risk" of impossibility applies where the parties contemplated the possibility of risk of non-performance at the *time the contract is made*. Thus if no contract has been agreed on by the parties, neither doctrine can apply. Once the trial court determined that the entire contract was not yet negotiated, it was precluded from applying these doctrines to the parts of the agreement that had been articulated by the parties.

Although the trial court erred in concluding that the ten-share transfer was valid, its ultimate remedy was to return the shares to plaintiffs, restoring the fifty-fifty balance of corporate ownership and directorship. We will not reverse when the trial court has achieved the right result, even if for the wrong reason. *DeHart v Joe Lunghamer Chevrolet, Inc*, 239 Mich App 181, 183; 607 NW2d 417 (1999). The remaining problem, as we discuss below, is with how the trial court attempted to restore the parties to their original positions. Upon remand the trial court should attempt to restore the parties to the financial and corporate status they would have had as if the alleged transfer had never taken place, being certain to identify the source of any payments to be made (e.g., distributions, loan account, gross profits) and to place its reasoning on the record.

Although this conclusion adequately disposes of the remaining issues in the case, we briefly address defendants' arguments that Samier's acts as majority shareholder were not oppressive and that the trial court erred in ordering the remedy described above.

The Michigan Business Corporation Act requires a director or officer to discharge his or her duties in good faith. MCL 450.1541a(1); MSA 21.200(541a). The trial court found Samier did not act in good faith, citing eight specific acts as "especially probative," but relied ultimately on the totality of the circumstances. The issue became one of witness credibility; this Court must give regard to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. *Hawkins v Smithson,* 181 Mich App 649, 651-652; 449 NW2d 676 (1989). When the entire record is reviewed, this Court is not left with the definite and firm conviction that a mistake has been committed. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). There was sufficient evidence in the record to support the trial court's conclusion of fact that Samier acted oppressively.

Likewise, defendants' argument that the trial court was not permitted under the statute to impose the remedy it ordered is without merit. The trial court's interpretation of the relevant statute is reviewed de novo. *Michigan Municipal Liability & Property Pool v Muskegon Co Bd Road Comm*, 235 Mich App 183, 189; 597 NW2d 187 (1999). That statute, § 489 of the Business Corporation Act provides:

> (1) A shareholder may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the

> corporation or to the shareholder. If the shareholder establishes grounds for relief, the *circuit court may make an order or grant relief as it considers appropriate,* including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.
>
> (f) Award of damages to the corporation or a shareholder. [MCL 450.1489; MSA 21.200(489) (emphasis added).]

The unambiguous language of the statute requires no construction by this Court; a trial court may fashion any relief it considers appropriate. *Stevens v Dep't of Social Services*, 226 Mich App 61, 66; 572 NW2d 41 (1997). The evidence here showed no other way, short of ordering dissolution, that fairness could be imposed on dealings between Samier and plaintiffs other than returning the fifty-fifty balance of share ownership and board membership. Samier's ability to oppress plaintiffs stemmed from his obtaining majority control; he was then able to vote himself sole director and sole officer and run the company at his own discretion.

On the other hand, the trial court did not make any findings of fact in support of its award to plaintiffs of $50,000, and whether it was based on low distributions, the difference between Samier's former and current salary, or some combination or other factor. While the evidence seemed clear that distributions to Evelyn were less than they should have been, no testimony was received regarding what the payouts should have been and whether they were made up in the following years. We do not question the *fact* that reimbursement was proper relief, but only the basis for the *amount* of the award. Thus, upon remand, if the trial court concludes that the reimbursement remains an appropriate remedy, it should explain why reimbursement is proper and the evidence that supports the amount of the award.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Gary R. McDonald
/s/ Jeffrey G. Collins