Date: 19991028
Docket: CA155716

NOVA SCOTIA COURT OF APPEAL

[Cite as: MacDonald Chisholm Inc. v. Chisholm,1999 NSCA 127]

Glube, C.J.N.S., Freeman, Bateman, JJ.A.

BETWEEN:

MacDONALD CHISHOLM INCORPORATED and EQUISURE FINANCIAL NETWORK INC.	Harry E. Wrathall, Q.C. and Stephen Kingston for the appellants
Appellants	
- and -	
WILLIAM LAWRENCE CHISHOLM	Randall Balcome for the respondent
Respondent	
	Appeal Heard: October 4, 1999
	Judgment Delivered: October 28,1999

THE COURT: Appeal is allowed in part as per reasons for judgment of Freeman, J.A., Glube, C.J.N.S., and Bateman, J.A., concurring.

<u>FreemanJ.A.</u>:

[1] This appeal involves the interpretation of an “escape clause” in a contract whereby the elderly founder of an insurance business was retained by a successor company, the appellant MacDonald Chisholm Incorporated (MCI), as consultant with reduced work load and income to serve as a “goodwill ambassador.”

[2] The appeal is from findings by the trial judge that termination of the respondent’s services breached the agreement and was not saved by a later amalgamation, that mitigation was not an issue, and from his assessment of damages.

[3] Under the agreement William Lawrence (Red) Chisholm was to invoice the company for his “consulting fee” of $1,500 a month for life, although the company could terminate the agreement if health problems made him unavailable as a consultant. The right to claim monthly remuneration depended not upon actual consultation but on Mr. Chisholm’s availability for consultation; in my view the contract was a retirement contract, similar to the agreement considered by the Supreme Court of Canada in **Canadian Ice Machine co. v. Sinclair**, [1955] S.C.R. 777. The agreement accommodated his wishes to continue working; in return Mr. Chisholm gave up an income of about $30,000 a year from residual commissions and others in the company gradually took over his accounts. Thus while the agreement was tailored to Mr. Chisholm’s special circumstances, it was not without benefit to both parties.

[4] The escape clause, final clause in a five-clause agreement to which Mr. Chisholm and MCI were the only parties, was drafted by Douglas MacDonald, president and C.E.O. of MCI. It provides as follows:

> 5. It is to be further understood and agreed between the respective parties that should the ownership of the shares of the company be sold by the existing shareholders or the majority of its assets pass from the control of the existing shareholders this agreement shall be null and void at the sole discretion of the purchaser.

[5] MCI was created by the 1980 merger of W.L.Chisholm Insurance Limited, then owned by the respondent's son David as principal, and R.L.MacDonald Real Estate Limited. The trial judge, Justice Haliburton, found that each of the merged companies, which remained in existence as holding companies, owned half the shares in MCI.

[6] On September 30, 1994 David Chisholm sold the shares in Chisholm lnsurance to the other corporate appellant, Equisure Financial Network Inc. The respondent's situation was not renegotiated. Justice Haliburton accepted David Chisholm's evidence that at the time he received assurance from Mr. MacDonald and others that his father's contract would not be affected because "the shareholders were not changing." David Chisholm entered into a ten-year contract to be a senior account executive for MCI.

[7] On January 3, 1995, Douglas MacDonald sold the shares in his holding company, MacDonald Insurance, to Equisure. Chishom Insurance and MacDonald Real Estate continued to own the shares in MCI. The only interest in the company

actually sold at the time of these transactions was a fraction of one share in the name of Mr. MacDonald and transferred by him to Equisure.

[8] On February 7, 1995, Douglas MacDonald, as president of MCI, drafted a letter to the respondent on company letterhead which was delivered two weeks later reciting that "David (Chisholm) and I recently sold our controlling interest in Macdonald Chisholm Inc. to Equisure Financial Network, Inc.," and informing him:

> . . . in accordance with Clause 5 of the Agreement between Macdonald Chisholm Inc. and yourself dated July 1, 1993 your consulting services will no longer be required after February 1, 1995.

[9] Justice Haliburton found that while the agreement left some questions unanswered, there was no ambiguity in the wording of Clause 5. He acknowledged that some parol evidence had been admitted during the trial, but he had not found it particularly helpful and it does not appear to have played a part in his conclusions.

[10] He found that the conditions necessary for termination of the contract under Clause 5 had not been met because it could not be said that "the ownership of the shares of the company [were] sold by the existing shareholders." When David Chisholm and Douglas MacDonald sold their shares in their respective holding companies to Equisure, the ownership of the shares in MCI did not change. Chisholm Insurance and MacDonald Real Estate continued to be the shareholders of MCI.

[11] In my view this is a reasonable interpretation of Clause 5 by the trial judge,

consistent with the objective intention of the two parties to the contract and expressed in what appears to be carefully chosen language. They, like David Chisholm, Douglas MacDonald and Equisure, are experienced in business and must be assumed to understand the difference between individual and corporate ownership of shares.

[12] The appellants submit however that all parties understood the agreement was predicated on ownership and control of the company remaining in the two principals, Mr. Chisholm and Mr. MacDonald, whether through holding companies or in their own right. To substitute the subjective intentions of the parties for the objective intention expressed by a valid written instrument there must be parol evidence, and parol evidence is admissible only if there is an ambiguity in the instrument.

[13] If there is no ambiguity in the written document as to the necessity for a sale of the shares of the existing shareholders before Clause 5 can be invoked, and I agree with Justice Haliburton that there is not, the submission is that Clause 5 is ambiguous as to how many shares would have to be sold to trigger its provisions. If a substantial interest in MCI had been sold, this ambiguity would have to be addressed and parol evidence would likely be necessary. If admitted for one purpose, the appellant submits parol evidence could be considered for any purpose.

[14] This question must be assessed in the existing evidentiary context, not in a speculative one. Mr. MacDonald owned one-half of one per cent (0.005 %)of the shares in MCI in his own right and conveyed this to Equisure at the same time he sold

his shares in MacDonald Real Estate. No reasonable person could consider that the parties to the contract intended that the sale by Mr. MacDonald of such a minuscule interest would permit MCI to void the agreement and turn its back on Mr. Chisholm.

[15] In my view the appellant has not established any relevant ambiguity and parol evidence should be excluded from the interpretation of the agreement, and in particular, of Clause 5. Justice Haliburton acknowledged that some parol evidence was heard, but in reviewing his decision in light of the evidence as a whole, I am satisfied that he neither found ambiguity nor considered parol evidence in interpreting the agreement. I am not persuaded he erred.

[16] The appellants further argue that the respondent failed to mitigate his loss. In the letter terminating the contract, amplified by subsequent discussion, Mr. Chisholm was offered $10.00 an hour to a limit of $4,000 a year to perform minor office duties and errands for the agency, but rejected this as an insult. There was some evidence that his son-in-law had offered him employment in his own insurance firm similar to that which he had had as a consultant with MCI, but Mr. Chisholm rejected this because he did not wish to compete with his son or with the agency he had founded.

[17] Justice Haliburton considered the evidence and concluded that in the circumstances, which included the respondent's age, the purpose of the agreement, and the fact that the agreement was not a contract of employment and did not require that the respondent's consulting services be limited exclusively to MCI, "mitigation was

not an issue." (See **Canadian Ice Machine co. v. Sinclair** (supra).

[18] Justice Haliburton accepted actuarial calculations that showed past loss of income at $69,339 with interest of $7,063. Mr. Chisholm was 82 with a life expectancy of 6.33 years at the time of trial. Justice Haliburton allowed future loss of income to age 85 in the amount of $40,028 for a total award of $116,430.

[19] After carefully reviewing the record and considering the oral and written submissions of counsel, I cannot conclude that the trial judge erred in the application of the law or made any palpable or manifest errors of fact which would permit this court to overturn his conclusions as to the breach of contract, mitigation, or, subject to the following consideration of a contingency factor, to the overall assessment of damages.

[20] An amalgamation of the companies occurred in December, 1995, at which time ownership of the shares of MCI did change. The cause of action had, however, arisen in February, 1995, and Justice Haliburton found that the only relevant effect of the amalgamation was to make previous transactions irreversible. In **R. v. Black and Decker Manufacturing Co.**, [1975] 1 S.C.R. 411, then Chief Justice Dickson remarked that the effect of amalgamation "is to have the amalgamating companies continue without subtraction in the amalgamated company, with all their strengths and their weaknesses, their perfections and imperfections, and their sins, if sinners they be. Letters patent of amalgamation do not give absolution." Under clause 19 of the

amalgamation agreement in the present appeal "an existing cause of action, claim or liability to prosecution relating to one or more of (the parties) shall be unaffected."

[21] The appellants argue the amalgamation should be treated as a contingency cutting off Mr. Chisholm's right to damages after December, 1995. This contention must be treated with caution lest defendants who breach contracts scramble to create justification after the event and present it in the guise of a contingency to limit damages. However it was a foreseeable possibility when the contract was entered into that at some time the agreement could be terminated as the result of a change of ownership of MCI. The ownership of the MCI shares did change as a result of the amalgamation. In my view that does not conclusively demonstrate that if the breach of contract had not occurred in February, 1995, Clause 5 would have been inevitably invoked in December 1995 nor at any subsequent time.

[22] In **Freeman v. BC Tel**, [1997] B.C.J. No. 2900 (Q.L.) Holmes J. referred to **Rankin v. National Harbours Board** (1981), 2127 D.L.R. (3d) 714 (C.A.) and **Canadian Ice Machine Co. v. Sinclair** (supra) in considering an argument that in an assessment of damages for a prematurely terminated employment contract, it is appropriate to take into account a negative contingency that the contract might, apart from the breach in question, have been prematurely terminated. He stated:

> I accept that where the evidence supports the suggestion an employment contract would not in any event have reached full term, a contingency factor for that event, in combination with any other appropriate contingency factors, may be

> taken into account in reduction of otherwise appropriate contractual damages. The evidence in support of such a contingency must however be closely considered.

[23] In **The Glenfinlas** (noted in) ,[1918] P. 363, owners of a steamship damaged in a collision were found entitled to the full cost of repairs although the ship had been sunk by a mine before the repairs could be completed.

Justice Haliburton erred in ignoring the evidence of a possible future termination of the agreement pursuant to Clause 5 as a result of an amalgamation of other change of ownership of the shares in MCI, although he does consider contingencies based on Mr. Chisholm's health and life expectancy. There was of course no way of determining in February, 1995, that an amalgamation would take place, when it might happen, that it would involve a change in ownership of MCI, or that such a change would be invoked to terminate the agreement. This court is in as good a position as a trial court to assess a contingency, and accordingly, I would allow the appeal to the extent of reducing the overall award by a contingency factor of twenty per cent. The effect is to reduce the overall award from $116,430 to $93,144. Success on the appeal is divided so I would award no costs.

Freeman, J.A.

Concurred in:

Glube, C.J.N.S

. Bateman, J.A.