NOVA SCOTIA COURT OF APPEAL
Citation: ***Nguyen v. Tran***, 2003 NSCA 72

Date: 20030626
Docket: CA 190296
Registry: Halifax

Between:

Hieu Nguyen and N & N Electric
Motor Specialists Limited

Appellants

v.

Nuong Cong Tran, Tien Tan Nguyen
and Cavina Trading Limited

Respondents

Judges:	Saunders, Chipman & Oland, JJ.A.
Appeal Heard:	June 11, 2003, in Halifax, Nova Scotia
Written Judgment:	June 26, 2003
Held:	Appeal dismissed with costs to the respondents in the amount of 40% of the costs awarded at trial, and in addition their reasonable disbursements on appeal as per reasons for judgment of Saunders, J.A.; Chipman & Oland, JJ.A. concurring.
Counsel:	Gavin Giles, for the appellants Donald L. Shewfelt, for the respondents

Reasons for judgment:

[1] After an eight day trial in the Nova Scotia Supreme Court, Justice Douglas L. MacLellan found in favour of the respondents and awarded them damages of $198,264 as compensation for the individual appellant's breach of fiduciary duty owed to their company, Cavina Trading Limited, of which all three individuals were shareholders. He also dismissed a counterclaim made by the appellants.

[2] The appellants appeal from that decision, complaining that the trial judge misconstrued the evidence; failed to understand or properly apply the law with respect to fiduciary relations and obligations; made manifestly erroneous findings with respect to such obligations; and erred in his assessment of damages. For these reasons the appellants seek to overturn the decision and have this court substitute a finding in their favour for the amount of their $34,000 counterclaim. In the alternative, the appellants seek a new trial or at the very least a reduction in the damages assessed by the trial judge.

[3] I will briefly set out the background of this litigation. The appellant, Hieu Nguyen ("Hieu"), is a Vietnamese educated electrical engineer. He graduated from the Technical University of Saigon in 1972. Upon graduation Hieu joined the South Vietnamese army and served as a communications lieutenant. He was captured by the North Vietnamese army during the fall of Saigon in 1975 and was held by the communists until he escaped in 1979. He eventually found his way to Hong Kong where he lived in a refugee camp. Government officials and church sponsors assisted in his immigration to Canada. He took up residence initially in Bridgewater, subsequently moving to Dartmouth where in 1985 he incorporated N & N Electric Motor Specialists Limited ("N & N") of which he is the president, principal director and owner.

[4] The respondents, Nuong Cong Tran, ("Tran") and Tien Tan Nguyen ("Tien") are also Vietnamese ex-patriots who reside in Nova Scotia. They arrived here in circumstances not unlike those which Hieu experienced.

[5] Church sponsors brought Tran and his family to the metro area. While learning English, he worked part time for three years at Birk's and then set up his own company in the business of jewellery design and repair, which he and three employees operate from his home.

[6] Tien's skills and employment experience are varied. He has driven a taxi, worked as a cook in a restaurant, owned and operated an automotive radiator repair business, worked as a manicurist and owns and manages a six-unit apartment building.

[7] The respondents, Tran and Tien, testified that they and Hieu were friends who, in April 1992, agreed to incorporate Cavina Trading Limited ("Cavina") to explore trade opportunities in Vietnam, secure contracts for the company and conduct trade between Nova Scotia and Vietnam. They entered into a shareholders agreement on April 24, 1992, the three men being the company's only shareholders, all agreeing to share the profits generated from the business.

[8] Five years later in January 1997, Tran and Tien sued Hieu alleging that sometime after Cavina's incorporation Hieu started a side business, siphoning away contracts, business and profits from Cavina for his own personal gain, thereby breaching his fiduciary obligations owed to the corporation. The respondents also alleged that Hieu "consorted" with N & N to induce third parties to breach contracts with Cavina, and to pass themselves off as Cavina in order to procure contracts and secure business, thereby perpetuating a fraud and depriving Cavina and Cavina's shareholders of the profits to which they were entitled.

[9] The respondents claimed relief of several kinds, including an accounting, return of monies, an equitable distribution of profits, punitive damages, general damages, interest, solicitor and client costs, injunctive or declaratory relief, recission and constructive trust.

[10] MacLellan, J. allowed the respondents' claim based on his finding that Hieu's actions constituted a breach of the fiduciary duty owed Cavina. He awarded Tran and Tien net damages of $198,264. This was based on a calculation of two-thirds of N & N's profits for the years 1996 to 1998, after first crediting Hieu with a 10% deduction on account of overhead expenses incurred in operating the business. In addition, the trial judge awarded the respondents pre-judgment interest, party and party costs and reasonable disbursements.

[11] In deciding in favour of the respondents, Justice MacLellan made several strong findings of fact. Such findings were essential to his ultimate determination that the respondents had established on a balance of probabilities their entitlement

to damages following Hieu's violation of the trust he owed to the company. MacLellan, J. said:

> [62] I am convinced that the first contact made by Hieu Nguyen with the Hanoi police was made by him on behalf of Cavina Trading Limited. I believe Tien Tan Nguyen when he testified that they were both approaching the police department on behalf of Cavina Trading Limited. I believe Hieu Nguyen went alone to talk with the police and when he returned he discussed with his partners the possibility of possible sales to the police department. I believe at that point he had no intention of dealing with the police by way of his own company. Later when he received the letter from Colonel Bong [Exhibit 1, Tab 9] he was happy for himself and his partners. I accept the evidence of the plaintiffs that they celebrated the receipt of that letter and they all talked to Colonel Bong on the phone from Hieu Nguyen's office in Dartmouth. I reject his evidence that the police in Viet Nam could not receive phone calls.
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> [63] I find that the first contract for $65,300.00 was handled by Hieu Nguyen on behalf of Cavina Trading Limited. He used N & N Electric Motor Specialists letterhead but was challenged about that by the others and agreed to not use it in the future. He agreed to put the money into the Cavina Trading Limited bank account not because he was wanting to help Cavina Trading Limited as he testified to, but because it properly belonged to Cavina Trading Limited.
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> [64] I find that the subsequent contracts done by N & N Electric Motor Specialists Limited during the period January 1996 to December 1997 as set out in Tab 24 to 42 were a direct result of the initial negotiations by Hieu Nguyen on behalf of Cavina Trading Limited and were all directed to the General Bureau of Vietnamese Peoples Police through Bach Dang Company the purchasing agent. I reject Hieu Nguyen's evidence that these contracts were for other police forces or companies. I conclude that the General Bureau of Vietnamese Peoples Police purchased police products for all police forces in Viet Nam.
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> [65] I conclude that the defendant Hieu Nguyen did breach his fiduciary duty to the plaintiff (sic) after his falling out with them and used information he obtained on behalf of Cavina Trading Limited to benefit himself and his company. I conclude that the plaintiffs should be compensated for this breach of fiduciary duty.

[12] Given the clear contradictions in the competing versions of events offered by Tran and Tien on the one hand and Hieu on the other, the trial judge was required to resolve the conflict and make findings on credibility. In the passages just

quoted, it is obvious that he accepted the respondents' evidence and rejected the appellant Hieu's testimony on the most significant issues.

[13] Deciding matters of fact, often based on conflicting evidence, and the drawing of conclusions from those facts, is the function of the trial judge, not the court of appeal. We will not interfere merely because we might take a different view of the evidence. Appellate review of a trial judge's findings has most recently been considered by the Supreme Court of Canada in **Housen v. Nikolaisen** (2002), 211 D.L.R. (4th) 577. There the Court urged great caution and deference on the part of appellate courts when reviewing the assessment of facts or inferences drawn from facts, by a trial court. An appeal is not a re-trial of the case, nor an opportunity for appellate judges to substitute their views for those of the judge of first instance. Accordingly, we will not interfere with findings of fact or proper inferences drawn from the evidence absent palpable and overriding error. See, as well,**Tonneguzzo-Norvel et al. v. Savein and Burnaby Hospital**, [1994] 1 S.C.R. 114; **Minister of National Revenue v. Schwartz** (1996), 193 N.R. 241(S.C.C.); **Québec v. Syndicat national des employés de l'Hôpital St-Ferdinand** (1996), 202 N.R. 321(S.C.C.); **Pye v. MacLean** (1996), 150 N.S.R. (2d) 159 (N.S.C.A.); and **White v. Slawter** (1996), 149 N.S.R. (2d) 321(N.S.C.A.).

[14] It also bears repeating that not every factual error or mis-step in the evaluation of evidence warrants appellate intervention. As Chief Justice Lamer observed in **Delgamuukw et al v. British Columbia** (1997), 153 D.L.R. (4th) 193, at ¶ 88:

> On a final note, it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was "overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue" (Quoting the Court's earlier decision in Schwartz v. Canada, [1996] 1 S.C.R. 254 at p. 281)

[15] There was no dispute between the parties in this case as to the law to be applied to the various claims, the relief sought, or assessment of damages. Rather, it is clear from the record that the case and its outcome was fact-driven and that the parties fully expected the judge's ultimate determination to turn on whether pivotal factual findings would favour either the appellants or the respondents.

[16] In argument, counsel for the appellants strongly urged that because of each party's difficulties in communicating in the English language great caution was required to determine precisely what each meant when responding to questions on direct or cross-examination. Mr. Giles argued that the trial judge failed to subject the testimony to such a careful degree of scrutiny and in the result erred in several of the factual conclusions drawn from the evidence. With respect, I do not accept counsel's submission.

[17] Having carefully considered the record and the submissions of counsel I am not persuaded that any of the judge's findings in this case which led him to conclude that the appellant had breached his fiduciary obligation to Cavina were manifestly wrong. Further, there is no basis for suggesting that he applied any wrong principles of law.

[18] Although, as I said earlier, the disposition of this case was largely fact-driven, it is unfortunate that the decision lacks any real legal analysis. Counsel for the respondents admitted that the analytical section of the trial judge's decision was brief. He rather generously characterized it as "succinct." It would have been far more instructive to the parties in understanding the outcome, and far more helpful to the panel in reviewing it, had the trial judge, even briefly, referred to the jurisprudence on fiduciary obligations, gone on to identify the particular elements of such a relationship which he found to have been established and then turned his attention to how any or all of those elements had been violated by the appellant Hieu's actions. See for example, Freeman J.A.'s analysis in **Williamson v. Williams**, [1997] N.S.J. 261 (NSCA) especially at ¶'s 41-67.

[19] In the seminal case of **Canadian Aero Service Ltd. v. O'Malley et al** (1973), 40 D.L.R. (3d) 371 (S.C.C.), Laskin, J. (as he then was) explained that neither a personal conflicting interest, nor profit acquired as a director and while in the execution of the office are the "exclusive touchstones of liability." There ought to be some flexibility applied to this branch of the law so as to accommodate any "new fact situations" that "may require a reformulation of existing principle to maintain its vigour in the new setting." (at page 383). To lend substance to this introductory proposition, Justice Laskin went on to offer this oft-quoted direction:

> The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform,

> must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively. Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge. (at p. 391)

[20] Applying the factors stated by Laskin, J. to the record in this case, I am satisfied that Justice MacLellan's findings and inferences drawn from those facts were well supported by the evidence and, analytically, provide a legal foundation for his disposition of the case. From the documentation and oral testimony, in particular the cross-examination of Hieu, the appellant acknowledged he was a more sophisticated businessman than his friends Tran and Tien. He asked to become president of Cavina after their shrimp contract was consummated. He operated on behalf of Cavina to solicit contracts for Cavina. He obtained a contract with the Vietnam police for Cavina, but was caught by Tran and Tien trying to use N & N letterhead for that business deal. He told the others that there would likely be more contracts for Cavina. When Tien found out that N & N had received subsequent police contracts, he and Tran had a falling-out with Hieu, Hieu left Cavina and gave Tien the company seal and letterhead. Hieu proceeded to work in the interests of his company N & N while still maintaining control over Cavina and thwarting any attempts by Cavina to do further business, by having the bank freeze Cavina's accounts. Hieu did not tell Tran and Tien about the other contracts and took these "repeat" contracts for N & N, destroying the actual written contracts in the process. Hieu conceded that his own company N & N was losing money during the years 1994-1995 and that the police contracts were part of the company's financial turn around.

[21] This and other evidence amply supported the trial judge's conclusion that as a director and president of Cavina, Hieu competed, in the form of N & N, against Cavina, in pursuit of his own personal and corporate interests and that such activities constituted a breach of Hieu's fiduciary duties owed to Cavina.

[22] Despite the decision's shortcomings, I am, after carefully considering the entire record, able to discern the trial judge's reasoning process as well as the

evidentiary foundation to which it was applied. In the end, I am not persuaded by any of the appellants' submissions that the trial judge erred.

[23] The appellants say MacLellan, J. erred in the manner in which he assessed damages. I disagree. The trial judge's adoption of the approach taken and calculations made by the chartered accountant retained by the respondents as their expert, did not amount to error of law or any palpable or overriding error of fact. As noted by MacLellan, J.:

> [70] The main difference of opinion between the two experts was that Mr. Dockrill felt that overhead expenses of N & N Electric Motor Specialists Limited should be factored into the export sales to determine what profit the company made as a result of these export sales. That overhead would include wages paid to N & N Electric Motor Specialists Limited employees in Dartmouth.
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> [71] Mr. Schmid based his opinion on the fact that overhead expenses were to be paid to Hieu Nguyen by way of the ten percent of profits he was entitled to. Also, he assumed that there was very little work on the equipment sent to Viet Nam and therefore the expenses incurred were largely the direct costs associated with the sales which were already calculated as expenses of the contract.
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> [72] I conclude that the approach used by Mr. Schmid is the better approach here. I reject the defendants' (sic) evidence that his employees worked in checking the equipment especially the instruments for alcohol testing. The suggestion that the defendants' had to provide warranty service on these items is also most unusual. I believe that the only warranty on the equipment would be that provided by the manufacturer.
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> [73] I believe that the defendants simply purchased the equipment and re-packaged it in Dartmouth and sent it to Viet Nam. I accept that the company had some staff in Viet Nam to handle the equipment.
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> [74] Mr. Schmidt has calculated that the defendants made a profit of $200,186.00 for the years 1996 and 1997, $130,258.00 for 1998 for a total of $330,440.00. Mr. Schmid's evidence is that in 1999 there were minimal export sales and therefore he did not determine the profit on export sales for that year. Mr. Dockrill puts the profit made by N & N Electric Motor Specialists Limited at $7,343.00 for the three years in question.
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> [75] This claim is based on counsel's interpretation of the financial statement of N & N Electric Motor Specialists Limited for that year. Mr. Schmid's evidence is that he did not consider that N & N Electric Motor Specialists Limited

> had significant export sales in that year and therefore could not calculate profits. A financial statement shows that N & N Electric Motor Specialists Limited had export sales of $203,818.00 in 1999 and had inventory at the end of the year in the amount of $351,394.00. It is therefore suggested by plaintiffs' counsel that this inventory must have been intended for export sales and he suggested that I use $250,000.00 of the inventory as inventory for export sales and then double that amount to represent mark-up. He then suggests I take ten percent as a profit margin resulting in profit of $50,000.00 on export sales.
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> [77] I am not prepared to do this. The burden is on the plaintiffs to show that N & N Electric Motor Specialists Limited has export sales resulting from Hieu Nguyen contacts for police equipment and I am not able to conclude that and therefore there will be no damage award for 1999 sales.
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> . . .
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> [80] I note that Mr. Schmid in his report in which he determined that N & N Electric Motor Specialists Limited had total profits of $330,440.00 for the years 1996 to 1998 that he did not deduct from this ten percent to which Hieu Nguyen would be entitled if all transactions had been conducted through Cavina Trading Limited. I would therefore deduct that amount from his total resulting in a figure ($330,440.00 - $33,044.00) of $297,396.00. The plaintiffs will therefore be entitled to the sum of $198,264.00

[24] It is trite law to observe that particular deference is owed to a trial judge's findings based on the credibility and reliability of witnesses, whether of lay persons or experts. Chief Justice Lamer put it succinctly in **Delgamuukw**, supra, at ¶ 91:

> However, I need only reiterate what I have stated above, that findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts.

[25] In assessing damages the trial judge was alive to the important differences in the calculations advanced by the two experts. He took those differing views into account based on his assessment of the evidence and in particular, how this business was run. I can find no error in either the trial judge's consideration of the evidence or his acceptance of Mr. Schmid's opinion. I see no basis for disturbing his decision.

[26] Given the language difficulties evident from the transcript of these lengthy proceedings, as well as the extent of the documentation, it was a difficult record with which to work. I wish to commend both counsel for their familiarity with the record, thorough preparations and able written and oral arguments.

[27] I would dismiss the appeal, with costs to the respondents in the amount of 40% of the costs awarded at trial, and in addition their reasonable disbursements on appeal.

Saunders, J.A.

Concurred in:

Chipman, J.A.

Oland, J.A.