NOVA SCOTIA COURT OF APPEAL

Citation: *Lavy v. Hong*, 2018 NSCA 6

Date: 20180111
Docket: CA 471905
Registry: Halifax

Between:

Danny Lavy, Star Elite Inc., and
Elite Group Inc.

Applicants/Appellants

v.

Shae Hong and Hong and Co.

Respondents

Judge:	Farrar, J.A.
Motion Heard:	January 11, 2018, in Halifax, Nova Scotia in Chambers
Written Decision:	January 12, 2018
Held:	Motion dismissed with costs in the amount of $2,500 inclusive of disbursements payable in any event of the cause, either on this appeal or the application below.
Counsel:	Peter Rogers, Q.C. and Jane O'Neill, Q.C., for the applicants/appellants Roderick (Rory) Rogers, Q.C. and Chris Madill, for the respondents

Decision: (Orally)

[1] The appellants make a motion to partially stay the December 29, 2017 Order of Justice Frank Edwards wherein he granted the respondents interlocutory injunctive relief pursuant to s. 5 of the Third Schedule of the *Companies Act,* R.S., c. 81.

[2] For the reasons that follow I would dismiss the motion with costs to the respondents.

Background

[3] The background to this appeal and the dispute between the parties is set out in detail in Justice Edwards' decision. I will not repeat it here. It is sufficient to say that Danny Lavy and Shae Hong are locked in a shareholders' dispute over the operation and control of Sensio Inc., a company they own indirectly through their companies Star Elite Inc., Mr. Lavy's company beneficially owns 50.05% of Sensio and Hong and Co., Mr. Hong's company, beneficially owns 49.95%.

[4] Shae Hong and Hong and Co. filed an application against the appellants in the Supreme Court seeking an order for injunctive relief. The application was heard over two days in November 2017. In a lengthy 58-page decision dated December 15, 2017 (reported 2017 NSSC 329), Justice Edwards thoroughly reviewed the evidence and the arguments of the parties. He determined that the applicants had made out a strong *prima facie* case of shareholder oppression by the majority shareholder, Mr. Lavy, and that Mr. Hong would suffer irreparable harm if relief was not granted. He also found the balance of convenience favoured Hong.

[5] In reaching his conclusion the application judge described Mr. Lavy's conduct in the strongest of terms labelling it as high-handed, punitive, retaliatory, retributive, arbitrary, abusive and reprehensible at different times. He found it was necessary to "level the playing field" until the Application could be heard. The Application is presently scheduled for June 2018.

[6] As a result, the application judge ordered a number of forms of relief. Of particular significance on this motion is the monetary relief ordered to be paid to Mr. Hong, a restriction on payments to any of Mr. Lavy's companies and a

requirement that Mr. Lavy continue to provide his collateral and personal guarantees necessary for Sensio to obtain interim financing.

[7] The appellants say the requirement for the guarantees was not sought nor argued before the application judge.

[8] In broad terms, the appellants ask that I stay or modify the provisions of the Order to prevent the payment of monies to Mr. Hong, remove the requirement for the guarantee and to allow payments to flow to Mr. Lavy's companies, in particular, they reference the shared costs associated with Mr. Lavy's private jet. Failure to do so, the appellants say, will result in irreparable harm to them, the primary argument being that Mr. Hong will be unable to repay any amount to the appellants if they are successful on this appeal and on the application. In support of their position they filed the affidavit of Marla Ruttenberg, CFO of the Elite Group of companies which includes Sensio.

[9] In response the respondents filed the affidavit of Mr. Hong.

Disposition

[10] The test on a motion such as this is well-known. I must be satisfied that there is an arguable issue raised on appeal; secondly, if the stay is not granted and the appeal is successful the appellants will suffer irreparable harm, that is harm that cannot be quantified in the monetary terms or which cannot be cured; and third, the balance of convenience favours the appellants. (*Fulton Insurance Agencies Ltd. v. Purdy*, [1990] N.S.J. No. 361 (N.S.S.C.A.D.); *Alementary Services Inc. v. Nova Scotia (Alcohol & Gaming Division)*, 2009 NSCA 61).

[11] I am satisfied the appellants have raised an arguable issue on this appeal. I will say no more about that aspect of the test.

[12] However, I am not satisfied the appellants have come remotely close to showing irreparable harm. There is no affidavit from Mr. Lavy to support the various assertions of irreparable harm. Ms. Ruttenberg's affidavit is also deficient in that regard. I am asked to infer irreparable harm from the very nature of the case, the circumstances of the parties and the amount of money involved. I am not prepared to do so. Suspicion and speculation and bald assertions are not a substitute for evidence. An inference of irreparable harm requires an evidentiary basis. There is no evidence that between today and this Court's hearing which is

scheduled for April 3 - less than three months away - the appellants will suffer irreparable harm.

[13] The appellants' assertion that Mr. Hong is not in a position to repay any award is simply that - an assertion. In any event, the fact that one party may be impecunious does not automatically determine the application in favour of the other party. It is but one factor to be taken into consideration. (*Alementary Services, supra*, ¶6)

[14] Even if I was satisfied that Mr. Hong was impecunious, which I am not, I would not find in favour of the appellants in light of the application judge's findings that Mr. Hong's financial woes are as a result of Mr. Lavy's actions.

[15] Having found there is no irreparable harm it is not necessary to address the balance of convenience aspect of the test.

[16] For these reasons I would dismiss the motion with costs to the respondents in the amount of $2,500 payable forthwith and in any event of the cause either on appeal or on the application alone.

Farrar, J.A.