NOVA SCOTIA COURT OF APPEAL
Citation: *Lavy v. Hong*, 2018 NSCA 28

Date: 20180412
Docket: CA 471905
Registry: Halifax

Between:

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

Appellants

v.

Shae Hong and Hong and Co.

Respondents

Judges:	Fichaud, Saunders and Farrar, JJ.A.
Appeal Heard:	April 3, 2018, in Halifax, Nova Scotia
Held:	Application to introduce fresh evidence dismissed; leave to appeal granted and appeal allowed in part, with costs, per reasons for judgment of the Court
Counsel:	Peter M. Rogers, Q.C. and Avram Fishman, for the appellants Rory Rogers, Q.C. and Christopher Madill, for the respondents

By the Court:

Background

[1] Danny Lavy and Shae Hong are in a shareholders' dispute over the operation and control of Sensio Inc. a company they own indirectly. 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% of the shares.

[2] On August 31, 2017, Mr. Hong and Hong and Co. filed an application in the Supreme Court seeking oppression relief against Mr. Lavy and his company pursuant to s. 5 of the Third Schedule of the *Companies Act*, R.S.N.S. 1989, c. 81.

[3] On September 7, 2017, Mr. Hong filed a motion seeking interlocutory injunctive relief in the oppression proceeding.

[4] The motion for interlocutory relief was heard over three days in November 2017 before Justice Frank Edwards. In a lengthy 58-page decision dated December 15, 2017 (reported 2017 NSSC 329), the judge granted the relief sought and issued an order on December 29, 2017. The background to the dispute is reviewed in detail in the judge's decision and it is not necessary to repeat it here. It is sufficient to say the parties are locked in a very acrimonious battle over the operation of Sensio with each accusing the other of inappropriate conduct.

[5] The appellants filed a notice of application for leave to appeal and notice of appeal on January 5, 2018 appealing Justice Edwards' interlocutory decision.

[6] On January 11, 2018, the appellants made a motion to partially stay the December 29, 2017 order. That motion was dismissed (reported 2018 NSCA 6).

[7] On March 22, 2018, the appellants filed a motion to introduce fresh evidence on this appeal.

[8] We heard the appeal from the interlocutory order and the fresh evidence application on April 3, 2018.

[9] The merits hearing of the oppression remedy is presently scheduled for four days commencing June 11, 2018.

[10] For the reasons that follow, we would grant leave to appeal, dismiss the fresh evidence application and allow the appeal in part, with costs to the respondents in the amount of $5,000, inclusive of disbursements.

[11] We will address the fresh evidence application before moving on to the issues on appeal.

Fresh Evidence Application

[12] The fresh evidence that the appellants seek to admit is contained in the affidavit of counsel for the appellants sworn on March 22, 2018. Specifically, the appellants seek to admit:

- a letter from James D. MacNeil, counsel to Jerry Rutigliano, President of Sensio Inc., dated February 12, 2018 to Mr. Hong's counsel, Rory Rogers Q.C., and Avram Fishman, Mr. Lavy's Montreal counsel;
- a letter from Mr. MacNeil to Mr. Rogers and Mr. Fishman dated February 26, 2018.

[13] The fresh evidence relates to two paragraphs in Justice Edwards' order which requires that Mr. Rutigliano be responsible for approving amounts to be paid to Elite Group for shared management services and to approve Mr. Hong's monthly expenses. In his correspondence to counsel, Mr. MacNeil advises that Mr. Rutigliano is not prepared to act in the capacity of reviewing and approving expenses.

[14] The appellants say the purpose of introducing the fresh evidence is to show that Mr. Rutigliano's lack of cooperation makes the operation of those provisions in the order unworkable.

[15] The test for the introduction of fresh evidence was reviewed by Fichaud, J.A. in *Armoyan v. Armoy*an, 2013 NSCA 99:

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. **Further, the fresh evidence must be in admissible form.** *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras 77-79, leave to appeal

> denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, para 30.
>
> [Emphasis added]

[16] The fresh evidence sought to be adduced here does not get over the hurdle of being in an admissible form.

[17] The appellants are attempting to introduce, by way of a solicitor's affidavit, evidence from Mr. Rutigliano through his solicitor James MacNeil which the appellants suggest the Court should accept for the truth of its contents. It is double hearsay and is not admissible. If the evidence had been sought to be admitted in this form before the motions judge, without the ability to cross-examine anyone on its reliability, it would not have been admitted.

[18] We also have concerns about admissibility of the documents on the other *Palmer* criteria but it is not necessary to address those factors.

[19] We would dismiss the fresh evidence application.

[20] We will now turn to the remaining issues on this appeal.

Issues

[21] During oral argument in this matter, we limited the matters for which we required argument from the respondents. In particular, we did not require the respondents to address those grounds of appeal that dealt with the threshold for granting the interim injunction, such as irreparable harm and balance of convenience. To the extent the appellants' grounds of appeal raise issues about the granting of an interim order, they are dismissed.

[22] We directed the respondents to limit their argument to those issues where the appellants argued the judge went too far in his decision. In particular, the appellants take issue with the following clauses in the order:

> (g) Sensio Inc. and Sensio Company are hereby prohibited from making any further related party loans to Danny Lavy, or to corporations or entities directly or indirectly controlled by Danny Lavy, or in which Danny Lavy has a direct or indirect interest, without the express prior written consent of the Applicants, or further order of this Court;

(i) Sensio Inc. is hereby prohibited from making any payment to any of the Respondents, or to corporations or entities directly or indirectly controlled by Danny Lavy, or in which Danny Lavy has a direct or indirect interest, save and except for valid charges for shared management services charged to Sensio Inc. by Elite Group Inc., which amounts may not be paid without the prior written consent of the President of Sensio Inc., Jerry Rutigliano; and save and except for payments to facilitate stand alone financing for Sensio Inc. to a maximum net amount of CDN $220,220 provided the Respondents provide the Applicants sufficient documentation and backup to verify these amounts must be paid;

(j) Sensio Inc. is hereby prohibited from paying any expenses in any way related to the use of a private plane;

(n) Sensio Inc. shall make an immediate payment of $240,000 (USD) to the Applicants, or either of them at their direction, that sum representing the unpaid monthly profit draws of $60,000 (USD) for each of September, October, November and December 2017;

(o) Sensio Inc. shall pay the regular monthly draw of $60,000 (USD) to the Applicants, or either of them at their direction, on the 1st day of each month commencing January 1, 2018 pending the hearing and disposition of this Application, or further order of the Court;

(p) Sensio Inc. shall make a profit drawing payment of $380,000 (USD) to the Applicants, or either of them at their direction, no later than December 29, 2017;

(t) Subject to any alternative arrangement with respect to financing for Sensio Inc. which is accepted in writing by both the Applicant, Shae Hong, and the Respondent, Danny Lavy, the Respondent, Danny Lavy, is hereby prohibited from refusing to continue to provide the collateral and personal guarantees necessary to secure any requisite interim financing for Sensio Inc., the timing and amount of that interim financing to be determined by the President of Sensio Inc., Jerry Rutigliano, pending the hearing and disposition of this Application, or further order of the Court; and

(u) The Respondents, Danny Lavy or Star Elite Inc., shall be entitled to a *pro rata* share of profits from Sensio Inc. for FY2018 commensurate with the 50.05/49.95% shareholding interest held by Star elite Inc. and Hong and Co., respectively, in Sensio Inc.

[23] The moneys in clauses (n) and (p) have already been paid so they cease to have any impact on an interim basis.

Standard of Review

Leave to Appeal

[24] The test for leave to appeal requires the appellants to raise an "arguable issue". The arguable issue must not be of merely academic interest, but one that actually arises on the facts and legitimately requires the Court's attention. It must be "an issue that would result in the appeal being allowed" (*Burton Canada Company v. Coady*, 2013 NSCA 95 at para. 18).

[25] As is apparent from this decision, we are of the view that the appeal raises at least one arguable issue. Therefore, leave to appeal is granted.

The Appeal

[26] The judge's decision to grant interlocutory injunctive relief pursuant to s. 5 of the Third Schedule to the *Companies Act* is a discretionary decision.

[27] An appellate court will only intervene in an appeal from an interlocutory injunction if it is persuaded that wrong principles of law have been applied; there are clearly erroneous findings of fact; or if failure to intervene would give rise to a patent injustice (*Whitman Benn and Associates Ltd. v. AMEC E & C Services Ltd.*, 2003 NSCA 126).

[28] The reason behind the high threshold for interlocutory discretionary decisions was explained by Saunders J.A. in *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26 (rev'd on different grounds 2012 SCC 46) where he explained:

> [30] … Unless the applicant can show an error in principle or a patent injustice, we will not intervene. …
>
> [32] **Our jurisprudence recognizes that trial judges serve at the front lines of our justice system. They dispose of hundreds of cases in court rooms across the country every day. To do so they must act fairly, expeditiously, and decisively. They have broad powers to carry out the duties expected of them. One such power is the judicial exercise of discretion. Whenever a judge's decision springs from the exercise of discretion, an appellate court will be loathe to intervene.** The reasons are obvious. First, judges are presumed to know the law. They have an acquired expertise in determining facts from the evidence, and ought to be accustomed to applying the law to the facts to achieve a just result. In practically every case, the application of discretion will permeate the decision-making process. On appeal such discretion will not be questioned

> lightly. Second, trial judges enjoy a special advantage in having presided over the proceedings, first hand. Their exposure to the witnesses and counsel is direct, and occurs in real time, a benefit not shared by appellate judges who are largely confined to reviewing a transcript, occasionally enhanced with the clarity of hindsight. Third, the cost of litigation is huge. Appeals from interlocutory matters incur delay and added expense to the parties, to say nothing of the burden upon the court's own resources and other proceedings in the system waiting to be tried.
>
> [33] For these reasons, appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. …
>
> [Emphasis added]

[29] The judge's decision will be reviewed on this standard.

Analysis

[30] The appellants cite the recent Supreme Court of Canada decision in *Wilson v. Alharayeri*, 2017 SCC 39, as follows:

> [52] …Fairness requires that, where "relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe" (*Ballard*, at para. 140). […]
>
> [53] Second, as explained above, any order made under s. 241(3) should go no further than necessary to rectify the oppression (*Naneff*, at para. 32; *Ballard*, at para. 140; *Themadel Foundation v. Third Canadian General Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (C.A.) ("*Themadel*"), at p. 754). This follows from s. 241's remedial purpose insofar as it aims to correct the injustice between the parties.
>
> [54] Third, any order made under s. 241(3) may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders (*Naneff*, at para. 27; *Smith v. Ritchie*, 2009 ABCA 373, at para. 20 (CanLII)). The oppression remedy recognizes that, behind a corporation, there are individuals with "rights, expectations and obligations inter se which are not necessarily submerged in the company structure" (*Ebrahimi*, at p. 379; see also *BCE*, at para. 60). But it protects only those expectations derived from an individual's status as a security holder, creditor, director or officer. Accordingly, remedial orders under s. 241(3) may respond only to those expectations. […]

> [55] Fourth — and finally — a court should consider the general corporate law context in exercising its remedial discretion under s. 241(3). As Farley J. put it, statutory oppression "can be a help; it can't be the total law with everything else ignored or completely secondary" (*Ballard*, at para. 124).

[31] With the exception of one clause in the order, which we will address below, we are satisfied that the judge did not run afoul of the parameters set out by the Court in *Wilson*.

[32] The judge's inclusion of clauses (g), (i), (j), (o), and (u) were what he considered necessary to alleviate what he found to be a *prima facie* case of oppression. It is not for us to reweigh and reassess the evidence and come to a different conclusion.

[33] Having said that, we would comment on what the judge characterizes as "findings of fact" in his decision granting the interim injunction. His findings are not and should not be considered a final determination on any issue in this proceeding. The matters in issue will be addressed at the merits hearing.

[34] At that time, the application judge will have an opportunity to consider, in detail, the evidence of the parties outlining their business relationship and practices. The application judge is not bound by and should not be influenced in any way by the findings made on the interim injunction. They were made on a limited record and were solely for the purpose of determining whether the threshold for granting the relief sought had been met. With this clarification on the respective roles of the judges on the interim and final hearings, we would dismiss the appellants' appeal insofar as they relate to clauses (g), (i), (j), (n), (o), (p), and (u).

[35] We would allow the appeal insofar as it relates to clause (t). For ease of reference, it provides:

> (t) Subject to any alternative arrangement with respect to financing for Sensio Inc. which is accepted in writing by both the Applicant, Shae Hong, and the Respondent, Danny Lavy, the Respondent, Danny Lavy, is hereby prohibited from refusing to continue to provide the collateral and personal guarantees necessary to secure any requisite interim financing for Sensio Inc., the timing and amount of that interim financing to be determined by the President of Sensio Inc., Jerry Rutigliano, pending the hearing and disposition of this Application, or further order of the Court; and

[36] Clause (t) was not a form of relief that was requested by the respondents before Justice Edwards. It appears to have been something which he thought was necessary without it being requested or without seeking prior input from the parties. In his decision, he says:

> [101] An additional clause must be added to restrain Lavy from refusing to continue to provide the collateral and personal guarantees necessary to secure any requisite interim financing for Sensio. The decision of when and in what amount interim financing is necessary shall be made by Mr. Rutigliano.

[37] In their Notice of Appeal, the appellants take exception to the judge's decision on this issue. The ground of appeal reads as follows:

> (1) The Learned Chambers Judge erred in law by granting relief reflected in paragraph 101 of the decision and paragraph (t) of the Order:
>
> (a) which was not sought by the Applicants in their Notice of Motion nor requested in submissions of the Applicants at any time prior to the Decision, and which the Respondents did not have an opportunity to address in evidence or argument, contrary to the principles of natural justice and fairness;

[38] Mr. Lavy's counsel, in argument, says not only did the respondents not request the relief that is set out in paragraph (t), but expressly acknowledged they were not requesting it. In particular, he refers to the post-hearing brief of Mr. Hong where it is written:

> **…Issues concerning the inter-company financing will be addressed at the merits hearing.** The Applicants acknowledge that relief is not being sought, at this interim stage, from the Court in relation to those loans, but protection is necessary in relation to any loans of a personal nature, whether to Mr. Lavy of his companies.

[Emphasis added]

[39] We cannot speculate on what caused the judge to include clause (t) in his order when it was not requested, nor was it the subject of pre or post-trial briefs of the parties. To the contrary, it appears from the respondents' post-hearing brief they were not requesting it.

[40] The inclusion of clause (t) was the subject of post-hearing correspondence with counsel when trying to settle the form of the order. Initially, the judge felt that it should be deleted. However, after further submissions, it eventually found

its way into the order. There is no explanation in the judge's decision or subsequent correspondence from him why it was necessary to be included in the order. Again, it would be unwise to speculate.

[41] Donald J.M. Brown, Q.C., in his text *Civil Appeals*, loose-leaf, vol. 1 (Thomson Reuters, 2017) comments on the issues of fairness in the trial process:

> *1:1210* ***Non-Compliance with Basic Participatory Requirements***
>
> *1:1211 Per Se Fairness Errors*
>
> Where the basic requirements of the adjudicative process have not been complied with, appellate intervention will be necessary. For example, where there has been a straightforward error such as attributing the burden of proof to the wrong party, excluding evidence that is both relevant and material, refusing to permit cross-examination, **deciding a matter without allowing a party to make submissions**, or undertaking an evidence-gathering exercise *ex parte*, **the usual result will be for the appellate court to set aside the decision** and require the adjudicative process to be started anew. [Footnotes omitted]
>
> [Emphasis added]

[42] Mr. Brown continues, concluding that an error in the process of trial or in a decision-making process will almost always be characterized as one resulting in a substantial wrong or a miscarriage of justice.

> ***6:2120 The Requirement of a Substantial Wrong or Miscarriage of Justice***
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> […] However, unless the error is harmless or the result inevitable, **an error in the process of the trial or in decision-making will almost always be characterized as one resulting in a substantial wrong or miscarriage of justice.**
>
> [Emphasis added]

[43] Because this relief was not requested or even mentioned at the motions hearing or in the submissions before the decision, the appellants were not provided with any opportunity to address the issue through evidence or argument. Inability to make submissions or to lead evidence on an issue goes to the very heart of the litigation and the decision-making process.

[44] We are of the view that the inability to address this issue in any meaningful way before it is decided by the judge results in a patent injustice. Particularly so when it involves potential personal liability on Mr. Lavy without any ability to

address why such relief is not necessary or would be inappropriate in these circumstances.

[45] As a result, we would allow this ground of appeal and order that clause (t) be deleted from the order.

Costs

[46] The respondents have been substantially successful on this appeal. We would allow costs in the amount of $5,000, inclusive of disbursements.

Fichaud, J.A.

Saunders, J.A.

Farrar, J.A.