S.C.A. No. 02801
S.C.A. No. 02802
S.C.A. No. 02803
S.C.A. No. 02804

NOVA SCOTIA COURT OF APPEAL

Cite as: Contours Ltd. v. I.J. Mathers Ltd., 1993 NSCA 145
Jones, Freeman and Roscoe, JJ.A.

BETWEEN:

CONTOURS LIMITED and MATHERS TRAVEL LIMITED, bodies corporate, and CHRISTOPHER MATHERS Appellants - and - I.H. MATHERS & SON LIMITED and BRETON SHIPPING COMPANY LIMITED, bodies corporate, and HARRY I. MATHERS Respondents/ Cross-appellants	)	David Miller, Q.C., Robert Grant and Andrew Burke for the Appellants W. Wylie Spicer and Willliam M. Leahey for the Respondents/ Cross-appellants Appeal Heard: May 21, 1993 Judgment Delivered: June 9, 1993

THE COURT: Appeal in S.H. No. 71881 allowed, the action dismissed and cross-appeal dismissed; costs on the trial in the amount of $13,375.00 to be paid by the respondents to the appellants, and the appellants are entitled to $5,350.00, being 40% of $13,375.00, as their costs on the appeal and cross-appeal, per reasons for judgment of Roscoe, J.A.; Jones and Freeman, JJ.A. concurring.

ROSCOE, J.A.:

This is an appeal and cross-appeal from a decision of Chief Justice Glube reported in (1992), 113 N.S.R. (2d) 284. The history and background of

the various disputes between Harry I. Mathers and his brother Christopher Mathers are set out in detail in the decision of the trial judge and it is not necessary to repeat them in this decision except in summary fashion.

The trial involved five separate actions which were never consolidated but which were, by agreement, heard together on common evidence. One of those actions (S.H. No. 68774) appears to have resolved itself during the trial and is not in issue on the appeal. The other four actions were:

1. S.H. No. 71881: The main or "umbrella" action in which Harry Mathers claimed, among other things, that conduct of Christopher Mathers in relation to the affairs of Mathers Travel Limited had been oppressive or unfairly prejudicial to him. A claim for wrongful dismissal was withdrawn at the commencement of the trial.

2. S.H. No. 68045: in which Mathers Travel Limited claimed against Harry Mathers that he had wrongfully appropriated a bonus in the amount of $100,000.00.

3. S.H. No. 68068: in which Harry Mathers and I.H. Mathers and Son Limited claimed against Christopher Mathers, Mathers Travel Limited and Contours Limited monies which were allegedly wrongfully deposited to the Contours account by Christopher Mathers.

4. S.H. No. 72645: a claim by Mathers Travel Limited against I.H. Mathers and Son Limited

and Harry Mathers for unpaid accounts for travel and entertainment.

(For ease of reference, I will hereafter refer to the brothers by their first names.)

At the times most relevant to the issues on this appeal, Harry owned 100% of I.H. Mathers and Son Limited (I.H.M.) and Breton Shipping Company Limited. Christopher owned Contours Limited and Christopher and Harry were equal shareholders in Mathers Travel Limited (M.T.L.), a company originally established by their father. From 1981 until 1988 Christopher owned two shares in M.T.L., Harry owned one and his company, Breton, owned another. In 1988 Christopher transferred one of his shares to his wife Susan Mathers and she was elected a director of the company. The process by which Susan Mathers became a shareholder and director was approved by a decision of the Supreme Court and affirmed by this Court (see 89 N.S.R. (2d) 355 and 90 N.S.R. (2d) 354).

Prior to Susan Mathers' involvement in the company, Christopher and Harry had numerous disagreements through the years over such matters as bonuses to be paid to the directors, travel and entertainment amounts chargeable to the company, the amount charged by I.H.M. to M.T.L. for accounting services, whether Contours Limited was taking business away from M.T.L., whether Harry was contributing sufficient effort to M.T.L. business and how much rent M.T.L. should be paying to another company controlled by two other brothers. At times the brothers were not speaking to each other at all.

From 1988 through 1991 the manoeuvring and competition escalated. During this time Harry wrote cheques to himself and Christopher in the amount of $100,000.00 for bonuses which had not been approved by the directors or shareholders. Christopher did not cash his cheque. Harry had activated a line of credit with M.T.L.'s bank in order to allow for payment of his bonus cheque. The result was that M.T.L. no longer met the minimum financial standards required by a travel agency by the International Air Transport Association (I.A.T.A.). In 1989 Harry wrote a memo to all staff of M.T.L.

advising that as a result of a breakdown in discussions between the owners, a court application for winding up the company would be made. A similar letter was written by Harry to M.T.L.'s bankers. In addition, Harry resigned as a director and through I.H.M. applied to I.A.T.A. for his own licence.

In June 1990, M.T.L. received a letter from I.A.T.A. saying that M.T.L. did not meet the minimum financial standards. Christopher then arranged approval through the Nova Scotia Securities Commission for a rights offering to all shareholders of the company, offering the right to buy one common share for each share held at a price of $25,000.00 each. Although Harry received the required notices of this share offering he declined the option to purchase. Christopher and Susan each bought one share.

In January 1991 Harry opened a new travel agency using the name I.H. Mathers Travel. In addition, Harry acquired from the other two brothers the controlling interest in the company which owned the premises leased by M.T.L. and gave six months notice to quit to M.T.L.

In response, Christopher arranged for another rights offering to obtain funds to finance new leased premises. Shares were offered at $12,500.00 each to existing shareholders. Christopher and Susan each bought two new shares but Harry did not exercise the option. M.T.L. moved into its new premises in July 1991. Several other skirmishes between the brothers involving the control of M.T.L. are detailed in the trial judge's decision.

The trial judge came to the following conclusions on the issues raised in the claim of oppression:

1. that although the statutory provision providing for the oppression remedy was enacted after the events complained of, the statute operated in a retrospective manner and therefore applied to this situation;

2. the actions of Christopher were oppressive and unfairly prejudicial to Harry;

3. the appropriate remedy was to order Christopher to purchase the shares of Harry and Breton;

4. M.T.L.'s shares were valued ***en bloc*** at $800,000.00, making the shares owned by Harry and Breton worth $400,000.00; and

5. a 20% discount was applied, resulting in an order that Christopher purchase Harry's shares for $320,000.00.

In the action involving Contours (S.H. No. 68068), the trial judge found that Christopher had breached an agreement with Harry and I.H.M. and that they were entitled to the sum of $13,180.00.

In the action regarding the bonus (S.H. No. 68045), Harry was ordered to pay back the sum of $65,900.00 plus compound interest.

In the action involving the travel accounts (S.H. No. 72645), Harry and I.H.M. were ordered to pay M.T.L. a total of $44,416.00 plus interest. In a supplementary decision dated June 12, 1992 and reported at 113 N.S.R. (2d) 310, the Chief Justice adjusted the amount payable in S.H. No. 68068 by $750.00 and considered the parties' submissions on costs. She determined that although there had been four separate actions, costs should be determined on the basis of one combined proceeding and ordered the payment by Christopher to Harry of the amount of $13,375.00 for costs.

Issues Raised on Appeal

The issues raised on the appeal and the cross-appeal can be summarized as follows:

1. whether the learned trial judge erred in ruling that the oppression remedy provisions of the ***Investors Protection Act*** were applicable to the situation in this case;

2. whether the learned trial judge erred in law by ruling that the conduct of Christopher Mathers unfairly prejudiced the interests of Harry Mathers and Breton Shipping as shareholders of M.T.L.;

3. whether the learned trial judge erred in law in the valuation of the shares of M.T.L.; and

4. whether the learned trial judge erred in making her award of costs.

First Issue

The first issue is whether or not the learned Chief Justice erred in law in determining that the new ***Investors Protection Act***, S.N.S. 1990, c. 15, applies in this case. The ***Investors Protection Act*** was proclaimed to come into force on July 15, 1991 by Order-in-Council 91-813. That legislation amended the ***Companies Act***, R.S.N.S. 1989, c. 81, by bringing into force s. 135A and the Third Schedule to the ***Companies Act***.

Section 5(2) of the Third Schedule is as follows:

> " 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of."

The statement of claim in the main action was amended after the proclamation of the ***Investors Protection Act*** to include a claim for the oppression remedy under s. 5(2). This amendment to the pleadings required the trial to be adjourned for a few months.

On this issue, the trial judge said at para. 80, p. 302:

> " The alleged acts of oppression all occurred before July 15, 1991; therefore, it is only if the third schedule is found to be retrospective that this remedy can be considered."

After reference to Construction of Statutes by E.A. Driedger, 2nd ed., Butterworths 1983 on the subject of retrospective and retroactive operation, the Chief Justice said at para. 88:

> " After analyzing the statute in this fashion I find the legislation is retrospective; it involves an event; however, it is beneficial and therefore does not attract the presumption. It applies to remedy an existing situation even though it came about as a result of conduct prior to the enactment of the legislation. In the present case, the consequences of actions which previously occurred are changed from the time of the enactment. Since the previous acts meet the test of oppression or being unfairly prejudicial or that they unfairly disregard the interests of Harry and Breton, persons named in the section, I find the court may grant an order to rectify those acts."

In Driedger's text at c. 10, pp. 183 to 221, he explains the sometimes confusing presumptions against retrospective and retroactive operation of statutes. At p. 186 Driedger compares a retroactive and a retrospective statute as follows:

> " A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be operative with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in ***Phillips v. Eyre***. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment. Thus, for example, the Act to amend the Customs Tariff, S.C. 1969-70, c. 6, assented to on December 19, 1969, provided that the amendments

> to the Customs Tariff should be deemed to have come into force on June 4, 1969 (the date of the Budget Speech of the Minister of Finance) and to have applied to goods imported after that day; thus, a new and higher rate of duty was applied to past transactions as of a past time, namely, importations prior to the date the Act was enacted.
>
> A retrospective statute, on the other hand, changes the law only for the future, but it looks to the past and attaches new prejudicial consequences to a completed transaction. As Lord Goddard said in ***Re a Solicitor's Clerk*** an Act is retrospective if it
>
> > provided that anything done before the Act should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force. . . .
>
> A retrospective statute operates as of a past time in the sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future."

In addition to the presumption against retrospective operation, another presumption, that is, the vested rights presumption, should not be invoked unless the statute is inconclusive or ambiguous. Driedger says at p. 189:

> "The retrospective presumption is a ***prima facie*** presumption and applies unless it is rebutted. The vested rights presumption is not a ***prima facie*** one; it is but one factor that may be employed to ascertain intent in cases of doubt."

[See ***Public Utilities Board v. Nova Scotia Power Corp.*** (1976), 18 N.S.R. (2d) 692 at p. 709.]

The first step in the Driedger analysis of retrospectivity is to determine whether the facts that bring the statute into operation describe either a status or characteristic or an event. Driedger says that when the fact situation is a status or characteristic, the enactment is not being given retrospective effect when it is applied to persons or things that acquired the status or characteristic before the enactment, but where the fact situation is an event, then the enactment would be given retrospective effect if it applied so as to attach a new

duty, penalty or disability to an event that took place before the enactment (p. 192).

In this case, I agree with the trial judge's conclusion on this part of the analysis, that is, that the statute refers to events and not status or characteristics. For the statute to apply, there must have been an act or omission or an exercise of power.

The next step in the analysis accordingly to Driedger is a determination as to whether or not the statute is a beneficial statute or a prejudicial one. He says at p. 198:

> " But not all retrospective statutes attract the presumption; only those, to use the words of Sedgwick, that
>
> > create a new obligation, or impose a new duty or attach a new disability in respect to transactions or considerations already passed.
>
> In brief, the presumption applies only to prejudicial statutes; not beneficial ones."

On this point the trial judge said at para. 87:

> " One could strongly argue that s. 5 is prejudicial to the one found to be the oppressor but beneficial to the security holder, creditor, director or officer upon whom the oppression has been perpetrated. The legislation is intended to benefit someone who formerly may not have had a remedy and that is the interpretation which I prefer. In my opinion, it is wrong to place an interpretation on the legislation which would attract the presumption when it is only prejudicing someone who was doing acts which were always wrong but previously there was no remedy."

With respect, I disagree. To begin with, to classify the alleged oppressive acts as ones which were always wrong is inaccurate. In this case, the trial judge determined that the rights offerings, for example, were oppressive because they had the effect of diluting the interest of Harry in M.T.L. The rights offerings were, however, conducted in accordance with the law that existed at that time.

Angus v. Hart et al. (1988), 52 D.L.R. (4th) 193 (S.C.C.) dealt with the ability of a wife to sue her husband for negligence in the operation of a motor vehicle. The car accident happened on April 30, 1975. Two months later the new ***Family Law Reform Act*** of Ontario provided that each spouse had the right to sue the other in tort as if they were not married.

LaForest J., on behalf of the full court, decided that the new legislation could not be given retrospective effect and dismissed the action by the wife. At p. 199 he said:

> "A 'tort' is a legal construct and is not to be confused with a 'wrong' in the general sense. It only exists where the law says it exists, i.e., where the law provides a remedy. While an action may not entail legal liability and yet be 'wrong' in many senses, it is only wrong in the sense required by Lord Denning's argument if it is actionable."

And further at p. 201:

> "The rule against retrospective application should certainly have effect in a context such as the present one, where a party is deprived of a defence to an action by the operation of the new statute; see ***Foy v. Foy*** (1978), 88 D.L.R. (3d) 761 at p. 762, 20 O.R. (2d) 747 at pp. 747-8, 9 C.P.C. 141 (C.A.); ***per*** Jessup J.A. ***in obiter***. This is the whole point of the presumption. The law is leery of retrospective legislation to begin with; the legislature will not lightly be presumed to have intended a provision to have retrospective effect when the provision substantially affects the vested rights of a party.
>
> Galligan J. also maintained that James Angus had no 'right to injure' his wife and was, therefore, not being deprived of anything. The reality seems to me to be quite otherwise. A retroactive application of s. 7 would clearly deprive him of a complete defence to the action."

To apply LaForest's reasoning to the present case leads to the conclusion that the actions of Christopher were not "always wrong" but only became wrong when the ***Investors Protection Act*** was later enacted. Prior to the enactment of the legislation, he had a complete defence to any action by Harry in respect to those actions found by the trial judge to be oppressive.

I agree with the submission of appellants' counsel that when Driedger indicates the presumption against retrospective application does not apply to beneficial statutes that he must have been referring to statutes which only confer a benefit. That appears to be the opinion of Jeffrey G. MacIntosh in "The Retrospectivity of the Oppression Remedy" (1987-88) 13 Canadian Business Law Journal 219 where he says at p. 220:

> "The oppression provision creates a new duty (or duties) that did not exist before. The legal liability so created operates prejudicially rather than benevolently, and appears to be founded on an event or transaction rather than a status or character."

And further in a footnote to the above statement:

> "A statute which confers a benefit rather than a burden is said to operate benevolently. Because of the policy underlying the presumption against retrospectivity, the presumption does not operate in the case of such a statute. See *Construction of Statutes* [Driedger]. Although the oppression provision could be said to confer a benefit on the plaintiff, it seems clear that a benevolent statute is one which *only* confers a benefit."

To not apply the presumption to a statute which both confers a benefit to one person and prejudices another person would, in the opinion of Pierre-André Côté, be wrong as indicated in the following passage from "The Interpretation of Legislation in Canada", 2nd ed., p. 136:

> " In several cases, retroactivity has been implied by the remedial character of the new statute. But is the fact that a law is more generous or liberal sufficient for it to be considered retroactive? Since all statutes are deemed remedial, such a view could lead to a general rule of retroactivity. That would be killing the patient to cure the illness! Certainly a statute that is remedial for one person may be prejudicial to another."

Côté cites as authority for those sentiments ***Ishida et al. v. Itterman***, [1975] 2 W.W.R. 142 (B.C.S.C.) in which Fulton J. considered an amendment to the ***Workers' Compensation Act*** which barred actions based on negligence of a co-worker. When dealing with the question as to whether or not the legislation was beneficial or prejudicial, Fulton J. said at p. 146:

> "While these cases are illustrative of the method of construction, they do not, it seems to me, lay down any firm rule or guide as to when legislation is to be construed as being remedial as distinct from privative. Indeed, in the particular situation involved here, I am inclined to the view that the discussion is somewhat sterile, for I fail to see how legislation which creates an immunity from suit, as this does, and which can thus be said to confer a benefit or be remedial when looked at from one point of view, can do so without depriving persons, who would otherwise enjoy a legitimate right of action, of that right - namely, the right to sue for the consequences of tortious conduct. This legislation clearly does both - at least for the future. For every immunity granted or benefit conferred there must, by the very nature and effect of the legislation, be a corresponding loss or deprivation of right.
>
> Nor can the matter be determined by consideration of whether, as argued by counsel for the defendants, the legislation is remedial in the general sense of being designed for the benefit of the public or to cure a general evil. It must be presumed that all legislation is intended to be for the public good: but to hold that for this reason it should be given retrospective effect as extinguishing the right to maintain an action already commenced when it was passed would, surely, be to strike down the principle which the law has carefully and clearly asserted over the years in applying statutes which take away rights. The matter at issue must, it seems to me, be determined by the strict application of the test: does there appear from the words of this legislation, or its nature and effect, a clear intention to deprive plaintiffs such as these of their right - a right which had already accrued - to maintain their action or actions against defendants such as these? In my view, there does not."

I agree with those comments and also agree with the following opinion of Côté that the same principles apply to the creation of new rights of action (p. 164):

> " While judicial proceedings are only the means of asserting a right, the authorities almost unanimously hold that a statute eliminating a right of action is more than purely procedural. Such acts cannot apply to claims existing prior to commencement unless Parliament indicates the contrary. The same rule also governs statutes creating a right of action or eliminating a defence: they cannot apply to events prior to their enactment without having a retroactive effect. Elimination of a defence should not apply in order to revive a claim retroactively."

There is nothing in the plain language of the relevant provisions of the Third Schedule to the ***Companies Act*** to indicate that the Legislature

intended that the provisions be applied retrospectively. The presumption against retrospective application has not been rebutted. This is the same conclusion reached in two Quebec cases dealing with similar provisions in the ***Canada Business Corporations Act***: ***Re Sabex Internationale Ltee.*** (1979), 6 B.L.R. 65 (Q.S.C.) and ***Sparling v. Doyle et al.*** (1991), 43 Q.A.C. 16 (A.C.). The reasoning in those cases is preferred to the case relied on by the learned trial judge: ***Re Mason and Intercity Properties Limited*** (1987), 22 O.A.C. 161.

In conclusion, it was, in my view, an error in law for the trial judge to conclude that the oppression remedy applied in a retrospective manner to actions and events that took place prior to the enactment of the legislation. The appeal in S.H. No. 71881 should be allowed and the action dismissed. I would also dismiss the cross-appeal.

Second and Third Issues

As a result of the conclusion reached on the first issue, it is not necessary to deal with the trial judge's finding that Christopher's actions were oppressive. Although, as well, it is not necessary to determine whether there was an error in law in the valuation of the shares of M.T.L. in case there should be further litigation involving this company, I should mention that, in my opinion, there does appear to be a problem with the failure to reduce the value of the shares in light of the fact that a non-competition clause would not be included in the court ordered purchase. The fact that Harry is able to directly compete in the travel business against M.T.L. using a company name very similar to that of M.T.L. and occupy the premises formerly occupied by M.T.L. in my respectful opinion, should have resulted in a much lower ***en bloc*** valuation of the shares.

Fourth Issue - Costs

If the trial judge's decision had been upheld in the main case involving the oppression remedy, I would have not interfered with her findings on the costs issues. It was entirely within her discretion to treat the matter as one

proceeding and to make the findings she did regarding the amount involved. However, having now found that it is necessary to allow the appeal on the main issue of oppression, it is necessary to review the costs awards.

Although, as indicated, I had some difficulty with the trial judge's ***en bloc*** valuation of the shares and that valuation impacted upon the amount involved in determining the costs issue, I do not disagree with the order that $13,375.00 is an appropriate amount of costs for all actions. As a result of her decisions in the other three actions which were not appealed except on the issue of costs, Harry Mathers must pay Christopher Mathers and Mathers Travel the sum of $110,316.00 which will be offset by the amount of $12,430.00 owed to Harry Mathers. The difference of almost $98,000.00 in Christopher's favour, when added to the amount that could have been involved in the oppression remedy case and considering that the amount claimed on the wrongful dismissal was $175,000.00, leads me to conclude that the total amount involved of $300,000.00 used by the trial judge as the amount involved for all actions was not unreasonable. I would therefore use the same amount of costs on the trial, that is, $13,375.00, but order that it be payable by the respondents to the appellants. In addition, I would order that the appellants be entitled to 40% of that amount, ie., $5,350.00 as their costs on the appeal and the cross-appeal.

J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.