NOVA SCOTIA COURT OF APPEAL

Citation: Edwards v. Edwards Dockrill Horwich Inc., 2009 NSCA 37

Date: 20090416
Docket: CA 298463
Registry: Halifax

Between:

Michael L. Edwards, M. L. Edwards Inc. and Nican Incorporated

Appellants

v.

Edwards Dockrill Horwich Incorporated, Minnej (N.S.) Incorporated, Michael Dockrill and James N. Horwich, carrying on business under the firm name and style of "Dockrill Horwich Chartered Accountants", Michael Dockrill as principal trustee of the M. B. Dockrill Family Trust and James N. Horwich, as principal trustee of the J. N. Horwich Family Trust

Respondents

Judges: Roscoe, Hamilton and Fichaud, JJ.A.

Appeal Heard: March 31, 2009, in Halifax, Nova Scotia

Held: Appeal is allowed to a limited extent involving the HST input credit on the legal fees. In all other respects the appeal is dismissed per reasons for judgment of Roscoe, J.A.; Hamilton and Fichaud, JJ.A. concurring

Counsel: Michael S. Ryan, Q.C. for the appellants
W. Augustus Richardson, Q.C., for the respondents

Reasons for judgment:

[1] This is an appeal from an unreported decision of Justice David MacAdam dismissing an application of the appellants to amend a joint receivers' report. The receivers were previously appointed by the judge after lengthy litigation regarding the dissolution of an accountancy practice (EDHI) and its associated management company (Minnej) formerly carried on by the individual parties.

[2] For the purposes of this appeal, it is not necessary to review the extensive background of the dispute between the parties which is set out in the decisions of Justice MacAdam. The decision after the 15 day trial is reported as 2005 NSSC 308. A supplemental decision, after several post trial applications, settling the form of order and providing more specific directions to the receivers, is reported as 2006 NSSC 157. The receivers, both chartered accountants, were directed to manage the affairs of EDHI and Minnej, ascertain amounts to be paid by the respective parties to give effect to the decision of Justice MacAdam, collect amounts owing to the companies, pay the proper creditors of the companies and distribute the balance to the shareholders. The order after trial provided 25 additional clauses of specific directions to the receivers.

[3] The receivers filed their 26 page final report with Justice MacAdam on June 21, 2007. As a result of their analysis, the receivers reported that the individual parties were to pay EDHI / Minnej the following amounts: Mr. Edwards - $117,069.75, Mr. Dockrill - $35,114.09 and Mr. Horwich - $35,200.82. The receivers concluded that after payment into the corporate entities of the various amounts owed and payment of all accounts owed by the companies, there would be very little, if any, in surplus funds left to distribute to the shareholders. Mr. Edwards sought numerous clarifications from the receivers who provided further explanation of their conclusions in correspondence to Justice MacAdam.

[4] The appellants then brought an application heard by Justice MacAdam on May 1, 2008 seeking to amend the receivers' report. Specifically, the appellants sought changes, corrections or additions to the report regarding: the extent of the obligation of EDHI to reimburse Messrs. Dockrill and Horwich for legal fees and disbursements they paid to defend the action against EDHI by Mr. Edwards, the payment of directors fees, the calculation of amounts due to the shareholders, the taxation of the legal accounts payable by EDHI, an input HST tax credit on the legal fees, and the cash disbursements made by EDHI.

[5] Justice MacAdam found that there was no excess of power, fraud or lack of *bona fides* on behalf of the receivers and therefore the question was whether the receivers' report was reasonable. He also adopted the test established in **Crown Trust Co. v. Rosenberg** (1987), 39 D.L.R. (4th) 526 (Ont. High Court) where Anderson, J., stated at page 548:

> . . . The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.
>
> In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

and at page 550:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the courts will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

And further at page 551:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[6] Justice MacAdam found that the appellants did not meet the test of finding that the report was unreasonable or that there were exceptional circumstances

requiring the court to intervene and amend the receivers' report and he therefore dismissed the application. He indicated that if the appellants wanted further calculations to be done by the receivers, they would have to pay the receivers' fees.

[7] The grounds of appeal raised by the appellants are:

> .. that MacAdam, J. erred in fact and in law in dismissing the Appellants' application for an Order directing the Receivers to amend their Report dated June 21, 2007 as follows:
>
> (1) by determining that the Respondents, Michael Dockrill and James N. Horwich, and their respective corporations, shall not be entitled to any indemnification in respect of legal costs which they incurred in this proceeding including, for greater certainty, costs associated with preparation of the report of Susan MacMillan at Grant Thornton and their attendance on the trial of this proceeding;
>
> (2) by determining whether the Respondents have claimed and recovered as an input tax credit harmonized sales tax in the approximate amount of $40,000, being a component of the legal accounts rendered to them in this proceeding;
>
> (3) by performing the income calculation and allocation directed by paragraph 19 of the order granted by MacAdam, J. December 28, 2006 as amended January 15, 2007;
>
> (4) by pursuing taxation of all legal accounts rendered to or borne by the Respondents, Edwards Dockrill Horwich Incorporated and Minnej (N.S.) Incorporated in this proceeding;
>
> (5) by amending adjustment (d) to the report by reflecting $9,000 due to the Respondent Edwards Dockrill Horwich Incorporated as a reimbursement of harmonized sales tax funded by this Respondent for the benefit of the Respondent, Dockrill Horwich Chartered Accountants with 50% of such amount to be due and owing by each of the Respondents Michael Dockrill and James N. Horwich.

[8] The judge's order was discretionary and although interlocutory, it was a final disposition in respect to the issues involving the receivers' report. Therefore the appropriate standard of review here is whether there was an error of law resulting in an injustice. See: **Canada (Attorney General) v. Foundation Co. of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (C.A.); **Frank v. Purdy Estate**

(1995), 142 N.S.R. (2d) 50 (C.A.); and **Clarke v. Sherman** (2002), 205 N.S.R. (2d) 112 (C.A.).

[9] I am of the view that Justice MacAdam was correct to apply a reasonableness test. A similar approach was sanctioned by this court in **Re Hoque**, (1996), 148 N.S.R. (2d) 142 where Hallett, J.A. said:

> 34 ...The tests to be applied by a court reviewing the decision of a trustee appointed under the **Bankruptcy and Insolvency Act** or a receiver appointed by the court respecting the sale of an asset are substantially the same. Both a trustee under the **Bankruptcy and Insolvency Act** and a receiver appointed by the court must act in a reasonable and competent manner in the performance of their duties to the creditors. A difference between a trustee acting under the provisions of the **Bankruptcy and Insolvency Act** and a receiver appointed pursuant to a court Order, is that the trustee is governed by the **Act** and the receiver by the common law and the terms of the court Order. In addition, the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors who can bring their experience to bear on proposed dispositions of assets by the trustee. These differences do not alter the requirement that both trustees and receivers respectively act with integrity in a competent and reasonable manner.
>
> 35 When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the **Act** to make such decisions.

[10] Several of the appellants' arguments on appeal relate to the apportionment by the receivers of the legal fees between those payable by EDHI and the personal defendants. They submit that the apportionment was clearly unreasonable, that accounts for legal fees should have been subject to taxation and that the defendant should not have been reimbursed for the cost of the Grant Thornton expert's report. In addition, they submit that the receivers' failure to complete one of the tasks assigned to them by the order following the trial, with respect to the income calculation and allocation, should have been corrected by the chambers judge. Another complaint involves an adjustment for $9,000 for HST in respect to the transfer of office furnishings between the corporate parties.

[11] With respect to these issues, I am unable to agree with the appellants' submission that Justice MacAdam erred in the application of the test in his review of the receivers' report. Having been the trial judge, he was very knowledgeable of the underlying issues and the specific directions he gave to the receivers following the trial. It is not the role of this court to second-guess the chambers judge and substitute our opinion for his, especially in a situation such as this where the judge was so experienced with the context and complexities of the litigation. To resolve some of the appellants' complaints would require a review of the entire trial transcript which is not before us on this appeal. In light of the significant deference owed to the decision under appeal, the issues noted above do not require a reassessment by this court. In my view, the judge did not err in legal principle with respect to these issues. Neither is there an injustice resulting from the decision which requires intervention of this court regarding these adjustments.

[12] However, the ground of appeal regarding the $40,000 input tax credit for HST does raise concerns. With respect to this issue, the receivers failed to inquire into the question of whether the respondents may have received a windfall of approximately $40,000 by receiving an input tax credit. The windfall might have arisen because they paid the legal fees of EDHI of $309,324 including HST, and as a result of the receivers' apportionment of legal fees, they were being indemnified to the extent of $296,421 including HST of approximately $40,000, which they may not be required to remit to Revenue Canada. When asked by the appellants' counsel prior to filing their final report if they had considered that possibility, the receivers replied: "We did not take any steps to determine if the defendant's professional corporations recovered the HST."

[13] Although their application did not specifically refer to this issue it was squarely raised in the pre-application written submissions filed by the appellants' and fully addressed by the parties in oral argument in chambers. Unfortunately the chambers judge did not refer to this aspect of the application in his oral decision. The question becomes whether it was reasonable for the receivers not to make any inquiries as to whether the respondents received a windfall as a result of the HST input tax credit on the legal fees. Since the chambers judge did not answer that question, it is difficult for this court to defer to his reasoning. If in fact there has been a windfall, or the amount paid by EDHI to the respondents for legal fees was $40,000 more than ought to have been reimbursed because of the input tax credit, surely an injustice would arise as a result of the chambers judge's failure to address the issue.

[14] In my view the appellants have raised a question about the receivers' report that should have been addressed. In the circumstances, the failure of the receivers to inquire into whether the respondents were required to remit the HST on the reimbursed legal fees to Revenue Canada, and if not, whether the respondents have been overpaid by EDHI, and to report their answers on these points to the trial judge, was unreasonable. If the chambers judge had found that it was not necessary for the receivers to make inquiries, or that their failure to make inquiries was reasonable, this court may have been restrained by the applicable standard of review from interfering. However, since the chambers judge did not address the issue in his decision, the decision is not subject to the usual deference.

[15] I would allow the appeal to a limited extent involving the HST input credit on the legal fees. In all other respects the appeal should be dismissed. I would order that the matter of the HST input credit on legal fees be remitted to the receivers to inquire into whether a further adjustment to the amount payable by EDHI to the respondents should be made on account of the HST on the reimbursed legal fees. The receivers should report their findings to the parties and Justice MacAdam within a reasonable time, following which any party may make further application to the chambers judge for directions and further adjustments.

[16] Given the divided success, each party should bear their own costs of the appeal.

Roscoe, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.