IN THE SUPREME COURT OF NOVA SCOTIA

Citation: L&B Electric Ltd. v. Oickle, 2005 NSSC 225

Date: 2005 08 12
Docket: S.B.W. 195973
Registry: Bridgewater

BETWEEN:

L&B Electric Limited

Plaintiff

and

Larry B. Oickle and Valorie Oickle

Defendants

AND BETWEEN:

Larry B. Oickle

Plaintiff

and

L&B Electric Limited and Ross M. Bunnell

Defendants

DECISION ON COSTS

Judge: The Honourable Justice Gerald R. P. Moir

Submissions Received: 15 June 2005, 15 June 2005 and 22 June 2005

Counsel: Victor J. Goldberg and Martha Mann, Counsel for Larry B. Oickle and Valorie Oickle
Rubin Dexter and Martin C. Dumke, Counsel for L&B Electric Limited, Ross M. Bunnell and Rosemary Fraser

Moir, J.:

[1] Mr. Oickle brought interlocutory applications to join Rosemary Fraser as a defendant, to withdraw admissions made in the statement of defence, to claim shareholder oppression remedies and to obtain leave to bring a derivative action on behalf of L&B Electric Limited against Rosemary Fraser and Ross Bunnell. The first application was unsuccessful. The others were successful. Costs have to be determined.

[2] For his clients, Larry and Valorie Oickle, Mr. Goldberg proposes $2,000 payable in the cause. Mr. Dumke agrees that costs should follow the event in respect of the application for leave, but he says that his clients should have costs of the applications for amendments as well as costs attendant upon any duplication of efforts caused by the amendments.

[3] Normally, the party seeking an amendment bears the cost of any reasonable opposition: Civil Procedure Rules 15.10 and 63.03(2)(a). Normally, an unsuccessful application to join a new party, as with Rosemary Fraser, is followed by an award of costs against the unsuccessful party: Rule 63.03(1). However, the applications for which Mr. Oickle would normally bear costs were closely bound up with the application for leave to bring a derivative action.

[4] Regarding costs on the application for leave, Mr. Dumke refers me to the discussion at para. 18 of *Discovery Enterprises Inc.* v. *Ebco Industries Ltd.*, [1999] BCCA 749. That discussion refers to English authorities sounding a "note of caution" for applications by a derivative plaintiff for corporate funding. At the end of para. 18, Newbury, J.A. said "I conclude that a similar note of caution is clearly appropriate." He was dealing with party and party costs on a leave application. The Chambers judge had exercised his discretion by ordering costs to the applicant payable after trial. The Court of Appeal substituted an order reserving any award of costs until after the trial.

[5] Party and party costs were awarded to successful leave applicants in *Jennings* v. *Bernstein*, [2001] O.J. 831 (S.C.J.); in *Johnson* v. *Meger*, [1987] S.J. 668 (Q.B.) where an order for interim funding was refused; in *Henry* v. *609897 Saskatchewan Ltd.*, [2002] S.J. 708 (Q.B.); and in *Richardson Greenshields of Canada Limited* v. *Kalmacoff*, [1995] O.J. 941 (CA). Costs of the leave application were deferred in *Intercontinental Precious Metals Inc.* v. *Cooke* [1993] B.C.J. 1903 (SC); in *Primex Investments Ltd.* v. *Northwest Sports Enterprises Ltd.* [1995] B.C.J. 2262.

[6] I respectfully disagree with the cautionary note of the British Columbia Court of Appeal in *Discovery Enterprises Inc.* v. *Ebco Industries Limited*. An application for leave to bring a derivative action is a proceeding separate from the action itself. Success is achieved when the statutory prerequisites are established: notice has been given, the applicant is acting in good faith and the action appears to be in the interest of the company. In some cases, and *Discovery Enterprises Inc.* seems to be one of them, concerns are expressed respecting conduct of the parties. However, special circumstances aside, no reason appears for treating these leave applications differently as regards the principle that costs usually follow success. But for the other applications, I would order costs forthwith to Mr. Oickle.

[7] So, one side would normally be entitled to costs on some of the applications and the other side would normally be entitled to costs on another. One just and ordinary conclusion would be no costs. However, I think that the complaints and the evidence respecting all these applications are so closely bound up that the more just solution is to order costs in the event of the cause. The amount will be $2,000, as suggested by Mr. Goldberg.

[8] There remains the question of prejudice arising from the amendments compensable in costs. In some cases this question is reserved to the trial judge: eg. *Global Petroleum Corp* v. *Point Tupper Terminals Co.*, [1998] N.S.J. 195 (SC). I will follow that course in this case, as suggested by Mr. Dumke.

[9] Costs of the applications are fixed at $2,000 payable in the event of the causes. Furthermore, Mr. Bunnell may recover an amount to be determined by the trial judge for any costs of defending the second action that he would not have incurred if the shareholder oppression pleadings had been in place from the beginning and L&B Electric Limited may recover from Mr. Oickle an amount to be determined by the trial judge for any costs of prosecuting the first action that it would not have incurred if the amended defence had been in place from the beginning.

J.

Halifax, Nova Scotia
12 August 2005