SUPREME COURT OF NOVA SCOTIA

Citation: *Molhant Proost v. Ferncroft Equities Ltd.*, 2015 NSSC 231

Date: 20150730
Docket: Hfx No. 416894
Hfx No. 419766
Hfx No. 422061
Registry: Halifax

Between:

Michaela Amalie Elizabeth Zoé Mauricia Molhant Proost

Applicant

v.

Ferncroft Equities Limited, Giuseppe Costantino, Brunello Donati, Zeus Holding SA, and Dominic Anthony Max Dolph Claude Gregory Edward Bunford

Respondents

Between:

Dominic Anthony Bunford

Applicant

v.

Michaela Amalie Elizabeth Zoé Mauricia Molhant Proost, Marie-Claude Bunford, Ferncroft Equities Limited, and Coloony Ltd.

Respondents

Between:

Dominic Anthony Bunford

Applicant

v.

Michaela Amalie Elizabeth Zoé Mauricia Molhant Proost, Marie-Claude Bunford, Ferncroft Equities Limited, and Coloony Ltd.

Respondents

DECISION on COSTS

Judge: The Honourable Justice Gerald R. P. Moir

Heard: December 22, 2014

Counsel: John A. Keith QC and Jack Townsend, for Ms. Molhant Proost
Andrew Fraser and Scott Campbell, for Mr. Bunford
William Mahody QC, for Mde. Bunford

Moir J.:

Introduction

[1] The captioned proceedings arise from a dispute among family members, a mother and a daughter vs. a son and brother. A valuable estate in southeastern France lies at the heart of the dispute.

[2] The estate is owned by a company, which is owned by another company, which was owned one-third each by the three family members. Mother transferred her shares to daughter. The refusal or failure of directors to register the transfer triggered the first proceeding, the daughter's application to have the transfer recognized.

[3] The son started an application against his mother, his sister, and the two companies primarily for shareholder oppression remedies, the second proceeding. It was to be heard with the first, but it was discontinued.

[4] Despite the discontinuance, the son started an action against the same parties for the same remedies. The court converted the third proceeding back to an application. When it and the first proceeding neared discovery and hearing, the third proceeding was discontinued. Soon afterwards, the son withdrew his contest

of the first proceeding and represented to the court that there were no longer any factual disputes. Nevertheless, he sued again, this time in the Kingdom of Belgium.

[5] The proceedings became extraordinarily intricate and expensive for litigation that never got as far as discovery and that, when boiled down to the essence, involved mundane issues.

[6] I have to determine how much the son should pay to his mother and his sister in costs.

Facts

[7] *Rift in the Bunford Family*. Max Edouard Bunford and Marie-Claude Bunford had two children, Dominic Bunford and Amalie Molhant Proost. They were wealthy people with connections to both the United Kingdom and the Continent.

[8] In 1975, when the two children were very young, Max Bunford bought an estate called Domaine de Beaumont at Valbonne, in southeastern France. The family used Domaine de Beaumont for vacations, special occasions, and other family gatherings. It is worth a lot of money.

[9] Max Bunford became ill in the early eighties. He created the Beauford Trust. He incorporated Ferncroft Equities Limited and Coloony Ltd., and conveyed the Domaine de Beaumont to Coloony. Ferncroft and Coloony are Nova Scotia companies. Ferncroft owned Coloony. The trust owned Ferncroft.

[10] Max Bunford died in 1984. On his death the trust beneficiaries were Mde. Bunford, Ms. Molhant Proost, and Mr. Dominic Bunford. Eventually, they became equal shareholders of Ferncroft and the trust was dissolved.

[11] In the years following her husband's death, Mde. Bunford managed Domaine de Beaumont. Her son began to assume that role in the mid-1990s, and he took over other family responsibilities also.

[12] In 2007, Mde. Bunford established another trust. It is called the MCB Trust, and the trustee was a Swiss company, Zeus Holding SA. Her one-third of the shares in Ferncroft went into this trust. Mr. Bunford was the sole beneficiary. However, the trust was revocable.

[13] After MCB Trust was established, the relationship between Mr. Bunford and his mother and sister began to deteriorate.

[14] Mr. Bunford says that he spent much time and money keeping the Domaine de Beaumont in good shape. Mde. Bunford and Ms. Molhant Proost do not dispute that a significant amount of money is owed to Mr. Bunford on this account.

[15] Mr. Bunford says his mother and sister contributed little to the estate. He complains that in recent times, his sister and her family took up residence there, preventing any opportunity to rent it out.

[16] Mr. Bunford says he took responsibility for the estate almost exclusively for the past decade, and he pleads "Ms. Proost and Madame Bunford knew and approved of Mr. Bunford taking on such a role, and wanted him to do so, for the good of the Domaine." However, Ms. Molhant Proost and Mde. Bunford have their own complaints.

[17] Mde. Bunford says it became increasingly apparent after the MCB Trust was established that her son was acting on his own and for his own interests. Without consultation, he added expensive additions to the estate involving rare birds and costly cages with water sprinklers and rare plants with a costly greenhouse. Without consultation, he set about to cultivate an olive grove and establish an olive oil business.

[18] Ms. Molhant Proost complains that the MCB Trust was created without her knowledge, and its existence was kept from her. She says that her brother kept her in the dark when he managed the Domaine de Beaumont. He said nothing to her about the plan he developed for an olive farm and olive oil business, which included a plan to lease the estate to a company controlled by Mr. Bunford and a partner. Ms. Molhant Proost also complains that Mr. Bunford got the directors of Ferncroft and Coloony changed without her assent.

[19] *Rift Concludes in Rupture*. An incident that had nothing to do with the Domaine de Beaumont brought the deterioration of this family relationship to a final rupture.

[20] Through a company, the family owned a luxury apartment in Monaco. They decided to sell it. An agreement of purchase and sale was signed. Mde. Bunford and Ms. Molhant Proost gave proxies to Mr. Bunford for an efficient closing by the company.

[21] Mr. Bunford used the proxies to appoint himself as a director, and to open a new bank account. At the same time, he increased his personal line of credit, telling the bank that his mother would guarantee the debt and put up her share of the sale proceeds as security.

[22] The sale closed in late September, 2012 and Mr. Bunford took Mde. Bunford to the bank early in October. She did not expect to be presented with a draft guarantee. The bank refused to release funds until Mde. Bunford signed a guarantee of her son's personal line of credit, which exceeded three million euros. Mr. Bunford had not discussed this with her. Yet, the required documents had been prepared and awaited Mde. Bunford's signature.

[23] Mde. Bunford says that she lost trust in her son. She was extremely distressed.

[24] Mde. Bunford did not walk out of the bank. She signed the guarantee despite her concerns. Indeed, the bank took her share of the funds, one-half of the total, as security for her guarantee.

[25] Three months later, on January 5, 2013, Mde. Bunford revoked the MCB Trust. Ms. Molhant Proost sent the revocation to the MCB trustee. A month after the revocation, Mde. Bunford signed an instrument transferring the principal subject of the former trust, her third of the shares in Ferncroft, to Ms. Molhant Proost. Mr. Bunford complains, "The purported Deed of Revocation and purported share transfer were done without my knowledge or consent."

[26] No document expressly justifies Mr. Bunford's use of the word "purported". Nothing expressly shows that his mother required his consent to revoke the trust or transfer her shares. He claims that the various trust instruments and agreements founded his expectation as a shareholder of Ferncroft that "my mother would not transfer her shares in Ferncroft to my sister without seeking and obtaining my agreement to such a transfer". This expectation would have been at the heart of his case for shareholder oppression.

[27] If the applications had gone to hearing, if Mr. Bunford had not conceded, he would have had some explaining to do.

- How can he say that his expectations as a shareholder of Ferncroft were fueled by the distribution of shares under the Beauford Trust when he participated long ago in the dissolution of the trust and the consequential direct, equal, and autonomous ownership of the shares?

- Or that his expectations were fueled by the old trust, when he participated in the formation of the MCB Trust which, while unrevoked, would have given him a greater distribution than under the Beauford Trust?

- How did he hold the stated expectation in light of his mother's and his sister's expectations or, if their expectations were the same as his, why did he not simply see to incorporation in one of the agreements?

- If his mother needed his consent to dispose of her shares, why was the MCB Trust revocable?

[28] That is not to say that events surrounding the revocation and share transfer clarify what was going on. No explanation is offered for the long period between the purported triggering event and the revocation. Also, correspondence by Mde. Bunford in May of 2013 is perplexing.

[29] By letter dated May 3, 2013, Mde. Bunford advised that the revocation and transfer were not in accord with her desires and should be treated as void. (Too late, it seems to me.) By letters dated May 9, 2013 and June 3, 2013, Mde. Bunford reaffirmed the revocation and the transfer.

[30] Mde. Bunford explained these letters in an affidavit she swore on August 5, 2013. Mr. Bunford did not provide evidence to contradict what his mother says. She says her son hounded her for five days to sign the May 3rd letter. "I just wanted Dominic to stop and did not think he would until I signed his papers." At

first opportunity, she delivered to her Parisian lawyer a letter contradicting her May 3rd letter.

[31] This explanation is perplexing because Mde. Bunford's mental health and susceptibility to influence were put in issue for a time, and the evidence suggests a fully competent and autonomous woman in her early seventies. There were better ways to put an end to badgering than to sign a false document that added confusion to a gathering controversy.

Proceedings

[32] *Recognizing the Share Transfer*. On February 6, 2013, Mde. Bunford requested the directors of Ferncroft register the transfer of her shares and issue a new share certificate to Ms. Molhant Proost. The directors did not do so. So, Ms. Molhant Proost applied in chambers for a declaration that she is the owner of her mother's former shares and for a mandatory injunction requiring registration of the share transfer in the company records and insurance of a new certificate. The notice was filed in June, to be heard in August.

[33] Mr. Bunford moved to convert the application from one in chambers to an application in court. He also filed a notice of contest. His grounds are summarized as follows:

- Mde. Bunford "countermanded" the revocation and the transfer.
- She was subject to undue influence.
- She lacked the mental capacity to revoke a trust or transfer shares.
- The shareholder oppression provisions of the *Companies Act* afford Mr. Bunford remedies against the revocation and transfer.

[34] Ms. Molhant Proost filed affidavits sworn by herself, Mde. Bunford, and Mde. Bunford's physician in advance of the August, 2013 hearing date. However, Mr. Bunford took the case to Appearance Chambers to seek an adjournment, a date for his conversion motion, and other relief.

[35] Justice Coady set the conversion motion for a day in late September, he imposed various deadlines, and he set the hearing of Ms. Molhant Proost's application for two days in March, 2014 whether or not it would be converted.

[36] Justice Scanlan converted the application in chambers to an application in court. He also set deadlines for disclosure and discoveries, he approved discovery of Ms. Molhant Proost, Mr. Bunford, and two directors, and he provided for experts on Belgian law, which applied to the gift of shares.

[37] Further directions were given by Justice Bourgeois in October, 2013. The second proceeding had been commenced. She adjourned the two-day hearing for March, 2014 to five days in May and June, 2014. She set required deadlines.

[38] For reasons to be discussed in connection with the second and third proceedings, Justice Wood heard the parties in January, 2014 and he provided new directions. He adjourned the hearing to five days in October, 2014.

[39] The parties got into a dispute about what further documents were required to be produced. Ms. Molhant Proost made a motion to compel further productions. The parties settled most of the issues, and Justice Bourgeois ruled on two categories of documents. She ordered Mr. Bunford to make disclosure. She set May 30, 2014 as the deadline.

[40] In April of 2014, Mr. Bunford obtained an order permitting him to amend his notice of contest. He withdrew his allegation that Mde. Bunford had lacked the mental capacity to revoke a trust or transfer shares. On May 30, 2014, Mr. Bunford discontinued the third proceeding. It was a reassertion of the second proceeding, which he had discontinued in November, 2013. Thus, only Ms. Molhant Proost's application for a declaration about her ownership of the shares from her mother and for an injunction against Ferncroft remained outstanding.

[41] Mr. Bunford failed to produce relevant documents contrary to the orders of Justices Wood and Bourgeois. Later in June of 2014, I found this to be an abuse of process, struck Mr. Bunford's notice of contest, but gave him thirty days to make production and seek reinstatement of his notice of contest.

[42] Early in July, the directors of Ferncroft decided to register the share transfer. They defended their decision "to wait until they could reassure themselves", but now appeared reassured "that the transfer was being made willingly and with full awareness of the consequences". Ms. Molhant Proost intended to press on with her claim for a declaration that she is the sole owner of the shares transferred by her mother.

[43] With that as the sole remaining issue, Mr. Bunford advised the court he had agreed to withdraw his notice of contest. Through counsel, he represented to the court "there are no longer any factual controversies in this proceeding".

[44] *Mr. Bunford's Suits*. In September of 2013, Mr. Bunford started a shareholder oppression application against Ms. Molhant Proost, Mde. Bunford, Ferncroft, and Coloony. He also claimed for a constructive trust. The main object of this proceeding was for Mr. Bunford to acquire half the shares that Mde. Bunford had transferred to Ms. Molhant Proost.

[45] By November, Mr. Bunford was facing the deadline for him to file affidavits proving his case and the parties were scheduling motions, including one to consolidate Mr. Bunford's application with Ms. Molhant Proost's so the evidence on both could be presented and the issues determined the following spring. Mr. Bunford discontinued his application.

[46] The discontinuance brought into operation Rule 9.06 requiring Mr. Bunford to pay costs. It did not give rise to *res judicata* or issue estoppel.

[47] Just before the discontinuance, Mr. Bunford started proceedings in the Belgium Court of First Instance at Brussels. He sought an order quashing the gift of shares by his mother to his sister on the basis of an alleged requirement under Belgian law for valuation of a gift formalized in Belgium.

[48] The same day he discontinued his Nova Scotia application, Mr. Bunford started another proceeding here, this time an action, premised on essentially the same grounds as in his discontinued application, shareholder oppression and constructive trust. He sought essentially the same remedies. Shortly afterward, he signified a desire for a jury trial.

[49] Shareholder oppression remedies are statutory. By the statute, they are available by application not action: *Companies Act*, Third Schedule, s. 5(1). Our

Rules show respect for a legislative choice for applications or actions: Rule 6.01. Our control of our own processes is such that the court can order the trial of a statutory application, and it can give procedural directions under which the application will more resemble an action. But, these things involve hearing all parties and a decision by the court, not one party acting on his own.

[50] Constructive trust is a common law remedy. It is not a cause. The remedy is available, if cause is established, on application or by action. In this case, Mr. Bunford chose the application. Rule 6 – Choosing Between Action and Application defines his procedural rights once that choice is made. Discontinuing his application and starting a new action for the same remedies frustrates Rule 6. But for that frustration, the parties would have been heard and the decision would have been made by the court, not Mr. Bunford acting on his own.

[51] The effects of this tactic could have been more serious had the court not intervened. We expect an application "to be heard in months, rather than years": Rule 6.02(5)(b). Ms. Molhant Proost's straightforward application could have been heard with her brother's, and the whole dispute dealt with, in months. The tactic would have caused lengthy delay of the Molhant Proost application or the risk of contradictory findings and remedies. The situation was made the worse

when Mr. Bunford decided he had a right, not only to a shareholder oppression trial, but to a shareholder oppression jury trial.

[52] It is not surprising, therefore, that on January 10, 2014, Justice Wood converted Mr. Bunford's action into an application and gave directions for it to be heard at the same time as Ms. Molhant Proost's application.

[53] Another effect of Mr. Bunford's tactic was that he escaped the deadline by which he was to put up his evidence in support of his allegation of oppression and his claim to a constructive trust. In light of later events, I find this effect to have been one of the intended objects of Mr. Bunford's tactic.

[54] As discussed in relation to Ms. Molhant Proost's proceeding for recognition of the share transfer, Justice Wood had to adjourn the hearings to five days in October of 2014 after they had already been adjourned to March of 2014, then May and June of 2014. Justice Wood directed new deadlines for Mr. Bunford's affidavits.

[55] As discussed already, Mr. Bunford discontinued his application on May 30, 2014, he failed to produce required documents, and he avoided discovery by withdrawing his notice of contest. Mr. Bunford represented to this court "there are no longer any factual controversies in this proceeding".

[56] I was due to hear motions on the Molhant Proost application in August, 2014. The representation that there were no longer any factual controversies was made in a letter to me on July 25, 2014. Three days before, Mr. Bunford started a Paulian action against Mde. Bunford and Ms. Molhant Proost in the Belgium Court of First Instance at Brussels.

[57] In that proceeding, Mr. Bunford claims to be a creditor of his mother on account of supposed misappropriations in her administration of his father's estate over a period of some thirty years. He claims that his mother has gradually made herself insolvent, "especially the gift of the shares". "In this case, as a result of the gift in issue, [Mde. Bunford] impoverished herself in an amount equal to the value of the shares …". "[O]nly their … would have enabled her to fulfill her financial obligations …". Relief claimed includes "The gift in issue must be declared unenforceable as against the applicant so that the applicant may assert his rights in relation to the portions that are the subject of the said gift."

[58] Mr. Bunford's duplicity can be summed up this way: he admits to a declaration by this court that his sister is the sole owner of the shares transferred to her by their mother, while at the very same time he pleads to the Belgium court that the transfer must be declared unenforceable. These things he does just before all of the issues were to be tried and determined.

[59] Mr. Bunford's assertions of fact in his latest Belgium proceeding would have been relevant to his shareholder oppression claims in Nova Scotia. Yet not one word was ever pleaded here on the subject. Further, we are well familiar with the Paulian action because Canada has a federal insolvency regime that preserves certain provincial remedies including those of the civilian province, Québec.

[60] So, Mr. Bunford did not have to abandon his Nova Scotia proceedings and sue in Belgium. As. Ms. Molhant Proost's counsel observes, twice Mr. Bunford attorned to this court then purported to go elsewhere. I find he did so because he wants to litigate against his mother and sister without facing the consequences of disclosure obligations, discovery, giving evidence, and getting a determination.

[61] *Interlocutory and Preparatory Expenses*. Despite the fact that Mr. Bunford did not prosecute his claims in Nova Scotia to anything approaching maturity, his defence of the Molhant Proost proceeding and prosecution of his own proceedings caused numerous interlocutory disputes and much unnecessary work. Ms. Molhant Proost spent in excess of $400,000. Mde. Bunford, $80,000. In the end, Ms. Molhant Proost obtained the determination she needed without having received disclosure as ordered, discovery as scheduled, or Mr. Bunford's evidence.

Submissions

[62] Mde. Bunford and Ms. Molhant Proost submit for solicitor and client costs, and Ms. Molhant Proost claims indemnity for any amounts she is required to pay for the defence of Ferncroft and Coloony. Their grounds are summarized this way by Ms. Molhant Proost:

> (a) Mr. Bunford made unfounded and ultimately unproven allegations of fraud and other serious forms of misconduct against Ms. Molhant Proost;
>
> (b) Mr. Bunford has abused the Court's processes in these proceedings and his actions have been described as malicious and duplicitous;
>
> (c) Mr. Bunford has engaged in forum shopping; and
>
> (d) Mr. Bunford unreasonably failed to engage in meaningful settlement discussions with Ms. Molhant Proost, despite receiving an overture from her that (if pursued) would have resulted in a much more beneficial result to Mr. Bunford from these proceedings.

[63] Mr. Bunford suggests lump sum costs of $75,000 plus reasonable disbursements to Ms. Molhant Proost and $5,000 plus disbursements to Mde. Bunford. He also says that neither have provided enough information about counsel's accounts for the court to establish an amount for solicitor and client costs, if the court is to tax them.

[64] The central point in Mr. Bunford's argument against solicitor and client costs is that he followed a defensible approach to litigation under which a proceeding is started on a theoretical foundation and is adjusted, even abandoned,

as evidence emerges and likely fact-finding becomes more precisely apparent. In oral submissions, he contrasted this with an approach to litigation under which much more is ascertained or assumed in the beginning and a blueprint is formulated. In written submissions, he described his approach this way:

> Pursuing alternative procedural options, asserting a vigorous defence, and charging the procedural vehicle for the dispute in light of the evolving nature and appreciation of the litigation – this is all part and parcel of acceptable, even normal conduct, in complex and hard fought civil litigation.

And, "Mr. Bunford properly sought to adapt his litigation strategy in response to an evolving, complicated and bitter family dispute …".

[65] Mr. Bunford takes credit for "saving the time, expense, and further strain upon the family that would have been occasioned by a contested proceeding". This is so because he "ultimately discontinued his allegations and withdrew his contest".

Principles of Solicitor and Client Costs

[66] The discretion to order a full indemnity, and the extraordinary circumstances required to exercise the discretion, are recognized in Rule 77 – Costs. The scope provision includes "solicitor and client costs, which may be awarded in exceptional circumstances to compensate a party fully for the expenses of litigation": Rule

77.01(1)(b). Thus, full indemnity is exceptional to partial but substantial indemnity through party and party costs.

[67] What circumstances give rise to the exception? This question is left to jurisprudence by Rule 77.03(2): "A judge may order a party to pay solicitor and client costs to another party in exceptional circumstances recognized by law."

[68] Mr. Bunford's counsel referred me to *Armoyan v. Armoyan*, 2013 NSCA 136, which reaffirmed, at para. 11, that there has to be "litigation misconduct … that would support an award of solicitor and client costs." The required circumstances are described not only as "exceptional", but as "rare". Counsel also surveyed Nova Scotia cases in which a full indemnity has been allowed or refused, and compared the circumstances in those cases with those in this one.

[69] Justice Hood reviewed authorities on solicitor and client costs at paras. 479 to 486 of *Smith's Field Manor Development Ltd. v. Campbell*, 2001 NSSC 44. The award is aimed at "reprehensible, scandalous or outrageous conduct". See the discussion at paras. 479 to 481.

[70] The reprehensible behavior may be in the making of allegations, the conduct of one's case or defence, or both. Reprehensible allegations of fraud, perjury, breach of fiduciary duty, and other kinds of dishonesty may lead to a full

indemnity (paras. 484 to 486). Reprehensible conduct of one's case or defence may consist in "high-handed and unilateral actions" (para. 491). Abuse of process is now expressly recognized as a ground for a full indemnity: Rule 88.02(1)(d).

[71] An abuse of process is "reprehensible" when it is "deserving of censure or rebuke" (paras. 482 and 483). However, reprehensible allegations or abuses of process do not always justify a full indemnity: *Brown v. Metropolitan Authority*, [1996] N.S.J. 146 (C.A.) at paras. 94 to 98.

[72] When does a reprehensible allegation or abuse of process justify a full indemnity? I think the discussion at paras. 94 to 98 of *Brown* tells us that there is no simple demarcation.

[73] Justice Pugsley recognized the discretion at para. 94. At para. 95 he noted, "This court has refused to award costs as between solicitor and client even though the conduct of the party in question has been found to be reprehensible." The Metropolitan Authority's conduct was "reprehensible" in the sense of "deserving censure or rebuke": paras. 96 and 97. Yet, Justice Pugsley concluded, at para. 98:

> There is, however, a difference between reprehensible conduct as demonstrated here, and those rare and exceptional circumstances which attract the sanction of costs as between solicitor and client. In my opinion, the Authority's actions do not cross that line, and accordingly, I would not award costs as between solicitor and client.

Disposition

[74] *Introduction*. I am satisfied that some of Mr. Bunford's allegations against Ms. Molhant Proost were reprehensible. I find that he abused the processes of this court in numerous ways and his abuses are reprehensible. Primarily because of the abuses of process, I say that Mr. Bunford crossed the line into rare and exceptional circumstances that justify his being ordered to fully indemnify Mde. Bunford and Ms. Molhant Proost for their legal expenses.

[75] As noted under "Submissions", Ms. Molhant Proost put forward four grounds for solicitor and client costs. I do not agree that "Mr. Bunford has engaged in forum shopping" and I make no finding on whether he "unreasonably failed to engage in meaningful settlement discussions".

[76] In my opinion, attitudes towards settlement have no place in any discussion of solicitor and client costs. There was some controversy about whether evidence on this subject should be excluded for privilege. I exclude it simply because it is irrelevant. The questions of reprehensible allegations or conduct and crossing the line into the rare and exceptional circumstances have no connection with settlement discussions in this case.

[77] I will explain my determination for full indemnities first in relation to reprehensible allegations and second in relation to what is in this case the compelling subject, abuses of process.

[78] *Unfounded Allegations*. Some of the pleadings for shareholder oppression merely cast Mde. Bunford and Ms. Molhant Proost in a poor light. These are not so personally damaging as the kinds of allegations that have generally founded a full indemnity for costs. They do not, for example, so directly attack honesty as does an allegation of fraud.

[79] However, the allegation that Ms. Molhant Proost used undue influence to get her mother's shares in Ferncroft is an allegation of dishonesty. It may be understandable in a family dispute motivated by a son's belief that his mother did him wrong by preferring his sister. However, it is the kind of allegation that invites the full indemnity.

[80] The allegation that Mde. Bunford lacked the mental capacity to revoke a trust or transfer shares was an attack on her autonomy as well as her competence. While it is not a kind of allegation that usually attracts the full indemnity and while it might be understandable in a family dispute in which a son fails to accept his

mother's reasons for preferring his sister, it did amplify the personal attack on Ms. Molhant Proost's honesty.

[81] All of these allegations were unfounded. They were withdrawn by amendment, late in the day, of the competency allegations in the notice of contest, the eventual withdrawal of the contest itself, and both discontinuances, which gave way to the Paulian action including allegations of fraud of a kind but not allegations of undue influence. Also, the evidence that was presented showed Mde. Bunford to be a free-willed and autonomous person who was not under the undue influence of her daughter.

[82] In my assessment, these unfounded allegations are reprehensible, but, on their own, they do not cross the line into the rare and exceptional circumstances that justify full indemnification. They are of the vitriol we often see in family disputes. However, when the vitriolic allegations are assessed in light of Mr. Bunford's conduct in reference to the Nova Scotia proceedings, a sinister intent appears.

[83] *Conduct of the Proceedings*. I reject Mr. Bunford's assertion that his withdrawals and discontinuances saved "time, expense, and further strain upon the

family". This is untenable because he immediately started the Paulian action in Belgium.

[84] I reject Mr. Bunford's assertion that he "properly sought to adapt his litigation strategy in response to an evolving, complicated and bitter family dispute". First, the dispute was not complicated. Mde. Bunford transferred shares to her daughter and not to her son. His defences and causes were mundane, and they turned out to be unfounded.

[85] Secondly, this was not a case in which one side was prevented from making an early assessment because the other controlled undisclosed evidence. Within months of the share transfer, Mr. Bunford had in his hands the direct evidence presented by Ms. Molhant Proost proving her case for an injunction and a declaration, which included her evidence, her mother's evidence, and the physician's evidence on undue influence and mental capacity. Further, he had opportunities for discovery on these subjects and shareholder oppression long before the discontinuance and withdrawal.

[86] Thirdly, there is no evidence that Mr. Bunford's allegations were made after careful assessment of facts known to him. The allegations were exploratory at best. I do not like what my mother did with her Ferncroft shares. Rather than

request my mother's reasons, let us explore whether my sister exercised undue influence and whether my mother suffers from mental illness. And, let us claim shareholder oppression on facts entirely within my knowledge.

[87] As I said on another occasion, Mr. Bunford's conduct from the beginning in early 2013 to the end is understood in light of his duplicity of July 25, 2014. It is a serious matter to withdraw a notice of contest, discontinue an application, and represent to the court that there are no factual controversies remaining in a proceeding. It is a serious abuse at the same time to sue in another country for the same remedy disclaimed by the withdrawal, the discontinuance, and the representation.

[88] Through this abuse, the sinister intent appears. Mr. Bunford does not want a judicial determination. He wants to use the court's processes to harass his mother and his sister.

[89] In my assessment, Mr. Bunford's behaviour in the Fall of 2013, discontinuing his first application and instituting an action on the same grounds for the same relief, was abusive all on its own. Rule 9 – Discontinuance does not qualify Rule 6 - Choosing Between Action and Application.

[90] A party has a choice under Rule 6.01 "to start an action or an application as the person is satisfied would be appropriate". Opting for an application is for "a flexible and speedy alternative to an action": Rule 5.01(4). Hearing dates are set and deadlines are imposed under Rule 5.09, such that parties are expected to invest preparatory work much earlier than in an action.

[91] If Rule 9 allowed the applicant to discontinue an application and replace it by starting an action, it would undermine the flexibility, speed, and upfront investments in an application. Rule 9 does not allow that. It has to be read in context, and Rule 6 is part of that context.

[92] As I said, Rule 6.01 gives a person starting litigation a choice between actions and applications. Once that choice is made, conversion is for a judge, not the party who made the choice: Rule 6.02(1). Note that the burden of convincing a judge that an application should be converted to an action is not only upon a respondent who moves for conversion. The burden is upon "[a] party who proposes that a claim be determined by an action, rather than an application". The burden is upon the applicant, if the applicant proposes an action instead of his application.

[93] The party who chooses an application must obtain an order to convert it to an action. Behaving as Mr. Bunford did is an abuse, not only because he acted contrary to Rule 6, but also because the purported conversion stymies the speed and flexibility, and wastes the upfront investments, in the route he chose.

[94] Those harms resulted from Mr. Bunford's unilateral conversion. He discontinued his application and started an action instead, when the deadline was upon him for filing the affidavits that would have constituted the direct evidence in his case-in-chief. In light of the antics of July, 2013, I find that this was the main purpose behind the unauthorized conversion. His unilateral conversion was reversed by Justice Wood, but the parties suffered delayed deadlines and delayed dates for the main hearings.

[95] The withdrawal of allegations about Mde. Bunford's mental capacity in April and the discontinuance of Mr. Bunford's proceedings at the end of May did not relieve Mr. Bunford of the obligation to produce numerous documents by May 30, 2014. The order for disclosure applied also in Ms. Molhant Proost's proceeding, and documents remained relevant to the remaining issues raised by the notice of contest. The failure to produce the documents was abusive on its own.

[96] Our Rules expressly recognize the necessity of disclosure to justice. "Making full disclosure of relevant documents, electronic, and other things is presumed to be necessary for justice in a proceeding": Rule 14.08(1). As of May 30, 2014, Mr. Bunford had been in contravention of his disclosure obligations under Rules 15.06 and 16.03 for over a year. The abuse is compounded by Mr. Bunford's having ignored the orders ruling on relevancy and setting deadlines for production.

[97] To allow significant numbers of relevant documents to go undisclosed in an application well more than a year after it was contested is a serious abuse, unless some compelling excuse is demonstrated. This undermines the purpose of the application procedure. To commit that abuse, especially in contravention of an order, invites sanction.

[98] I find the discontinuance of Mr. Bunford's application and the withdrawal of his contest were tactics, as was his representation to the court that there were no longer any factual disputes in the proceedings. They were tactics to avoid disclosure and discovery, to escape imminent determination, and to pursue delay by purporting to seek the same remedy in Belgium. They were tactics in service of a strategy of using the courts for harassment not justice.

[99] Mr. Bunford argues that Mde. Bunford should not be indemnified for her expenses in relation to the Molhant Proost application because Mde. Bunford was not a party. First, a person should closely monitor a proceeding in which her mental capacity and autonomy is put in issue. Second, Mr. Bunford made her a party to related proceedings that were to be heard together with the Molhant Proost application.

[100] Having put Ms. Molhant Proost and Mde. Bunford through pointless contests at great expense, Mr. Bunford's tactics take us into the realm of rare and exceptional circumstances in which reprehensible conduct demands full indemnity.

Amounts

[101] Mr. Bunford complains that the evidence of actual costs and disbursements comes in summaries. A party charged with paying costs on a solicitor and client basis should receive the same protection as does the client. Therefore, I shall order that Mr. Bunford pay Ms. Molhant Proost's expense for fees and disbursements related to the captioned proceedings, and that he pay the same of Mde. Bunford, on a solicitor and client basis to be taxed by an adjudicator.

Expenses of Ferncroft and Coloony

[102] Ms. Molhant Proost guaranteed the liability of these companies to their lawyers for work done on account of the share transfer, and the Nova Scotia proceedings. She seeks an order requiring Mr. Bunford to indemnify her. She relies on *Commerce Capital Trust Co. v. Berk*, [1989] O.J. 1763 (C.A.).

[103] An earlier decision of the same panel, reported in [1989] O.J. 614 (C.A.), allowed the trust company's appeal and found Berk and other solicitors liable for the trust company's losses on a loan after the foreclosure of a commercial building. The solicitors had acted for both sides when the purchase of the building was financed by the trust company.

[104] The solicitors were aware that the building had been assigned a value under an agreement that was much less than the value expressed in an appraisal the purchaser had submitted to the trust company. They were also aware that various transactions relevant to assessing credit risk were not arm's-length. They did not disclose the information to the trust company.

[105] After that decision was released, the parties made submissions on costs to be paid to former parties against whom the trust company made claims that had been discontinued. At para. 2 of the second decision, the court said:

> In our opinion, it was necessary and proper for the appellant to join the other parties to whom costs have been or are required to be paid because it was only through pre-trial procedures, including discoveries and, in one case, at trial itself, that the appellant was able to establish the facts upon which its claim ultimately was based. The appellant, therefore, is entitled to be reimbursed for costs paid or required to be paid to these parties.

[106] The decisions do not tell us who the former parties were or exactly what their entitlement to awards of cost was. However, it is clear that they were not related to the trust company and that the trust company's liability arose from having joined them, not having guaranteed their expenses. In these ways, the situation in *Commerce Capital Trust Co.* differs fundamentally from the present claim.

[107] The primary purpose of costs was expressed this way by the last Costs and Fees Committee: "… the recovery of costs should represent a substantial contribution towards the parties' reasonable expenses in presenting or defending the proceeding …": quoted at para. 16 of *Landymore v. Hardy*, [1992] N.S.J. 79 (S.C.). Costs are intended to compensate, usually partially compensate, a party's expenses "in presenting or defending the proceeding".

[108] It would be unusual, therefore, to order costs that compensate a person who guaranteed a party's legal expenses. The law of costs would settle the liabilities of the parties as parties to the litigation and not as parties to a private contract.

[109] In the circumstances of this case, the law of costs could settle the companies' claims against Mr. Bunford or Ms. Molhant Proost, or their claims against the companies. The guarantee does not afford Ms. Molhant Proost a platform from which to claim compensation for her contingent liability. Her compensation is governed by the laws of suretyship, such as recourse against the primary debtors, and by company law, including the internal bylaws of Ferncroft and Coloony.

Conclusion

[110] I will order that Mr. Bunford pay Ms. Molhant Proost's costs and Mde. Bunford's costs on a solicitor and client basis in all three proceedings to be taxed by an adjudicator. I dismiss Ms. Molhant Proost's claim for an indemnity against amounts paid by Ferncroft or Coloony to their lawyers in connection with the three proceedings.

Moir J.