

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Norman v. Clear Picture Corporation, 2005 NSSC 289

**Date:** 20051026

**Docket:** S.H. 234634

**Registry:** Halifax

**Between:**

Terrence James Norman, (Norman Group Members), Sean Alexander Norman, Patricia Erin Norman, Kathleen Margaret Norman, Christopher James Norman and Dr. George R. Marshall

Plaintiffs

v.

Clear Picture Corporation Limited, Paul Koch, Kwan Hoh Jee, Peter Forton, Robert Stark, Keri Smith, ACF Equity Atlantic, Inc., Bank of Montreal Capital Corporation and Telecom Applications Research Alliance Inc.

Defendants

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** July 12, 2005 (in Chambers), at Halifax, Nova Scotia

**Written Decision:** October 26, 2005

**Counsel:** Brian F. Bailey, for the Plaintiffs  
John A. Keith, for the Defendants

**Coughlan, J.:** (Orally)

- [1] The defendants apply pursuant to Civil Procedure Rule 13.01 for an order dismissing the plaintiffs' action.
- [2] I have read the material filed, including the affidavits of Terrence James Norman, Tim C. Gillis and Lynda MacKenzie; read the pre-hearing briefs of counsel and the cases to which I was referred; heard the evidence of Ronald Emery Smith and submissions of counsel.
- [3] The facts are as follows:
- [4] NBD Communications Incorporated was incorporated under the *Companies Act*, R.S.N.S. 1989, c. 81 on May 17, 1995. The company's name was changed to Clear Picture Corporation Limited (Clear Picture). The plaintiffs are shareholders of Clear Picture.
- [5] In September, 2000, the defendants, ACF Equity Atlantic, Inc. (ACF) and Bank of Montreal Capital Corporation (BMOCC), entered into a subscription agreement with Clear Picture and its shareholders, whereby ACF and BMOCC each invested \$750,000 in the company and each received 75,000 Class A preferred shares, convertible into common shares at \$1.80 per share. All shareholders at the time accepted the agreement.
- [6] On November 30, 2001, ACF and BMOCC agreed to a further investment of \$250,000 each in Clear Picture, and each received 25,000 Class B preference shares with a par value of \$10.00 per share. The Class B preference shares contained the same conversion rates and anti-dilution protection as the Class A preference shares, except the Class B conversion rate was \$1.17 instead of \$1.80.
- [7] At the same time, the Telecom Applications Research Alliance Inc. (TARA) entered into an agreement with Clear Picture whereby TARA released unpaid royalties it was owed by Clear Picture in exchange for 25,000 Class C preference shares in Clear Picture, each share having a par value of \$1.00. The Class C preference shares contained conversion rights and an anti-dilution clause similar to the Class A preference shares. The Class C shares were convertible into common shares at a conversion rate of \$1.17 for each share. Each shareholder agreed to and accepted the terms and conditions attached to the Class A, B and C preferences shares and signed a special Shareholders' Resolution authorizing the shares. In addition, the shareholders on November 30, 2001 signed an amended and restated Shareholders' Agreement.
- [8] The amended and restated Shareholders' Agreement made effective November 30, 2001 provided the Norman Group Members, if they owned

cumulatively at least 10% of the securities in Clear Picture, are entitled to nominate one member of the Board of Directors of Clear Picture. Securities are defined in the Agreement as follows:

“Securities” means shares in the capital of the Company or securities capable of conversion into or carrying a right to purchase or subscribe for any shares in the capital of the Company.

- [9] At all material times the Norman Group Members were entitled to nominate one member of the Board of Directors. The amended and restated Shareholders’ Agreement also provided for the replacement of a member of the Board of Directors as follows:

**Replacement**

The party entitled under Section 4.2 to nominate a Director shall be entitled, as set out under this Article, to require the other Shareholders to vote in favour of the removal of any Director nominated by them and to require the other Shareholders to vote in favour of a successor nominee nominated by it at any time and from time to time. Any party who wishes to replace a Director may have such Director replaced at any duly constituted meeting of the shareholders of the Company or shall forward a written resolution to that effect, signed by that Shareholder, as the case may be, to the other Shareholders not less than forty-eight (48) hours before a meeting of Directors at which such replacement Director is expected to attend. Upon receipt of such written resolution, the other Shareholders shall execute the resolution and promptly return it to the party initiating the same who, upon receipt thereof, shall forward the signed resolution to the Company for filing in the corporate minute book.

- [10] Ronald Smith was the Norman Group Members’ nominee on the Board of Directors. Mr. Smith became a director on September 5, 2001.
- [11] In 2002, Clear Picture was in a precarious financial position and in need of additional funding. The company was looking for refinancing. Clear Picture submitted its business plan to Nova Scotia Business Incorporated (NSBI) in an attempt to attract investment or secure a loan. NSBI required additional participation from at least one (ideally two) out-of-province investors. The company was unable to attract any additional investors and talks were discontinued in August, 2002. In May, 2002, Clear Picture has submitted its business plan to the Business Development Bank of Canada (BDBC) to secure investment. BDBC declined and discussions were discontinued as of August, 2002.

- [12] ACF was a shareholder in Clear Picture and had representatives on the Clear Picture Board of Directors. By offer in writing dated July 9, 2002, open for acceptance until July 12, 2002, ACF indicated an offer to loan Clear Picture the sum of \$500,000 secured by a convertible subordinated debenture as follows:

Convertible Subordinated Debenture (“Debenture”), payable on demand at the earlier of, three years from closing, a liquidity event, or an event of default or interest and principal convertible at \$0.20 per share at the earlier of the above events or the Investor’s option. Events of default will include, but may not be limited to, failure to make interest payments, material adverse change, cessation of the business, or bankruptcy of the Company.

The Debenture will bear interest of 10% per annum, payable quarterly, but cumulative until such time that quarterly EBITDA is greater than three times the interest payment due. Accumulated interest up to the point that the current interest can be paid will be paid at maturity.

The Debenture will be subordinate to all bank operating loans and term debt, and will be secured.

ACF will receive 1,000,000 warrants to purchase common stock of the company on a one for one basis at \$0.20. The warrants shall have a five-year life.

- [13] Ronald Smith testified it was his opinion the refinancing arrangement was highly dilutive. Mr. Smith was not aware if other offers were available. He did not believe Terrence Norman had knowledge of ACF’s proposal. Mr. Smith told Mr. Norman he could not continue to represent the Norman Group Members on the Board of Directors. Mr. Smith told Mr. Norman he should see the ACF offer.
- [14] On July 3, 2002, Terrence Norman sent a faxed memo to Tim Gillis, Chief Financial Officer of Clear Picture, informing him Mr. Smith resigned from the Board of Directors that day and enclosed a Resolution to be signed by the majority shareholders pursuant to s. 4.7 of the Shareholders’ Agreement, replacing Mr. Smith with Mr. Norman on the Board of the Directors, effective immediately. On July 4, 2002, Mr. Gillis responded setting out a course of action for Mr. Norman to follow and stated in part:

On advise from legal counsel, I have been advised to recommend that you follow provision 4.7 of the Shareholders’ Agreement whereby you distribute the resolution and return a copy to Clear Picture Corporation. Once the Company

receives a completed signed copy of the Resolution you will be notified of any Directors meetings to be held 48 hours thereafter. The first order of business at such meeting would be to accept the resignation of Ron Smith and your appointment to the Board. For your information, our counsel did express some minor concerns on the wording of the resolution but nothing that causes it to be ineffectual.

- [15] Mr. Gillis also stated he was prohibited from sending the investment offer from ACF Equity Atlantic, Inc. to Mr. Norman due to a confidentiality clause contained in the offer, adding once Mr. Norman was a director of Clear Picture he would be provided a copy. Mr. Norman circulated a Resolution appointing himself as Mr. Smith's replacement on the Board of Directors. For example, on July 13, 2001 Denis Connor, Chief Executive Officer of Clear Picture, acknowledged receipt of the Resolution on July 7, 2001 and informed Mr. Norman he had signed the Resolution on Thursday, July 11, 2001. Meanwhile, on July 11, 2001, Clear Picture accepted the financing offer made by ACF.
- [16] In March, 2001, Terrence Norman was terminated as an officer and director of Clear Picture. The settlement agreement provided Mr. Norman was entitled to tender for sale shares of Clear Picture on the following terms:

**Company Shares** - Mr. Norman shall be entitled to tender for sale on a pro-rata basis to the other shareholders of Clear Picture, on the basis of the right of first refusal provisions detailed in Article 8 of the Shareholders Agreement, shares having a fair market value totalling \$50,000.00 in each year for the next three years. For the purposes of this paragraph, a year shall be the period beginning April 1st of one year and ending March 31st the next year, with the first year being April 1, 2001, to March 31, 2002. The number of shares included in the \$50,000.00 figure shall be based on fair market value at the time of the tender of the shares, and the fair market value shall be set by the last arm's length transaction involving the purchase/sale of a minimum of 100,000 common shares in Clear Picture. If the other shareholders have not, within thirty days, purchased the tendered shares, Clear Picture will repurchase the shares, subject to the liquidity provisions of the *Companies Act* (Nova Scotia).

- [17] Mr. Norman tendered shares pursuant to the agreement on December 24, 2001 and on March 14, 2003. Clear Picture refused to purchase the shares on the basis it did not satisfy the liquidity provisions of the *Companies Act*. Tim Gillis, as Chief Financial Officer of Clear Picture, had confirmed as of October 24, 2001, when the Company purchased 742 common shares of the Company, that:

- (a) the Company would have been able to pay its liabilities as they became due; and
- (b) the realizable value of the Company's assets would have been greater than the aggregate of its liabilities and paid up capital of all classes.

[18] Civil Procedure Rule 13.01 provides:

**Application for a summary judgment**

**13.01.** After the close of pleadings, any party may apply to the court for judgment on the ground that:

- (a) there is no arguable issue to be tried with respect to the claim or any part thereof;
- (b) there is no arguable issue to be tried with respect to the defence or any part thereof; or
- (c) the only arguable issue to be tried is as to the amount of any damages claimed.

[19] The test for summary judgment was set out by Iacobucci and Bastarache, JJ. in giving the Court's judgment in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at p. 434 as follows:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[20] Have the defendants shown there is no genuine issue of material fact requiring trial?

[21] The Norman Group Members held more than 10% of the securities in Clear Picture. They were entitled to have a nominee on the Board of Directors. Ronald Smith, the Norman Group's nominee, thought the financing offer of ACF was highly dilutive. Mr. Norman, who was not aware of the details of the offer, immediately took steps to replace Mr. Smith on the Board. It may well be that it was a reasonable expectation of the Norman Group Members

- they would have a nominee on the Board of Directors. I did not have before me the Minutes of the Directors' Meeting authorizing acceptance of the ACF financing offer.
- [22] Which directors were involved in the decision? Was there delay in replacing Mr. Smith on the Board? Were there financing options other than the ACF offer? For example, BDBC and NSBI had not finished discussions concerning refinancing until August of 2002. What was the role of Peter Forton - resigning from the Board, making the financing offer for ACF and then rejoining the Board? Was the new conversion rate of \$0.20 per share an unfair advantage to ACF and BMOCC, and oppressive of the interests of the plaintiffs? At the relevant time did Clear Picture meet the liquidity provisions of the *Companies Act*?
- [23] After reviewing the material, I am left with too many questions. I find there are genuine issues of material fact requiring trial. The applicants have not satisfied the first part of the test for summary judgment.
- [24] The defendant, Keri Smith, became a director of Clear Picture on May 21, 2003. The relevant time period for this action is July to November, 2002. Ms. Smith, having joined the Board on May 21, 2003, there could be no cause of action against her, and the action against her is dismissed.
- [25] Vipon Ghai was a director of Clear Picture from September 18, 2000 to April 18, 2002, outside the relevant time period, and the action against Vipon Ghai is dismissed.
- [26] Peter Forton was a director of Clear Picture until May 22, 2002. He then signed the financing offer on behalf of ACF dated July 9, 2002. Subsequently, he rejoined the Board. In view of the outstanding issues of fact to be determined, I am not prepared to grant an order dismissing the action against Mr. Forton.
- [27] The application for dismissal of the claims against the defendants, Keri Smith and Vipon Ghai, is allowed. The application as it relates to the other claims of the plaintiffs is dismissed.
- [28] If the parties are unable to agree, I will hear them on the issue of costs.

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**Coughlan, J.**