IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Hardman v. Alexander , 2004 NSSC 274

Date: 20040930
Docket: SH 150389
Registry: Halifax

Between:

W.B. Hardman, The Hardman Group Limited and Bryman Enterprises Limited and D.S. Precious Maxillofacial Surgery Inc.

Plaintiffs
(Respondents)

- and -

Christopher Alexander, Susan Pratt and Herman's Point Developments Limited

Defendants
(Applicants)

DECISION ON APPORTIONMENT OF LEGAL FEES

Revised Decision: The neutral citation number has been changed from 2005 NSSC 32 to 2004 NSSC 274. The decision date has been changed from 20050208 to 20040930. The oral decision was given on September 30, 2004.

Judge: The Honourable Justice Suzanne M. Hood

Heard: September 27, 2004 *(Oral decision September 30, 2004)*

Written Decision: February 8 , 2005

Counsel: **John Merrick, Q.C.** and **Dufferin Harper** for the plaintiffs (respondents)
William L. Ryan, Q.C. for the defendants (applicants)

By the Court: (Orally)

[1] This is an application brought to determine the apportionment of legal fees of Green Parish and Stewart McKelvey Stirling Scales as between Christopher Alexander and Herman's Point Development Limited.

[2] There was a twenty-five day trial in 2002 between April and October. My decision was rendered in March 2003 and, after a further hearing, my decision on costs and damages was rendered in July 2003. Both decisions set out the facts of the dispute which are relevant as background to this application.

[3] Affidavits were filed in this application by both Christopher Alexander and William Hardman and both were cross-examined on those affidavits.

[4] Christopher Alexander's affidavit contained the accounts which are the subject of the application. William Hardman's affidavit contained various correspondence and there were other pieces of correspondence tendered as exhibits. There is little case law on this particular point.

[5] The issue is the apportionment of the accounts of Green Parish and Stewart McKelvey Stirling Scales rendered between September 1998 and the present, a period of six years.

[6] Herman's Point Development Limited agreed to have the matter decided by the court. No position was taken by the company. Therefore, I treat this as an application by Christopher Alexander against the other shareholders. Susan Pratt wrote to say she supports the position of Christopher Alexander and I heard nothing from the other shareholder, the company owned by David Precious.

[7] Christopher Alexander retained counsel as a minority shareholder, first Green Parish and, subsequently, Stewart McKelvey Stirling Scales. Green Parish and Stewart McKelvey Stirling Scales had no conflict at the outset. This was dealt with previously and now it is not alleged that there was any conflict at that time. Christopher Alexander was successful at trial on most issues and was awarded damages and costs. The damages awarded to Herman's Point (from the Hardman Group Limited) were $67,000.00 for breach of contract. Christopher Alexander and Susan Pratt obtained damages of $11,000.00 each from William Hardman, for breach of fiduciary duty, and they each received punitive damages of $50,000.00

for a total of $61,000.00. They were awarded nothing for their claim for aggravated damages.

[8] On the costs application, Christopher Alexander said he had incurred $355,000.00 in costs for the trial and Susan Pratt said she had incurred $219,000.00. The costs award was $125,000.00 to Christopher Alexander and $90,000.00 to Susan Pratt and it was apportioned between Hardman Group and William Hardman in proportion to the awards. The costs award to Christopher Alexander was $35,000.00 greater than that to Susan Pratt because, in that decision, I recognized that his counsel also represented Herman's Point and was successful on the breach of contract argument.

[9] Now Christopher Alexander seeks reimbursement of a portion of the legal fees from Herman's Point Development Limited, of which companies controlled by William Hardman and David Precious are majority shareholders.

[10] There is little case law on point. Mr. Ryan cited *Meredith & Company v. Poloway Clmilar and Poloway* (1989), 40 B.C.L.R. (2d) 281; 1989 Carswell 198 (B.C.C.A.). I do not find it to be very helpful. In that case, each of the defendants, the company and the individual shareholders, signed an agreement to retain the law firm. When the matter was concluded, only one person was sued by the law firm for the fees. The court found he should pay only his proportionate share. That is factually very different from this case. That was not a shareholders dispute and all of the shareholders and the company were sued by a third party and all had signed a retainer agreement.

[11] Herman's Point did not retain either Alan Parish or Mr. Ryan on the lawsuit. The action was a minority shareholder's action and the other shareholders had their own counsel. Mr. Hardman and the Hardman Group had the same counsel and, of course, there was no conflict between their positions. David Precious, the other shareholder, was not a party after the trial got under way.

[12] The action was a derivative action brought under s. 41 (g) of the *Judicature Act* , R.S., c. 240 which I will not quote. There is also authority for such an action under the *Companies Act*, Third Schedule, s. 4 (3) (d). Again, I am not going to quote that section. No objection was taken at that time to there being no court approval as is required by the *Companies Act*.

[13] Mr. Merrick says the interests of Christopher Alexander and Herman's Point now diverge. He says because Christopher Alexander is seeking reimbursement of the fees from the company in which he is the president that is a conflict of interest.

[14] The bills from both Green Parish and Stewart McKelvey Stirling Scales were directed to Christopher Alexander: the latter to December 2003. Then they were jointly addressed to him and to Herman's Point at Mr. Alexander's home address. On cross-examination, Mr. Alexander said he thought the bills with only his name on them were just an accounting error and he did nothing about it.

[15] As I said, the decision in the matter was rendered on March 13, 2003 and the costs and damages decision in July 2003. Mr. Merrick says the responsibility for fees lies *prima facie* with Christopher Alexander and I agree. Therefore, I can only order the company to indemnify or reimburse Mr. Alexander if I am satisfied that it is reasonable that it should be done. I agree with Mr. Merrick that the onus is on Mr. Alexander to satisfy me I should so exercise my discretion and, because it was not resolved in advance, any uncertainty should be resolved against Christopher Alexander. The test in the Third Schedule to the *Companies Act* is reasonableness. Therefore, I can only make such a decision if it is reasonable and advances the interests of the company

[16] Mr. Merrick says the fees should be looked at in three categories: fees for the trial, fees for post-trial litigation and fees for other legal services. I agree that it is a reasonable approach.

[17] Since all the bills up to the end of 2003 were addressed to Christopher Alexander, *prima facie* the responsibility is his. They were addressed to him as the client and there was no retainer of Stewart McKelvey Stirling Scales by Herman's Point to act as corporate counsel. Therefore, I must be satisfied it is reasonable for Herman's Point to reimburse or indemnify Mr. Alexander.

[18] The first category is fees for the trial and the costs and damages hearing. Mr. Merrick submits that these are the responsibility solely of Mr. Alexander and I agree. I awarded costs to Christopher Alexander and not to Herman's Point. No costs were awarded to Herman's Point at all. In my decision, I recognized the premium as a result of his counsel acting for Herman's Point and obtaining a judgment for that company against the Hardman Group. In the costs hearing, Christopher Alexander's position was that the legal fees were his.

[19] The majority of legal services for the trial were for the benefit of Christopher Alexander. Four actions were consolidated. The action for specific performance of the agreement to sell the shares was a personal action not a corporate action. That action was dropped at the start of the trial but legal fees had been incurred before that.

[20] The second action was an action with respect to breach of fiduciary duties by Mr. Hardman and the Hardman Group. There were a number of breaches found with respect to Christopher Alexander and one with respect to Herman's Point. Damages were awarded to Christopher Alexander to be paid by William Hardman for the breach of fiduciary duty and nothing to Herman's Point for this. Also, Christopher Alexander had punitive damages awarded in his favour. Herman's Point, however, was awarded $67,000.00 from the Hardman Group for breach of contract.

[21] The third action was the action with respect to the Stockton Maxwell shares. That was a personal action not a corporate action; however, it did entail only a little trial time, as I said in my decision. The result of that action was against Christopher Alexander and Susan Pratt.

[22] The fourth action was an action by Herman's Point Developments for an injunction and other remedies. I think it was agreed by all that the same issues were raised in that action as in S.H. 150389. The result was that Herman's Point was awarded damages for breach of contract.

[23] The issues at trial, as reflected in the decision, in addition to the issue with respect to the Stockton/Maxwell shares which I have mentioned, were: firstly, the issue of the presidency, i.e. a dispute between Christopher Alexander and William Hardman personally; secondly, breach of fiduciary duties owed by William Hardman to Herman's Point, Christopher Alexander and Susan Pratt. Almost all the breaches found were against the individuals and only one against the company; and, thirdly, the breach of the management agreement which was between Herman's Point and the Hardman Group: that was a corporate issue. Then there was the issue of punitive damages and those were personal claims brought by Christopher Alexander and Susan Pratt and damages were awarded to them.

[24] I conclude that the legal fees were incurred by Christopher Alexander and it is not reasonable to apportion them to Herman's Point Developments Ltd. Although Herman's Point achieved success at trial (a $67,000.00 award for breach of contract), as I have said, this was recognized in the Costs Decision when I awarded additional costs in light of this fact. Christopher Alexander therefore received $125,000.00 in costs. If he now obtained seventy-five percent of the total costs at trial, as he has proposed, he would pay only $80,000.00 toward the costs of trial and receive $45,000.00 more than that. In my view, that is not a reasonable result.

[25] The second category of fees to which Mr. Merrick referred was the litigation after trial and the costs hearing. There were two types: the work on the appeals and the work on the issue of the fifth director. Work on the appeal brought by Christopher Alexander was brought personally with respect to the Stockton/Maxwell shares and, on the same basis as at trial, on the appeal brought by the other side on which Mr. Alexander filed a Notice of Contention. The issue with respect to the fifth director, that was a director's or shareholder's issue, not a corporate issue. In my view, it is Christopher Alexander's responsibility as it was not a company issue.

[26] I conclude that I have authority to apportion but it is not reasonable in this case to apportion those fees because there were no interests of the company at stake.

[27] The third category of fees which we discussed were those fees rendered after the decision in March 2003 for actions taken by Christopher Alexander as president of the company flowing from the decision that he had been president since the meeting in July 1998.

[28] It is clear that there was no authorization from Herman's Point for Stewart McKelvey to act as corporate counsel. The things that were done were done at the request of Christopher Alexander as president. Nor were there any reporting letters to the company from Stewart McKelvey.

[29] Mr. Merrick submits that Christopher Alexander can be in no better position on this than Stewart McKelvey if it sued for its fees. There is no contractual relationship and no authorization.

[30] Therefore, I can only order an indemnification or reimbursement of Christopher Alexander if it is reasonable to do so. Mr. Merrick says that the list of things which have been accomplished since March 2003 (which are contained in Exhibit 6) have been done through the efforts of counsel for both so called "camps". It is clear that some of the work which was done is work corporate counsel would normally do, for example, banking resolutions and matters of that nature. There should be some cost to Herman's Point for this and not to Mr. Alexander as president. The total fees for this work were $133,000.00 but the work was not broken down into two separate files : one for Christopher Alexander and one for the corporate work. They are still very much in the aftermath of the litigation. Relations are still acrimonious.

[31] The Ethics Handbook of the Nova Scotia Barristers' Society provides in Rule 6:

> A lawyer has a duty not to
>
> a) advise or represent both sides in a dispute; or
>
> b) Act or continue to act in a matter where there is or is likely to be a conflicting interest, unless the lawyer has the informed consent of each client or prospective client for whom the lawyer proposes to act.

[32] *In Mottershead v. Burdwood Bay Settlement Co.*, [1999] B.C.J. No. 2554 (B.C.S.C.), Justice Allan says, at p. 3 of the Quick Law version of that decision:

> ... The duty of the solicitor for the Company is to advise all of the directors so that they may make an informed decision as a board with respect to the best interests of the Company.
>
> In shareholder litigation, there exists a potential conflict of interest between the personal interests of the individual parties both plaintiffs and defendants as shareholders and their fiduciary duties as directors of the Company. A solicitor acting both for the majority shareholders and for the Company on the sole basis of the instructions of that same majority personifies that conflict.
>
> Moreover, a solicitor owes a duty of confidentiality to his or her client and information received from the majority shareholders in their capacity as personal defendants would be privileged. Surely a conflict arises when that solicitor receives privileged information in his capacity as solicitor for the majority shareholder defendants and declines to advise the board of directors which

> includes the minority shareholders of that information notwithstanding his role as corporate solicitor and counsel for the defendant Company.

[33] In my view, the same holds true where the litigation has ended (possibly), although appeals are pending, but the counsel for one of the parties to the litigation purports to have his counsel act for the company.

[34] In *Edwards-MacLeod Properties Ltd. v. 1037661 Ontario Ltd*., [2001] O.J. No. 145 (Ont. S.C.J.), Justice Zelinski referred to the leading Supreme Court of Canada case on conflict of interest, *MacDonald Estate and Martin* (1996), 48 C.P.C. (2d) 113 (S.C.C.) and quoted from passages in it. He also referred to the decision of *Alles v. Maurice*, [1992] O.J. No. 331 (Ont. C.J. - Gen'l Div.), in which the headnote says:

> ... At issue in one instance was the conflict between the law firm's duty to the defendant shareholders in the action and its duty to the company.

[35] In that case, Justice Austin said, at p. 4 of the Quick Law version:

> In my view, there is considerable wisdom in the view that, to the extent corporations such as TASCO and Marlba actually need representation in this proceeding, it should be chosen by persons chosen independently of the litigating individuals. As matters stand, there is at least a suggestion of conduct unfairly prejudicial to or unfairly disregarding the interests of the plaintiff.

[36] Mr. Merrick submits that nothing should be paid for the legal fees of the company because of the conflict of Stewart McKelvey acting for Christopher Alexander as a minority shareholder and also acting for the company on issues where the interests of Christopher Alexander and Herman's Point diverge. In my view, it is clear that it is in the interests of Herman's Point to limit its liability for legal costs. In that respect, the position of William Hardman on this application is more in the interests of Herman's Point than that of Christopher Alexander. The company president wants his legal fees paid in part by the company. In my view, there was clearly a conflict of interest once this application was initiated. Although it was brought in both the names of Christopher Alexander and the company, clearly, different results are in the interests of each.

[37] One questions how Mr. Ryan, as solicitor for Christopher Alexander, can give him confidential advice and obtain confidential information when, as counsel

for Herman's Point, that information must be disclosed. Or, said another way, how can he take instructions from his client, as company president, and not disclose it to the others.

[38] Mr. Merrick, in his brief, gives other examples. To me, the clearest is the issue of the conflict raised at the April 23, 2004 meeting. Mr. Alexander voted and Mr. Sutherland could not give independent legal advice on that issue because his firm represents Mr. Alexander.

[39] Another example of a conflict raised by Mr. Merrick was the issue about the restrictive covenants. This issue has a greater effect on Mr. Hardman and Dr. Precious because of the location of their existing cottages. There was an opinion, before the transfer of the presidency, about the enforceability of the restrictive covenants. It is in the interests of the company to enforce them. A subsequent opinion was obtained to the same effect but not acted upon and it was not provided to the directors who had raised that issue. Furthermore, there was an intimation in the facts that the lots that David Precious was interested in could be sold and subdivided, which was contrary to the legal opinion which was given.

[40] A third example was the so-called "script". Two of the directors had a script for the April 2003 meeting which was not provided to the others, even when requested. The cost should not be that of the company. Stewart McKelvey, acting for Christopher Alexander and not for the company, provided it. It was in conflict with the company's interests.

[41] Another example was the efforts of William Hardman and David Precious to have meetings. There was a requisition for an Annual General Meeting by two of the directors, Mr. Hardman and Dr. Precious. Mr. Sutherland advised them that Christopher Alexander as president would not call a meeting. There was then a requisition for a Special General Meeting. It was followed by a notice of a Directors' Meeting with an agenda item involving a lawsuit against the Hardman Group, William Hardman and the Bank of Nova Scotia.

[42] As well, I have regard to the flavour of the correspondence between counsel. Although there were corporate resolutions that were being put forward, Stewart McKelvey was still acting on the instructions of Christopher Alexander. In one piece of correspondence Mr. Ryan referred to Christopher Alexander as his client: that was on page 3 of the February 4, 2004 letter. The letters from Stewart

McKelvey do not sound like letters from corporate counsel dispassionately giving legal advice to a corporate client. An example is the April 22, 2004 letter. It is clear to me that the parties were still acting adversarily and that Mr. Ryan was acting in that capacity for Mr. Alexander. There was still an adversarial atmosphere. The two "camps" still existed.

[43] It is clear that the animosity went both ways but, on the side of William Hardman's counsel, Mr. Merrick and Mr. Harper were not purporting to act for the company as well as the shareholders and directors who are involved in the dispute.

[44] I agree with Mr. Ryan that, if the company had independent counsel, it would not likely have been less costly because of the animosity. The result would have been that there would have been a fourth lawyer involved, one for Mr. Hardman, one for Mr. Alexander, one for Susan Pratt and a fourth lawyer for the company. This does not undo the conflict. It is not an answer either to say that William Hardman and David Precious had independent counsel. They are not asking Herman's Point to pay part of their costs.

[45] It is clear to me that Stewart McKelvey, the firm that acted for Christopher Alexander during the trial, could not act for the company in corporate matters. I conclude that this conflict began with the release of the decision in March 2003. The interests of Christopher Alexander and the company diverge. This application makes that conflict of interest apparent. Mr. Alexander's interest is to limit his expenditures and to have Herman's Point's costs maximized. The matter of the conflict and the effect on the fees as between Mr. Alexander and Stewart McKelvey is not before me and I do not therefore address it.

[46] The application is dismissed.

Hood, J.