SUPREME COURT OF NOVA SCOTIA

Citation: Edwards v. Edwards Dockrill Horwich Inc., 2010 NSSC 287

Date: 20100720
Docket: Hfx. 175050
Registry: Halifax

Between:

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

Plaintiffs

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

Defendants

Judge:	The Honourable Justice A. David MacAdam
Heard:	May 25, 2010, in Halifax, Nova Scotia
Final Written Submissions:	May 17, 2010
Written Decision:	July 20, 2010
Counsel:	Michael S. Ryan, Q.C. and Paul Robert Arkin, for the plaintiffs W. Augustus Richardson, Q.C., for the defendants

By the Court:

[1] The plaintiffs and defendants each seek party-and-party costs. They disagree as to which side had greater success at trial and under the ensuing receivership. The trial decision is found at 2005 NSSC 308, 238 N.S.R. (2d) 104.

[2] Rule 63.03(1) of the *Civil Procedure Rules* (1972) provides that "[u]nless the court otherwise orders, the costs of a proceeding, or of any issue of fact or law therein, shall follow the event." Some of the plaintiffs' claims were allowed, some were dismissed and some were allowed in part. Meanwhile, the defendants' counterclaim succeeded. The defendants maintain that they were more successful in the final result and are thus entitled to costs of between $150,000 and $175,000 from the plaintiffs. The plaintiffs take the contrary view, seeking costs of between $275,000 and $310,000 from the individual defendants, though not from the corporate defendants.

Background:

[3] The plaintiff Mr. Edwards was an employee, director and officer of the defendant accounting firm Edwards Dockrill Horwich (EDHI). He was dismissed in June 2001 and EDHI ceased operation about two months later. After September 1, 2001 EDHI mainly concerned itself with attempting to collect outstanding accounts receivable and dealing with liabilities and legal proceedings. Edwards brought an action against EDHI, seeking to recover consulting fees and damages for oppression and breach of fiduciary duty. He also advanced claims against the individual defendants respecting his entitlement to accounts receivable, the value of his EDHI shares and the possible dissolution of the company.

[4] The plaintiffs' action was allowed in part. The conduct of the individual defendants failed to meet the standards required of persons in their positions. While the evidence did not establish oppression, it did establish that the individual defendants acted in a manner unfairly prejudicial to Mr. Edwards, or which unfairly disregarded his interests as a shareholder. They had breached their fiduciary duties as officers and directors. The claim for interference with economic relations was not established.

Success at Trial:

[5] The defendants submit that, of eight claims advanced by the plaintiffs, four were dismissed, three were allowed and one (appointment of receivers) was not contested. The dismissed claim for professional services was "one of the central issues in the plaintiffs' claim," the defendants say, and others were found to be without merit. As for the claims that were allowed, the defendants say:

> a. one (the unreasonable settlement of the Survival accounts) resulted in an award of only $8,187.50 – and was balanced by the fact that Edwards was ordered to repay to EDHI the $16,667.00 he had received but not delivered to EDHI in respect of the same settlement;
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> b. one (the one in respect of breach of fiduciary duty) was balanced by the fact that the plaintiffs in fact ***failed*** to establish the larger claim that they had set out to prove – oppressive conduct; and
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> c. one (the one with respect to the purchase of wip [work in progress] at the wrong discount) was balanced by the fact that:
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> i. The defendants Dockrill and Horwich were at least open and candid about the fact that
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> (1) they (or rather their partnership) had purchased the wip,
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> (2) the discount they applied, and
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> (3) did pay for the wip,
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> ii. as opposed to the plaintiffs, who
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> (1) did not reveal that they had taken EDHI wip and billed it as their own, and
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> (2) were ordered to pay a total pf $42.447.00 plus HST in respect of such wip they had taken from EDHI without paying.

[6] The defendants also observe that all of their counterclaims were allowed. On balance, the defendants say that they were more successful than the plaintiffs having been successful in their counterclaim while the plaintiffs failed in two major claims (professional fees and forced purchase of Mr. Edwards' shares).

[7] The plaintiffs submit that it was they who were substantially successful at trial. They say the defendants' submission on costs "double counts" some of their substantive claims so as to artificially increase the number of "unsuccessful" claims. In effect, they say, the defendants have counted heads of relief and specific allegations of conduct as specific claims. The plaintiffs say that "an accurate depiction of 'who won' can ... only be arrived at by evaluating the substance of the claims advanced by the parties, and how the parties fared with respect to each such claim."

[8] The plaintiffs submit that they were "completely successful" in their claim for breach of fiduciary duty. They also claim success on the claim for oppressive or unfairly prejudicial conduct by Dockrill and Horwich, submitting that the defendants' distinction between the two should be rejected, pointing out that the pleading relates to a single provision of the Third Schedule of the *Companies Act*. The effect of the defendants' position, the plaintiffs maintain in their reply brief, is that "Dockrill and Horwich should be rewarded for having been found to have violated the Third Schedule ... because they did not breach their obligations as badly as they might have." The defendants, not surprisingly, deny that this is their position, stating that, while "the conduct of Messrs. Dockrill and Horwich was found wanting," it was not to the degree and extent that the plaintiffs sought to prove."

[9] The plaintiffs say they were successful in advancing the argument that they were owed a duty of good faith in relation to the resolution of the Survival Group account and that Dockrill and Horwich ignored their interests in deciding to settle the accounts for less than the amount owing.

[10] With respect to the contract claim that EDHI was liable to M.L. Edwards Incorporated (MLEI) in respect of consulting services provided, the plaintiffs say their theory was that all three professional corporations were entitled to charge EDHI for services in support of EDHI's practice. According to the plaintiffs, the "net effect" of the finding that MLEI had no claim in contract was to make those funds available for distribution to shareholders.

[11] The plaintiffs say the dismissal of the claim for intentional interference with economic relations carries little weight in determining success or failure at trial. They say that while specific intent was not established, there was evidence of loss

and of unlawful conduct by the individual defendants. They add that no such findings were made on the counterclaim for intentional interference with economic relations.

[12] As to the counterclaim, the plaintiffs submit that they demonstrated their willingness to pay a "reasonable amount for services and equipment acquired from Minnej" before the close of pleadings and the decision. Meanwhile, they say, the defendants "did not feel compelled" to pay for EDHI assets and employees, while insisting that the plaintiffs had to do so. The plaintiffs note that this conduct was referenced in support of the conclusion that the defendants acted in an unfairly prejudicial manner and in breach of their fiduciary duties. The plaintiffs note that the defendants reference only the single claim on which they had success. There was no finding in favour of the defendants on their counterclaim for intentional interference with economic relations, defamation, trespass and conversion, the claims respecting the Boheimer/Survival System accounts, the claim for amounts owing to Singleton & Associates and for punitive and exemplary damages.

Success in Receivership:

[13] Alternatively, the defendants say, success can be gauged by an assessment of the parties' respective recovery under the receivership. By this measure, the defendants say, the various parties were required to pay into the estate the following amounts:

a. Edwards $88,352.93

b. Dockrill $15,309.21

c. Horwich $20,393.69

[14] On this scale, the defendants submit, "the plaintiffs paid more than twice what the defendants did" and "ought to be taken as having been the more successful of the parties...." The plaintiffs say the relative success of the parties as a result of the receivership can only be determined by "taking into account the status quo existing at the time this action was commenced."

[15] Mr. Edwards was excluded from his role as a director and officer of EDHI and Minnej in the summer of 2001. He subsequently learned that Dockrill and Horwich had transferred assets to their new partnership in breach of their fiduciary

duty and at an "unduly low" price. They also diverted accounts receivable to a different bank from the one that held security for the outstanding loans. Generally, the plaintiffs allege "a pattern of conduct pursuant to which the individual Defendants attempted to capture in their new partnership the value of work that was effectively performed by or on behalf of EDHI...." In respect of the transfer of "work in progress," the plaintiffs maintain that the defendants were not as "open and candid" as they claim.

[16] The plaintiffs also allege that Dockrill and Horwich sought as a receivership expense reimbursement for life insurance premiums on "a policy that they had effectively appropriated for their new business activity many years earlier," and that the receiver would have paid these amounts, if not, for Mr. Edwards' intervention. As a result, the plaintiffs submit, they were forced to commence the proceeding:

> ...The conduct of the individual defendants in appropriating EDHI/Minnej assets for use in their new practice, and other acts undertaken by them in breach of their fiduciary duties and in acting in a manner that was found ... to be unfairly prejudicial to Mr. [Edwards's] interests, surely confirm that Mr. Edwards was unlikely to obtain any relief from the Defendants' wrongful acts other than by resort to the courts...

[17] The plaintiffs submit, on this basis, that an assessment of the parties' success pursuant to the receivership requires a recognition of:

> ... the fact that Mr. Edwards was effectively forced to sue, and that his gains or losses from the outcome of the receivership should reflect the fact that he would not otherwise have any prospect of recovering amounts owing to him, or for that matter ensuring that amounts wrongfully taken by Dockrill and Horwich from the companies would be returned to the companies.

[18] The plaintiffs submit that adjusting the receiver's calculations for legal fees and costs (which they say is required to establish a fair and accurate assessment of success in the receivership) results in the individual defendants, Dockrill and Horwich, being required to reimburse EDHI the amount of $366,768.83, while Mr. Edwards is required to reimburse the amount of $117,069.75.

[19] While the receivers decided to indemnify Dockrill and Horwich for most of their legal costs, the plaintiffs submit that this is not a reasonable reflection of their

success under the receivership. They say the legal fee indemnification should be disregarded in determining success as between the parties. The defendants respond that the plaintiffs "seem intent on re-litigating issues they lost at trial," such as "the legal costs of EDHI/Minnej and the indemnification of Messrs. Dockrill and Horwich for those costs," as well as the allocation formula, which, they say, "Mr. Edwards claimed at trial should be employed notwithstanding that it had not been used by the partners and notwithstanding that [the court] ruled that a different 'formula' was appropriate – and notwithstanding Mr. [Edwards's] own refusal to pay for its application when he was offered the choice by [the court]." The defendants maintain that such re-litigation is not appropriate.

The Defendants' Offer to Settle:

[20] The defendants point to their offer to settle, dated February 4, 2004 in which they claimed that the plaintiffs would owe EDHI/Minnej about $66,000, and offered to settle on the basis that Edwards would receive $30,000 in respect of the Sweet account, less any HST owing; all claims and counterclaims dismissed; and a transfer of the EDHI/Minnej share certificates to the defendants. The plaintiffs did not accept this offer. In view of the result of the trial, the defendants say, it is clear that they were more successful than the plaintiffs.

[21] The plaintiffs say the offer to settle does not support the conclusion that the defendants were more successful. They say Mr. Edwards "actually owed the companies less than one-third of the amount claimed by the individual defendants in the Offer to Settle." They add that the offer did not mention amounts that the individual defendants "owed EDHI/Minnej in respect of items taken by them from the companies, which we know from the Receivers' report was substantially more than the amount owed by Mr. Edwards and his professional corporation." Further, the defendants were in a position to collect most of EDHI's accounts receivable and to invoice most of its work in progress, while "Mr. Edwards was essentially being told by the Defendants that he was entitled to no portion of the collective value represented by EDHI/Minnej...." In the circumstances, the plaintiffs submit, it would not be reasonable to "penalize Mr. Edwards for refusing to simply walk away under these circumstances."

***The Scale and the Amount Involved*:**

[22] The defendants say the amount involved should be derived from the amounts found to be payable under the receivership, that being around $120,000. The defendants submit that the complexity created by the plaintiffs calls for the application of Tariff A, Scale 3. As to the importance of the issues, the defendants say the issues were only of significance to the parties. They say that the costs to which they would be entitled under Scale 3 of Tariff A on an amount involved of $120,000 – a total of $15,313 – is an amount that "entirely fails to satisfy the principle that an award of costs should represent a 'substantial contribution towards but not a full indemnity of' a successful party's legal expenses." The defendants claim to have incurred legal costs of some $408,000, including legal fees of about $318,000. More than $90,000 is attributed to a disbursement for Grant Thornton's report. As such, the defendants say, the principle of substantial contribution requires the award of a lump sum of between $150,000 and $175,000, pursuant to Rule 63.02(1)(a). It has been said that a "substantial contribution" should be in the rage of between 66 and 75 per cent of a party's costs.

[23] The plaintiffs say the amount involved should be determined by reference to the difference between the amount by which the receiver concluded that the individual defendants should reimburse EDHI ($366,768.83) and that by which Mr. Edwards was required to reimburse the company ($117,069.75). This gives an amount involved of $249,699.08. Rounding the amount involved to $249,000, the plaintiffs say the application of Scale 3 would yield costs of $28,438.00. Mr. Edwards states that he has incurred legal fees of $414,116.50, disbursements of $21,795.21 and an additional $76,457.75 on account of the report of PriceWaterhouseCoopers. They, therefore ,seek a lump-sum award of between $275,000 and $310,000. They note that unfounded allegations of misconduct, as they characterize the allegations against Mr. Edwards, are grounds for increasing a costs award.

[24] The plaintiffs maintain that it would be "absurd" to determine the amount involved by reference to the amounts found to be owing by the individual defendants to the corporate defendants. They say this position illustrates the diverging interests of the two groups of defendants.

Costs Against Individuals:

[25] The plaintiffs request that any award in their favour be made against the individual defendants, rather than the corporate defendant. The defendants

likewise ask that any award of damages be made against Mr. Edwards in his personal capacity, on the basis that "M.L. Edwards Inc." may have been reduced to a paper shell." The plaintiffs object to this proposal, submitting that "the fact that Mr. Edwards carried on his accounting practice for a time [after the dispute arose] through MLEI should not support an order of costs against Mr. Edwards personally." They say that he has done nothing improper in "winding down his accounting practice in MLEI" and that MLEI "is essentially in the same position now that it was in when the dispute arose in the summer of 2001: its value then was derived solely from its interest in EDHI, and that is its position now."

[26] In reply, the defendants point out that Mr. Edwards confirmed that as of May 17, 2010 MLEI had no business or assets besides shares in EDHI/Minnej, and "hence any order for costs as against it would be against a paper company." The defendants also say that, while Mr. Edwards admits that he was using MLEI to carry on his accounting business as of June 2001, he has not explained why MLEI continued to carry on business under the new name of Edwards, Dean & Company, why it was necessary to transfer the business to "a new entity" or when MLEI began to wind down its business, "other than to say it had done so by February 2009." These questions, the defendants submit, justify their "concern that any order for costs as against MLEI would be valueless."

"Unsubstantiated Allegations" by the Defendants:

[27] The plaintiffs refer to "numerous serious allegations" in the statement of defence relating to "the supposed conduct of the individual plaintiff, Mr. Edwards." These allegations include arranging and receiving secret commissions in violation of Mr. Edwards' ethical obligations, promoting inappropriate "tax deferral products" to EDHI clients, taking equity positions in corporate clients of EDHI in return for providing services without charge, artificially inflating his, and his professional corporation's, professional income by rendering invoices without expectation of payment, providing taxation and consulting services through another company in breach of fiduciary obligations to EDHI, orchestrating "sham transactions" in order to give a client access to the equity tax credit and, finally, exposing the defendants to potential claims by clients as the result of scheme to provide equity financing to a company "through a syndicate," and soliciting EDHI clients as investors in this venture.

[28] The plaintiffs say these allegations were intended to depict Mr. Edwards as being "deceitful and dishonest," that they do not relate to matters that would sustain liability and were not successfully substantiated at trial. They say these considerations are significant in supporting the conclusion that the defendants were "substantially unsuccessful" at trial. The defendants respond that they did not allege fraud, or attempt to prove it. They did, they say, attempt to prove that Mr. Edwards had taken work-in-progress and accounts receivable that was property of EDHI. They say this position was accepted in the trial decision.

[29] As to the purchase of EDHI work in progress, the defendants say that although they lost on the point, they did not conceal the fact of the purchase or the price, and that the agreement of purchase and sale provided for an adjustment if it was decided that a different price should have been paid. They contrast this "openness" with "the conduct of the plaintiffs, who hid their taking of the [work in progress] and accounts receivable of EDHI until the last minute, during trial" and "lost on this point as well."

Conduct of the Parties:

[30] The plaintiffs take issue with various submissions of the defendants to the effect that the trial decision depicted the plaintiffs' conduct as "in effect, as blameworthy as the conduct of Dockrill and Horwich in their dealings with the companies and the Plaintiffs." For instance, the defendants' counsel comments that one of the plaintiffs' claims, requiring Dockrill and Horwich to purchase Mr. Edwards' shares in EDHI/Minnej, flowed from a late amendment and "was dismissed on the grounds, in part, that the conduct of the plaintiffs (no more than the defendants) had fallen short of what would otherwise be expected of them." The defendants cite several passages of the trial decision to this effect:

> [144] I am satisfied the "oppressive conduct" found in *Pelley v. Pelley, supra*, is not here present. Nevertheless, the conduct of the individual defendants did not meet the minimum standard of "behaviour and bona fides" required of those holding their positions. Notwithstanding, my earlier comments and conclusions on the issue of the legal fees paid, in defending the lawsuit brought by Edwards, I conclude, as did J. Griffiths in *Abraham v. Inter Wide Investments Ltd.* that although the evidence does not support a finding of "oppressive conduct" the evidence supports a finding the individual defendants "acted in a manner unfairly prejudicial to the plaintiff or, at the very least, unfairly disregarded the plaintiff's interests as a shareholder".

....

> [167] Notwithstanding the submissions of counsel, I am not satisfied this is an appropriate circumstance to order the defendants to purchase the shares of the plaintiffs. The plaintiffs suggest the values set out in the Bradley Report can be adopted by the court as a basis for the determination of the fair value of the shares. Nevertheless, and whatever the value that may be determined, I am satisfied the conduct of all parties in these circumstances is not such to warrant one party being ordered to acquire the shares of the other, at any price. All parties conducted themselves in a manner that was designed solely to benefit themselves, without regard to the economic impact on the others. As such they are not entitled to claim the kind of equitable relief that would be required in ordering the purchase of the shares of the one party because of the oppressive or unfair conduct of the other.
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> ...
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> [178] Although the plaintiffs have not established the torts of intentional interference with economic relations and oppressive conduct, I have found they breached their fiduciary duties to EDHI and Minnej and unfairly disregarded the plaintiff, Nican Incorporated, interests as a shareholder. The plaintiffs are, therefore, entitled to judgment as against the individual defendants. Nican Incorporated is awarded the sum of five thousand dollars, as against each of the individual defendants and the individual defendants are also required to each pay the sum of five thousand to EDHI/Minnej.

[31] The plaintiffs submit, in reply, that these passages of the trial decision involved the conclusion that all of the parties "conducted themselves in their dealings with the companies and each other in a manner that was designed to solely benefit themselves without regard to the economic impact on the others." These findings, the plaintiffs submit, do not equate the conduct of Mr. Edwards with that of Dockrill and Horwich "in having committed actionable breaches of their obligations to Mr. Edwards and the companies." They say there was no finding against Mr. Edwards equivalent to the finding that Dockrill and Horwich "breached their fiduciary duties to the companies and ... acted in a manner that was unfairly prejudicial to Mr. [Edwards's] interests as a shareholder." They say this distinction is crucial because it was the conduct of Dockrill and Horwich that forced Mr. Edwards to commence the action.

[32] The defendants say the litigation, in contrast to the claim itself, was "complex, involved and inordinately prolonged," with "virtually all" of the interlocutory steps being brought by the plaintiffs. They say that pre-trial proceedings "were marked by a 'scorched earth' policy on the part of the plaintiffs," including "no less than three contempt applications wherein the plaintiffs sought to avoid a trial on the merits by litigating a procedural issue." The contempt application related to alleged non-production of certain "billing files." It was not a live issue in the trial decision.

[33] As the defendants portray it, the first contempt application was withdrawn, the second dismissed (after Mr. Edwards' affidavit was struck), with costs payable in any event of the cause. The third contempt application was also dismissed on its merits. The defendants say that all three contempt applications rested on the same issue and "the same information and submissions," and that they "added immeasurably to the cost of [the] litigation." The plaintiffs submit that the court should, nevertheless, consider the defendants' conduct for costs purposes. They say, unknown to Coughlan J., when he held that contempt was not established is that the defendants had the files in their possession with the knowledge of their counsel. The plaintiffs say this "concealing" of the files should sound in costs.

[34] The plaintiffs say the defendants complaint about a "scorched earth" policy "rings hollow when one considers the substantial corporate resources utilized by the Defendants to mount a defence against not only an $84,000.00 contract claim made against EDHI, but significant (and ultimately successful) claims made against the individual Defendants." They add that "it was the actions of Dockrill and Horwich that caused the assets of EDHI/Minnej to be depleted in order to fund their defence."

[35] The defendants allege that the plaintiffs have "not explained why they have not paid the two costs awards of $1,500 each that were made against them in respect of the two contempt applications that were dismissed." They also assert that the plaintiffs "are once again litigating something that [the court] decided against them" (by holding that this was a production issue). They say that "when presented with the opportunity to ask for the files (once they had been properly identified) at trial," the plaintiffs did not request them. Moreover, the defendants assert that they only raised the question of the contempt applications in order "to explain why it was that the costs of defending EDHI/Minnej in what should have been a relatively simple matter were so high," in response to the plaintiffs'

complaint that the costs were too high. If this was the case, the defendants say, "it was at least partly because EDHI/Minnej were fighting for their lives."

Post-trial Conduct:

[36] The defendants allege that the plaintiffs' "unbelievably litigious" conduct continued after trial, requiring multiple court appearances to formalize the trial order and various applications in relation to the receivership. The defendants submit that this "post-trial wrangling was a function of the plaintiffs' failure to adopt a reasonable interpretation or approach" to the court's orders and the Receiver's work, and say the point is that "much of the time and effort taken up in settling the form of the order surrounded issues raised (and lost) by the plaintiffs."

[37] The plaintiffs maintain that the responsibility for any posty-trial "wrangling" rests with the defendants. They specifically dispute the defendants' suggestion that their success in having the receiver address the issue of indemnification for HST on legal costs was ultimately irrelevant because HST is a "flow-through" that must be remitted once collected. The plaintiffs say this is an incorrect description of the effect of the *Excise Tax Act*, R.S.C. 1985, c. E-15, according to which, they say, the defendants would not have been required to account for the HST component of the indemnified amounts. As such, the plaintiffs argue, "including the HST component of legal costs in the indemnification payment would have resulted in a windfall to Dockrill and Horwich at the expense of EDHI."

[38] The defendants concede that the HST issue is complicated, but maintain that "to the best of [their] recollection" Mr. Casey, the solicitor for the receivers, stated at the hearing that HST was a "flow-through." In any event, the defendants say, "it remains the case that this was the only one of many issues that the plaintiffs argued and lost in their original application ... and argued and lost on their appeal of that decision." They submit that this is "the most relevant point when it comes to assessing the question of costs."

Circumstances Where Costs Have Been Denied:

[39] While, as a general rule, costs follow the event and are awarded to the successful party, there are occasions where the court's discretion permits a different order to be made. Orkin, in *The Law of Costs*, 2d edn., identifies several exceptions to the general rule that costs should be awarded to the more successful

party. These exceptions include misconduct by the parties, miscarriage in procedure and oppressive and vexatious conduct of the proceedings (vol. I, pp. 2/63-72). The author notes that costs have been denied in cases "where success was divided or where the court was unable to conclude that one party was more successful [then] the other ... or where neither party was blameless" (p. 2/80).

[40] In the present case, there was no clear "winner" at trial. Considering only the legal expenses incurred by the parties in this litigation, it is fair to say that none of them were winners. Nor does the manner in which the parties conducted the proceeding and, the way in which they presented their respective cases, assist the court in determining which party was "more successful" for the purposes of party-and-party costs. In the course of the breakdown of the business and employment relationships among the parties, all sides disregarded the interests of the other, as the trial decision indicates. In giving evidence at trial, the party witnesses were found to have "enhanced" their memories in a manner most likely to advance their positions. The finding at trial on the issue of whether the defendants should be required to purchase the plaintiffs' shares was that no such order should be made because all of the parties had conducted themselves solely in pursuit of their own benefit, disregarding the economic impact on the others, and they were all, therefore, disentitled to any equitable relief. On similar grounds, as well as the mixed result, I am satisfied that no party is entitled to costs. This is a case where (to quote Coady J. in *Force Construction Ltd. v. Campbell*, 2008 NSSC 310, 2008 CarswellNS 588 (S.C.) at paras. 6 and 7) the parties generally "could not see the strengths in their opponents case or the weaknesses in their own" and where, in the result, there is "no clear winner" and "success and failure are shared almost equally."

[41] Accordingly, neither party is entitled to party and party costs.

MacAdam, J.