SUPREME COURT OF NOVA SCOTIA

Citation: Beacon Securities Ltd. v. 2125395 Ontario Inc., 2011 NSSC 207

Date: 20110520
Docket: Hfx No. 344735
Registry: Halifax

Between:

Beacon Securities Limited — Applicant

and

2125395 Ontario Inc. and Redlend Enterprises Ltd. — Respondents

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DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	May 19, 2011
Written Decision:	Oral decision transcribed, edited, and signed on May 31, 2011
Counsel:	Peter M. Rogers, Q.C. and Michael Murphy, for Applicant
	Brian K. Awad, for Respondents

Moir, J. (Orally):

[1] *Introduction*. Beacon Securities Limited applied for an order recognizing that a partnership has been dissolved or imposing a judicial dissolution. The application is scheduled to be heard next month.

[2] The respondents move for an order staying the application on the ground that the issues must be determined by arbitration. I have to decide whether to grant the stay.

[3] *Facts*. Early in 2007, the parties made an agreement for carrying on a particular kind of securities business through a division to be created in Beacon Securities. The agreement makes no reference to partnership. It leaves to implication the nature of the relationship between Redlend Enterprises, 2125395 Ontario Inc., and Beacon Securities.

[4] The agreement recites that the three parties "wish to establish a separate division of Beacon's brokerage business". The business is "to be developed and managed" on the terms of the agreement.

[5] The first article names the division Beacon Wealth Management. And, it emphasizes a major part of the undertaking, the recruitment and management of investment advisors. The investment advisors must enter into an agency agreement with Beacon Securities, as required by IIROC.

[6] Although the undertaking is within Beacon Securities Limited and the agency agreements must be between it and the investment advisors, Article 2 and Schedule A provide for sharing of the net profits of the Division 50% to Beacon Securities, 45% to 2125395 Ontario Limited, and 5% to Redlend. And, Article 3 contains provisions for management by the three parties.

[7] The agreement contains no provision for termination or for dissolution of the relationship between the three parties *vis a vis* the division. However, it does recognize that a party can sell its notional interest in the division, and it provides a right of first refusal and a shot gun clause.

[8] Section 16 of the agreement requires arbitration of the disputes concerning the agreement. It says:

> Any controversy or dispute which shall arise between the Parties to this Agreement concerning the construction or application of this Agreement, or the rights, duties or obligations of any party to this Agreement, shall be referred to an arbitration subject to the procedures set out in Schedule "B" attached hereto and forming part of this Agreement.

For some reason, Schedule B repeats the requirement for arbitration but uses different language to do so. In my view, the operative words for the requirement are those of Article 16, and Schedule B only exists to provide procedure and to incorporate statutory provisions. Schedule B applies the *Arbitration Act*.

[9] It appears from the grounds in the notice of application and the notice of contest that the parties went ahead with creating and staffing the division. However, the dealings between the parties deteriorated over issues that included the responsibility of the numbered company and Redlend to cover a share of expenses or losses and the propriety of expenses accounted against the division by Beacon Securities.

[10] *Principles for a Stay*. Section 7 of the *Arbitration Act* provides for a stay of proceedings pending an arbitration. In *Black & MacDonald Ltd. v. Degrémont Ltée.*, 2009 NSSC 85 this court adopted the approach suggested in *Mantini v. Smith*

Lyons, [2003] O.J. 1831 (C.A.). A court that considers a stay pending arbitration must first interpret the arbitration provision. Then, it must analyze the claim to determine whether it must be decided under the arbitration provision, as interpreted.

[11] *Interpretation of Arbitration Provision*. Section 16 of the agreement covers any dispute between the parties concerning the construction or application of the agreement or about their rights, duties, or obligations under the agreement.

[12] As I said, Schedule B applies the *Arbitration Act*. It does not apply the *Commercial Arbitration Act*, and it appears to be common ground that that statute is inapplicable.

[13] Section 16 is to be interpreted in the context of the rest of the agreement, not only because all contractual provisions are interpreted in context but also because section 16 is tied to the agreement. Related extra contractual rights are not covered.

[14] The contract contains provisions about sale of the business but it contains no express provision for termination other than by sale. It does not lend itself to the implication of termination provisions, other than by sale. The agreement appears to proceed on the happy premise of profit and cooperation rather than loss and dissension.

[15] What happens in the event of loss or dissension is left either to unanimity or extra contractual rights. In either case, termination or dissolution is outside s. 16.

[16] The agreement covers distribution of profits. Consistent with its happy premise, it does not deal expressly with responsibility for losses. This may be a difficult question because, whatever entity or relationship the parties have created for themselves, it exists within a corporation. It may be that the corporation bears the liabilities to third parties simply, or with recourse to the parties. Or, it may be that the parties bear some or all of the liabilities.

[17] It seems to me that those questions turn on the agreement, including the possibility of implied terms.

[18] In conclusion, I interpret section 16 to apply broadly to all disputes between the parties that are resolvable under the agreement. It does not, however, extend to extra contractual rights.

[19] *Analysis of the Claim*. The claim is for dissolution under the *Partnership Act*. That remedy is not available unless the agreement creates a partnership, a proposition denied by Redlend and the numbered company.

[20] The remedy of dissolution would not resolve the ultimate issues between the parties, which concern what expenses are properly charged by Beacon Securities to do the division and what, if any, liability Redlend and the numbered company have for losses.

[21] The remedy claimed by the applicant is extra contractual. It is an important statutory remedy for partners, just as winding-up is an important statutory remedy for corporations, especially closely held corporations the members of which fall into dissension.

[22] These are remedies that have been with us for a very long time, and that are so basic that one should assume that those who make partnership agreements or shareholder agreements do so with the statutory remedies in the background.

[23] They are also important remedies. Without them partners or shareholders may find themselves locked in a relationship after the underlying reasons for the relationship have disappeared because of losses, dissension, or other reasons.

[24] In the case of partners who do not have an agreed exit route, cannot get unanimity, and do not qualify or do not want an insolvency remedy, dissolution may be the only way out of their fiduciary obligations and their liabilities to third parties.

[25] *Whether Dissolution Must be Decided by Arbitration?* Dissolution is not within the provisions for arbitration. The parties might have agreed to such, as they did in *Curtis v. Burke*, 2003 NSSC 248. But they did not do so.

[26] *Whether the Premise for Dissolution Must be Decided by Arbitration?* Mr. Awad refers me to *Self v. Abridean Inc.*, 2001 NSSC 191 at para. 11 quoting from

Bakorp Management Limited v. Pepsi-Cola Canada Ltd., [1994] O.J. 873 (Ont. Ct. Gen. Div.); *Giorno v. Pappas*, [1999] O.J. 168 (C.A.) at para. 20, and; *Armstrong v. Northern Eyes Inc.*, [2000] O.J. 1594 (D.C.) at para. 33 for the proposition that the court takes a practical approach to the question of deference to arbitration. Are the subjects in dispute inextricably bound up with subjects that must go to arbitration? See, *Bakorp*. Are the arbitrator's powers comparatively close to the remedy being sought from the court? See, *Armstrong*.

[27] Justice Goudge puts it this way at para. 20 of *Giorno*:

> What is important is that the arbitrator is empowered to remedy the wrong. If that is so, then where the essential character of the dispute is covered by the collective agreement, to require that it be arbitrated, not litigated in the courts, causes no "real deprivation of ultimate remedy". The individual is able to pursue an appropriate remedy through the specialized vehicle of arbitration. He or she is not left without a way to seek relief.

This shows that the approach taken by the court is focussed practically on remedy.

[28] Before dissolution is ordered, one must decide whether the agreement creates a partnership. On that basis Mr. Awad distinguishes decisions relied on by Beacon Securities, such as *T.W. Manufacturing Inc. v. UFG Supplies Sales*, 2007 BCSC 18, in which there was no controversy about partnership. In that case, the

court retained jurisdiction to order dissolution but held that the consequential issues, such as those that ultimately concern the parties, were reserved for arbitration after dissolution was decided.

[29] As I see it the question of partnership is necessarily preliminary to that of dissolution, but its determination provides no remedy. The practical focus in cases about staying proceedings pending arbitration is on the remedy.

[30] In determining remedies within his or her power, the arbitrator may have to decide whether the parties formed a partnership. Under the practical approach, the court is not precluded from determining issues of law or fact that may also arise on arbitration.

[31] *Conclusion.* There is an important remedy available from the court if the *Partnership Act* applies. It may be the only remedy by which Beacon Securities can put an end to its relationship with the respondents, extinguish ongoing fiduciary obligations, and extinguish third party liabilities.

[32] The remedy is not available on the kind of arbitration for which the parties contracted. The fact that a prerequisite to the remedy may overlap a mixed question of law and fact that could arise on arbitration is not a reason to preclude possible access to the remedy.

[33] The motion for a stay of this proceeding is dismissed.

J.