Date: 20010928
Docket: S.Am. No. 3197

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Wilson v. Cross Roads Co-Operative, 2001 NSSC 130]

BETWEEN:

PAUL WILSON

PLAINTIFF/RESPONDENT

- and -

CROSS ROADS CO-OPERATIVE, a body corporate, CO-OP ATLANTIC, a body corporate, ANNA YORKE, JOAN QUINN, ELIZABETH WELTON, KENNETH CANNING, FRANK QUINN, MILFORD WELTON, RONALD MacLEAN, STEVEN HANNA, DAVID GILBERT, RAYMOND SMITH, CLAYTON GRAHAM, CHARLES DAVISON, BRENDA ALLEN, ANGELA GILROY, BEVERLY DUGUAY and ANGELA VAUTOUR

DEFENDANTS/APPLICANTS

D E C I S I O N

HEARD BEFORE:	**The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia (Chambers) at Amherst, N. S. on September 6th, 2001**
DECISION:	**September 6th, 2001 (Orally)**
WRITTEN RELEASE OR ORAL:	**September 28th, 2001**
COUNSEL:	**Mary Ellen Nurse, Solicitor for the Plaintiff /Respondent** **R. Malcolm MacLeod, Q.C., Solicitor for the Defendants/Applicants**

GOODFELLOW, J.: (Orally)

BACKGROUND

[1] The Originating Notice Action and Statement of Claim were issued the 3rd of April, 1998. Paul Wilson commenced employment with Cross Roads Co-Op on or about May 15th, 1995 as the Manager of the Parrsboro store. The Statement of Claim makes numerous references to the Board of Cross Roads Co-Op. All paragraphs of the Statement of Claim were reviewed and in order to appreciate the background, the following paragraphs are reproduced.

> 4. The Defendants Anna Yorke, Joan Quinn, Elizabeth Welton, Kenneth Canning, Frank Quinn, Milford Welton, Ronald MacLean, Steven Hanna, David Gilbert, Raymond Smith, Clayton Graham, and Charles Davison (collectively, the "Directors" or the "Board") all reside in the Town of Parrsboro, Nova Scotia or the Parrsboro area and were at all times material hereto Directors of Cross Roads Co-Op and comprised the Board of Directors of Cross Roads Co-Op.
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> 6. The Defendant Angela Vautour resides in Moncton, New Brunswick and was at all times material hereto an employee of Co-Op Atlantic, and so acted on behalf of Co-Op Atlantic in her capacity as Human Resources Area Manager, and further provided professional services and advice to Cross Roads Co-Op, which services and advice Cross Roads Co-Op accepted.
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> 9. During the term of the Plaintiff's employment with Cross Roads Co-Op, from the commencement of the Plaintiff's employment until February 8, 1998, the Plaintiff was never reprimanded or given any warning by the Board nor was his job performance ever criticized in any way. In fact, during the said period of time, the Plaintiff received various commendations from the Board for good job performance.
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> 12. On February 8, 1998, the Directors requested that the Plaintiff attend a special meeting of the Board. At that time, the Directors informed the Plaintiff that allegations of sexual harassment had been made to the Directors against the Plaintiff by the Defendants, Allen, Duguay and Gilroy. On the basis of those allegations, the Directors suspended the Plaintiff with pay.

13. On the evening of February 11, 1998, the President of the Board, the Defendant Frank Quinn, telephoned the Plaintiff at the Plaintiff's home and advised the Plaintiff that he (Mr. Quinn) had spoken with the Defendants Duguay, Allen and Gilroy and that they had now admitted to Mr. Quinn that the Plaintiff had not sexually harassed them.

14. By facsimile correspondence dated February 17, 1998, the Defendant Angela Vautour advised the President of the Board, the Defendant Frank Quinn, that "the complaints brought against Paul [the Plaintiff] to date are not sufficient grounds for dismissal", but went on to recommend dismissal of the Plaintiff in any event on the basis that "the working relationship between him and his staff has become unworkable".

15. On February 17, 1998, the Plaintiff met with the Defendants Frank Quinn, Joan Quinn and Steven Hanna, the said Defendants being the Executive of the Board. At that meeting, the Defendant Frank Quinn advised the Plaintiff that the Board knew that the allegations of sexual harassment against the Plaintiff were untrue, but that the Board had decided to terminate his employment anyway. At the conclusion of the meeting, Mr. Quinn provided the Plaintiff with a letter confirming the termination of the Plaintiff's employment by the Board.

16. Subsequent to the Plaintiff's termination, the Plaintiff was forced to remove his 9 year old daughter from Parrsboro Elementary School as she was exposed to rumours circulating within the school and community regarding the allegations of sexual harassment made against the Plaintiff. In view of this negative publicity, the Plaintiff's spouse was compelled to sell her clothing and craft business located in Parrsboro, Nova Scotia and the Plaintiff's family moved to Fredericton, New Brunswick. As the Plaintiff has been unable, to date, to sell his home in Parrsboro, the Plaintiff and his family are currently residing in Fredericton with relatives in a two bedroom bungalow.

17. Since his termination by the Board, the Plaintiff has assiduously looked for alternative employment, but has been unable to secure same. On two specific occasions, the Plaintiff's application for employment was rejected due to the allegations of sexual harassment made against him. The Plaintiff has also experienced social rejection by some former friends and colleagues, strained marital relations, public humiliation and damage to his reputation.

18. The Plaintiff says that his contract of employment with the Defendant Cross Roads Co-Op was terminated without cause and the Plaintiff claims

that he has been wrongfully and unjustly dismissed from his employment by Cross Roads Co-Op.

20. The Plaintiff says that the Defendant Directors, and all of them individually, acted willfully and maliciously (or, in the alternative, negligently) in terminating the Plaintiff's employment and with full knowledge that the allegations of sexual harassment raised against the Plaintiff were untrue. The Plaintiff further says that the Directors, and each of them individually, owed the Plaintiff a duty of care and breached that duty by their actions insofar as they knew or ought to have known that their actions in dismissing the Plaintiff from his employment would be perceived in the community as giving credence to the false allegations of sexual harassment; and that the Directors, and each of them individually, knew or ought to have known that the Plaintiff's career and reputation would thereby be damaged.

22. The Plaintiff says that the Defendant Angela Vautour so acted in the normal course of her employment duties, thus making the Defendant, Co-Op Atlantic, vicariously liable for her actions.

CIVIL PROCEDURE RULES

Particulars of Pleading

14.12(1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies.

Striking and Pleadings

14.25(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(a) it discloses no reasonable cause of action or defence.

(2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

Persons who may be examined

18.01(1) Any person, who is within or without the jurisdiction, may without an order be orally examined on oath or affirmation by any party regarding any matter, not privileged, that is relevant to the subject matter of the proceeding.

(2) Where it is unnecessary, improper or vexatious, the court may limit the number of persons to be examined and set aside the appointment for the examination of any person.

(3) The costs of examining more than one person, other than a party, shall, unless the court otherwise orders, be borne by the party examining.

APPLICATION-ISSUES

[2] The Directors of Cross Roads Co-Operative Limited, represented by R. Malcolm MacLeod, Q.C., apply to have them struck as parties on the basis that the pleadings do not disclose any facts (or acts) of conduct of a personal nature and that the Statement of Claim refers only to actions and conduct by them in their capacity as Directors. A second Application is filed to exclude those Directors not yet discovered from being discovered. Ms. Mary Ellen Nurse, on behalf of Paul Wilson opposes the Applications and raises the issues of timeliness and the filing of an Affidavit on behalf of the Applicants. Ms. Nurse advances that the Directors are properly joined in their personal capacity.

[3] The issues are stated as follows:

1. DO THE FACTS, AS PLEADED BY THE PAUL WILSON, DISCLOSE THAT IT IS PLAIN AND OBVIOUS THAT THE ACTIONS ALLEGED IN THE RESPONDENT'S STATEMENT OF CLAIM ARE ABSOLUTELY UNSUSTAINABLE OR CERTAIN TO FAIL, AGAINST THE "APPLICANT DIRECTORS" IN THEIR PERSONAL CAPACITIES?

2. DO THE FACTS, AS PLEADED BY THE PAUL WILSON, DISCLOSE THAT IT IS PLAIN AND OBVIOUS THAT THE ACTIONS ALLEGED IN THE RESPONDENT'S STATEMENT OF CLAIM ARE ABSOLUTELY UNSUSTAINABLE OR CERTAIN TO FAIL, AGAINST THE "APPLICANT VAUTOUR" IN HER PERSONAL CAPACITY?

3. SHOULD SOME OF THE DIRECTORS BE EXCUSED FROM DISCOVERY ON THE BASIS OF A NUMBER OF DISCOVERIES ALREADY HAVING BEEN HELD OF OTHER DIRECTORS AND ON THE BASIS OF SOME OF THEM BEING AGED AND INFIRMED?

APPLICATION OF *CIVIL PROCEDURE RULE* 14.25

[4] The use of *Civil Procedure Rules* in striking out pleadings has been authoritatively dealt with by the Supreme Court of Canada. In *Hunt v. Carey Canada Inc.* (1991), 74 D.L.R. (4th) 321 at 330 (S.C.C.), Wilson J. reiterated her comments in *Operation Dismantle Inc. v. The Queen* (1985), 18 D.L.R. (4th) 481 at 515 (S.C.C.), by stating:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is: Do they disclose a reasonable cause of action, i.e. with a cause of action with some chance of success, ... or, ... is it 'plain and obvious' that the action cannot succeed?"

[5] The Nova Scotia Court of Appeal in *Future Inns Canada Inc. v. Labour Relations Board (N.S.), et al* (2000), 179 N.S.R. (2d) 213 at p. 222, Pugsley, J.A. stated:

> **The Test Under Rule 14.25**
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> **[28]** The parties are in agreement that the test on an application under *Rule 14.25* is a stringent one. Where the application involves striking a statement of claim, the applicant must establish under *Rule 14.25(1)(a)* that it is "plain and obvious" that it discloses no reasonable cause of action *(Fraser, et al v. Westminer Canada Ltd., et al* (1996), 155 N.S.R.(2d) 347; 457 A.P.R. 347 (C.A.)).
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> **[29]** As put by Justice Freeman for the court in *American Home Assurance Co., et al v. Brett Pontiac Buick GMC Ltd., et al* (No. 2) (1992), 116 N.S.R. (2d) 319; 320 A.P.R. 319 (C.A.), at p. 322:
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> The appellant faces an onerous double burden in appealing from the dismissal of an application to strike out the statement of claim, a serious matter that would result in the action being decided against the respondent plaintiffs without trial. A claim will be struck out only if, on its face, it is 'absolutely unsustainable' ... or 'is certain to fail because it contains a radical defect'.

[6] The premise upon which a court must proceed when faced with an Application to Strike pursuant to C.P.R. 14.25 requires the court to assume that the facts as pleaded within the Statement of Claim have been proved. An Applicant seeking to strike must establish to the satisfaction of the court that it is plain and obvious that the facts as pleaded either fail to give rise to any action or an action that is "absolutely unsustainable" or "certain to fail". Paul Wilson claims against his former employer, Cross Roads Co-Op, and recites facts that in his Statement of Claim are presumed to be true. Examination of the provisions of the Statement of Claim make it clear that he alleges Cross Roads Co-Op wrongfully dismissed him and recites facts in support that relate to the conduct of the Directors, Executive Board and employee, Vautour, in carrying out the wrongful dismissal. Discovery of some of the Directors and parties has taken place and an opportunity was presented to counsel for the Plaintiff to advance any facts of personal liability on behalf of the Directors or the Defendant, Vautour, that would give rise to an amendment supporting a separate cause of action against the Directors in their personal

capacity and none were forthcoming. There are no facts advanced in the Statement of Claim that could begin to sustain a cause of action rendering personal liability on any of the Directors or Ms. Vautour.

[7] The rule in *Salomon v. Salomon Company*, [1987] All E.R. 33 (H.L.), applies to the Applicants in the present action. The oft-quoted rule states that the actions undertaken on behalf of the corporation by its Directors are the actions of the corporation, and not of the Directors personally. In *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1996), 26 O.R. (3d) 481 at 491 (C.A.), Finlayson J. A. at p. 491 succinctly states the legal position of a Director of a corporation:

> A corporation may be liable for contracts that its Directors or Officers have cause it to sign, or for representations those Directors or Officers have made in its name, but this is because a corporation can only operate through human agency, that is, through its so-called 'directing mind'. Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the Court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the Directors of Peoples personally liable, there must be some activity on their part that takes them out of the role of directing minds of the corporation. [Emphasis Added]

[8] There is no allegation of fact advanced indicating that the Directors acted outside the scope of their authority. This requirement has been upheld in several Canadian jurisdictions. In British Columbia, the British Columbia Court of Appeal in *Pearl v. Pacific Enercon Inc.*, [1985] B.C.J. No. 2180 (C.A.) [Q.L.] overturned the Trial Judge's decision that the President of the Defendant company was personally liable for negligently inducing the breach of the employment contract of the Plaintiff. At para 25, Hinkson J.A., stated:

> It would appear that Mr. Spurgeon was simply performing his duty as an officer of the company...I am unable to conclude that the finding of the Trial Judge was any basis for his conclusion that Mr. Spurgeon personally was liable for negligent inducement to breach the Plaintiff's contract. [Emphasis Added]

[9] I conclude therefore that the Applicant has met the test under *Rule 14.25* and the action stated to be against the Directors and Ms. Vautour in their personal capacity is struck.

[10] It is clear from the decision of our Court of Appeal in *Future Inns Canada Inc. v. Labour Relations Board (N.S.)* above, that the appeal was granted from the Chambers Judge's erroneous determination that questions of law are not for determination in an Application under *Rule* 14.25. Pugsley, J. A. stated:

> **[54]** In conclusion on this issue, with respect, I am of the opinion that questions of law may be determined under rule 14.25 when the law is clear, and no additional evidence is required to resolve the issues raised.

[11] I do make note of Ms. Nurse's objection to the filing of an Affidavit which does contain some representations in regard to the conduct of the Directors and I am in agreement with her that such is not appropriate and it has not been considered in the determination to strike, pursuant to C.P.R. 14.25. *Sherman v. Giles* (1994), 137 N.S.R. (2d) 52 (C.A.).

[12] The provisions in the Affidavit that relate to the age and infirmity of certain Directors is relevant to the second issue of whether or not they ought to be discovered. Discovery is not limited to a person being a party to the action.

[13] A separate sustainable cause of action must be indicated in the Statement of Claim. For example, in *Austin v. Habitat Development Ltd.* (1992) 114 N.S.R. (2d) 379, the Statement of Claim pleaded that the Plaintiff had suffered damages as a result of the Directors breach of fiduciary duties and fraud. Both the Company and Director were held liable for money taken by the Director for his own purposes and the second Director was held equally liable as a participant, even though he derived no personal benefit.

[14] An allegation of wrongful dismissal, being an allegation of the breach of an employment contact without justification, cannot therefore succeed against parties that are not privy to that contract. In the text, H. A. Levitt, *The Law of Dismissal in Canada*, 2nd Ed. (Canada Law Book: Aurora, 1992), the author states at p. 76:

> An employee cannot sue the Directors or shareholders in a company for wrongful dismissal, unless a given shareholder or Director provides a personal guarantee. Only the company itself can, in general, be sued.

[15] In stating that proposition, the author relied upon *Schouls v. Canadian Meat Processing Corp.* (1983), 147 D.L.R. (3d) 81 (Ont. H.C.J.) where Trainor, J. stated at para 33:

> The contract of employment was with the Defendant corporation, and nor the Director....I am unable to conclude that there was any contractual relationship between the Plaintiff and the personal Defendant. The wrongful act of the Defendant Paletta was accomplished in his capacity as a Director on behalf of the Defendant corporation. There was no evidence that the Defendant Paletta guaranteed the Plaintiff's employment or otherwise assumed any personal liability for its performance.

[16] As to the extent that the Statement of Claim can be said to allege tortuous conduct on the part of the Directors, there are no facts pleaded that take the conduct of the Directors outside their scope of authority. In *Lussier v. Windsor-Essex School Board* (1999), 128 O.A.C. 98 (D.C.), the Ontario Divisional Court sitting in appeal, held at para 24:

> The individual defendants in this case were acting within the scope of their authority as agents or operating minds of the defendant Board. They had no interest other than the interest of the Board in pursuing the actions that took place. It cannot be said that the procedures that followed were outside the scope of their employment. [Emphasis Added]

[17] Upon this finding of fact, Kozak, J. held that the Statement of Claim against the individual School Board Directors be struck. At para 25, the Learned Judge held:

> The pleading does not set out facts with respect to the tortuous acts of the individual defendants which are separate and independent of the breach of contact claim against the defendant Board. [Emphasis Added]

[18] And at para 26:

> Even upon the most generous and favourable reading of the Statement of Claim, this Court is of the view that the pleadings are insufficient to establish an independent cause of action against the individual defendants. [Emphasis Added]

[19] In the case at Bar, the allegation that the Directors acted maliciously, etcetera, is an allegation as to the nature in which they conducted themselves in their capacity as Directors and not an allegation of any facts rendering or raising the question of personal liability for conduct outside their conduct as Directors.

APPLICATION OF *CIVIL PROCEDURE RULE* 18.01

[20] It was clear in the course of argument by counsel that neither fully appreciated the others respective position with respect to this issue. Nine of the Defendants have already been discovered. It does not appear that Ms. Nurse was aware of the age and infirmity of some of the Directors, two at least, it is advanced have no real capacity of comprehension and probably suffer from alzheimer's. Ms. Nurse did indicate she would be satisfied with the timely presentation of two particular individuals for discovery and Mr. MacLeod agreed, rendering the Application unnecessary.

[21] In the case at Bar, the allegation that the Directors acted maliciously, etcetera, is an allegation as to the nature in which they conducted themselves in their capacity as Directors and not an allegation of any facts rendering or raising the question of personal liability for conduct outside their conduct as Directors.

COSTS

[22] This is one of those situations where I think costs in the cause is appropriate, however, to make certain that they are not subsumed in any Tariff disposition, I would set and tax the costs of the Application in the amount of $500.00. The costs I award to the eventual successful party are in addition to whatever Tariff award is made by the Trial Justice. Without this direction, the costs of this interlocutory proceeding would in all probability be subsumed. *Gilfoy, et al v. Kelloway, et al* (2000), 184 N.S.R. (2d) 226.

J.