SUPREME COURT OF NOVA SCOTIA
Citation: Giffin v. Soontiens, 2011 NSSC 403

Date: 20110119
Docket: Hfx No. 292594
Registry: Halifax

Between:

Gordon Giffin — Plaintiff

and

Nicole Soontiens, Ilona MacAlpine, XL Electric Limited, a body corporate, Huntec Limited, a body corporate, and CNCA Holdings Limited, a body corporate — Defendants

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DECISION AT TRIAL ON PAROL EVIDENCE

Judge:	The Honourable Justice Gerald R. P. Moir
Date of Hearing:	January 18, 2011
Written Decision:	Oral decision transcribed, edited, and signed on October 31, 2011
Counsel:	John A. Keith, Andrew D. Taillon, and Jack J. Townsend, articled clerk, for plaintiff George W. MacDonald, Q.C., Kiersten Amos, and Michael Blades, articled clerk, for defendants Scott Sterns with watching brief for Tibor Berta and Western Electrics (2004) Ltd.

Moir, J. (Orally):

[1] Mr. Giffin started an action for shareholder oppression remedies against the majority shareholders, Ms. Soontiens and Ms. MacAlpine, and the main corporation and two related corporations who supplied premises to the main corporation. We are at the early stages of the trial.

[2] The defendants object to a broad range of evidence offered by the plaintiff. For practical reasons, I heard some of the evidence, even some of the cross-examination, before ruling on the objection. I must now make the ruling.

[3] Mr. Giffin asserts that he had a reasonable expectation of equal treatment with the other two shareholders. The asserted expectation will likely become more particular as the evidence unfolds. I already understand that it may be about equal treatment after repayment of a start-up loan.

[4] Mr. Giffin, Ms. Soontiens, and Ms. MacAlpine were parties to a shareholders' agreement under which the three were not treated equally. Mr. Giffin contends that the way the agreement was developed, the agreement itself, and

subsequent unequal treatment that may have been authorized by the agreement are unfair. These are said to be important facts going to a finding of oppression. Among other things, Mr. Giffin seeks an order nullifying the agreement.

[5] The evidence at issue includes drafts of the shareholders' agreement, which might show that Mr. Giffin's interests became less and less protected with each progressive draft. The evidence would also show the sources of the drafting lawyer's instructions and some of the content of the instructions. It would also show how much time the lawyer spent with the instructing representative of the company, Ms. Soontiens, on the subject of the shareholders' agreement. The evidence at issue may also include oral statements, representations, or even promises that are inconsistent with the shareholders' agreement.

[6] From the evidence so far, it appears that the shareholders' agreement is unambiguous. It contains an "entire agreement" clause. Mr. Giffin was advised to get independent legal advice and he did not do so. The agreement was explained to the shareholders by the company's lawyer, the drafting lawyer. That explanation included the "entire agreement" clause, anything unusual, and provisions by which Mr. Giffin was treated differently than the others.

[7] For the defendants, Mr. MacDonald objects to the extrinsic evidence on the grounds of the parol evidence rule and the entire agreement clause.

[8] For the plaintiff, Mr. Taillon responds that the parol evidence rule and the entire agreement clause do not stand in the way of proving oppression or Mr. Giffin's alternative cause, breach of fiduciary obligation. The plaintiff does not say that the shareholders' agreement is ambiguous, or that it means other than what it says.

[9] The first thing to be emphasized is that, despite its name and its frequent elaboration in terms of what a contracting party cannot produce as evidence, the parol evidence rule is not a rule of evidence. It is part of the substantive law of contract. Professor Wigmore starts his lengthy chapter on the rule by making this point.

[10] A contracting party cannot set up a parol agreement that adds to, varies, or contradicts the party's unambiguous written agreement.

[11] I do not understand the plaintiff to be setting up for enforcement a parol agreement that adds to, varies, or contradicts the shareholders' agreement. Rather, the plaintiff seeks to avoid the agreement and relies on law that is beyond contract. The second thing to emphasize is that the oppression remedies supercede contract.

[12] I find it helpful to bear in mind the legislative history behind the Third Schedule. For present purposes, a sketch will do.

[13] As with many other fields of law, there were currents in the 1960s for reform of company law. An early expression of that is the Laurence Commission in Ontario. Then, the Trudeau government asked the eminent commercial scholar, Professor Dickerson, and two colleagues of his, to report on changes that might be made through a modern statute to replace the *Dominion Corporations Act*.

[14] Dickerson reported in a most unusual way. He provided a draft statute. Forty years later, the Dickerson draft still reflects the pattern, and much of the substance, of the *Canada Business Corporations Act*. Dickerson and his colleagues recommended a sleek new model for pattern incorporations, a model that has since been adopted in almost every provincial legislative jurisdiction. It

also recommended, in strong language, protections for minority shareholders. In the draft, these protections were the derivative action (addressing the worst abuses of *Foss v. Harbottle*) and the oppression remedy.

[15] With minor changes, the government accepted the Dickerson recommendations, and Parliament enacted the government's Bill. Nova Scotia remained attached to its Victorian model for pattern corporations, but our legislature could not resist the two protections for minority shareholders. So, we have the Third Schedule.

[16] The protections for minority shareholders were not contractual. Before the *CBCA*, minority shareholders were parties to shareholder agreements. Even when there was no formal shareholders' agreement, the cluster of rights represented by a share was largely contractual. The oppression remedy protected minority shareholders by allowing them to insist on fairness notwithstanding the limits of their contractual and proprietary rights.

[17] As I said, the protection supercedes contract.

[18] This action will be determined on the principles found in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. Mr. Giffin's claim will be determined on two inquiries:

> (1) Does the evidence support the reasonable expectation asserted by the claimant? (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[19] The shareholders' agreement will be central in the first inquiry, but it cannot be exclusive. At para. 71, the court in *BCE* says, "It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature." However, the court allowed itself a few "generalizations", starting with one taken directly from the Dickerson report. "Actual unlawfulness is not required to invoke [an oppression remedy]; the provision applies 'where the impugned conduct is wrongful, even if it is not actually unlawful' ". Further, "The remedy is focussed on concepts of fairness and equity rather than legal rights." The limits of relevancy in an oppression case are, therefore, very broad.

[20] It is, therefore, open to a plaintiff in an oppression action to prove that the majority did something that, though authorized by a shareholders' agreement, was wrongful, unfair, or inequitable.

[21] The broad limits of relevancy in an oppression case can also be seen in another aspect of the *BCE* decision. The decision suggests a list of factors that may be relevant in assessing the reasonableness of the asserted expectation. Agreements are only one of these factors.

[22] As far as I am aware, there is only one decision that deals with the issue raised by Mr. MacDonald. He referred me to it: *Matthews Investments Ltd. v. Assiniboine Medical Holdings Ltd.*, 2007 MBQB 245. Justice Joyal gave "a mid-trial ruling respecting the admission of parol evidence". He gave an oral ruling, then amplified it with a thorough written decision.

[23] The plaintiffs claimed that failures to declare dividends breached a 1993 agreement. They also claimed that the failures founded an oppression remedy. They sought to prove a 1985 agreement to respond to an ambiguity said to arise on the wording of the 1993 agreement.

[24] Justice Joyal found the 1993 agreement to be unambiguous. Therefore, the 1985 agreement was excluded as evidence on the claim for breach of contract.

[25] At para. 36, Justice Joyal noted that the court considers factors such as "the history of the parties' relationship", "the nature and structure of the company", "previous general company practice", and "the nature of the rights affected" when determining the reasonableness of expectations in an oppression action. The 1985 agreement "and other like extrinsic evidence" was admissible on the oppression claim.

[26] It seems to me that there are two bases upon which to admit evidence of expectations contrary to a shareholders' agreement in an oppression case. Firstly, the agreement is only part of the evidence for determining whether an expectation was reasonable or unreasonable. Secondly, a reasonable expectation that a shareholders' agreement would be performed or administered differently than its strict terms allow can found an oppression remedy. Such would be irrelevant in a case of breach of contract; it could be material in an oppression case.

[27] I doubt that Parliament or the provincial legislature were cognizant of the cost consequences of the very broad limits they created for relevancy in oppression cases. The statutes provide for a minority shareholder to apply to a judge for a remedy. The reforms we saw in the sixties often embraced judicial discretion as the solution, and assumed that the discretion would be available quickly after a short hearing.

[28] Oppression remedy cases are often long in preparation and long in hearing. In part, that is because the bounds of relevancy are so broadly set.

[29] In my view, reasonable expectations may be established in an oppression case although the expectations contradict an unambiguous shareholders' agreement. The parol evidence rule, and the exclusive agreement clause, do not control relevancy in such a case.

[30] I will therefore admit the evidence objected to as going to the claim for an oppression remedy.

[31] As I said, the plaintiff also supports admission of the evidence on the basis of his claim for breach of fiduciary obligation. I prefer to leave that to the end. It is enough for now to say that it goes to oppression.

J.