Date: October 5, 2001
Docket: SH 150389C

1998

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as: Hardman v. Alexander, 2001 NSSC 137)

BETWEEN

W.B. Hardman, the Hardman Group Limited and Bryman Enterprises Limited

Plaintiffs
Defendants by Counterclaim and Defendants

-and-

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

Defendant
Plaintiffs by Counterclaim and Plaintiffs

-and-

Ronald Stockton and Bernadette Maxwell

Second Defendants

DECISION
(Chambers Application)

Heard before: **the Honourable Associate Chief Justice Michael MacDonald on September 4, 2001 in Halifax, N.S.**

Date of Written Release of Decision: **October 5, 2001**

Counsel: **Dufferin R. Harper & Sean Foreman,** ***Merrick Holm for the Plaintiffs & Defendants by Counterclaim and Defendants***
William L. Ryan, Q.C. & Nancy Rubin, ***Stewart McKelvey Stirling Scales for Defendants & Plaintiffs by Counter-Claim & Plaintiffs***
Robert Belliveau, Q.C. ***McInnes Cooper for Susan Pratt***
Bernadette Maxwell & Ronald Stockton ***(self-represented)***

MACDONALD, A.C.J.:

[1] A disputed real estate venture has led to a series of claims that have been consolidated into one main action. I have been asked to rule on several interlocutory matters including an application for partial summary judgment and cross- applications for amendments to pleadings.

BACKGROUND

[2] In the Fall of 1996, five investors got together to develop a large tract of land on Herman's Island, Lunenburg County. They incorporated a company, Herman's Point Development Limited. The share structure of the Company at incorporation is set out in paragraph 4 of the Christopher Alexander affidavit:

> 4. THAT the shareholders of the Company at the date of incorporation were:
>
> a. Bryman Enterprises Limited ("Bryman")..... 300 shares
> b. Precious Maxillo-Facial Surgery Inc. ("PMFS").....300 shares
> c. Bernadette Maxwell & Ronald Stockton ("Stockton-Maxwell")..200 shares
> d. Susan Pratt ("Pratt").....200 shares
> e. Myself.....200 shares
>
> (collectively "the Shareholders").

[3] This arrangement is interesting in that two of the investors control one half of the shares while the other half is controlled by the remaining three investors. At the same time, by virtue of their Shareholders' Agreement (*Exhibit "B"* of the Alexander affidavit) each shareholder gets to elect one Director to a five-member Board. In other words while two investors, "Bryman" (Hardman) and Precious, own one half of the Company, they controlled only two-fifth's of the Board. As will be seen later, this arrangement is at the heart of the stand-off presently facing this Company.

[4] The dispute emanates from the actual management of the Company. The initial arrangement called for one of the investors, Hardman, to manage the day-to-day operations of the Company. To effect this, the Shareholders' Agreement confirmed Hardman as the Company's President. At the same time the Company entered into a management agreement with one of Hardman's other companies. (*Exhibit "C"* of the Alexander affidavit).

[5] Eventually, certain investors expressed dissatisfaction with Hardman and his management of the Company. This culminated in a highly controversial set of Director/Shareholder meetings held on July 13, 1998. While there is much disagreement as to what if anything was resolved at this meeting, the emergence of two divergent camps was obvious. Precious and "Bryman"

(Hardman) supported Hardman's management and the three remaining groups opposed it. These same three Directors further maintain that at this meeting, Hardman was officially removed as Director; something that Hardman adamantly denies.

[6] To further complicate matters, the Maxwell/Stockton shares have been tendered and their ownership is up in the air. They have also resigned their shared directorship. Thus, the Company was left in a major deadlock. There are now only four Directors, evenly divided into two camps. Furthermore, while Precious and Hardman have more shares (one-half) than Pratt and Alexander (one-third), neither camp has a majority.

[7] From all this there emerged four law suits that have now been consolidated into the one main action at Bar. The style and nature of these actions are succinctly summarized at page 4 of Hardman's brief:

S.H. #	**Date Filed**	**Parties to Action**
150107C	September 10, 1998	Bryman v. Alexander, Pratt, Stockton & Maxwell
150389C	September 23, 1998	Bryman, Hardman Group & Hardman v. Alexander
151138C	October 21, 1998	Alexander v. Bryman, Stockton and Maxwell
151139C	October 21, 1998	The Company v. Hardman Group and Hardman

> In S.H. 150107C, Bryman alleges that on August 13, 1998, Alexander, Pratt, Stockton and Maxwell ("the Defendant Shareholders") had reached a binding agreement with it for the purchase of their shares in the Company. Bryman seeks, *inter alia*, an Order declaring its right and interest in the shares and shareholder loans of the Defendant Shareholders.
>
> In S.H. 150389C, Bryman, Hardman Group and Hardman seek an Order declaring, *inter alia*, that the purported termination of the Hardman Group on August 28, 1998, as the project manager and developer of the Herman's Point Development was unlawful. It includes a request for injunctive relief restraining Alexander from further interference.
>
> In S.H. 151138C, Alexander seeks an Order against Bryman, Stockton and Maxwell, prohibiting the transfer of Stockton's and Maxwell's shares to Bryman, and requiring Stockton and Maxwell to offer their shares to both Bryman and Alexander at the same price and same time.
>
> In S.H. 151139C, the Company (though Alexander) alleges negligence, breach of contract and breach of fiduciary duties against Hardman Group and

> Hardman and seeks an Order for a mandatory injunction requiring Hardman Group and Hardman to remit and return all Company documents, and to advise the Company of the status of all offers, pending offers and sales of lots of the Company.

The Applications

[8] In the first Application, Alexander seeks a declaration that Alexander is the President of the Company. In addition to contesting this application, Hardman counters by seeking three amendments to the pleadings. Specifically Hardman (with Precious) seeks to:

a. Add Precious as a plaintiff in Hardman's actions,

b. Enforce a recent offer to acquire all the shares in the Company, and

c. Seek a winding up of the Company as alternative relief.

[9] I will now deal with each Application in order.

Alexander's Claim to be President

[10] Alexander and Pratt assert that at the July 13, 1998 Directors' meeting, Hardman resigned as President. Alternatively they insist that, at the same meeting, a majority of Directors in any event replaced him as President. According to Alexander and Pratt, Hardman has admitted as much in subsequent declarations. Based on these admissions, Alexander therefore, seeks summary judgment on this specific issue.

[11] For his part, Hardman denies officially resigning on July 13, 1993 and further denies ever subsequently confirming his resignation. He concedes discussing his resignation at the July 13, 1998 meeting. However, he insists that because his presidency was confirmed by way of the Shareholders' Agreement, it would take an amendment to that document to actually replace him.

Analysis

[12] In seeking partial summary judgment, Alexander relies on *Civil Procedures Rules* 13.04 and 21.03:

> **Judgment on admission of facts or documents**

13.04. The court may grant a summary judgment or order under rule 21.03 on an application based on admission of facts or documents in a pleading or otherwise.

Judgment on admission of facts or documents

21.03. When an admission of the truth of any fact or the authenticity of any document is made by a party by his pleading or otherwise, any other party may apply to the court for such judgment or order as he may be entitled to on the admission without waiting for the determination of any other question between the parties, and the court may give such judgment or make such order as it thinks just.

[13] In essence, Alexander and Pratt refer to Hardman's numerous acknowledgments both during and after the July 13th meetings which they submit either individually or cumulatively confirm Hardman's admission that he is no longer President.

[14] In considering this submission, it is important to remember the principles applicable to summary judgment applications. To defeat this application, Hardman faces a very light burden. He need only establish that the presidency issue represents an arguable issue to be tried. While this test has been referred to in many Nova Scotia cases, I refer to the following passages by the late Pugsley J.A. in *Saunders et al. v. Oceanus Marine Incorporated* [1996] N.S.J. No. 301. where at paragraphs 16 and 20 he noted:

> All that was required of the Saunders to defeat the applications was to raise an arguable issue to be tried. The burden is not a heavy one, *Lienaux v. Toronto-Dominion Bank* (1995), 140 N.S.R. (2d) 156 and 158...
>
> It was, with respect, not the function of the chambers judge, on an application for summary judgment, to determine matters of fact or law which were in dispute. Matters of controversy should be left for resolution at trial. (*Irving Oil Ltd. v. Jos A. Likely Ltd.* (1982), 42 N.B.R. (2d) 624).

[15] Having carefully considered the detailed affidavits and the able submissions of counsel, I find that Hardman has raised an arguable issue to be tried. I say this for the following reasons.

[16] The entire presidency issue centres around the acrimonious meetings of July 13, 1998. Regardless of the minutes, there remains significant controversy as to exactly what was said and therefore as to what was resolved. While Hardman admits that he talked at the Directors' meeting about not re-offering, he insists that this was qualified in that it, in his mind, was subject to further confirmation

by the shareholders. Regardless of how many witnesses and how many documents contradict what Hardman may have said that evening, he ought not be denied his right to have his evidence weighed by a trial judge. In other words there are issues of credibility flowing from those very important meetings and these issues are properly left for trial. At page 13 of his brief, Alexander acknowledges the importance of the July 13th meetings and in fact invites the Court to weigh the evidence against Hardman:

> Having established that the procedure was proper and followed, the questions of the actual vote is key to the resolution of this declaration. Four parties before you - Alexander, Pratt, Stockton and Maxwell state that the election of the officers was duly held and that Alexander was voted the President of the Company. It should be noted that Stockton and Maxwell are adverse parties to Alexander as is apparent from the pleadings. Despite this adversity of interest, Stockton and Maxwell confirm that the outcome of the July 13, 1998 directors' meeting is that Alexander is President. It is submitted that their evidence ought to be given great weight. *[Underlining mine]*

[17] With respect, it is not the role of the chambers judge on a summary judgment application to weigh the credibility of witnesses on what should be an important trial issue.

[18] Furthermore Hardman's assertions about what he said and meant at the July 13th meetings is crucial in placing his subsequent acknowledgments into context. He has offered an explanation as to why he subsequently alluded to Alexander as president. If believed, this explanation may be plausible. Again it is not for me at this stage to test his credibility. It is enough to say that when placed in context, his admissions appear much less clear. In order to be successful Alexander must present clear and unequivical admissions. I refer to the NSCA decision of *Campbell v. Lenaux* (1998), 167 N.S.R. (2d) 196, 502 A.P.R. 196 (N.S.C.A.) where at paragraph 12, Cromwell noted:

> Not every admission entitles the opposite party to judgment. The admission must be clear, unequivocal and relate to matters the admission of which entitles the party to judgment: see Rule 21.03 and *Bank of Nova Scotia v. Dombrowski* (1977), 23 N.S.R. (2d) 532 (N.S.C.A.). Moreover, statements made by a party in evidence, or correspondence, must be examined in context and the party making the statements has the opportunity to explain or qualify them. In short, there was no obligation on the Chambers judge to first consider the statements on which the appellants relied without considering the context, the explanations and qualifications which the respondent placed before him. Indeed, it would have been wrong for the Chambers judge to have done so.

[19] In reaching this decision, I realize that in Nova Scotia, the Directors are responsible for electing the officers and that this may be so even in the face of a conflicting shareholders agreement. I also realize that a majority of the Directors purport to having replaced Hardman as president. Nonetheless, the resolution of this issue all goes back to the July 13, 1998 meetings. What was done depends in large measure upon what was said. What was said is a matter of factual dispute and therefore should be resolved at trial and not summarily.

Application to Amend the Pleadings

[20] Turning to Hardman's request to amend the pleadings, CPR 15.01 and 15.02(1) are the relevant provisions:

> Amendment of a document filed in a proceeding:
>
> 13.01 A party may amend any document filed by him in a proceeding other than an order.
>
> (c) at any time with the leave of the court.
>
> Amendments by the court:
>
> 15.02(1) The court may grant an amendment under Rule 15.01 at any time, in such manner, and on such terms as it things just.

[21] The test to amend pleadings is settled in this province and recently confirmed in *Lamey v. Wentworth Valley Developments Ltd.*, [1999] N.S.J. No. 122 at paragraph 12:

> The trial court has a wide discretion on an application to amend pleadings. It is usual to allow amendments where the applicant is acting in good faith and where there would be no injustice or serious prejudice by the amendment that could not be compensated by costs. The test to be applied in Nova Scotia for granting an amendment to a pleading is set out in *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182, where Chief Justice Clarke states at page 183:
>
> > [5] A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs. One of the earliest statements of this proposition is by Bramwell, L.J. , in *Tildesley v. Harper* (1878), 10

> Ch.D. 393. In considering whether to grant leave to amend the statement of defence, he stated at pp. 396-397:
>
> > ...My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.
>
> [6] The opinion expressed by Bramwell, L.H. has been followed in numerous judgments of courts since 1878, including this court in *Baumbour v. Williams* (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564. In Baumbour, at the commencement of the trial, the defendant sought to amend his defence to allege fraud. After reviewing the authorities, including *Tildesley*, Coffin, J.A. said at p. 567:
>
> ...there is a very important issue to be tried and the respondents have not shown that they would be unduly prejudiced by the amendment. The respondents should be adequately compensated for any inconvenience by costs.
>
> [7] In considering this application the chambers judge entered upon an examination of the merits of the proposed amendment. In our opinion, that ought to have been left for the trial judge to determine on the evidence and the law.

Analysis

[22] I will now apply this rather low threshold to the each of Hardman's three requests:

[23] 1. The request to add Dr. Precious as a party was in the end uncontested and I therefore confirm this amendment.

[24] 2. The second request flows from an offer by Hardman and Precious to buy all outstanding shares in the Company pursuant to the provisions of the Shareholders' Agreement. This offer was made in January of this year. Hardman now wishes to enforce this offer and to amend the pleadings accordingly. On this issue, I find that it would be inappropriate to add this issue to the existing pleadings. It is a separate cause of action involving relatively recent developments. I realize that the same Shareholders' Agreement will be considered in the trial proper with or without this amendment. Yet, this amendment would undoubtedly lead to new and more detailed discovery hearings for a matter that is already complicated. This action should proceed

to trial as soon as possible without further complications. Based on the information presently before me, I find for the reasons stated, an amendment at this time would unduly prejudice the responding parties.

[25] 3. The final request involves an alternative plea to have the Company wound up. I do not have the same concerns with this request. This is simply an additional form of relief, not based on a new cause of action or new facts. This amendment should not lengthen the discovery process or further complicate the evidence. I acknowledge responding counsel's submission that clause 3 of the order consolidating these actions matter prevents the parties from seeking further relief. Clause 3 provides:

> 3. **THAT** no party in the consolidated action shall be liable for any damages or other relief claimed except as specifically pleaded in each particular action.

[26] I do not share responding counsel's interpretation of that clause. While this clause may attempt to limit the exposure of the parties, it should not be seen to prevent a court from granting amendments to the pleadings. Furthermore I confirm that while the Shareholders' Agreement prevents the Company from seeking a winding up, there is nothing to prevent a party from seeking the same. For all these reasons, it is proper to grant this amendment and I so order.

Disposition

[27] Alexander's application for declaratory relief is dismissed. Hardman's application to add Precious as a plaintiff is granted; as is his application to claim a winding up of the Company. His application to amend the pleadings so as to enforce the January 2001 offer to purchase is dismissed.

[28] I trust that the parties can agree on costs for this application. On that assumption, I invite Mr. Harper to present the order after Mr. Ryan and Mr. Belliveau have consented as to form. Should the parties be unable to agree on costs, I will convene a conference call to resolve this issue.

Michael MacDonald
Associate Chief Justice