<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: Giffin v. Soontiens, 2012 NSSC 2

Date: 20120103
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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SUPPLEMENTARY DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: Written Submissions only

Last Written Submission: December 29, 2011

Counsel: John A. Keith, for the plaintiff

George W. MacDonald, Q.C., for the defendants

Moir, J.:

[1] *Introduction*. I met with counsel after my decision of October 31, 2011 and gave directions for evidence and submissions on various outstanding issues that must be determined before a final order can be prepared.

[2] *Appointment of Valuer*. Para. 438 of the decision provides for an order "that the defendants cause the equity in XL to be valued by a chartered business valuer". I also said, "The court will appoint the valuer if the parties cannot agree." The parties cannot agree.

[3] The parties put forward names of qualified valuers. The plaintiff has reservations about the defendants' nominees, and the defendants have reservations about the plaintiff's. None of the reservations are flimsy, but none are such as would disqualify any nominee.

[4] In my assessment, the least substantial reservations are those expressed about Mr. Harold Duffett of Kent and Duffett Chartered Accountants. The order will provide for his appointment.

[5] I am prepared to give an additional direction, subject to submissions counsel may care to make on this unexplored idea. I would direct that Mr. Duffett use Ms. Barbara Morton of Ernst & Young for peer review, if both consent. Next after Mr. Duffett, I thought the reservations about Ms. Morton least substantial.

[6] *Offset.* The payment to Mr. Giffin for XL Electric Limited must be calculated net of debt owed by him to XL. The same goes for Huntec Limited, if there is any debt owing by him to it.

[7] *Kind of Valuation.* The main decision refers to "market value" at para. 436. However, it provides at para. 438 that "the company is to be valued as a going concern" and that the price to be paid to Mr. Giffin is "the value of the equity" followed by certain adjustments.

[8] Plaintiff's counsel says that "fair value" and "fair market value" are terms of art in business valuations. Defendants' counsel objects that this is giving evidence. So, plaintiff's counsel referred me to the discussion at para. 104 of *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.).

[9] The term "market value" can have the same meaning as "fair value", or it can refer to one of several approaches to business valuations, the "market value approach". I did not wish to restrict the valuer to any approach.

[10] We need to know the value of the interest of the shareholders in XL at the time when Mr. Giffin left it. That is what I meant by "the equity".

[11] Mr. Duffett is free to make a motion under Rule 22.11(1), if further clarification is required.

[12] *Whether to Decide Costs Now?* The defendants propose that we wait for the valuation to finish submissions on costs. The plaintiff made a submission for solicitor and client costs, and he wants the issue determined now.

[13] The plaintiff pleaded for an order requiring the individual defendants to purchase his shares at fair value. He also pleaded for a valuation, if necessary. He is getting what he pleaded for no matter what the valuation tells us.

[14] That said, the valuation is necessary to assessing one aspect of the claim for full indemnification and it will be helpful to the overall assessment.

[15] The main points to the plaintiff's argument for full indemnification are about

- the finding of oppression itself
- misconduct in disclosure and production
- the plaintiff's settlement offers.

The valuation will be essential for my assessment of the third of these points. Though unnecessary, it will be helpful on the others.

[16] The valuation will also be helpful on the overall assessment. At the moment, I have no idea what the equity in XL was worth when Mr. Giffin resigned. Even in shareholder oppression cases, parties who fight over little or nothing can expect a different attitude toward costs than those who have much at stake.

[17] Finally, the valuation will be helpful to assessment of party and party costs, if the claim for full indemnification fails. Otherwise, I will have to speculate about "the amount involved" in arriving at tariff costs either for the purpose of awarding a tariff amount or for the purpose of abandoning the tariffs to achieve partial but substantial indemnification.

[18] Therefore, I will wait for the valuation before setting deadlines for any further evidence and submissions on costs.

[19] *Compensation for Unequal Salary, Bonus, or Dividend*. It is submitted for Mr. Giffin that para. 418 to 421 of the main decision amount to a finding "that the unequal taking of profits was an oppressive or bad faith attempt to take advantage of a minority shareholder". Mr. Giffin wants the distribution of profits equalized.

[20] The defendants submit firstly that "there is no such remedy provided for in [the main] decision" and "the terms of the order can only reflect the contents of [the] written decision". I disagree. I believe that a decision is only an opinion. It may be added to, or otherwise changed, until the order is issued.

[21] Secondly, the defendants see the plaintiff's claim for equalization as a kind of double recovery. "The Plaintiff should be entitled to a remedy *for* the oppressive conduct, or a reversal of the oppressive conduct, but not both." Respectfully, the two are not mutually exclusive. I would compensate for the unequal treatment and consider ordering the purchase of the shares as well, if the unequal payments were the foundation for the finding of oppression.

[22] The oppressive conduct did not consist merely in the making of the unequal payments. Indeed, Mr. Giffin acquiesced in them. The oppressive conduct consisted in a broader set of findings.

[23] The only years in which unequal payments were important for the finding of shareholder oppression were fiscal 2005 and 2006. I found that Mr. Giffin was treated roughly as an equal from 1999 until, and including, 2004 (see para. 236).

[24] In 2005, the company achieved real profitability, with retained earnings nearing the objective set by the other shareholders. The intention to declare dividends on class A shares was announced at the annual meeting. Mr. Giffin was displeased with the inequality that would result (see para. 264). Despite his

displeasure, Mr. Giffin signed the resolution authorizing the dividends (see para. 279 and para. 288 and also para. 260 to para. 284).

[25] The inequality was perpetrated again in 2006 when Mr. Giffin's employment income was reduced relative to that of the others (see para. 286 and also para. 285 to para. 305).

[26] So, the conduct that amounted to oppression, as discussed at para. 417 to 421, was not the decisions to make unequal payments for 2005 and 2006 on their own. Mr. Giffin was a director, and he participated in those decisions. Mr. Giffin got what he was legally entitled to in 2005 and 2006. The oppression had a broader context.

[27] The other shareholders intended to take more for themselves if the business truly succeeded. They knew Mr. Giffin expected equality, yet they concealed their intent from Mr. Giffin while he worked hard to make the business truly successful. The true intent was revealed only at the 2005 annual meeting. That caused Mr. Giffin to lose trust and to leave the company.

[28] That is the bare bones for the finding of oppressive conduct. The correct remedy is not to equalize payments when the unequal payments were, however grudgingly, authorized by Mr. Giffin and the other directors and shareholders. The correct remedy for the oppressive conduct is one that lets him leave the company, and the oppression, behind but with the fair value of his shares.

[29] *Prejudgment Interest on the Share Value*. The plaintiff seeks interest at 5 percent on the monetary award, the value of his shares.

[30] Plaintiff's counsel refers to Rule 70.07, which establishes a rate and calculation for liquidated claims, "five percent a year calculated simply". The Rule also permits a judge to order a different rate or calculation.

[31] Mr. Giffin's is not a liquidated claim. Counsel argues "... there is no principled reason to distinguish the pre-judgment interest rates which accrue to liquidated claims from those which accrue to unliquidated claims." I disagree.

[32] Rule 70.07 is part of Rule 70 - Assessment of Damages. The presumptive rate avoids the need for a hearing to assess interest on a liquidated claim, which

usually requires no elaborate assessment. See also, Rules 8.06(b) and 8.07(1)(d). An unliquidated claim requires an assessment of damages. If the principal is to be assessed, the interest can efficiently be assessed at the same time. So, a presumptive rate serves a purpose for liquidated claims, avoiding an assessment hearing, that would not be available for unliquidated claims.

[33] There is no presumptive rate for damages on an unliquidated claim.

[34] The *Judicature Act* was amended in 1980 to provide for prejudgment interest. Before that, a common law entitlement to prejudgment interest had just begun to be recognized in Nova Scotia.

[35] Paragraph 41(i) of the *Judicature Act* provides that "the Court shall include [in a judgment] ... interest thereon at such rate as it thinks fit". Most often, the parties agree on a rate and the judge accepts it as fit. Sometimes, parties provide evidence from which the judge is able to find a fit rate. Occasionally, judges have established a rate based on their own knowledge: eg. *Yeadon v. Gauthier*, [1981] N.S.J. 447 (S.C., T.D.). Before the Practice Memorandums under the 1972 Rule elapsed, Practice Memorandum No. 7 applied to set rates for prejudgment interest.

It referred to consent in para. 2(a), presumptive rates in para. 2(b), and the practice of a judge selecting a rate without consent or evidence in para. 3.

[36] Paragraph 2(b) of the practice memorandum called for evidence about "the prevailing rates of interest for the relevant period of time". It "suggested" parties prove a table "showing the average rates of interest for one (1) year or two (2) year term deposits or treasury bills".

[37] Justice Coughlan applied Practice Memorandum 7 in *Awan v. Cumberland Health Authority*, 2009 NSSC 295 affirmed 2010 NSCA 50, although that case was decided after the old practice memorandums elapsed. Most of the litigation had taken place when the 1972 Rules were still in force, and Justice Coughlan chose to use the memorandum as a guide.

[38] The defendants provided evidence about rates paid on one year treasury bills between March 26, 2007 and December 1, 2011. They averaged 1.88 percent per year. Rates for two year bills were not immediately available. Judging from spreads referred to in reported decisions, that rate is probably over two percent.

[39] In my opinion, the practice memorandum ought not to be a guide in cases that are primarily litigated after the new Rules were made in June of 2008. Those Rules did not incorporate the practice memorandum, or the preference for deposit rates.

[40] Mr. Giffin left XL because of the oppressive conduct. He took a lower paying job. A forced purchase of the shares is proportionate to the oppressive conduct only if it dates from the day he left the company. Mr. Giffin's financial circumstances are such that two percent would not adequately compensate for the wait. The money, if paid at termination, would not have gone entirely to savings. Depending on the principal amount, perhaps none would have gone to savings.

[41] A fit rate of interest in the circumstances of this case is one that weighs between savings rates and borrowing rates. Four percent should accomplish that objective.

[42] I allow prejudgment interest on the payment for Mr. Giffin's shares at four percent a year calculated simply.

[43] Each side blames the other for delays in the liquidation of the Huntec property or the distribution of the proceeds. The parties have shown a remarkable disinclination to agree on anything.

[44] Huntec is not the object of the oppression remedy. It has been liquidated. The sums in trust, including interest earned, are to be divided as the main decision provides.

[45] Entitlement to interest should be restricted to whatever has accrued in trust.

[46] *Conclusions*. Mr. Harold Duffett is to be appointed as valuer. I am open to directing that Ms. Barbara Morton should do the peer review.

[47] Mr. Giffin's interest in XL is to be calculated net of debt owed by him to XL. The same goes for Huntec, if there is debt owing.

[48] I am not restricting the valuation to any approach, or combination of approaches. If Mr. Duffett needs clarification, he can make a motion under Rule 22.11(1).

[49] Mr. Giffin is not entitled to compensation for the unequal 2005 and 2006 dividends, salaries, or bonuses, which he authorized.

[50] Prejudgment interest on the payment for Mr. Giffin's XL shares will be calculated at four percent a year simply. No interest is payable on his Huntec claim beyond his share of whatever has been earned in trust.

[51] Counsel are working on two further issues and I will be available to make a determination, if the parties cannot agree.

[52] I will not determine any issues about costs now. I will revisit the submissions made by counsel last month, and counsel will have an opportunity to make further submissions, after Mr. Duffett submits his valuation.

J.