SUPREME COURT OF NOVA SCOTIA
Citation: Jeffrie v. Hendriksen, 2012 NSSC 335

Date: 20120705
Docket: Hfx No. 346079
Registry: Halifax

Between:

Roderick Jeffrie

Applicant

v.

Anthony Hendriksen, Inland Marine Services Limited
and Three Ports Fisheries Limited

Respondents

Judge:	The Honourable Justice Michael J. Wood
Heard:	July 3, 2012, in Halifax, Nova Scotia
Decision:	July 5, 2012 (Orally)
Written Release of Decision:	September 26, 2012
Counsel:	William L. Ryan, Q.C., Christa M. Brothers and Matthew Pierce, for the Applicant Michael S. Ryan, Q.C. and Ezra Van Gelder, for the Respondents

By the Court: (Orally)

INTRODUCTION

[1] Although I am giving my reasons orally, I reserve the right to amend a written decision as required to supplement those reasons and edit them slightly. There will be no change in substance obviously, or result.

[2] There were two preliminary motions brought on behalf of the applicant, Roderick Jeffrie, and these are as follows:

1. A motion to amend the notice of application in court to add a claim for relief seeking the appointment of a receiver for Three Ports Fisheries Limited and liquidation of that company; and

2. A motion to strike out correspondence between legal counsel, which is attached as exhibits to the affidavit of Mr. Ralph Ripley on the basis that it is covered by settlement discussion privilege or is irrelevant.

[3] Firstly, with respect to the motion to amend the notice. Ms. Brothers, on behalf of the applicant, says that the amendment is a matter of housekeeping and does not change the evidence filed or the arguments to be made.

[4] She relies on the reference to the third schedule of the *Companies Act* found in para.17 of the notice. Section 5(3) of that schedule sets out the remedial authority of the court if it is satisfied that there has been corporate conduct which is oppressive, unfairly prejudicial or that unfairly disregards the interests of an aggrieved party. Among the powers set out in s. 5(3) is the authority to appoint a receiver under s-s. (b) and to order liquidation of the company under s-s. (l). Ms. Brothers argues that the respondents should have known that this relief might be granted and have prepared accordingly.

[5] Mr. Van Gelder, on behalf of the respondents, submits that mere reference to s. 5 of the third schedule is not adequate notice. The specific relief claimed in the notice for the alleged oppressive conduct was damages. He says that s. 5(3) of the third schedule lists a wide range of remedial powers, including the authority to

set aside transactions. A party cannot be expected to anticipate that all possible remedies are on the table, when only damages are specifically claimed.

[6] If the respondents had been aware that receivership and liquidation were being sought, Mr. Van Gelder says that additional evidence would have been filed, particularly with respect to Mr. Jeffrie's competing business which would benefit from such an order.

[7] The respondents are not requesting a further adjournment to deal with the potential amendment. Amendments are governed by *Civil Procedure Rule* 83. The parties agree that the test to be applied is whether the party seeking the amendment is acting in bad faith, or whether the other party will suffer serious prejudice as a result of the requested amendment which could not be compensated by costs.

[8] There is no suggestion of bad faith on the part of the applicant and therefore the question is whether there would be serious prejudice to the respondents that could not be compensated by costs.

[9] Mr. Van Gelder's arguments include submissions with respect to whether the Court has a sufficient factual basis to grant the requested relief. However, as noted by Justice Bourgeois in *Nova Scotia (Department of Community Services) v. Hopkins*, 2011 NSSC 382, at para. 14, consideration of the merits of the proposed amendment should not be undertaken at this stage.

[10] The main part of Mr. Van Gelder's submission was that the respondents may have wanted to file additional evidence had the request for the appointment of a receiver and liquidation of the company been made earlier.

[11] Ms. Brothers says that no new evidence is needed and the Court will be able to exercise its remedial discretion once the facts are determined.

[12] An oppression remedy is intended to be broad and flexible. It depends upon the facts of the case and the discretion of the court. This discretion will be affected by a broad range of considerations.

[13] Appointment of a receiver and liquidation of a company are drastic measures and should not be granted without a full appreciation of all of the relevant circumstances.

[14] The respondents say that they had no notice of this possible relief and so did not file their evidence with this in mind.

[15] Section 5(3) of the Third Schedule of the *Companies Act* lists many possible remedies and I agree with Mr. Van Gelder that it is not reasonable for the respondents to have assumed that they were all potentially triggered. The notice of application specifically claimed damages for oppression and nothing more.

[16] In addition, the amendment of the notice of application last fall to provide further particulars did not include addition of a claim for receivership and liquidation.

[17] Finally, the lengthy pre-hearing brief filed by the applicant makes no reference to receivership or liquidation.

[18] In the circumstances, there would be no reason for the respondents to file affidavits dealing with these issues. In light of the broad discretion to be applied in considering receivership and liquidation, I accept that there may have been other evidence which the respondents may have wanted before the Court.

[19] We must keep in mind that the procedure chosen by Mr. Jeffrie was an application in court. This means that all evidence must be pre-filed through affidavits. In such a proceeding the ability to react to amended pleadings is more restricted than at trial.

[20] I return to the question of whether the respondents will suffer prejudice that cannot be compensated by costs. I am mindful of the many cases where amendments are granted even very late in the process.

[21] In my view, the request for an amendment is very late and not a matter of housekeeping. Having said that, I have considered the submissions of Mr. Van Gelder and believe that the respondents should be able to respond to the amendment by adducing additional evidence.

[22] For this reason, I will allow the amendment but will give the respondents the chance to make submissions about filing additional evidence in response.

[23] I am open to hearing their suggestions as to the manner and timing of the filing of this evidence. Of course, I will also consider their submissions with respect to the responsibility for any associated costs.

[24] I would ask the respondents to advise the Court by the morning of July 6, 2012, whether they wish the opportunity to file any additional evidence and if so, what the proposed evidence is, the manner in which it will be adduced and when they proposed to present it.

[25] I will now deal with the motion to strike the solicitors' correspondence.

[26] The applicant says that the letters exchanged between Stewart McKelvie and Ralph Ripley in November of 2010 through January, 2011 represent communications covered by settlement privilege or are irrelevant.

[27] Ms. Brothers submits that Mr. Ryan was retained as litigation counsel and had an ethical duty to recommend settlement to Mr. Jeffrie. She says that the letters in question represent efforts towards settlement and are impliedly without prejudice.

[28] Mr. Michael Ryan, on behalf of the respondents, argues that there is no evidence to support this motion and this correspondence is simply ongoing negotiations for the sale of shares, or alternatively, a repudiation of any existing agreement.

[29] I agree with Ms. Brothers that the absence of express terms that the letters are sent without prejudice is not fatal. It is the context and the correspondence itself which must be considered and not just labels.

[30] The application alleges that an oral agreement for the purchase of his shares in Three Ports Fisheries Limited was reached with Anthony Hendriksen in September, 2010. He says that there were a series of adjustments to the agreement

during the next few weeks, but no changes to the essential terms of quantity of shares and price.

[31] There was never a signed agreement of purchase and sale for the shares. The resolution of this proceeding will depend upon the Court's assessment of the evidence of the parties themselves, as well as third party witnesses.

[32] The respondents argue that there was never a binding agreement reached in 2010 despite a series of meetings and discussions. They say that these amount to no more than ongoing negotiations which never came to fruition.

[33] On November 3, 2010, Ralph Ripley sent a draft share purchase agreement to Mr. Jeffrie's then lawyer, Dwight Rudderham. The response on behalf of Mr. Jeffrie was Mr. Ryan's letter of November 9, which was the first of the impugned correspondence.

[34] That letter introduced Mr. Ryan as follows and I quote the first sentence from that letter:

> Please be advised that our firm has been retained by Mr. Jeffrie in connection with the sale and/or purchase of shares of Three Port Fisheries Limited.

[35] The letter then goes on to reject the offer set out in the draft agreement, to propose another offer to purchase the shares on certain terms and purported to do so pursuant to the shotgun clause of the alleged shareholders agreement. The letter also indicates that if no agreement was reached, the applicant might seek recourse under the arbitration provisions of the alleged shareholders agreement. Subsequent letters requested copies of a signed shareholders agreement and sought to clarify the terms of the offer to purchase, which was being made by Mr. Hendriksen.

[36] Settlement privilege requires the following:

1. a litigious dispute must be in existence or within contemplation;

2. communication must be made with the expressed or implied intention that it not be disclosed if the negotiations fail; and

3. the purpose of the communication must be to effect settlement of the dispute.

[37] The policy underlying the privilege is that settlement is to be encouraged and concessions made to advance settlement should not be used against the party making them.

[38] I have reviewed the letters in question and do not believe that they fall within settlement privilege. I am not satisfied that there was litigious dispute in existence or contemplated that was the subject of a settlement negotiation represented by the correspondence.

[39] Mr. Ryan's letter of November 9 is apparently a counteroffer to an offer to buy shares. There is nothing in that letter or the context to suggest that it is an attempt at settlement of a dispute.

[40] The subsequent letters are simply ongoing discussions of the same nature.

[41] With respect to the question of relevance, I note that the existence of an oral agreement in September 2010 is central to the litigation.

[42] In trying to determine whether an agreement has been reached, subsequent conduct of the parties can be considered. For example, see the decision in *Salminen v. Garvie*, 2011 BCSC 339, at para. 28.

[43] The correspondence between counsel may assist the Court in determining what agreement, if any, was reached between the parties.

[44] As a result, I will dismiss the applicant's motion to strike out the solicitors' correspondence attached to the Ripley affidavit.

Wood, J.