SUPREME COURT OF NOVA SCOTIA
Citation: Stewart v. Bardsley, 2013 NSSC 11

Date: 20130109
Docket: Hfx No. 328760
Registry: Halifax

Between:

David Stewart, Peter Beaini, and High Performance Energy Systems Inc.

Applicants

v.

James Bardsley, Palmer Refrigeration Inc., and Palmer Engineering Ltd

Respondents

SUPPLEMENTARY DECISION

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	November 6, 2012
Last Written Submissions:	December 31, 2012
Counsel:	Jasmine M. Ghosn, for applicants Kent L. Noseworthy, for respondents

Moir J.:

[1] *Introduction*. I released a decision in this case on May 10, 2012. It was followed by a series of correspondence from counsel attempting to argue numerous issues. I wrote to counsel indicating which of these issues could be decided by me and which fell outside this proceeding.

[2] I held a hearing on November 6, 2012 to deal with the issues that I could decide. This supplementary decision records my determinations of those issues.

[3] Since the November 6, 2012 hearing, counsel delivered numerous correspondence to me. Various allegations not supported by evidence were made. This is an unsatisfactory way to resolve issues. See Rule 27 - Motion by Correspondence.

[4] I direct counsel to stop sending me correspondence unless it contains a proposed order, or makes comments on a proposed order. I do not require that a party consent as to form. I will determine a final order on the proposal and comments.

[5] *Appointment of Receiver*. First, the applicants proposed Mr. Donald Leet of WBLI Inc. and the respondents put forward Mr. Mark Rosen of BDO Canada Limited. The respondents' only concern with Mr. Leet was that he had had conversations with the applicants before indicating his consent.

[6] At the hearing, I told the parties that both Mr. Leet and Mr. Rosen are very experienced and highly respected insolvency practitioners who would put irrelevant information out of their minds. I said that I would appoint Mr. Leet and that I was doing so only because he was proposed first.

[7] Once again the parties fell into disagreements. Mr. Leet withdrew his consent to act as receiver.

[8] A party who files a consent signed by an experienced insolvency practitioner may also deliver to me a draft order disposing of this proceeding, including the appointment of the receiver and terms for the receivership. The party must show that the terms for the receivership are approved by the consenting insolvency practitioner. The proposed receiver may address me at any time.

[9] *Terms of Receivership Order*. The order must provide that Mr. Horwich has a first charge on High Performance's assets and is to be paid by the receiver.

[10] The receiver should be directed to consult Mr. Lloyd Robbins about money paid into court.

[11] Otherwise, I am open to terms usually found in receivership orders granted by me.

[12] *Appointment of Referee*. Assuming his consent is filed and not withdrawn, Mr. Michael Casey is to be appointed referee to conduct the accounting referred to in the main decision.

[13] The accounting is only for revenues and expenses under the contract between Mr. Bardsley's company and R. W. Armstrong. I rejected the respondents' submission that Mr. Casey should review the revenues and expenses under the High Performance contract. Those revenues and expenses are not relevant to Mr. Bardsley disgorging profits from an opportunity diverted from High Performance, to whom he owed fiduciary duties.

[14] I rejected the applicants' submission for an order that third parties make disclosure for Mr. Casey's task. I said that whether to move for an order compelling third parties to make disclosure should be left to Mr. Casey's judgment. In any case, the third parties would have to be notified of the motion.

[15] The respondents will have ten days from the date of the order to produce their statement of receipts and disbursements. The receiver will have thirty days after that for the statement of acknowledgments and disputes.

[16] In view of the acrimony between the parties, the order should include a requirement that all communications to and from the referee are to involve all parties.

[17] The referee will organize a time and place for a hearing. The parties will be entitled to give Mr. Casey written submissions after the hearing within deadlines to be set by Mr. Casey.

[18] Mr. Casey's expenses will be paid half by High Performance and half by the respondents. Mr. Casey is to have a second charge on the High Performance assets.

[19] *Correction to Finding*. Paragraph 219 of the main decision reads:

> I find that nothing is owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies. On the other hand, the applicants have not discharged the onus they bear to prove a balance of accounts favours High Performance.

The first of these findings did not take account of the fact that Ms. Harrietha's calculations allowed $89,570 and $103,133 as credits to High Performance for the drill rig purchase price and for funds withdrawn by Mr. Bardsley from High Performance.

[20] I determined that the first finding is wrong and a net amount may be owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies. However, I pointed out that those people made no claim in this proceeding and did not attempt to establish legal or equitable set off. It may be open to Mr. Bardsley, Ms. Harrietha, or the Palmer companies to advance a claim elsewhere.

[21] My oral decision on November 6, 2012 was:

> At paragraphs 216 and following paragraphs of the main decision I wrote as follows:
>
> > *Claim for Repayment of $225,000 and Payment of Further Sums.* This figure represents the applicants' guess at the state of accounts between Mr. Bardsley and High Performance. Ms. Harrietha swore that $825,915 is owed by High Performance to herself, Mr. Bardsley, or Palmer Refrigeration after allowances in the amount of $1,145,964 for payments by High Performance to Mr. Bardsley or Palmer Refrigeration.
> >
> > I find that the following invoices are for equipment rental not agreed by High Performance or they are for services performed by High Performance, not the Palmer companies.
>
> And then I list a number of services and itemize their amounts. And then I say:
>
> > These total $727,916.34. That reduces Ms. Harrietha's balance to $98,000.
> >
> > I am also satisfied that hourly rates in invoices for the services of Troy Winters and Brian Bardsley are excessive.
> >
> > I find that nothing is owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies. On the other hand, the applicants have not discharged the onus they bear to prove a balance of accounts favours High Performance.
>
> In this I relied on the very extensive affidavit and accounting prepared by Ms. Harrietha. Mr. Noseworthy points out that in that accounting, Ms. Harrietha had already given credit for money or damages Mr. Bardsley is now being ordered to pay.
>
> I did not appreciate that $103,133 and $89,570 had been credited in the accounting. For that reason, my finding that nothing is owing by High Performance to Mr. Bardsley, Ms. Harrietha, or the Palmer companies is in error. There may well be some $200,000 owing. Mr. Noseworthy suggests that Mr. Bardsley should not be ordered to pay these sums twice. They have already been paid he says, in the sense of credited against debt.

> I agree with Ms. Ghosn that the respondents cannot use the accounting to take a preference. The effect of the submission for the respondents is that damages for misappropriation of funds and damages for conversion of property are set off against debt. No case was made for legal set off. Indeed, none could possibly have been made. It would be inequitable for Mr. Bardsley, Ms. Harrietha, and the Bardsley companies to set off debt against assets of High Performance to the disadvantage of the other general creditors. There is no case, therefore, for equitable set off.
>
> I correct my finding, but the only result is that there respondent and Ms. Harrietha are free to attempt to rank as unsecured creditors.

[22] This prompted the applicants to ask me to take another look at the response Mr. Stewart attempted to make to Ms. Harrietha's accounting. I pointed out that the operative finding was the second one, that the applicants had failed to prove their claim that a balance of accounts favoured High Performance. The correction to the first finding does not preclude a challenge to a claim made in future by Mr. Bardsley, Ms. Harrietha, or the Palmer companies.

[23] The applicants' position on this subject was strident, and it was even suggested that I did not read the affidavit in which Mr. Stewart attempted to do his own forensic accounting. That affidavit provided, among other things, Mr. Stewart's basis for establishing an opening balance sheet, for entirely rejecting those of Ms. Harrietha's expenses that Mr. Stewart found to be unsupported by source documents, and for making numerous financial claims against Mr.

Bardsley. I concluded, at para. 231 of the main decision: "Except as discussed elsewhere, I will dismiss the applicants' claim for judgment based on the state of accounts between High Performance and the respondents."

[24] One of the reasons the applicants failed to prove the state of accounts between High Performance and the respondents, and the reason the respondents will have difficulty with any future claim, is that the directors utterly failed in their duty to set up adequate financial controls for their company. See the main decision including these paragraphs particularly: 3 to 13, 80 to 87, 102 to 103, 136, 180, 185 to 196, and 220 to 231.

[25] *Costs*. The applicants submitted that I should take a different approach to costs than that suggested in the main decision. I said I would stick with my decision that each party bear their own costs. I also decided not to secure Ms. Ghosn's account. I said:

> I take Ms. Ghosn's point but I feel it is necessary to say that I will be sticking with my decision that no party is being awarded party and party costs from another party. Firstly, success, and even if you just analyze it in terms of High Performance's interests and ignore the participation of Mr. Stewart and Mr. Beaini, success was divided. From a financial point of view, it was divided more heavily in favour of the respondents than the applicants.

> I will go a step further now that I have been pressed and say that both sides are in contempt of an order of this court and I just don't see ordering costs when that situation is there.
>
> And, I will also say that I think both sides are responsible for the mismanagement for High Performance. I think I have made that clear in my decision. And for all of those reasons, I am saying no award of costs.
>
> As regards to the question Ms. Ghosn brings up, there is the mechanism of a solicitor's lien on the proceeds of litigation. The difficulty I have with that is that Ms. Ghosn is representing not only High Performance, but also Mr. Stewart and Mr. Beaini and it's not for me to inquire as to the nature of the relationship or contract between her and her several clients. So, that's the first difficulty I have with that.
>
> I don't want to give Mr. Stewart and Mr. Beaini a preference for what looks to be a very small bit of assets in High Performance. But, a solicitor's lien is not automatic. And in all of the circumstances of this case, I would be, if a motion had been made for one, disinclined to order it. Especially at the stage where I am at now.
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> So, the answer to the question is Ms. Ghosn has recourse against Mr. Stewart and Mr. Beaini according to whatever her contract provides, and I don't want to know what it provides, and she has recourse against High Performance only as an unsecured creditor.

[26] *Disputes After Hearing*. After the November 6, 2012 hearing the parties were unable to agree on the terms for orders. I received numerous correspondence and draft orders from counsel.

[27] *Interest on Damages for Drill Rig Conversion and Misappropriation of Funds*. Mr. Noseworthy submits that interest should cease for the conversion on

October 20, 2010 when the registry of motor vehicles cancelled the registration of the drill rig. I disagree. High Performance is out of possession and the tort continues to this day. Prejudgment interest should run to the date of the final order. The main decision refers to the misappropriation having taken place on June 19, 2009 in para. 14, 147, 151, and 244. In para. 211 and 212, I mistakenly refer to 2010. Interest on damages for misappropriation should run from June 19, 2009 to the date of the final order.

[28] *Compound Interest*. After the hearing the applicants made a submission for compound interest. The evidence of the financial effects of the June 2010 misappropriation leads me to conclude that prejudgment interest should be compounded. There was no similar deprivation on the drill rig. Interest on those damages should be simple.

[29] *Conclusion*. A party who files the consent of an experienced insolvency practitioner may deliver to me a draft order covering all of the remedies determined in the main decision. It must conform with that decision and this supplementary decision.

[30] The other party will have ten days calculated as provided in the Rules to comment on the order. The party preparing the order will have five days for a brief reply.

[31] Future submissions should be confined to these parametres.

J.