SUPREME COURT OF NOVA SCOTIA
Citation: *Kadray v. Gaum*, 2013 NSSC 197

Date: 20130626
Docket: Hfx. No. 396239
Registry: Halifax

Between:

Issam Kadray

Applicant

v.

Errol Gaum

Respondent

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: May 8, 2013, in Halifax, Nova Scotia

Counsel: Peter Rumscheidt, for the plaintiff/respondent
Jason Cooke, for the defendant/applicant

By the Court:

[1] This is an application for an interim order brought pursuant to s. 5 of the Third Schedule to the *Companies Act*, RSNS 1989, c 81. Mr. Kadray ("the Applicant") claims that Dr. Gaum ("the Respondent") acted oppressively toward him with respect to two companies they owned and operated together.

Background

[2] The Applicant and the Respondent each own 50% of the shares in two Nova Scotia companies, Granville Place Investments Limited ("Granville") and 1195 Bedford Highway Limited ("1195"). For each company, the Respondent is the president and the Applicant is the secretary, and they are also the only directors of the company. It is not contested that they are joint signatories on all banking documents, promissory notes, and mortgages in relation to the companies' activities and operations.

[3] The parties appear to have had a sound relationship for many years. However, that relationship has deteriorated and the Respondent recently brought an action against the Applicant seeking an oppression remedy pursuant to s. 5(3) of the Third Schedule of the *Nova Scotia Companies Act*. The Applicant filed a

defence and counterclaim, also alleging oppression and seeking relief under the same provision.

[4] The basis of this motion arises from the Applicant's claim that the Respondent acted without authority in various matters affecting both companies. The Applicant now seeks an interim order which declares that he has the ability to represent the company in negotiations with some third parties and to be given the authority to sue those third parties on behalf of the companies should a cause of action be disclosed.

Granville

[5] Dealing first with the claim against the Respondent in relation to Granville, the Applicant's principal complaint relates to the renewal of a mortgage on the property owned by Granville. He attached to his affidavit copy of a document labelled a resolution and certificate of the secretary of Granville Place Investments Limited and dated the 15th of December, 2009. That document states that: (1) Dr. Gaum was the duly appointed secretary of Granville; (2) that a resolution had been passed authorizing Granville to borrow funds from Maxium Financial Services Inc.; and (3) that only Dr. Gaum was authorized to sign documents on Granville's behalf. The Applicant protests that none of these statements are true.

[6] Further, he also produced two promissory notes from Granville which, though I cannot make out the precise numbers, appear to make commitments to pay to Maxium Financial Services Inc. several hundreds of thousands of dollars. Although in both cases there are marks over the space for his signature, he says that he neither signed nor authorized anyone to sign either note.

[7] The Applicant claimed that he was never even made aware that the mortgage was due for renewal as he had not been provided with any advance notice that the existing mortgage on this property required renewal. He only became aware that the mortgage had been renewed some time after the event and indicated that he was surprised that the renewed mortgage carried a high interest rate. He claimed that he had considerable experience in commercial real property and that had he been consulted the credit been renewed at a considerably lower interest rate. He also claimed that he was unaware that the Respondent had retained a man named Colm McDevitt to assist in the renewal of the mortgage, as there was no such need. He also claimed that it was unusual to pay a finder's fee to renew a mortgage.

[8] The Applicant also maintained that he had no knowledge of the various attempts made by the Respondent or Mr. McDevitt to renew the mortgage. He denied that he assisted Mr. McDevitt by providing him with a list of tenants.

[9] The Applicant also claimed that there were a number of documents that appeared to have his signature or some imitation of his signature on them. He maintained that he had neither signed these documents nor authorized anyone to sign them on his behalf. He attached as exhibits to his affidavit a number of cheques which appeared to include his signature along with that of the Respondent.

[10] The Respondent maintained that the Applicant was aware that Mr. McDevitt had been retained to assist in the renewal of the mortgage and that the Applicant in this period had contact with Mr. McDevitt. The Respondent stated that the original mortgage on the company's property was for a five-year term and that the renewal of the mortgage was necessary as it was about to become due and Granville could not pay the balance. He claimed that the Applicant had refused to sign any documents because he wanted to be bought out. He claimed that he had no choice but to sign the promissory note and the mortgage alone. As well, he asserted that the Applicant had signed company documents alone in the past.

[11] The Respondent claimed that the interest rate charged on the renewal mortgage was a reasonable rate because it was necessary to obtain a higher ratio mortgage, thereby resulting in a higher interest rate that would have been available

if the company had been able to obtain a conventional mortgage from the chartered bank.

[12] The Respondent also claimed that the amount paid to Mr. McDevitt for his services was a reasonable amount.

[13] With regard to the cheques, the Respondent explained that the Applicant would sometimes go on vacations and leave signed cheques in blank to cover expenses for both companies while he was absent. This allowed the Respondent to pay bills on behalf of the company and he denied that he forged the Applicant's signature.

[14] The Applicant denied that he maintained any such practice, though he acknowledged that some of the cheques were for company expenses.

[15] Mr. McDevitt also gave evidence, and he claimed that he was retained by the Applicant and the Respondent to renew the mortgage on the Granville property and that the Applicant provided him with assistance such as providing him with a list of names of the tenants and a copy of the building plans. Mr. McDevitt claimed that he initially sought the necessary financing from TD Canada Trust, RBC, and

the Bank of Montreal, but that none were willing to provide the amount of financing required.

[16] He next approached CIT Financial, who tentatively agreed to provide the financing at an interest rate of 6.5%. CIT Financial required an Assignment of Rents, and so Mr. McTevitt says he approached Mr. Kadray and asked for his assistance by introducing him to the tenants and by giving him some background documents. Mr. McTevitt says that Mr. Kadray complied.

[17] Nonetheless, the deal with CIT Financial was eventually abandoned because CIT Financial required a costly environmental assessment which the company was not prepared to pay.

[18] At this point, the expiry of the existing financing was imminent. Mr. McDevitt contacted Desante Financial, an agent of Maxium Financial Services Inc., who required a 7.5% interest rate to renew the financing. Mr. McDevitt says that he told both the Applicant and the Respondent and both agreed to the rate.

[19] Mr. McDevitt acknowledged that he, not the Respondent, filled in the director's resolution saying that the Respondent has president and secretary of Granville. He claims that the Applicant did not want to sign any documents with

reference to the renewal of the mortgage as he was in the process of selling his interest in the company to the Respondent.

1195

[20] The Applicant also claimed that 1195 borrowed funds from the TD Bank without his knowledge or consent. In fact, he claimed that for a period of approximately one year so, the finances of 1195 were directed through a personal account of the Respondent. He also produced a cheque for $5,000.00 that his own company, Omaray Developments Limited, loaned to 1195 in order to pay some HST arrears. That cheque was deposited to the Respondent's personal account. In addition, he claimed that the Respondent borrowed $1,300,000 from the TD Bank to purchase mutual funds. The interest on this loan was paid by 1195, however, the interest earned on the investment was paid to the Respondent's personal account.

[21] The Respondent maintained that the Applicant refused to attend at the TD bank to sign banking documents to operate of the corporate account; therefore, it was necessary to operate the account in his personal name. He also maintained that the $1,300,000 loan was the replacement loan which 1195 had with Scotia Bank. This loan was called by the bank and eventually was paid out as a result of the

bank liquidating the Respondent's securities in the amount of $900,000. The Respondent claimed that the TD Bank loan was simply a replacement of the previous loan with Scotia Bank. The Respondent also admitted that he received interest payments on the loan for a portion of 2009 and 2010, but that this was unintentional and, when discovered, was set off against his shareholders account with 1195.

[22] The Applicant also said that, like with Granville, the Respondent issued cheques without his knowledge and authorization and his signature appeared or facsimile thereof. The Respondent maintained that he did not have the Applicant's signature forged and that it was the Applicants practice of signing cheques in blank because he was absent on occasion when bills had to be paid.

[23] The Applicant indicated his concern to TD Bank but had not received any response from them by the date of the hearing.

The Order Sought

[24] Section 5(3) of the Third Schedule sets out a non-exhaustive list of the remedies available under the oppression remedy. It provides that:

> **5 […] (3)** In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> **(a)** an order restraining the conduct complained of;
>
> **(b)** an order appointing a receiver or receiver-manager;
>
> **(c)** an order to regulate a company's affairs by amending the memorandum or articles;
>
> **(d)** an order directing an issue or exchange of securities;
>
> **(e)** an order appointing directors in place of or in addition to all or any of the directors then in office;
>
> **(f)** an order directing a company, subject to subsection (5) of this Section, or any other person, to purchase securities of a security holder;
>
> **(g)** an order directing a company, subject to subsection (5) of this Section, or any other person, to pay a security holder any part of the moneys paid by him for securities;
>
> **(h)** an order varying or setting aside a transaction or contract to which a company is a party and compensating the company or any other party to the transaction or contract;
>
> **(i)** an order requiring a company, within a time specified by the court, to produce to the court or an interested person financial statements in the form required under the Act or an accounting in such other form as the court may determine;
>
> **(j)** an order compensating an aggrieved person;
>
> **(k)** an order directing rectification of the registers or other records of a company required under the Act;
>
> **(l)** an order liquidating and dissolving the company;
>
> **(m)** an order directing an investigation pursuant to Section 116 of the Act;
>
> **(n)** an order requiring the trial of any issue.

[25] As mentioned earlier, the Applicant seeks an interim order permitting him to seek information regarding the culpability of certain third parties and to sue them

in the name of the companies if cause should arise. In his draft order, he proposes that the following language be employed:

> 1. The Defendant/Plaintiff by Counterclaim, Issam Kadray, is hereby authorized to act on behalf of Granville Place Investments Limited in dealings with and claims against, if any, Maxium Financial Services Inc., and its agent, Desante Financial, in relation to a mortgage from Maxium Financial Services Inc. on a property located at 604 Bedford Highway, Bedford, Nova Scotia. Maxium Financial Services Inc. and its agent, Desante Financial, may only deal with Issam Kadray on behalf of Granville Place Investments Limited until and unless this court orders otherwise.
>
> 2. The Defendant/Plaintiff by Counterclaim, Issam Kadray, is hereby authorized to act on behalf of 1195 Bedford Highway Ltd. in dealings with and claims against Toronto-Dominion Bank in relation to any transactions involving 1195 Bedford Highway Ltd. and the Toronto-Dominion Bank including, but not limited to a $1,300,000 loan from the Toronto-Dominion Bank and the processing of the finances of 1195 Bedford Highway Ltd. through a personal account of Dr. Errol Gaum and not in an account in the name or owned by 1195 Bedford Highway Ltd.

[26] The Applicant claims that the Order is necessary for three reasons:

> First, without any express authorization by the Court that Mr. Kadray can act in that regard on behalf of the two companies, it will be most difficult for further investigation to be done (as can be seen by the lack of response to date by Toronto-Dominion Bank). Secondly, in a typical situation such authority would be provided by a director's resolution which clearly would not be forthcoming given the circumstances. Finally, the only other person in a position to pursue these investigations and claims would be Dr. Gaum who is clearly in a conflict of interest in regards to the above.

The Applicant also submitted that the Order being sought is the least intrusive order that can be obtained in order to preserve his rights. As the Applicant is not seeking to liquidate the company, or to restrain conduct, or appoint a receiver or receiver manager, or substitute or remove directors, or order a party to purchase or to transfer or otherwise dispose of shares, this will not have any impact on the day–to–day management or operations of the company.

[27] The Respondent, on the other hand, maintained that there is no basis to grant the relief sought because it is premature to do so. The Affidavit Disclosing Documents has just been provided by the Respondent to the Applicant. Presumably, the Applicant will, in due course, provide his Affidavit Disclosing Documents. Arrangements, as of the date of the hearing, had not yet been made with respect to the discovery examinations of the parties however, that these may have been held since the submissions were made.

[28] The Respondent also objects to the order to the extent that it permits the Applicant to sue the named financial institutions on behalf of the companies. Although he acknowledges that the powers of the court under s. 5(3) are significant, the Respondent submits that such an order is not available since derivative actions are governed separately by section 4. That section sets out the

process and criteria for obtaining leave of the court for a complainant wishing to bring an action in the name of and on behalf of the company. In his view, there would be no need for section 4 if derivative actions could be authorized under section 5.

[29] I have serious reservations about this latter submission. It is true that an order directing a company to authorize someone to bring an action on its behalf is not among the enumerated orders, but that list is not exhaustive. Section 5(3) says that "the court may make *any* interim or final order it thinks fit," and it specifically notes that the list of orders is not meant to limit the generality of that. Indeed, it is possible under section 5(3)(e) of the Third Schedule to appoint directors in place of or in addition to all or any of the directors then in office and thereby affect the votes of the directors. If the court can replace directors altogether, I see no reason that it cannot make an order that could as easily be effected by a director's resolution.

[30] Further, I do not think this renders section 4 impotent. For a section 5 remedy to be available, oppression against the complainant must be shown. The same is not true of section 4 which would, for instance, permit a complainant to bring an action on behalf of the company even when the injury is only to the

company. Therefore, there is still scope for section 4 even if such an order is potentially available under section 5.

[31] As such, the order sought is available, but I do not believe it is appropriate to frame it as a declaration. Effectively, the order sought requires Granville and 1195 to appoint the Applicant as its agent for the specific purposes identified and it will bind them to his actions in those regards. It is not simply a declaration.

[32] Rather, it is a mandatory injunction. In *Injunctions and Specific Performance*, loose-leaf (consulted on 20 June 2013), (Toronto: Canada Law Book, 2012), Justice Sharpe defines a mandatory injunction at paragraph 1.10 as "one which requires the defendant to act positively." Since Granville and 1195 are not parties to the action, it would perhaps be better to say that the order sought requires Dr. Gaum to vote affirmatively on a directors' resolution to the same effect. Either way, framing the order sought as a declaration does not change the nature of the order from one which requires positive action by Dr. Gaum.

[33] As such, the ordinary test for granting such injunctions should be applied. Section 5(3) itself draws no distinction between interim or final orders and it does not *require* the same test that is ordinarily used for an interlocutory injunction.

However, I am of the view that such a test will ordinarily be useful as it is well-tailored to balance the competing interests in granting an injunction at an interlocutory stage, even if it may not always be strictly necessary. In *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334, Justices Cory and Sopinka recited the test in the following terms:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

[34] That said, there appears to be a division on the test to be applied at the first stage in this context. One line of authority establishes that the Applicant must prove that there is a serious issue to be tried while another line of authority requires that the Court find that the Applicant has established a strong *prima facie* case.

[35] In *RJR-MacDonald Inc, supra,* Justices Cory and Sopinka described the serious issue to be tried standard in the following terms at pages 337-338:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[36] Given that the relief sought is mandatory, however, I refer to the Nova Scotia Court of Appeal decision in *DE & Son Fisheries Ltd v Goreham*, 2004 NSCA 53 at para 10, where the court stated:

> It is generally accepted that the test [for a mandatory injunction] is more rigorous than that applied where a prohibitory injunction is sought.

[37] The Court of Appeal did not definitively decide the standard, but at para 10, it added:

> The requirements for a mandatory interim injunction have been discussed and debated in numerous authorities. It suffices, here, to say, that the plaintiff is not required to 'clearly prove' his claim to the exclusion of any defence which may be set up by the defendant. The application is, instead, assessed by the strength of the applicant's case coupled with a consideration of the issues of irreparable harm and the balance of convenience.

Other courts have abandoned the different standard for mandatory injunctions altogether: *Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 at paras 42-48, 341 DLR (4th) 407.

[38] The analysis is also potentially modified by the oppression context, which was discussed by Justice Warner in *Merks v. Poultry Farms Ltd*, 2010 NSSC 278. There, he applied his reasoning in the earlier case of *Re Argo Protective Coating Inc*, 2006 NSSC 283. Generally, he held that the standard varies depending on the

circumstances and the relief sought, and I refer to his comments found in paragraphs 46, 49 and 56:

> 46. As noted, the oppression remedy is a broad, comprehensive, open-ended shareholder remedy, intended to apply in a wide variety of situations, and with a wide variety of remedies.
>
> **[…]**
>
> 49. In my view, the evidence that will satisfy the burden for interim relief depends upon the specific circumstances, and remedies sought, in the context of the specific case. It should be a contextual analysis. In the context of a request for an investigation - to access the information that may confirm or disprove the specific allegations of oppression, the burden should not be as high as requests for some of the other remedies enumerated in s. 5 (3) of the Third Schedule to the *Companies Act*, which are more intrusive and should only be ordered on proof of oppression, such as requests to permanently restrain (enjoin) conduct, to appoint a receiver, to amend the memorandum or articles, to direct purchase, issuance or exchange of shares, or the payment of money, to set aside transactions, or to liquidate the corporation.
>
> **[…]**
>
> 56. The applicant must establish, and the Court must find, before making an interim order for an investigation, that the evidence tendered by the applicant, supports a reasonable inference that the acts or conduct complained of are, on their face, likely true. Said differently, that the evidence has the *appearance* of proving the facts though it may not constitute certain proof. The fact that the allegation is denied is not, per se, sufficient to defeat the inference. There has always existed an evidential burden on the party in exclusive control of evidence, to produce that evidence or face a possible inference that the evidence may not be favourable to that party. On the other hand, evidence of a respondent that tends to show that the factual premise of the applicant's complaint is not likely true, may defeat what some describe as a "strong *prima facie* case".

[39] On a portion of the relief sought, I would readily apply the "serious issue to be tried" standard. However, on the right to commence legal proceedings against the TD Bank and the mortgagee, it is necessary to resort to the strong *prima facie* case standard.

Preliminary Merits Assessment

[40] I refer to the provisions of s. 5 of the Third Schedule to the *Companies Act*:

> **5 (1)** A complainant may apply to the court for an order under this Section.
>
> **(2)** If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> > **(a)** any act or omission of the company or any of its affiliates effects a result;
> >
> > **(b)** the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
> >
> > **(c)** the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,
>
> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[41] The leading case on the oppression remedy is *BCE v 1976 Debentureholders*, 2008 SCC 69, [2008] 3 SCR 560. In that case, the Supreme Court of Canada said at paragraph 56 that:

> One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the *CBCA*.

[42] The Respondent admits that the following were reasonable expectations on the part of the Applicant:

> 1. That both Dr. Gaum and Mr. Kadray would be consulted on and involved with all significant business decisions regarding the companies including mortgage financing and renewals;
>
> 2. That the banking arrangements of the companies would be shared and in particular company cheques would require the signatures of both Dr. Gaum and Mr. Kadray; and
>
> 3. Each of Mr. Kadray and Dr. Gaum would act as equal and active business partners in the best interests of the companies.

[43] Admitting that these were the reasonable expectations of both parties, it is a question of evidence whether the reasonable expectations were breached. In my view, the Applicant's claims are not frivolous or vexatious, and I would conclude that there is a serious issue to be tried.

[44] I referred to some of the evidence contained in the affidavits and at cross examination. There is agreement that some of the things alleged by the Applicant

happened. On one side, the Applicant maintains that the Respondent did all of these things behind his back and failed to keep him abreast of events that were taking place with reference to the mortgage renewal or with reference to the TD Bank loan. On the other side, the Respondent provided evidence that the Applicant had given up on the company and was refusing to sign any documentation in connection with the companies' ongoing obligations and in dealing with the TD Bank.

[45] There is also a strong disagreement between the parties as to whether or not the Respondent added the Applicant's signature to various cheques and other documents. The Applicant maintains that that the Respondent did so while the Respondent denies that was the case. His response to that claim was that the Applicant had signed the cheques in blank which could be used by the Respondent in his absence.

[46] Given that, there is definitely an argument to be made that the Applicant no longer had reasonable expectations to be consulted and that his interest was not being unfairly disregarded. It is a question of credibility and it is not up to me to make such a finding at this stage. Without such a finding, I am unable to state that

the plaintiff has established a strong *prima facie* case, although I am satisfied there is a serious issue to be tried.

[47] As such, I do not believe that the Applicant has met the standard required to authorize him to commence legal proceedings on behalf of either company. However, the standard is met for the lesser relief sought for authorization to talk to employees of the respective institutions and request documents under the authority of both companies.

Irreparable Harm

[48] On whether or not there would be irreparable harm and to the Applicant if the order is not granted, I am of the view that he would not suffer irreparable harm if the order sought is not made. As the Applicant's relief or authorization to have the ability to obtain documents about the financial arrangements the company had with the TD Bank or with the mortgage lender and to speak to their employees, I believe that the disclosure/discovery mechanism under the Civil Procedurals would likely satisfy the Applicant's concerns. Therefore, there would be no real need for this order to be made with respect to the production of documents. Certainly, in the

event that these documents were not made available to him in the matter which I have described, the Applicant could return to court for further direction.

[49] It is also not clear that an inability to talk to the employees of the third parties about their financial arrangements with Granville and 1195 would cause irreparable harm. However, I am willing to relax this requirement when what is being sought is investigatory in nature and it causes no real harm to the Respondent. I note that in *Re Argo Protective Coating Inc*, *supra*, there was no analysis of irreparable harm.

Balance of Convenience

[50] As to which party is favored by the balance of convenience, if all that the Applicant is seeking is document disclosure and the ability to talk to the employees of the third parties about his companies' financial arrangements with them, then the balance of convenience is in favor of the Applicant. That causes no real harm to the Respondent.

[51] However, with respect to the ability to pursue a cause of action against the third parties on behalf of the companies, I note that it would fail at this stage even if I had not already found that it fails at the preliminary merits test. Litigation is

expensive and there is currently no indication that Granville or 1195 would have any cause of action against those third parties. The balance of convenience favours the companies and the Respondent.

Conclusion

[52] In the end, I am prepared to grant a motion in part namely, that the Applicant will have authorization to receive documents he is unable to recover from the disclosure/discovery process and secondly to the ability to speak to employees of the name corporations about his company's financial arrangements with them. Otherwise, that the application is dismissed.

[53] I leave it with counsel to resolve the wording of the order. In the event there is no agreement, I will draft the order and circulate it to counsel for the consideration.

[54] As there has been mixed results, I do not award any costs.

LeBlanc, J.