SUPREME COURT OF NOVA SCOTIA

Citation: *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2016 NSSC 335

Date: 2016-12-07
Docket: Hfx. No. 270401
Registry: Halifax

Between:

Abbott and Haliburton Company Limited; A.W. Allen & Son Limited; Berwick Building Supplies Limited; Bishop's Falls Building Supplies Limited; Arthur Boudreau & Fils Ltée; Brennan Contractors & Supplies Ltd.; F.J. Brideau & Fils Limitee; Cabot Building Supplies Company (1988) Limited; Robert Churchill Building Supplies Limited; CDL Holdings Limited, formerly Chester Dawe Limited; Fraser Supplies (1980) Ltd.; R.D. Gillis Building Supplies Limited; Yvon Godin Ltd.; Truro Wood Industries Limited/Home Care Properties Limited; Hann's Hardware and Sporting Goods Limited; Harbour Breton Building Supplies Limited; Hillier's Trades Limited; Hubcraft Building Supplies Limited; Lumbermart Limited; Maple Leaf Farm Supplies Limited; S.W. Mifflin Ltd.; Nauss Brothers Limited; O'Leary Farmers' Co-operative Ass'n. Ltd.; Pellerin Building Supplies Inc.; Pleasant Supplies Incorporated; J.I. Pritchett & Sons Limited; Centre Multi-Décor De Richibucto Ltée; U.J. Robichaud & Sons Woodworkers Limited; La Quincaillerie Saint-Louis Ltée; R & J Swinamer's Supplies Limited; 508686 N.B. INC. operating as T.N.T. Insulation and Building Supplies; Taylor Lumber and Building Supplies Limited; Two by Four Lumber Sales Ltd.; Walbourne Enterprises Ltd.; Western Bay Hardware Limited; White's Construction Limited; D.J. Williams and Sons Limited; and Woodland Building Supplies Limited

Plaintiffs

v.

White Burgess Langille Inman, carrying on business as WBLI Chartered Accountants

and First Defendant

R. Brian Burgess

Second Defendant

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	February 11, 2016, in Halifax, Nova Scotia
Last Written Submission:	October 17, 2016
Counsel:	Brian Murphy and Candace Salmon, for the Plaintiffs, Alan D'Silva and Aaron Kreaden, for the Defendants

By the Court:

Introduction

[1] The plaintiffs claim that the defendants were negligent in providing accounting services to the plaintiffs' purchasing body and that, as a consequence of that negligence, the defendant is liable to them for approximately $17 million dollars.

[2] The plaintiffs are/were shareholders of A.W.A.R.D ("AWARD"), a company that acted as a buying group in the building materials industry. The building materials were sold to the members at the same cost that AWARD paid for them. Rebates from volume buying were distributed in total to the members relative to their purchasing participation. The operating costs of the company were offset by expense contributions from the members.

[3] The shareholders started the action after they had retained the Grant Thornton accounting firm to perform various accounting tasks. It is alleged that it was during this work that problems with the defendants' work was discovered. The central allegation in the action is that the defendants failed to apply generally accepted auditing and accounting standards while carrying out their functions and thereby caused financial loss to the shareholders.

[4] The defendants brought a motion for summary judgment in August of 2010, seeking to have the shareholders' action dismissed. In response, the shareholders retained Susan MacMillan, a forensic accounting partner at the Halifax office of Grant Thornton LLP, to review all the relevant materials, including the documents filed in the action and to prepare a report of her findings. Her affidavit sets out her findings, including her opinion that the auditors had not complied with their professional obligations to the shareholders.

[5] The defendants applied to strike out Ms. MacMillan's affidavit on the grounds that she was not an impartial expert witness. They also sought to strike the affidavit of Fred O'Hearn who was intended as a fact witness.

[6] The motions judge struck out both affidavits. The majority of the Nova Scotia Court of Appeal concluded that the motions judge erred in excluding the

MacMillan affidavit but denied the plaintiff's appeal of the decision to strike the O'Hearn affidavit.

[7] The matter was ultimately decided by the Supreme Court of Canada in its decision reported at 2015 SCC 23, upholding the decision of the Court of Appeal. The matter was returned to this Court in mid-2015. Since that time, there have been a series of case management meetings intended to bring the parties to bear on the scheduling of the summary judgement motion, among others.

The current motion

[8] The plaintiffs now seek leave of the court to file two new affidavits as part of their response to the motion for summary judgement. The defendants are opposed.

[9] Written briefs and oral submissions were made by counsel for the parties on this motion. While the decision was on reserve the second defendant R. Brian Burgess died. Counsel for the defendants was granted permission to make further submissions as to the impact Mr. Burgess' passing made on the current motion. It has been submitted that his death is a further reason to deny the plaintiff's current motion. The plaintiffs disagree.

Position of the plaintiffs

[10] The plaintiffs seek to admit the affidavit evidence of Lloyd Hillier and Tim Tomkins as part of their response to the summary judgement motion. The affidavits in question were sworn after the matter was returned from the Supreme Court of Canada. In support of this motion the plaintiffs rely upon Rules 2.03, 23.11 and 23.12.

[11] The proposed evidence is presented to demonstrate that there are material facts in dispute which the court needs to be aware of in determining whether the matter should proceed to trial or conclude with the summary judgment motion. In short, the plaintiffs say that the affidavit evidence is reliable and necessary to fulfill the plaintiffs' responsibility to "put its best foot forward" in responding to the summary judgement motion.

[12] The plaintiffs further submit that the court has jurisdiction and a discretion to grant leave to file the affidavits; that to do so causes no prejudice to the defendants and that to fail to permit the affidavits into evidence would deny the

plaintiffs the opportunity to speak to their reliance on defendants' representations to the plaintiffs which are "vital" to the plaintiffs' case.

[13] In response to the defendants' concerns over the passing of Mr. Burgess the plaintiffs submit that to the extent that his passing causes prejudice it does so for both sides in the overall proceeding, but that his absence results in no actual prejudice to the defendants in advancing the summary judgment motion.

Position of the defendants

[14] The defendants submit that the motion should be denied for the following reasons:

1. The court lacks jurisdiction to set aside or to vary the Court Order, or the Direction by the Case Management judge, both of which prohibited the filing of further affidavits on the summary judgement motion;

2. The motion to admit the affidavits in the face of existing court orders prohibiting the filing of same constitutes an impermissible collateral attack on those orders;

3. The affidavits sought to be admitted should be struck as they are repetitive of an earlier affidavit that was struck by the court, and because they contain inadmissible statements;

4. The death of the defendant R. Brian Burgess causes serious and irreparable prejudice to the ability of the defendants to provide a reply affidavit to the affidavits sought to be admitted by this motion.

Issues:

1. Is the affidavit evidence relevant, material and not otherwise inadmissible?

2. If so then what is the basis upon which to refuse the admission of the evidence?

Analysis

Is the affidavit evidence relevant, material and not otherwise inadmissible?

[15] The affidavits in dispute have been provided by the principals of two of the corporate plaintiffs.

Lloyd Hillier

[16] Mr. Hillier's affidavit was sworn September 16, 2015 and filed with the court on September 18, 2015. There are 22 paragraphs and 10 attached exhibits lettered A to J.

[17] He says that he incorporated the plaintiff Hillier's Trades Ltd. in 1983 and that the company was in the business of selling hardware and business supplies. It is somewhat ambiguous but it seems to suggest that Mr. Hillier, in his personal capacity, was a shareholder in AWARD.

[18] In paragraph 4 Mr. Hillier attests that he is providing "…the evidence and facts contained in this affidavit as a representative sample of what all plaintiffs experienced as members of AWARD."

[19] In paragraph 21 he again describes himself as "representative shareholder of AWARD".

[20] He describes the management structure of AWARD and offers a general observation that the financial reporting to the shareholders like himself always presented a positive financial situation for AWARD.

[21] The affiant attached as exhibits some examples of written reports prepared by Tom Smith who was the President of AWARD at times relevant to the claim and which were distributed to Mr. Hillier among others. These reports, dated in 2004, are submitted to confirm Mr. Hillier's understanding of the financial health of AWARD at that time.

[22] Mr. Hillier suggests, in paragraph 14, that he accepted the financial statements of AWARD as accurate "since they were audited by a reputable accountant, the defendant WBLI".

[23] Exhibit "I" to his affidavit includes a cover letter and audited financial statement of AWARD to December 31, 2003. In the letter the defendant WBLI specifies that:

> These financial statements are the responsibility of the company's management. Our responsibility is to express an opinion on these financial statements based on our audit.
>
> We conducted our audit in accordance with Canadian generally accepted auditing standards….
>
> In our opinion, these financial statements present fairly, in all material respects, the financial position of the company as at December 31, 2003…

[24] He offers that the financial health of AWARD was reportedly good at the end of 2004 as well, but that in 2005 he learned that the defendants had provided "information" that was "false, misleading and not in accordance with the Generally Accepted Accounting Principles(GAAP)." (At para. 19)

[25] Mr. Hillier professes to have suffered a loss as a result of his reliance on the defendants' representations as to the financial health of AWARD. He also claims, in paragraph 21 that "all plaintiff companies lost money as a result of the actions of the Defendant either directly or as Shareholders of AWARD." This would, by implication, include Hillier's Trades Limited.

Tim Tompkins

[26] Mr. Tompkins' affidavit was sworn September 17 and filed September 18, 2015.

[27] There are 23 paragraphs and 11 exhibits attached, lettered A to K. The contents of the affidavit are identical or nearly identical to that of Mr. Hillier in 17 of the 23 paragraphs. Of the remaining 6 paragraphs, those paragraphs numbered 2-5 differentiate his company, TNT Insulation and Building Supplies, as a named plaintiff and sets out the timing and motivation for joining as a shareholder of AWARD.

[28] Paragraph 5 adds that Mr. Tomkins was a Board member of AWARD in 2005.

[29] Paragraph 18 identifies Grant Thornton as the source for the information that the audited statements were erroneous. Mr. Hillier stated in paragraph 17 of his affidavit that he learned this information at a "special meeting", but otherwise his affidavit does not state the source of this information.

[30] Paragraph 19 is different from Mr. Hillier's in that Mr. Tomkins states that:

> I read the financial review conducted by Grant Thornton and do verily believe their conclusions that the financial audits performed by the defendants were in error.

[31] Mr. Hillier does not say that he read the Grant Thornton financial review.

[32] A copy of the December 31, 2005 Consolidated Financial Statements prepared by Grant Thornton is attached as an exhibit to Mr. Tomkins' affidavit.

The pleadings

[33] In paragraphs 15 and 16 of the Further Amended Statement of Claim (December 8, 2006) the plaintiffs plead reliance on the accuracy of the defendants' Audited Financial Reports and that such reliance was reasonable. A duty of care is said to have been owed to the plaintiffs by the defendants and the breach of that duty with resulting economic loss amounted to negligence.

[34] In view of the pleadings the affiants' positions as shareholders is relevant. The attestation that they personally relied upon the accuracy of the audit reports prepared by the defendants, and that they ultimately lost money are also relevant points.

[35] I conclude that the affidavits contain some evidence which is relevant to the cause of action in negligence. I will consider the defendants' objections to the admissibility of the contents in my discussion of the third issue.

What is the basis upon which to refuse the admission of the evidence?

[36] I turn now to the four sub issues identified by the defendants' arguments.

> ***Argument 1:*** Is there a jurisdictional basis upon which to admit the affidavits?
>
> ***Argument 2*****:** Is this an impermissible collateral attack on the February 2011 order of Justice Boudreau and on the Direction given by myself in September 2011?

[37] These two questions stem from the same factual basis - that there are existing orders of this court prohibiting either party from filing further affidavits in the summary judgment motion. The defendants say that the court does not have

jurisdiction to vary or set aside those orders, and further that the current motion by the plaintiffs amounts to an impermissible collateral attack on the orders.

[38] An important aspect of the opposition to this motion is found in the chronology of the case. The action was commenced in 2006 and since that time has had two amendments to the Statement of Claim and one further proposed amendment that has now been abandoned.

[39] The claim is a significant one and the defendants complain that the plaintiff has consistently contributed to delay over the past 10 years by, among other things, missing court imposed timelines.

[40] Arising from two case management conferences in June 2010 I directed, among other things, that the summary judgement motion hearing would be held November 8-10, 2010 and that the defendant's motion documents should be filed on or before August 6, 2010 with supporting affidavits. The defendants did file the motion for summary judgment with the supporting affidavit of Brian Burgess, on August 13, 2010.

[41] The plaintiffs were required to file their reply affidavits by August 27, 2010. It was only on September 17, 2010 that the plaintiffs delivered to the defendant an affidavit of Susan MacMillan offering expert opinion evidence. There had been no prior notice that the plaintiffs were intending to adduce expert opinion evidence. The plaintiffs did not file affidavits from fact witnesses, such as those in issue now.

[42] As a result of this development a further case management conference was convened on October 21, 2010 at which time the summary judgment motion hearing was adjourned to January 24, 2011. There was still no mention by counsel for the plaintiffs that he intended to present fact witness affidavits.

[43] On January 14, 2011, just 10 days before the date set for hearing of the motion for summary judgment, counsel for the plaintiffs advised that they had "inadvertently failed to serve… the affidavit of Fred O'Hearn sworn in September 10, 2010". It is noteworthy that this took place after the plaintiffs had received all of the defendants' materials required in support of their motion, including their written brief of argument. Further, counsel for the plaintiffs indicated that Mr. O'Hearn would not be available for cross-examination at the hearing but that the plaintiffs wanted the hearing to proceed as scheduled, with the defendants' counsel conducting cross examination of Mr. O'Hearn at some later date.

[44] This was unacceptable to the defendants for obvious reasons. The affidavit of Mr. O'Hearn was filed months late and it was the first and only fact witness affidavit put forward by the plaintiffs. There was insufficient time in which to prepare a reply to the affidavit.

[45] As result of this development, a conference was convened with Justice Allen Boudreau on January 21, 2011. He was scheduled to hear the summary judgment motion. The parties agreed to enter into a Consent Order that included the following terms:

1. The motion is adjourned to mutually convenient dates, to be determined at a date assignment conference;

2. The plaintiffs are not permitted to file any further material or evidence in respect of the Motion, except that the plaintiffs may file an amended affidavit of Fred O'Hearn (the "Amended O'Hearn Affidavit"), provided that the same is filed and served by March 4, 2011.

[46] The Consent Order was signed by Justice Allen Boudreau and was issued February 23, 2011. On March 3, 2011, Mr. O'Hearn swore an amended affidavit.

[47] At an on the record case management conference of September 8, 2011, the summary judgment motion was rescheduled for hearing on March 26, 27 and 28, 2012. I gave a direction, which was later committed to writing in a letter dated September 9, 2011 (amended September 15, 2011), which stated:

> The parties will not be permitted to file further affidavit evidence. The Defendant will be permitted to file an amended brief in support of its motion for summary judgment which brief must be filed on or before February 24, 2012.

[48] At the outset of the summary judgment motion hearing in March 2012, the defendants made a motion to strike the affidavits of both Mr. O'Hearn and Ms. McMillan. In reasons released on June 1, 2012 Justice Pickup ruled that both affidavits were inadmissible.

[49] The matter went on appeal to the Nova Scotia Court of Appeal which confirmed the motions judge's decision which ruled the O'Hearn affidavit to be inadmissible. The Court of Appeal overturned the motions judge's decision in relation to the MacMillan affidavit and ruled that it was admissible. This decision

was affirmed by the Supreme Court of Canada in a decision released April 30, 2015.

[50] On August 5, 2015 a further case management conference was convened at which time counsel for the plaintiffs indicated that he intended to file new affidavits from five additional witnesses in response to the summary judgment motion. As the defendants would not consent it was determined that the current motion would be necessary. Ultimately, the plaintiffs elected to proceed with a motion seeking leave to admit the affidavits of Messrs. Hillier and Tompkins only.

[51] Impliedly, I am being asked by the plaintiffs to vary my previous direction and the Order of Boudreau J., each of which mandated that no further affidavits would be permitted to be filed on the summary judgment motion.

[52] The plaintiffs have cited Rules 2.03, 23.11, and 23.12, in support of this motion to admit.

[53] Rule 2.03 has no application in this situation. It provides that a judge has a general discretion in the direction of a proceeding and to excuse compliance with a Rule subject to the limitations set out in Rules 2.03(2) and (3). The question in this case is whether there is authority to vary existing orders of the court.

[54] The relevant parts of **Civil Procedure Rule** 23.12 are:

> 23.12 (1) A party may only file an affidavit after a deadline in Rule 23.11 with the permission of a judge.
>
> (2) On a motion to permit a late affidavit, the judge must consider all of the following:
>
> > (a) the prejudice that would be caused to the party who offers the affidavit, if the motion proceeds without that affidavit;
> >
> > (b) the prejudice that would be caused to other parties by allowing the affidavit to be filed, including the prejudice caused by an adjournment, if an adjournment would result;
> >
> > (c) the prejudice caused to the public if motions set by appointment are frequently adjourned when it is too late to make the best use of the time of counsel, the judge or court staff.

> (3) A judge who allows a late affidavit may order the party filing the affidavit to indemnify any other party for expenses resulting from the filing, including expenses resulting from any adjournment.

[55] The timelines in Rule 23.11 are not applicable as a new date for the hearing has not been set. Neither does the Rule speak to a request to file an affidavit after an order has issued saying that no further affidavits would be permitted.

[56] If there is authority to do as the plaintiff asks then the factors set out in Rule 23.12(2) may only provide guidance as to whether such a discretion should be exercised.

[57] The Direction that I made in September 2011 expanded the prohibition on filing further evidence to the defendants. It did not relax the effect of Justice Boudreau's order as it applied to the plaintiffs.

[58] This action is under case management. Rule 26 gives the case management judge the discretion to issue directions, to appoint a time, date, and place for a trial or hearing, and to rule on an issue of procedure or evidence for an upcoming trial or hearing. *See*, Rules 26.02 (2) and 26.04(1).

[59] Directions that are given at a case management conference may be varied. *see*, Rule 26.04 (2). A direction, including a ruling, made at a conference may be enforced as provided in Rule 78 - Order. see, 26.05(3)

[60] Rule 78.01(2) says that "Directions and rulings are orders." Rule 78.01(3) specified that an Order is enforceable "in accordance with this Rule'.

[61] In this case my September 2011 Direction was made in court and on the record. Counsel, both being from outside of Nova Scotia, joined by telephone. The Direction was then committed to writing in letter form. No written order that included this Direction was taken out. Neither has a "record certified by a court reporter or a judge" been prepared, which according to Rule 78.03(4) is necessary if the Direction is to be enforceable as an Order. Therefore the Direction I issued was only enforceable as an Order after having the Direction committed to a written order or by the preparation of a Certified record of the Direction. Therefore I retain discretion under Rule 26.04(2).

[62] I am of the view that Rule 26.04(2) authorizes me to vary directions which have not been perfected in the form of an enforceable order that complies with the

provisions of Rule 78. There is no enforceable order in existence at this time, even though it would be relatively simple to do.

[63] This does not resolve the question of the effect of Justice Boudreau's order, nor does it mean that I should exercise the discretion to vary my Direction.

[64] The Consent Order issued by Justice A. Boudreau has not been appealed. There are no conditions or terms that excuse compliance with the order. It is a valid order, although it deals with the procedure to be followed on the motion and not the substance of the motion itself.

[65] In *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[66] The plaintiffs have not appealed or otherwise had the order lawfully quashed. It might be said that I am being asked, inferentially, to nullify the order. I have not been provided any authority which permits me to do so. Given that it was entered into with the consent of the plaintiffs and that the evidence sought to be admitted now was available to the plaintiffs at the time the order was entered into there is no obvious basis upon which the plaintiffs could have sought to set aside the order.

[67] In my view Justice Boudreau's order remains in force and the motion fails for this reason.

Exercise of discretion

[68] In the event that I am wrong in this conclusion I would refuse to exercise my discretion to grant the motion. These are my reasons.

[69] The plaintiffs submit that they will suffer prejudice if the motion proceeds without these affidavits. That is not plainly apparent at this time. The plaintiffs intend to call Susan MacMillan as an expert witness whose report is based upon her review of business records and financial statements of the defendants. Her report has been in hand for both parties since September 17, 2010. The attempt by

the defendants to strike her affidavit on the basis of partiality was ultimately unsuccessful.

[70] The plaintiffs caused two hearings to be adjourned as a result of the late filing of affidavits. One of those, the O'Hearn affidavit, was so defective as to be struck.

[71] The plaintiffs then waited for 2 years following the decision of the Court of Appeal ruling on the O'Hearn affidavit before seeking to introduce new fact witness affidavits. Those witnesses have been available to the plaintiffs from the commencement of this action. Nothing changed over the years except that the plaintiffs came to the view, after the O'Hearn affidavit was struck, that they should try again.

[72] It should be remembered that the plaintiffs did not intend to put forward any fact witness affidavits for the hearing scheduled in November 2010. The Consent Order and this history all influenced my Direction made in September 2010. In short it was time to get this matter done and the parties had had more than ample time to identify and put forward their evidence on the summary judgement motion.

[73] The defendants submit that they will suffer prejudice by allowing the affidavits to be filed. Counsel for the plaintiffs has admitted this to be the case in paragraph 12 his affidavit. He takes the view, however, that any prejudice can be compensated in costs, which is certainly one remedy available to the defendants. I acknowledge that the filing of the affidavits will not cause an adjournment – no date has been set for the motion hearing as yet.

[74] The defendants rightly complain that they have been operating under the cloud of a very significant contingent claim against them and have been for some 10 years.

[75] I decided in September 2011 that the parties should have no further opportunities to delay by bringing in further evidence after two failed attempts to get the motion heard.

[76] Assuming there is a discretion to grant this motion, the plaintiffs' submission fails to address two points - the reason why the orders were issued in the first place, and the lack of any change in the status of the case which would justify their introduction now.

[77] The orders were issued because of the late filing of plaintiffs' materials on two different occasions leading up to scheduled hearing dates. At best this indicates the plaintiffs' lack of timely focus on the issues of the motion and at worst a litigation strategy of waiting until the defendant committed to its position and then springing evidence on them so close to the motion hearing that they could not respond adequately.

[78] As to the second point, the passage of time as a reason to adduce additional evidence is only germane when something happened during that time period which materially impacted on the relevance or materiality of the evidence previously put forward, or where new evidence has been discovered that was not previously known or available. This has not occurred here.

[79] Instead, as appears to have been the case repeatedly, the plaintiffs perceived with the passage of time that their position needed shoring up. Whether that is accurate or not is not the point, it is that their objective is to belatedly submit evidence that they believe will help their position, evidence which has been available to them from the filing of this motion in August of 2010.

[80] As I will discuss later, the current motion - the third time the plaintiffs have attempted to add evidence belatedly- is obviously an attempt to substitute the rejected O'Hearn affidavit with almost identical evidence. The plaintiffs have twice changed and are attempting again to belatedly change the evidentiary basis upon which they intend to defend the motion. In having to adjourn the first two hearing dates it caused inconvenience to the court and to the defendants.

[81] The defendants have the right to rely on the order of Justice Boudreau and my Direction – that the opportunity to adduce further evidence has been closed, even though no date for hearing had been set. I do not see that the intervening 3 years that passed while Justice Pickup's decision was under appeal has changed the basic rationale for the Direction.

[82] In reaching this conclusion I am mindful of the concern that a successful summary judgement motion can be determinative of the plaintiffs' claim. The prospect of that outcome does not, on balance, dissuade me from the conclusion that I reached in September 2011 or now.

[83] I am further reinforced in my conclusion by my assessment of the contents of the affidavits and will turn to that now.

Argument 3: The affidavits sought to be admitted should be struck as they are repetitive of an earlier affidavits struck by the court and because they contain inadmissible statements;

[84] I have previously outlined the contents of the affidavits and in particular noted that they are largely identical to each other.

[85] The defendants say that the affidavits repeat information set out in the O'Hearn affidavit which was struck.

[86] They also submit that the contents offend the provisions of Rule 39. I have been referred to and considered the provisions of that rule. I have also reviewed the principles set out in *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1993) 123 N.S.R. (2d) 46.

Lloyd Hillier

[87] In paragraph 4 Mr. Hillier attests that he is providing "…the evidence and facts contained in this affidavit as a representative sample of what all plaintiffs experienced as members of AWARD." In paragraph 21 he again describes himself as "representative shareholder of AWARD".

[88] This action has not been certified as a Class Action and so his use of the term is not in a formal legal capacity. Unless otherwise sourced in accordance with the *Waverley* principles and Rule 39 any statement of the affiant that purports to speak for anyone other than himself is not admissible.

[89] Mr. Hillier offers a general observation that the financial reporting to the shareholders like himself always presented a positive assessment of AWARD's financial situation. See, paragraphs 6 to 11. In some instances the affiant provides examples of written reports prepared by Tom Smith who was the President of AWARD at times relevant to the claim and which were distributed to Mr. Hillier among others. These reports, dated in 2004, are submitted to confirm Mr. Hillier's understanding of the financial health of AWARD at that time.

[90] However, there are many statements in those paragraphs which attribute the financial reporting to "the Board" or the "officers and/or directors". While paragraph 7 identifies "people like Peter Miller, John MacDougal, Tom Smith and Nils d'Entremont" as the presenters of this information the affiant fails to attribute any specific comment to any specific speaker on any specific date. Those

comments contain opinions on the financial statements, and hearsay that has not been properly particularized.

[91] Paragraphs 18- 20 state:

> 18. In or around the year 2005, AWARD hired Grant Thornton to review AWARD's audit history. Soon after, a special meeting was called and that is when I was informed and do verily believe that previous audited statements were in error failing to disclose true costs, write-offs and did not fairly represent a true financial picture of AWARD for all material times that WBLI and Brian Burgess were auditors.
>
> 19. I relied on the advice and work of WBLI during my participation in the AWARD program, I was present when WBLI presented AWARD's financial reports at the annual general meetings and I trusted their expertise. I subsequently found out that the information given by WBLI was false, misleading and not in accordance with the Generally Accepted Accounting Principles (GAAP).
>
> 20. I have also read the affidavit of Susan Dorothy MacMillan filed on this Motion and do verily believe its contents as to the facts related therein.

[92] Paragraphs 18 and 19 contain information that is hearsay. Both fail to adequately particularize the sources of the information contained therein. In paragraph 19 the affiant fails to swear to his belief in the information. Paragraph 20 purports to offer an opinion on the accuracy of the expert report.

[93] These paragraphs, collectively, are also substantively indistinguishable from the evidence which Justice Pickup ruled to be inadmissible in his decision reported as *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants)* 2012 NSSC 210:

> 45 At para. 16, Mr. O'Hearn states:
>
> > 16. AWARD engaged Grant Thornton to review AWARDS audit history. I was informed by Grant Thornton and do verily believe that as all AWARD members were, that previous audited statements were in error in failing to disclose true costs, write offs and did not fairly represent a true financial picture of AWARD for all the material times that WBLI and Brian Burgess were auditors. I have read the financial review conducted by Grant Thornton, have spoken to Sue MacMillan of Grant Thornton and do verily believe their conclusions that the financial audits performed by the Defendants were in error.

> 46 The defendants say that as a lay witness Mr. O'Hearn is not permitted to offer his opinion on Grant Thornton's auditing. Similarly his attempt to bolster the credibility of other witnesses violates the rule against oath helping. They say that this is inadmissible opinion. The plaintiffs argue that this paragraph is relevant to the fact of AWARD's audit history being reviewed and to the fact that Mr. O'Hearn was told and believed that previous audit statements were in error. They agree that Mr. O'Hearn's belief in their conclusions should be struck. I find that this paragraph should be struck in its entirety. I am not satisfied that Mr. O'Hearn's conclusions as to Grant Thornton expert's advice is relevant to the ultimate determination of this issue.
>
> (Emphasis in original)

[94] Paragraph 21 of Mr. Hillier's affidavit states:

> 21. It is my belief and knowledge, as representative shareholder of AWARD, that all Plaintiff companies lost money as a result of the actions of the Defendants either directly or as shareholders of AWARD, the proposed Plaintiff.

[95] Pickup J. also struck a similar averment from the O'Hearn affidavit:

> 49 Finally, the following appears at para. 18 of the amended affidavit.
>
> > 18. It is my belief and knowledge, as representing a shareholder of AWARD and as a former board member of AWARD that all Plaintiff companies lost money as a result of the actions of the Defendants either directly or as shareholders of AWARD, the proposed Plaintiff.
>
> 50 The defendants say that Mr. O'Hearn refers to other plaintiffs without providing the source of the information and the grounds for his belief, resulting in inadmissible hearsay. The fact that Mr. O'Hearn believed that "all plaintiff companies" lost money is irrelevant, according to the defendants. The plaintiffs request an exercise of the court's discretion to keep this paragraph "for the fact, not for the truth, that plaintiff companies lost money". They submit that Mr. O'Hearn is speaking from personal and general knowledge and from having the opportunity to review AWARD's finances as a shareholder and as a member of the board.
>
> 51 Paragraph 18 should be struck in its entirety for the reasons advanced by the defendants.

[96] As is evident there are serious problems with the admissibility of significant parts of Mr. Hillier's affidavit.

Tim Tompkins

[97] Mr. Tompkins' affidavit, as previously noted, is identical or nearly identical to that of Mr. Hillier in 17 of 23 paragraphs. His paragraph 18 is the same as that of Mr. Hillier except in two respects: he identified the source of the information as Grant Thornton and not from a "Special Meeting" (changes highlighted):

> 18. In or around the year 2005, AWARD hired Grant Thornton to review AWARD's audit history. ~~Soon after, a special meeting was called and~~ That is when I was informed by Grant Thornton and do verily believe that previous audited statements were in error failing to disclose true costs, write-offs and did not fairly represent a true financial picture of AWARD for all material times that WBLI and Brian Burgess were auditors.

[98] This paragraph still lacks the necessary specificity to admit hearsay evidence. It also is a statement of his belief in the opinion of Grant Thornton, which Justice Pickup ruled inadmissible.

[99] Mr. Tompkins' paragraph 20 is identical to Mr. Hillier's paragraph 19 and so suffers from the same fatal flaws:

> 20. I have also read the affidavit of Susan Dorothy MacMillan filed on this Motion and do verily believe its contents as to the facts related therein.

[100] Paragraph 19 is different from Mr. Hillier's in that Mr. Tompkins states that:

> 19. I read the financial review conducted by Grant Thornton and do verily believe their conclusions that the financial audits performed by the defendants were in error.

[101] A copy of the December 31, 2005 Consolidated Financial Statements prepared by Grant Thornton is attached as an exhibit to Mr. Tomkins' affidavit.

[102] As with Mr. Hillier's affidavit, paragraphs 18 and 19 of the Tompkins affidavit are in substance indistinguishable from paragraph 16 of the O'Hearn affidavit which Justice Pickup ruled was inadmissible. *See*, Pickup J. decision at paras. 45-46.

[103] He too purports to be a "representative shareholder", at paragraph 22.

[104] Counsel for the defendants also points out that paragraphs 10, 12, 15 and 16 of the submitted affidavits, being identical to each other, relate information provided to them "by the Board". Justice Pickup was asked to determine whether hearsay evidence identifying the "management team" as the source was admissible.

[105] At paras. 14-17 of his decision, he agreed with the defendants' argument that the phrase "said management team" leads to inadmissible hearsay as it does not identify which individuals on the management team are being referred to as the source. The use of the term "the Board" in the Hillier and Tompkins' affidavits does not correct the problem that caused these references to be struck from the O'Hearn affidavit by Justice Pickup.

[106] I have previously identified certain evidence in the affidavits that is relevant, however they are only a small part of what are affidavits that have serious admissibility issues. These would have to be parsed out.

[107] Counsel for the defendants submit that the affidavits should be struck for the same reasons that Justice Pickup decided that the O'Hearn affidavit should be struck. Pickup J. held:

> ***Should the O'Hearn affidavit be struck in its entirety?***
>
> 54 The authority to strike the affidavit in its entirety is found in Rule 39.04(3), which provides as follows:
>
> > (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> 55 I have also considered the comments of Justice Cromwell (as he then was) in Wall v. Horn Abbot Ltd. (1999), 176 N.S.R. (2d) 96 (C.A.) where he explained that where an affidavit is fundamentally defective "a court should not be required to take it apart in pieces to preserve some possibly admissible material". This is consistent with Rule 39.04(3).
>
> 56 I am satisfied the O'Hearn affidavit is fundamentally defective and should be struck in its entirety. In particular, what is left when the challenged provisions are struck is difficult to separate from the struck portions, and is difficult to understand. Moreover, it is not the function of this court to dissect an otherwise poorly drafted affidavit to try to preserve some admissible material. (Wall, supra)
>
> (Emphasis added)

[108] Perhaps more troublesome than the admissibility problems is that the plaintiffs have attempted to resubmit some of the same evidence which was previously ruled inadmissible, a ruling that was confirmed on appeal. This motion has generated extra delay and cost – putting the defendants to the task of re-

litigating some of the same issues that have been previously determined against the plaintiffs.

[109] It is another reason why I would not be prepared to exercise any discretion that I might have to permit the filing of these affidavits. It is not in the public interest to permit this type of litigation approach. To permit the filing of these affidavits in the circumstances of this case would be inconsistent with the object of the Rules as set out in Rule 1.01:

> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.

Argument 4: Does the death of the defendant R. Brian Burgess cause serious and irreparable prejudice to the ability of the defendants if the plaintiffs' motion is granted?

[110] Mr. Burgess was the initial affiant in support of the defendants' motion. He also provided a reply affidavit. The defendants cannot offer his evidence in reply to the affidavits sought to be admitted by this motion.

[111] In view of my previous findings, it is not necessary to respond to this argument.

Conclusion

[112] The February 2011 Order of Justice Boudreau prohibiting the filing of further affidavit evidence by the plaintiffs on this summary judgement motion is valid and enforceable. In the result, the motion of the plaintiffs to file two new fact witness affidavits is denied.

[113] If necessary to the result, I would also refuse to exercise any discretion that I might have to grant the motion for the reasons set out herein.

[114] I will hear the parties as to costs if they are unable to agree.

[115] Motion dismissed.

Duncan, J.