**SUPREME COURT OF NOVA SCOTIA**
**Citation:** *Baillie v. Power*, 2017 NSSC 12

**Date:** 20170117
**Docket:** Tru No. 439649
**Registry:** Halifax

**Between:**

Carl Baillie

Applicant

v.

James Power Jr., Kris McNeil, Robert Youden, George Jessen, Paul Yurchesyn, and William MacLeod

Respondents

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| **Judge:** | The Honourable Justice Peter Rosinski |
| **Heard:** | January 9, 2017, in Truro, Nova Scotia |
| **Counsel:** | Dennis James, Q.C., for the Applicant<br>Sheree Conlon, and Michael E.J. MacIsaac for the Respondents |

**By the Court:**

## Introduction

[1] The applicant, Mr. Baillie, and the Respondents are shareholders of Municipal Capital Incorporated [MCI]. MCI is a private Nova Scotia limited company. MCI operates as an investment holding company providing management services to subsidiary and affiliated companies including Municipal Ready-Mix Limited [MRM]. Since its incorporation on August 1, 1989, David W. MacKenna, has been President and a Director of MCI.

[2] The controlling shareholder of MCI is Inoca Transport Limited [ITL]. Through ITL, David MacKenna has always exercised a controlling interest in MCI. The minority shareholders of MCI have always been employees of the Municipal Group of Companies [MGC] which includes MRM, Mill Creek Environmental Services Limited, and Beechmount Quarry Limited.

[3] In July 2012, Mr. Baillie and the Respondents entered into a share purchase agreement [SPA] – Mr. Baillie was named as seller and the Respondents as purchasers. ITL and David W. MacKenna also signed the SPA.

[4] Each of the Respondents was to purchase 1539 or 1540 shares from Mr. Baillie at a purchase price of $82.58 per share. A formal evaluation, conducted by Grant Thornton, concluded that the midpoint of an en bloc fair market value of the shares of MCI was $8,840,000, which represented a share value of $114.29 for each of the 77,344 issued shares. The undisputed evidence is that an approximate 30% discount of that value was considered appropriate given that Mr. Baillie was selling his shares as a minority shareholder.

[5] The purchase of all of Mr. Baillie's 9238 shares was to take place over time based on a schedule of annual payments with deadlines on: July 9, 2012, December 27, 2012, December 27, 2013, and December 27, 2014. The December 27, 2014 payments were the only payments not made – and not made by any of the Respondents.

**Positions of the Parties**

[6] Mr. Baillie says that the SPA is unambiguous. The Respondents agreed to purchase **all** of Mr. Baillie's shares. The total price for all those shares was agreed to be paid by instalments – 25% at each of July 2012, December 31, 2012, December 31, 2013 and finally December 31, 2014. By not making the final payment, Mr. Baillie says the Respondents have breached their agreement.

[7] Consequently, Mr. Baillie, by notice of Application in Court, sued each of the Respondents individually for breach of contract. He requests the following relief:

> Specific performance of the share purchase agreement requiring the Respondents to purchase outstanding shares from the applicant; Prejudgment interest; Costs; and such further and other relief as this Honourable Court deems just.

[8] Two major issues must be determined by the court: was there a breach of contract; and if so, should specific performance be ordered in relation to the unpaid 2308 shares?

[9] The Respondents also say that the SPA is unambiguous. Under their interpretation of the SPA, the Respondents could, without having to give any reason for refusing to do so, at any time decline to purchase any of Mr. Baillie's shares. While the SPA contemplates allowing the Respondents the opportunity to purchase Mr. Baillie's shares in part or in whole, they say they are not obligated to purchase any of them because of the wording of clause 9. Therefore, there is no breach of contract. Even if the court concludes there is a breach of contract, they argue specific performance is inappropriate, because the wording of Clause 9 provides an agreed to "remedy" – i.e. "the shares remaining unpaid shall remain the property of the vendor".

[10] Clause 9 reads:

> Should there be a default in payment of the purchase price by any Purchaser, the remaining purchasers are to have a first option to purchase the Shares which have not been paid for pro rata. If any of the remaining Purchasers do not exercise their option and if there are no purchasers available pursuant to the terms of the Memorandum of Association of the Company, or others outside the company, then the Shares remaining unpaid shall remain the property of the Vendor.

[11] I agree with the Respondent purchasers. While on the bare wording contained in the SPA, Mr. Baillie's arguments may be viewed as having some

persuasiveness, resort to the principles of contractual interpretation undermine that persuasiveness. The application is dismissed. I will next elaborate upon my conclusion.

**The evidence**

[12] The evidence available to the court is limited to the affidavit of Mr. Baillie filed October 21, 2016, and the affidavit of David MacKenna filed December 21, 2016- and their cross examination (which did result in the filing of two exhibits – a May 4, 2012, email from Mr. Baillie to Mr. MacKenna, and a February 2, 2015, email from Mr. Baillie to Mr. MacKenna's assistant, for his attention).

[13] In his affidavit, Mr. MacKenna stated that:

> During the negotiation, one of the issues that arose was Mr. Baillie wanted a one-time payment for his shares, and did not want to be paid over four years. I explained to Mr. Baillie that… the funds were coming from special bonuses that could be paid to the Respondents from MCI/MRM's cash flow, and there would not be sufficient funds available to make a one-time payment… [and therefore]… Clause 9 was included in the Agreement, which provided that Mr. Baillie would remain the owner of any unpaid shares in the event of a default under the Agreement.

[14] It was not disputed by Mr. Baillie, and was confirmed by Mr. MacKenna, that at the time the agreement was signed on July 9, 2012, Mr. Baillie knew that:

1. Over the history of MCI, employees would from time to time be paid "special bonuses" by the Company, which would allow those employees to buy shares in MCI. Such special bonuses were not intended to be repaid by the employees. However, under Article 201 of the Memorandum of Association a process existed for their potential resale – they would be first offered to other shareholders- thereafter they "may be sold to any person without any restriction as to price";
2. If a shareholder sought to sell their shares to other shareholders, whether and to what extent "special bonuses" would be provided by the Company to permit the other shareholders to purchase those offered shares, was practically dependent on cash flow of the company at the relevant time – i.e. "special bonuses" were not legally guaranteed to be paid by the Company, even if a shareholder had

agreed to sell shares over time to other shareholders. A case of a similar default by other shareholders who had intended to purchase the offered shares from Calvin Edmonds, had occurred in approximately 1999 because MCI's cash flow was insufficient to permit the payment of special bonuses to the purchasing shareholders; and

3. Although he preferred a one-time payment for all his shares, he was told, and recognized, that the company could not afford to pay special bonuses to allow such purchase all at once.

[15] Mr. Baillie also acknowledged that five of the six Respondent shareholders came to MCI after he did, and as the senior employee, he made them aware that there was a potential for special bonuses to be paid in order to allow them to purchase shares from the company, or from other shareholders who were offering their shares for sale, but that special bonuses were not guaranteed.

[16] Mr. Baillie also testified (for the first time in cross-examination) that Mr. MacKenna had verbally agreed to buy the shares from Mr. Baillie if special bonuses were not paid, and the purchasing shareholders defaulted by not paying the agreed-to purchase price at the agreed-to time(s).

[17] Mr. Baillie's own evidence in this respect, that he "trusted Dave [MacKenna]" and believed he had a guaranteed buyer for his shares in any event, is somewhat inconsistent with his claim that the Agreement was drafted so that he maintained a right to sue for breach of contract; or conversely that the return of the unpaid shares to him per clause 9 did not preclude his right to sue for breach of contract.

[18] Once the Respondents defaulted, Mr. Baillie went to Mr. MacKenna, but "he wasn't interested in buying the shares".

[19] Mr. Baillie stated in his affidavit that:

> There was no agreement of any kind between myself and the Respondents that the payments to be made to me were contingent upon receipt of funds from MCI to make those payments… I never agreed to receive any payments on the basis that the Respondents first receive funds from MCI to make those payments… It was never openly discussed during the negotiations of the Agreement that, if the Respondents fail to honour the Agreement, I would have no recourse against the Respondents other than to retain ownership of whatever shares had not been purchased by the Respondents.

[20] However, in cross-examination, Mr. Baillie agreed that "generally yes" he knew the Respondents would not be putting any personal money up for the shares. Moreover, in his email to Mr. MacKenna on May 4, 2012, he stated in part:

> Hi Dave
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> We talked about your offer and have the following comments:…3) as we noted before the four year buyout terms you mentioned were for people that were retiring and wanted to spread out their payments for tax purposes.4) as you know the normal payout for people fired is a one-time payment [I note here that Mr. Baillie's employment was being terminated by mutual agreement between Mr. MacKenna and Mr. Baillie].5) if we [Mr. Baillie and his wife] accepted the four payment plan you propose, this will certainly limit and probably eliminate our options for moving forward on starting, buying or buying into a business.6) **we are taking a huge risk on failure of future payments, not to wish you harm, but if you were killed in an accident on the way home tonight the company would fail soon after**.7) this payment schedule allows M Cap [MCI] to stay very close to its current bonus schedule (if you forgo taking a bonus) and still add value to its net worth.8) **the shareholders are making a huge profit at our expense under your plan, without paying anything out of pocket. If the company does well and they get the bonus to pay, we then get paid that year. If the company has a bad year that year they have no legal obligation to pay me, they simple give me back the shares, which are probably devalued at that time or possibly worthless. With all of the above taken into account we are still willing to work with you to finalize a deal.** We propose to increase the discount factor by 6%, not the 4% that you proposed and spread it over four payments, one dated January 2012 and three in December 2012, 2013, and 2014. If this is acceptable, please prepare the payment chart for our review and how you propose to provide the guarantees that we discussed at our meeting yesterday. Then as you noted we should meet and finalize the severance agreement.

[21] When it was put to him in cross-examination, that two months before the signing of the SPA, he acknowledged in his email that if no special bonuses are paid by MCI to the prospective purchasers of Mr. Baillie's shares " they have no legal obligation to pay me, they simple [sic] give me back the shares"; in his testimony all he said in response: "It looks like I made that statement in the email".

[22] Mr. MacKenna, in his December 31, 2014 letter, informed Mr. Baillie that:

> I regret I must inform you that the transaction due to take place on December 27, 2014 in the above-noted agreement will not take place. MRM has been under financial stress this year… As a result, we are unable to pay bonuses to provide cash for the purchasers to pay for the shares. The 2308 shares to be purchased on December 27, 2014 will remain your property. There is a process in place (we

> used it in 2001) for you to offer your shares to one – other shareholders; or two – offer the shares to others outside the current shareholder group (I can give you more specific information if you are interested).

[23] In his January 8, 2015 e-mail response, Mr. Baillie stated:

> I received your letter regarding the sale of my shares. **I am deeply disappointed and expressed this exact concern at the time that it was agreed that my shares would be bought.** I would like to move forward with the sale of the shares as quickly as possible. So please put in place whatever procedure that is required to offer these shares outside our standing agreement.

[24] I found Mr. Baillie's cross-examination answers, to largely straightforward questions, were given in a tentative, reluctant and calculated manner. Moreover, the inconsistencies between his testimony, the exhibits, and other independent evidence, as well as reasonable inferences, I draw therefrom, cause me to conclude that on the material points in dispute herein, his evidence is qualitatively diminished, and I give it less weight for those reasons.

[25] I did not have similar concerns in relation to Mr. MacKenna's evidence, and where their evidence conflicts I generally prefer the evidence of Mr. MacKenna.

## Why there was no breach of contract here

[26] The parties do not disagree about the applicable law. It is captured in the following cases: *Creston Moly Corp v. Sattva Capital Corp*., 2014 SCC 53; *Canadian National Railway v. Halifax (Regional Municipality)*, 2014 NSCA 104, per Fichaud J.A.; *323-3954 Nova Scotia Limited v. Systemcare Cleaning and Restoration Ltd*., 2011 NSSC 22, per Warner J.

[27] As Geoff Hall put it, in his second edition of *Canadian Contractual Interpretation Law* (LexisNexis, 2012), at p. 79:

> It has long been established in Canada that prior drafts and evidence of the negotiations leading up to a final agreement may not be considered as part of the interpretive process… However, the rule has an important exception: it does not extend to preclude the admission of evidence of prior drafts and negotiations showing pertinent surrounding circumstances other than the parties subjective intentions. From the perspective of contractual interpretation, there would seem to be considerable logic to this exception. Contractual interpretation is fundamentally about finding the correct meaning by considering both the words the parties agreed upon and the context in which the words were used. Prior drafts and evidence of negotiation may in some cases be quite helpful in setting the context for a final agreement and thereby assist in ascertaining meaning correctly.

> As long as such evidence does not touch upon subjective intention, it is difficult to see such evidence as objectionable in principle.

[28] As more recently explained in *Sattva* by Justice Rothstein:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement… The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties' as expressed in the words of a contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract… While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.
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> …
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> 58 It should consist only of objective evidence of the background facts at the time of the execution of the contract… That is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'… Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of the execution of the contract is a question of fact.

[29] The evidence establishes that it was known or reasonably ought to have been within the knowledge of all parties at or before the date of contracting that any obligation of the Respondents regarding their ability to purchase Mr. Baillie's shares was practically contingent on them receiving special bonuses from MCI, and thus constitutes "surrounding circumstances", which I may use in the proper interpretation of the words of the contract.

[30] Moreover, it was also known to all the parties that Mr. Baillie, as an employee, was permanently leaving the company. The SPA was a means for him to formally cut his shareholder ties with the company, and gain some monies.

[31] Properly interpreted, according to the SPA, during the interim between July 9, 2012, and December 27, 2014, the un-purchased shares of Mr. Baillie were available for purchase by only the Respondents at the price and times specified in the SPA. Any "default" by the Respondents in not purchasing Mr. Baillie's shares at the price and times specified in the SPA, was comprehensively addressed in Clause 9.

[32] Clause 9 required first that the shares be offered to the other Respondents; next offered to others according to the Memorandum of Association of the Company [any other shareholders of the Company at a price fixed by the auditors], or others outside of the Company [without any restriction as to price]. If no one purchased them, "then the Shares remaining unpaid shall remain the property of the Vendor".

[33] Clause 9 permitted the Respondents to not purchase any of Mr. Baillie's shares, without breaching the SPA. While this seems odd on its face, it is explained by the manner in which such purchases would be financed: i.e. - by the MCI/MRM giving "special bonuses" to employees; which "special bonuses" were only paid on a discretionary basis by the MCI/MRM when it was determined that there was sufficient cash flow to justify payment of the special bonuses.

[34] In this way, an ongoing employee, or a departing employee, had the opportunity to obtain a reasonable price for their shares (which as minority share holdings in a private company would otherwise likely have limited general appeal to investors), and ongoing employees had an opportunity to expand their holdings of shares.

[35] Ultimately, Mr. Baillie still has the 2308 shares, which were worth $190,594.64 on December 27, 2014. Their value will fluctuate over time depending on the fair market value of MCI. Arguably, Mr. Baillie has lost the benefit of that money on or about December 27, 2014, and has a significantly lesser minority interest at present, making it likely that a greater minority shareholder discount will be applied should he negotiate the sale of the shares remaining in the future.

[36] Nevertheless, the fact that a party has entered into a "bad bargain", is not a good basis for interfering with a proper interpretation of the contractual document.

[37] Incidentally, while I did not rely thereon to interpret the SPA, I note here that it appears Mr. Baillie foresaw this risk in his May 4, 2012, email to Mr. MacKenna, but he concluded: "with all of the above taken into account, we are still willing to work with you to finalize a deal… and spread it over four payments…".

**Conclusion**

[38] The SPA was not ambiguous: it provided a structure for Mr. Baillie to sell his shares on clear terms, to a defined group of purchasers, who were under no obligation to buy any of them. Nevertheless, they did buy 75% of the shares. That they did not buy the remaining 25% was not a breach of the SPA.

[39] Mr. Baillie's claim is dismissed.

[40] I am hopeful that the parties will be able to come to an agreement regarding costs. If not, I direct written submissions to be filed no later than February 9, 2017.

Rosinski, J.