

1998

S.H. No. 145467

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

KATE FINLAYSON and CATHY MILLER, both of Halifax, in
the Halifax Regional Municipality, Province of Nova Scotia,
carrying on business under the firm name and style of
CONVENTIONAL WISDOM EVENT PLANNING

Plaintiffs

- and -

ELECTROPOLIS STUDIES INCORPORATED

Defendant

DECISION

HEARD BEFORE: The Honourable Justice David W. Gruchy at Halifax, Nova Scotia

DATE(S) HEARD: June 28 and 29, 1999

DECISION DATE: September 10, 1999

COUNSEL: Mr. Srinivasen Pillay, Q.C. for the Plaintiffs

Mr. Erroll Treslan and Natasha Party, article clerk,
for the Defendant

GRUCHY, J.:

Factual Overview

Kate Finlayson and Cathy Miller carry on business in the city of Halifax under the firm name and style of Conventional Wisdom Event Planning. Electropolis Studios Incorporated is the brain child of Bernard Smith, an accountant/consultant although he no longer has a financial interest in it.

Electropolis Studios Incorporated took over an empty power generating plant within the City of Halifax for the purpose of constructing and operating film sound studios. The development of the sound studios was considered to be a high interest media event and Mr. Smith was largely personally responsible for its inception and development. He decided in 1997, as the project drew close to its conclusion of construction, that it would be appropriate to hold an event which would attract considerable media and public attention.

In October and November 1997, Electropolis contacted Conventional Wisdom and after a period of negotiations entered into an agreement dated November 18, 1997 which contained, *inter alia*, the following terms:

1. The following services will be provided by Conventional Wisdom for the fees outlined herein:
 - (a) Cordination [sic] of the Launch Party and Premier's and Ministerial Reception and Facility Tour for the Electropolis Sound Stage including, without limitation, media coverage, marketing, fund raising and overall design.
 - (b) Coordinating and management of secondary suppliers for full event management of both launch party and opening event.

2. As Full consideration for the services the client will pay Conventional wisdom, subject to full completeion [sic] of the services:

(a) \$1000.00 upon full execution of this agreement

(b) 10% of corporate contributions or of a reasonable valuation of goods received "in kind" including contributions in kind received from caterers, media, and corporate sponsors. (Payments to be made on a weekly basis upon receipt of an accounting of contributions received)

(c) 10% of all ticket sales such amount to be paid weekly upon receipt of an accounting of revenues received.

(d) \$2000.00 upon successful completion of the services where completion is within 10% of the mutually agreed objectives, or exceeds the same, as outlined in this agreement, and confirmed and final budget as outlined in draft budget attached in Appendix A, and the \$2000.00 to be paid within 15 days of the launch party.

A budget for the event was attached to the original agreement and that budget was as follows:

CONVENTIONAL WISDOM APPENDIX A

<u>EXPENDITURES</u>		<u>REVENUE</u>	<u>AVAILABLE BALANCE</u>
Security	2,000	Ticket Sales	\$61,000
Electricity	1,000	Corporate Sponsorship	\$10,000
Sound/Music	20,000*		
Decor	5,000*		
Ticket Marketing	2,500		
Toilet	1,500		
Clean up	500		

Kerry Fraser	2,000		
CW Fee	10,000		
	\$44,500	\$71,000	\$26,500
In Kind	\$28,500	\$28,550	
	\$73,050	\$99,550	\$26,500

Mr. Smith's concept of the opening events of the sound studios was to have an "extravaganza party". He had initially wanted the party to be earlier - around Halloween - but that was not possible.

As time went on with the planning and execution of the event the budget was amended. Indeed, I find that budgeting was an ongoing process requiring input from both parties.

Mr. Smith's planned that corporate sponsors and sales of tickets would pay for the event. Conventional Wisdom retained the services of Charlene Dill to coordinate corporate sponsorship. It was her responsibility to solicit and obtain corporate donations and/or "in kind" contributions. She was unquestionably successful in obtaining corporate sponsorship of considerable value.

Prior to the actual launch party there were two events for which Conventional Wisdom was responsible: a press conference which took place on December 16, 1997 and a ministerial reception which took place on January 6, 1998.

Initially - and as the launch party date approached - the ticket sales and public interest appeared to be slow. There were undoubtedly some planning problems, which but do not appear to have materially or adversely affected the outcome of the launch party.

Each corporate sponsor was to place a monetary value on the in kind contribution made by it. Cash donations or monetary sponsorships do not present a problem. Those donations were generally made on the understanding that the sponsor would receive credit and some advertising for the highly publicized and high profile event. While there was, therefore, a benefit derived by the corporate sponsors for their donations, this cannot and should not be considered to have been consideration for the purchase of publicity. It is unnecessary for the purposes of this decision, to detail all the donations received.

There were, however, two sponsorships which have caused difficulty between the parties. They were the Atlantic Television (ATV) sponsorship which that company valued at \$135,000 and RCR Catering valued at \$15,000. Conventional Wisdom ultimately invoiced (on January 21, 1998) Electropolis for 10% of all corporate sponsorships including those two disputed accounts. I will deal with each of those accounts separately below.

Kate Finlayson and Charlene Dill testified that Mr. Smith became aware of the valuation of the ATV donation at \$135,000 in December 1997. Mr. Smith denied that date. He said in fact he had a distinct recollection of receiving a telephone call at a particular time in January 1998 (the precise date of which was not clear) when he was told of the valuation. His immediate response was that he could not pay a commission based on that value. Charlene Dill and Kate Finlayson both said that Mr. Smith was excited and probably upset about the valuation and recognized and said immediately that his budget could not stand 10% of \$135,000. Kate Finlayson said that when she received a telephone call from Mr. Smith about that account she was extremely busy with arrangements for the events and informed Mr. Smith, in effect, that she could not deal with the subject then but they would address the matter later. It is this latter fact - that Kate Finlayson was extremely busy - which persuades me that the telephone conversation concerning the account with respect to \$135,000 sponsorship occurred at or about the time of the event - when Kate Finlayson was at her busiest because of that event.

As Mr. Smith wanted one of the biggest parties Halifax had ever seen, considerable advertising would be required. Charlene Dill approached ATV. As I mentioned, by late December 1997 ticket sales were slow. Then Ms. Dill achieved sponsorship by ATV. I find it is clear that neither of the parties nor ATV addressed the value of the sponsorship and free advertising until after the fact - that is, after the advertising and sponsorship had largely taken place. In reaching this conclusion I am mindful that the principals of Conventional Wisdom and Charlene Dill said that by December 16 ATV sponsorship was in place and Mr. Smith was aware of the value placed on it by ATV. In fact, however, ATV did not write to Conventional Wisdom and place a value on its sponsorship until January 12, 1998 - six days after the grand opening and five days before the launch party. I have considered their evidence and the conflicting evidence of Mr. Smith and I have concluded that Mr. Smith was not informed of the value placed on ATV's sponsorship until a date more or less contemporaneous with the letter of January 12, 1998. That conclusion also accords with the evidence of Mr. Elgie of ATV who testified to the effect that Electropolis knew of the extent of ATV's coverage of the event but not the monetary value placed on it by ATV.

The defendant has submitted that the conversation concerning the commission to be paid for the valuation attributed to the sponsorship and advertising by ATV amended the agreement or otherwise amounted to a waiver by Conventional Wisdom. I find it unnecessary to address that particular argument.

I conclude that I must examine the account in relation to the services rendered relative to the overall value of the project and determine whether it is reasonable. In fact that is precisely what was contemplated by the agreement in paragraph 2(b) thereof:

“... 10% of corporate contributions or of a reasonable valuation of goods received 'in kind' including contributions in kind received from

caterers, media, and corporate sponsors. (Payments to be made on a weekly basis upon receipt of an accounting of contributions received.)”

The \$135,000 valuation for the services rendered by ATV is not reasonable. I reach this conclusion for the following reasons.

1. The original budget contemplated a series of events, the total cost of which would be in the range of \$75,000. The parties had originally budgeted for a revenue of \$71,000 and in kind contributions of \$28,550. In the context of this contemplated budget a \$135,000 account by one of the media sponsors appears on its face unreasonable.
2. ATV wrote to Charlene Dill on January 12, 1998 as follows:

This is to confirm that ATV has agreed to provide promotional consideration in the amount of \$135,000 (One Hundred and Thirty Five Thousand Dollars) in connection with the opening of Electropolis.

I trust this is to your satisfaction,

Yours truly,

Dick Prat
Manager of Programming
& Communications

In fact, however, a large portion of the \$135,000 is entirely notional. Michael Elgie of ATV testified that he had no doubt that the account for \$135,000 was accurate. It had been originally conceived by Dick Prat, a former employee of ATV. Mr. Prat had prepared certain notes to justify the figure of \$135,000 and those notes are set forth as follows:

ELECTROPOLIS

<u>Promotional Air Time</u>	- 3 per day	31,920 + 2,000=
	-start Dec 20 - 4 wks	34,000
	-nite 2 wks (4 th spot 2 wks)	5,139
		39,139

Contest-(they provide air and Hotel) (full Maritimes)		
- in Live at 5	1,260(1.5 mins) x3 x 3 days=	11,340
	<u>x 3 times value</u>	34,020

4 ATV Personalities = 5,000

Live at 5 = 15,120

6PM Saturday hit = 15,120

BT Hit - 225 per 30 x 4 (2 mins) = 900 x 8 hrs x 3 times value = 21,600

Sunday item - 3,500

Headline news - 100 x 3 x 3 = 1000

135,000

- 'Exclusivity"
- Signage all 4 studios
- Guarantee re future advertising

Mr. Elgie conceded, however, that much of this package of services could not have been purchased commercially. The account includes, for example, \$5,000 for ATV personalities, but in fact, personalities cannot be purchased in this fashion. The valuation of the contest at \$34,020 is notional but it had a commercial value. Similarly, the items for "Live at 5" for \$15,120, "6PM Saturday Hit" at \$15,120, "BT Hit" at \$21,600, "Sunday items" at \$3,500 and "Headline news" at \$1,000 are not parts of a commercial package. Rather, they were the result of a decision by ATV to sponsor a high profile event for its own purposes at a time when there was no high demand for commercial airtime.

In addition, ATV did not understand at any time that Conventional Wisdom would be paid a commission for the value of ATV's services. I infer that ATV might not have arrived at such a valuation had it known of the agreement to pay a commission.

3. In fact, the advertising coverage provided by ATV was on a full regional advertising basis, covering all of Nova Scotia, New Brunswick and Prince Edward Island. Such coverage for an event in Halifax which, while it might have regional implications, was essentially a local event, could have been purchased at 60% of the regional advertising cost. ATV for its own purposes, decided that the profile of the event warranted its sponsorship on a regional level. That, however, does not justify the value placed upon it by ATV.

Conclusion Re ATV

It is my conclusion that a reasonable valuation of the promotional services provided by ATV, in relation to this event and to the total value of this event should be calculated as follows, keeping in mind the reduction of 60% for local advertising only:

Promotional air time at \$39,139	\$23,483.40
Contests at \$34,020	\$20,412.00
	TOTAL: \$43,895

In addition, had Conventional Wisdom followed the expressed intention of section 2(b) of the Agreement and given an accounting in a timely fashion - on the assumption that they had received the valuation of the ATV services on or about December 16, (which I do not accept as accurate) - then the defendant could have terminated the sponsorship at that time and dealt with the consequences.

RCR Catering

I have reviewed the RCR budget of costs of food and services supplied by RCR. There is no doubt that RCR profited by the sale of liquor, the profit of which was to offset, at least in part, the cost of food services. Any loss was considered to be a contribution. That is a reasonable approach and the defendant has not produced evidence to show RCR did not incur a loss as it had forecast and as claimed by Conventional Wisdom.

In view of the fact the public attendance was greater than budgeted and accordingly, liquor sales and profits would have increased, I will allow an in kind contribution of \$10,000 upon which Conventional Wisdom may charge its commission.

Miscellaneous

It is clear from a reading of the supporting material for the Maritime Broadcasting System valuation (Exhibit 6N) an error was made in the calculation. Maritime Broadcasting calculated its on air promotions at \$18,1600.00, whereas in fact the total of on air valuation should have been \$17,080.00. Accordingly, Conventional Wisdom's account for this item will be reduced to \$1,708.

As well, the account was based on a \$3,000 contribution by Westin Hotels, whereas in fact Westin valued its contributions at \$2,750 and this error will be reflected in the ultimate account as well.

In addition, Conventional Wisdom conceded that its commission on ticket sales should have been on the basis of net sales as opposed to gross. This reduces the figure upon which a commission may be charged to \$42,379.14.

Conclusion

The Conventional Wisdom claim breakdown will accordingly be as follows:

Deposit	\$1,000.00
Ticket sales	4,237.91
Caterer	1,000.00
Media Sponsor	4,389.00
Corporate Prizes	942.02
Corporate Sponsors	2,600.00
Completion Fee	2,000.00
Total:	\$16,168.93

The defendant will be given credit for the amount of \$11,500.00 already paid to the plaintiffs and judgment will be in the amount of \$4,668.93.

Costs will be on the basis of the amount involved on Scale 2 plus disbursements.


