SUPREME COURT OF NOVA SCOTIA
Citation: *Hong v. Lavy* 2018 NSSC 54

Date: 20180313
Docket: Hfx No. 467757
Registry: Halifax

Between:

Shae Hong and Hong and Co.

- Applicants

v.

Danny Lavy, Star Elite Inc. and Elite Group Inc.

- Respondents

Judge: The Honourable Justice Jamie Campbell

Heard: March 6, 2018, in Halifax, Nova Scotia

Counsel: Roderick Rogers, Q.C. and Chris Madill, for the Applicants
Peter Rogers, Q.C. and Jane O'Neill, Q.C., for the Respondents

By the Court:

[1] Danny Lavy and Shae Hong are shareholders in Sensio Company and Sensio Inc. They have been described as a being "at war". What took place before Justice Edwards in *Hong. v. Lavy*[1], in November 2017, was full scale three-day legal battle. This motion was a General Chambers skirmish, though one that had the potential to fundamentally change the course of the dispute.

[2] Mr. Lavy has made a motion under *Nova Scotia Civil Procedure Rule 6*, to convert the proceeding from an application to an action, or in the alternative to amend the hearing dates for the application and the pre-hearing filing and other deadlines involved.

[3] The proceeding to which the motion relates involves the dispute between the two shareholders of Sensio. That company manufactures and distributes small appliances that are made in China. It operates mainly out of New York and Montreal and has annual revenues of more than $140,000,000 (USD). Danny Lavy owns 50.05% of the shares and Shae Hong owns 49.95%. Mr. Hong contends that since 2013 the company has issued loans to Mr. Lavy or his companies totalling more than $21,000,000. Mr. Hong says that those loans were made without his knowledge, consent or approval as an executive officer, director or shareholder of Sensio. There were other issues identified as well. There were concerns about expenses, including those related to Mr. Lavy's private jet. Mr. Hong filed a Notice of Application in Court on August 31, 2017. That was followed very quickly by a Notice of Motion seeking injunctive relief under the Third Schedule of the *Companies Act*[2].

[4] Mr. Lavy responded with a Notice of Contest and a Notice of Respondents' Claim making claims against Mr. Hong.

[5] A Motion for Directions was heard on September 27, 2017 before Justice Ann Smith. The matter was set down for hearing on 4 days starting June 11, 2018. Dates were set for the filing of evidence and submissions. There was no objection at that time to the matter going forward as an application.

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[1] 2017 NSSC 329

[2] R.S.N.S. 1989, c. 81

The Interim Injunction

[6] The matter came before Justice Edwards last November. That was for the motion seeking an interim injunction. Justice Edwards issued a decision on December 15, 2017. The decision in *Hong v. Lavy* is direct and pointed. The court concluded that Shea Hong had made out a strong prima facie case of shareholder oppression by Mr. Lavy. Justice Edwards found that when Mr. Hong questioned some examples of questionable financial transactions Mr. Lavy acted swiftly to "financially cripple Hong and ultimately drive him out of the company".

[7] Justice Edwards commented on the financing of the company.

> Lavy's decision to stop unilaterally financing Sensio is telling. It demonstrates that Lavy is willing to take Sensio to the financial brink -- and maybe beyond -- in order to defeat Hong. Lavy knows that Hong is currently in no position to help finance Sensio. Put another way, Lavy is willing to risk irreparable financial harm to Sensio if that is what it takes to get rid of Hong. The Respondents themselves recognize that there are "important risks" to Sensio associated with the gridlock between the two shareholders.[3]

[8] Justice Edwards described Mr. Lavy's conduct in using Mr. Hong's personal information regarding his personal wealth to try to defeat the injunction application as "reprehensible".[4] He said:

> …I am concerned that Lavy's "scorched earth" style of litigating will see him take Sensio to the financial brink and perhaps beyond. Lavy has demonatrated that his primary focus is defeating Hong. That means forcing Hong out of Sensio. I am concerned that if this Court does not intervene, Sensio (and therefore Hong) may suffer irreversible financial damage.[5]

[9] Justice Edwards expressed his concern that that Mr. Lavy will "put the financial squeeze on Sensio in order to pressure Hong".[6] He noted that from an operational perspective, Mr. Hong was, and remained, the driving force behind Sensio's success while recognizing that Mr. Lavy played an important role with respect to strategic planning. He said that he saw as vital to the company's success "at least for the next six months or so"[7] that Mr. Hong be as unfettered as possible.

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[3] *Hong v. Lavy* at para. 68
[4] Para. 77
[5] Para. 87
[6] Para. 88
[7] Para. 89

[10] Justice Edwards described Mr. Hong's circumstances.

> Sensio, at this precarious time, cannot afford to have Hong distracted by trying to survive financially. Much of his wealth is mortgaged or subject to the vagaries of the real estate market. Hong has tried to alleviate the strain by securing a $1 million demand loan from a friend. He testified that he has already drawn $400-500,000 of that amount. It would be unfair to insist that Hong now sell his home, move his family, sell his other real estate, or liquidate his personal property (jewellery etc.) and at the same time continue this litigation (and effectively operate Sensio). I also have no intention of rewarding the Respondents for their surreptitious and high-handed appropriation of Hong's personal financial information. Lavy's financial situation is secure. Hong and Lavy should be able to contest this dispute on more equal terms. (to use a sports analogy, on a level playing field).[8]

[11] Justice Edwards was by no means mincing words in his description of the situation. He essentially found that to Mr. Lavy, getting rid of Mr. Hong was more important than the company itself. From Justice Edward's decision, it can be inferred that the longer, more protracted and more drawn out this matter becomes, the more the circumstances favour Mr. Lavy, with litigation zeal and deeper pockets. Justice Edwards granted an interim injunction. Mr. Lavy has appealed. The motion before the Court of Appeal to stay the injunction pending the appeal was dismissed. Mr. Lavy's counsel takes issue with the characterization of the evidence by Justice Edwards, and maintains that the time limitations imposed in the injunction hearing prevented full cross-examination so that the facts of the matter were not before Justice Edwards.

The January 15, 2018 Consent Order

[12] Following Justice Edwards decision counsel discussed dates for document production. It was clear at that time that the matter would be document intensive. By December 20, 2017 Mr. Lavy had produced in the range of 200,000 documents. They were not provided within the original timeline. The parties eventually agreed to amended filing dates on January 15, 2018 while retaining the June 2018 dates for hearing of the application. Those dates were set out in a consent order. Mr. Hong's affidavit would be due on February 12, 2018 and Mr. Lavy's affidavit was due on March 5, 2018. Dates were set for the filing of reply evidence, expert reports and legal submissions. There were no issues raised at that time about the

[8] *Hong v. Lavy* at para. 90

matter proceeding as an application. Only after Mr. Hong's affidavit on the merits of the application was filed did Mr. Lavy indicate any concern with the matter proceeding in that way or with the June 2018 court dates.

[13] Mr. Lavy now says that his counsel has had a very limited time to produce documents. He produced approximately 200,000 documents without having the opportunity to review them, while Mr. Hong has produced about 50,000. A paralegal at McInnes Cooper is leading a team of 5 articled clerks and three associates to review Mr. Lavy's documents for relevance. Mr. Lavy's counsel argues that if the matter continues on its current timeline they will not have time to review the documents that survive the culling undertaken by the document review team.

The Content Requirements on Motion to Convert

[14] Mr. Lavy contends that the matter is not suitable to continue as an application and should be converted to an action under *Rule 6.02*. The matter involves very substantial document production and as is clear from Justice Edwards' decision, matters of credibility are of significance.

[15] The moving party bears the onus of satisfying the judge that an application should be converted to an action. There is a policy in favour of the use of applications.[9] According to *Rule 6.03(1)* the moving party must provide, by affidavit, a description of the evidence that it would seek to introduce at trial, set out its position on all of the issues raised in the application and disclose all further issues the party would raise by way of notice of contest if the proceeding remains an application or in a statement of defence if the proceeding were converted to an action. The requirements are clear.

[16] The only affidavits filed by Mr. Lavy in this matter are the affidavits of Rachael Barnes a paralegal with McInnes Cooper. Given the clear and specific requirements of *Rule 6.03(1)* those affidavits take on considerable significance.

[17] Ms. Barnes' affidavit dated March 2, 2018 contains information provided to Ms. Barnes by Peter Rogers Q.C., one of Mr. Lavy's counsel. The affidavit attaches an excerpt of the transcript from the interim injunction hearing to show that Mr. Hong retained Canadian legal counsel to obtain advice on his shareholder

[9] *Brodie v. Jentronics Ltd.* 2009 NSSC 399

rights in December 2016. The affidavit also notes that while Mr. Lavy has counsel from Montreal so too does Mr. Hong. That affidavit was filed for a purpose that does not relate to fulfilling the content requirements of *Rule 6.03(1)*.

[18] Ms. Barnes' affidavit of February 26, 2018 focuses primarily on the issues that pertain to document discovery and the quantity of materials involved. The affidavit states at paragraph 4(i) that credibility is a "central issue" in the case. There is no written shareholder's agreement. Mr. Hong asserts that his oppression claim is based on reasonable expectations that Mr. Lavy says are inconsistent with past practice. Mr. Lavy says that Mr. Hong negotiated and agreed upon the current shareholders' distributions. And finally, the post-hearing briefs of the parties, attached to the affidavit, noted the contradictions that illustrate the extent of the credibility issues.

[19] Much of the affidavit addresses concerns regarding the substantial document disclosure. Ms. Barnes says that on February 23, 2018 she was advised by Jane O'Neill Q.C. also counsel for Mr. Lavy, that there were deficiencies in the document production being completed on behalf of Mr. Lavy. She was asked to evaluate the completeness of Mr. Hong's document production and determined that Mr. Hong had not provided a single document that was not an email or an email attachment, nor has he produced a single email or document that predates June 15, 2015, except to the extent that such a document was attached to a post June 15, 2015, email.

[20] The affidavit steps beyond the mere recitation of facts and puts counsel's argument in the mouth of Ms. Barnes. She states that she has been informed by Ms. O'Neill and Mr. Rogers that they do not believe that they can "responsibly represent the Respondent's case by filing affidavits on the merits on March 5, 2018 or any time close to that…" She offers the reasons that they have given. They have not had an opportunity to obtain and review the large number of documents that have not been produced to date, they lack sufficient time to review the documents that have been produced and they lack the time to meet with possible deponents to get their evidence relating to important documents, many of which have not been produced to date. That argument may support the position taken by counsel but it does not address the specific issues required by *Rule 6.03(1)*.

[21] The first requirement, in *Rule 6.03(1)(a)* is a "description of the evidence the party would seek to introduce." Ms. Barnes states at paragraph 15(a) of her affidavit that counsel anticipate calling *viva voce* evidence from several named

individuals “and other witnesses concerning all of the issues raised in the pleadings”. That does not describe the evidence sought to be introduced. Saying that the evidence is concerning all the issues raised in the pleadings is a very general statement that provides no description of the evidence as contemplated by the Rule. If that general statement were to be accepted as a “description” it would render the requirement meaningless. The affidavit does state earlier that credibility is a central issue, that the assertion of “reasonable expectations” made by Mr. Hong is inconsistent with past practices and that Mr. Hong and Mr. Lavy had agreed in to the current and cumulative shareholder distributions. That suggests that there are issues in dispute. *Rule 6.03(1)(a)* requires a description of the evidence that Mr. Lavy would seek to introduce. There is no statement in the affidavit describing the evidence.

[22] *Rule 6.03(2)* provides that a party who wishes to withhold disclosure of evidence for impeachment of a witness need not describe, under *Rule 6.03(1)*, the evidence or the investigations to be undertaken to obtain evidence. That would suggest that what is contemplated by *Rule 6.03(1)(a)* is substantially more than a *pro forma* statement that evidence relevant to the pleadings will be introduced.

[23] *Rule 6.03(1)(b)* requires the moving party to state his position on all issues raised by the Application. The affidavit does not do that at all.

[24] *Rule 6.03(1)(c)* requires the moving party to disclose any further issues they would raise. No further issues have been identified.

[25] In this motion, Mr. Lavy has asked for remedies in the alternative. First, he has requested an order to convert the application to an action. Second, he has asked for a delay in the filing dates and hearing dates if the matter remains as an application. The information provided on the motion is directed toward the number of documents to be produced, the alleged inadequacy of production and what is argued to be the unfairness of constraints imposed by the agreed upon deadlines. The conversion of an application to an action requires the moving party to discharge an onus. That requires compliance with the terms of *Rule 6.03(1)*. Mr. Lavy in this case has not complied with those requirements. There is no meaningful description of the evidence sought to be introduced, no statement of a position on the issues, and no indication of any further issues that would be raised.

[26] The motion to convert the application to an action is dismissed on that basis.

Conversion of an Application in Court to an Action

[27] Even had Mr. Lavy complied with the requirements of *Rule 6.03(1)* the motion would be dismissed on its merits.

[28] *Rule 6.02(2)* establishes that there is a preference for matters to proceed as applications rather than actions. A party who proposes that a claim be determined by an action, rather than by an application has the onus of satisfying a judge that an application should be converted to an action or an action should not be converted to an application. The onus is not on the moving party but on the party arguing in favour of an action. If a party wishes to have a matter converted from an action to an application the party arguing against the conversion bears the onus. So, the onus is not merely an onus favouring the *status quo* and against conversion. It is an onus specifically in favour of proceeding by way of application.

[29] As set out by Justice Pickup in *Jeffrie v. Hendriksen*[10] there are three stages to the court's analysis. The first is whether any of the presumptions in favour of an application are applicable under *Rule 6.02(3)*. Second, if none of the presumptions favouring an application apply, the court should determine whether any of the presumptions in favour of an action apply. Third, the court has to determine the extent to which each of the four factors favouring an application under *Rule 6.02(5)* are present and determine the relative cost and delay as between an action and an application under *Rule 6.02(6)*.

[30] Justice Chipman in *Fana (DCD) Holdings Inc. v. Dartmouth Cove Developments Inc*.[11] provides a thorough review of the caselaw on motions to convert since the new *Nova Scotia Civil Procedure Rules* were introduced. At paragraph 20 of the decision he sets out a list of factors that tend to be present when cases either remain as or become applications after the consideration of *Rule 6.02*.

- fewer parties
- discreet, clearly detailed issues, sometimes narrowed by agreement
- reasonable hearing estimates of relatively short duration (often five days or less)
- readily available key documents and the like, central to the dispute

[10] 2011 NSSC 292
[11] 2017 NSSC 157

- the parties being (realistically) ready for a hearing within a short timeline (usually within months, not years)
- situations involving comparatively little time to conduct investigative work
- agreement on admissible extrinsic evidence
- limited, if any discovery required
- time being of the essence in bringing the matter forward to a hearing
- identifiable (typically party) witnesses with evidence conducive to affidavit form
- an absence of "unfriendly" witnesses, who might well be disinclined to swear affidavits
- generally, an uncomplicated proceeding

[31] Those factors were not provided as a checklist but give a sense of the kinds of cases that will generally tend to proceed by way of application. The decision makes clear that applications are not a panacea for busy court dockets. There certainly are cases where the procedures available in the traditional trial process are more suitable. Parties should not get too carried away with enthusiasm for applications.

[32] The first step in the process is to determine whether any of the presumptions in favour of proceeding by application apply. *Rule 6.02(3)* says that an application is presumed to be preferable if there are substantive rights asserted by a party that will be eroded in the time it takes to bring an action to trial and the erosion will be significantly lessened if the dispute is resolved by application or if the court is requested to hold several hearings in one proceeding, such as proceedings involving corporate reorganization. With regard to the latter situation counsel for Mr. Hong noted that in this case there has been the interim injunction hearing as well as this motion for conversion to an action. That does not appear to be what the Rule contemplates by the reference to several hearings in one proceeding. The example given in the Rule itself has multiple hearings that are inherent in or required for the completion of the proceeding. They are not driven by the individual circumstances, such as the interim injunction motion. This was not a proceeding in which several hearings are normally contemplated or required by the nature of the proceeding itself.

[33] The issue of the potential erosion of rights is applicable here as making an application the presumed preferable manner of proceeding. Justice Edwards decision makes it abundantly clear as to why an interim injunction was required. It

is also clear that the animosity between the two shareholders of Sensio will have implications for the health of the company even with an injunction in place to protect Mr. Hong's interests. Justice Edwards found that Mr. Lavy was prepared to take Sensio to the brink of financial ruin and perhaps beyond that in order to remove Mr. Hong. An injunction provides some relief over the course of some months but does not allow for anything like normal operations of the company potentially for years in the case of a trial, with the attention of the shareholders diverted to the ongoing litigation. In the injunction decision Justice Edwards noted that even Mr. Lavy agreed that the "gridlock between the two shareholders threatens the proper operation of the Company."[12] That gridlock is not fully resolved by the granting of injunctive relief.

[34] The injunction granted by Justice Edwards is the subject of an appeal. With or without that injunction in place however, Sensio itself is placed at risk by the ongoing dispute. The longer the dispute goes on, given the level of rancor involved, the higher the risk that the company with suffer financially and as a result Mr. Hong's rights will be eroded. Given the findings made by Justice Edwards about Mr. Lavy's willingness to place the company at risk for the purpose of removing Mr. Hong, that concern is magnified.

[35] There is no presumption that shareholder oppression matters will proceed by application, though they often do. Presumably there are cases where the dispute is such that the wellbeing of the company is not placed at serious risk as the matter goes through the trial process. In this case, the risk to Sensio is evident from the findings of Justice Edwards in the interim injunction motion and while the order put in place as a result provides some level of protection to Mr. Hong's interests it does not protect the company from the consequences of a more protracted dispute between its two shareholders, in a circumstance where there has been a finding that one of them is more interested in removing the other than in their mutual interests in having the company prosper or even survive.

[36] This is a situation in which the erosion of Mr. Hong's rights will take place in the time it would take to bring an action to trial and that erosion will be significantly lessened if the dispute is resolved by application. The presumption in favour of proceeding by application applies.

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[12] *Hong v. Lavy* at para. 88

[37] Once the presumption of an application applies there is no requirement to advance to the next step of considering whether any of the factors that favour the presumption of proceeding by an action apply. The presumption in favour of an action is addressed only if the presumption in favour of application does not apply. Here, the presumption in favour of an application applies. Even if it did not, neither of the two factors favouring proceeding by an action would apply. Neither party has requested a jury trial. There has been no suggestion that it would be unreasonable to require a party to disclose information about a witness "early in the proceeding" such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

[38] At this point in the analysis, the presumption in favour of an application applies.

[39] The next step is to consider whether any of the factors set out in *Rule 6.02(5)* as favouring an application, apply. *Rule 6.02(3)* sets out circumstances when an application is presumed to be preferable. *Rule 6.02(5)* sets out factors "in favour of an application". The court should also consider at this point the relative cost and delay of an action. The list of factors favouring an application is not exhaustive.[13] There may be other factors that arise in individual cases. Here, the issue of the timing of the motion needs to be addressed. It is relevant to how the other factors should be considered, in the circumstances of this case.

[40] The application was commenced on August 31, 2017, seeking various forms of relief under the Third Schedule to the *Companies Act*. It was served the next day. Mr. Lavy filed a Notice of Respondent's Claim on September 25, 2017. That was to be dealt with as part of the application and there was no suggestion at that time that the matter was so long, complicated, document intensive or credibility reliant that it was not appropriate to have it heard in that format. The matter came before Justice Ann Smith on a Motion for Directions on September 25, 2017. Dates were set for filing and once again, there was no issue raised about the manner of proceeding.

[41] Mr. Hong's motion for an injunction was heard on November 20, 21 and 22, 2017 before Justice Edwards. Once again, there was no issue raised about the manner of proceeding as an application, set for June 2018.

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[13] *Kings (County) v. Berwick (Town)* 2009 NSSC 398

[42] According to the Order for Directions Mr. Lavy was required to produce documents on December 1, 2017. On November 28, 2017, Mr. Lavy's counsel advised that they would be unable to meet the deadline. There was a fair bit of back and forth between the lawyers but eventually it was agreed that the documents would be produced by December 15, 2017. That would necessitate a change in the other filing deadlines but Mr. Hong's counsel made it clear that any changes would be conditional on an agreement that the remaining hearing and filing dates would be unchanged.

[43] Justice Edwards' decision on the injunction was released on December 15, 2017. On that day, Mr. Hong's documents were provided. On the same day, Mr. Lavy produced about 47,000 documents with 150,000 still pending. Mr. Hong's counsel expressed concern that the delay was creating a serious prejudice for their client. On December 22, 2017, Mr. Lavy's counsel provided 152,612 documents. At this point, still no suggestion had been made about converting the application to an action.

[44] Mr. Hong's counsel brought a motion to amend the filing deadlines because of the delay in receiving materials from Mr. Lavy. On January 15, 2018, the parties agreed to an amended timetable for filing of materials but the dates for the hearing of the application, in June 2018, remained unchanged. Once again, there was no objection raised about the manner of proceeding. At this point, after the release of Justice Edwards' decision, all parties would have been aware of the nature and scope of the claims, the fact that there were credibility issues involved and the requirements for document production.

[45] The first deadline under the January 15, 2018 Amended Order for Directions was for the filing of Mr. Hong's affidavit on February 12, 2018. The materials were filed on that date.

[46] The next deadline date was March 5, 2018. That was for the filing of Mr. Lavy's affidavit evidence. That deadline has not been met. Mr. Lavy instead made this motion on February 26, 2018, seeking to convert the application to an action. Once again, by that date, Mr. Hong's evidence had been filed and Mr. Lavy, with the benefit of having reviewed that evidence has asked to fundamentally change the way the matter will proceed.

[47] Mr. Hong's substantive rights will be eroded, even with an injunction in place, if the two principals of Sensio have their attentions, energies and resources diverted toward potentially protracted litigation. That creates a presumption in

favour of proceeding by application. Mr. Lavy's opinion that this matter is more suited to an action appears to have formed rather suddenly and at that only after the disclosure of Mr. Hong's evidence. The timing of the motion to convert could suggest that is being used as a litigation tactic.

[48] The other factors set out in *Rule 6.02(5)* that favour an application can be considered having regard to the timing of this motion.

[49] If the parties can quickly ascertain their important witnesses will be, that favours proceeding by application. Mr. Lavy filed his Notice of Contest in September 2017, without any suggestion of converting the application to an action. He and his counsel at that time knew the claim and could then identify the important witnesses, otherwise a motion to convert would have been made at that time. Furthermore, the parties have gone through an injunction hearing dealing generally with the issues that will be relevant in the application itself. They have already identified the important witnesses. In her affidavit Ms. Barnes says, at paragraph 15(c) that it may be impossible to get affidavits from some witnesses like Vince Portera, Jerry Rutigliano and Chuck Myers. Mr. Myers and Mr. Rutigliano have already provided affidavits. This is not a matter where important witnesses have not been able to be identified.

[50] The Rule provides that if the parties can be available for hearing in months rather than years that favours proceeding by application. The matter was commenced as an application when the documents were filed in on August 31, 2017. The response to that was not to contest the manner of proceeding or to suggest that the matter could not be resolved in the timeframe contemplated for applications. Both parties operated on the basis that this matter could be resolved in months rather than over the course of some years. That understanding was operative when dates were set at the first Motion for Directions before Justice Ann Smith on September 25, 2017. That did not change in January 2018, when new dates were set for filing but the hearing dates for June 2018 were retained. The first suggestion that this matter could not be heard within months was when this motion was filed on February 26, 2018. There is no indication as to what has changed to alter the nature of the matter itself. This is a matter that the parties have agreed for some months could be completed within months. There has been no fundamental change in its nature and scope. Mr. Lavy has had Mr. Hong's documents since September 2017.

[51] The hearing is of predictable length and content. It has been set for four days in June 2018. In that sense, it is highly predictable. It is four days. Both parties agreed that it could be heard in the time allocated for it. It is late in the day to now be suggesting that more investigation is required. Mr. Hong provided disclosure of his documents in September 2017. The parties argued the injunction motion in November 2017. If there were concerns about investigations they could have been raised then but they were not.

[52] Similarly, counsel for Mr. Lavy have argued that the evidence is such that credibility is directly in issue and cannot be addressed using the procedures permitted in an application. The issue is whether a court can assess credibility having regard to the documents on file, the affidavit evidence of each witness and the cross-examination of witnesses on their affidavits. Justice Warner in *Kings (County) v. Berwick (Town)*[14] addressed that issue.

> 38 The difference between an application in court and a full, traditional trial, is that direct evidence in an application is primarily given by way of affidavit. An affidavit is usually formulated by counsel, or with the assistance of counsel, and is usually a fairly articulate and focussed presentation by a witness of what facts he or she wants the court to receive. It is far more focussed and helpful to the court, than rambling oral evidence that sometimes is sidetracked into matters unrelated or less directly related to the real issues.
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> 39 Seldom is credibility decided by direct examination and probably less in the context of this kind of proceeding where the factual evidence is of context. Cross-examination is the real tool for discovery of truth. *Sidney Lederman, Alan Bryant, and Michelle Fuerst,* in *The Law of Evidence in Canada, (called Sopinka*), Third Edition (Markham: LexisNexis, 2009), at p. 1133 under the heading of cross-examination para. 16.112 states:
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> > The oft quoted words of Wigmore that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth" indicate its great value in the conduct of litigation. Three purposes of generally attributed to cross-examination:
> >
> > (1) to weaken, qualify or destroy the opponent's case;
> >
> > (2) to support the party's own case through the testimony of the opponent's witnesses;
> >
> > (3) to discredit the witness.

[14] Paras. 38 and 39

[53] Cross-examination has been seen historically as the "grand security" against erroneous or mendacious testimony. Credibility as an issue is not a trump card to be used to avoid proceeding by application. There must be some reason why, in the circumstances of the case, cross-examination on affidavits and documents will not be sufficient to allow for an assessment of credibility. There have been no circumstances identified here to suggest why adequate credibility assessment will rely on procedures available in a trial and not available in an application. Moreover, Mr. Lavy was aware of the nature of the matter and significance of credibility soon after the documents were filed in September 2017. Credibility in this matter is not a late breaking issue.

[54] The relative cost and delay of an action or an application are circumstances to be considered on a motion to convert a proceeding. In this case, the Application was filed in August 2017 and a Notice of Contest was filed in September. Dates were set for filing and dates were set for a hearing in June 2018. And apparently, no one had an issue with that until February 26, 2018. A matter that both parties contemplated having completed within the space of less than one year, if the motion to convert were to succeed, would be completed some years from now at considerably more expense and with the added risk to Mr. Hong that the rights he seeks to protect would be eroded. The level playing field that Justice Edwards sought to preserve would be gone.

[55] The *Nova Scotia Civil Procedure Rules* do not set a deadline by which a motion to convert must be filed. There is no requirement that it be done before a Notice of Contest is filed or before a Motion for Directions setting the dates for hearing has been held. Timing can still be a relevant factor to consider. The motion to convert the application to an action relies on factors that reasonably would have been known by Mr. Lavy much earlier in the process. By making the motion only after Mr. Hong's evidence has been filed, Mr. Lavy would achieve the tactical advantage of seeing the evidence and if the motion were successful would gain the advantage of being able to use his greater resources to fund the litigation.

[56] Even had the motion been made in compliance with the content requirements of *Rule 6.03(1)*, Mr. Lavy has not shown that the application should be converted to an action. In this case Mr. Hong's substantive rights will be eroded in the time it would take to bring an action to trial. The parties have determined or can "quickly ascertain" who their important witnesses will be. They have already agreed that the matter can be heard in months rather than years and that the hearing is of predictable length and content. Credibility is an issue, but there is nothing

about this case that has been shown to make the procedures available in an application unsatisfactory for the purpose of making a determination on credibility. Conversion to a trial will involve more cost and significant delay. The motion for conversion has been brought at a time that would achieve a tactical advantage at the expense of the other party.

[57] The motion for conversion to an action is dismissed.

[58] The motion to adjourn the hearing dates is dismissed for the same reasons. The parties agreed to these deadlines with knowledge of the scope and nature of the matter. A delay in filing dates would result in a delay in the hearing dates. That would serve to prejudice Mr. Hong's interests. The longer the matter goes on, and the more expensive it becomes the greater the risk to the company itself and the greater advantage Mr. Lavy obtains.

[59] This matter went forward as a motion in General Chambers because of the urgency involved. Costs are assessed as a chambers motion taking more than one hour but less than a half day. Costs are award to Mr. Hong in the amount of $1,000.

Campbell, J.