SUPREME COURT OF NOVA SCOTIA
Citation: *Bertram v. Fundy Tidal Inc.*, 2018 NSSC 165

Date: 20180510
Docket: Yar No. 461282
Registry: Halifax

Between:

J. Douglas Bertram, J. Scott Bertram, Marc Blinn and Alan McGuire
Plaintiffs

v.

Fundy Tidal Inc., Peter B. Budd, Darren Comeau, Nina Barnaby, James H. Outhouse, David Wilson, Jane E. Lowrie, Nico Keyserlingk and Vincent Stuart
Defendants

Decision

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	May 7 and 8, 2018, in Halifax, Nova Scotia
Oral Decision:	May 10, 2018
Written Release of Oral Decision:	July 5, 2018
Counsel:	Andrew Nickerson, Q.C. and Jason T. Cooke, for the Plaintiffs Brian K. Awad, Q.C., for the Defendants Fundy Tidal Inc., Peter B. Budd, Darren Comeau, Nina Barnaby, David Wilson, Jane E. Lowrie and Vincent Stuart John Keith, Q.C. and Matt Saunders, for the Defendants James Outhouse and Nico Keyserlingk

By the Court (Orally):

Facts

[1] This is going to be quite a brief decision. And because it is brief and because I have not quoted and cited all the cases to which I have referred, I reserve the right, should it be required to be reduced to writing, to edit but of course not change the substance.

[2] Four plaintiffs who are minority shareholders of Fundy Tidal holding approximately 25 percent of the shareholdings seek leave of the Court to bring a derivative action in the name of the company.

[3] The facts, in brief, are that Fundy Tidal was incorporated in October of 2006. The founding members were interested in future local tidal power projects. Fundy Tidal's business is to develop, manage and operate tidal power electrical generation facilities.

[4] Since 2010, the Province of Nova Scotia has had a program called Community Feed in Tariff, also known as COMFIT, by which companies are permitted to sell electrical power to Nova Scotia Power.

[5] Originally Fundy Tidal had five COMFIT projects but only three were proceeded with. Digby Gut, Petite Passage and Grand Passage were in the works of being proceeded with. One of the objectives of the program by the provincial government was to engage local businesses and individuals in the projects.

[6] However, this did not result in enough capital to develop the projects, which in 2013 was estimated at $19 million for Digby Gut, later revised to $28 million in 2015; and in 2013 the estimates for Petite Passage and Grand Passage were $14 million.

[7] Digby Gut was the first project to be developed and it was a 1.95 megawatt project. It was developed through a limited partnership and the Minister approved the transfer of the COMFIT for Digby Gut to the limited partnership made up of FTI and IME.

[8] FTI held the majority interest in that limited partnership. Subsequently FTI intended to develop both Petite Passage and Grand Passage together which totalled 1.0 megawatts. Extensions were granted for the projects to December 31, 2018.

[9] The plaintiffs are shareholders and Mr. Bertram is also a director and at one time was the CEO of Fundy Tidal.

[10] Seven of the defendants, including Fundy Tidal, are represented by Mr. Awad and they object to the Motion for Leave. The other two defendants take no position on the motion. Eight are directors of FTI and Mr. Stewart is also FTI's president.

[11] On March 13, 2017, the four plaintiffs commenced the action against Fundy Tidal and the eight directors. They sought relief for the plaintiffs personally. A defence was filed on June 1 and seven of the defendants subsequently moved for summary judgment in a motion filed on November 9, 2017.

[12] The hearing was scheduled for January 2018 but, in response to the summary judgment motion, the plaintiffs responded by filing this leave motion. The January 2018 hearing was adjourned after the plaintiffs requested the opportunity to bring the leave application to commence action as a derivative action.

[13] In the original Statement of Claim, the plaintiffs say there was no AGM since October 2014. Subsequently there was one in May 2017. They say a special resolution was required to transfer FTI's COMFIT rights.

[14] They also say only one proposal to raise additional capital was considered, that of Spray Energy, although there were two others that were interested. The

plaintiffs say that in January 2017, Mr. Stewart as president signed an agreement with Spray Energy without Board approval.

[15] Thereafter there was a request to transfer the COMFIT rights but no special resolution was passed until the February 7, 2017 directors' meeting. At that meeting Mr. Bertram, one of the plaintiffs and also a director, asked for 24 hours to review the proposal.

[16] His request was denied. Jane Lowrie and Peter Budd were associated with Spray Energy. They declared a conflict of interest at the meeting. There is a dispute about whether Jane Lowrie voted for the proposal.

[17] Two directors left the meeting and one purported to give a proxy to David Wilson. The plaintiffs say that no proxies are allowed. The plaintiffs also say that no Material Change Report was filed with the Securities Commission and there was no approval from the Community Economic Development Investment Fund.

[18] They say the defendants failed to act *bona fide* in the best interests of the company. They say no business plan was received from Spray Energy and presented to the Board, nor was the actual agreement to be signed presented to the Board.

[19] They also say, as I have said, that there were two other proposals which were not considered by the Board. The plaintiffs say in their proposed Amended Statement of Claim an allegation that the defendants breached their fiduciary duties to the company. This is in addition to the matters raised in the original Statement of Claim.

[20] The remedies sought include: a declaration that the decisions of the Board are invalid; a declaration that the transfer documents to Spray Energy are not authorized and therefore of no force and effect; a declaration that certain directors compensate the company; removal of the individual defendants as directors; and compensation for breach of fiduciary duties.

[21] In their defence, the defendants dispute the claims of the plaintiffs. They say they acted properly and *intra vires* throughout.

[22] The purpose of derivative actions is to allow shareholders to bring action on behalf of the company. These derivative actions counteract the rule in *Foss v. Harbottle*.

[23] The claim must be for wrongs done to the corporation. Paraphrasing from *Rea v. Wildeboer*, 2015 ONCA 373, to prevent abuse of the power, legislation

requires that shareholders who wish to bring an action must obtain leave of the court.

[24] Section 4 of the third schedule to the *Companies Act*, R.S.N.S. 1989, c. 81, provides as follows:

> 4(1) Subject to subsection (2) of this Section, a complainant may apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.
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> (2) No action may be brought and no intervention in an action may be made under subsection (1) of this Section unless the court is satisfied that (a) the complainant has given reasonable notice to the directors of the company … of his intention to apply to the court under subsection (1) … if the directors of the company or its subsidiary do not bring, prosecute or defend or discontinue the action; (b) the complainant is acting in good faith; and (c) it appears to be in the interests of the company … that the action be brought, prosecuted, defended or discontinued.

[25] In this case there is no dispute about the reasonable notice requirement.

[26] The second requirement is good faith. There must be evidence that the applicants are acting with proper motives.

[27] Good faith is not defined but it is a question of fact in each case, on all the evidence and the particular circumstances. The court must analyze the facts to see if there is bad faith which would, of course, negative good faith.

[28] On a motion for leave I am not to decide the issues for trial or weigh credibility. Justice Hamilton in *L & B Electric Ltd. v. Oickle*, 2006 NSCA 41 said:

> 59. As set out by D.H. Peterson Shareholder Remedies in Canada … Good faith is said to exist where there is *prima facie* evidence that the applicant is acting with proper motives, such as a reasonable belief in its claim, and is ultimately a question of fact to be determined on all of the evidence and the particular circumstances of the case.
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> 60. This principle is restated in *Winfield v. Daniel*, 2004, 352 A.R. 82 (Alta. Q.B.) at para. 16:
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> > Section 24(2)(b) of the *Act* requires that the court be satisfied that the complainant is acting in good faith. Good faith is said to exist where there is *prima facie* evidence that that complainant is acting with proper motives such as a reasonable belief in the merits of the claim. Good faith is a question of fact to be determined on the facts of each case. The typical approach by the Courts is not to attempt to define good faith but rather to analyze each set of facts for the existence of bad faith on the part of the applicant. If bad faith is found, then the requirement of good faith has not been met.

[29] There is a low threshold for determining whether good faith is established. There are two elements to the question of good faith, the subjective and objective.

[30] The former is to determine if the plaintiffs believe that their claim has merit and the latter is for the court to determine if the claim is frivolous and vexatious and whether there is an arguable issue for trial.

[31] I am satisfied that the applicants have a belief that their claim has merit. I am satisfied objectively that there are arguable issues for trial. I conclude the interests of the plaintiffs coincide with the interests of all shareholders.

[32] Although the responding defendants say that Mr. Bertram has animus towards one of the defendants, Jane Lowrie, I do not see evidence of a vendetta or

vengeance. There are three other plaintiffs and no such allegations were made against them.

[33] There is conflicting evidence but I cannot decide on credibility and I cannot conclude that bad faith has been shown. The actions that the plaintiffs say address the propriety of their motives are those set out in the original and the proposed Amended Statement of Claim.

[34] There are factual issues in dispute but it is not my role on a leave motion to deal with credibility or to weigh the merits of the claims. As I have said, the threshold is low and I conclude it has been met.

[35] The third requirement is whether the derivative action appears to be in the best interests of the company. In my view, the threshold for this is low as well. There need not be a *prima facie* case, but the action must appear to be in the interests of the company.

[36] The claim or claims must have some chance of success or, in other words, are not bound to fail. The court must be satisfied, based upon the evidence presented by all the parties, that the plaintiffs are not bound to fail. There must be an arguable issue.

[37] In *Gartenburg v. Consolidated Stone Industries Inc.*, 2005 BCCA 462, the court quoted from *Bellman v. Western Approaches Ltd.*, (1981), 130 D.L.R. (3d) 193 (B.C.C.A.), Chief Justice Nemetz said:

> This section does not say that the court must be satisfied that it is in the interests of the corporation. It says that no action may be brought unless the court is satisfied that it appears to be in the interests of the corporation to bring the suit. I take that to mean that what is sufficient at this stage is that an arguable case be shown to exist. [underlining in original]

[38] The responding defendants say that if leave is granted to commence a derivative action, the December 31, 2018 deadline will not be met, and the Spray Energy proposal will not go ahead.

[39] They say therefore that because of that, it is not in the company's interests for leave to commence a derivative action be granted. They say therefore that the claim in essence is frivolous and vexatious.

[40] The plaintiffs say that if leave is not granted, FTI will lose all control of the tidal power projects to Spray Energy.

[41] These are issues for trial as they are arguments on the merits if leave is granted. They are issues with respect to the control of FTI.

[42] In *Oickle supra*, the Court of Appeal referred to Justice Moir's decision in the lower court that there was an arguable issue and the standard is that the action not appear to be frivolous and vexatious and could reasonably succeed.

[43] The responding defendants say that it is frivolous and vexatious to allow a claim that they say makes no sense. They make submissions contrary to the claims the plaintiffs make.

[44] However, I am not to decide on a leave motion who will be successful at trial. The defendants say the Spray Energy proposal is in the company's interests. The validity of that proposal is an issue for trial.

[45] The plaintiffs say the proposal and other actions by the Board are not in the company's interests. If there is uncertainty about who will succeed at trial, the balance is in favour of the plaintiffs since that means there is a chance the plaintiffs will succeed.

[46] To enter into a cost benefit analysis proposed by the responding defendants in this case would require me to make findings not only of credibility but also to consider the merits of each party's position.

[47] As I have said, the threshold is low and I must be satisfied that there is a chance that the claims will succeed at trial. I conclude in my discretion that it is not obvious that they will fail.

Conclusion

[48] I therefore conclude that the plaintiffs are acting in good faith and that their claims are not bound to fail. The motion is granted.

Hood, J.