

SUPREME COURT OF NOVA SCOTIA

Citation: RCBS Holdings Inc. v. East River Holdings Ltd, 2013 NSSC 410

Date: 20131022

Docket: PIC. No. 408356

Registry: Pictou

Between:

RCBS Holdings Incorporated

Applicant

v.

East River Holdings Limited

Respondent

Judge:

The Honourable Justice Patrick J. Murray

Heard:

September 17, 2013, in Pictou, Nova Scotia

Oral Decision:

October 22, 2013

Counsel:

Donn Fraser, for RCBS Holdings Incorporated
Joshua J. Santimaw, for East River Holdings Limited

By the Court:

[1] This is my oral decision on a Motion for Contempt filed on March 6, 2013 by the Applicant, RCBS Holdings Incorporated, against the Respondent, East River Holdings Limited.

[2] The Applicant is represented by counsel, Donn Fraser, and the Respondents are represented by their counsel, Joshua J. Santimaw. I may refer occasionally to the Respondent, East River Holdings Limited, Phillip Young and Robert Young, collectively as the Respondents.

[3] The motion is directed to the Company East River Holdings Limited, but also to Phillip Young and Robert Young. In the case of Robert Young and Phillip Young, the Applicant alleges that they caused, facilitated and/or encouraged East River Holdings Limited to breach the Order and aided and abetted in the non-compliance of the Order and otherwise acted in a way to prevent compliance and interfered with the compliance of the Order of Justice Hood issued on 20th of December, 2012.

[4] Specifically, the Applicant alleges that East River and the Youngs knowingly installed an auditor for East River Holdings Limited, whom would not be able to meet the court imposed deadline of providing audited financial statements and failed to appoint an alternate auditor despite objection by the Applicant.

[5] The Order of Justice Hood required three (3) things to be completed by the Respondent Company, East River:

- 1) To update the company's share register of members prior to November 26, 2012;
- 2) To hold a special meeting prior to November 26, 2012 to appoint an auditor to carry out all of the functions required as an auditor of the Company under the *Companies Act*, R.S.N.S. 1989, c. 81; and
- 3) To complete and have produced to the Applicant audited financial statements and auditors reports pertaining to all fiscal years of the Company after July 7, 2006, along with those statements being completed in full compliance with the *Companies Act* and the *Articles of Association of the Company*.

[6] The audited statements were to be completed on or before January 14, 2013, unless the Court ordered an alternate date on notice to the Applicant, RCBS Holdings Incorporated.

Background

[7] The main issue on this motion is paragraph three (3) in the Order requiring the completion of the audited financial statements prior to January 14, 2013. By way of background, the Applicant invested \$300,000 in East River in 2006. The Applicant maintains that for the six years following, it was kept in the dark as to what the Company did with the Applicant's funds and the Applicant was forced to engage counsel in an attempt to force the Company and the Respondents to cooperate and lawfully comply with the obligations under the *Companies Act*. The Order of Justice Hood is part of that effort to seek cooperation and compliance by the Applicant.

[8] Phillip Young is the president/secretary and director of East River Holdings Limited. The common shareholder of East River is 3113571 Nova Scotia Limited. That Company gave its proxy to Robert H. Young to exercise his vote at a

shareholders meeting held on November 26, 2012. It was at that meeting that the Applicant alleges the Company and individuals approved the appointment of Mr. Etter, a certified public accountant to prepare the audited financial statements, knowing that his involvement had not been fully engaged. The Respondent Company and the Youngs' position is that the appointment was to initiate the process. Mr. Robert Young is a former director of East River Holdings Limited. Mr. Robert Young is the father of Mr. Phillip S. Young.

[9] Evidence at the motion hearing was given by the oral testimony of Mr. Etter, who was subpoenaed by the Applicant. Also, Phillip S. Young was cross-examined on his Affidavit sworn to on April 26, 2013. Further evidence submitted in support of the motion was Mr. Donn Fraser's Affidavit sworn to on April 12, 2013. In the Applicant's brief, reference was made to the Affidavit of Sarah MacIntosh sworn on October 23, 2012.

[10] The Applicant maintains that Robert Young is the party in control of the Young's family business enterprises including the Respondent, East River. Mr. Fraser's Affidavit contains as Exhibit "P" a Registry of Joint Stock Companies print out. The registered office of the Company is 99 Wyse Road, Suite 600,

Dartmouth, Nova Scotia, Canada. East River, it appears, operated a marina which it did not own but leased from PYMC Sailing Centre Inc.

[11] In evidence as exhibit "4" is a Warranty Deed from PYMC to another Company, Marine Services East Inc. dated June 26, 2013. Prior to that the property had been mortgaged in 2007 and 2008 with the Youngs being guarantors on one of the mortgages and East River Holdings Limited and Robert Young being guarantors on another (a 2008 financing). Phillip Young was, at that time, the president of PYMC Sailing Centre Inc.

[12] Recently, Marine Services East on June 14, 2013 placed a mortgage on the lot in Lunenburg containing PID# 60636222, which is the same lands at or near in the district of East River Point, in the County of Lunenburg, NS, which East River Holdings Limited had earlier guaranteed, by way of the mortgage in 2008

[13] I do not propose herein to review all of the exhibits or discuss the myriad of financial transactions upon which Phillip Young gave evidence. I will, however, make reference to certain of the evidence and any conclusions drawn therefrom. I turn now to my analysis of this matter which will be followed by my decision.

Analysis

[14] The Applicant, RCBS, through Mr. Fraser, states the Order of Justice Hood is clear. The items required in the Order were straight forward: A fourth provision required the Respondent to pay costs of \$ 4,000.

The Applicant submits that the up-to-date share register and the Order for Costs, were complied with, only after the Motion for Contempt was filed ,or when “the Respondent’s feet were to the fire”. Significantly, states the Applicant, the deadline of January 14th was allowed to pass without the Respondent or the Young’s seeking an extension of the deadline, which under the terms of the Order they were permitted to do.

[15] The Applicant asks the Court to seriously consider the impact of Court Orders not being honoured and deadlines being ignored. The public perception, submits the Applicant, needs to be preserved. Ignoring deadlines and making a mockery of the justice system and Court Orders which form an integral part of it must and should be addressed on this motion by the Court. From his client’s perspective, says Mr. Fraser and from the perspective of the public in general, how can meaningful compliance with Court Orders be ignored, the Court must compel compliance in a meaningful way to preserve the integrity of the Court as an institution.

[16] I concur that these principles are relevant and at stake in motions dealing with non-compliance and contempt motions such as the one before me.

[17] Mr. Santimaw, on behalf of the Respondent and the Youngs, submits that non-compliance with the Order was not intentional. The terms of the Order were not intentionally broken or disregarded by the Company. The Company is unable to obtain reports due to it being impecunious and did not intentionally withhold or refuse to produce the audited financial statements. In the Affidavit of Phillip Young, he states as follows in paragraph's 25, 26 and 27:

25. Mr. Etter provided a substantial fee to the Respondent for the creation of audited financial statements and auditor's reports, in the range of \$65,000 - \$75,000.

26. The Respondent is insolvent; this fee "was well beyond it's means".

27. The Respondent did not intentionally break the terms of the Order, rather it was not able to meet them. The distinction here arises on the intention. The Respondent was without the means to procure the audited financial statements and auditors report. The failure to provide them was not intentional, it was the result of the Respondent company's circumstances.

[18] I turn to discuss the nature of civil contempt and what must be proven.

Justice John D. Murphy provided a succinct summary of it in **Blackman v. CIBC**

Wood Gundy Financial Services Inc., 2009 NSSC 416, wherein referring to **TG**

Industries Limited v. Williams, 2001 NSCA 105, a decision of the Nova Scotia

Court of Appeal, he stated:

The core element of civil contempt is failure to obey a Court Order of which the alleged contemnor is aware.

[19] Referring to the requirement, of whether *mens rea* is required to be proven, the Court stated at paragraph 48:

CIBC's motive is irrelevant, it is contempt even when a party fails to exercise proper diligence. There is no requirement to prove *mens rea*.

[20] Referring once again to **TG Industries**, the Court in **Blackman** summarized three principles set out by the Court of Appeal in **TG Industries** as follows:

- a) there is a long line of authority for the view that intention to disobey is not an element of civil contempt;
- b) the elements of contempt must be proven beyond a reasonable doubt; and
- c) the Court should use its contempt power cautiously and with great restraint.

[21] In its brief the Respondent submits at paragraph 19 that it is the Applicant who must prove beyond a reasonable doubt the four (4) elements enumerated in the case of **Soper v. Gaudet**, 2011 NSCA 11. These elements as set out are as follows:

- 1) The terms of the order must be clear and unambiguous;
- 2) Proper notice must be given to the contemnor;

3) Clear proof must exist that the terms of the Order have been broken by the contemnor; and

4) The appropriate *mens rea* must be present.

And here I note the suggestion of the appropriate *mens rea*.

[22] There is no issue before me as to elements 1, 2, and 3, namely the terms of the Order are clear; that notice of the terms of the Order was given and there is clear proof that the terms of the Order have not been complied with. In other words, the audited financial statements have not been provided. The Respondents and the Youngs submit however, that the fourth element is not present here. The Respondent cites **Soper** in stating at paragraph 17:

“the core elements of civil contempt are knowledge of the Order and the intentional commission of an Act which is in fact prohibited by it.”

[23] The Respondent argues that the Company did not intentionally fail to complete the act as ordered by the Court, the omission was necessary. The Respondent wasn't able to perform the act as ordered by Justice Hood. The Respondent, therefore, submits that the Applicant has failed to prove the fourth part of the test in **Soper** beyond a reasonable doubt.

Decision

[24] Having carefully considered the evidence and the submissions, I am satisfied that the Applicant has discharged its onus to establish the elements of contempt beyond a reasonable doubt.

[25] There is, in my respectful view, ample evidence to establish that the Respondent did not take compliance with the Order seriously. Mr. Etter stated that Robert Young phoned him and scheduled two appointments in November to discuss having the audited statements completed. Neither the Youngs nor any other representative from East River showed up. Both meetings were missed.

[26] Mr. Etter stated in evidence that he was contacted only two days prior to November 26, 2012 when a special meeting with the Respondent was to be held.

[27] Mr. Etter gave further evidence that he was not contacted again until five (5) months later in April, 2013, which was subsequent to the filing of the contempt motion in March of 2013, and three (3) months after the deadline for providing the audited financial statements in mid January, 2013.

[28] The evidence indicates the deadline of January 14, 2013 was simply ignored by the Respondent Company. The evidence further indicates that the Respondent Company did not act in a timely manner. The timing of these failed attempts at compliance suggest that the Respondent, (and the Youngs) were of the view, that the Order was not worthy of compliance. It was not a priority.

[29] Even if I accept that the Company had financial difficulties, I concur with the Applicant that in the past the Company and the Youngs had little difficulty in arranging funds, when needed.

[30] In his evidence, Phillip Young, stated that on one occasion the Company paid out \$65,000 in professional fees alone, those being accounting and legal fees. This is an amount similar to that quoted by Mr Etter for completing the financial statements.

[31] Mr. Phillip Young, in his evidence, confirmed his awareness that the Order was not being complied with. He acknowledged he knew that no work was being done to provide proper financial statements so as to enable the audit to begin. Mr.

Etter noted the statements he was provided with were deficient for audit purposes. He cautioned the statements contain no notes and they contain no cash flow statement.

[32] Mr. Phillip Young indicated he had no direct contact with Mr. Etter. He admitted nothing was being done to have the financial statements prepared on time. Mr. Phillip Young indicated that he had a conversation on the phone with Mr. Etter. This was contrary, at least in part, to Mr. Etter's evidence who said he met Phillip Young for the first time at the motion hearing.

[33] In the case of **TG Industries**, the Court at paragraph 38 set out several factors which a Court should consider in addressing civil contempt:

- 1) The diligence exercised by the contemnor;
- 2) The room for disagreement on the terms of the Order;
- 3) Prejudice to the Appellant and for the importance for the Orders to be taken seriously.

[34] Based on the evidence, the diligence of the alleged contemnor here is clearly lacking. There is little room for disagreement as to the terms of the Order.

The prejudice to the Appellant is obvious. The importance for the Order to be taken seriously has already been discussed and should not required further discussion. Justice Hood's Order was not made conditional upon the Company having the financial means. The Respondent's did not return to Court to plead same.

[35] In the case of **Chandler v. Confidential Recycling Services Limited**, [2001] O.J. No. 455, a motion was made to require directors and majority shareholders to comply with the Court Order for production of audited financial statements. The Court held that the directors and shareholders could not avoid compliance with the statutory obligation of the Company on the ground of cost, "where the Court found the Order was necessary for the ends of justice."

[36] The Court, in **Chandler**, found that the costs, while significant, were not shown to be beyond the means of the Respondents. In **TG Industries** the Court stated at paragraph 29, referring to the Author, Robert J. Sharpe, *Injunctions and Specific Performance*:

The requirement of intention excludes only casual or accidental acts. In other words, the party seeking a finding of contempt must prove no more than that the

Defendant intentionally did the forbidden act or consciously omitted to do what was required.

[37] In my view, it is no answer here for the Respondents or the Youngs to argue that the Order was not complied with due to impecuniosity, when their deliberate conduct or lack of action had the effect of contravening the Order. This was stated in **Blackman** at paragraph 48:

On the whole of the evidence, I am satisfied that the Applicant has met its burden of establishing beyond a reasonable doubt the elements of contempt.

The Youngs

[38] The more difficult question before me today with respect to this motion, is whether Mr. Phillip Young, as a director, and Mr. Robert Young, as a former director, should be held responsible for the companies actions or more accurately stated, lack of action.

[39] The evidence of Phillip Young is that they were business partners. The evidence of Mr. Etter confirms that his contact for the purposes of the audit was with Robert Young. It is reasonably clear from the evidence that Robert Young is still a directing mind of the Company, East River. He had a key role in the

refinancing and transferring of the Deed to the property up to and as recent as June of 2013.

[40] This included financing to keep the Company and family enterprises running, which included being able to employ his son and pay Phillip's salary, albeit a modest one. It is evident that East River, at some point, was "placed aside" and became less important in the family's operations.

[41] While Mr. Robert Young did not give evidence, it was apparent in the evidence that was given that he was actively working behind the scenes to direct the manner in which the financing was arranged and the Company was operated. From this, I draw an appropriate inference that he is still controlling the assets and making key decisions in respect of the Company.

[42] I have been provided with caselaw authority as it relates to corporate directing minds. It's been held that a directing mind of a Company may be found to be in contempt for the Company's actions. I refer to the **United Food and Commercial Workers International Union Locals 175 and 633**, [2005] O.J. No. 4140, case at paragraph 45.

[43] *Nova Scotia Civil Procedure Rule 89* permits a Contempt Order against “a person”. This would allow leeway for a finding that an individual was responsible for contempt committed by the corporation of which they were a principal. *Rule 89.08(1)* makes specific allowance and requires the attendance of corporate directors and officers. It also makes specific reference to penalties available at *Rule 89* including the specific power to sequester corporate assets at *Rule 89.13(3)*.

[44] The Applicant has provided authority for finding that a non party who disobeys a Court Order or interferes with its affect so as to obstruct the course of justice can be found in contempt. The case cited in support of this is **Brian Mallard Insurance Services Ltd v. Shirley**, 2005 ABQB 858.

[45] In Paragraph 41 of the **United Food v. Commercial Workers** the Court stated “a party in an Order can be found guilty of contempt for aiding and abetting a breach of that Order.” While Mr. Robert Young is currently not a director or a party, he is, in my view, inextricably linked to the transactions and dealings of the Company, among other family enterprises, as the evidence indicates. As a past

officer and director of East River, he was the person who voted by proxy for 3113571 Nova Scotia Limited to appoint Mr. Etter as the auditor at the November 26, 2012 meeting.

[46] In the **Millard** case at paragraph 44 the Court concluded that a non party could be found to be in contempt. I find on the evidence, Mr. Robert Young to be a “defacto” director and the controlling mind of the Respondent Company even though at present he is not a director of the Respondent, East River. The law extends as well to passive conduct which may have the effect of an Order being breached. Passive conduct may be the cause of the Company being in default of its obligations.

[47] Phillip Young stated in evidence that he knew the Order would not be complied with. He admitted it and was passively neglectful of it’s compliance, deferring to his father, who he admitted was a decision maker. It was Robert Young who set up the appointments with Mr. Etter, which were not kept. Mr. Etter stated he never met with Phillip Young, I accept his evidence that he was mainly in contact with Robert Young.

[48] As stated, it was also Robert Young who voted by proxy to appoint Mr. Etter. I concur with the Applicant that at that point both individuals knew that the Order would not be complied with. I find that Robert Young, in addition to Phillip Young, contributed to the Company's default and the Order not being addressed in a timely manner and, therefore, not taken seriously. I am satisfied that if Robert Young wanted the Order to have been complied with he could have and would have secured the necessary funds to complete the audited statements.

[49] The burden of proof which I have mentioned remains squarely on the Applicant. I repeat Justice Cromwell's statement in **TG Industries** that there is a long history of cases which state an intention to disobey is not an element of civil contempt. This Order, as any Order of this Court, is made in the interest of justice. In my view, the actions of the Company, East River, Mr. Phillip Young and Mr. Robert Young show that they did not demonstrate a serious effort to comply with the Order unless and until motions for contempt were made. Even then, their efforts fell far short of any meaningful compliance, as far as the audited statements are concerned.

[50] They have put forward the defence the impecuniosity of the Company. I conclude, however, that their deliberate conduct had the effect on contravening the Order and that is all that is necessary for the Applicant to establish proof of their contempt. In that way, they aided abetted in the non-compliance. I turn now to discuss an appropriate sanction to be levied against the Company and Mr. Phillip Young and Mr. Robert Young for the finding of contempt I have made against them.

Conclusion

[51] I must now determine a fit and proper sanction. The primary objective of a fair and just sentence in contempt is one that will direct or coerce compliance with the original Order. The law suggests that restraint must be applied. In that regard, I note that the primary contemnor here was the Company, East River. In addition, some flexibility in imposing the sanction is necessary to ensure future compliance. According to the evidence of Mr. Etter, the improper format and content of the financial statements was a major stumbling block in having the audit completed. Determining an appropriate sanction has not been an easy exercise. I have considered these factors in the exercise of my discretion. The penalty, which I

impose, for the findings of contempt against the Company and both Robert and Phillip Young is as follows:

- a) Phillip Young and Robert Young shall each pay personally the sum of \$10,000 for a total of \$20,000 into Court within twenty days of this, my decision. The same is to be held pending completion of the terms of my Order.
- b) Within a further twenty days, the Company and/or the Young's shall retain Mr. Etter or another accountant to complete proper financial statements containing notes and cash flow statements in accordance with acceptable accounting standards for unaudited statements, at this point.
- c) The funds paid into Court shall be used to pay Mr. Etter or another accountant for the unaudited statements, which shall be completed within sixty days. If an additional amount is required the sum of \$5,000, or \$2,500 each, is hereby directed to be paid resulting in a maximum amount paid into Court of \$25,000.

- d) Following completion of the unaudited statements the Company shall be given an opportunity to purge its contempt by using those statements to obtain audited statements in accordance with Justice Hood's Order. These statements shall be completed within a further sixty day period.

- e) Failure by any of the parties to abide by the terms of this Order may, in default, result in a further penalty being imposed including, but not limited to, house arrest, imprisonment, or further personal liability at a hearing held for such purpose. Such hearing may result in a further Order pursuant to *Rule 89.13(3)* and may be initiated by either party on fourteen days notice.

- f) Any party may apply to the Court for further directions arising from this Order as needed.

- g) I will hear the parties as to costs, I note that the Applicant is seeking costs on a solicitor-client basis.

[52] I wish the parties to know, I have set forth a measured and step by step approach to compliance with Justice Hood's Order. Nothing in my decision changes Justice Hood's Order and the requirement to comply with Justice Hood's Order continues to be imposed upon the parties herein.

[53] Order accordingly.

Murray, J.