

SUPREME COURT OF NOVA SCOTIA

Citation: Homburg Invest Inc. v. 3258949 Nova Scotia Ltd.,
2014 NSSC 102

Date: 20140318
Docket: Hfx 422406
Registry: Halifax

Between:

Homburg Invest Inc.

Plaintiff

v.

3258949 Nova Scotia Limited (formerly Homburg International Limited),
Homburg International Limited (formerly Homburg Services Group (N.A.) Inc.,
Citadel Holdings Inc. (formerly Homburg Canada Incorporated),
and Homburg Realty Services (U.S.), Inc.

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: December 16, 17, 18 and 31, 2014, in Halifax, Nova Scotia

Final Written

Submissions: Plaintiff: January 31, 2014
Defendants: February 20, 2014

Counsel: G. Grant Machum and Daniela Bassan, for the plaintiff
Blair Mitchell, for the defendants

By the Court:

[1] Homburg Invest Inc. (the “plaintiff” or “HII”) started an action against 3258949 Nova Scotia Limited (formerly Homburg International Limited), Homburg International Limited (formerly Homburg Services Group (N.A.) Inc.), Citadel Holdings Inc. (formerly Homburg Canada Incorporated) and Homburg Realty Services (U.S.) Inc.

[2] HII’s statement of claim, filed on December 9, 2013, alleges that Homburg Realty Services (U.S.) Inc. (henceforth referred to as “HRS”) unlawfully misappropriated a total of U.S. \$2.895 million in three separate transactions:

(I) U.S. \$186,000;

(II) U.S. \$109,000; and

(III) U.S. \$2,600,000

[3] HII’s statement of claim was later amended to include a claim based on unjust enrichment and another framed “in money had and received.”

[4] Coincidental with the filing of the notice of action and statement of claim, HII also filed an *ex parte* motion to preserved the assets it alleged were unlawfully misappropriated by HRS and the other three corporate defendants working in concert with one another.

[5] The *ex parte* motion was heard, on an emergency basis, by the Honourable Justice Gerald R.P. Moir on the same day it was filed. Based on the affidavit evidence of Mr. James F. Myles which was supplemented by additional oral testimony requested by the Court and after considering the written and oral submissions of HII’s counsel, Justice Moir granted an order in the nature of a *Mareva* injunction. The order froze the assets of the four corporate defendants including any assets that were beneficially owned by them as well any assets which they have the power, directly or indirectly, to dispose of or deal with. The defendants were not prevented from disposing of or dealing with their assets so long as the total unencumbered value of the defendants’ assets in Nova Scotia remained above U.S. \$2.895 million.

[6] Upon being served with a copy of this order, the defendants requested the opportunity to be heard. In its' notice of motion filed on December 12, 2013 the defendants asked that the *ex parte* order preserving assets be set aside or, alternatively, that certain operative paragraphs be varied. Affidavits from Jamie Wentzell, the Chief Financial Officer of 3258949 Nova Scotia Limited and Homburg International Limited (referred to collectively as "HIL") and Mr. Neil Chapman, the President of HRS, were filed in support of the defendants' response to the initial *ex parte* motion of HII.

[7] Supplementary affidavits from Mr. Miles and Mr. Wentzell were filed prior to the return date hearing which began on the afternoon of December 16, 2013 and continued for most of the following two days.

[8] The Court chose to reserve its decision until December 23, 2013. Due to the filing of additional written submissions by defendants' counsel over the intervening week-end followed by further written submissions of counsel for the plaintiff, the Court was forced to adjourn its decision in order to allow time for the further oral arguments of counsel on December 31, 2013. After hearing from counsel, the Court ruled that the *Mareva* injunction, ordered in the first instance by Justice Moir, should continue without variation.

[9] On January 6, 2014 defendants' counsel requested permission to make a motion by correspondence seeking to have the *Mareva* injunction vacated on the basis of proceedings taking place in the courts in Barbados and the State of Colorado, United States of America. HII's counsel opposed the request and the Court ultimately denied it.

[10] There was also considerable time and effort devoted to the wording of the order reflecting my decision. It eventually got worked out but not without the Court's further involvement which resulted in a final order being issued on January 27, 2014.

[11] It was left with counsel to attempt to reach agreement on costs failing which the Court, after receipt of written submissions of counsel, agreed to decide the issue. Not surprisingly, the parties could not agree.

APPLICABLE RULES

[12] Our rules of procedure provide the template against which costs are determined.

[13] Generally speaking, costs follow the event and are awarded to the successful party. While there is a fair degree of latitude accorded to the hearing judge to determine both the quantum of the award and the timing of payment, the exercise of the judge's discretion should do more than pay lip service to the rules. It is open to the judge to "make any order about costs as the judge is satisfied will do justice between the parties." [Rule 77.02(1)]

[14] Rule 77.03(3) states that:

Costs of a proceeding follow the result, unless a judge orders or a Rule provides otherwise.

[15] Rule 77.03(4) leaves it open to a judge "who awards party and party costs of a motion that does not result in the final determination of the proceeding (to) order payment in any of the following ways:

- (a) in the cause, in which case the party who succeeds in the proceeding receives the costs of the motion at the end of the proceeding;
- (b) to a party in the cause, in which case the party receives the costs of the motion at the end of the proceeding if the party succeeds;
- (c) to a party in any event of the cause and to be paid immediately or at the end of the proceeding, in which case the party receives the costs of the motion regardless of success in the proceeding and the judge directs when the costs are payable;
- (d) any other way the judge sees fit.

[16] In the case of a motion, Rule 77.06(3) applies. It reads:

- (3) Party and party costs of a motion or application in chambers, a proceeding for judicial review, or an appeal to the Supreme Court of Nova Scotia must,

unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[17] Rule 77.07(1) allows a judge to “add an amount to, or subtract an amount from, Tariff costs.

[18] And, Rule 77.08 provides for a lump sum costs award instead of Tariff costs.

[19] The starting point for determining costs of a motion is Tariff C. A review of Tariff C, however, reaffirms the Court’s authority to “...award costs that are just and appropriate in the circumstances...” “... notwithstanding this Tariff C...” [Tariff C, para. 3]

[20] The range of costs provided for in Tariff C is:

LENGTH OF HEARING OF APPLICATION	RANGE OF COSTS
Less than 1 hour	\$250 - \$500
More than 1 hour but less than ½ day	\$750 - \$1,000
More than ½ day but less than 1 day	\$1,000 - \$2,000
1 day or more	\$2,000 for full day

[21] In this case if I was to simply follow the range set out in the Tariff and award costs of \$2,000 per day for the approximately three days spent in Court, the plaintiff, HII, would only be entitled to an award of \$6,000 plus disbursements. This would not be just and appropriate in the circumstances.

[22] HII is seeking an award of \$25,000 plus \$597.81 in disbursements for a total of \$25,597.81.

[23] The defendants, although they earlier offered \$8,000 all inclusive to settle the matter, are now suggesting that costs be set over for assessment in the cause, or, alternatively, be set in an amount of \$4,000 plus \$597.81 for disbursements, totalling in all \$4,597.81. This latter amount, suggests counsel for the defendants, is based on the hearing having consumed about two days in Court and also on the plaintiff’s

“unsupported, over-stated contention of misconduct on the part of the Defendants”
(Page 12 of the defendants’ brief on costs)

[24] This latter suggestion has no merit and therefore no bearing on my award.

[25] Given the complexity of the issues, the urgency in which it had to be pursued and the rather precipitous steps taken by employees and officers of several of the defendant corporations to quickly spirit HII’s funds first from the USA then to Canada and finally to Barbados, an award of costs based solely on Tariff C would not “... do justice between the parties.” (Rule 77.02(1))

[26] This is an appropriate circumstance in which to order the defendants to pay to the plaintiff a lump sum award of \$16,000 plus disbursements of \$597.81 for a total of \$16,597.81 payable immediately and in any event of the cause.

Glen G. McDougall, J.