SUPREME COURT OF NOVA SCOTIA
Citation: *Stewart v. Bardsley*, 2014 NSSC 342

Date: 20140910
Docket: Hfx No. 328760
Registry: Halifax

Between:

David Stewart, Peter Beaini, and High Performance Energy Systems Inc.

Applicants

v.

James Bardsley, Palmer Refrigeration Inc., and Palmer Engineering Ltd

Respondents

Decision on Accounting

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	September 9, 2014, in Halifax, Nova Scotia
Transcribed and released:	September 17, 2014
Counsel:	Jasmine M. Ghosn, for the Applicants Kent L. Noseworthy and Andrew Cristovi, for the Respondents Jason Cooke and Leon Tovey, for the receiver High Performance Energy Systems Inc.

Moir J. (Orally):

[1] At para. 248 of my decision of May 10, 2012, I determined to order an accounting against Mr. Bardsley and parties related to him. They were to disclose "all revenue realized on the MASDAR project" and they were to receive credit for "whatever expense the respondents prove is properly attributable to the revenues".

[2] By order dated September 5, 2013, I appointed Mr. Michael Casey, CA, to act as referee on the accounting. The accounting was to be "of the contract between Palmer Refrigeration Inc. and R. W. Armstrong, dated February 2010". That contract is proved by the affidavit of David Stewart sworn on February 10, 2010 in the main hearing. By its terms, the contract was made effective February 1, 2010 although execution took place on February 19 and March 7, 2010. Under the order, Mr. Casey was "to determine the revenues, proper expenses and profits from the aforementioned contract".

[3] Mr. Casey conducted the reference and filed his report last May. High Performance, by its receiver, moves for judgment. Mr. Bardsley and his related parties do not oppose that, but they submit that the court should adopt certain conditions, which I shall call caveats, that Mr. Casey suggests in his report. Mr. Stewart and Mr. Beaini oppose adoption of the report. They argue that the state of

liability between Mr. Bardsley and High Performance is much greater than the $69,499 found by Mr. Casey.

[4] The factual background to the accounting is found in the main decision and I will not repeat it here. Also, I do not propose to expressly address each of the many concerns raised by Mr. Stewart and Mr. Beaini. As I said during the submissions, the motion has a narrow focus, the February 2010 contract and the revenues and expenses under it. As I also said, the court will not delve into concerns that have no evidentiary founding upon which to make findings.

[5] I will begin by examining Mr. Casey's findings on revenues and respond to the Stewart and Beaini position that some $200,000 is not accounted. Then I will examine the finding on expenses and respond to the Stewart and Beaini position that invoices paid after the February 2010 contract for goods, services, or technology produced before that time should be excluded. Then I will deal with the caveats.

[6] *Revenue*. Mr. Casey found that the total revenue was $175,509. The High Performance December 2008 contract with R. W. Armstrong was for $475,400. $91,600 was paid. Mr. Stewart and Mr. Beaini suggest that $208,291 has gone missing.

[7] The fallacies in this submission are in assuming that Palmer contracted to do everything outstanding under the High Performance contract after the $91,600 was paid, that none of the balance was eaten up in efforts R. W. Armstrong had to make as a result of the serious and protracted defaults by High Performance, and that R. W. Armstrong was unable to realize any efficiencies or windfalls under the new contract. There is no evidence to support any of those propositions.

[8] Further, there is no evidence to support the proposition that R. W. Armstrong paid Palmer more than what was due under the February 2010 contract. The suspicion of nefarious payments is inconsistent with the revenue contracted for and the payments proved in evidence.

[9] I adopt Mr. Casey's finding on revenue.

[10] *Expenses*. Subject to his caveats, Mr. Casey disallowed expenses invoiced and paid before February 2010. In my view, they had to be disallowed. I will discuss this further when I turn to the caveats.

[11] Palmer received invoices from Mr. Snijders' company and from Vineland. I found in the main decision that Vineland was not arm's length from Mr. Bardsley's parties. The invoices totalled $69,176. All but $10,000 was for Mr. Snijders'

companies. Mr. Casey allowed them in total. They include much for work done before February 2010.

[12] It was a dynamic of working under a MASDAR subcontract that one had to wait to be paid. So, it is pointed out on behalf of Mr. Stewart and Mr. Beaini that much of the post-February invoicing was for work done under the High Performance, not the Palmer, contract. They say that little was left to be done when the February 2010 contract was signed.

[13] Mr. Casey made no finding that little work was done and neither do I. I refer to the main decision, including the extent of the deficiencies resulting from the High Performance defaults. Further, there is no evidence to explain why R. W. Armstrong would agree to grossly overpay the value of outstanding goods, services, or technology.

[14] Mr. Casey does not make it exactly clear why he attributes work done before February 2010 to the contract executed at that time. However, the evidence in the main proceeding made it clear that Mr. Snijders' work was essential to the High Performance contract and that he would not work when previous invoices were outstanding. The same may have been true for Vineland.

[15] I accept Mr. Casey's attribution of all post-contract invoices on the basis that these were for new work or for old work that had to be covered to maintain the loyalty of Snijders and Vineland.

[16] *Caveats*. The following passages are found at pp. 6 and 7 of Mr. Casey's report.

> The Respondents, of whom Mr. Bardsley is one, have had a judgment placed against them for this amount [$105,000], to repay it as noted in the main decision. We understand at the present time this judgment remains unpaid. Therefore, it cannot be used as a deduction by the Respondents against contracted revenues.
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> In the event that this amount under judgment is properly repaid, then at that point in time it can be used as an expense to be deducted from the revenues.
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> ...
>
> **Vineland Electronics Limited**
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> In the attached Schedule A, each item has been assigned a bracketed number. The reference and resulting determination of each is noted below.
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> (1) Although these payments [and these are Vineland] were all before Palmer had obtained their contract, they do relate to the contract. However, similar to IF Tech International referred to above [that's Mr. Snijders' company], these were included in the funds withdrawn improperly from HPES by Mr. Bardsley in June 2009. In the event that this amount under judgment is properly repaid, then at that point in time these $6,100 worth of payments can be used as an expense to be deducted from the revenues.
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> ...
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> **Travel Expenses**
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> (6) These are well before any contract with Palmer began. However, they fall into the same category as IF Tech International and Vineland Electronics Limited above. In the event that the amount under judgment is properly repaid, then at that point in time the 2009 travel expenses can be used as an expense to be deducted from the revenues.

I profoundly disagree.

[17] The $50,000 was not expended by Mr. Bardsley on account of the February 2010 Palmer contract. It was expended to get the business opportunity represented by the December 2008 High Performance contract away from High Performance and to Mr. Bardsley exclusively. It purchased the Snijders report although Mr. Snijders' company had a contractual obligation to High Performance. It enabled Mr. Bardsley to keep the report away from High Performance. The $50,000 was an essential part of the conduct by which Mr. Bardsley egregiously breached his fiduciary obligations owed to High Performance. It was essential to liability under the very remedy referred to Mr. Casey.

[18] The amounts paid in June 2009 and the amounts subsequently expended by Mr. Bardsley so as to breach his fiduciary obligations are in no sense "proper expenses" under the February 2010 contract. The caveats would compensate Mr. Bardsley for the expense of breaching his fiduciary obligations to High Performance.

Conclusion

[19] I will sign the order prepared by Mr. Cooke on behalf of the receiver. Subject to comments on costs, which I will call for in a minute, I request that Mr. Cooke extend to Mr. Casey my thanks for his professionalism.

Moir J.