Court File No. CV-18-00611219-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

FTI CONSULTING CANADA INC.,
in its capacity as Court-appointed monitor in proceedings
pursuant to the *Companies' Creditors Arrangement Act,* RSC 1985, c. c-36

Plaintiff

- and -

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP, SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM HARKER and WILLIAM CROWLEY

Defendants

BOOK OF AUTHORITIES OF THE DEFENDANTS WILLIAM HARKER AND WILLIAM CROWLEY

March 8, 2019

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Bennett v. Bennett Environmental Inc.

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John Anthony Bennett (Applicant / Respondent) and Bennett Environmental Inc. (Respondent / Appellant)

S.E. Lang, R.G. Juriansz, G. Epstein JJ.A.

Heard: November 25, 2008
Judgment: March 5, 2009
Docket: CA C48644

Proceedings: affirming *Bennett v. Bennett Environmental Inc.* (2008), 2008 CarswellOnt 7285 (Ont. S.C.J.)

Counsel: Linda M. Plumpton, Andrew D. Gray for Appellant
Nigel Campbell, Bruce O'Toole for Respondent

***S.E. Lang J.A.*:**

1 This appeal concerns the interpretation and application of a statutory provision that, in certain circumstances, prohibits corporations from indemnifying officers and directors for the financial consequences of their regulatory offences. It arises in an appeal by Bennett Environmental Inc. (BEI) from a March 4, 2008 order. In that order, notwithstanding s. 124(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the CBCA), the application judge required BEI to indemnify its former corporate director, John Anthony Bennett, for all costs, charges and expenses arising from certain civil and administrative proceedings, including proceedings under the *Securities Act*, R.S.O. 1990, c. S.5.

Background

2 BEI, a company publicly traded on both the Toronto and American Stock Exchanges, is a federally incorporated company. It carries on a business that includes the thermal remediation of contaminated soil. Bennett, the founder of BEI's predecessor company, was BEI's Chief Executive Officer and a member of its two-person Disclosure Committee. After Bennett resigned from both positions in February 2004, he was no longer involved in the details of management. However, he served as chair of BEI's Board of Directors until August 2004 and thereafter continued as a consultant to BEI.

3 In June 2003, BEI announced it had been awarded the largest soil remediation contract in its history, called the Phase III Contract (the Contract). The Contract was executed with Sevenson Environmental Services Inc. (Sevenson), which acted as subcontractor for the United States Army Corps of Engineers (the Corps). BEI had previously entered into and fulfilled similar contracts in the first two phases of the same soil remediation project.

4 After its announcement, BEI was notified in June 2003 that a competitor was protesting the award of the Contract to BEI. In August and September, 2003, BEI was notified that the Corps asserted a withdrawal of its consent to the award of the Contract to BEI and that the Corps was rebidding a contract (the Second Contract) through Sevenson for a much smaller volume of soil. Nonetheless, in intervening press releases, BEI continued to list the Contract, including its large volume of soil remediation, as part of its inventory of projects. In June 2004, BEI executed the Second Contract.

That month and the next, the Corps definitively took the position that the Contract was at an end and that the Second Contract was the only outstanding contract.

5 In July 2004, BEI issued a press release disclosing that further shipments under the Contract were "highly unlikely" and that it had been awarded the smaller Second Contract. In the same press release, BEI disclosed that the status of the Contract had been in dispute since August 2003. The price of BEI shares fell almost 50% within ten days.

6 After the dramatic loss in share value, class actions were brought in the United States against BEI and BEI directors. As well, the U.S. Securities and Exchange Commission (the SEC) brought proceedings against BEI, Bennett, and other BEI directors. The class actions and SEC proceedings were ultimately settled in 2005 and 2006.

The Ontario Securities Commission Proceedings

7 In addition to the proceedings brought in the U.S., the staff of the Ontario Securities Commission (the OSC) also made allegations against BEI, Bennett, and other BEI directors, which included alleged violations of the disclosure requirements under the *Securities Act*. The OSC later abandoned an allegation that Bennett had provided misleading evidence during its investigation. There was no allegation of insider trading against Bennett, although his successor at BEI admitted to that offence.

8 In 2006, the OSC approved a settlement agreement between its staff and Bennett. In that agreement, Bennett admitted that, at the time it arose, the existence of the dispute about the Contract constituted a "material change" within the meaning of the *Securities Act* and that BEI had failed to disclose that change, contrary to s. 75 of the *Securities Act* and the public interest. In view of that admission, Bennett acknowledged "serious misconduct" in the violation of s. 122(1)(b) and s. 122(3) of the *Securities Act.* At the same time, the settlement agreement expressly acknowledged that Bennett had had an honest but mistaken belief that, despite the dispute, the Contract was enforceable and the dispute would ultimately be resolved in favour of BEI.

9 In accordance with the terms of the settlement agreement, the OSC prohibited Bennett from acting as an officer or director for a period of ten years, issued a reprimand, and ordered him to pay an administrative fine of $250,000, as well as $50,000 toward the cost of the OSC investigation. BEI was not ordered to pay any penalty.

The Indemnification Proceedings

10 In December 2006, Bennett sought indemnification from BEI for both the fine and the costs he had incurred in the OSC proceedings. However, BEI not only refused Bennett's request for OSC-related indemnification, but it also sought repayment of monies it had already advanced to indemnify Bennett in relation to the U.S. class action and the costs of the SEC proceedings. The minutes of BEI's Board meeting reflect this decision and refer to the prohibition against indemnification contained in its by-law as well as "limited cash resources" from which to indemnify Bennett. In response, Bennett brought an application for a declaration that he was entitled to indemnification in relation to all the proceedings.

11 Section 124(1) of the CBCA permits indemnification of a director or officer by the corporation for all costs, charges, or expenses incurred "in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation". BEI's General By-law No. 1, on the other hand, mandates indemnification.

12 However, s. 124(3) of the CBCA and BEI's by-law, which echoes the wording of s. 124(3), prohibit indemnification where the director or officer has not complied with certain requirements. The non-indemnification provisions of ss. 124(3)(a) and (b) of the CBCA contain two components, which are sometimes referred to as the "good faith and lawful conduct requirements":

> *A corporation may not indemnify an individual* under subsection (1) *unless the individual*

(a) *acted honestly and in good faith with a view to the best interests of the corporation*, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; *and*

(b) *in the case of a* criminal or *administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.* [Emphasis added.]

13 In his affidavits in support of his application for indemnification, and in his cross-examination on those affidavits, Bennett attested that he did not consider the Contract to be in jeopardy. He also attested that he did not take seriously the Corps' notification in the summer and fall of 2003 that it was withdrawing its consent to the Contract. In Bennett's view, the Corps was only stating this position to placate the competitor who had protested the award of the Contract to BEI.

14 Bennett held this view because he considered such protests were standard and to be expected in the industry. Bennett was certain that the Contract remained extant because, from his extensive experience in the industry, he knew that BEI was the only company that could fulfill the Contract, BEI had been the successful bidder for Phases I and II of the project, and both BEI's U.S. representative and Sevenson's representative had assured BEI and Bennett that the Contract remained binding. Even when the Corps spoke of tendering a Second Contract, which Bennett believed would be for soil additional to the outstanding Contract, Bennett believed that this again was only done to placate the competitor. BEI and Bennett turned out to be wrong.

15 As evidence of the sincerity of his belief at the time in the binding nature of the Contract, Bennett pointed out that he had received his October 2003 bonus in the form of stock options instead of cash. In addition, against the advice of his financial adviser, he had refused to sell any BEI stock during the relevant period. This conduct, he argued, belied any director misconduct on his part.

16 BEI, on the other hand, asserted that Bennett had not held his belief honestly and, even if he had, that such a belief was unreasonable. Moreover, BEI took the position that Bennett could not have acted in good faith, or have had reasonable grounds for his belief, when he did not consult with legal counsel. Accordingly, BEI argued that it was prohibited by both its by-law and s. 124(3) of the CBCA from indemnifying Bennett.

The Application Judge's Reasons

17 The application judge noted Bennett's position and BEI's argument that Bennett had not fulfilled either requirement of s. 124(3). He also recognized BEI's view that a person in Bennett's position, who considered all the available information, would or should have known that BEI was required to disclose the Contract dispute, and that Bennett's position to the contrary was "untenable".

18 The application judge described the proceeding as raising the issue of whether the director seeking indemnification or the company opposing indemnification bears the onus of establishing the presence or absence of the director's "honesty, good faith and belief in lawful conduct". He quoted both prongs of the s. 124(3) requirement for indemnification. He determined that the onus fell on BEI to demonstrate that Bennett did not satisfy the requirements of s. 124(3) and that the correct test is reflected by asking the following question: "what would have been done by a reasonable person in the circumstances by a person acting as a director who possessed the skill, training and experience of the individual in question?" The application judge also recognized that a reasonable director is "not entitled to rely on an unreasonable subjective belief."

19 Since BEI had failed to establish that Bennett had acted "in bad faith or unlawfully", or that his belief in the lawfulness of his conduct was "unfounded or totally unreasonable", and since there was "no conclusive objective evidence" on which "to conclude that Bennett should not be believed on his version of the events", the application judge ordered BEI to indemnify Bennett.

Issues

20 BEI challenges both the application judge's interpretation and application of the appropriate tests required by s. 124(3) as well as his factual findings. BEI also argues that indemnification in the circumstances of this case is inconsistent with the policy rationale underlying s. 124.

21 For the reasons that follow, I would dismiss the appeal.

Analysis

Standard of review

22 Counsel agree that questions of law are to be reviewed on the standard of correctness, questions of fact and factual inference on the standard of palpable and overriding error, and questions of mixed fact and law, generally speaking, on a spectrum between the other two standards, dependent on whether the alleged error is closer to an error of law or one of fact.

The Policy Rationale

23 In interpreting the relevant provisions, I begin with the legislative rationale for permitting indemnification generally, while prohibiting it in specified circumstances. The primary purpose of indemnification is to provide assurance to those prepared to become corporate directors that they will be recompensed for any adverse consequences arising from well-intentioned entrepreneurism undertaken on the corporation's behalf. This assurance serves to attract and to protect competent directors who will advance the interests of the corporation.

24 However, to encourage appropriate conduct, Parliament and the provincial legislatures also provide deterrents against misconduct. Arguably, the most effective deterrent is the consequence, including the stigma, of director prosecution and conviction. Another deterrent is the legislative prohibition against corporate indemnification for director misconduct. [1]

25 This tension between the competing objectives of encouraging director entrepreneurism on the one hand, and discouraging director misconduct on the other, informs the interpretation of s. 124(3).

The Onus and the Test

26 From the perspective of these competing objectives, I turn to the wording of s. 124(3) of the CBCA. Section 124(3) requires a consideration of the particular context in which the individual acted. Subsection 124(3)(a) sets out, as a pre-condition to indemnification, that the individual must have acted honestly and in good faith in the best interests of the corporation. Section 124(3)(b) adds an additional prerequisite regarding indemnification arising from criminal or regulatory penalties: the individual must also have had reasonable grounds for believing his or her conduct was lawful.

27 In keeping with the contextual perspective, Parliament determined that entitlement to indemnification must be decided on the basis of the circumstances that existed at the time of the director's (a) conduct and (b) belief. This is clear not only from the wording of s. 124(3), but also from the leading case of *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.), where Iacobucci J. observed, at para. 74, that the similar non-indemnification provision in the *Business Corporations Act*, R.S.O. 1990, c. B.16, allows "for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection."

28 In addressing the required degree of misconduct, Iacobucci J. instructed, at para. 74, that indemnification will only be prohibited if the director acted with *mala fides*. At para. 35, he cited *General Motors of Canada Ltd. v. Brunet* (1976), [1977] 2 S.C.R. 537 (S.C.C.), at p. 548, for the proposition that "persons are assumed to act in good faith unless proven otherwise" and placed the onus of proving *mala fides* on the corporation opposing indemnification.

29 Noting that this interpretation of s. 124(3)(a) is in keeping with academic commentary, Iacobucci J. quoted, at para. 74, from Jacob S. Ziegel *et al.*, *Cases and Materials on Partnerships and Canadian Business Corporations*, 3d ed., vol. 1 (Scarborough, Ont.: 1994), at p. 523. There, the authors acknowledge the appropriateness of denying indemnification for "fraud or misappropriation", but recognize that a director should not be denied indemnification if the "conduct ... was not coloured by any opportunistic behaviour". Opportunistic or self-seeking behaviour may be encompassed within the term *mala fides* because such behaviour exhibits a type of dishonesty that should not be countenanced by an award for indemnification.

30 The scope of the bad faith described in *Blair* was clarified in *Entreprises Sibeca inc. c. Frelighsburg (Municipalité)*, [2004] 3 S.C.R. 304 (S.C.C.). At para. 25, Deschamps J., writing for the court and citing *McCullock Finney c. Barreau (Québec)*, [2004] 2 S.C.R. 17 (S.C.C.) at para. 39, accepted that bad faith can encompass recklessness in the sense that the conduct at issue is so inexplicable that it suggests an absence of good faith. Deschamps J. also noted, at para. 26, that this clarification means "no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it." Thus, inexplicable, apparently reckless, conduct may lead to the inference that the conduct was deliberate, intentional and undertaken in bad faith.

31 Since the dispute in *Blair* involved a director's indemnification for a civil proxy dispute, it did not expressly consider the second branch of the CBCA's non-indemnification test under s. 124(3)(b), which requires reasonable grounds for belief in lawful conduct.

32 Nonetheless, in my view, for reasons analogous to the observation in *Blair* regarding honest and good faith conduct, the corporation also bears the burden of showing that the director did not have reasonable grounds for his or her belief that the conduct was lawful. Placing the burden on the corporation is consistent with the principle affirmed in *Blair* regarding s. 124(3)(a) that persons are assumed to act in good faith. In my view, under s. 124(3)(b), persons should also be assumed to believe they are acting lawfully and to have reasonable grounds for that belief, unless the contrary is proven. There is no indication in the wording of the legislation that suggests a different burden should be imposed for (b) than for (a). The imposition of the burden on the corporation best balances the promotion of strong director decision-making, on the one hand, while discouraging irresponsible behaviour on the other. Finally, as a practical matter, this placement of the burden makes sense because the corporation, and not the individual director, will most likely have the advantage of unrestricted access to corporate documents relevant to the indemnification proceeding.

33 Relying on *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2006), 79 O.R. (3d) 288 (Ont. C.A.), BEI submits that an objective test must be applied in determining whether Bennett satisfied s. 124(3)(a) and that the application judge erred in applying a subjective standard.

34 In *Catalyst*, Cronk J.A., writing for the panel, determined, at para. 105, that a director was not entitled to indemnification under s. 124(3) because the significance of the changed circumstances "would have been apparent to even the most untrained observer". Thus, she concluded, at para. 106, the director "cannot make out a claim for indemnification by relying on an unreasonable subjective belief."

35 In my view, *Catalyst* rightly concluded that a director cannot ground a claim for indemnification on an unreasonable belief where that belief would have been obviously erroneous to even the most untrained observer. Such a belief would be analogous to the reasoning in *Enterprises* that observed that a director cannot rely on recklessness to defend otherwise indefensible conduct. Thus, the conclusion in *Catalyst* reflects the finding that the director's evidence regarding his good faith was not credible in the circumstances of that case. Accordingly, I do not accept the appellant's submission that *Catalyst* changed the test from that set out in *Blair*, as clarified in *Enterprises*.

36 Indeed, the *Blair* reasonableness test achieves the same result by asking whether the director acted reasonably when the director's conduct or belief is considered in the context of the perspective of a director in comparable circumstances at

the time. Looking at comparable circumstances involves looking at the issue from the perspective of the knowledge and skill set of the individual director and the information and advice upon which the director's conduct or belief was based.

37 The wording employed by Parliament in both s. 124(3)(a) and (b) supports this interpretation of the reasonableness test. That wording instructs that the question is whether "the individual" exhibited good faith conduct and had reasonable grounds for believing that his or her conduct was lawful. The answer must include consideration of the context in which the director decided on the conduct or formed the belief at issue. It is implicit in the wording that the conduct or belief at issue must have been reasonable when considered in context.

38 I turn to the application of the test to the circumstances of this case, an issue that I approach mindful of the factual findings made by the application judge.

Application of the test

39 By admitting to breaches of s. 122(1)(b) and s. 122(3) of the *Securities Act*, Bennett acknowledged to the OSC that, at the time, the Contract dispute was a material change that BEI was obliged to disclose. However, BEI acknowledges that this admission does not, in itself, preclude Bennett's indemnification. Otherwise, there would be no point in the CBCA's provision of director indemnification for such administrative penalties. Moreover, the onus and test regarding an offence under the *Securities Act* differ from the onus and test mandated by the non-indemnification provisions of the CBCA. Thus, while Bennett's admissions to the OSC may reflect on the credibility of his evidence before the application judge, the OSC findings do not predetermine the result of the indemnification application.

40 Both before the OSC and on his application, Bennett attested that, in the light of all the circumstances, he mistakenly believed the Contract dispute would be resolved in BEI's favour and so he did not consider the ongoing developments to be a change in the binding nature of the Contract, let alone a material one. For this reason, he did not identify any obligation to disclose. Thus, he argues, he acted honestly in BEI's interests and that he believed his conduct was lawful. Further, he asserts there is no basis on which to conclude his belief or conduct was reckless or that his view would have been obviously erroneous to even the most untrained observer at the time.

Section 124(3)(a)

41 Under s. 124(3)(a), the issue for the application judge was whether BEI had established that Bennett was not credible in his evidence that he had "acted honestly and in good faith with a view to the best interests of the corporation".

42 While the application judge was alive to BEI's position that Bennett was lying about his good faith conduct (or that he acted unreasonably), he concluded that BEI had failed to satisfy its onus to disprove Bennett's evidence. BEI argues that the application judge erred in so concluding. I do not agree.

43 While undoubtedly the obligation to disclose a material change is absolute, it is not always clear at the time that an event, or even a series of events, constitutes a material change. Such a determination may turn on an assessment of the reliability of the available information. In this case, Bennett gave reasons why he did not take the developing information seriously at the time. Those reasons included the assurances about the Contract Bennett received from BEI's own U.S. representative and from Sevenson's representative. Bennett also had regular discussions about the Contract with another director who was a lawyer. In addition, Bennett had discussions with his fellow director on the Disclosure Committee, albeit those discussions were not couched in terms of any disclosure obligations since he did not consider the developments to constitute a material change. Bennett's evidence was further supported by his open discussions with other officers and directors at BEI and the candid discussions with the Board about the dispute. In other words, Bennett's belief was an informed one.

44 Furthermore, the honesty of Bennett's belief was supported by the absence of any motive to withhold disclosure. Indeed, Bennett pressed the BEI Board to proceed with the development of a new plant that would only have been required to honour the Contract. Bennett would not likely have done so if he believed the Contract was in jeopardy.

Moreover, unlike others involved in BEI, Bennett did not stand to gain personally from the non-disclosure. This is also evident from Bennett's election to take his bonus in options and from his decision not to sell any BEI stock.

45 Based on this evidence, the application judge concluded that he was not able to reject Bennett's position. From reading the application judge's reasons as a whole, it is clear that BEI failed to establish that Bennett's stated belief was either opportunistic or amounted to a reckless disregard of his obligations. The application judge specifically observed the absence of "conclusive objective evidence on which to make such a finding." He considered and applied Iacobucci J.'s reasoning at para. 76 of *Blair*:

> It is insufficient to say retrospectively that Blair 'should have' acted differently or that he did not handle things perfectly in order to deny indemnification under s. 136(1). Actual *mala fides* must be shown such that the director did not act with a view to the best interests of the corporation.

Similarly, it is not enough in this case to say, with the benefit of hindsight, that Bennett should have done more. The application judge accordingly was entitled to conclude that BEI had not satisfied the burden of establishing that Bennett acted in bad faith.

Section 124(3)(b)

46 The trial judge did not expressly separate his consideration of the s. 124(3)(b) requirement that Bennett had reasonable grounds to believe that non-disclosure was lawful from his s. 124(3)(a) analysis. The two requirements are distinct: see *People's Department Stores Ltd. (1992) Inc., Re*, [2004] 3 S.C.R. 461 (S.C.C.), at para. 33, where Major and Deschamps JJ. discuss this distinction in the context of the different duties of directors under s. 122(1) of the CBCA.

47 Nonetheless, the application judge's reasons demonstrate that he was alive to the distinction between s. 124(3)(a) and (b). On more than one occasion, he referred to "belief in lawful conduct" as a requirement that was in addition to the requirement of honesty and good faith. Moreover, in the particular circumstances of this case, it is apparent that the facts and the evidence underpinning both branches of the test, to a certain extent, are intertwined, as are the arguments advanced by the appellant.

48 One of BEI's arguments, which applies to both branches of the test, is that Bennett could not possibly have had reasonable grounds to believe that his conduct was lawful (or that he was acting in good faith) when he did not consult legal counsel.

49 This issue arose in *Blair* where, unlike in this case, the director seeking indemnification relied on the fact that he had consulted counsel before proceeding with the impugned conduct as evidence that he had acted in good faith, In upholding an order for indemnification, Iacobucci J. explained, at paras. 58 and 65, that, while a director's *de facto* reliance on legal advice does not guarantee indemnification, reliance on counsel's advice "will strongly militate *against* a finding of *mala fides* or fiduciary breach" (emphasis in original). The court in *Blair* relied on several additional considerations in ultimately concluding that the director was entitled to indemnification.

50 In my view, while reliance on reasonable legal or professional advice will substantially assist a director seeking indemnification in establishing reasonable grounds for belief that his or her conduct is lawful, such consultation is not a prerequisite to indemnification. Rather, the variety of additional considerations that may come into play in a particular case makes it both undesirable and unnecessary to promulgate an inflexible rule mandating legal advice as a prerequisite to indemnification under either branch of s. 124(3).

51 That said, however, a failure to obtain professional advice may raise questions in a particular case about a director's conduct or belief. In such a case, it may be necessary to assess the surrounding circumstances and conduct of the director at the relevant time to look for other evidence of the reasonableness of the relied-upon belief.

52 In this case, Bennett testified that he did not turn his mind to the issue of disclosure or seek legal advice because it simply did not occur to him to do so, in part, because he was an engineer and not a lawyer. Standing on its own, this explanation cannot constitute reasonable grounds under s. 124(3)(b). A director serving on a Disclosure Committee, lawyer or not, is expected to have at least a basic familiarity with disclosure obligations.

53 However, this was not a case where Bennett recognized and wilfully ignored an evident disclosure obligation or failed to make reasonable inquiries. To the contrary, as detailed above, the evidence shows that Bennett sought information from BEI's U.S. representative and from Sevenson's representative. He also had discussions with other directors and officers in the company. While Bennett was subsequently proven wrong in his decision not to make earlier disclosure, BEI failed to demonstrate that, from the perspective of someone in Bennett's position at the time, Bennett did not have reasonable grounds for believing he was acting lawfully.

54 While the application judge's reasons are couched in terms of Bennett's belief in the continued validity of the Contract, rather than in terms of his belief that he did not have disclosure obligations, in the circumstances of this case, the two beliefs are synonymous. If Bennett honestly and reasonably believed the Contract was not in jeopardy, and that it accordingly remained a binding contract, there was no basis upon which he ought to have believed that he was obliged to make disclosure of a material change. I see no error of law in the application judge's reasons and therefore no basis to interfere with his conclusions in this regard.

55 Accordingly, I conclude that it was open to the application judge to determine that BEI did not meet the onus on it to establish that Bennett did not have reasonable grounds to believe his conduct was lawful.

56 Finally, I note that this is not a case that invokes the business judgment rule discussed in *Kerr v. Danier Leather Inc.*, [2007] 2 S.C.R. 331 (S.C.C.). In *Kerr*, Binnie J. instructed, at para. 54, that the business judgment rule "is a concept well-developed in the context of *business* decisions but should not be used to qualify or undermine the duty of disclosure" under the *Securities Act* (emphasis in original) Accordingly, the test to be met in this case is that set out in s. 124(3) of the CBCA.

Other errors

57 BEI also submits that the application judge made factual errors. I reject this ground of appeal. To the extent that BEI argues that the application judge was obliged to refuse indemnification in the light of the factual findings of the OSC, I disagree. I have already given my view that the different burden and test under the *Securities Act* and the CBCA may result in different outcomes. I also disagree with BEI's characterization of the application judge's reasons as requiring expert or other evidence to refute Bennett's evidence. While this issue is more a question of law than of fact, in my view, the application judge's excerpted reasons do no more than reinforce his already-stated view that the evidence led by BEI was insufficient to meet the requisite onus under either branch of the s. 124(3) test.

58 Finally, BEI observes that the OSC specifically declined to impose a penalty on BEI on the basis that such a penalty would ultimately be borne by the shareholders. From this, the appellant argues that granting Bennett indemnification in this application would impose the financial burden on the shareholders, contrary to the OSC's intention.

59 In my view, BEI's argument is answered in two ways. First, while the argument is premised on the assumption that Bennett's conduct was sufficiently egregious to deny him indemnification, the application judge concluded that BEI failed to prove such misconduct and, as I have already stated, I see no reason to interfere with his conclusion. Second, BEI chose to protect directors against the imposition of financial penalties by enacting a by-law providing for director indemnification except in the case of misconduct. Again, as found by the application judge, BEI has failed to prove such misconduct.

Result

60 In the result, I would dismiss the appeal. I would also award costs to Bennett fixed at $14,000, inclusive of disbursements and GST.

***R.G. Juriansz J.A.*:**

I agree.

***G. Epstein J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The relevant statute in every province permits indemnification generally, and restricts it in specified circumstances. Indeed, most of the provincial indemnification provisions prescribe the identical good faith and lawful conduct requirements set out in the CBCA (New Brunswick, Newfoundland, Ontario, Manitoba, Alberta, Saskatchewan, and British Columbia), and others deny indemnification where the charges, expenses, or liability were occasioned by the director's own fault (Quebec), wilful neglect of default (Prince Edward Island), or dishonesty (Nova Scotia): see *Companies Act*, R.S.P.E.I. 1988, c. C-14, s. 64; *Business Corporations Act*, S.N.B. 1981, c. B-9.1, s. 81; *Companies Act*, R.S.N.S. 1989, c. 81, ss. 204 and 205; *Corporations Act*, R.S.N.L. 1990, c. C-36, s. 205; *Companies Act*, R.S.Q. c. C-38, ss. 90 and 184; *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 136; *Corporations Act*, C.C.S.M. c. C225, s. 119; *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 124; *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 119; and, *Business Corporations Act*, [SBC 2002] c. 57, s. 163.

1995 CarswellOnt 1393
Supreme Court of Canada

Blair v. Consolidated Enfield Corp.

1995 CarswellOnt 1179, 1995 CarswellOnt 1393, [1995] 4 S.C.R. 5, [1995] A.C.S. No. 29, [1995] S.C.J. No. 29, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161, 25 O.R. (3d) 480 (note), 25 O.R. (3d) 480, 58 A.C.W.S. (3d) 230, 86 O.A.C. 245, J.E. 95-1939, EYB 1995-67681

CONSOLIDATED ENFIELD CORPORATION v. MICHAEL F. BLAIR

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Oral reasons: March 21, 1995
Written reasons: October 19, 1995
Docket: Doc. 23887

Proceedings: On Appeal from the Court of Appeal for Ontario

Counsel: *Dennis R. O'Connor, Q.C.* and *Ronald Foerster*, for appellant.
Patricia A. Virc, for respondent.

The judgment of the court was delivered by *Iacobucci J.*:

1 This appeal was dismissed from the bench on March 21, 1995, with reasons to follow. These are those reasons.

2 This appeal requires us to determine who should bear the costs of legally contesting a disputed directors' election: the corporation, or the chairman in his personal capacity as the individual making the impugned ruling?

I. Background

3 The respondent Blair was, from 1984 to 1989, the President and a Director of the appellant Consolidated Enfield Corporation ("Enfield"). In 1989, Enfield was plagued with fairly serious corporate infighting between Blair and another shareholder, Canadian Express Limited ("Canadian Express"), which had, in 1988, elected some of its officers (Willard L'Heureux and Manfred Walt) to Enfield's Board of Directors.

4 The dispute came to a head on July 20, 1989 when Enfield's annual shareholders' meeting was scheduled to take place. Blair, as President of the company, was obliged under the by-laws to act as chairman. One of the matters on the agenda was the election of the new Board of Directors. A management information circular had been previously issued in which 11 candidates were proposed for the 11 director positions. Blair was part of this slate, which divided 6-5 in favour of Blair's "camp" over the Canadian Express group.

5 Although the Board had agreed on these candidates, on the day of the shareholders' meeting, Canadian Express nominated a surprise 12th candidate from the floor, Timothy Price, thereby requiring a more formal election. According to Canadian Express, although it had originally intended to vote for the management slate of directors, including Blair, Blair's actions in the months before the election (during which Canadian Express alleges that it and Blair had signed an "accord" to work together in the best interests of Enfield) purportedly indicated that he had no intention of co-operating with the Canadian Express camp.

6 The Canadian Express camp, with Walt being the proxyholder for these shares, combined with Ravelston Corporation Limited (another shareholding group whose proxyholder was John Boultbee) and together pooled their

voting shares. Their coalition represented 43 percent of the total shares and a majority of the shares actually voted at the meeting. The one candidate they did not vote for was Blair. For his part, Blair, through his own holdings (14 percent of Enfield), plus substantial management proxy support, culled together 41 percent of the total shares. The effect of the election was that Blair was out and Price was in as the 11th director. This reflected a total change in control of the Board in favour of the nominees of Canadian Express.

7 There was, however, one major complication. On July 19, 1989, the night before the shareholders' meeting, the respondent had met with a representative of the scrutineer, Montreal Trust Company, and Enfield's corporate counsel, Osler, Hoskin & Harcourt ("Osler"), who had advised him that the Canadian Express and Ravelston proxies which had been deposited that day could be used to vote only in favour of the management slate since the instructions in the proxies (specifically Note 3 thereof) restricted the proxyholders to voting for the management slate because no specifications had been made thereon by the shareholders to indicate voting otherwise. Osler also noted that the *Securities Act*, R.S.O. 1980, c. 466, provided that votes cast pursuant to proxies could not be counted in favour of a candidate not named in the circular. Osler also delivered to Enfield several written memoranda dealing with procedural matters, the role of the chair, and the principles relating to the validity of the proxies.

8 The next day, after the voting had taken place on the surprise candidacy of Price, Blair once again solicited Osler's advice on what he should do with the proxy votes. He turned towards corporate counsel and queried: "You know the law. I will take my direction from you. What should I do?" There were six senior corporate lawyers from Osler present at this ad hoc meeting and, before they reached their decision, they deliberated for over one and one half hours in part with the scrutineers while remaining in constant contact with solicitors in their head office. Following Osler's advice that the proxy votes in favour of Price were invalid, Blair, reading verbatim from a statement prepared by Osler, declared that Price had received no votes and that the 11 candidates in the management circular had been elected. When L'Heureux vigorously objected to this decision, Blair refused to entertain any discussion thereon, telling L'Heureux to take the matter up with Enfield's counsel.

9 Instead, the Canadian Express representatives immediately filed an application in Ontario Supreme Court to the effect that Blair's ruling was wrong in law and that Price, not Blair, should have been elected as the 11th director. Both Blair and Enfield were named as co-respondents. Mention was made of the fact that Blair allegedly breached his quasi-judicial duties as chairman by not ceding the chair when the issue he was to rule upon so directly involved his own interests, as well as by foreclosing debate on the ruling and by not giving notice to Canadian Express as to the limitations of their proxy-holding power. On September 25, 1989, J. Holland J. found that Blair's ruling was wrong in law and that Blair was in breach of his fiduciary duties [reported at 46 B.L.R. 92 (Ont. H.C.)]. He thus allowed the application, concluding that the ballots were legally cast for Price, in accordance with the proxies, and, consequently, that the respondent had not been elected a director. Costs were issued against Blair and Enfield.

10 Blair sought to appeal the substantive findings of J. Holland J. to Ontario Divisional Court. This appeal was unsuccessful.

11 Since Canadian Express was then in control of Enfield, it sought to recover its costs from Blair alone. Blair then applied to Enfield to be indemnified for these costs, which indemnification was refused.

12 Blair then filed an application under s. 4.02 of Enfield By-law No. 3, which essentially incorporates the terms of the statutory right to indemnification found in s. 136(1) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, and in the business corporations statutes of most of the provinces as well as the federal business corporations statute, for an order that he be indemnified by Enfield for the legal costs incurred in defending his corporate acts.

13 On October 28, 1992, Carruthers J. dismissed the respondent's application, concluding that the respondent's conduct was not in the best interests of Enfield and thereby outside the scope of s. 136(1): [1992] O.J. No. 2291 (QL). Blair's appeal to the Court of Appeal for Ontario was allowed on October 6, 1993: (1993), 15 O.R. (3d) 783, 106 D.L.R. (4th) 193, 66 O.A.C. 121, 12 B.L.R. (2d) 303. Enfield, now controlled by Canadian Express, appeals to this Court.

II. Relevant Statutory Provisions and Corporate By-laws

Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (OBCA):

> *134.* — (1) Every director and officer of a corporation in exercising his or her powers and discharging his or her duties shall,
>
> (*a*) act honestly and in good faith with a view to the best interests of the corporation; and
>
> (*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
>
> *135.* (4) A director is not liable under section 130 or 134 if the director relies in good faith upon,
>
> . . . . .
>
> (*b*) a report of a lawyer, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person.
>
> *136.* — (1) A corporation may indemnify a director or officer of the corporation ... against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party by reason of being or having been a director of such corporation or body corporate, if,
>
> (*a*) he or she acted honestly and in good faith with a view to the best interests of the corporation ....

Enfield By-law No. 3:

> 4.02 *Indemnity of Directors and Officers*. Subject to the limitations contained in the [OBCA], every director or officer of the Corporation ... shall, from time to time, be indemnified and saved harmless ... from and against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party by reason of being or having been a director or officer of such corporation ... if (a) he acted honestly and in good faith with a view to the best interests of the Corporation ....

III. Judgments Below

A. Ontario Supreme Court (1989), 46 B.L.R. 92, per J. Holland J.(sub nom. Canadian Express Ltd. v. Blair)

14 It is important to emphasize that it is not J. Holland J.'s decision that is appealed to this Court. The application before J. Holland J. was launched by Canadian Express to overrule, on the merits, Blair's decision to void the proxy votes tabulated in favour of Price. J. Holland J. found in favour of Canadian Express and named Price, not Blair, as the 11th director of Enfield. Blair appealed J. Holland J.'s decision; his application was summarily dismissed. However, a review of J. Holland J.'s decision is warranted since it (1) provides a factual background to the s. 136(1) issue involved in the present appeal, and (2) constitutes the first tier of the proceedings for which Blair is presently seeking indemnification. The matter before J. Holland J. is thus the underlying "litigation" for which Blair wishes his reasonable expenses defrayed by Enfield.

15 I note that the proceedings before J. Holland J. were commenced by Canadian Express even though Blair had convened another shareholders' meeting on July 24, 1989, ostensibly for the purpose of settling the outstanding voting issues. Blair was added to these proceedings in his capacity and status as a director of Enfield and as chairman of the shareholders' meeting of July 20, 1989.

16 J. Holland J. concluded (at p. 94) that "the true construction of the disputed proxies is that they conferred general discretion" on the proxyholders. He found that the proxies "were effectively converted to unsolicited shareholder proxies once the names of the proposed management proxyholders were deleted and the names of the shareholder designees were inserted". They were thus valid.

17 J. Holland J. noted "the importance of enabling shareholders to freely exercise their voting rights in accordance with their intentions" and underscored that "shareholder designees who hold blank proxies ... are recognized as having full discretion to vote as they see fit, just as the shareholders in person at the meeting could vote" (p. 94). He stated that the disputed proxies should be construed "in light of surrounding circumstances and, where possible, in a manner consistent with business common sense" (p. 95). With these considerations in mind, J. Holland J. held (at p. 95) that:

> ... I accept that [the proxyholders] were entitled to vote a total of 19,038,296 shares, which was more than 50 per cent of the shares represented at the meeting. There is no doubt on the evidence that the proxyholders intended to, and did, cast their votes for Price and not for Blair. [Emphasis in original.]

18 J. Holland J. found that the respondent "failed to meet the quasi-judicial standard of conduct demanded of a chairman" (p. 95). He stated that, based on the evidence, it could be reasonably inferred that the respondent was alerted to the fact that the election of directors would be contentious and that he was likely to be in a position of conflict. He noted that the respondent, when he reconvened the meeting to announce the results of the balloting, read from a statement prepared by his solicitors, stating that Price had received no votes and that he had been elected. He found that this was in accordance with the plan conceived by the respondent to protect his personal interests and that it was no excuse for Blair to say that he relied upon legal advice. J. Holland J. then concluded (at p. 96) that:

> From the tally, it was clear that all the votes cast by [the proxyholders] for Price had, by reason of the chairman's decision, been counted as votes resulting in his own election. He did not permit discussion at the meeting as to this decision. At the very least, he had an obligation to allow those affected by his ruling on the disputed ballots an opportunity to be heard. He chose to act as Judge in his own cause and it is properly inferred from the evidence that he had determined to act in this way, at least at the time of the July 19 meeting and until the announcement of the voting results. In view of Blair's conduct alone and quite apart from the true construction of the proxies, his ruling cannot stand.
>
> It was Blair's decision and not that of the scrutineers to determine the ballots in this way. It is no excuse for Blair to say that in doing so he was relying upon legal advice. It was his responsibility to conduct himself quasi-judicially throughout the proceedings.

19 J. Holland J. stated that, in exercising his discretion as to costs, he did so on the basis of the relationship of the respondent and Enfield in the sense that the respondent breached his fiduciary duty following legal advice given by Enfield's solicitors. J. Holland J. concluded that Canadian Express was entitled to costs against both Blair as well as Enfield. These were assessed (after an assessment appeal) at $165,432.67.

20 Blair appealed J. Holland J.'s order as to the proxy votes. This appeal was dismissed. He then commenced an application on Ontario Court (General Division) for a declaration that Enfield was to indemnify him for all costs, charges and expenses incurred by him in respect of the proceedings before J. Holland J. It is to this issue that I now turn.

B. Ontario Court (General Division)

21 Carruthers J. denied Blair's claim for indemnification.

22 Carruthers J. stated that the onus was on the respondent, pursuant to s. 136(1) OBCA to demonstrate, on a balance of probabilities, that he "acted honestly and in good faith with a view to the best interests" of Enfield throughout the litigation. However, Carruthers J. stated that, "following my opportunity to reflect on the merits of this application

on the basis of the material filed with the court to this point, I have been able to reach my conclusion without having to determine the issue of good faith on the part of Blair". In the end, Carruthers J. simply found that, since Blair's involvement in the Canadian Express application had not been undertaken with a view to Enfield's best interests, he was not entitled to indemnification.

23 Carruthers J. stated that the respondent's honesty and good faith were relevant for the purposes of the trial judge, who was not concerned with whether the respondent acted "with a view to the best interests of" Enfield in defending the litigation. Carruthers J. then stated that he had to be concerned with this last issue as it related to the respondent's conduct or involvement in the litigation. He concluded that:

> The applicable provisions of the Act or by-law require that his involvement in that litigation be in the best interests of Enfield quite apart from whether it can also be described as honest and in good faith. Thus, whether Blair was in fact acting honestly and in good faith during the course of his disputing or defending the claims of Canadian Express raised in the litigation, he is not entitled to succeed in this present application unless, as well, what he did can be said to have been in the best interests of Enfield.

24 Carruthers J. was of the view that the dispute was about the control of Enfield and "involved efforts by both sides to either preserve or promote their respective desires and interests in this respect". He found that the respondent, on the advice of Enfield's solicitors, reached the decision that he had been elected. The question at this point was whether the respondent had done this "in order to promote the best interests of Enfield." Carruthers J. concluded that:

> ... Blair's conduct at the meeting, including his decision, was not something that can be said to have been in the best interests of Enfield. Accordingly, because the sole purpose of disputing the claims raised on behalf of Canadian Express in the litigation was to uphold Blair's conduct, again including his decision, Blair cannot fit himself into either the provisions of s. 136(1) of the OBCA or of s. 4.02 of the Enfield By-Law No. 3.
>
> Both Blair and Enfield were properly named as parties to the litigation; Blair chaired and ran the meeting and made the decision, and Enfield to be bound by the result .... [a]s that matter was one personal to him, and as well to the other shareholders who supported him, Enfield is not liable to indemnify Blair for the costs, charges and expense which he has incurred by reason of defending the litigation.

C. Ontario Court of Appeal (1993), 15 O.R. (3d) 783

25 The Court of Appeal set aside Carruthers J.'s decision and permitted Blair to be indemnified under s. 136 for all proceedings (i.e. before J. Holland J., Carruthers J. and the Court of Appeal), with the exception of the appeal of J. Holland J.'s decision regarding the validity of the impugned proxies, and the expenses related thereto, which Carthy J.A. found not to have been reasonably incurred.

26 Carthy J.A. stated that the issue before the Court was the proper application to the facts of the By-law which granted rights of indemnity in the terms authorized by s. 136(1) OBCA. He also stated that "reliance upon legal advice cannot be excluded as a factor in determining whether a director acted 'honestly and in good faith with a view to the best interests of the corporation' as set forth in s. 136" (p. 787). He then held (at pp. 789-90) that:

> ... I read s. 136(1)(a) and the language 'acted ... with a view to the best interests of the corporation' as referring back to, in this case, the conduct of the vote for directors — not to the conduct of the litigation. The litigation that is contemplated by s. 136(1)(*a*) is against the director personally and the indemnity is against personal liability. There is no purpose in a requirement that personal litigation be conducted in the best interests of the corporation. The costs of litigation are dealt with separately in s. 136(1) and must be 'reasonably incurred'.

27 Carthy J.A. emphasized that the issue was Blair's ruling on the overall balloting, and "to conclude that his ruling was *male fide* because the result favoured him is to conclude that he was compelled to rule the other way, or give up the chair, no matter what advice he received" (p. 798). He then stated that, aside from the question of giving up the chair,

"the real test should be whether the ruling was made with the *bona fide* intent that the company have a lawfully elected board of directors" (p. 798).

28 Carthy J.A. found that the authorities generally described the chairman's duty as quasi-judicial "without defining what that means in this context" (p. 799). He stated that it was confusing "to use, and seek to define, the word judicial or *quasi*-judicial in this context because an adjudicator or judge can never have a personal interest in the issue". He then concluded (at p. 799):

> A chairperson who is more than a nominal shareholder of a public company, on the other hand, always has a personal interest in everything that affects the company, which includes all of the rulings of the chair. If that distinction is not recognized the reflex reaction is to assume that a decision which benefits the chair personally is non-judicial and thus not *bona fide*. In my view, it is preferable to describe the duty as one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company.

29 Carthy J.A. found that the events leading up to the election created an "aggressively competitive atmosphere". He also found that Blair "felt very strongly that the shareholders as a whole should be fully informed of a change in control" and that Blair "undoubtedly resented the surprise nomination of Price". In the end, this made the respondent "a protagonist in the duel for control". Carthy J.A. stated that, based on the sequence of events, Blair did not have a choice when he made the impugned ruling (at pp. 799-801):

> Given the necessity of determining who the legal directors of the company were, so that business could be carried on in a regular fashion, some decision had to be made. Even if a disinterested chairperson could have been found in the room, he or she would, in these circumstances, have had to look to the corporation's solicitors for an answer to this purely legal issue of interpretation. ...
>
> . . . . .
>
> No matter what debate might have ensued on July 20 and no matter who the chairperson might have been, there was no obvious error or oversight which would enable the chairperson to turn away from the advice of the company's solicitors.
>
> ... I am satisfied that Blair was acting honestly and in good faith and in the best interests of the corporation in accepting and implementing that advice.
>
> ... I am satisfied that the evidence shows that he properly performed his duty as chairman of the meeting.

30 Carthy J.A. considered whether Blair acted reasonably in his defence of the litigation and concluded that there was nothing unreasonable in Blair's involvement in the initial application as well as in the other proceedings.

IV. Issue on Appeal

1. Did the Ontario Court of Appeal err in concluding that the respondent Blair was entitled to be indemnified by the appellant Enfield regarding the costs of the Canadian Express application (and appeals on the costs issue emanating therefrom) pursuant to s. 4.02 of Enfield By-Law No. 3, modeled upon s. 136(1) OBCA?

V. Analysis

A. An Overview of the Legislation: Burden of Proof and the Scope of the Conduct That Is Caught

31 For purposes of convenience, I reproduce s. 136(1) OBCA (relevant portions underscored):

> *136.* — (1) A corporation *may* indemnify a director or officer of the corporation ... against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, *reasonably incurred* by him or her in respect of any civil, criminal or administrative action or proceeding to which he or she is made a party *by reason of being or having been a director* of such corporation or body corporate, if,

(*a*) *he or she acted honestly and in good faith with a view to the best interests of the corporation* .... [Emphasis added.]

32 The effect of s. 4.02 of Enfield By-law No. 3 essentially duplicates that of s. 136(1), although the wording does vary:

> 4.02 *Indemnity of Directors and Officers*. Subject to the limitations contained in the [OBCA], every director or officer of the Corporation ... *shall, from time to time, be indemnified* and saved harmless ... from and against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him in respect of any civil, criminal or administrative action or proceeding to which he is made a party *by reason of being or having been a director or officer of such corporation* ... if (a) *he acted honestly and in good faith with a view to the best interests of the Corporation* ....

33 Given that the effect of s. 4.02 of By-law No. 3 is essentially the same as that of s. 136, any interpretation given to the By-law by this Court will affect the application of the Act. Furthermore, s. 136(1) is reproduced in turn in the corporations law of many provinces, as well as federally: *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, s. 124; Newfoundland Corporations Act, R.S.N. 1990, c. C-36, s. 205; Manitoba *Corporations Act*, R.S.M. 1987, c. C225, s. 119; Saskatchewan *Business Corporations Act*, R.S.S. 1978, c. B-10, s. 119; Alberta *Business Corporations Act*, S.A. 1981, c. B-15, s. 119; British Columbia *Company Act*, R.S.B.C. 1979, c. 59, s. 152.

34 The largest difference between s. 136(1) and s. 4.02 of By-law No. 3 is that, whereas under s. 136(1) the director *may* be indemnified, under the By-law the director shall be indemnified. Is this of any importance? The respondent submits that this difference is relevant to the issue of the burden of proof. Since under the By-law indemnification is mandatory, the onus should lie on the corporation to demonstrate that the director acted with *mala fides*. I do not find this argument terribly persuasive.

35 What I do find more persuasive is the proposition that persons are assumed to act in good faith unless proven otherwise: *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, at p. 548. In this respect, contrary to the appellant's submissions before this Court, I believe that a proper construction of the statute and law related to good faith issues reveals that Blair is not required to prove his good faith, although he may certainly call evidence in this regard to counter whatever evidence of bad faith may be adduced against him. To a large extent, it is the corporation that must establish, to the satisfaction of the court, exactly what Blair did that was inimical to its best interests.

36 Section 136(1) and the Enfield By-law specify three conditions that the director or officer must fulfil in order to receive indemnification for the costs of defending in litigation:

> (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation;
>
> (2) the costs must have been reasonably incurred; and
>
> (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

37 As I will now discuss, Blair has fulfilled all three conditions entitling him to indemnification.

38 In terms of applying this law to the facts, I see no reason to disturb the findings of the court below that the expenses were reasonably incurred. The court grounded its assessment in the following factors:

> (a) Osler was retained in the annual meeting litigation to act for both Enfield and Blair, in his capacity as chairman of the meeting;
>
> (b) The Enfield board reviewed the issue of whether it should have separate counsel from Blair and determined that there were no grounds for Enfield taking such action;

(c) Blair added nothing to the costs of the litigation arising out of the shareholders' annual meeting;

(d) Blair's conduct following the shareholders' meeting, in requisitioning another shareholders' meeting for the purpose of electing directors, was consistent with his protestations throughout that he had no interest in leading the company if voted out by a majority of informed shareholders.

39 Thus, this appeal, when properly focused, involves only the "good faith" requirement contained within s. 136(1). In this connection, I now direct my attention to the respondent's conduct during the July 20, 1989 shareholders' meeting, bearing in mind that this conduct must be placed within the context of the longstanding corporate feud arising between the respondent and Canadian Express. However, before a determination can be made whether this conduct was undertaken in good faith and with a view to promoting the best interests of the corporation, I must respond to the appellant's contention that Blair is involved in this litigation in his personal capacity as opposed to his capacity as a director, thereby prima facie precluding him from the benefit of s. 136(1).

B. Is Blair Involved in this Litigation in his Capacity as Director/Chairman of Enfield or in his Personal Capacity?

40 The appellant submits that the Canadian Express application (and appeals related thereto) is essentially a dispute between two shareholders (Blair and Canadian Express) concerning the 11th position on Enfield's Board. As such, the logical inference to be drawn is that Enfield ought not to reimburse the losing shareholder, in this case Blair.

41 I disagree with this characterization of the Canadian Express application. It directly involved the reputation of Enfield and the integrity of its voting procedures; moreover, Blair's participation in the impugned proceedings flows entirely from his role as chairman of the meeting, not from his status as a shareholder. In fact, he was named as a respondent to the Canadian Express application in his capacity as "chairman of the meeting". The fact that, pending the outcome of that application, an interim order was adopted by McRae J. precluding Blair from acting as an Enfield director demonstrates the extent to which Blair was involved *qua* director, not *qua* shareholder or individual. Further, both Enfield and Blair were represented by the corporate counsel Osler. In a letter from Osler to counsel for Canadian Express dated July 25, 1989, Osler states:

> In your letter dated July 24, 1989, you asked us to clarify who we are representing in these proceedings. *In these proceedings we are counsel to Enfield and to Mr. Blair in his capacity as Chairman of the Annual Meeting. We are not acting for Mr. Blair in his personal capacity*. [Emphasis added.]

42 In short, the impugned acts in this case were corporate acts insofar as they were made within the authority accruing to the chairman of Enfield meetings. I now turn to the content of the chairman's responsibilities for the purposes of s. 136(1) and the question whether Blair's conduct on July 20, 1989 disentitled him from indemnification.

C. Factors Relevant in "Acting Honestly and in Good Faith with a View to the Best Interests of the Corporation"

(i) What are the "best interests of the corporation" in the context of this case?

43 The question is not who is the better director, or whether the corporation's best interests would be furthered by having one rather than the other as the 11th director. Rather, as Carthy J.A. held, the best interests of the corporation in the instant appeal centre solely on the maintenance of the integrity and propriety of the voting procedure.

(ii) The quasi-judicial role of a chairman

44 If chairmen at shareholders' meetings are under a quasi-judicial duty and if Blair is found to have breached that duty, such a finding could constitute evidence in favour of denying him indemnification under s. 136(1).

45 At the outset, I would like to express my agreement with Carthy J.A. that the term "quasi-judicial" is, in a certain sense, inappropriate to describe the duty of a chairman when that chairman is also (as will often be the case in the

corporate world) interested in the affairs that are being deliberated before him or her. A judge, adjudicator or arbitrator, on the other hand, will ideally never have any interest in the outcome of the proceedings before him or her. Consequently, chairmen of shareholders' meetings cannot labour under "quasi-judicial" duties in the strict sense because that term imports the idea of a wholly disinterested person.

46 In any event, Carthy J.A. correctly observed that it is one thing to state that a chairman is under a quasi-judicial duty, it is quite another to define the content of the responsibilities engendered by such a duty. Clearly, the chairman of any meeting, especially one mandated by and procedurally governed by statute, operates under certain duties of administrative fairness. The key question is to what extent a chairman will be permitted to be interested in the matters before him or her before a conflict of interest arises and he or she should be expected to cede the chair.

47 I would affirm Carthy J.A.'s standard; namely that the duty under which chairmen labour is "one of honesty and fairness to all individual interests, and directed generally toward the best interests of the company" (p. 799). However, when one turns to the application of this standard, a contextual approach is necessary. In this respect, it is very important to focus on the actual conduct of the chairman instead of perfunctorily finding bad faith simply because that person stands in a potential conflict and does not step down. As shall become evident, I do not find that Blair's conduct was such that he improperly used his position as chairman to further his own agenda. It was not his doing that the proxies were temporarily disqualified. We were not pointed to any evidence of a "design" or "plan" for the proxies to be invalidated.

48 In a sense, the argument of the appellant is rather simplistic: Blair was the chairman and because the proxies were deemed invalid and because no debate was fostered on the issue, Blair must have acted in bad faith. In response, I would affirm the following observations made by the Ontario Court of Appeal (at pp. 798 and 794):

> ... to conclude that [Blair's] ruling was *male fide* because the result favoured him is to conclude that he was compelled to rule the other way, or give up the chair, no matter what advice he received. ...
>
> It can also be assumed that he received the [legal] opinion agreeably and was not unhappy that he could make a ruling to thwart any attempt to alter the slate of directors. That falls short of a plan to deviously sidestep the entitlement of shareholders.

49 I also take issue with the appellant's statement that the fact that a chairman has an interest in the outcome of a decision impugns the integrity of the process because of the mere appearance of bias. With respect, it is the Enfield shareholders who concluded that it is to be the President of the company (who is allowed to be a director) — a person who invariably is interested in every matter discussed at the shareholders' meetings — who is to act as chairman (Enfield By- law No. 3, s. 5.05). In this respect, there is no unacceptable appearance of bias because it was never contemplated that the chairman was to be someone who would appear to be totally disinterested in the first place. The fact that a decision- maker has an interest in the outcome of his decision does not disqualify him or her from making decisions if the authority from which he or she obtains the status as decision-maker contemplates that he or she may act as judge in his or her own cause: *Alcyon Shipping Co. v. O'Krane*, [1961] S.C.R. 299, at p. 305; *Walters v. Essex County Board of Education* (1973), [1974] S.C.R. 481, at pp. 487-88.

50 The detailed organization of a corporation is essentially a private contractual matter. If the shareholders decide to designate the President as chairman, so be it. If the shareholders are concerned about the maintenance of *prima facie* impartiality, they can specify through the by-laws or otherwise that the corporate meetings are to be chaired by a neutral third party. It is helpful to note that the drafters of the OBCA considered these issues and in fact established as a default principle that interested parties should operate as chairmen of shareholders' meetings. Section 97(*c*) of this statute provides:

> *97.* Subject to this Act or the articles or by-laws of a corporation or a unanimous shareholder agreement,
>
> . . . . .

(*c*) the president or, in his or her absence, a vice-president who is a director shall preside as chair at a meeting of shareholders. ...

51 On a broader note, I find that there are valid policy reasons militating against blindly precluding anyone holding more than a nominal share in a public company from acting as a chairman. This is not practical for many closely held corporations and, moreover, might pave the way for much litigation regarding the definition of "nominal holdings", instead of properly focusing on the actual conduct that is impugned. There are many chairmen who have large holdings in a company yet conduct themselves on a most professional basis in terms of chairing meetings; there may be persons who own just one share who conduct themselves improperly. The focus should thus not be on the size of the holdings, but on the nature of the conduct. This is not to say, however, that there might not be situations in which the nomination of a wholly disinterested chairman is advisable as has apparently been the case in a number of situations that have arisen recently or where the court has appointed such a person pursuant to specific statutory provisions. However, such an exceptional situation is not found in the facts of the present appeal.

52 I now turn to the jurisprudence cited by the appellant in favour of the proposition that a chairman has a duty to act quasi-judicially: *Bomac Batten Ltd. v. Pozhke* (1983), 43 O.R. (2d) 344 (H.C.); *Gray v. Yellowknife Gold Mines Ltd.*, [1946] O.W.N. 938 (H.C.); *Johnson v. Hall* (1957), 10 D.L.R. (2d) 243 (B.C. S.C.); *Re United Canso Oil & Gas Ltd.* (1980), 12 B.L.R. 130 (N.S. T.D.); *Byng v. London Life Association Ltd.* (1988), 42 B.L.R. 280 (C.A.). I do not find that this jurisprudence supports the appellant's position. Quite the contrary: many of these cases demonstrate the extent to which courts, through hindsight, are reluctant to find chairmen to be in dereliction of their responsibilities barring proof of bad faith. Those remaining cases that offer some assistance to the appellant can readily be distinguished on the facts. To the extent that *Bomac Batten Ltd. v. Pozhke* is not distinguishable, I would overrule it.

53 On another note, although a chairman has an obligation to promote administrative fairness, this is necessarily tempered with the need to control and organize a meeting so as to ensure that it proceeds effectively. As noted by Chitty J. in *National Dwellings Society v. Sykes*, [1894] 3 Ch. 159, at p. 162:

> A question of some importance has been mooted in this case, with regard to the powers of the chairman over a meeting. Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner ....

54 In closing debate on the proxy issue, Blair was, based on Osler's instructions, fulfilling his responsibility as chairman to see that the shareholders' instructions as set out in the proxies were followed. Further, allowing the meeting to devolve into a shouting match between two rival camps debating a complex and unsettled area of corporations law could hardly be seen as enhancing the validity and integrity of Enfield's voting procedure. The function of a chairman is to oversee, not participate in a partisan sense. It may be sensible to refer briefly to the reason why the chairman is so ruling, but again courts should not attempt to hamstring in advance chairmen of meetings in contested settings. Although it is clearly proper for a shareholder to raise any relevant matter in the manner the Canadian Express representatives did, I cannot find anything improper in Blair's answer to the points raised, especially given his thorough consultation with Enfield's independent legal counsel.

55 In fact, s. 107 OBCA specifically contemplates that, in an imbroglio such as that presented in this appeal, recourse is to be had to the courts, not to the chairman. The rationale behind this provision is to avoid the spectacle that can result from continual challenges made during the corporate meeting to decisions made by the chair. Section 107 reads as follows:

> *107.* — (1) A corporation, shareholder or director may apply to the court to determine any controversy with respect to an election or appointment of a director or auditor of the corporation.

Blair properly instructed the Canadian Express representatives to take up their grievance with corporate counsel on the basis that the issue involved was a legal one. Despite the fact that corporate counsel were present at the meeting, the Canadian Express representative did not communicate with them.

56 On a final note, the duty of a chairman is to give effect to the proxy and ensure that the instructions it contains are followed. In this appeal, many of the beneficial owners of the shares for which proxies had been issued were not present at the meeting. The appellant submits that it was self-evident that these proxy-"givers" wanted to vote for Price. I find this untenable. First, there is no evidence that they had ever turned their minds to Price's candidacy. Second, and more importantly, the chairman has no duty to inquire into the minds of the beneficial owners of shares represented at a meeting: *Cohen-Herrendorf v. Army & Navy Department Store Holdings Ltd.* (1986), 55 Sask. R. 134 (Q.B.), at p. 148 (at paras. 80 and 81 citing Ontario and U.K. authority). There is no obligation to look behind the proxies. The chairman is simply required to give effect to their instructions. This is precisely what Blair did, believing Osler's interpretation of the instructions and thereby acting with a view to Enfield's best interests. Absentees from the meeting have the right to expect that proxy rules will be followed, and that their proxies will be applied pursuant to the instructions they place upon them.

57 In sum, the fact that Blair made the impugned ruling with the *bona fide* intent that Enfield have a lawfully elected board of directors constitutes evidence that he acted honestly and in good faith and with a view to the best interests of Enfield for the purposes of s. 136(1). Although his decision to disallow the proxies turned out, under judicial scrutiny, to be wrong, it did not evidence any *mala fides*. I am further buttressed in this conclusion by the fact that Blair entirely relied upon objective legal advice from corporate counsel in arriving at this decision. It is to this factor that I now turn.

(iii) The Reliance on the Legal Advice of Corporate Counsel

58 How does reliance on legal advice support a claim for indemnification under s. 136(1)? At the outset, I note my agreement with the position of the Court of Appeal that mere *de facto* reliance on legal advice will not guarantee indemnification. However, reliance that is reasonable and in good faith will establish that a director or officer acted "honestly and in good faith with a view to the best interests of the corporation". In the instant appeal, Blair's reliance on Osler's advice was both reasonable and in good faith.

59 Blair sought Osler's advice in the broadest of terms:

> You know the law. I will take my direction from you. What should I do?

60 Implicit in this query was not only concern over whether the proxies should be allowed, but also the question whether Blair should step down as chair, or whether he was in any position at all to make a decision. At no time did Enfield's corporate counsel ever suggest that Blair should relinquish control of the chair. If anything, Osler advised Blair that it was his duty, as chairman, to make a ruling. Osler did not advise Blair that he should hear submissions regarding the ruling; nor did they correct Blair's decision not to allow for such submissions. The ruling made by Blair was entirely prepared by Osler: Blair read verbatim from a script, with the exception of one gratuitous comment directed at Price which, although it probably should not have been made, was, given the tense atmosphere, understandable and, even if it were not excusable, certainly did not demonstrate bad faith or an intention to undermine the best interests of the corporation.

61 Osler deliberated over these issues for about an hour and a half. Blair did not participate in the substantive aspects of this discussion. There were six senior corporate lawyers present and they were in constant communication with Osler's head office. Furthermore, the conclusions they reached on July 20, 1989 were in line with the conclusions arrived at the night before as well as the results of the research memoranda prepared for Enfield. The point of the matter is that there was no reason for Blair, acting reasonably, to have believed Osler was making a hasty decision based on sketchy advice. In any event, Osler was Enfield's corporate counsel and it strikes me as odd that it would amount to "bad faith" or a dereliction of a chairman's duty of care not to solicit a second opinion from an independent legal counsel.

62 The evidentiary record reveals that Blair believed that, in relying on the advice of Enfield's corporate counsel, he acted in a prudent manner, in good faith and with a view to Enfield's best interests. Blair goes so far as to affirm in discovery:

> ... having gone through an hour, an hour and a half of deliberation, including a discussion with other counsel in their firm, and gone through a full process, I would have felt compelled to accept their advice and act on it.

63 If anything, I am sympathetic to the respondent's submission that he believed that the rejection of Osler's advice, which is what the appellant appears to suggest Blair should have done, could not be in Enfield's best interest:

> (a) Blair was not qualified to interpret and apply the law to the ballots and proxies;
>
> (b) Blair owed a duty to shareholders to see that the instructions contained in their proxies were followed;
>
> (c) The shareholders who had not received notice of the surprise nomination of Price and who were not present at the Shareholders' Meeting and who held enough votes to change the result had they received notice might have a cause of action if Price were declared elected against the advice of Enfield's counsel;
>
> (d) The shareholders who were represented by management proxies had no opportunity to assess Price or to vote in relation to his candidacy, and they relied on Enfield and its chairman to ensure that their rights at the meeting were protected.

64 In deciding not to reject the advice of counsel, Blair in fact fulfilled his fiduciary duty. Consequently, I would disagree with J. Holland J. to the extent that he held otherwise in a series of *obiter* comments not necessary to the resolution of the question before him (i.e. whether, upon their true construction, the proxies were validly voted).

65 The appellant cites some case law in favour of the proposition that reliance on legal advice in and of itself does not entitle an officer or director to indemnification: *Central & Eastern Trust Co. v. Rafuse*, (sub nom. *Central Trust Co. v. Rafuse*) [1986] 2 S.C.R. 147; *Exco Corp. v. Nova Scotia Savings & Loan Co.* (1987), 35 B.L.R. 149 (N.S. T.D.). Although this principle is found in the jurisprudence, it is not really relevant to the case at bar, given that the decision to permit Blair to be indemnified is not grounded in and of itself in Blair's reliance on the erroneous advice yet, instead, takes root in several considerations, such as the fact that he did not breach his duties as chairman, and is further coloured by the fact that the reliance on Osler's advice was fully made in good faith. I note that the case law cited by the appellant establishes that reliance on counsel's advice (even if it leads to a deleterious result) will strongly militate *against* a finding of *mala fides* or fiduciary breach, such a finding being necessary to disentitle one from indemnification. For example, in *Exco* at pp. 220-21, Richard J. held:

> *The presence of ... counsel ... do[es* have the result of absolving the directors of any allegation of bad faith with respect to their actions. Directors have a right, indeed a duty to rely on the opinion of counsel.] ...
>
> Although what the directors did, as a board, may have been unlawful, no liability can attach to the directors personally for what they did, having first received advice from ... counsel who held himself out as having experience and expertise in that area of the law. [Emphasis added.]

66 And, in *Rafuse, supra*, at pp. 215-16, Le Dain J. held:

> The executive officers of the ... Company and the members of the Executive Committee of the Board of Directors did not have a duty of care with respect to the legal aspects of a transaction other than to retain qualified solicitors to perform the necessary legal services. ... They might well have been negligent had they relied on their own legal judgment in such a case. ... the trust company "took the only course open to it to determine the validity of the mortgage, namely, consulting the solicitors."

67 It was reasonable for Blair to believe, and the evidence shows he did believe, that reliance on the advice of Osler was the only course open to him. Thus, it is clear that Blair fulfilled his duty of care under the Rafuse standard. This militates against a finding that he should not be indemnified for the subsequent litigation initiated by Canadian Express. I also note that such a conclusion is consonant with jurisprudence in other contexts which has held that reliance on actuarial and legal advice obtained from competent sources would militate against a finding of misconduct: *Bathgate v. National Hockey League Pension Society* (1994), 16 O.R. (3d) 761 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1994] 2 S.C.R. viii (for trustees); *C.M.S.G. v. Gagnon*, [1984] 1 S.C.R. 509, at p. 532 (a union's decision not to take a grievance to arbitration).

68 Of considerable relevance is the fact that reliance on the work of a lawyer has been recognized within the OBCA itself as comprising part of the director's standard of care. Section 135(4) reads as follows:

> 135 (4) A director is not liable under section 130 or 134 [describing the fiduciary duties and duties of care governing directors' conduct] if the director relies in good faith upon,
>
> . . . . .
>
> (*b*) *a report of a lawyer*, accountant, engineer, appraiser or other person whose profession lends credibility to a statement made by any such person. [Emphasis added.]

Blair fits within the scope of s. 135(4)(*b*) given that there was no reason to doubt Osler's competence. Osler was apprised of all the relevant facts, and Blair acted in full accordance with the advice that was given.

69 I should also mention that s. 135(4) codifies the anterior common law director duties of care, in which a director would be absolved of liability if he or she relied upon the work of an official of the company (in the present appeal, corporate counsel) if such work is properly left to that official and, in the absence of grounds for suspicion, the director is justified in trusting that official to perform the duty: *Re City Equitable Fire Insurance Co.* (1924), [1925] Ch. 407 (C.A.), per Romer J., affirmed (1924), [1925] Ch. 500 (C.A.). Consequently, directors will be held liable for the misdeeds of officials of the company only if they have been personally negligent or if they have acted unreasonably in relying on an official whose honesty or competence they have reason to suspect.

70 On another note, I cannot accept Enfield's submission that Osler was partial to Blair and acted on behalf of Blair and was hence not independent counsel. At all material times, Osler was Enfield's corporate counsel and represented Blair in that capacity as it was professionally obliged to; in fact, the only reason Osler represented Blair at the Canadian Express application was because Enfield was joined as a co-defendant. There is no evidence whatsoever that Osler's advice to Blair during the meeting was influenced by any partiality. Its conclusion as to the validity of the proxies was reasonable and involved a complicated question of law over which J. Holland J. heard, for eight days, expert testimony before reaching his conclusion. This seems to confirm that this issue would not have been solved by giving Canadian Express representatives a few moments to address the shareholders' meeting. Further, it should be remembered that Blair, a layperson, could not have been expected to be suspicious about advice that, prima facie, appeared legitimate and came from Enfield's own corporate counsel. I would affirm the Court of Appeal's finding that the advice given by Osler and followed by Blair would, to a layperson in Blair's circumstances (and with his business experience), have been "ostensibly credible" (p. 801). He thereby acted in accordance with the duties he owed.

(iv) The Interests of the Shareholders Not Present at the Meeting

71 Many of the persons issuing proxies were not present at the meeting. Although they may very well have been informed of the tensions between Blair and Canadian Express, they would certainly not have expected there to be a contested election for the position of 11th director. At the time the proxies were given to Ravelston and Canadian Express, it was assumed that the eleven persons listed in the management circular would simply be elected. The evidentiary record does not reveal that anyone's mind was alerted to the possibility that the proxyholders would use the proxies to nominate Price over Blair. No notice whatsoever was given of Price's nomination. In this context, I find some merit to Blair's

submission that his decision to follow Osler's advice must be viewed also in light of the interests of the shareholders not present at the meeting.

72 In the end, by following the instructions on the proxies and then requisitioning a new shareholders' meeting on July 24, 1989, Blair gave all shareholders an opportunity to make a fully informed decision regarding the election of the directors, thereby promoting the integrity of Enfield's voting procedures. Shareholders holding fully 16 percent of the shares of Enfield who were not aware that Canadian Express would attempt to take control of the Board were thus placed in a position of being able to make an informed choice as to how to vote (see judgment of the Court of Appeal, at p. 801). The corollary is that Canadian Express suffered no prejudice in respect of its voting rights in that it had the opportunity to nominate and support Price at the new meeting or pursue legal action against Enfield. Instead of waiting for the newly requisitioned meeting (at which it could have ensured that its proxies be filled out as per Osler's instructions), Canadian Express took the far more circuitous route of obtaining Price's election through the court system, with the hope of transferring the costs thereof upon Blair. A similar observation was made by Carthy J.A. (at pp. 802-3):

> *Given the opportunity provided by Blair's requisition of the meeting on July 24 the more obvious question is why Canadian Express did not drop the litigation. In a way, it was being offered the opportunity to correct the mistake that had apparently been made on July 19 and 20*. It was up to the board of Enfield to set the date for the meeting, and at a meeting on July 27 it was decided, without dissent and without Blair's involvement, to do nothing until the outcome of the court case was known. ...
>
> Blair added nothing to the costs of the proceedings, *his requisition of an annual meeting made it possible for the board to hold one before the litigation reached the courtroom*, and his conduct was consistent with his protestations throughout that he had no interest in leading the company if voted out by a majority of informed shareholders. [Emphasis added.]

73 In my mind, the fact that Blair promptly, and contrary to his personal interests, requisitioned a new meeting constitutes further evidence that his actions were taken with a view to the best interests of Enfield. If anything, Canadian Express's decision to pursue this matter through litigation drives against the well- being of Enfield's shareholders, especially those who have no personal interest in who acts as the 11th director, provided simply that individual discharge his or her duties to the corporation in a competent and trustworthy manner.

(v) Policy Concerns

74 Permitting Blair to be indemnified is consonant with the broad policy goals underlying indemnity provisions; these allow for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurism. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained. As noted by Jacob S. Ziegel et al. *Cases and Materials on Partnerships and Canadian Business Corporations*, vol. 1, 3rd ed. (Scarborough, Ont.: 1994), at p. 523:

> If an officer or director is compensated for acts of fraud or misappropriation effected against the corporation and its shareholders, then, apart from the negative publicity aspect of an explicit judgment against the director or officer, there will be little deterrent value left in legal controls, and agency costs will be left uncontrolled. In essence, indemnification would be tantamount to an employment contract recognizing that a director owes no duty to various corporate constituencies.
>
> *Despite the concerns with unrestrained managerial opportunism, a blanket prohibition against arrangements designed to minimize the impact of civil liability may be overbroad. There may be situations in which directors and officers are held liable for conduct that was not coloured by any opportunistic behaviour, and reflects outcomes that are the by-product of legitimate business judgments*. [Emphasis added.]

75 Given the circumstances of this appeal, denying Blair indemnification would, in my mind, run afoul of these policy concerns. See also Ronald J. Daniels and Susan M. Hutton, "The Capricious Cushion: The Implications of the Directors' and Officers' Insurance Liability Crisis on Canadian Corporate Governance" (1993), 22 Can. Bus. L.J. 182, at p. 187:

> To temper excessive care and activity level reactions to potential gatekeeper liability, modern corporate law statutes permit a corporation to indemnify a director for any expense reasonably incurred in defending, settling or satisfying a judgment for any action, provided that the director's fiduciary duty to act "honestly and in good faith and with a view to the best interests of the corporation" has been fulfilled.

VI. Conclusion and Disposition

76 The appeal is dismissed. Blair's ruling was made with the *bona fide* intent that the corporation have a lawfully elected Board of Directors. It is insufficient to say retrospectively that Blair "should have" acted differently or that he did not handle things perfectly in order to deny indemnification under s. 136(1). Actual *mala fides* must be shown such that the director did not act with a view to the best interests of the corporation. This has not been demonstrated in this case. Therefore Blair is entitled to indemnification for the costs arising out of the application before J. Holland J. (though not for the costs of appealing J. Holland J.'s decision regarding the validity of the impugned proxies, and the expenses related thereto, which Carthy J.A. found not to have been reasonably incurred.)

77 As pronounced at the hearing of the appeal, the appeal is dismissed with costs to the respondent on a solicitor-client basis. After the judgment was pronounced but before reasons were released, Blair brought a motion under Rules 5 and 51 of the Supreme Court of Canada Rules, for an extension of time and a rehearing, to seek clarification of this Court's order with respect to costs. Upon consideration of the materials filed by Blair and Enfield in connection with the motion, and upon consideration of all the circumstances, Blair is awarded his costs on a solicitor and client scale not only in this Court but also in the proceedings before Carruthers J. and in the Ontario Court of Appeal.

Appeal dismissed.

1998 CarswellOnt 4538
Ontario Court of Justice (General Division)

D.E. & J.C. Hutchison Contracting Co. v. Windigo Community Development Corp.

1998 CarswellOnt 4538, [1998] O.J. No. 4884, 80 O.T.C. 16, 84 A.C.W.S. (3d) 54

In the Matter of the Construction Lien Act R.S.O. 1990 c. C. 30

D.E. and J.C. Hutchison Contracting Co. Ltd., Plaintiff and Windigo Community Development Corporation and Placer Dome Canada Limited, Defendants

Kozak J.

Judgment: November 17, 1998
Docket: Thunder Bay 96-0261, 96-261, Kenora 95-212

Proceedings: additional reasons to (September 30, 1998), Doc. Thunder Bay 96-0261, Kenora 95-212 (Ont. Gen. Div.); refused leave to appeal (November 25, 1998), Doc. Thunder Bay 96-0231, 96-0261 (Ont. Gen. Div.); additional reasons at (February 4, 1999), Doc. Thunder Bay 96-0261, 96-261, Kenora 95-212 (Ont. Gen. Div.)

Counsel: *Morris J. Holervich, Esq.*, for the plaintiff.
David L. Corbett, Esq., for Placer Dome.
David Hunter, Esq., for Windigo.

Subject: Contracts; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.g Material facts
Civil practice and procedure
X Pleadings
X.1 General requirements
X.1.s Prolixity
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.c Pleadings
IV.10.c.ii Sufficiency of pleadings
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.l Costs
IV.10.l.ii Security for costs
Construction law
IV Construction and builders' liens
IV.10 Practice on enforcement of lien
IV.10.l Costs
IV.10.l.x Discretion as to costs

1998 CarswellOnt 4538, [1998] O.J. No. 4884, 80 O.T.C. 16, 84 A.C.W.S. (3d) 54

Headnote

Practice --- Pleadings — General requirements — Material facts

Parties involved in construction lien and extras actions — Plaintiff brought motion to amend statement of claim — Second defendant brought cross-motion to strike out proposed amendments — Second defendant objected mainly on ground that prior dealings between itself and plaintiff were not material facts — Statement of claim is struck if it discloses no reasonable cause of action when assuming all pleaded facts are true — Facts in pleadings not confined to those which must be proved to establish cause of action — Facts may be material even though not necessary — Factual merits of proposed amendments to be evaluated at trial — Proposed amendments allowed in part.

Practice --- Pleadings — General requirements — Prolixity

Parties involved in construction lien and extras actions — Plaintiff brought motion to amend statement of claim — Second defendant brought cross-motion to strike out proposed amendments — Statement of claim is struck if it discloses no reasonable cause of action when assuming all pleaded facts are true — Fact that proposed amendments were unduly prolix and lent prejudicial atmosphere not sufficient ground to deny amendments so long as pleadings were relevant — Proposed amendments allowed in part.

Table of Authorities

Cases considered by *Kozak, O.C.J.*:

Dale Perusse Ltd. v. Kason, 6 C.P.C. (2d) 129, [1985] I.L.R. 1-1985 (Ont. H.C.) — considered

Dimbleby & Sons Ltd. v. National Union of Journalists, [1984] 1 W.L.R. 427 (U.K. H.L.) — considered

Falloncrest Financial Corp. v. Ontario (1995), (sub nom. *Nash v. Ontario*) 27 O.R. (3d) 1 (Ont. C.A.) — considered

Foxcroft v. Pilot Insurance Co. (1992), 8 O.R. (3d) 600 (Ont. Div. Ct.) — considered

Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142, 74 O.A.C. 145 (Ont. C.A.) — considered

Hunt v. T & N plc, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959 (S.C.C.) — considered

International Corona Resources Ltd. v. Lac Minerals Ltd., 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 69 O.R. (2d) 287, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 26 C.P.R. (3d) 97, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574 (S.C.C.) — considered

Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co. (1995), 25 O.R. (3d) 106, 41 C.P.C. (3d) 75 (Ont. Gen. Div.) — considered

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04 — considered

R. 2.01 — considered

R. 21.01(1)(b) — considered

R. 26 — considered

ADDITIONAL REASONS in motions by second defendant to dismiss construction lien and extras actions against itself.

***Kozak, O.C.J.*:**

Introduction

1 In its reasons delivered on September 30, 1998, this Court outlined the series of motions that were presented in the herein matters and, in so doing, disposed of the said motions save and except the pleadings motions that were brought on behalf of the plaintiff with respect to the lien action and the extras action. Following a conference call that took place on October 16, 1998, counsel requested that this Court deal with the motion to amend the statement of claim in the lien action and to defer its decision with respect to the motion to amend the statement of claim in the extras action. In asking that the Court dispose of the motion to amend in the lien action, counsel filed a signed consent and acknowledgement in which certain admissions and paragraphs in dispute were brought to the attention of the Court.

Background

2 The statement of claim in the lien action was originally issued in Kenora, Ontario on September 18, 1995 as Court File No. 95-212 and was amended on March 5, 1996. The amended statement of claim contained some 33 paragraphs and included *inter alia* the following claims:

(a) $5,000,000.00 for goods and services;

(b) $5,684,092.00 as special damages for breach of contract;

(c) general damages of $2,000,000.00 for breach of contract;

(d) $250,000.00 as punitive damages; and

(e) in the alternative, the sum of $5,206,840.90 as restitution on a quantum meruit basis.

3 The lien action stems from an arrangement in February 1995 between Hutchison, Placer Dome, and Windigo for the construction of an all weather road leading to the Musselwhite Mine. Windigo, an aboriginal development corporation, with a total lack of experience, was made a party to the project as a result of the Musselwhite agreement, so that certain collateral economic benefits could be conferred upon aboriginal communities in the area. The contractual arrangement as described in paragraphs 14 and 15 of the statement of claim called upon the plaintiff Hutchison to perform substantially all of the work. The agreement, in form, outlines a promise by Hutchison to construct a road for Windigo in accordance with a contract signed between Placer and Windigo on April 10, 1995. The plaintiff stated in the statement of claim that it was unjustifiably instructed to cease work on the road by Windigo in breach of the contract at a time in July 1995 when an invoice in the amount of $3,726,874.00 remained outstanding and unpaid to Hutchison. As a result the herein action was commenced on September 18, 1995.

4 In May of 1996, following a motion by the plaintiff to fix a trial date, both defendants sought production and discovery. In the spring of 1996 Hutchison produced approximately 11,000 documents, Placer produced 6,300 documents, and Windigo produced 477 documents. Examinations for discovery were held in June and July 1997 at which time:

(a) Hutchison examined Placer for eight days;

(b) Hutchison examined Windigo for five days;

(c) Placer examined Hutchison for 19 days over a period of five weeks; and

(d) Placer has not commenced any examination of Windigo.

5 On October 7, 1997 Mr. Justice Maloney ordered that Windigo produce, within 30 days, all of its financial, accounting and banking records relating to the winter road and the all weather road and camp facilities, including all correspondence and filings with Revenue Canada. In *February 1998* Windigo produced a further 1,625 documents

including many documents other than those referred to in Mr. Justice Maloney's order. Included in these other documents were numerous contract documents not initially produced.

6 As a result of the productions and discoveries in which many previously unknown facts were brought to the attention of the plaintiff, a motion for leave to amend the statement of claim in the lien action was made returnable on December 8, 1997. In this regard a draft of the proposed amended statement of claim was attached to the affidavit of Ronald A. Hutchison, sworn December 4, 1997. The draft amended statement of claim contained 80 paragraphs and needless to say, extensive amendments. The double underlining depicts this as being the second round of amendments.

7 Paragraphs 5 to 10 provide background information pertaining to the construction of the all weather road, including the Musselwhite agreement which it is alleged, obliged Placer Dome to ensure the participation of First Nations in economic development opportunities which would arise from the construction of a mine at the lake. Windigo was incorporated for this purpose and was awarded a contract to construct the road for Placer in spite of its lack of equipment and experience because of Hutchison's agreement to participate in the actual construction.

8 Paragraphs 11 to 15 describe the previous dealings among the parties and, in particular, refer to previous dealings between Placer and Hutchison between 1986 and 1995 in which the parties bargained and dealt with each other in *good faith* in which compensation was commensurate with change.

9 Paragraphs 16 to 18 outlined the discussions that took place as between Hutchison and Placer prior to construction taking place.

10 The performance of the work is set out in paragraphs 19 to 23.

11 The contractual arrangements as between Hutchison and Placer and Hutchison and Windigo are pleaded in paragraphs 24 to 33. The facts as to the matter of camp facilities are pleaded in paragraphs 34 to 37.

12 Paragraphs 38 to 44 plead the quantities of work performed and their relationship to the estimates as submitted by Placer and Windigo. In particular, Hutchison's pleadings describe the quantities estimates as being insufficient to construct the road and that Placer was fully aware of this fact in asking Hutchison to complete the road. Paragraphs 45 and 46 refer to financial disclosures of Hutchison's construction costs.

13 The termination of Hutchison is pleaded in paragraphs 47 to 61, including Hutchison's advising Placer as to its perilous financial circumstances as a result of not having received payment for work performed and thereby facing insolvency and possible bankruptcy. Paragraphs 62 and 63 describe the appointment of a receiver to sell the assets of Hutchison and Hutchison's claim for damages against Placer as a result of the receiver being appointed.

14 Paragraphs 64 to 67 deal with Hutchison's claim for additional work as requested by Placer.

15 Paragraphs 68 to 72 deal with the plaintiff's claim for lien. Paragraph 73 is a claim based on quantum meruit.

16 Hutchison claims breach of contract by Placer in paragraph 74 and breach of contract by Windigo in paragraph 75. Damages are pleaded in paragraphs 76 to 79.

Argument

17 On January 30, 1998 and February 26, 1998 this Court heard argument with respect to the plaintiff's motions to amend the statement of claim in both the lien action and the extras action. The motions were adjourned to May 7, 1998 for continuation. As a result of submissions and judicial comment, counsel for the plaintiff saw fit to present and file a new draft revision of the proposed twice amended statement of claim in *both* the lien action and the extras action. A copy of this revised draft statement of claim in the lien action was forwarded to counsel for the defendants on April 29, 1998 as was the revised statement of claim in the extras action.

18 Mr. Corbett appeared on May 7, 1998 to argue the motions and informed the Court that he had just received the new draft revisions of the statements of claim two days ago. He also stated that he would be speaking on behalf of Mr. David Hunter, counsel for Windigo. The motions were argued and the Court's decision was reserved. In view of the late service of the revised statements of claim, Mr. Corbett requested and was granted the right to present further legal argument in writing. Counsel for the plaintiff was in agreement that counsel for the defendants be extended this right.

19 Written submissions on behalf of Placer, dated July 28, 1998, were delivered to this office relating to the statements of claim in both the lien action and the extras action. Some 33 pages of written argument were presented. This prompted counsel for the plaintiff to reply in writing to Placer's written submissions by delivering his written submissions on August 6, 1998. The plaintiff's written reply consisted of some 28 pages of argument and relevant case law.

20 On September 9, 1998 a conference call involving counsel for the parties and myself was conducted. The call was initiated by counsel for Placer, for the purpose of voicing an objection to the written reply of the plaintiff dated August 6, 1998 and asking to have the letter struck. It was indicated to all involved that the written submissions were reply argument, not evidence and that the plaintiff's reply was appropriate under the circumstances.

21 On October 19, 1998 a conference call was conducted which resulted in the following:

(1) The filing of a *consent and acknowledgement* which was executed by the parties with respect to the statement of claim in the lien action, in which the parties outlined those specific paragraphs where they were able to reach agreement, as well as those specific paragraphs where the parties were in disagreement.

(2) The filing of a *consent* that final argument and decision on the motion to amend this statement of claim in the *extras action* be deferred until after the Court's decision to amend the statement of claim in the lien action, and the disposition of a motion for leave to appeal the order of this Court refusing to strike the plaintiff's claim in the extras action.

22 In accordance with the consent and acknowledgement in the *lien action*, and dealing specifically with the proposed draft statement of claim delivered in May 1998, it is hereby ordered that:

(a) Paragraphs 14 and 19 are to be deleted.

(b) The phrase "including but not limited to" in paragraphs 84, 85, 86 and 87 is to be deleted and the phrase "consisting of" substituted therefore.

(c) The defendant's withdraw their objections to paragraph 90.

(d) The language of paragraphs 18(f) and 18(g) is to be changed as follows:

18(f) Placer promised Hutchison that Hutchison would be paid extra for any work or expense in addition to that contained in the proposal and that Placer would treat Hutchison fairly as it had in previous dealings between the parties.

18(g) Placer and Hutchison agreed to at all times trust each other and treat each other fairly, equitably and with good faith.

It is understood that although the defendants agree to have the language changed, that they are not consenting to the amendments. They simply wish to have the amendment decided on the basis of the revised wording. In its written submissions of July 28, 1998, tab A page 3, paragraph 18 was found to be acceptable to Placer and agreed to by Hutchison. The Court sees no reason to deny these pleadings in that they simply reflect an allegation of fact that the parties had formed an intention to bargain and perform in good faith. These amendments are therefore allowed.

23 Prior to dealing with the individual paragraphs in the statement of claim in the lien action that are in dispute, an overview of the objections of Placer would be helpful in understanding the concerns of the parties. To begin with, Placer takes the position that the pleading is prolix and repetitive and that substantial portions of the proposed draft constitute background evidence that may very well be admissible at trial but, is not necessary or proper in the pleadings. Placer submits that the lien action contains the following claims: the lien claim, the contract claims, the quantum meruit claims and the damages claims and that only the material facts necessary to give rise to these claims should be included in the statement of claim. Placer's position as to the allegations of a course of prior dealings as between itself and Hutchison, in which they agreed to conduct themselves in good faith, does not give rise to an independent contractual term to act in good faith and, that there is no authority in Canada to support such an obverse proposition. Accordingly, Placer is of the view that such prior dealings are not material facts that should be allowed to be pleaded. Furthermore, that the pleading of such prior dealings would make the case even more unwieldy. As to the claim for consequential losses, Placer expresses the view that such a claim will expand the scope of production and trial substantially and may involve additional parties such as the plaintiff's bank.

24 The plaintiff Hutchison considers the prior dealings as between itself and Placer to be material and germane in establishing the special relationship that the plaintiff was to assume with Placer in the construction of the all weather road, given the involvement and total lack of experience of Windigo with respect to such a project, and the manner in which the plaintiff was being called upon to evaluate and build the road. As to the matter of consequential loss, Hutchison takes the position that Placer was aware that Hutchison had completed over 90% of the road, was only paid 3.8 million dollars and was overdrawn at the bank when Placer required Windigo to revoke a direction to pay a $700,000.00 progress payment to the plaintiff and thereby should have known that the bank would act to liquidate the plaintiff.

25 As opposed to Placer's position that the pleadings tell a long story that gives rise to different legal theories and causes of action, the plaintiff states that the narrative style of pleading in this case is necessary because of the unique and unusual circumstances of this case, and that detailed allegations of fact are required to give definition to the matters in issue and to give proper notice of the claims to the defendants in light of the complexities of the case.

Principles of Pleadings

26 The principal objects of pleadings are fourfold:

(1) To define with clarity and precision the issues or questions which are in dispute;

(2) to give fair and proper notice to the other side of the case that they have to meet;

(3) to inform the Court as to what are the precise matters in issue between the parties; and

(4) to provide a permanent record of the issues raised and decided in the action so as to prevent further litigation upon matters already litigated.

27 On a motion to strike out a pleading, the Court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof. Moreover, the Court should not, at an earlier stage of proceedings, dispose of matters of law that have not been fully settled in the jurisprudence. *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.).

28 The threshold for sustaining a pleading under Rule 21.01 (1) (b) is not a high one and the fact that the cause of action is novel, is not a bar to its proceeding to trial. Furthermore, the categories of relationships giving rise to fiduciary duties are not closed, nor are the categories of negligence in which a duty of care is owed. *Hanson v. Bank of Nova Scotia* (1994), 19 O.R. (3d) 142 (Ont. C.A.)

29 Claims for punitive and exemplary damages for mental distress in a breach of contract action should not be struck merely because succeeding in such a claim is rare. *Foxcroft v. Pilot Insurance Co.* (1992), 8 O.R. (3d) 600 (Ont. Div. Ct.)

The Court permitted a claim for punitive and exemplary damages in an action against an insurer for breach of its duty of *good faith and fair dealing*. *Dale Perusse Ltd. v. Kason* (1985), 6 C.P.C. (2d) 129 (Ont. H.C.).

30 The doctrine of interference with contractual relations has been extended to include ... where the performance became more difficult though not impossible. *Dimbleby & Sons Ltd. v. National Union of Journalists*, [1984] 1 W.L.R. 427 (U.K. H.L.).

31 The test on a motion to strike out portions of a statement of claim was enunciated by the Supreme Court of Canada in *Hunt v. T & N plc* (1990), 74 D.L.R. (4th) 321 (S.C.C.) at 336:

> Assuming that the facts as stated in the statement of claim can be proved it is plain and obvious that the plaintiff's statement of claim discloses no reasonable course of action.

32 A party is bound by his or her pleadings and is confined to the issues raised by the pleading. Failure to raise a matter in the pleadings may very well be that the point will not be open at trial or appeal. The matters in question in an action are those defined in the pleadings. The pleadings limit the scope of discoveries as much, if not more than, the scope of the trial.

33 Pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved. However, a pleader is not confined to pleading only facts which must be proved in order to establish a cause of action. Certain facts may be material even though they are not necessary. They may be relevant to the cause of action, the quantum of damages or the type of relief being sought. No averment should be omitted which is essential to success.

34 The fact that a fresh statement of claim is unduly prolix and provides a prejudicial atmosphere is not sufficient ground to deny amendments so long as the pleading is relevant. (See *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Ont. Gen. Div.).

35 The factual basis for a proposed amendment is not a material consideration at the amendment stage. The more appropriate time to evaluate factual merits of claims or defences is at trial. The test to be applied is the plain and obvious test where assuming all the facts, as pleaded, are true, the statement of claim discloses no reasonable claim.

36 The complexity or novelty of the question should not act as a bar to the trial taking place or the claim being pleaded.

37 Rule 26 and the liberal policies stated in Rules 1.04 and 2.01 provide that the Court shall grant leave to amend a pleading at any stage of the action on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment. No such prejudice is found to exist in this case.

38 An amendment should not be allowed to a pleading where it discloses or advances no reasonable cause of action.

39 Motions to amend pleadings are frequently controversial and cause great expense to the parties. Extensive examinations into factual merits of the proposed amendments is particularly costly. The more appropriate time to evaluate factual merits of claims or defences is at trial.

Determinations

40 Paragraph 1, Placer argue that paragraphs 1 B(c) and 1C(c) should be deleted because they duplicate the claim in paragraph 1(1). Counsel for the plaintiff agrees. The balance of paragraph 1 is acceptable and is hereby allowed.

41 Paragraph 2 is acceptable to the defendants and is allowed.

42 Paragraph 5 is acceptable to Placer and is allowed.

43 It is submitted by Placer that paragraph 6 is unnecessary background which does not add anything useful to the information contained in paragraph 5. This Court agrees. To permit this amendment would be to open up a needless area of examination and production. Paragraph 6 is hereby ordered to be struck.

44 In paragraph 7 the plaintiff pleads the Musselwhite agreement, to which Placer and Windigo were parties, with respect to the Musselwhite property. It is pleaded that the Musselwhite agreement obligated Placer to ensure First Nations' participation in economic development opportunities which would arise in the event Placer constructed a mine at the lake. Windigo was incorporated for this purpose. Placer argues that, at most, the Musselwhite agreement may provide content as to why certain contractual arrangements were entered into but, that motive is not material in a contract action. Accordingly, it is argued that the Musselwhite agreement is not a material issue in the proceeding, is not related to the cause of action, and is not central to any breach. The plaintiff argues that the Musselwhite agreement and paragraph 7 formed the framework or backdrop against which Placer conducted its dealings with both Hutchison and Windigo in relation to the road contract. The said agreement, which provided for the involvement of Windigo in the road construction project, is relevant to the plaintiff's claim for payment on a quantum meruit basis and the obligations that were imposed on Hutchison to make economic opportunities available to members of the First Nations. Accordingly, paragraph 7 is found to be proper and is allowed.

45 Paragraphs 8 to 10 relate to a contract entered into, in late 1994, between Placer and Windigo for the construction of a winter road from highway 808 to the lake, at which time it was made clear to Placer that Windigo simply lacked the equipment, experience, and expertise to construct an intended all purpose road and, that Placer's concerns were alleviated as a result of Hutchison's agreement to participate in the construction of the road. Placer submits that the construction of the winter road is not a material fact that relates to the construction of the all weather road. The plaintiff states, at paragraph 55 of the revised proposed statement of claim, that Windigo used monies received from Placer, under the all weather road contract, to pay for debts it incurred on the winter road project. In the Court's view the facts pertaining to the construction of the winter road points out the inability of Windigo to engage in any productive participation in the all weather road and, the reasonable expectations that Placer and Hutchison would expect from each other to insure that the project was properly completed. Accordingly, paragraphs 8 to 10 are hereby allowed as amendments.

46 Paragraphs 11 and 12 are brief statements of fact as to previous dealings between Placer and Windigo prior to February 1995 and, between Hutchison and Windigo prior to February 1995. In both instances it is pleaded that there were no such previous dealings. Placer states these pleadings cannot be material to the contractual terms among the parties. Hutchison argues that the facts pleaded are material to issues respecting the identification of the contractual terms among the parties. It is not plain and obvious that paragraphs 11 and 12 should be struck and these amendments are therefore allowed.

47 Paragraphs 13 and 14 plead prior dealings as between Hutchison and Placer involving the performance of some $10,000,000.00 of construction work. During the course of these prior dealings, it is pleaded that the parties agreed to deal with each other fairly, equitably, and in good faith and, in those cases, where the quantity of the work changed substantially, that payment would be commensurate with the change. Placer argues that the allegation of a term to act in good faith, as a result of prior dealings, is an allegation that a normal principle of contractual interpretation be elevated into an implied independent contractual term. Placer further argues that such a pleading is simply an attempt to allege a breach of trust in a lien action which it states the plaintiff cannot do. The plaintiff counters by stating that the materiality of these allegations is not confined to the determination of the contractual terms. It is argued by the plaintiff that although the *Act* states that a trust claim shall not be *joined* with the lien claim, the *Act* contains no prohibition against alleging a breach of trust as a result of Placer failing to act as promised or, being in breach of contract. As a rule, allegations of prior transactions, which may show a course of conduct tending to support the plaintiff's claim, have been struck out as being evidence in support of the claim. Contrary to the submissions of counsel for Placer that there is no authority in Canada that elevates good faith dealings to the status of an independent contractual term, there is an emerging doctrine in modern contract law that imposes not only a duty to bargain in good faith but, to also perform

the contract in good faith. In this regard see *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) where LaForest J. stated:

> The institution of bargaining in good faith is one that is worthy of legal protection in those circumstances where that protection accords with the expectations of the parties

The duty to bargain and perform the contract in good faith relies upon the following factors:

(1) A unique factual context.

(2) A relationship of trust and co-operation.

(3) The expectation of the parties.

Counsel for the plaintiff submits that all of the above factors are present in this case, as defined in the facts set out in the pleadings. In particular, the prior relationship of trust and co-operation, as between Hutchison and Placer, arose when Hutchison was called upon to commence work with no tender documents and little or no engineering or geo-technical investigation being done. It was argued that no contractor would assume the risks, inherent in undertaking the work, under these circumstances without relying on independent good faith from Placer. The amendments in paragraphs 13 and 14 are hereby allowed.

48 Paragraphs 15 to 17 deal with the proposal or pre-contractual dealings which Placer submits are unnecessary background and therefore not material. The plaintiff states that the facts alleged are material in that the proposal was a joint effort between Placer and Hutchison based on quantity estimates provided by Placer, which allegations are fundamental to Hutchison's case.

This Court agrees with the plaintiff and hereby allows the amendments. It is difficult to understand why there should have been an objection to these paragraphs, given that this narrative form of pleading, in the circumstances of this case, was calculated to better define the contractual arrangements.

49 Paragraph 18 is acceptable to both parties and is hereby allowed.

50 By agreement, paragraph 19 is hereby deleted.

51 In objecting to paragraphs 20 and 21, Placer is repeating its assertions that general obligations, to act in good faith, do not give rise to express and specific contractual terms. In addition, it states that allegations respecting the financial position of Hutchison are not material to any allegations, other than the claim for consequential damages, and even if that claim is permitted to proceed, the allegations are not a sufficient basis for the claim. The plaintiff states that the purpose of paragraph 20 is to give Placer fair notice of what it is that Hutchison says Placer was specifically obliged to do, in fulfilment of its contractual obligation, to treat Hutchison fairly and in good faith. As to the allegations of Hutchison's financial position, the plaintiff contends that this is material to its claim for consequential loss. For reasons previously stated with respect to prior dealings and, the duty to bargain and perform in good faith, the paragraph 20 amendment is hereby allowed. Paragraph 21 alleges facts in support of a claim for consequential damages and the amendment is hereby allowed. As to whether the facts are sufficient, to support the claim, will be for the trial Judge to determine.

52 Paragraphs 22 and 23 are not in dispute and are allowed.

53 Placer objects to paragraphs 24, 26, 27 and 28 which relate to the making of contracts, among the parties, on the grounds that there is nothing material about the dealings as pleaded but, at the same time, concedes that the making of the contracts will be relevant in evidence at trial. Counsel for the plaintiff agrees that the said paragraphs are relevant, if not material. Under the circumstances, these amendments are being allowed so as to give the Court a clearer insight of the plaintiff's position in an area of the case which is the subject of controversy.

54 Paragraphs 25, 29 and 30 are not in dispute. Similarly, paragraphs 31 to 37 are not in dispute and are allowed.

55 Placer submits that paragraphs 38 to 43, which deal with the camp facilities, are confusing and may be immaterial. Placer suggests that these allegations, if they are to be permitted, should be clarified. Hutchison seeks leave to further amend these paragraphs to clarify the concerns of Placer. Paragraphs 38 to 43 are allowed, subject to leave of this Court to further amend the said paragraphs.

56 In paragraph 44 it is pleaded that following the termination of Hutchison's involvement in the road project, Placer agreed to purchase and Windigo agreed to sell the north end camp facilities and, Placer made to Windigo and Windigo received from Placer payments for the use of the north end camp facilities. Placer submits that this is an immaterial pleading and ought not to be permitted, given the pleadings in paragraphs 31(c) and 32(c) that the construction of the camps was a Windigo Corporation project in connection with the road. In claiming that this pleading is immaterial and ought not to be permitted, Placer states that nothing is pleaded anywhere about the ownership of the camps and Hutchison's position is that it did work on the camps for Placer and Windigo and is unpaid. Placer states that nowhere is it alleged that Hutchison has lien security over the camps, that such lien security could exist in the camps or, that it is entitled to any remedy in respect of the camps. Placer states that the sale of the camps is not material to any issue in this proceeding, other than the enforcement of any judgment that Hutchison may obtain. Hutchison's position is that its claim for lien extends to include the North camp and that the claim for lien creates an interest in the camp in favour of Hutchison. The plaintiff states that the allegations are material to its quantum meruit claims and claims for punitive damages. The plaintiff meets the threshold in the matter of materiality and the amendment is allowed.

57 Paragraph 45 pleads the non-disclosure of design and geo-technical reports, cost estimates and other information by Placer to Hutchison. This is information which Hutchison alleges that Placer had in its possession, make it apparent that the quantity estimates provided by Placer to Hutchison would be insufficient to construct the road and, that the costs to construct the road would exceed the $7.295 million price in the proposal. Placer argues that this allegation is immaterial in that it is an allegation of negligent misrepresentation which should not be included in a lien action. Hutchison states that this paragraph contains specific allegations respecting what Placer did or did not do in the disclosure of information in its possession concerning the anticipated cost of the road and the work required to construct same. Hutchison says that the allegations in this paragraph are particulars of the allegations in paragraph 20(a). Hutchison expresses the view that negligent misrepresentation and breach of contract may flow from the same facts and, that the remedies are not mutually exclusive. The amendment is hereby allowed.

58 Paragraph 46, which further deals with the non disclosure of the information stated in paragraph 45, is also allowed as an amendment in that it is alleged in paragraph 18(b) of the claim that Placer promised to deliver a detailed design specification in a timely manner.

59 Paragraphs 47 to 50 are not in dispute and are hereby allowed as amendments.

60 Paragraphs 51 to 53 are pleadings pertaining to financial disclosures that were provided by Hutchison to Windigo and Placer, and requests by Hutchison to Windigo for a disclosure of its costs which, when they were received, were related by Hutchison to Placer. Counsel for Placer takes the position that these allegations are immaterial in that no legal consequences flow from such an alleged failure to make disclosure. Placer contends that where alleged facts have no legal consequences, even though they may be admissible at trial, they should not be set out in the claim. Counsel for Hutchison argues that there is no authority for the sweeping proposition that facts having no legal consequences should not be set out in the claim. He contends that pleadings often contain particulars, some of which may be narrative, to not only enable the other parties to comprehend the pleading party's position, but to also assist the trial Judge in establishing a comprehensible framework for the reception of evidence, particularly in a case such as this, where the Court is presented with an unusual set of circumstances. This Court is of the view that paragraphs 51 to 53 be allowed as amendments.

61 Placer objects to paragraphs 54 to 61 on the basis that they are prolix and immaterial. The allegations relate to events leading to the termination of Hutchison's contract, which Placer states is not material to the real issues, i.e. whether the termination was justified and how much, if anything, may be owed to Hutchison by Placer and/or Windigo. Furthermore, the allegations that Windigo breached trust obligations and that Placer knew this to be the case, are not permitted in a lien proceeding, according to Placer. Hutchison's position is that it is claiming punitive damages against Placer for its high handed and arrogant conduct in terminating Hutchison from the project and, that Placer will be required to justify the termination. Therefore, the events leading up the termination are material. As to Placer's contentions respecting the inclusion of material alleging a breach of trust by Windigo, the plaintiff relies on its previous submissions in this regard. This Court finds the allegations of fact to be material and paragraphs 54 to 61 are hereby allowed as amendments.

62 Hutchison, in pleading wilful and deliberate repudiation by Placer, for reasons unrelated to the conduct of Hutchison in paragraph 63, has done so for the purpose of grounding a claim for punitive damages. Placer claims that this ought not to be permitted because punitive damages will only arise in a contract case where the conduct complained of amounts to an independent wrong and, the controlling of business costs and maintaining business relations do not constitute such independent wrongs. This Court finds that Hutchison has pleaded sufficient particulars to ground a claim for punitive damages against both Placer and Windigo. Accordingly, paragraph 63 is allowed as an amendment.

63 Paragraph 64 is acknowledged not to belong in a lien action in that it was pleaded to support a claim for wrongful interference with contractual relations. Accordingly, it is hereby struck.

64 Paragraph 65, which describes Placer's conduct, in inducing Windigo to terminate its conduct with Hutchison, is a proper plea in support of the claims for breach of contract and punitive damages. Paragraph 65 is therefore allowed as an amendment.

65 Paragraph 66 to 68 are not in dispute and are allowed as amendments.

66 Paragraph 69 pleads the fact that audits were prepared of Hutchison's and Windigo's costs and, that inadequate particulars were provided as to Windigo's costs. Placer states that these facts ought not to be permitted because, although the actual costs expended by Windigo and/or Hutchison are clearly material to this proceeding, the evidence by which such costs may or may not be established is not. This Court agrees paragraph 69 is immaterial, given the allegations contained in paragraphs 32(e) and 85(k). Paragraph 69 is hereby disallowed.

67 Paragraphs 70 to 74 relate solely to the claim for consequential loss. Placer submits that these allegations should not be permitted in that the assertion that the losses were foreseeable, and not remote, is a bald allegation with nothing being pleaded to establish the basis of the claim. The plaintiff's allegations contain a sufficient basis to deal with the issues of foreseeability and remoteness and the pleadings contained in paragraphs 70 to 74 are hereby allowed.

68 Paragraphs 75 to 78 are acceptable to Placer, except for the following phrase in paragraph 78, "despite having notice of Windigo's unrelated and unnecessary expenditures, Windigo's breach of trust, Hutchison's indebtedness to its bank". Placer's submission is that these matters do not give rise to any legal consequences for the alleged failure of Placer, or its alleged payments to Windigo. Hutchison's response is that the allegations are material to the claim for punitive damages. It is this Court's decision that paragraphs 75 to 78 be allowed as amendments in their present form.

69 There is no dispute as to paragraphs 79 to 83 and these paragraphs are allowed as amendments.

70 In paragraph 84 Hutchison pleads breach of contract by Placer and then goes on to state the conduct of Placer that constitutes the said breach in subparagraphs (a) to (u). Placer's position with respect to this pleading is that subparagraphs (a) to (d) are acceptable and, accordingly, these amendments are allowed. Placer objects to subparagraph (e), which it states is an allegation of negligent misrepresentation elevated to an alleged breach of contract and, as such, should not be permitted in a lien action. Hutchison states that subparagraph (e) is an allegation that the failure to disclose documents and information is itself a breach of contract and, that such failure may constitute both negligent misrepresentation and

breach of contract. As stated previously by Hutchison, the remedies are not mutually exclusive and Placer is not relieved of any liability in contract for the alleged conduct simply because the conduct also constitutes a tort. This Court finds the allegation in subparagraph (e) to be proper and the amendment is allowed. In subparagraph (f) Hutchison refers to Placer's refusal to provide, in a timely manner, its written contract with Windigo. Placer contends that subparagraph (f) is improper in that there is no legal remedy for failure to produce such a document in that there is no allegation that the document has legal force. Such an allegation does, however, surface in subparagraph (g), which Placer states is not grounded in the pleadings. Hutchison argues that subparagraph (f) is proper in that at paragraph 20 (a) of the claim, Hutchison alleges Placer's contractual obligations to Hutchison to provide a copy of its written contract with Windigo and paragraph 84 (f), alleges that Placer failed to do this. As to subparagraph (g), Hutchison argues that this is a proper pleading in that technical specifications were delivered to Hutchison, which Hutchison would be expected to look at, in relation to the building of the road. Placer later changed the specifications and did not tell Hutchison that it did so and now maintains that its obligations to everyone, including Hutchison, is as defined in the specifications, which it altered. This Court views the alteration as having contractual force from which legal consequences may flow and, accordingly, subparagraph (f) is hereby allowed as an amendment. Subparagraphs (h), (i), (d), and (k) are not in dispute and are hereby allowed as amendments. Subparagraphs (1), and (m) relate to Windigo's breach of trust and, as such, according to Placer are improper in a lien action. Hutchison repeats its contention on this issue that subparagraphs (1) and (m) are allegations of fact, which are broken promises of Placer to Hutchison, and that there is no prohibition against advancing a claim for breach of contract where the circumstances alleged to constitute a breach of contract, also constitute a violation or some breach of trust imposed under the *Construction Lien Act*. This Court finds subparagraphs (1) and (m) to be proper pleadings and they are hereby allowed as amendments. Subparagraphs (n) and (o) relate to the construction of the camps, which have been discussed earlier, and both amendments are hereby allowed. Similarly, subparagraphs (p) is also allowed as an amendment. Subparagraphs (q), (r), (s), and (t) relate to the circumstances surrounding the termination of Hutchison's involvement in the road. Here again these matters have previously been discussed and determined and, the said paragraphs are hereby allowed as amendments.

71 Paragraph 85 Hutchison pleads breach of contract by Windigo and then enumerates in subparagraphs (a) to (u) the conduct that constituted the said breach. The same general comments were made by counsel for Placer, on behalf of Windigo, as were made with the alleged breaches of contract by Placer in paragraph 84. To begin with, there are no objections to subparagraphs (a) to (j) and these amendments are therefore allowed. Subparagraph (1) is also not in dispute and is allowed as an amendment. For reasons similar to that under paragraph 84, the remaining subparagraph are allowed as amendments. In summary, paragraph 85, in its entirety, is allowed as an amendment.

72 Paragraphs 86 and 87 relate to damages for breach of contract by Placer and Windigo. Placer accepts subparagraph (a) of paragraphs 86 and 87, but objects to subparagraph (b) which deals with consequential loss. For reasons given previously, subparagraph (b) of paragraphs 86 and 87 are found to be proper pleadings. Paragraphs 86 and 87 are therefore allowed as amendments.

73 Paragraphs 88 and 89, which relate to punitive damages, are hereby allowed as amendments for reasons previously given.

74 Paragraphs 90, 91, 92, and 93 are not in dispute and they are hereby allowed as amendments.

75 Order to issue accordingly.

Counsel may speak to the matter of costs and scheduling leading to the earliest possible date for the trial of this proceeding.

Order accordingly.

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De Iuliis v. Zilli

2014 CarswellOnt 13547, 2014 ONSC 5515, 245 A.C.W.S. (3d) 47

Danilo de Iuliis also known as Danny de Iuliis, Emilia de Iuliis, Sebastian de Iuliis, by his litigation guardian, Emilia de Iuliis, Andrea de Iuliis, by her litigation guardian, Emilia de Iuliis, and Dominic de Iuliis, by his litigation guardian, Emilia de Iuliis v. Luigia Grazia Zilli, personally, and carrying on business as Kerr Village Art Gallery, and Corporation of the Town of Oakville operating as "Town of Oakville"

Emery J.

Heard: August 21, 2014
Judgment: September 25, 2014
Docket: Milton 1864/14

Counsel: Douglas J. Simpson, for Plaintiffs
Robert W. Wilson, for Defendant, Luigia Grazia Zilli
Scott Hamilton, for Defendant, Corporation of the Town of Oakville

Subject: Civil Practice and Procedure; Public

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.g Scope of documentary discovery
XII.2.g.v Miscellaneous

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Miscellaneous

Plaintiff D was employed by town — D alleged that individual defendant made complaint to town which resulted in his termination — D and members of his family brought action against individual for various torts and against town for defamation and negligent investigation — Before pleadings closed, plaintiffs brought motion for production of documents from town — Motion granted — Documents were made essential when town gave notice of intention to bring motion to strike statement of claim — Prdoduction would enable plaintiffs to amend statement claim to meet technical requirements for pleading defamation and negligent investigation — It would be fundamentally unfair for town to demand particulars it already possessed and also seek to strike pleadings because of documents it controlled and was holding back — Motion not fishing expedition but legitimate request — Plaintiffs at unfair disadvantage by not having access to documents.

Table of Authorities

Cases considered by *Emery J.*:

Freedom International Brokerage Co. v. Tullett Prebon Canada Ltd. (2009), 2009 CarswellOnt 6113 (Ont. S.C.J.) — followed

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2005), 202 O.A.C. 310, 36 C.C.L.T. (3d) 105, 2005 CarswellOnt 4589, 76 O.R. (3d) 481, 33 C.R. (6th) 269, 259 D.L.R. (4th) 676 (Ont. C.A.) — followed

Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board (2007), 2007 SCC 41, 2007 CarswellOnt 6265, 2007 CarswellOnt 6266, 87 O.R. (3d) 397 (note), 40 M.P.L.R. (4th) 1, 64 Admin. L.R. (4th) 163, 50 C.C.L.T. (3d) 1, 368 N.R. 1, 285 D.L.R. (4th) 620, [2007] 3 S.C.R. 129, [2007] R.R.A. 817, 50 C.R. (6th) 279, 230 O.A.C. 253 (S.C.C.) — referred to

Hong Kong (Official Receiver) v. Wing (1986), 57 O.R. (2d) 216, 1986 CarswellOnt 438, 12 C.P.C. (2d) 217 (Ont. H.C.) — considered

Lysko v. Braley (2006), 2006 CarswellOnt 1758, 212 O.A.C. 159, 49 C.C.E.L. (3d) 124, 79 O.R. (3d) 721 (Ont. C.A.) — referred to

Promatek Industries Ltd. v. Creative Micro Designs Inc. (1989), 33 C.P.C. (2d) 272, 1989 CarswellOnt 356 (Ont. Master) — referred to

Statutes considered:

Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56

Generally — referred to

s. 52(3) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04 — considered

R. 21 — considered

R. 29.1.03 [en. O. Reg. 438/08] — considered

R. 30.03(1) — considered

R. 30.04(1) — considered

R. 30.04(2) — considered

R. 30.04(5) — considered

MOTION by plaintiffs for production of documents.

***Emery J.*:**

1 Danilo De Iuliis is convinced that Luigia Grazia Zilli laid a complaint against him on May 16, 2012 to his employer, the Town of Oakville because he had broken off an affair with her two months before. Mr. De Iuliis had been employed as a Parking Control Officer by the Town and Ms. Zilli's business was located on his patrol route. Mr. De Iuliis is equally convinced that the Town relied upon the complaint laid by Ms. Zilli and subsequent statements made by her in the course of its investigation when it terminated his employment two months later.

2 Mr. De Iuliis and his family commenced this action against Ms. Zilli and the Town of Oakville seeking damages they have allegedly suffered as a result of the defendants tortious conduct. Mr. De Iuliis seeks general, special and punitive or exemplary damages against Ms. Zilli for defamation, intentional infliction of emotional suffering, extortion, intimidation, uttering death threats and intentional interference with contractual relations between himself and the Town. He seeks general, special and punitive or exemplary damages against the Town for defamation and for negligent investigation.

3 Mr. De Iuliis has deposed that the plaintiffs commenced this action before they could obtain the complaint and statements of Ms. Zilli or the documentary record of the investigation conducted by the Town to preserve their claims within the relevant limitation period. Mr. De Iuliis deposes that it has always been the intention of the plaintiffs to amend the Statement of Claim once those documents were produced.

4 The plaintiffs bring this motion under Rule 30.04(5) to compel the defendant Zilli and the defendant Town to produce the required documents. Before submissions, counsel for Ms. Zilli advised the court that the plaintiffs had settled the motion with Ms. Zilli. Therefore, the motion proceeded as against the Town only for production of the following documents:

1. The complaint received by the Town from the defendant Luigia Grazia Zilli on May 16, 2012;

2. All documents received by the Town from the defendant Luigia Grazia Zilli on or after May 16, 2012;

3. The record of any oral statements, to the extent that they were reduced to writing by employees of the Town, made by Ms. Zilli on or about May 16, 2012 either preceding or following the complaint; and,

4. Transcripts or notes taken by employees of the Town of any interviews of Ms. Zilli conducted by the Town between May 16, 2012 and July 25, 2012.

Background

5 Counsel for the Town of Oakville served a Notice of Intent to Defend on or about April 23, 2014. The Town of Oakville then served a Demand for Particulars dated May 2, 2014. The Demand included a request for particulars of the allegations contained in paragraph 27, various sub-paragraphs of paragraph 31, and paragraphs 32 and 35 of the Statement of Claim.

6 On or about May 30, 2014, Mr. De Iuliis served particulars in response to the Demand for Particulars of the Town. In response to the Demand for Particulars to the allegations contained in paragraphs 27 and 31 of the Statement of Claim, Mr. De Iuliis stated that the plaintiffs will bring a motion under Rule 30.04(5) to obtain them from the defendants.

7 The plaintiffs had already applied to the Town of Oakville for access to the documents required to provide these particulars to the allegations contained in the Statement of Claim, under the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. The Town of Oakville has provided Mr. De Iuliis his employment file. However, the Town refused to provide the complaint(s) and statement(s) of Ms. Zilli to the Town on the basis that the *Act* does not apply to "records collected, prepared, maintained or used by or on behalf of an institution in relation to meetings, consultations, discussions or communications about labour relations or employment related matters" pursuant to section 52(3).

8 The plaintiffs have also served a request to inspect documents on each of the defendants. Both defendants have refused to produce the documents requested. I note that the request to inspect documents does not make reference to any pleading, affidavit or other document, as required by Rule 30.04(1) or (2).

9 Neither of the defendants have filed a Statement of Defence. Mr. De Iuliis states in his affidavit that the defendants have indicated their intention to bring a Motion under Rule 21 to strike out all or part of the Statement of Claim. Although materials for those motions have not been served, October 21, 2014 has been reserved as a date for the court to hear those motions.

10 There is evidence before me that Mr. De Iuliis has good reason to conclude that Ms. Zilli had made complaints or statements about him to the Town of Oakville that lead to the investigation. He attaches to his affidavit an email sent by Ms. Zilli to himself in which she threatened to inform the Town about a personal relationship between them that implied her intention to procure the termination of his employment.

11 Mr. De Iuliis has given evidence that he inferred from the events that followed Ms. Zilli's threat on May 16, 2012 that her complaint or statements to the Town on or after May 16, 2012 were of a serious and damaging nature to him.

12 On May 16 2012, the Town issued a letter to Mr. De Iuliis stating that he had been placed on administrative suspension because it had received a complaint from a member of the public. Mr. De Iuliis deposes that although the complainant was not identified in the letter, he is certain that the complaint was made by Ms. Zilli. In her email, Ms. Zilli declared to Mr. De Iuliis that when someone betrays her, she goes into "destroyer mode".

13 The Town subsequently terminated Mr. De Iuliis from his position as a parking control officer in July 2012. In the Statement of Claim, Mr. De Iuliis pleads that he accepted a severance package from the Town to mitigate his damages.

Analysis

14 Rule 30.04(5) provides the court with the discretion to order the production of documents at any time, provided those documents are not privileged and are in the possession, control or power of the other party. However, there are limits on the exercise of this discretion. Generally, the power to order documentary disclosure before the close of pleadings is used sparingly. Where it is in the interest of justice to order production before the close of pleadings, using that power merits greater consideration.

15 In *Hong Kong (Official Receiver) v. Wing*, [1986] O.J. No. 1104 (Ont. H.C.) the court held that production of a documents should not be ordered prior to the close of pleadings unless the court is satisfied that the documents at issue were essential or necessary for the purpose of allowing the requesting party to plead. It would appear this statement was based on Rule 30.03(1) as it read before the amendments to the *Rules of Civil Procedure* came into effect on January 1, 2010. There is no reason for present purposes why that principle should not be considered the general rule today even with introduction of the Discovery Plan under Rule 29.1.03.

16 The affidavit sworn by Melanie Fullerton in response to the motion contains a helpful chronology of most events in the litigation to date. However, the affidavit does not give a reason why the Town is refusing the request for documents at this stage, or makes any claims for privilege over the documents.

17 There is no denial that those documents are in the possession, power or control of the Town. Indeed, the letter from the Town to Mr. De Iuliis dated May 16, 2012 and attached to as Exhibit "B" to his affidavit refers specifically to a complaint and the start of an investigation. And attached at Exhibit "A" to Ms. Fullerton's affidavit is the letter from the Town to Mr. De Iuliis dated July 25, 2012 confirming the conclusion of the investigation resulting in his dismissal.

18 Where a party makes a claim for defamation, the law contains technical requirements for pleading defamation as a cause of action. Those requirements do not require the Statement of Claim to set out the exact words used, but the words that are substantially the words allegedly spoken or published to make it sufficiently clear to enable the defendant(s) to plead: *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.). Mere speculation is not enough: *Promatek Industries Ltd. v. Creative Micro Designs Inc.*, [1989] O.J. No. 159 (Ont. Master).

19 Likewise, the requirements of making a claim for negligent investigation informed by defamatory statements raises the requirement that the plaintiffs know the basis for the investigation in order to plead. The tort of negligent investigation has been recognized in Ontario as a cause of action at least since *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board* [2005 CarswellOnt 4589 (Ont. C.A.)], [2005] CanLII 34230, affirmed at 2007 SCC 41 (S.C.C.). The Court of Appeal in *Hill* described the appropriate standard of care for the investigating officers as being what would be expected of reasonable officers in like circumstances, subject to the qualification that the standard of care is tied to reasonable and probable grounds at the point of arrest.

20 I would think that the question of "like circumstances" makes the documents relevant to allow the parties to plead for the purpose of eventual disclosure and production. The question is, however, whether the court should order production of those documents before the defendants have pleaded.

21 I conclude that the Town must produce those documents now as those documents are essential to the plaintiffs' case. The documents are not only essential because of the evidence of Mr. De Iuliis that the plaintiffs always intended to amend the Statement of Claim when those documents were obtained and the strict rules for pleading defamation claims, they were made essential when the Town gave notice of its intention to bring a motion under Rule 21 to strike the Statement of Claim.

22 In *Freedom International Brokerage Co. v. Tullett Prebon Canada Ltd.* [2009 CarswellOnt 6113 (Ont. S.C.J.)], 2009 CanLII 54766, the plaintiff by counterclaim alleging libel and slander moved for the production of a letter in the possession of the defendant to the counterclaim. The defendant to the counterclaim had served a Demand for Particulars of the allegations of the libel and slander. The defendant to the counterclaim did not deny the existence of the letter but took issue with the lack of specifics and particularity in the pleading. Although the plaintiff by counterclaim responded to the Demand for Particulars and stated it would provide a more fulsome response once the letter was produced, the defendant to the counterclaim served its motion to strike pleadings.

23 Master Brott expressed the view that on a motion under Rule 30.04(5), when the court finds a valid reason to order one party to an action to produce a document to another party, then the one party should be ordered to produce those documents.

24 The Court in the *Freedom International Brokerage* case found that it was the pending motion of the defendant to the counterclaim to strike pleadings that rendered the production of the subject letter essential. The Master also indicated that she relied heavily on Rule 1.04 that requires that all *Rules of Civil Procedure* shall be construed liberally to secure the just, most expeditious and least expensive determination of every civil proceeding on the merits. She expressed the view that the motion to strike might be averted once the letter was produced.

25 The decision in *Freedom International Brokerage* is on all fours with the motion before me. I do not accept the argument made by the Town that the reasoning of the Master in *Freedom International Brokerage* can be distinguished on the facts. The reality is that a defendant bringing a motion to strike and the threat of bringing a motion to strike coupled with booking a long motion date is a distinction without a difference. In each instance, the pleading of the plaintiff is under attack and the life of the action is placed in imminent danger of being dismissed.

26 Production of the documents at issue by the Town will enable the plaintiffs to amend the Statement of Claim to meet the technical requirements for pleading defamation and negligent investigation claims. Production of those documents will allow the plaintiffs to provide a more fulsome response to the Demand for Particulars served by the Town. When those amendments are made and particulars given, the Rule 21 motion may be adverted if it is brought at all. If the defendant Town brings the motion, each of the parties will at least have the subject documents to use as they may. It will level the playing field and give each of the litigants the same advantage with respect to those documents. There is something fundamentally unfair about a defendant who not only demands particulars it already possesses, but also seeks to strike pleadings or dismiss the action of a plaintiff because of documents it alone controls and is holding back.

27 In my view, the plaintiffs' motion is not a fishing expedition. It is a legitimate request for documents in the hands of the Town that in the interests of justice should be produced under the prevailing circumstances. Those documents are relevant and would likely be disclosed after pleadings were closed in the normal course of events. The plaintiffs are at an unfair disadvantage by not having access to those documents now.

28 I therefore order the Town of Oakville to produce the documents at issue by October 3, 2014.

29 If any party seeks costs of this motion, written submissions may be made consisting of no more than three typewritten pages not including a costs outline, and sent by fax to my Judicial Assistant Sherry McHady at (905) 456-4834 by October 10, 2014.

Motion granted.

End of Document

2011 ONSC 1891
Ontario Superior Court of Justice

Kalen v. Brantford (City)

2011 CarswellOnt 2036, 2011 ONSC 1891, [2011] O.J. No. 1348, 200 A.C.W.S. (3d) 339, 83 M.P.L.R. (4th) 57

Randy Kalen, Plaintiff and The Corporation of the City of Brantford, and Garth Dix, Defendants

Turnbull J.

Heard: December 21, 2010; March 15, 2011
Judgment: March 28, 2011
Docket: CV-10-164

Counsel: Peter Quinlan, for Plaintiff
Jason Squire, for Defendants

Subject: Civil Practice and Procedure; Public; Property; Constitutional; Torts; Contracts

Related Abridgment Classifications

Civil practice and procedure
X Pleadings
X.9 Application to strike
X.9.f Amendment as alternative to striking
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.c Time of production
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.i Solicitor-client privilege
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.iii Private and confidential communications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xii Waiver of privilege

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Solicitor-client privilege
On November 23, 2009, DT, city's General Manager, Public Health, Safety and Social Services, submitted report signed by him and fire chief GD, to mayor and city council with respect to termination of plaintiff as deputy fire chief — Front page was marked "Private and Confidential" with level of confidentiality marked as "High Risk" — Pursuant to s. 239(2)(b) of Municipal Act, 2001, report was identified as relating to "personal matters about an identifiable individual,

including municipal or local board employees" — Report detailed communications and advice of city's outside lawyer concerning plaintiff's employment, city's right to terminate, city's position in anticipated litigation, and strategy and settlement parameters for anticipated negotiations with plaintiff — Council considered report at November 24, 2009 in-camera meeting, and recommended plaintiff's termination without cause — Plaintiff brought action against city and GD for damages for wrongful dismissal, defamation, interference with contractual relations, breach of his human rights and "moral damages", and seeking reinstatement order — Plaintiff was presented with "leaked" copy of report — Plaintiff brought motion for production of report to permit him to finalize his pleadings — Motion dismissed — While containing some legal advice to council, report was not only report between client and solicitor, it was also report to council from two of its employees — Defendant could not claim solicitor-client privilege over entire report — Report was subject to communications privilege and need not be produced.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Private and confidential communications

On November 23, 2009, DT, city's General Manager, Public Health, Safety and Social Services, submitted report signed by him and fire chief GD, to mayor and city council with respect to termination of plaintiff as deputy fire chief — Front page was marked "Private and Confidential" with level of confidentiality marked as "High Risk" — Pursuant to s. 239(2)(b) of Municipal Act, 2001, report was identified as relating to "personal matters about an identifiable individual, including municipal or local board employees" — Report detailed communications and advice of city's outside lawyer concerning plaintiff's employment, city's right to terminate, city's position in anticipated litigation, and strategy and settlement parameters for anticipated negotiations with plaintiff — Council considered report at November 24, 2009 in-camera meeting, and recommended plaintiff's termination without cause — Plaintiff brought action against city and GD for damages for wrongful dismissal, defamation, interference with contractual relations, breach of his human rights and "moral damages", and seeking reinstatement order — Plaintiff was presented with "leaked" copy of report — Plaintiff brought motion for production of report to permit him to finalize his pleadings — Motion dismissed — Report was subject to communications privilege and need not be produced — Authors intended for contents to remain confidential, confidentiality was essential to relationship between council and its employees, which relation should be sedulously fostered, and injury to relationship of council and its employees would far exceed any benefit to fair disposition of this litigation.

Civil practice and procedure --- Discovery — Discovery of documents — Privileged document — Waiver of privilege

On November 23, 2009, DT, city's General Manager, Public Health, Safety and Social Services, submitted report signed by him and fire chief GD, to mayor and city council with respect to termination of plaintiff as deputy fire chief — Front page was marked "Private and Confidential" with level of confidentiality marked as "High Risk" — Pursuant to s. 239(2)(b) of Municipal Act, 2001, report was identified as relating to "personal matters about an identifiable individual, including municipal or local board employees" — Report detailed communications and advice of city's outside lawyer concerning plaintiff's employment, city's right to terminate, city's position in anticipated litigation, and strategy and settlement parameters for anticipated negotiations with plaintiff — Council considered report at November 24, 2009 in-camera meeting, and recommended plaintiff's termination without cause — Plaintiff brought action against city and GD for damages for wrongful dismissal, defamation, interference with contractual relations, breach of his human rights and "moral damages", and seeking reinstatement order — Plaintiff was presented with "leaked" copy of report — Plaintiff brought motion for production of report to permit him to finalize his pleadings — Motion dismissed — Report was subject to communications privilege and need not be produced — Authors intended for contents to remain confidential, confidentiality was essential to relationship between council and its employees, which relation should be sedulously fostered, and injury to relationship of council and its employees would far exceed any benefit to fair disposition of this litigation — Report was "leaked" by someone so that copy fell into plaintiff's hands — Improper breach of intended confidentiality was not condoned or effected by chief, manager, or city — In such circumstances, communications privilege attached to report was not waived or breached — Any comments GD might have made about plaintiff's competence to council would have been squarely within his purview as plaintiff's superior, and it was his duty to report to that information to council — GD's comments as to competence, if particularized, would be protected by privilege.

Civil practice and procedure --- Discovery — Discovery of documents — Time of production

"Pre-pleading production" — On November 23, 2009, DT, city's General Manager, Public Health, Safety and Social Services, submitted confidential report signed by him and fire chief GD, to mayor and city council with respect to termination of plaintiff as deputy fire chief — Plaintiff brought action against city and GD for damages for wrongful dismissal, defamation, interference with contractual relations, breach of his human rights and "moral damages", and seeking reinstatement order — Plaintiff alleged that GD exchanged emails with two women with whom plaintiff had prior personal relationships, and that those communications were contributing factor motivating GD to recommend termination of plaintiff's employment — Plaintiff's personnel file with city was ordered produced pursuant to Freedom of Information request, but GD's personnel file on plaintiff was not — Plaintiff brought motion for production of GD's personnel file on plaintiff, including production of emails — Motion granted — "Pre-pleading production" of file was necessary to enable justice to be done — Defendants had brought motion to strike significant portion of statement of claim because it lacked particularity and disclosed no cause of action to legally sustain continued claim for damages for defamation and intentional interference with contractual relationships — It would not be just to strike plaintiff's claims when defendants arguably had information in their possession which would support such allegations — If file was ultimately produced after pleadings closed, it probably would result in further motion to amend pleadings, which was not most expeditious and least expensive way to determine this civil proceeding.

Civil practice and procedure --- Pleadings — Application to strike — Amendment as alternative to striking

On November 23, 2009, DT, city's General Manager, Public Health, Safety and Social Services, submitted confidential report signed by him and fire chief GD, to mayor and city council with respect to termination of plaintiff as deputy fire chief — Report was considered at council's November 24, 2009 in-camera meeting, and recommended plaintiff's termination on without cause basis — Plaintiff brought action against city for damages for breach of contract, "moral damages", damages for violation of his rights under Human Rights Code, damages for defamation, and seeking reinstatement order, and against GD for damages for interference with contractual relations and defamation — Plaintiff was presented with "leaked" copy of report — Plaintiff alleged that GD exchanged emails with two women with whom plaintiff had prior personal relationships, communications were contributing factor motivating GD to recommend plaintiff's termination, and communications were repeated to city council to obtain authority to terminate his employment — GD's personnel file, including subject emails, were ordered produced — Defendants brought motion for order striking certain paragraphs of statement of claim — Motion granted — Plaintiff ordered to deliver amended statement of claim — Paragraph seeking damages personally against GD for repeating alleged "false and defamatory information to the elected Councillors of the City to obtain authority to terminate the plaintiff" was struck, as comments made during "in camera" meeting were privileged — While exact words might not be able to be provided in pleading, plaintiff must identify nature of defamatory comments made, time, place, and those people to whom statements were made so that defendants could fully respond to each allegation — Claim against fire chief personally for intentional interference with contractual relations was struck as there was no suggestion he acted for personal gain, plaintiff's employment contract was with city, and fire chief would not be liable for damages if court determined plaintiff should have been granted greater compensation in lieu of notice — Plaintiff's claim for damages for breach of his human rights was without foundation and relevant portions of pleadings were struck — Plaintiff was granted leave to properly claim moral damages.

Table of Authorities

Cases considered by *Turnbull J.*:

ADGA Systems International Ltd. v. Valcom Ltd. (1999), 41 B.L.R. (2d) 157, 117 O.A.C. 39, 168 D.L.R. (4th) 351, 1999 CarswellOnt 29, 44 C.C.L.T. (2d) 174, 43 O.R. (3d) 101, 39 C.C.E.L. (2d) 163 (Ont. C.A.) — considered

Chan v. Dynasty Executive Suites Ltd. (2006), 2006 CarswellOnt 4318, 30 C.P.C. (6th) 270 (Ont. S.C.J.) — considered

Correia v. Canac Kitchens (2008), 2008 ONCA 506, 2008 CarswellOnt 3712, 67 C.C.E.L. (3d) 1, 240 O.A.C. 153, 294 D.L.R. (4th) 525, 91 O.R. (3d) 353, 58 C.C.L.T. (3d) 29, 2009 C.L.L.C. 210-001 (Ont. C.A.) — considered

GEA Group AG v. Ventra Group Co. (2009), 76 C.P.C. (6th) 3, 2009 CarswellOnt 4854, 2009 ONCA 619, 254 O.A.C. 198, 96 O.R. (3d) 481 (Ont. C.A.) — considered

Grant v. Torstar Corp. (2009), 204 C.R.R. (2d) 1, [2009] 3 S.C.R. 640, 397 N.R. 1, 258 O.A.C. 285, 72 C.C.L.T. (3d) 1, 314 D.L.R. (4th) 1, 2009 CarswellOnt 7956, 2009 CarswellOnt 7957, 2009 SCC 61, 79 C.P.R. (4th) 407 (S.C.C.) — considered

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, (sub nom. *Honda Canada Inc. v. Keays*) 2008 C.L.L.C. 230-025, 376 N.R. 196, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays*) [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays*) 63 C.H.R.R. D/247, 66 C.C.E.L. (3d) 159, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 239 O.A.C. 299 (S.C.C.) — followed

Lysko v. Braley (2006), 2006 CarswellOnt 1758, 212 O.A.C. 159, 49 C.C.E.L. (3d) 124, 79 O.R. (3d) 721 (Ont. C.A.) — considered

Meditrust Healthcare Inc. v. Shoppers Drug Mart (1999), 124 O.A.C. 137, 1999 CarswellOnt 2762 (Ont. C.A.) — considered

Norwich Pharmacal Co. v. Customs & Excise Commissioners (1973), [1974] A.C. 133, [1973] 2 All E.R. 943, [1973] 3 W.L.R. 164, [1974] R.P.C. 101 (U.K. H.L.) — considered

Said v. Butt (1920), [1920] All E.R. Rep. 232, 90 L.J.K.B. 239, 124 L.T. 413, [1920] 3 K.B. 497 (Eng. K.B.) — considered

Truckers Garage Inc. v. Krell (1993), 3 C.C.E.L. (2d) 157, 68 O.A.C. 106, 1993 CarswellOnt 875 (Ont. C.A.) — considered

Wallace v. United Grain Growers Ltd. (1997), 123 Man. R. (2d) 1, 159 W.A.C. 1, 152 D.L.R. (4th) 1, 1997 CarswellMan 455, 1997 CarswellMan 456, 219 N.R. 161, [1997] 3 S.C.R. 701, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 3 C.B.R. (4th) 1, [1997] L.V.I. 2889-1, 97 C.L.L.C. 210-029 (S.C.C.) — considered

Statutes considered:

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

Municipal Act, 2001, S.O. 2001, c. 25

s. 239(2) — considered

s. 239(2)(b) — considered

s. 239(2)(d) — considered

s. 239(2)(e) — considered

s. 239(2)(f) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 1.04 — considered

R. 25.06(1) — referred to

MOTION by plaintiff for production of certain documents to permit him to finalize his pleadings; MOTION by defendants for order striking certain paragraphs of statement of claim.

***Turnbull J.*:**

1 There are two motions before the court. The plaintiff has brought a motion seeking production of certain documents to permit him to finalize his pleadings. The defendants have brought a motion seeking an order striking many of the paragraphs of the statement of claim for various reasons. After discussion with counsel, it was determined that the court would deal with each of the heads of relief sought by the plaintiff and then deal with the defendant's motion.

Overview of the Facts

2 The plaintiff has brought a claim against the City of Brantford and its Fire Chief, Garth Dix, for damages for wrongful dismissal, defamation, interference with contractual relations, breach of his human rights and "moral

damages." He further seeks an order for reinstatement to his former position as Deputy Chief of the Brantford Fire Department. The defendants have brought a motion to strike most of the pleadings in the statement of claim, including those against Chief Garth Dix personally. As of yet, no statement of defence has yet served.

3 On November 23, 2009, Dan Temprile, the General Manager, Public Health, Safety and Social Services of the City of Brantford, submitted a Report to the Mayor and members of City Council with respect to the termination of the employment of the plaintiff, then Deputy Fire Chief, Randy Kalan. The front page of the report was clearly marked "Private and Confidential" with the level of confidentiality marked as "High Risk." Pursuant to section 239 (2)(b) of the *Municipal Act, 2001*, S.O. 2001, c. 25, the report was identified as one relating to "personal matters about an identifiable individual, including municipal or local board employees."

4 The Report was signed by Chief Dix and Mr. Temprile and was considered at an in-camera meeting of Brantford City Council on November 24, 2009. It recommended the termination of the employment of the plaintiff on a without cause basis.

5 Subsequent to the plaintiff's termination and the commencement of these legal proceedings, the plaintiff was presented with a "leaked" copy of the report.

6 When this litigation commenced, counsel for the plaintiff quite properly advised counsel for the defendant that his client had presented him with a copy of the report. Though Mr. Quinlan had read the report, he agreed to have his copy of the report sealed and not refer to it again until the determination of this motion. He has done so and I reviewed his copy of the report with the permission of counsel at the outset of this motion. It is substantially the same as Exhibit 1 on this motion except that Exhibit 1 has attached to it two opinion letters from outside Counsel retained by the City of Brantford. The parties agreed that those attachments were unquestionably privileged.

7 The plaintiff seeks an order that the report is not privileged and that he is able to use it as part of his case before this court.

8 The November 23, 2009 report details some communications with and the advice of the City's outside lawyer. Not only are those communications and that advice referred to in the body of the Report, but the Report also appends two letters from that outside lawyer concerning the employment of Mr. Kalan, the City's right to terminate that employment, the City's position in anticipated litigation arising out of that termination, and a strategy and settlement parameters for anticipated discussions or negotiations with Mr. Kalan.

9 The defendant argued that the Report and its appendices were prepared in contemplation of the present litigation, and that they communicate and discuss legal advice.

10 Mr. Kalan has not described in his affidavit on this motion how he obtained a copy of the November 23, 2009 Report. Given that the Report was not addressed to Mr. Kalan, and given that Mr. Kalan's employment and potential litigation was the subject matter of the report, the defendant contends that there was no legitimate means by which Mr. Kalan could have been provided a copy of the Report. However, in reply to my question on that issue, Mr. Squire candidly acknowledged that there is nothing on the record before the court on this motion to suggest that Mr. Kalan, himself, had done anything improper in obtaining his copy of the document.

11 In response to the Council's decision to terminate Mr. Kalan's employment without cause, Mr. Kalan has brought this extraordinary lawsuit, seeking

a. Reinstatement and $1.5 million in damages, plus the present value of his future pension loss, for the termination of his employment;

b. $1,000,000.00 in damages from the City of Brantford and Garth Dix personally for alleged defamation;

c. $ $1,500,000.00 in damages from Garth Dix personally for alleged intentional interference with contractual relations;

d. $500,000.00 from the City of Brantford for "moral damages";

e. $500,000.00 damages for an alleged breach of Mr. Kalan's human rights; and,

f. An order for production of various notes, reports and minutes relating to the *in camera* meeting of City Council to consider Mr. Kalan's termination.

12 The defendants have brought a motion to strike substantial portions of the statement of claim, including the claims against Chief Dix personally, the defamation claims, the claims of "moral damages" and breach of the plaintiff's human rights, on the basis that each of those claims are inadequately pleaded and the statement of claim does not disclose proper causes of action.

13 Accordingly, no statement of defence has been served, nor have affidavits of documents been exchanged.

14 Although the plaintiff has brought a motion to add Mr. Temprile as a defendant, he has not provided any form of draft pleading purporting to do so, or setting out any allegations against him. In the circumstances, such relief is premature and that portion of the motion is dismissed without prejudice to the rights of the plaintiff to properly bring a motion to join Mr. Temprile as a party to this action.

I. The Plaintiff's Motion

Issue #1: Is the November 23, 2009 report privileged?

15 The plaintiff argued that the Report was made for the purpose of seeking authority from City Council for the plaintiff's termination. The report itself did not come from a solicitor nor was it directed to a solicitor seeking that solicitor's advice. As a result, Mr. Quinlan argued forcefully that solicitor and client privilege does not attach to the document. In that respect, he drew the attention of the court to the case of *Chan v. Dynasty Executive Suites Ltd.*, [2006] O.J. No. 2877 (Ont. S.C.J.) where Belobaba J. stated:

> ...not all communications passing between a solicitor and client are privileged — only those that involve the seeking or giving of legal advice and that are intended to be confidential.

16 The plaintiff submitted that it follows that solicitor and client privilege cannot attach to the report to City Council. However, the plaintiff is content that the few references to legal advice in the report be redacted.

17 Mr. Quinlan has submitted that the document was already in the plaintiff's hands when this issue arose. There is no evidence before the court from where he got it but there is no hint that he has done anything improper in obtaining it. The fact that it is marked high risk and "confidential" does not mean privilege attaches to the communication.

18 This is not the usual case where the plaintiff is seeking production prior to pleadings being closed. Instead, he is seeking leave of the court prior to using a document which is prima facie properly in his possession. He has properly come to the court and sought leave to have a portion of it redacted out of respect for the law of privilege and thereafter be granted leave to use it as he would any other document in framing his pleadings.

19 The defendant contends that the November 23, 2009 Report and its appendices communicate and discuss legal advice, and were prepared in contemplation of this present litigation. Hence, the defence argued that the entirety of the November 23, 2009 Report is privileged and cannot be ordered produced to the plaintiff.

Analysis

20 The purpose of solicitor-client privilege is to preserve confidential communications between a lawyer and client for the purposes of giving or receiving advice. It is clear that this report, while containing some legal advice to City Council, was not only a report between a client and solicitor. It was also a report to City Council from two of its employees, Chief Dix and Mr. Temprile. The first section of the report was a summary prepared by the defendant Chief Dix and Mr. Temprile to outline the facts and underlying reasons for the proposed termination of the plaintiff. Then in another section of the report, there were recommendations made by Mr. Temprile and Chief ix, based partly on communications with the Corporation's solicitors and partly on the attached letters from legal counsel, on how the City should proceed with the termination.

21 In my view, the defendant cannot claim solicitor-client privilege over the entire report. The first section dealing with factual issues behind the termination could just as easily have been in a separate report where it would not have attracted solicitor-client privilege. On my review of the report, paragraph 4.02 should be redacted. Otherwise, paragraphs 4.0(1), 5.0, and 6.0 of the report are not subject to a solicitor-client privilege and could have been used by the plaintiff as counsel advised but for my ruling below with respect to the transmission of confidential communications. The second part of the report and the attached letters are clearly protected by the solicitor/client privilege and the plaintiff would not have been able to make any use of them in the litigation.

22 However, the fact that the first portion of the report is not protected by solicitor-client privilege does not end the matter. It is necessary to consider if the document attracts the privilege against the disclosure of communications. In that respect, *Wigmore on Evidence*, 3 rd ed., (McNaughton Revision, 1961) at p. 2285 outlines the four fundamental conditions to the establishment of a privilege against the disclosure of communications:

> (1) The communications must originate in a confidence that they will not be disclosed.

23 In this case, the correspondence was clearly marked "confidential" and assessed as "high risk." I have no doubt that the Garth Dix and Dan Temprile both intended for the contents to remain confidential.

24 Further:

> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.

25 In my view, the council of every municipality in this province must have confidence that its employees can fairly and accurately report matters of concern to the elected representatives where it is felt that Council must know and act upon those concerns. If every municipal employee who attempts to fulfill his/her professional and/or fiduciary duties to his/her employer by preparing and communicating confidential information to Council faced the spectre of being personally named as a defendant in an ensuing lawsuit, the chilling effect on good municipal governance is evident.

26 Thirdly:

> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

27 Clearly, a municipal employee must be able to honestly and fully inform Council of a matter of concern to the effective administration of the municipal corporation. It is a relationship which should be sedulously fostered. After all, it is the taxpayers of the community who fund the municipal corporation.

28 And finally:

> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

29 I am satisfied that this criteria is fulfilled in the present case. There will be circumstances in which it is necessary that employees of a municipality are able to communicate to Council, in writing or orally, in a confidential manner. Otherwise, the business of the Corporation would be impossibly hindered. There is an indirect recognition of this fact in Section 239(2) of the *Municipal Act, 2001*, S.O. 2001, c. 25, which provides that certain meetings of Council may be closed to the public if certain subjects are to be discussed. Relative to the case at bar, subsections (d), (e) and (f) of Section 239(2) provide that meetings involving labour relations or employee negotiations, litigation or potential litigation, and advice that is subject to solicitor-client privilege, including communications necessary for that purpose are all matters which can be discussed "in camera."

30 I have read the report to Council in its entirety. The first portion which relates the facts upon which the legal opinion is ultimately based does not contain information which is prima facie defamatory or written in such a way as to evidence an intention to interfere with the contractual relationship between Brantford and the plaintiff. In other words, I am not satisfied that the correct disposal of this litigation is dependent on the disclosure of the contents of the confidential report. On the other hand, I have no doubt that the injury to the relationship of Council and its employees in this case would far exceed any benefit to a fair disposition of this litigation.

31 I am cognizant of the fact that the report was "leaked" by someone so that a copy fell into the hands of the plaintiff. The improper breach of the intended confidentiality was not condoned or effected by Chief Dix, Mr. Temprile, or the Corporation of the City of Brantford. In such circumstances, the communications privilege attached to the document has not been waived or breached.

32 I further find that any comments Chief Dix may have made about the plaintiff's competence to City Council would have been squarely within his purview as the plaintiff's superior, and it was his duty to report to that information to City Council. His comments as to competence, if particularized, would be protected by privilege.

Conclusion on Issue #1

33 It is therefore ordered that the contents of the report of November 23, 2009 authored by Garth Dix and Dan Temprile are subject to the communications privilege and the report does not have to be produced by the defendants to the plaintiff at this juncture.

Issue #2: Production of the File of Garth Dix

34 The defendant Garth Dix kept his own personnel file on the plaintiff. The file was not ordered to be produced pursuant to a Freedom of Information request, although the plaintiff's personnel file with the defendant City of Brantford was.

35 The plaintiff asserts that Garth Dix exchanged emails with women, with whom the plaintiff had had prior personal relationships, and in particular Melody Rader and Teresa Coté. He seeks an order for production of the personnel file kept by Garth Dix, including copies of said emails. The plaintiff alleges that the communications with these women were a contributing factor motivating Garth Dix to recommend termination of the plaintiff's employment.

36 The plaintiff also believes that in addition to the email correspondence, the file contains memoranda prepared by Garth Dix as a result of meetings he conducted with these two women who fell into the category of "jilted lovers."

37 The plaintiff asserts that an order for production of the personnel file kept by Chief Dix should be made at this stage because the file should have been part of the personnel file kept by the City. Counsel for the plaintiff submitted that the contents of the file will demonstrate the attitude of Garth Dix toward the plaintiff and will reveal his motivation for preparing the report seeking the termination of the plaintiff's employment. He also argued that the contents of the file are crucial to the plaintiff's claim for defamation, in particular, with respect to allegations of malice on the part of

Garth Dix, and to determining whether he was defamed by others in communications to Garth Dix. He further argues it is relevant to his claim for moral damages.

38 On this basis, it is submitted that the file kept by Garth Dix should be produced forthwith by way of a *Norwich* [1] type order, or in the alternative in the defendants' Affidavit of Documents, but in any event there should be an order preserving the file kept by Garth Dix in order that it not be lost to the plaintiff.

39 The essential difference between the request made by the plaintiff on this motion and a *Norwich* order, is that the plaintiff's request is not being made to a stranger to the litigation but to the defendants who are already obliged to eventually produce the documents pursuant to the *Rules of Civil Procedure*, R.R.O. 1990. Reg. 194. Mr. Quinlan emphasized that it is merely a request for an order to produce the documents immediately so that that the issues can be clarified in the pleadings and relevant documents identified to allow the parties to get on with the litigation.

40 Mr. Quinlan submitted that such an order is not inconsistent with some of the factors to be taken into consideration in granting a *Norwich* order. He noted that the Ontario Court of Appeal in *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 (Ont. C.A.), stated that such orders constitute an form of equitable relief and are accordingly discretionary (para.85), are granted to enable justice to be done (para. 90) and the discovery must be needed for a legitimate objective. (para 91). The Court stated that the "context and facts" of each case must determine if this exceptional remedy is appropriate.

Position of the Defendants

41 Counsel for the defendants argued that the Rules of Civil Procedure specify that the defendants produce documents in their possession or control which are relevant to the issues framed in the pleadings and which are not protected by privilege. Because the pleadings have not been closed, the defendants argue that this motion is premature and is evidence of the fact that the plaintiff is simply on a "fishing expedition" to find evidence.

Analysis

42 The issue before this court is clearly different from the relief sought in a traditional "*Norwich*" situation, as here it is one of the parties who has the information being sought. The real issue before the court is the simpler question of whether the court should order "pre pleading production" or simply allow that production to occur in the normal course, *ie.* after the exchange of pleadings and the serving and filing of affidavits of documents.

43 Within the context of this action and based on the facts before this court, I find that such production of the file at this stage is necessary to enable justice to be done. In making that decision, I am mindful of the fact that Mr. Squire fairly agreed that the file would have to be produced in due course as part of the production process if the action is to be continued against Chief Dix. Secondly, one of the submissions made by the defendants on the motion to strike pleadings against Chief Dix personally was that the alleged defamatory incidents and words spoken were not sufficiently particularized.

44 In the end, the *Rules of Civil Procedure* must be interpreted liberally to secure the most "just, most expeditious and least expensive determination of every civil proceeding on its merits" (See Rule 1.04).

45 The defendants have brought a motion to strike a significant portion of the plaintiff's statement of claim because it lacks particularity and discloses no cause of action to legally sustain a continued claim for damages for defamation and intentional interference with contractual relationships.

46 To me, it would not be just to strike the plaintiff's claims when the defendants arguably have some or all of the information in their possession and control which will support such allegations. If the file is ultimately produced after pleadings have closed, Mr. Quinlan suggested that it probably will result in a further motion to amend pleadings, which is not the most expeditious and least expensive way to determine this civil proceeding; I concur.

Conclusion on Issue #2

47 It is therefore ordered that the personnel file of the defendant Garth Dix be produced for inspection by counsel for the plaintiff and that copies of documents required by counsel for the plaintiff be provided to counsel at the expense of the plaintiff. It is further ordered that the original file be preserved pending the trial or other resolution of this matter.

II. Defendants' Motion to Strike Pleadings

48 The defendants have brought a motion to strike substantial portions of the plaintiff's statement of claim. This motion gives significant context to the relief sought by the plaintiff in this matter and so I will deal with this aspect of the motion in some detail.

49 The defendants essentially seek an order that the plaintiff be restricted to pleading the only matter they consider to be relevant in this litigation, namely the proper calculation of the reasonable notice period on the plaintiff's dismissal without cause. The defendants request that the claims against Chief Dix personally be dismissed.

50 In his statement of claim, the plaintiff has sought judgment against the named defendant the Corporation of the City of Brantford (Brantford) under the following causes of action:

a. Damages for breach of contract,

b. Moral damages,

c. Reinstatement to his former position and damages for violation of his rights under the *Human Rights Code*, R.S.O., 1990, c. H.19.

d. Damages for defamation.

51 The plaintiff seeks judgment against the defendant Garth Dix in his personal capacity under the following causes of action:

a. Damages for intentional interference in contractual relations,

b. Damages for defamation.

52 In paragraph 3 of his statement of claim, the plaintiff alleges that the defendant Brantford is vicariously liable for the actions and resultant damages caused by its employee Garth Dix.

53 The defendants' motion can be dealt with under five separate questions:

1. Should the Defamation pleadings against Garth Dix be struck?

2. Should the pleading relating to the claim of intentional interference with contractual relations against Garth Dix be struck?

3. Should other paragraphs be struck due to the pleading being prolix, irrelevant or constituting the pleading of evidence?

4. Should the plaintiff's claim under the Human Rights Code be struck?

5. Should the plaintiff's claim for moral damages be struck?

Issue #1: Should the Defamation pleadings against Garth Dix be struck?

54 After the statement of claim was served, the defendant delivered a lengthy Request for Particulars pursuant to the *Rules of Civil Procedure*. Counsel for the plaintiff replied and the chart at tab 5 of the Defendants' Motion Record is a helpful analytical tool to consider the issues presented in this motion.

55 In paragraph 13 of the statement of claim, the plaintiff claims that Chief Dix received false and defamatory information from women who had had failed relationships with the plaintiff. Even though the plaintiff identified the women he believes communicated false and defamatory information to Chief Dix in his Response to Demand for Particulars, the plaintiff understandably cannot particularize what defamatory words they used, when or where. He expects that some of that information will be found in the file of Chief Dix which I have already ordered to be produced.

56 The essence of the defamation charges asserted against Chief Dix are found at paragraphs 13 to 17 of the statement of claim where it is pleaded that Chief Dix repeated false information that had been conveyed to him by those women to City Council to obtain authority to terminate the plaintiff's employment. In his Response to Demand for Particulars, the plaintiff asserted that Garth Dix said that the plaintiff was unethical, immoral and a womanizer. However, I have already found in paragraph 32 of these reasons that the comments made to Council by Garth Dix during the "in camera" meeting are privileged. If in his discussions with Council, he elaborated on his perception of the ethics and/or morality of the plaintiff as those factors related to the plaintiff's competence to do his job, such comments were privileged.

57 Hence, in my view, paragraph 15 of the statement of claim that seeks damages personally against Garth Dix for repeating the alleged "false and defamatory information to the elected Councillors of the City to obtain authority to terminate the plaintiff" shall be struck.

58 In paragraph 16 of the Statement of Claim, the plaintiff alleges that Garth Dix "repeated the false allegations to other individuals within the City's Fire Department as well as to others with other Departments of the City of Brantford, other Firefighter Associations and even members of the general public, all with the intention to damage the reputation of the plaintiff and to justify the termination of the plaintiff."

59 When asked to particularize in his Response to Demand for Particulars the false allegations which were repeated, the plaintiff responded that:

> the allegations repeated were *principally* the reference to the plaintiff being unethical, a womanizer and reference to the plaintiff not being able to be trusted around women. [Chief Dix] even went as far as to compare the plaintiff to Tiger Woods in his multiple infidelities in early 2010. In addition, [Chief Dix] made statements to the effect the plaintiff was unfit to be the successor Fire Chief.

60 The allegations were allegedly made "commencing in the fall of 2009 and afterward...and have been repeated since that time."

61 In his Response to Demand for Particulars, the plaintiff identifies in some considerable detail the individuals and the people to whom the defamatory statements allegedly were made.

62 In assessing if this action can proceed personally against Garth Dix on the grounds of defamation, there are several factors which the court must take into account.

63 In *Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 (S.C.C.), the Supreme Court of Canada held that a plaintiff in a defamation action is required to prove that the impugned words were defamatory in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person, that the words in fact referred to the plaintiff, and that the words were published, meaning that they were communicated to at least one person other than the plaintiff.

64 In a defamation claim, pleadings are to be examined more carefully than in most other types of litigation, and the court will protect against fishing expeditions. As one commentator has put it:

65 A plaintiff should not be permitted to speculate as to the words which may or may not have been spoken or written, and incorporate them into the pleadings in the hope that he or she may later discover the actual defamatory words that were published. Where the plaintiff has never seen the defamatory material, he or she may not guess at what it contains and then embark on a fishing expedition in hopes of discovering the real words. Nor can he or she suggest that something defamatory was said without specifying the particular words. It is simply not enough to assert that words to a particular effect were spoken when the plaintiff is not in a position to establish it. Vague and conclusory allegations will not do (Raymond E. Brown, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1994)).

66 At a minimum, the pleading must allege a *prima facie* case against the defendants. In limited circumstances, it is open to a court to permit a plaintiff to proceed with a defamation claim in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. In the case of *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (Ont. C.A.), the court held at para. 101 that to be permitted such an exception to the strict rules of pleading in a defamation claim, the plaintiff must show:

> a. That he has pleaded all of the particulars available to him with the exercise of reasonable diligence;
>
> b. That he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience;
>
> c. That the coherent body of fact of which he does have knowledge shows not only that there was an utterance or a writing emanating from the defendant, but also that the emanation contained defamatory material of a defined character of and concerning the plaintiff; and
>
> d. That the exact words are not in his knowledge, but are known to the defendant and will become available to be pleaded by discovery of the defendant, production of a document or by other defined means, pending which the plaintiff has pleaded words consistent with the information then at his disposal.

67 If the comments allegedly made by Garth Dix about the plaintiff were made in the places and circumstances particularized by the plaintiff, they may very possibly constitute actionable defamation.

68 In my view, these should be properly particularized as best as possible so that the defendants can properly plead to each allegation. While the exact words stated may not be able to be provided in the pleading, it is essential for the plaintiff to identify the nature of the defamatory comments made, the time, the place, and those people or groups to whom the defamatory statements were allegedly made so that the defendants can fully and fairly respond to each allegation.

69 Hence, it is ordered that the plaintiff deliver an amended Statement of Claim within 30 days hereof complying with the directions in this endorsement with respect to his pleading of defamation against the defendant Garth Dix.

Issue #2: Should the pleading relating to the claim of intentional interference with contractual relations against Garth Dix be struck?

70 The plaintiff pleads in paragraphs 21 and 22 of the Statement of Claim that Chief Dix "undertook a course of conduct to manipulate the termination of the plaintiff's employment." In response to a request to particularize that pleading, the plaintiff answered that "the defendant Garth Dix is well aware of the steps he took to manipulate and unethically proceed with the termination of the plaintiff's employment...and none will be provided."

71 The tort of intentional interference with contractual relations is a unique cause of action which the Ontario Court of Appeal recently considered in *Correia v. Canac Kitchens*, 2008 ONCA 506 (Ont. C.A.). At para. 99 of that decision, the court articulated the three elements of the tort as follows:

a. The defendant had knowledge of the contract between the plaintiff and the third party. In this case, obviously Garth Dix had knowledge of the contract between Randy Kalen and Brantford.

72

b. The defendant's conduct was intended to cause the third party to breach the contract.

In my view, the plaintiff's action will not be able to satisfy this element of this cause of action. Garth Dix clearly did not want Brantford to breach its contract with the plaintiff. To the contrary, on the record before this court, he wanted the plaintiff's contract lawfully terminated with cause.

73

c. The defendant's conduct caused the third party to breach the contract.

Again, I do not think that the plaintiff can sustain this cause of action in this matter based on this third requirement. First, Garth Dix had a duty to report his recommendations to Council. Council was not bound to accept the recommendations made by him and/or Dan Temprile. Secondly, in cases of termination of employment without cause, it is not a breach of a contract to terminate an employee absent a specific provision to the contrary in the employment agreement. It is trite law that any employer can terminate the employment of an employee without cause, subject to giving that employee reasonable notice. It is not the conduct of Garth Dix that led Council to make a determination to offer a "notice period" termination allowance that was too low in the eyes of Mr. Kalen. That was the decision of the defendant Brantford which is a properly named party to this action.

74 If Garth Dix was inaccurate or unfair in his recommendations to Council, the plaintiff has recourse against Brantford. As the Court of Appeal noted in *Correia*, *supra*, there is no need to interpose the tort of intentional interference to obtain redress against Garth Dix.

75 The common law has long recognized that employees of a corporation must be capable of recommending the termination of a contract of employment without exposing themselves to liability. The exception in *Said v. Butt*, [1920] 3 K.B. 497 (Eng. K.B.), assures that officers, directors, and servants are capable of directing that a contract of employment be terminated without concern for personal liability in tort, provided that they acted in a*bona fide* manner. The principle behind that decision has been adopted by courts in Canada and cited with approval by the Ontario Court of appeal in *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999] O.J. No. 27 (Ont. C.A.) and *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [1999] O.J. No. 3243 (Ont. C.A.).

76 At paragraph 32 of*ADGA Systems International Ltd. v. Valcom Ltd.*, *supra*, the Court of Appeal cited Osborne J. A. in *Truckers Garage Inc. v. Krell* (1993), 68 O.A.C. 106 (Ont. C.A.), where the court was dealing with an allegation that the principal of the defendant corporation allegedly induced a breach of the plaintiff's contract of employment. The court held that:

...at the very least, the evidence must establish, to a degree of probability, that some separate interest from Teperman's [the personally named director] standpoint was involved. ....If that were not the case, the directing mind of any corporate employer would be liable for the tort of inducing a breach of contract in the event an employee was wrongfully terminated.

77 City Council can only have acted to terminate the plaintiff's employment on a without cause basis on the advice and recommendation of his superior, Chief Dix. There is no suggestion on the record before this court that Garth Dix acted as he did for his personal gain. The plaintiff's contract of employment was with the City, not with Chief Dix. Chief Dix is not liable for damages in the event the court determines that his employer should have given greater compensation to the plaintiff in lieu of notice.

78 In the circumstances, I am satisfied on the record before this court that it is clear and obvious that the plaintiff's claim against Garth Dix personally for intentional interference with contractual relations cannot succeed and the pleadings related to that cause of action are struck.

Issue #3: Should the plaintiff's claim under the Human Rights Code be struck?

79 The plaintiff has made the following allegation in paragraph 31 of the Statement of Claim in support of his request for reinstatement and/or damages pursuant to the *Human Rights Code*, R.S.O., 1990, c. H.19.

> The plaintiff states that Dix, for whom the City is vicariously [liable], breached the plaintiff's human rights by basing his termination decision on the plaintiff's family relations rather than upon the plaintiff's ability to perform his job.

80 The plaintiff's claim for damages for breach of his human rights is completely without foundation or any particulars. He has no disability, and on the record before this court, he was not discriminated against based on his family relations, his marital status or any other enumerated ground under the *Human Rights Code*. The best that the plaintiff can say is that defamatory statements were allegedly made by Chief Dix "to the effect that the plaintiff was unethical, immoral and a womanizer." [2]

81 In my view, on the facts found on the record before this court, this claim cannot succeed and paragraphs 1A (e) and (f) and paragraphs 31 and 32 of the pleading should be struck.

Issue #4: Should the plaintiff's claim for moral damages be struck?

82 The defendants assert that the plaintiff has pleaded no allegations in support of his claim for "moral damages" at paragraph 1 of the statement of claim. Counsel for the plaintiff asserts that such a claim is permitted pursuant to the decision of the Supreme Court of Canada in *Keays v. Honda Canada Inc.*, [2008] S.C.J. No. 40 (S.C.C.). I concur with the plaintiff's position on this issue.

83 In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), the Supreme Court of Canada held that bad faith on the part of the employer at the time of termination would be compensated by way of an extension of the notice period. The court held that:

> where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth or self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, the damages do not flow from the dismissal itself but rather from the manner in which the dismissal was effected by the employer (*Wallace v. United Grain Growers Ltd.*, *supra* at para. 103)..

"Wallace damages" were calculated by extending the notice period. In fact, the employee did not have to prove that actual damages were suffered.

84 In *Keays v. Honda Canada Inc.*, [2008] S.C.J. No. 40 (S.C.C.), just over a decade after the *Wallace* decision, the Supreme Court of Canada revisited the issue.The Court determined that the manner of assessing damages for an employer's breach of the duty of good faith and fair dealing should be fundamentally altered and explicitly held that:

> in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as all other cases dealing with *moral damages* (*Honda v. Keays*, *supra* at para. 59). (Emphasis added).

85 Thus, if the employee can prove the manner of dismissal caused mental distress that was within the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an

award that reflects actual damages. In other words, the court held that the damages are to be compensatory, based upon actual proof that they suffered actual damage as a result of the employer's conduct.

86 The law is clear that if an employer wrongfully terminates an employee in a high handed or bad faith manner, the employer can in certain limited instances be liable for moral damages. The plaintiff is therefore granted leave to amend his claim to properly claim moral damages, if he so chooses.

Issue #5: Should other paragraphs of the statement of claim be struck due to the pleading being prolix, irrelevant or constituting the pleading of evidence?

87 I concur with the position of the defendants that some of the paragraphs in the statement of claim should be struck for these reasons.

88 Paragraph 1(g) seeks an order that the City produce minutes of the in-camera meeting in which it approved the termination of the plaintiff and copies of all reports tendered for that meeting regarding the plaintiff. In a similar respect, paragraphs 1(j), 1(k), and 19 seek production of documents. These requests for production of documents are not properly pleaded in a statement of claim and should be the subject matter of an interlocutory motion. The pleadings contained in those paragraphs shall be struck.

89 Paragraphs 10, 11 and 12 constitute the pleading of evidence and shall be struck.

90 Paragraphs 13-17 and paragraph 20 which deal with the personal action against Garth Dix for defamation shall be struck, but as noted above, the plaintiff is granted leave to amend the statement of claim to properly plead and particularize the claims for defamation against Garth Dix.

91 Paragraphs 21 and 22, which constitute the allegations supporting a claim for intentional interference with contractual relations shall be struck.

92 Paragraphs 28, 29 and 30 shall be struck because they constitute a pleading of evidence contrary to Rule 25.06 (1) of the Rules of Practice.

Costs:

93 As success was divided on this motion, each party shall bear its own costs.

Order accordingly.

Footnotes

1 A form of pre-action discovery sometimes referred to as a "*Norwich* order" based on the principles articulated in *Norwich Pharmacal Co. v. Customs & Excise Commissioners* (1973), [1974] A.C. 133 (U.K. H.L.).

2 Plaintiff's response to Demand for Particulars. Defendants' Motion Record, tab 5, page 31, para. (i).

2006 CarswellOnt 8092
Ontario Court of Appeal

Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital

2006 CarswellOnt 8092, 154 A.C.W.S. (3d) 324, 40 C.P.C. (6th) 6

JACOB MEUWISSEN, a minor by his Litigation Guardian DEBORAH MEUWISSEN and the said DEBORAH MEUWISSEN and MICAHEL MEUWISSEN (Respondents / Plaintiffs) and STRATHROY MIDDLESEX GENERAL HOSPITAL and GARY PERKIN (Appellant / Defendant)

R.J. Sharpe, R.A. Blair, J. MacFarland JJ.A.

Heard: December 18, 2006
Judgment: December 18, 2006
Docket: CA C44789, C44801

Proceedings: reversing *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital* (2006), 2006 CarswellOnt 8371 (Ont. S.C.J.)

Counsel: Kirk F. Stevens, Dara M. Lambe for Gary Perkin
Hans Engell for Strathroy Middlesex General Hospital
Donald Leschied, Stephen Marentette for Jacob Meuwissen et al

R.J. Sharpe J.A. **(orally):**

1 Dr. Gary Perkin and the Strathroy Middlesex General Hospital appeal from the order of Rogin J. requiring the production of certain documents relating to an intended medical malpractice action.

2 The motion for pre-action discovery was brought pursuant to rule 37.17. We are satisfied that the motion could not proceed under that rule as it is conceded that there was no urgency.

3 We agree with the appellants that rule 30.04(5) does not contemplate an order for pre-action discovery. That rule is available to a "party" and accordingly, only applies where a proceeding has been commenced. See *TD Insurance Home & Auto v. Sivakumar (Litigation Guardian of)* (2006), 80 O.R. (3d) 671 (Ont. C.A.). As the respondents had not commenced an action, they have no right to invoke rule 30.04(5).

4 Similarly, rule 30.10 which provides for discovery against a non-party may be invoked only by a "party" which means that an action must have been commenced. Moreover, any form of production against the non-party must relate to a material issue which can only be determined by reference to the pleadings.

5 English decisions according broader rights to pre-action discovery are based upon legislation and rules which find no equivalent in Ontario law.

6 Pre-pleading, post-commencement of action production may be ordered in exceptional circumstances to enable a party to plead: see *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.) at p. 219. However, in this case no action had been commenced and in any event, the respondents have not made out a case for such an exceptional order. They already have retained experts and there is no evidence that production is required for them to obtain an opinion.

7 The motions judge did not find that pre-action production was required to enable the respondents to plead. Moreover, on this record, it would be impossible to make such a finding.

8 There is no authority for the proposition cited by the motion judge in paragraph 5 of his reasons, namely, that "the intended plaintiffs in this case should be entitled at this time to disclosure of anything to which they would eventually be entitled." In our view, this proposition cannot be supported in law.

9 The equitable remedy of a bill of discovery is preserved in Ontario law and does permit pre-action discovery in certain circumstances: see *Straka v. Humber River Regional Hospital* (2000), 51 O.R. (3d) 1 (Ont. C.A.). Properly conceived, the relief sought by the respondents should have been presented as an application for a *Straka* order. In any event, we are satisfied that with the information that the respondents have already obtained from the hospital and with the information obtained from the College of Physicians and Surgeons, they are in possession of ample information to formulate and plead their case and we see no basis for a *Straka* order. The order appealed from represents a significant departure from the ordinary procedure laid down by the rules of court relating to pleadings and discovery that is not required in the circumstances of this case.

10 We agree with the appellants that the respondents were precluded by the *Regulated Health Professions Act 1991*, R.S.O. 1991 c. 18 s. 36(3) from adducing in evidence on the motion the report of the College of Physicians and Surgeons disposing of the complaint against Dr. Perkin and that accordingly, that portion of the evidence should be struck and removed from the court record.

11 In view of our disposition of these issues, it is unnecessary for us to deal with the other issues raised by the appellants relating to privilege.

12 For these reasons, the appeal is allowed and the order of motion judge is set aside. Costs to Dr. Perkin fixed at $10,000 and to the Strathroy Middlesex General Hospital fixed at $5,000, both figures inclusive of disbursement and GST.

Appeal allowed.

Court File No.: CV-18-00611219-00CL

FTI CONSULTING CANADA INC. Plaintiff	-and-	ESL INVESTMENTS INC *et al.* Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
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