SUPREME COURT OF NOVA SCOTIA
Citation: *Thornridge Holdings Limited* v. *Thomas*, 2024 NSSC 119

Date: 20240424
Docket: 509484
Registry: Halifax

Between:

Thornridge Holdings Limited

Plaintiff

v.

Alexander Francis Thomas, Clinton James Stewart, Dan Roy Richards, David Jason Hodder, Jeffrey Aaron Fraser, Robert Cliff Schwichtenberg, Scott Michael Sangster, Terry Grant Kipper, Michael Anthony Tringali, and Michael Gordon Ryan

Defendants

DECISION

Judge: The Honourable Justice C. Richard Coughlan

Heard: February 13 and 14, 2024, in Halifax, Nova Scotia

Counsel: Christopher W. Madill and Sarah A. Walsh, for the Plaintiff Daniel F. Wallace
Articled Clerk Graham Headley, for the Defendants Alexander Thomas, Clinton Stewart, Dan Richards, Jason Hodder, Jeffrey Fraser, Robert Schwichtenberg, Scott Sangster and Terry Kipper
Matthew McEwen, for the Defendants Michael Tringali and Michael Ryan

By the Court:

BACKGROUND

[1] Thornridge Holdings Limited (Thornridge) commenced an action against Alexander Francis Thomas, Clinton James Stewart, Dan Roy Richards, David Jason Hodder, Jeffrey Aaron Fraser, Robert Cliff Schwichtenberg, Scott Michael Sangster, Terry Grant Kipper, Michael Anthony Tringali, and Michael Gordon Ryan concerning promissory notes the defendants executed in favour of Thornridge. The defendants filed defences.

[2] The defendants Thomas, Stewart, Richards, Hodder, Fraser, Schwichtenberg, Sangster and Kipper (Defendant Employees) move for an order for summary judgment on evidence dismissing Thornridge's claim again them. Thornridge opposes the motion.

[3] The background of this motion is as follows.

[4] This proceeding centres upon a complex commercial transaction. Envirosystems Inc. (Envirosystems) carried on business as a provider of specialized waste-management and environmental solutions to a broad range of industrial sectors including petrochemical facilities and mining operations.

[5] Thornridge owned the shares of Envirosystems either directly or through subsidiaries. In February 2015 Thornridge sold the majority of its shares in Envirosystems to 3287166 Nova Scotia Limited (3287166) a holding company of Torquest Partners Fund III (Torquest) a private equity company. The sale closed on February 26, 2015.

[6] As part of its negotiations to purchase Envirosystems in 2014 Torquest requested that certain key employees, which included the Defendant Employees have a risk commitment in 3287166. Thornridge loaned money to the defendants including the employee defendants to acquire an equity stake in the company. The loans were secured by promissory notes from the individual defendants and a pledge of their shares in the company on a full recourse basis.

[7] Thornridge loaned the total principal sum of $2,154,888 to the defendants broken down as follows:

(a) The principal sum of $147,410 to Mr. Thomas;

(b) The principal sum of $157,067 to Mr. Stewart;

(c) The principal sum of $186,000 to Mr. Richards;

(d) The principal sum of $177,734 to Mr. Hodder;

(e) The principal sum of $140,533 to Mr. Fraser;

(f) The principal sum of $150,586 to Mr. Schwichtenberg;

(g) The principal sum of $103,333 to Mr. Sangster;

(h) The principal sum of $169,467 to Mr. Kipper;

(i) The principal sum of $401,958 to Mr. Tringali; and

(j) The principal sum of $520,800 to Mr. Ryan.

[8] In consideration for Thornridge advancing these sums each of the defendants executed a promissory note dated February 26, 2015.

[9] On January 7, 2015, Nicholas Betts, President of Thornridge sent an email to Michael Ryan President of Envirosystems, copying Robert Gillis then Thornridge's secretary, Christine Pound Thornridge's counsel, David Hennigar Thornridge's chairperson, chief executive officer and Thornridge director and others stating:

> Mike, another thought would be to make no reference to recourse in the note, then appoint you and Mike Tringali as irrevocable agents to administer collection, with power to accept settlement in the event of default.
>
> That would put complete control in your hands.
>
> We would not need to disclose this in my opinion, but let's keep thinking.

[10] On February 22, 2015 the Thornridge board of directors met to authorize the sale of the Envirosystems shares. Mr. Ryan attended the meeting at which a resolution was passed which authorized any two directors of Thornridge acting together, or any one director and any one officer of Thornridge acting together, to execute documents in connection with the sale of the shares.

[11] On February 24, 2015 two days prior to the closing Ms. Pound sent an email to Blois Colpitts stating "Please have Nick sign" in response to Mr. Colpitts email attaching the Appointment of Agent Agreement (Agency Agreement).

[12] On February 26, 2015 Mr. Betts emailed Messrs. Colpitts, Gillis, David Hennigar, and Trevor Hennigar a Thornridge director stating:

> Also, we should finalize the Agency Agreement for Mike regarding administration of the employee loans one of these days.

[13] Mr. Colpitts responded, "Agency is done and signed."

[14] The Agency Agreement between Thornridge and Michael G. Ryan and Michael A. Tringali dated February 26, 2015 was signed by Nicholas Betts who was at the time President, Chief Executive Officer, and a director of Thornridge. Under Mr. Betts' signature is the statement "I have authority to bind the company." Neither his name nor his position with Thornridge is marked under his signature. The Agency Agreement provides the agreement and the facts surrounding it are confidential and not to be disclosed or discussed (para. 8). An agent was not liable for any action taken in good faith unless it shall be proved that the agent was grossly negligent in ascertaining the pertinent facts or acted intentionally in bad faith (para. 9). Thornridge indemnified each agent in respect to their actions pursuant to the agreement EXCEPT for gross negligence or willful misconduct on the part of the agent seeking indemnification. For greater certainty, the indemnification provisions of the Agency Agreement do not apply with respect to the liabilities and obligations of an Agent as debtor (para. 10).

[15] None of the Defendant Employees saw the Agency Agreement in February 2015 and many had never heard of it until after Thornridge demanded payment of the promissory notes on August 19, 2021.

[16] In an email dated January 28, 2015 from Mr. Betts to Victor Goldberg which was copied to Mr. Ryan, the following was said about the proposed Agency Agreement:

> Victor, as discussed, the Proposed Agency Agreement is not part of the pledge documents, and will not be executed or become official until the Thornridge Board has approved, and that will likely take place sometime in May, well after the closing.
>
> No disclosure of this "hypothetical" document is required.
>
> Nick

[17] In June 2018 the 3287166 Nova Scotia Ltd. shares were exchanged for shares of Terrapure Environmental Ltd. ("Terrapure") following Terrapure's acquisition of the Company.

[18] In written notices dated August 11, 2021 to Mr. Ryan and Mr. Tringali, Mr. Gillis President of Thornridge stated the following concerning the Agency Agreement:

> RE: Document entitled Appointment of Agent Agreement dated February 26, 2015 and signed by Michael G. Ryan (MGR), Michael A. Tringali (MAT) and N. Betts purportedly on behalf of Thornridge Holdings Limited (the "Company") (the "Document")
>
> Reference is made to the Document.
>
> Be advised that the Company is not bound by the Document. The board of directors of the Company neither approved nor authorized the Company to enter into or deliver the Document.
>
> You are in an unconditional conflict of interest in respect of any actions you may take pursuant to the Document.
>
> Notwithstanding your flagrant conflict of interest under the Document, any authority that you thought you may have thereunder, you should consider that it is void from the date of its signing and accordingly it is null, void and terminated.
>
> As a result, the Company will hold you accountable for all direct and indirect losses, damages and expenses, it or its shareholders, officers, directors or employees may incur or suffer from any action you take or purport to take directly or indirectly under or pursuant to the Document.

[19] In August 2021 the shares in 3287166 were sold to GFL Environmental Inc. ("GFL") as part of GFL's acquisition of Terrapure.

[20] On August 19, 2021 Thornridge determined an act of default had occurred and formal demands for payment of the various promissory notes were sent to each defendant. The demands contained the following:

> We also advise that Thornridge considers the Appointment of Agent Agreement dated February 26, 2015 purportedly made among Michael G. Ryan, Michael A. Tringali and Thornridge to be null and void for various reasons including want of corporate authority on the part of the signatory on behalf of Thornridge. Thus, Thornridge considers that any action taken by you or to be taken by you under the terms of such agreement to be null and void and of no force or effect in relation to your obligations under the Note.

[21] After receiving the demands the Defendant Employees in September 2021 entered into settlement agreements with Mr. Ryan which purported to settle the debts for significantly less than the amounts due under the promissory notes.

[22] The Defendants Ryan and Tringali, at the same time purported to settle each other's note for significantly less than the amounts due under their promissory notes.

ISSUE

[23] The issue for the Court is whether the Defendant Employees are entitled to summary judgment on the evidence dismissing the action by Thornridge against them.

Position of the Parties

[24] The Defendant Employees submit this is a straightforward case dealing with promissory notes. That there is no genuine issue of material fact.

[25] Each Employee Defendant was employed by Envirosystems, or companies affiliated with Envirosystems at the time Thornridge sold shares in the company to Torquest. Each of the Defendant Employees executed a promissory note to allow each to purchase shares in connection with the sale to Torquest in 2015. Thornridge, by its then President, Chief Operating Officer and a director and Michael G. Ryan entered into the Agency Agreement on February 26, 2015, irrevocably appointing Mr. Ryan as principal Agent to administer the debts arising pursuant to the promissory notes in the event of a default. On or about August 23, 2021, on behalf of Thornridge and pursuant to his clear and irrevocable authority under the Agency Agreement, Mr. Ryan entered into settlement agreements with each of the Defendant Employees regarding their respective promissory notes.

[26] The Defendant Employees go on to submit there is a question of law to determine whether the Appointment of Agent Agreement is valid. They say the action has no real chance of success. Section 30 of the *Companies Act* RSNS 1989, c.81 codifies the indoor management rule, that a company cannot assert against a person dealing with a company that a person held out by the company as a director, officer or agent has not been duly appointed or has no authority to exercise the powers and perform duties that are customary in the business or usual for the director, officer or agent. Consequently, Thornridge cannot question the validity of the Appointment of Agent Agreement executed by Mr. Betts with the knowledge of other directors and agents.

[27] The Defendant Employees also submit the unjust enrichment claim must fail as the facts pleaded were material to a breach of contract claim not an unjust enrichment claim.

[28] Thornridge submits there are genuine issues of material fact in issue.

[29] The first material fact mixed with a question of law is whether Mr. Ryan's attendance at the Transaction Closing Board Meeting means he had "knowledge to the contrary" that two signatures were required for the Appointment of Agent Agreement when he signed it on February 26, 2015 so that he could not rely on Section 30 of the *Companies Act*.

[30] The second material fact in dispute, mixed with a question of law is whether Mr. Ryan's attendance at the Transaction Closing Board Meeting together with his receipt of letters from Thornridge on August 11 and 19, 2021 meant that he had "knowledge to the contrary" as of August 2021 that the Appointment of Agent Agreement was not validly executed so that he could not rely on Section 30 of the *Companies Act*.

[31] The third material fact in dispute is whether the Defendant Employees who received a demand for payment of the promissory notes dated August 19, 2021 in which Thornridge stated it considered the Appointment of Agent Agreement to be null and void and therefore they had "knowledge to the contrary" that the agreement was invalid so that they could not rely on Section 30 of the *Companies Act*.

[32] The fourth material fact in dispute mixed with a question of law, is whether the Appointment of Agent Agreement is part of the transaction documents covered by the authorized persons resolution. Thornridge submits this was a complex transaction with many documents all of which have to be reviewed in order to find the necessary facts within the factual matrix to determine the matter. The Appointment of Agent Agreement is a management loan document which makes it a transaction document.

ANALYSIS

[33] Section 30 of the *Companies* Act, *supra*, provides:

> **Assertions by guarantor**
>
> A company or a guarantor of an obligation of the company may not assert against a person dealing with the company or with any person who has acquired rights from the company that
>
> (a) the memorandum of association or any articles of association have not been complied with;

(b) the persons named in the most recent notice sent to the Registrar under subsection (1) of Section 98 are not the directors and officers of the company;

(c) the place named in the most recent notice sent to the Registrar under subsection (1) of Section 79 is not the registered office of the company;

(d) a person held out by the company as a director, an officer or an agent of the company has not been duly appointed or has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for the director, officer or agent; or

(e) a document issued by any director, officer or agent of the company with actual or usual authority to issue the document is not valid or not genuine,

except where the person has or ought to have, by virtue of his position with or relationship to the company, knowledge to the contrary. R.S., c.81, s.30

[34] Summary judgment on evidence is governed by *Civil Procedure Rule* 13.04 which provides:

Summary judgment on evidence in an action

(1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

[35] The manner in which a judge is to deal with a motion for summary judgment was set out in detail by Fichaud, J.A. in giving the Court's judgment in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 where he identified five sequential questions to be answered.

> First Question: Does the challenged pleading disclose a "genuine issue of material fact" either pure or mixed with a question of law?
>
> Second Question: If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
>
> Third Question: If the answers to #1 and #2 are no and yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton's* second test: Does the challenged pleading have a real chance of success?
>
> Fourt Question: Should the judge exercise the "discretion" to finally determine the issue of law?
>
> Fifth Question: If the motion under Rule 13.04 is dismissed, should the action be converted to an application and, if not, what directions should govern the conduct of the action?

[36] In the same judgment Fichaud J.A. stated at paragraph 36 each party is expected to put its best foot forward:

> "**Best foot forward**": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success". Rule 13.04(4) and (5); *Burton*, para. 87.

[37] Is there a genuine issue of material fact, whether on its own or mixed with a question of law?

[38] The Appointment of Agent Agreement is key to the Defendant Employees' motion. Their counsel started his submission to the Court stating it was the principal issue. The Defendant Employees say the Agency Agreement is valid on two bases: (a) the directors' resolution passed by Thornridge directors on February 22, 2015 concerning the sale of the Envirosystems shares does not cover the Agency Agreement and therefore it did not require two signatures; and (b) Section 30 of the *Companies Act* prohibits a company from asserting against a third party that an officer or director does not have the authority to exercise the powers and perform

duties that are usual or customary. The Agency Agreement was signed by Mr. Betts the President of Thornridge.

Section 30

[39] First dealing with the Section 30 issue. Can the Defendant Employees rely on Section 30 of the *Companies Act*, so that Thornridge cannot assert its then president did not have authority to bind it when he signed the Agency Agreement. They say they can.

[40] Thornridge says Section 30 does not support the Defendant Employees' position as the exception set out in Section 30 applies which states: "except where the person has or ought to have, by virtue of his position with or relationship to the company, knowledge to the contrary."

[41] Thornridge says Mr. Ryan knew or ought to have that the Agency Agreement needed two signatures. He received a copy of Mr. Betts' email to Victor Goldberg dated January 28, 2015 which stated that the proposed Agency Agreement would not be executed or become official until it was approved by the Thornridge Board. Mr. Ryan attended the February 22, 2015 Thornridge Board meeting when the authorized persons resolution requiring two signatures on documentation was passed. He and Mr. Tringali received the notices dated August 11, 2021 which stated Thornridge was not bound by the Agency Agreement, the Board of Directors had not approved or authorized it and that they were in a conflict of interest. Then Mr. Ryan and the other defendants received the demands for payment of the various promissory notes dated August 19, 2021 which also stated:

> We also advise that Thornridge considers the Appointment of Agent Agreement dated February 26, 2015 purportedly made among Michael G. Ryan, Michael A. Tringali and Thornridge to be null and void for various reasons including want of corporate authority on the part of the signatory on behalf of Thornridge. Thus, Thornridge considers that any action taken by you or to be taken by you under the terms of such agreement to be null and void and of no force or effect in relation to your obligations under the Note.

[42] Thornridge says the Defendant Employees had knowledge or ought to have known the Agency Agreement was null and void as none of them had seen the Agency Agreement before they each received the demand dated August 19, 2021 to pay their respective promissory notes which contained the same statement concerning the Agency Agreement set out above. Most Defendant Employees did not know of the Agency Agreement before receiving the demand for payment. The

Defendant Employees were told in their demands for payment that the Agency Agreement was null and void. They went ahead and entered into settlement agreements.

[43] Knowledge is a question of fact *Sattva Capital Corp.* v. *Creston Moly Corp*., 2014 SCC 53 at para. 58.

[44] If Mr. Ryan knew or ought to have known that the Agency Agreement required two signatures, then the exception to Section 30 of the *Companies Act* may apply and Thornridge can assert the Agency Agreement was not valid.

[45] If the Defendant Employees knew or ought to have known that Mr. Ryan was not an agent of Thornridge or that the Agency Agreement was not valid, it would affect Thornridge's claim against them. There are no affidavits from any of the Defendant Employees.

[46] What Mr. Ryan and the Defendant Employees knew or ought to have known are material facts. I find there are genuine issues of material fact to be determined.

Conclusion

[47] I dismiss the motion for summary judgment.

[48] If the parties are unable to agree, I will hear them on the issue of costs.

[49] I direct that the parties contact my office to schedule a hearing pursuant to *Civil Procedure Rule* 13.08.

Coughlan, J.