Claim no. 298292

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Boudreau v. Fitzgerald, 2008 NSSM 77

BETWEEN:

JOSEPH R. BOUDREAU and others

Claimants

- and -

DAVE FITZGERALD and A CAB CO. LTD

Defendants

REASONS FOR DECISION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Dartmouth, Nova Scotia on November 4, 2008

Decision rendered on November 18, 2008

APPEARANCES

For the Claimants	self-represented
For the Defendants	Dave Fitzgerald, President A-Cab Treasurer, A-Cab

BY THE COURT:

Introduction

[1] The Claimant Joseph R. Boudreau commenced this action on behalf of himself and nine or ten other taxi drivers who in about the spring of 2006 invested money in a new company being formed as a cooperative venture, A-Cab Services Ltd.[1] (hereafter referred to as "A-Cab").

[2] The Claimants whom Boudreau claims to represent are Douglas Brine, Ralph Doyle, Peter Arneaud, Frank Horwill, Marilyn Forgeron (on behalf of her late husband, Wayne Forgeron), Ken Paul, Peter McDougall, Bruce Cochrane and Alfred Snow. All but the last two were present at the trial and confirmed their status as Claimants. Another gentleman, Bill Steward, originally signed on as a Claimant but has signed a document, presented at the trial, stating that he is no longer a Claimant. As such, his interest in the matter at issue will not be considered.

Background facts

[3] The idea of a taxi co-op excited a number of people. The taxi business in Halifax Regional Municipality has historically been dominated by a small number of large well-established companies, and there was considerable interest in having a new company run by and for the drivers.

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[1] I note that the Claim was issued against "A-Cab Co. Ltd.," which I will treat as a misnomer and amend the style of cause accordingly.

[4] The name A-Cab Service had been used for many years by veteran cab driver Frank Horwill, who offered to give the name to this new cooperative venture, and who also became one of the founding members. Mr. Horwill also donated space rent-free for one year in a building that he owned on Main Street in Halifax, to assist the fledgeling enterprise.

[5] Mr. Horwill eventually became disenchanted with the way the company was being run, and became part of the group bringing this action to obtain the return of their investment. Mr. Horwill testified at the trial. In a sad footnote to this case, he died suddenly less than a week after the trial, and long before these reasons were prepared.

[6] The idea for this company was undoubtedly a good one, but unfortunately there were disputes about how it was being run, and frustration among some of the members concerning the lack of clarity as to their shareholdings.

[7] Despite the good intentions all around, and for whatever reason, this enterprise was poorly conceived from a legal point of view, which in turn led to suspicion, factionalism, and equally poor decisions by virtually everyone concerned.

[8] The way the taxi business is organized in Halifax Regional Municipality, typically the so-called taxi companies do not own the vehicles or control the taxi licences (more commonly referred to as roof lights). What they mostly provide to licenced drivers is a radio and the right to receive calls. The companies obtain the easy-to-remember phone numbers, which they

advertise widely, and employ people to answer the phones and dispatch the calls.

[9] There is no requirement that a taxi driver belong to one of the companies, and many do not, but it is a useful association if they want to share in the calls that the companies receive.

[10] The idea for A-Cab was to try to compete with the big cab companies in an enterprise where the profits would go back to the drivers, and where the drivers would make the rules for themselves. It was loosely modelled on the idea of a cooperative. The plan was not only to have the members provide start up capital, but also volunteer time in the office dispatching and doing other things, to reduce the expenses. A-Cab would obtain phone lines and a radio system, and charge drivers (including but not limited to the original investors) a fee for the use of the equipment and the receipt of calls, which fee is commonly referred to as “office rent.”.

[11] The required investment was to be $1,010.00. It is not absolutely clear how this unusual amount was arrived at; however most people understood that it was $10.00 to purchase the share or shares, with the other $1,000.00 as an “investment” or “start-up capital.” Some appear to have believed that the entire $1,010.00 was to buy shares. The truth would have been difficult to discern at the time the company was being formed and people began paying their money, because there was nothing by way of documentation to set out clearly how this enterprise was being structured.

[12] The Defendants placed into evidence a document which they loosely referred to as a prospectus, and which was titled on its face as a rough

draft proposal called “A Plan For Your Future.” There was conflicting evidence as to whether or not this document was available at the early recruiting meetings, as the Defendants contend.

[13] The witnesses on behalf of the Claimant group were adamant that there had been no such document provided to them, and claimed never to have seen it before. The witnesses called by the Defendants stated that the document was there, although there was a conflict in the testimony as to whether or not the document was given to the attendees to take home, or had to be left at the meeting either because it was still in rough form or because copies were limited.

[14] On balance, I believe that the document most likely did show up at some of the meetings, although perhaps not at the very earliest meetings. I also find that it was not something that everyone was encouraged or permitted to take with them; rather, there were likely copies circulating but were mostly ignored in the context of meetings where everyone was more interested in what was happening on the ground than what was being put on paper.

[15] I do find that this “prospectus” set out the basic intentions, the most important ones for my purpose being:

A. This would be a limited company.
B. There was an element of risk in the venture, for investors.
C. The initial investors would establish company policy.
D. Eventually there would be written contracts requiring each investor to agree to the policies established.

E. Investors would pay a one-time sum of $1,000.00 to provide working capital for the expenses such as phone lines, radios etc.

F. Investors would volunteer four hours per week in the office.

G. Ongoing operating costs would be funded by the weekly “office rent” (the fee for being part of the radio service).

H. The initial investments would be placed in a trust account and not accessed unless enough individuals had committed to the proposal.

I. The company was committed to buying back investors’ shares for market value if an investor elected to retire.

[16] Obviously, this document - whether or not it has any legal effect - did not cover nor attempt to cover every relevant issue. The biggest gap for present purposes is the question of how the deposits of start-up capital would be treated once the critical number of investors was reached and the enterprise started up.

[17] The Claimant group maintains that there was a verbal commitment made at the founding meetings that investors would be entitled to receive their money back if they decided to leave the company. The Defendants deny that there was any such commitment, although as observed there is nothing in the prospectus that speaks to the status of the $1,000.00 investments, and it is difficult to believe that there would not have been questions asked about this. More will be said about this later.

Start Up

[18] The company accepted the $1,010.00 deposits (and some lesser amounts) and opened for business in or about August 2006. Phone lines were

acquired. Thirty radios were leased on a three-year lease from one of the large mobile equipment companies.

[19] The Defendant Dave Fitzgerald was elected as the president of the company and given primary responsibility to run the operation, while still driving his own taxi.

[20] The idea was to have regular business meetings both to keep the investors informed and also to decide issues of policy.

[21] To add further confusion to the situation, as noted, not all of the investors were able to come up with the entire $1,010.00 right away, and lesser sums were accepted on account. It became a source of friction and confusion as there was resistance to the idea of someone who had only paid $200 having the same full vote at meetings as someone who was fully paid up.

[22] People also started to ask when they would receive their shares.

Private companies

[23] It is well understood among lawyers and business people, that in a private company involving more than one or two people, individual shareholders are in a minority position and therefore have very few rights. To address this problem, there is typically a shareholder's agreement which acts like a constitution and sets out the rights that minority shareholders can exercise.

[24] It is also understood by many people that there is very little real value (though there might be symbolic value) in having an actual share certificate in a private company, because it is likely unsaleable and the definitive indicator of ownership is what is contained in the company records.

[25] It does appear that Mr. Fitzgerald and others in his immediate circle had a lawyer who was expected to draft a shareholders agreement and issue shares which would, at least, have made the shareholders a bit more comfortable with their status. For reasons which were not explained, little or nothing happened to bring those share certificates or that shareholders agreement into fruition until much too late to satisfy the small but growing group of disgruntled investors.

[26] While no one stated precisely when it happened, in about October or November of 2007 a number of investors announced that they were quitting and handed in their radios, although they still apparently regarded themselves as shareholders.

[27] In November of 2007, a general meeting was called where, among other items of business, a draft shareholders agreement was to be presented. When people arrived at this meeting, they noted that not all of the original investors were listed on the draft agreement that was circulated. This created confusion and anger.

[28] By then there was also some significant dissent concerning the management style of Dave Fitzgerald. For whatever reason, by then he had made enemies within the group.

[29] To make matters much worse, Mr. Fitzgerald made a statement in either this or another meeting around the same time, to the effect that he was the only shareholder and director, and thus the sole owner of the company.

[30] The issue at that time was the status of all of the other shareholders and the question of when certificates would be issued. The only conclusion I can reach on the evidence is that Mr. Fitzgerald had been in touch with the company's lawyer, who had informed him (as was likely the case) that the company had originally been incorporated with the issuance of one share to him.

[31] What Mr. Fitzgerald must have at best dimly understood, and what no one else at the meeting understood at all, is that it is common practice for a company to be incorporated in this fashion. Often the lawyer handing the incorporation will issue one share, or some number such as one hundred shares, to him or herself, or to a representative client, as purely a temporary measure until the precise ownership structure of the company is decided. Later, further shares would be issued by the company or transferred from the initial shareholder, to recognize all legitimate shareholders. Similarly, one person may be appointed as the initial director, pending a decision about who should be on the board of directors. So when Mr. Fitzgerald was telling the meeting that he was the sole shareholder and owner of the company, he may well have been although this was at most true in a purely technical sense.

[32] In any event, this statement only served to infuriate some of the investors who leaped to a conclusion that Fitzgerald was hijacking the company and appropriating their investments. Further defections followed.

[33] The individuals who have joined in this action have never received share certificates and are not considered shareholders by the company, as it eventually (within a month of this trial) issued shares to all of the other investors who remained onside.

[34] The Claimants want their investment returned to them. The total claimed is $9,293.00.

[35] The position of A-Cab is that the Claimants abandoned their investments and as such are not shareholders in the company. It also seeks to hold these individuals responsible for the financial losses that their defections caused. In particular, the radios were leased by A-Cab on three year leases. When some of the drivers simply handed back their radios, A-Cab was still on the hook for the leases. The cost for each radio was $22.50 per month. According to Mr. Fitzgerald, there were initially thirty radios leased, and a few more added along the way. Currently there are only 27 people driving for A-Cab., and seven radios are basically gathering dust.

[36] Mr. Fitzgerald also testified that A-Cab is currently a money losing enterprise.

[37] On the brighter side, Fitzgerald testified, in the first year of business A-Cab received 100,000 calls. He stated that the national average for a taxi ride is $7.00, and according to his calculation each driver working full-time with A-Cab should have made about $23,000 from those calls. He stated that the investors - including the Claimant group - received good value for their investment.

What is the legal status of the shares and investments?

[38] Amidst all of the uncertainty and confusion, I must find some clarity.

[39] I am satisfied that the intention here, though poorly expressed, was that there would be a nominal payment of $10.00 for the shares (which is a common enough practice) and that each original investor would be obliged to lend $1,000.00 to the company to supply working capital. Those loans would be reflected on the books of the company as shareholder loans.

[40] I note that the company did return moneys to a couple of people, each of whom presented special circumstances. The Claimants cited these as examples in support of the view that they were entitled to their money back. I would not go that far. There were compassionate reasons to let these two people out of the deal. In one case, a widow received back her late husband's money, and in another case, a driver left the company within a very short time and did not really cost the company anything.

[41] A shareholder loan is just that - a loan - though not every loan is necessarily repayable on demand. It depends entirely on the agreement. In the absence of a written agreement, reasonable terms must be implied.

[42] The Defendants filed in evidence an unsigned copy of the shareholders agreement that was eventually drafted by the company lawyer and, evidently, signed by the remaining shareholders. This agreement is not binding on the Claimants because they never agreed to its terms. Even so, it does briefly touch upon the subject of shareholder loans, providing in

paragraph 2.11 that shareholder loans bear interest at prime plus 1% and are “repayable on a proportionate basis,” whatever that phrase may mean.

[43] It does not appear to me that the drafter of this shareholders agreement turned his or her mind directly to the $1,000.00 loans, but if paragraph 2.11 did apply the only real question standing in the way of the Claimants receiving their loans, would be whether the loans being repayable on a proportionate basis means that they should receive something less than the full amount.

[44] The bottom line is that A-Cab cannot simply absorb these individuals’ investments and also deny them the status of shareholders. Money and ownership rights do not vanish so conveniently.

[45] At the time that the Claimant group left A-Cab, the company might have been more within its rights to say to these drivers that if they forfeited their shares the company could not necessarily repay their loans immediately, if to do so would impair the operation. However, that did not happen.

[46] It is my finding that, in the absence of any binding terms to the contrary, the investors are entitled to have their shareholder loans repaid.

[47] There is no evidence that the “proportionate basis” provision, if it applied, would dictate that they receive a lesser amount. I find that this provision does not apply because the Claimant group never agreed to be bound by the shareholder’s agreement.

[48] It is also my finding that the Claimants abandoned their shares in the company, for which they paid $10.00. This is not big loss as there is no evidence that those shares would have been worth anything at this time.

[49] I also find that the company does not have any recourse against the Claimants for the radios or any other expenses, because the Claimants' legitimate rights and interests were clearly not being respected at the time they decided to leave the company. By failing to deal fairly with the Claimants, A-Cab caused itself this financial loss and there is no legal basis to claim it back against them.

[50] The amounts that the Claimants are entitled to recover are set out in the table below:

Claimant	**Amount of loan to be refunded**
James R. Boudreau	$1,000.00
Douglas Brine	$1,000.00
Ralph Doyle	$1,000.00
Peter Arneaud	$1,000.00
Frank Horwill (to be paid to his estate)	$1,000.00
Marilyn Forgeron (on behalf of her late husband, Wane Forgeron)	$1,000.00
Ken Paul	$523.00
Peter McDougall	$300.00
Bruce Cochrane	$1,200.00
Alfred Snow	$1,000.00

Total	$9,023.00

[51] It should be noted that the Claimants have sued both A-Cab and Mr. Fitzgerald personally. There is no basis in law to hold Mr. Fitzgerald personally responsible. He was at all times acting on behalf of the company, and the company A-Cab alone bears the legal responsibility to repay these loans.

[52] I do recognize that making these payments may present a hardship for A-Cab. As an Adjudicator, I do not have the authority to structure the repayment to lessen the blow. I do observe that this company was a good idea, born of good intentions, and it would be a shame for it to fail. I therefore encourage the parties to be creative and patient and work toward a solution that satisfies all legitimate concerns.

[53] The Claimants are entitled to their cost of filing this claim. In the result, the Claimants will have judgment for $9,023.00 plus costs of $174.13.

Eric K. Slone, Adjudicator