CLAIM NO. 113242
Date:20011012

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Boyne Clarke v. Connors, 2001 NSSM 6

BETWEEN:

Name	BOYNE CLARKE	Claimant
Name	KEVIN CONNORS	Defendant
	-and-	
Name	MICHAEL MOSES	Defendant
	-and-	
Name	COASTAL WATCH INFORMATION SERVICES LIMITED	Defendant
	-and-	
Name	i-CARDS INC.	Defendant

Revised Decision: The text of the original decision has been revised to remove addresses and phone numbers for the parties on August 17, 2006. This decision replaces the previously distributed decision.

D E C I S I O N

Appearances:
David A. Thompson, Solicitor, on behalf of the Claimant, Boyne Clarke
Rebecca L. Lamb, Solicitor, on behalf of the Defendants

This matter came on before me on October 11, 2001. It highlights the importance of lawyers obtaining detailed and specific retainers with respect to the payment of their fees from their clients. It concerns an account rendered by Boyne Clarke for legal services performed by it (and in particular, Mr. David Thompson) over several months in early to mid-2000. The total legal account was for $12,389.89: Exhibit C1, Tab 10. Boyne Clarke waived any amount in excess of $10,000, and says that all four Defendants are personally liable for the account.

The Defendants agreed that the fees were reasonable. They did not dispute Boyne Clarke's entitlement to be paid for those services. They did dispute, however, the issue of who should pay for them. Their position was that only the Defendant i-Cards Inc. ("i-Cards") was responsible and liable for the account.

In essence, the principal issue between the parties was whether the individual Defendants Kevin Connors ("Connors") and Michael Moses ("Moses") had ever agreed to pay for or be obligated to pay for the legal fees that were provided to i-Cards by Boyne Clarke. The Claimant says that there was such an agreement as part of their original retainer; the Defendants deny the existence of any such agreement.

I heard the evidence and submissions of David Thompson on behalf of the Claimant, and the evidence of the Defendants Kevin Connors and Michael Moses, and the submissions of Ms. Lamb, on behalf of the Defendants.

The Evidence

Mr. Connors is a businessman. He has a controlling interest in a company called Trebley Atlantic Sales Inc., which in turn owns 51% of a company called Coastal Watch Information Services Limited ("Coastal Watch"). Mr. Moses is also a businessman, and owns 49% of the shares of Coastal Watch.

In the fall of 1999, Mr. Moses and Mr. Connors were invited to a presentation at Boyne Clarke. The presentation was made by James Nicholl, an investment advisor with Beacon Securities Limited, and Mr. David Thompson of Boyne Clarke. The presentation dealt with the ways in which equity financing could be raised for small and medium size businesses by way of private offerings. Mr. Connors was impressed with the presentation.

Sometime shortly thereafter, Mr. Connors approached Mr. Nicholl regarding a business plan he and Mr. Moses were developing. As I understand it, the plan called for the creation of a company that would provide online processing of merchant and credit card accounts for small and medium size Canadian e-commerce businesses. Mr. Connors was interested in raising money for this project. Mr. Nicholl suggested that money could be raised by way of a private offering, but that it was necessary to assemble a team to put together and market the offering. The team included the following people:

(a) Mr. Nicholl, to provide the investment strategy and obtain investors;
(b) Cynthia Robertson, of Corporate Communications Limited, to provide the marketing;
(c) David Thompson, of Boyne Clarke, to provide the legal services; and
(d) Keith MacIntyre, of Grant Thornton, to provide the accounting and tax advice.

Sometime in early 2000 an exploratory meeting between Mr. Connors and Mr. Moses on the one hand, and the team members on the other, was held. Everyone was enthusiastic about the plan. Mr. Nicholl expressed his confidence that $1 million could easily be raised. He described it as "a piece of cake".

The first recommendation that Mr. Connors and Mr. Moses received from the team was that they incorporate a company to give effect to the business plan, and to provide the vehicle for raising the investment. This company was i-Cards.

i-Cards was incorporated by Mr. Thompson and registered on March 28, 2000: Exhibit D2, Tab 2.

On April 3, 2000, Mr. Thompson sent a letter addressed to "i-Cards Inc. c/o Michael Moses and Kevin Connors" at 67 Wright Avenue in Dartmouth: Exhibit C1, Tab 1. The letter enclosed Boyne Clarke's fee and billing policy brochure.

On April 12, 2000, Mr. Thompson e-mailed Mr. Moses at Coastal Watch, and Mr. Connors at Trebley. He stated that he had a draft business plan from Corporate Communications, which he would use "as part of the offering memorandum, the selling document I will be preparing in conjunction with Beacon and Grant Thornton:" Exhibit D2, Tab 3.

A copy of the first draft of the offering memoranda, marked "For Discussion Purposes Only" was prepared by Mr. Thompson on or about April 18, 2000: Exhibit D2, Tab 4.

The draft offering memoranda contains a number of defined terms, one of which is "Company", which is defined to mean "i-Card Inc." The draft described the company's management team as being made up of Mr. Moses and Mr. Connors, who are described as having had "a highly successful business partnership in Coastal Watch:" see p.2 of the draft. Mr. Connors and Mr. Moses were listed as directors and officers of i-Cards: p.3.

The draft offering memoranda went on to state that the board of directors had created an advisory board "composed of individuals who will provide advice on an ongoing basis to the board on marketing, taxation, business and legal matters:" p.3. The members of the advisory board, who were not directors, were the members of the original team: that is, Messrs. Thompson, Nicholl, MacIntyre and Ms. Robertson. The draft noted that all members of the advisory board except Mr. MacIntyre had been granted "options to purchase up to 100,000 common shares at an exercise price of $1 per share:" p.4.

The "financing" of the company was described at pp.14-15 of the draft as follows:

> "The hardware, software and staffing needs of the company are being provided by the promoters. The other start-up costs, with the exception of marketing costs, are not anticipated to be significant. Consequently, the company does not intend to borrow any funds to fund its start-up. The only financing currently obtained will be the net proceeds of the offering as outlined in the table below:

Share Equity	**Amount**
Investors - 1,000,000 common shares @ $1 per share	$1,000,000
Agency fees paid to Beacon Securities Limited	(100,000)
Legal, accounting and other professional fees (estimated)	(20,000)
Marketing services of Corporate Communications Limited	(8,000)
Net	**$872,000**

Finally, at p. 21 of the draft, the "legal counsel" for i-Cards is described to be the firm of Boyne Clarke.

The draft was revised a number of times, and a final version was prepared sometime in the middle of May, 2000: see Exhibit C1, Tab 8.

On June 7, 2000, Mr. Thompson wrote to the Nova Scotia Securities Commission. The letter stated that Boyne Clarke acted "on behalf of the company", which was defined in the letter as i-Cards: Exhibit C1, Tab 4.

It appears that about this time the business plan began to unravel. It had always depended upon the participation of a chartered bank. CIBC had originally been interested, but by this time had withdrawn its backing. Mr. Moses and Mr. Connors attempted to find another bank, but in mid-July Mr. Thompson learned that the Bank of Nova Scotia had also turned i-Cards down: C1, Tab 5.

On July 17, 2000, Mr. Thompson e-mailed Mr. Moses and Mr. Connors as follows:

> "Our account manager has asked me to contact you about some outstanding accounts. The accounts for the family trust and incorporation are still outstanding. Could you please forward payment on those. Thanks.
>
> As you are aware, I haven't rendered an account on the offering to date. I was not intending to do so until the successful completion of the offering. I do not expect to incur very much more time on that matter unless the offering needs to be amended. To date there is approximately $10,500 worth of legal fees, plus HST and disbursements, which is within the estimate provided early on in the process. In the

> event i-Cards makes a final decision not to proceed with the offering for whatever reason, please let me know so that I can render my account for the legal fees for the offering:" Exhibit C1, Tab 5

On September 1, 2000, a past due account was sent to Michael Moss, c/o Coastal Watch for file no. 59736 regarding "Incorporation of i-Cards Inc.:" Exhibit D2, Tab 1. This file, and this account, pertained to the services in respect of the original incorporation of i-Cards. The account was paid by Coastal Watch on or about October 6, 2000: Exhibit D2, Tab 1 and the evidence of Mr. Connors.

By this time, Mr. Moses and Mr. Connors were attempting to keep the business plan alive, albeit in a different form. They were now hoping to use Coastal Watch as the vehicle for the realization of the business plan. In response in part to Mr. Thompson's concerns about the status of Boyne Clarke's account, a letter was sent to Mr. Thompson by Mr. Moses, in his capacity of president of Coastal Watch, on October 6, 2000. The letter, written on Coastal Watch letterhead, was as follows:

> "In response to concerns raised a couple of weeks ago as to the responsibility for the professional fees incurred by your respective firms, I am pleased to inform you that Coastal Watch Information Services Limited will assume these commitments from i-Cards Incorporated. We appreciate all your hard work and patience with us and look forward to moving on with Coastal Watch picking up the torch. We are renewing our quest for financing of the merchant cards services with vigor and determination to see this come to fruition in the next 30-45 days at the most.
>
> It is my intention to retain your services under the new corporate structure and also look forward to your input as we move forward:" Exhibit C1, Tab 6

On October 23, 2000, Mr. Thompson e-mailed Mr. Moses seeking a "letter confirming that Coastal Watch will pay our account." Mr. Thompson went on to note that he had "seen a draft form but not the signed one:" Exhibit C1, Tab 7.

The accounting department at Boyne Clarke then prepared a pre-bill on or about October 24, 2000. The pre-bill, for file no. 59759, was directed to "Mr. Moses, i-Cards Inc.:" Exhibit C1, Tab 8. I note here that this pre-bill is in respect of the services for which Boyne Clarke now brings suit, and that the file number is different than the file number associated with the incorporation of i-Cards.

On November 3, 2000, Mr. Thompson sent Boyne Clarke's statement of account "Re Private Placement Offering." The letter was sent to Mr. Moses at Coastal Watch, and noted that "we have reduced our legal fees by approximately 15% as a goodwill gesture, given that the private placement was not successful:" Exhibit D2, Tab 6. The account itself was directed to "Coastal Watch Information Services Limited." It was expressed to be in respect of the "private placement offering." The file number was 59759, which, as I have already noted, is different from the file number respecting the actual incorporation of i-Cards.

The final bit of documentary evidence concerns a fax sent to a Mr. Wayne McAlpine in June, 2001. Apparently about this time Mr. Thompson learned that a western company (represented by Mr. McAlpine) was interested in as a business plan, and in forming some kind of relationship with, or purchase of, Coastal Watch. Some issue had arisen as to the Boyne Clarke account, and Mr. Thompson sent a fax attaching "our account to Coastal Watch and a copy of a letter from Mike [Moses] agreeing that Coastal Watch will cover this account:" Exhibit C1, Tab 11.

Turning to the principal issue, and the oral testimony in respect of it, both Mr. Connors and Mr. Moses were adamant that at no time was there any suggestion that they would be personally liable for the cost of the legal services that were to be provided by Boyne Clarke once i-Cards was incorporated; and once i-Cards proceeded with the private placement offering process. Neither Mr. Connors nor Mr. Moses ever provided a personal guarantee that the legal fees of i-Cards would be paid by them.

Mr. Thompson's submission was essentially this. In March 2000, the services of Boyne Clarke (which were to be provided primarily by him) were retained by Mr. Moses and Mr. Connors on the following basis:

(a) Boyne Clarke would provide services for a company to be incorporated (i-Cards);
(b) Those services would be paid by i-Cards out of the proceeds on the closing of the private offering; however,
(c) In the event that the offering was not successful, Mr. Connors and Mr. Moses would be personally liable for those services.

However, Mr. Thompson's evidence, in my view, fell short of supporting this submission.

Mr. Thompson agreed in evidence that no guarantees had ever been given by Mr. Connors and Mr. Moses. He also agreed that the offering memoranda called for Boyne Clarke's fees to be paid by i-Cards out of the proceeds raised by it in the private offering. His evidence was that the idea at the time was that he was "going to be paid out of the proceeds of the offering when it was closed." He said in evidence that it was his "position" was that it was "always ***understood*** that we [ie, Boyne Clarke] be paid if the offer did not close." [emphasis added] He admitted in cross-examination that this understanding had never been reduced to writing, and that they had been proceeding at the time "on the assumption that it [ie. the offering] would successfully close."

Mr. Thompson did agree that he had never expressly warned or advised either Mr. Connors or Mr. Moses that they were or could be personally liable for the legal expenses of i-Cards. He took the position that it had always been "understood" that such was the case. However, he was not able to pinpoint any particular meeting or discussion at which the alleged understanding was made clear to either Mr. Connors or Mr. Moses that they would be personally liable to pay the account if the closing did not take place.

The Issues

The issues before me are these:

(a) Is i-Cards liable to pay the legal fees claimed?
(b) Was there an agreement by Mr. Moses and Mr. Connors to pay the legal fees incurred by i-Cards in the private offering process?
(c) If not, are Mr. Moses and Mr. Connors liable under the doctrine of pre-incorporation contracts?
(d) Is Coastal Watch liable to pay the legal fees of Boyne Clarke that were incurred by or on behalf of i-Cards?

Liability of i-Cards

The first issue can be simply addressed. Ms. Lamb admitted, on behalf of i-Cards, that it was liable to pay the account of Boyne Clarke. Neither Mr. Moses nor Mr. Connors took issue with this liability in their evidence.

Did Mr. Connors and Mr. Moses Agree to Assume Personal Responsibility for the Legal Fees of i-Cards?

The submission on behalf of Boyne Clarke was that it was a term of its retainer that Mr. Connors and Mr. Moses agreed to assume personal responsibility for the legal fees of i-Cards. This submission cannot succeed in my view.

First, such a term flies in the face of the printed documentation prepared by Boyne Clarke itself. As detailed above, Boyne Clarke represented itself as counsel ***to i-Cards***. It did this in the offering memoranda. It did this in correspondence with the Nova Scotia Securities Commission. Moreover,

in its own internal accounting records, the client was always expressed to be i-Cards, not Mr. Moses or Mr. Connors.

Second, Mr. Thompson admitted that neither Mr. Connors nor Mr. Moses ever expressly guaranteed to pay the legal fees of i-Cards. While he may have "always understood" that Mr. Connors or Mr. Moses would be personally liable, he could not provide evidence that he had ever communicated that understanding to them.

Third, and flowing from the above, the concept of personal liability for corporate debts is foreign to the principle enshrined in *Salomon v. Salomon & Company* [1897] A.C. 22 (H.L.). This principal is understood by most business people, as well as lawyers. A term in a retainer that contradicts this principle would, in my opinion, have to be clearly spelled out by the lawyer to the client. Indeed, I would have thought that a lawyer in such a case would have a duty to advise the client of such a potential personal liability. Ideally such a term should be reduced to writing and agreed upon by the client. At the very least, there ought to be evidence that the term was actually and clearly discussed with the client, and agreed upon by him or her. None of this was done in this case. In the absence of such evidence - and in particular of a written retainer - the burden of any misunderstanding must fall upon the lawyer.

Accordingly, I find that at the time the retainer was entered into, the agreement was as follows:

(a) Boyne Clarke was retained to incorporate i-Cards and then to prepare, on i-Card's behalf, a private offering;
(b) While the initial retainer was made by Mr. Moses and Mr. Connors (since i-Cards was not yet in existence), the ongoing retainer was transferred to i-Cards once that entity was incorporated;
(c) The agreement between Mr. Moses and Mr. Connors and Boyne Clarke prior to incorporation was that the fees in respect of these services were to be paid by i-Cards out of the monies raised by it in the private offering; and that i-Cards would be liable to pay those fees even if a private offering did not succeed; and
(d) That agreement was adopted and accepted by i-Cards, as evidenced by, inter alia, the private offering materials prepared by Boyne Clarke and filed with the Nova Scotia Securities Commission.

In other words, there never was an agreement at any time that Mr. Connors or Mr. Moses would be personally liable for the legal fees of i-Cards.

Are Mr. Connors and Mr. Moses Liable as Promoters for Pre-Incorporation Contracts?

It is well accepted law that in certain cases, persons "who incur obligations on behalf of a proposed corporation do so at their own peril, for if a corporation, after incorporation, choose to repudiate the obligation, they will be personally liable:" Fraser & Stewart, *Company Law of Canada* (6 Ed. 1993) at p. 625.

Boyne Clarke submits that Mr. Connors and Mr. Moses are liable under this principal.

There are two difficulties with this submission.

First, on the evidence, neither Mr. Connors nor Mr. Moses ever incurred an obligation on behalf of i-Cards. The agreement always was that legal fees (at least after the incorporation of i-Cards) would be paid by i-Cards. The retainer (ie. the obligation) never included a personal obligation on the part of Mr. Connors and Mr. Moses.

Second, i-Cards has not repudiated the agreement. i-Cards had the benefit of the work of its counsel, Boyne Clarke, and i-Cards has admitted that it is liable for those fees.

On this evidence, I conclude that the doctrine does not apply.

Boyne Clarke also relies on an early Supreme Court of Canada decision, *Clergue v. Bugbee Estate* (1900) 31 S.C.R. 66.

In that case, the Defendant (the promoter of a company not yet in existence) obtained a loan on behalf of one of the yet to be incorporated companies he was promoting. The issue in the case was whether or not the promoter was personally liable for that loan.

However, in my view, the case is distinguishable. As I understand the facts of that case, the entire obligation (ie. the loan) was incurred before the incorporation of the company that was being promoted. That is not the case here. Here, the bulk of the services - and hence the obligation to pay for those services - was incurred ***after*** the incorporation of i-Cards. The case might have been different if there had been an agreement, prior to incorporation, to pay a flat, fixed fee. Then it might be argued, by analogy to the case in *Clergue*, that the obligation had been incurred before the company was in existence. But in the case at bar, the obligation was an ongoing one, that arose out of the ongoing services provided on an ongoing basis by Boyne Clarke. Accordingly, it cannot be said that there was a *pre-incorporation* obligation where the obligations in question were in fact incurred and arose *after* the company came into existence.

Accordingly, in my opinion this submission must also fail.

Did Coastal Watch Agree to Assume Liability to Pay the Fees?

It is clear on the evidence that Coastal Watch agreed to assume the liability of i-Cards to pay the fees of Boyne Clarke. Ms. Lamb does not dispute the agreement, but submits there was no consideration for the agreement.

It is trite law that consideration may be found in a peppercorn. Here there was evidence that Boyne Clarke agreed to defer to delay its account while Coastal Watch attempted to salvage the business plan that had originally been attempted through i-Cards. I accordingly find that that deferral constituted sufficient consideration to support Coastal Watch's agreement to assume the liability of i-Cards.

Conclusion

For the above reasons, I find as follows:

(a) That the Defendants i-Cards and Coastal Watch are now jointly and severally liable to pay the claim of Boyne Clarke in the amount of $10,000 plus costs; and
(b) That the claim of Boyne Clarke as against the Defendants Michael Moses and Kevin Connors is dismissed.

Dated at Halifax, Nova Scotia, this _____ day of October, 2001.

_____
ADJUDICATOR
W. Augustus Richardson

Original Court File
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