

Indexed as:

Woodford v. Johnston

Between

**Patrick Woodford (defendant), moving party, and
Wayne Johnston and Ruth Johnston (plaintiffs), respondents, and
John Deere Limited/John Deere Limitée, a body corporate, third
party**

And between

**Patrick Woodford, applicant, and
Johnston Equipment (1998) Ltd., respondent**

[2000] N.B.J. No. 394

[2000] A.N.-B. no 394

230 N.B.R. (2d) 188

100 A.C.W.S. (3d) 577

Nos. M/C/235/00 and MM/84/00

New Brunswick Court of Queen's Bench
Trial Division - Judicial District of Moncton

Rideout J.

Heard: September 22, 2000.

Judgment: filed October 11, 2000.

(26 paras.)

Company law -- Shareholders -- Agreements -- Unanimous shareholders agreement -- Offer to purchase -- Enforcement -- Redemption of preferred shares -- Disclosure of financial documents.

Motion by Woodford for summary judgment dismissing the action by the Johnstons against him, for costs and an order permitting him to continue his counterclaim. In a second, related action, Woodford applied for judgment requiring Johnston Equipment (1998) Ltd. to redeem 199 of his preferred shares, and that the company provide access to him of a list of financial documents. Woodford was a shareholder, officer and director of the company in question, and entered into a unanimous share-

holder agreement with the Johnstons. The Johnstons purported to make an offer to purchase Woodford's shares in accordance with the agreement. The terms of the offer were ambiguous in that they did not reflect Woodford's actual shareholding. The Johnstons' action was for specific performance of the offer to purchase. Woodford refused to comply on the grounds that the wording was confusing such that the offer was a nullity. He also sought to have his preference shares redeemed which the company refused to do on the basis that his shares were already the subject of an offer to purchase, and the bank would not permit the redemption in any event given the company's financial condition.

HELD: Motion for summary judgment and application to redeem preferred shares dismissed. Motion for disclosure of financial documents allowed. The notice to purchase given by the Johnstons was confused. There were a number of possible interpretations open to a court once it heard all of the evidence such that it was not appropriate to strike out the Johnstons' claim at this point. As such, the application to redeem Woodford's preferred shares was also dismissed, since the disposition of the application depended upon the resolution of the first matter. There was the additional problem of imperiling the company's financial status. Woodford was entitled to disclosure of the company's pursuant to s. 18 of the Business Corporations Act. The documents requested by Woodford all fell into the category of accounting records for purposes of the Act in that they were documents used in the preparation of financial statements.

Statutes, Regulations and Rules Cited:

Business Corporation Act, S.N.B. 1981, c. B-9.1, s. 18(2), 18(4).

New Brunswick Rules of Court, Rule 22, 22.01, 22.02, 22.04.

Counsel:

John MacFarlane, for the plaintiffs.

R. Bruce Johnson, for the defendant.

1 RIDEOUT J.:-- Patrick Woodford and Wayne and Ruth Johnston were business partners in a company called Johnston Equipment (1998) Ltd. The company operated a John Deere franchise. Mr. Woodford owns 25 common shares and 200 preferred shares of Johnston Equipment (1998) Ltd. The Johnstons own 75 common shares and 600 preferred shares. This is the total of the issued and outstanding shares of Johnston Equipment (1998) Ltd.

2 Patrick Woodford has launched two law suits. For the purposes of the motion and application presently before the court, it is easier to deal with both matters in the same reasons for judgment. In the first action (M/C/235/00) third party proceedings have been commenced but the third party has not yet filed a defence and did not take part in the matters presently before the court.

3 In the first action (M/C/235/00) Mr. Woodford has made the following motion for:

1. An Order that the Plaintiffs Wayne Johnston and Ruth Johnston's action against Patrick Woodford be dismissed.

2. An Order that the Plaintiffs Wayne Johnston and Ruth Johnston pay the costs of this Motion on a solicitor-client basis.
3. An Order that the Defendant be allowed to continue with his counterclaim.
4. In the event that the Defendant should not be successful in this motion for summary judgment, then an order that the Defendant may proceed with his defence as stated in his Statement of Defence dated March 29, 2000...

4 In the second action (MM/84/00) Mr. Woodford applies for an order as follows:

- a) Johnston Equipment (1998) Ltd. (the "Corporation") be obliged to redeem 199 of Patrick Woodford's preferred shares in the Corporation within 30 days of the order, at the price set out in the Notice of Optional Redemption dated May 11, 2000.
- b) The Corporation be ordered to provide access to Patrick Woodford to all or any of the following documents during normal office hours, for both the Moncton and Sussex locations:
 - (i) copies of all sales, complete with sales worksheets analyzing all costs on the deals;
 - (ii) copies of all expenses filed;
 - (iii) copies of all payroll registers;
 - (iv) weekly inventory lists (new and used) complete with values;
 - (v) weekly parts and service sales;
 - (vi) order files for both accounts 1034 and 2034;
 - (vii) copies of John Deere monthly billings;
 - (viii) detailed lists of both receivables and payables (including aging);
 - (ix) monthly financial statements (complete details);
 - (x) monthly financial ratio analysis; and
 - (xi) copies of all internal invoices

FACTS

5 Patrick Woodford is a shareholder, director and secretary-treasurer of Johnston Equipment (1998) Ltd. Wayne Johnston is also a shareholder, director and the President of Johnston Equipment (1998) Ltd. On June 24, 1998 Woodford and the Johnstons entered into a unanimous shareholders agreement. This agreement provides for the usual terms and conditions respecting the selling or encumbering of any of the shares held by the parties in the agreement which is all the issued and outstanding shares. The agreement also dealt with the death or bankruptcy of a shareholder. Paragraph 5 of the agreement provided "Buy-out Provisions" by one of the shareholders.

6 A reading of article 5 could lead a person to conclude that the parties intended what is commonly called a "shot gun" clause. However, there is unclarity in the drafting of the clause resulting in portions of the clause being ambiguous, and other portions making little if any sense.

7 Coupled with the problem of interpreting article 5 of the shareholders agreement is the fact that the Johnstons purport to make an offer to purchase Mr. Woodford's shares pursuant to article 5. This offer is also confusing in that it provides as follows:

Take notice that pursuant to Article 5 of the unanimous Shareholders Agreement dated June 24th, 1998 and in particular article 5.4 Wayne and Ruth Johnston hereby offer to purchase all of your shares in Johnston Equipment (1998) Ltd. for the purchase price of \$1,500.00 per share. As you currently have 100 common shares in the company, the total purchase price therefore is \$150,000.00.

8 The evidence is clear that Mr. Woodford does not own 100 shares. He owns 25 common shares and 200 preferred shares.

9 Wayne and Ruth Johnston have now sued Patrick Woodford for specific performance of the offer to purchase shares. Mr. Woodford says that the wording in the offer and article 5 of the shareholders agreement is so confused as to amount to a nullity. Consequently they are asking for Summary Judgment under Rule 22 of the Rules of Court to strike the Plaintiffs Statement of Claim.

10 On May 8, 2000 Mr. Woodford had his solicitor prepare a notice of optional redemption of 199 of his 200 preferred shares in Johnston Equipment (1998) Ltd. This notice was prepared in accordance with the provisions attached to the preference shares. To date the company has not redeemed the preference shares of Mr. Woodford. It would appear that the reason for the failure to redeem is two fold. The preference shares may already be subject to an offer to purchase by the Johnstons and/or the company is not financially able to redeem the shares. The Company has apparently maximized its borrowings and is presently overdrawn at the Bank.

11 The financial documentation between the company and its banker provides that the company was, "not [to] redeem preferred shares without the prior written consent of Royal Bank." Edward Erdely, an official of the bank, testified that in his view the regional office of the bank would not consent to the redemption given that financial condition of the company. He conveyed this information to Mr. Johnston. To Mr. Erdely's knowledge no formal request for approval was received by the Bank. Mr. Woodford now wants this Court to order the redemption of the 199 preference shares subject to the concurrence of the Royal Bank.

12 Finally Mr. Woodford has been requesting financial information concerning the company. As enumerated earlier he is requesting that he view a number of corporate financial records. The solicitor of Johnston Equipment (1998) Ltd has agreed to make available the monthly financial records but nothing more. Mr. Woodford requested an order that he be permitted to view the documents outlined.

ISSUES

13

- a) Should Summary Judgment striking the action of Wayne Johnston and Ruth Johnston against Patrick Woodford be granted?
- b) Should Johnston Equipment (1998) Ltd. be ordered to redeem Patrick Woodfords 199 preferred shares?
- c) Should Johnston Equipment (1998) Ltd. be required to produce some or all the documents requested?

ANALYSIS

SUMMARY JUDGMENT

14 Rule 22 of the Rules of Court provide in part as follows:

22.01 Where Available

To Defendant

- (3) After he has filed and served his Statement of Defence and before the action is set down for trial, a defendant may apply for summary judgment against the plaintiff on the ground that there is no merit to the action, or to one or more claims therein, or to part of any such claim. ...

22.02 Affidavit Evidence

- (2) A defendant applying for summary judgment shall file and serve an affidavit

- (a) setting out the facts verifying his contention that there is no merit in the whole or part of the claim, and

(b) stating that he knows of no fact which would substantiate the whole or part of the claim

...

22.04 Disposition of Motion

Where No Defence or Merit to Action

- (1) Where, on a motion for judgment, the applicant satisfies the court that
 - (a) there is no defence or merit to a claim or part thereof, and
 - (b) the applicant is entitled to judgment,

the court may grant judgment.

15 In *Cannon v. Lange et al* (1998), 203 N.B.R. (2d) 121 the New Brunswick Court of Appeal considered the issue of summary judgment. Drapeau J.A. says at paragraph 17, 22, 23 and 24:

[17] The wording of rule 22.04 sets the standard at a high level. It provides that the court may grant judgment only where there is no merit to the defence or no merit to the claim, or part thereof. The wording leaves no room for anything but a very stringent test. Practical experience with the civil process inspired the trial lawyers and judges who drafted rule 22.04 to choose its wording. The wording reflects their conviction that, except in clear cases, the best truth finding device is a trial. ...

[22] In dealing with any motion for summary judgment, the court must undoubtedly take a hard look at the pleadings and the evidence to determine whether there is truly some merit to the action or defence, or part thereof. The court's ability to do so will necessarily depend on the nature and quality of the evidentiary record which the parties can place before it. In some cases, perhaps not this one, the evidentiary constraints imposed by Rules 22 and 39.01(4) will make a judgment without trial inappropriate.

[23] Common sense should move the parties to put their best foot forward on a motion under Rule 22. Such a course of conduct is particularly wise for a respondent, since he or she has the most to lose. As stated by the Ontario Court of Appeal in *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), at 557 in a vernacular expression, the respondent "must lead trump or risk losing." It will rarely be sufficient for the respondent to promise that evidence, which is admissible pursuant to Rule 39.01(4), will be produced at trial: absent a compelling explanation, the respondent is required to produce admissible evidence which will prevent a conclusion that the action or defence is bereft of merit. I have no doubt that, where the ends of justice require, the court will allow all appropriate accommodations including leave to file further affidavit evidence.

[24] It is up to the moving party to satisfy the court that an apparent factual controversy or credibility conflict is a sham. If material facts remain genuinely in dispute after the court has taken a hard look at the evidence and the pleadings, it is not appropriate to grant summary judgment (see *R.C.L. Operators Ltd.*). Likewise, where there is an unresolved genuine credibility conflict relating to a material question, it is not appropriate to grant summary judgment.

16 See also Stratton C.J.N.B. in *Ripulone v. Pontecorvo* (1989), 104 N.B.R. (2d) 56 at 63:

[13] The general rule is that on a motion for summary judgment a court should not attempt to resolve disputed issues of fact. Summary judgment should be granted only when there is no reason for doubt as to what the judgment of the court should be if the matter proceeds to trial. The moving party's case must be unanswerable.

Cannon v. Lange supra confirms that *Ripulone* is still good law in New Brunswick.

17 While I acknowledge that the Notice to Purchase the shares given by the Johnstons to Mr. Woodford is confused and in error, there are a number of interpretations a Court could place on the document once it heard all of the evidence. Likewise with respect to the ambiguities in the unanimous shareholders agreement of June 24, 1998. It is quite possible that that the interpretation placed in the documents by Mr. Woodford will prevail. However, I am of the view that material facts remain in dispute and I am not satisfied that Mr. Woodford's case is unanswerable. Therefore I must dismiss Mr. Woodford's request for a summary judgment. As well I do not have to deal with the issue of continuing the counterclaim as the case will now follow the usual procedures.

REDEMPTION OF PREFERRED SHARES

18 Mr. Woodford has made application for the redemption of 199 of his 200 preference shares. It is my view that the decision not to grant a summary judgment has implications on this issue. It may be that a Court upon hearing all the evidence will decide that Wayne and Ruth Johnston have made a valid offer to purchase all of Mr. Woodford's shares. If that be the case Mr. Woodford would not be in a position to request redemption as he would have sold his shares.

19 Additionally there is the issue of whether the redemption of the preferred shares would imperil the financial health of the company. There are arguments on both sides of this issue but the court does have clear evidence that the company's banker would probably not consent to such a redemption. The financial officer in charge said he could not recommend the redemption to his regional office based on his knowledge of the financial situation of the company. On its face a redemption would imperil the company.

20 For these reasons, I can not grant the request of Mr. Woodford to order the redemption of 199 of his preference shares in Johnston Equipment (1998) Ltd.

PRODUCTION OF ACCOUNTING RECORDS

21 The obligation to maintain corporate and accounting records as well as having them available for review is found in section 18 of the Business Corporation Act, S.N.B. 1981 Ch. B-9.1. Sections 18(2) and (4) are applicable and provide:

18(2) In addition to the records described in subsection (1), a corporation shall prepare and maintain adequate accounting records and records containing minutes of meetings and resolutions of the directors and any committees thereof.

18(4) The records described in subsection (2) shall be kept at the registered office of the corporation or at such other place as the directors think fit and shall at all reasonable times be open to inspection by the directors.

22 The issue to be decided is what constitutes accounting records. There is no definition of accounting records in the Business Corporations Act. The Dictionary of Canadian Law, a Carswell publication written by Dukelow and Nurse, provides some assistance;

ACCOUNTS. N. The statement of profit and loss and the balance sheet. See ACCOUNT; BOOK ..

BOOK ACCOUNTS. All the accounts and debts current and future as in the ordinary course of business would be entered in the books, whether actually entered or not, and includes all books, documents and papers relating to the accounts and debts...

23 The circulars issued by Revenue Canada are also of some assistance. 1C78-10R3 entitled Books and Records Retention provides in part;

1. The circular gives information and guidance to persons who are required by law to keep records and books of account according to sections 230 and 230.1 of the Income tax Act, section 87 of the Employment Insurance Act, and section 24 of the Canada Pension Plan. It does not reflect the require-

- ments imposed by other statutes, whether federal, provincial, or municipal, to maintain adequate records and books of account.
5. For the purpose of this circular, a record has the meaning assigned by subsection 248(1) of the Act. A "record" includes an account, an agreement, a book, a chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a plan, a return, a statement, a telegram, a voucher, and any other thing containing information, whether in writing or in any other form."
 6. As a general rule, the Department does not specify the records and books to be kept. However, records and books of account have to:
 - permit the taxes payable or the taxes or other amounts to be collected, withheld, or deducted by a person to be determined.
 - substantiate the qualification of registered charities or registered Canadian amateur athletic association for registration under the Act;
 - permit the verification of all charitable, athletic, and political donations received for which a deduction or tax credit is available; and
 - be supported by source documents that verify the information in the records and books of account.
 7. A source document includes items such as sales invoices, purchase invoices, cash register receipts, formal written contracts, credit card receipts, delivery slips, deposit slips, work orders, dockets, cheques, bank statements, tax returns, and general correspondence.

Underlining Added

24 I am satisfied that the requested items outlined earlier meet the criteria outlined above. On their face they appear to documents or records which would be used in the preparation of financial statements. These would be considered as source documents to these financial statements.

25 I therefore order that the Corporation provide access to Patrick Woodford to all or any of the following documents during normal office hours, for both the Moncton and Sussex locations:

- (i) copies of all sales, complete with sales worksheets analysing all costs on the deals;
- (ii) copies of all expenses filed;
- (iii) copies of all payroll registers
- (iv) weekly inventory lists (new and used) complete with values;
- (v) weekly parts and service sales;
- (vi) order files for both accounts 1034 and 2034;
- (vii) copies of John Deere monthly billings;
- (viii) detailed lists of both receivables and payables (including aging);
- (ix) monthly financial statements (complete details);
- (x) monthly financial ratio analysis; and
- (xi) Costs on a solicitor and client basis.

26 I further order that Johnston Equipment (1998) Ltd pay costs to Patrick Woodford in the amount of \$600.00 inclusive of GST plus reasonable disbursements. In addition, because Mr.

Woodford was unsuccessful, I order that he pay Wayne Johnston and Ruth Johnston costs in the amount of \$350.00 inclusive of GST plus reasonable disbursements.

RIDEOUT J.

cp/d/qlkcd

---- End of Request ----

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Time Of Request: Monday, June 21, 2010 15:36:26