SUPREME COURT OF NOVA SCOTIA

Citation: *Alpha Investments Limited v. Lunenburg Marine Railway Company*, 2023 NSSC 362

Date: 20231117
Docket: 467738
Registry: Halifax

Between:

Alpha Investments Limited, a body corporate

Plaintiff

and

Lunenburg Marine Railway Company, a body corporate, Lunenburg Foundry & Engineering Limited, a body corporate, carrying on business as Lunenburg Industrial Foundry & Engineering, Peter J. Kinley, Shona Kinley-MacKeen, Joseph F. Kinley, John G. Kinley, Kevin Feindel, David Allen, Timothy Clahane, Jane Ritcey-Moore, and J. Edward Kinley and Paula Kinley-Howatt

Defendants

DECISION ON MOTION TO AMEND PLEADINGS

Judge: The Honourable Justice Ann E. Smith

Heard: May 24, 2023, in Halifax, Nova Scotia

Counsel:
Donn Fraser, for the Plaintiff
Michelle Kelly, K.C., and John Boyle, for the Defendants – Lunenburg Marine Railway Company, Lunenburg Foundry & Engineering Limited, Lunenburg Industrial Foundry & Engineering, Peter J. Kinley, Shona Kinley-MacKeen, Joseph F. Kinley, John G. Kinley, David Allen and Timothy Clahane
Christine Murray, for the Defendant – Kevin Feindel
Brian Casey, K.C., for the Defendant – Jane Ritcey-Moore
Nathan Sutherland and Nicola Watson, for the Defendants – J. Edward Kinley and Paula Kinley-Howatt

Corrected Decision: The text of the original decision has been corrected according to the attached erratum dated November 28, 2023.

By the Court:

Introduction

[1] Alpha Investments Limited ("Alpha") seeks to amend its Statement of Claim in an oppression claim. Certain of the Defendants oppose some of the amendments sought relating to what was a proposed sale of assets of the Defendant Lunenburg Marine Railway ("LMR") and the Defendant Lunenburg and Foundry and Engineering Limited ("LFE") and the purchase of those assets by Develop Nova Scotia Limited (the "DNS transaction"). Jerry Nickerson is the President of Alpha Investments Limited ("Alpha"), its sole shareholder and its directing mind. Alpha is a minority shareholder of LMR.

[2] The Defendants opposed to the amendments sought are LMR, LFE, Peter J. Kinley, Shona Kinley-MacKeen, Joseph F. Kinley, John G. Kinley, Timothy Clahane and David Allen (the "Main Defendants"). The remainder of the Defendants take no position on the motion to amend the pleadings.

[3] The Main Defendants oppose amendments sought to the second amended Statement of Claim relating to the DNS transaction and a new claim for punitive damages. These Defendants do not oppose the remainder of the lengthy

amendments sought, including amendments sought relating to the eventual sale of the assets to Bradison Boutilier (the "Boutilier transaction").

[4] The basis for the opposition of the Main Defendants is that the DNS transaction did not come to be. The sale of assets of LMR and LFE to DNS did not close. As a result, the Main Defendants say that its conduct, which Alpha alleges was wrongful and oppressive related to that transaction, is a non-starter. There is no live issue. Put another way, there is no "justiciable issue". These Defendants say that the relief Alpha seeks relating to the DNS transaction cannot be granted by a Court because it is all, or primarily, declaratory in nature. They say that Courts are not in the business of granting declarations where there is no live issue between parties. As such, the Main Defendants say Alpha's motion should be dismissed.

[5] From the perspective of Alpha, the alleged conduct of the Main Defendants surrounding the DNS transaction remains a live issue. Alpha says that given the underlying action is one of oppression relating to a course of conduct, the trial judge will be entitled to consider in such a claim the material facts Alpha has plead in the proposed amendments which relate to the DNS transaction, irrespective of whether that transaction closed or not.

[6] Alpha's motion is brought pursuant to *Civil Procedure Rule* 83. It seeks an order permitting it to amend its claim in the manner it proposes.

Evidence on the Motion

[7] Alpha filed the Affidavit of Jerry E.A. Nickerson. The Main Defendants filed the Affidavit of John Boyle, who is of counsel to the Main Defendants. Each Affiant was cross-examined on their Affidavit during the course of the motion.

Background

[8] The background to this motion is that on August 31, 2017, Alpha commenced an oppression claim against LMR and LFE as well as several individuals described as past directors and relevant decision makers in LMR and LFE. These individual defendants, Peter J. Kinley, Shona Kinley-MacKeen, Joseph F. Kinley, John G. Kinley, David Allen and Timothy Clahane are represented by Cox & Palmer, the same counsel also represents LMR and LFE. The individual Defendant Kevin Feindel is represented by Christine Murray; the individual Defendant Jane Ritcey-Moore by Brian Casey, K.C.; and the Defendants J. Edward Kinley and Paula Kinley-Howatt by Nathan Sutherland and Nicola Watson. Counsel for each of the Defendants Kevin Feindel, J. Edward Kinley and Paula Kinley-Howatt took a watching brief only on the within motion.

[9] The Statement of Claim (the "Claim") was previously amended in October 2020.

The Oppression Claim in Brief

[10] The Claim sets out that Alpha's expectations as a shareholder "are informed by the duty that LMR directors and officers, in fiduciary positions, in particular owed to LMR."

[11] Alpha alleges in the Claim that what it terms the "Fiduciary Defendants", which are said to include various Defendant Kinley family members, "owed a duty to LMR as directors, officers or top management, to act only in the interests of LMR and LMR shareholders", "all transactions carried out by the Fiduciary Defendants (as agents of both LMR and LIFE, as well as the decision makers for those companies) are therefore, on their face, tainted by conflict of interest." The Claim alleges that "this conflict alone gives rise to a concern that one side of transactions between LMR and LIFE was or will be disadvantaged."

[12] Under the heading, "General Conduct of the Affairs of LMR and LIFE" (LFE) Alpha pleads as follows:

> General Conduct of the Affairs of LMR and LIFE

72. The Plaintiff states that, in general, the affairs of LMR and LIFE have been conducted in a way that is designed to confer benefit upon LIFE, (as opposed to in a manner that is in the best interests of LMR) and which has done so to the detriment of LMR, particulars of which include the matters stated above.

73. This pattern of conduct appears to have been on-going and continuous for a significant period of time.

74. The Plaintiff states that the conduct pleaded above has been oppressive, unfairly prejudicial to and/or has unfairly disregarded the interests of the Plaintiffs as shareholders of LRM, as has the following acts or omissions of the applicable Defendants:

a. entering into intercompany transactions (between LMR and LIFE) which were not reasonable, or in the best interests of LMR, to the prejudice of LMR and to the benefit of or with the intent to benefit LIFE;

b. failing to assess the reasonableness of intercompany transaction or dealings as between LMR or LIFE, or to negotiate and insist upon terms more favourable to LMR in any intercompany dealings (between LMR and LIFE), or to seek out business dealings more favourable to LMR through other parties as an alternative or alternatives to LIFE:

c. depriving shareholders of audit reports and audited financial statements, in violation of ss. 117 and 119 B of the Companies Act, R.S.N.S. 1989, c. 81, as amended;

d. encumbering LMR assets and/or increasing liabilities of LMR to LIFE, to the benefit of operations of LIFE but not to the material benefit of LMR;

e. failing to explore or obtain financing options for any funding needs of LMR, other than through LIFE or with the terms in place with LIFE (including in relation to guarantee(s) or other transactions) and/or failing to consider alternatives to expenditures for which LIFE funding had been utilized;

f. paying or assuming liability to LIFE for alleged repairs, maintenance or management fees, which allowed LIFE to profit, be compensated for or defray LIFE overhead costs, when the subject work was primarily if not entirely for the ultimate benefit of LIFE given LIFE's exclusive use of the Marine Railways;

g. failing to pursue or generate business opportunities, profits and revenues for LMR, while pursuing such business opportunities, profits and revenues for the benefit of LIFE (to the exclusion of LMR);

h. failing to reasonably respond to requests for information or disclosure by shareholders expressing reasonable and legitimate inquiries and/or concerns in light of the conflict of interest position of the Fiduciary Defendants serving as management of LMR and LIFE;

i. failing to heed or properly consider concern driven recommendations by shareholders, including in relation to title issues or other potential liabilities;

j. failing to assess or pursue options by which LMR could be operating independently of LIFE and/or in a manner which would better serve the interests of LMR then what has proven to be the case under its relationship with LIFE and dealings orchestrated between those Defendant companies by the Fiduciary Defendants exercising control at the relevant times;

k. generally, failing to operate and conduct the affairs and business of LMR in an independent manner and in a way that has been in the best interests of LMR, as opposed to in a manner which is in the best interest of LIFE.

[13] Alpha pleads and relies upon the "oppression" provision of the *Companies Act*, and in particular s. 5 of the Third Schedule thereto.

[14] The Claim sets out the relief sought by Alpha as follows:

a. a declaration that the acts and/or omissions of the Defendants have effected a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiff and the shareholders of LMR;

b. a declaration that the business or affairs of the Defendants have been and are being carried on and conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of the Plaintiff and shareholders of LMR;

c. a declaration that the powers of the relevant Fiduciary Defendants, have been exercised (at the relevant times and over a significant period of time) and/or are being exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the shareholders of LMR;

d. to the extent necessary, an interlocutory order requiring a full disclosure in such form as the Court may determine of relevant transactions between LMR and LIFE (both historical and more recent);

e. an order requiring that any arrangements between LMR and LIFE (both historical and more recent) that are found to have effected a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiff and shareholders of LMR be unwound or set aside;

f. an order requiring payment or repayment to LMR of an amount to be determined as compensation for an disproportionate benefit gained by LIFE (both historically and more recent) at the expense, prejudice or detriment of LMR, and/or which represents profits that LMR ought to have directly received or to have been able to generate, (including in relation to the transactions concerning LIFE's use of the Marine Railways and business generated therefrom, the Bluenose II Restoration Project and Alliance), and/or requiring payment of dividends to the Plaintiff in amounts appropriate to do justice and remedy the oppressive and unfair conduct;

g. an order holding personally liable for such amounts those of the Fiduciary Defendants shown to be responsible for acts or omissions which have been oppressive or unfairly prejudicial to or disregarding of the interests of the shareholders of LMR;

h. an order requiring the appointment of directors of LMR and LIFE who do not sit in conflict of interest (on an interlocutory basis if necessary);

i. to the extent necessary to do justice between the parties, a liquidation of MR and/or LIFE (or any assets of either), with such distribution of proceeds as this Honourable Courts deems just.

[Emphasis added]

[15] The Main Defendants filed a defence to the claim on February 22, 2018. In this defence, these Defendants deny all acts of oppressive conduct and other allegations of unfair or prejudicial treatment of Alpha as a shareholder of LMR.

In terms of the relief sought in the Claim, the Main Defendants say that the remedies sought by Alpha are not connected to any oppressive conduct, "but, rather, reflect the Plaintiff's underlying and improper goal of leveraging a minority shareholder interest".

The Events Leading Up to the Filing of the Within Motion

[16] The events and circumstances leading up to this motion are gleaned from the Affidavits filed in this motion and from Court records. This Court will refer to the most relevant of these.

[17] In early January, 2023, this Court conducted a case management conference with the parties. In advance of that conference, the Main Defendants were advised that Alpha was looking to file an amended pleading. On January 6, 2023, counsel for the Main Defendants wrote to Mr. Fraser, counsel for Alpha, advising that the amended pleading would need to be provided to defence counsel in order for them to gather and produce documents related to same. At the January 6, 2023, case management conference, this Court set deadlines related to Alpha's intended amended pleading. On January 13, 2023, Alpha's counsel circulated a proposed second amended Notice of Action, which included allegations relating to the subsequently failed DNS transaction. On January 27, 2023, the Main Defendants consented to the proposed amendment on behalf of the Main Defendants.

[18] On February 1, 2023, Mr. Fraser wrote the Court confirming that all parties had consented to the amended pleading, and that the amended pleading would follow for filing in due course. However, that pleading was not filed.

[19] Later in February, 2023, DNS chose not to proceed with the DNS transaction. At that point, the amended pleading still had not been filed.

[20] On February 13, 2023, Mr. Fraser wrote all counsel stating that the media were reporting that the DNS transaction had been aborted. Counsel wrote to the Court concerning the impact of the aborted DNS transaction and how that might affect the outcome of a *mareva* injunction, which this Court had heard but yet decided.

[21] On March 10, 2023, LMR and LFE notified their respective shareholders of the terminated DNS transaction and the prospective Boutilier transaction.

[22] On March 13, 2023, Mr. Fraser wrote to counsel for the Main Defendants, Ms. Kelly, K.C., demanding disclosure of information and records pertaining to the proposed Boutilier transaction.

[23] On March 15, 2023, Ms. Kelly rejected the request for information and records on the basis that they were not relevant to the pleadings as filed. Ms. Kelly also referred Mr. Fraser to LMR/LFE's corporate counsel for matters outside this litigation.

[24] On April 13, 2023, Mr. Joseph Kinley wrote to Mr. Nickerson directly (in the apparent absence of corporate counsel) regarding requests for documents received

from Mr. Fraser. Mr. Kinley confirmed that the Corporate Defendants would not be disclosing the requested records to shareholders in advance of their vote concerning the sale of the assets to Boutilier. On the same day, Mr. Fraser responded to Mr. Kinley, copying all counsel for this matter, asserting that Mr. Kinley was acting in bad faith and "childish silliness". Further, Mr. Fraser wrote that it was inappropriate nonsense "confounding orderly and efficient handling of the litigation" as it was (apparently) impacting finalization of pleadings for filing.

[25] Thereafter followed further correspondence between opposing counsel concerning the pleadings and disclosure.

[26] On April 28, 2023, an LMR shareholder meeting was held during which the LMR shareholders, excluding Alpha, unanimously voted in favour of the Boutilier transaction.

[27] On May 2, 2023, Mr. Fraser wrote all counsel advising that elevated costs would be sought against any party who opposed Alpha's sought amendments. Ms. Kelly responded on May 4, 2023, emphasizing that she felt that Mr. Fraser's correspondence was inappropriate from a number of perspectives.

[28] On May 7, 2023, Mr. Fraser wrote to Ms. Kelly and Mr. Boyle reiterating Alpha's perception that Mr. Joseph Kinley had caused delay, and from Ms. Kelly's

perspective “threatening” greater exposure and publicity concerning the Boutilier transaction if the Main Defendants did not consent to the amended pleading.

[29] On May 8, 2023, Mr. Boyle wrote Mr. Fraser and other counsel to confirm that the Main Defendants opposed the amendments sought under the heading, “Liquidation of LMR Assets and Planned Distribution” (which included allegations concerning both the DNR and the Boutilier transactions) and why. Mr. Boyle also advised at that time that the Main Defendants would consent to the amendments concerning the Boutilier transaction once that transaction closed on June 26, 2023.

[30] On May 8, 2023, Mr. Fraser wrote to all counsel again stating that the Main Defendants were abusing the process and raising a potential additional claim for punitive damages.

[31] On May 12, 2023, Alpha filed its motion materials.

[32] The proposed amended pleading contains a further amendment concerning punitive damages that was not presented to the parties for their consent.

[33] The portion of the amendments opposed by the Main Defendants, at the time the motion materials were filed and at the time it was heard by this Court, fall under

the heading, “Liquidation of Assets and Planned Distributions” and focus on two distinct events:

(a) The DNS transaction;

(b) The Boutilier transaction.

[34] Since this motion was heard, the Boutilier transaction has taken place, closing on June 26, 2023. The Main Defendants have advised that, as a result, they do not oppose Alpha’s proposed amendments to the Claim in that regard. As a result, the only amendments which remain at issue on this motion are the amendments relating to the DNS transaction.

[35] As I advised counsel at the start of the hearing of this motion, Mr. Fraser’s lengthy submissions in his Reply brief on the motion concerning alleged “misrepresentation(s)” on the part of Ms. Kelly, K.C. during the course of a Case Management call with this Court on May 2, 2023, had no basis whatsoever. These alleged misrepresentations had no bearing on the substance of the motion. Rather they concerned the length of “new material” presented in the proposed amended pleading. Ms. Kelly fully and completely explained, both to counsel, and to this Court, what she meant when she characterized the number of pages covered by “new

material" in the proposed amended pleading. Nothing more needs to be said about this utterly baseless allegation of misrepresentation.

Issues

1. Should Alpha be permitted to amend its pleading to add a claim concerning the DNS transaction?
2. If successful, should Alpha be awarded costs on a "elevated scale"?

Law and Findings

[36] Amendments are governed by *Rule* 83. Pursuant to that *Rule*, if an amendment is not made within 10 days after the day when all parties claimed against have filed a notice of defence or a demand of notice, the other parties must either consent to the proposed amendment, or seek an order of the court allowing it:

> **83.02 Amendment of notice in an action**
>
> (1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.
>
> (2) The amendment must be made not later than ten days after the day when all parties claimed against have filed a notice of defence or a demand of notice, unless the other parties agree or a judge permits otherwise.
>
> …

[37] As is obvious, in this case considerably more than 10 days have passed since the close of pleadings.

[38] The caselaw in Nova Scotia on amendments is well established. As summarized by Justice Chipman in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2021 NSSC 344, there are three elements to the test:

> 12 The test to amend pleadings pursuant to Rule 83.02 developed through the jurisprudence may be summarized as follows:
>
> 1. Does the proposed amendment raise a justiciable issue?
> 2. Is the applicant acting in bad faith?
> 3. Would allowing the amendment subject the other party to serious prejudice that could not be compensated by costs?

[39] The main Defendants submit that Alpha's claims related to the DNS transaction fail to raise a justiciable issue.

[40] In addition, the Main Defendants further submit that Alpha's claims related to the DNS transaction are made in bad faith in that they are an attempt to gain access to materials that the Corporate Defendants are not required to disclose to minority shareholders.

[41] The Court in *Martin v. MacIntosh*, 2022 NSSC 360, canvassed the law in Nova Scotia regarding justiciability and held that the claim must disclose a reasonable cause of action:

> 63 In *Drysdale v. Bev & Lynn Trucking Ltd*, 2016 NSSC 109, the plaintiff obtained summary judgment on the evidence on the issue of liability in a motor vehicle accident case. She also sought to amend the Notice of Action to add a claim for aggravated damages arising from the defendant's refusal to admit

liability. Chipman J. held that the proposed amendment did not raise a justiciable issue, in that it was plain and obvious that it was bound to fail:

> 38 A proposed amendment to a statement of claim must raise a justiciable or triable issue, in the sense that the amendment should not be allowed if it is "plain and obvious" that it discloses no reasonable claim or cause of action: see *Roynat Inc. v. A&A Auctioneers and Appraisers Ltd.*, 2003 NSSC 114, at paras. 7-9.

64 Justice Chipman again identified a "justiciable issue" as a prerequisite for a judicially permitted amendment in *Annapolis Group Inc v. Halifax (Regional Municipality)*, 2021 NSSC 344. Similarly, in *Gillard v. Nova Scotia (Registrar General)*, 2021 NSSC 204, Coady J dismissed a motion to amend pleadings on the ground that the requested amendments "will certainly fail and are not sustainable…" More recently, and more definitively, Wood CJNS said, in *EllisDon Corporation v. Southwest Construction, SWP Maple Operating Partnership and Southwest Properties Limited*, 2021 NSCA 20:

> 26 A judge should not permit an amendment to add a claim which discloses no cause of action or where the action is obviously unsustainable. This is the same standard applied on a motion for summary judgment on pleadings under Rule 13.03.

71 The law is, that an amendment proposing a claim that fails to disclose a reasonable cause of action, or which is obviously unsustainable, should not be permitted

[42] Alpha's allegations in the Amended Notice of Action say, in effect, that the DNS transaction was structured in a manner designed to unfairly benefit LFE over LMR fails to raise a justiciable issue, i.e., that the monetary benefit to be received by LFE and its shareholders would have a negative impact on the monetary benefit to be received by LMR and its shareholders, including Alpha. There is no monetary benefit at issue now, since the DNS transaction did not proceed. Alpha is not out any compensation related to that transaction whatsoever. Alpha did not suffer any damages because of the contemplated transaction or proposed share distribution method, all of which it alleges were unfair and oppressive in its proposed pleading.

[43] The only relief pertinent to the above claims is Alpha's request for declaratory relief. Alpha seeks various declarations at paragraphs 77(a) to (c) concerning the Defendants' alleged oppressive conduct. The other forms of relief, such as a full accounting, repayment of disproportionate benefits, the appointment of independent directors, unwinding or setting aside transactions, and liquidation of LMR and/or LFE, have no relevance to a transaction that did not occur.

[44] The Nova Scotia Court of Appeal recently confirmed that the Courts should not issue declarations related to moot issues. In *Schnare v. Schnare*, 2023 NSCA 30, Justice Fichaud held that the Court's bases for declining to exercise its discretion to issue a declaration includes that it would not effectively dispose of the issue:

> 23 David Schnare applied for a declaration. A declaration is a discretionary remedy. In determining whether to entertain the application, the court focuses on utility. The court's bases for declining to exercise its discretion include the declaration would not effectively dispose of the issue and there is a more effective alternative remedy:
>
> …
>
> - In *Daniels v. Canada (Indian Affairs and Northern Development)*, [2016] 1 S.C.R. 99, Justice Abella for the Court said:
>
> > 11. … **A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties** [citations omitted].
> >
> > [Emphasis added]

[45] The full quote from Justice Abella in *Daniels v. Canada (Indian Affairs and Northern Development),* [2016] 1 S.C.R. 99 is:

> 11 This Court most recently restated the applicable test for when a declaration should be granted in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII), [2010] 1 S.C.R. 44. The party seeking relief must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution. A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.

[46] Clearly then, the Court's role is not to issue declarations where there is no utility due to there being no live controversy between the parties.

[47] In *Spencer v. Canada (Attorney General),* 2023 FCA 8, the Federal Court of Appeal very recently dismissed a claim seeking a declaration on the basis that no live controversy continued to exist. In that case, the claimants sought a declaration that certain quarantine provisions related to the COVID-19 pandemic were invalid. Prior to the appeal being heard, the impugned provisions were terminated. Given the impugned provisions were no longer in effect, the Federal Court of Appeal held, *inter alia*, that the appeal should be dismissed:

> 5 As the impugned provisions are no longer in effect, we are of the view that these appeals are now moot (*Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231). Where declarations are sought as in this case, relief will be granted only if the relief will settle a "live controversy" between the parties (*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99 at para. 11). Although the

> appellants have a genuine interest in the outcome of the appeals, there is no longer a live controversy between the parties. Therefore, the appeals have become moot.

Disposition

[48] Pleadings must plead material facts which disclose a cause of action. There is no live cause of action against the Main Defendants concerning the failed DNS transaction. There is no direct remedy sought arising out of that failed transaction. Evidence about why and how that transaction did not happen might be relevant in the context of an on-going oppression claim but that does not make such evidence material facts to be plead. In fact, counsel for the Main Defendants advised the Court that disclosure has been made to Alpha regarding the failed DNS transaction. There is some suggestion that Alpha says that that disclosure may not be complete. However, this is not a motion for production, but a motion for the amendment of pleadings.

[49] The Court notes that the Main Defendants did consent to the amended pleading in relation to the DNS transaction in January 2023 at a point in time when the deal had not closed. However, that deal unwound and never closed. Counsel has admitted that in hindsight they should have waited to see if the deal finalized before agreeing to the amendment sought. At the time however, they thought the

deal would close. Counsel have agreed to the amendments sought relating to the Boutilier transaction, precisely because that deal closed.

[50] As noted, the Main Defendants also submit that Alpha has no genuine interest in adjudicating its oppression claim related to the DNS transaction. Rather, these Defendants say that Alpha is fixated on obtaining records that Alpha could not obtain as a minority shareholder. In particular, the Main Defendants point out that the evidentiary record before the Court shows that counsel for the Main Defendants advised Alpha's counsel that they would consent to disclose documents related to the Boutilier transaction, provided that deal closed. It did close, and the documents were disclosed to Alpha. Counsel for the Main Defendants, contending that the DNS transaction is moot, say that this entire motion was unnecessary and that all Alpha had to do was wait to see if the Boutilier transaction closed. If it did, then Alpha would receive disclosure related to it.

[51] The Court notes that counsel for Alpha suggested that Alpha had a "legal right" to disclosure of the information relating to the DNS transaction. He did not ground that supposed right within the common law or the Third Schedule to the Nova Scotia *Companies Act* RSNS, c. 81. In any event, this motion is not a motion for production.

[52] It is clear to this Court that Alpha has sought, with considerable vigour, information related to the DNS transaction. It was initially denied such information as a minority shareholder. It now seeks to amend its pleadings, to gain access to these documents. That is not a proper reason to amend pleadings. Further, as noted, the Main Defendants have now disclosed documents related to the DNS transaction.

[53] This Court notes that Alpha could have, but did not, seek injunctive relief to obtain the records prior to the vote occurring in the DNS transaction. However, Alpha did not do so.

[54] The Court is not prepared to find that Alpha acted in bad faith in its pursuit of documentation relating to the DNS transaction. While there was an element of Alpha trying to obtain documents that it was not entitled to as a minority shareholder, there was also an assertion that in the context of an oppression claim a failed transaction was relevant and could be plead.

[55] At the end of the day, I find that there is insufficient evidence for the Court to make a finding of bad faith on Alpha's part and I decline to do so.

[56] The Court notes for completeness sake that there was no evidence before the Court that allowing the amendments would subject the Main Defendants to serious prejudice that could not be compensated by costs.

Amendment Sought Re Punitive Damages

[57] The Court makes no decision at this time with respect to whether the amendment which seeks punitive damages against LMR, LFE, Peter Kinley, Shona Kinley-MacKeen, John Kinley and Joseph Kinley is granted or not. The Court invites counsel for all Defendants, including the Main Defendants, to advise the Court after receipt of this decision, whether there is an objection to the amendment relating to punitive damage, and if so, on what basis.

Costs

[58] Costs are awarded to the Main Defendants. If the parties are unable to agree on costs, the Court will receive short submissions on costs within twenty (20) calendar days of the date this decision is provided to counsel for the parties.

Conclusion

[59] The amendments to the pleading relating to the DNS transaction fail to disclose a justiciable issue. They are not permitted.

Smith, J.

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Alpha Investments Limited, a body corporate

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Lunenburg Marine Railway Company, a body corporate, Lunenburg Foundry & Engineering Limited, a body corporate, carrying on business as Lunenburg Industrial Foundry & Engineering, Peter J. Kinley, Shona Kinley-MacKeen, Joseph F. Kinley, John G. Kinley, Kevin Feindel, David Allen, Timothy Clahane, Jane Ritcey-Moore, and J. Edward Kinley and Paula Kinley-Howatt

Defendants

DECISION ON MOTION TO AMEND PLEADINGS

Erratum

Judge: The Honourable Justice Ann E. Smith

Heard: May 24, 2023, in Halifax, Nova Scotia

Counsel: Don Fraser, for the Plaintiff
Michelle Kelly, K.C. and John Boyle, for the Defendants:

- Lunenburg Marine Railway Company
- Lunenburg Foundry & Engineering Limited

- Lunenburg Industrial Foundry & Engineering
- Peter J. Kinley
- Shona Kinley-MacKeen
- Joseph F. Kinley
- John G. Kinley
- David Allen
- Timothy Clahane

Christine Murray, for the Defendant – Kevin Feindel
Brian Casey, K.C. for the Defendant – Jane Ritcey-Moore
Nathan Sutherland and Nicole Watson, for the Defendants:

- J. Edward Kinley
- Paula Kinley-Howatt

Erratum date: November 28, 2023

Erratum details: The citation for the case was given as 2023 NSSC 69 which was incorrect. The correct citation is 2023 NSSC 362 and the decision has been updated to reflect this change.