

**SUPREME COURT OF NOVA SCOTIA**

**Citation: Gallagher Holdings Ltd. v. Unison Resources Inc., 2017 NSSC 19**

**Date:** 20170104

**Docket:** Hfx No. 451310

**Registry:** Halifax

**Between:**

Gallagher Holdings Limited, a body corporate,  
Aldamad Investments Limited, a body corporate,  
Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux,  
Bonnie Barteaux, Michael Lund, and Blaise Wilson

Applicants

v.

Unison Resources Incorporated, an extra-provincial corporation,  
UWGC Limited, a federal body corporate,  
Stephen Patterson, and Genevieve Paquin

Respondents

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**DECISION**

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**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** October 12, 2016, in Halifax, Nova Scotia

**Oral Decision:** January 4, 2017

**Written Decision:** January 23, 2017

**Counsel:** John A. Keith, Q.C. and Caitlin Regan-Cottreau, for the  
Applicants  
Christopher I. Robinson, for the Respondents

**BY THE COURT (McDOUGALL, J. ORALLY):**

[1] A Notice of Motion was filed on behalf of the Applicants, Gallagher Holdings Limited, Aldamad Investments Limited, Andrew Armstrong, James Williams, Michael Williams, Bruce Barteaux, Bonnie Barteaux, Michael Lund and Blaise Wilson. The Application seeks and Order that:

1. The Respondent – UWGC Limited –produce the following documents by no later than Wednesday, October 19, 2016:
  - a.UWGC’s tax returns, financial statements, balance sheets, relevant general ledger accounts, from 2012 to date; and
  - b.UWGC’s Minute Books.

[2] The Motion was filed on October 3, 2016 and argued on October 12, 2016. Upon hearing the oral arguments of counsel for the opposing parties the Court reserved it’s decision.

**BACKGROUND:**

[3] By way of background, counsel for the Applicants filed an Amended Notice of Application in Court on May 13, 2016. The Applicants seek an Order:

1. Granting joint and several damages against the Respondents for breach of contract and, in particular, an agreement to repay the Applicants here [sic, herein] for monies invested in the Respondent Unison Resources Incorporated, a company controlled by individual Respondents (Stephen Patterson and Genevieve Paquin);
2. In the alternative, granting joint and several damages against the Respondents Unison Resources Incorporated and Stephen Patterson for fraudulent and/or negligent misrepresentation;

3. Declaring that the Respondents Unison Resources Incorporated, Stephen Patterson, and Genevieve Paquin have acted in a manner that is oppressive of, is unfairly prejudicial to, or unfairly disregards shareholder interests;
4. Granting joint and several damages against the Respondents Unison Resources Incorporated, Stephen Patterson, and Genevieve Paquin for oppression contrary to section 5 in Schedule 3 of the *Companies Act*, RSNS 1989, c. 81, as amended;
5. Awarding the Applicants pre-judgment interest and costs; and
6. Such further and better relief as this Honourable Court deems just.

[4] Counsel, on behalf of the Respondents filed a Notice of Contest admitting some of the facts set out in ten of the 44 paragraphs stated as grounds for the Application while denying the rest. The Notice of Contest, filed on June 9, 2016 asks that the Application be dismissed.

**MOTION:**

[5] Returning to the Motion, itself, the relief sought on behalf of the Applicants is against UWGC Limited only. It calls for:

- (a) UWGC's tax returns, financial statements, balance sheets, relevant general ledger accounts, from 2012 to date; and
- (b) UWGC's Minute Books

[6] In his written brief, filed on behalf of the Respondents on October 6, 2016 and subsequently reiterated in oral submissions presented during the hearing of the Motion, counsel for the Respondents argues that:

5. The Applicants allege that at some point after the Agreement was entered into, UWGC Limited ("UWGC") was either made a party to the Agreement and stepped into the shoes of Unison; or entered into a separate contract with the Applicants and itself agreed to repurchase their shares on the same terms as Unison had earlier agreed. [Application para. 37]

[7] This is an exact recitation of what is contained in para. 5 of the Respondents' counsel's brief. He goes on to say, at para. 6 of his brief:

6. The Applicants are not – nor were they ever – shareholders of UWGC, nor did they ever have any relationship with UWGC whatsoever, beyond the alleged contract entered into in connection with the Agreement.

[8] In respect to the alternative relief sought by the Applicants, counsel for the Respondents submits that it does not involve UWGC and consequently the Respondents oppose the request for production as being irrelevant to the claim against UWGC as pleaded.

[9] In his oral submissions counsel for the Respondents suggested that the only factual allegations made by the Applicants against UWGC are contained in para. 37 of the Amended Notice of Application. The Respondents indicated that they would be prepared to disclose relevant financial information including bank account statements and balance sheets from October 1, 2015 onward as that is the date alleged by the Applicants, in para. 31 of the Amended Notice of Application, when Unison agreed to repay 85% of the investments by December 1, 2015.

[10] For its part, counsel for the Applicants points out that the Amended Notice of Application claims damages for breach of contract not only against Unison Resources Incorporated along with Stephen Patterson and Genevieve Paquin personally, but also against UWGC Limited. This is clearly stated in the first paragraph on page one of the Amended Notice.

[11] Counsel for the Applicants, both in written and supplementary oral submissions, point to UWGC's alleged involvement along with Unison and Stephen Patterson in conduct that they say amounts to a breach of contract and a breach of UWGC's duty of honest contractual performance. These allegations are contained in paras. 37 and 44 of the Amended Notice of Application.

[12] Counsel for the Applicants contend that UWGC was a party to the Settlement Agreement that would have seen Unison repurchase the shares previously acquired by the Applicants by way of repayment at 85% of the initial subscription cost.

[13] The Respondents deny that UWGC was a party to this agreement and instead claim that UWGC only agreed to assist Unison in refunding the repayment amount required under the Agreement. (See para. 30 of the Notice of Contest.)

[14] Furthermore, the Respondents contend that UWGC was unable to provide financial assistance to Unison due to its own inability to conclude a separate transaction with another subscribing entity.

[15] This lack of funds is the same explanation offered by Unison for its failure to meet its contractual obligations under the Settlement Agreement.

[16] The Applicants argue that if they are successful in establishing that UWGC, like Unison, was a party to the Settlement Agreement then it was required to perform its obligations thereunder in good faith. And, if the financial disclosure sought by the Applicants shows that UWGC did, in fact, have the funds to provide to Unison in order that it might fulfil its contractual obligations but chose not to then it would have been acting in bad faith.

[17] I will return later to these and other allegations set out in the Amended Notice of Application and the Notice of Contest but first I will turn my attention to the Rules of Procedure governing disclosure.

[18] I will also make reference to some of the existing jurisprudence that speaks to the issue of legal relevance and to some cases that offer assistance in interpreting the rules that provide for disclosure and production of relevant documents.

**APPLICABLE CIVIL PROCEDURE RULES:**

[19] The starting point on a motion for production is **Civil Procedure Rule 14.08(1)** which states:

Presumption for full disclosure

14.08 (1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

[20] A party who proposes that a judge modify an obligation to make disclosure must comply with Rule 14.08(3). Rule 14.08(3) states:

(3) A party who proposes that a judge modify an obligation to make disclosure must rebut the presumption for disclosure by establishing that the modification is necessary to make cost, burden, and delay proportionate to both of the following:

(a) the likely probative value of evidence that may be found or acquired if the obligation is not limited;

(b) the importance of the issues in the proceeding to the parties.

[21] Subsections (4) and (5) of Rule 14.08 are also applicable in this situation:

(4) The party who seeks to rebut the presumption must fully disclose the party's knowledge of what evidence is likely to be found or acquired if the disclosure obligation is not limited.

(5) The presumption for disclosure applies, unless it is rebutted, on a motion under Rule 14.12., Rule 15.07 of Rule 15 - Disclosure of Documents, Rules 16.03 or 16.14 of Rule 16 - Disclosure of Electronic Information, Rule 17.05 of Rule 17 - Disclosure of Other Things, or Rule 18.18 of Rule 18 - Discovery.

[22] Keeping with Rule 14, a judge may order production pursuant to Rule 14.12(1):

Order for production

14.12 (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding if the moving party provides all of the following representations:

(a) the party is in compliance with Rule 15 - Disclosure of Documents and Rule 16 - Disclosure of Electronic Information;

(b) the party believes the delivery would promote the just, speedy, and inexpensive resolution of the proceeding, including a concise statement of the grounds for the belief;

(c) the party will pay the reasonable costs of making the delivery, unless a judge directs otherwise.

[23] Subsection (4) of Rule 14.12 allows a judge to limit a requirement to produce in accordance with Rule 14.08 if it is disproportionate in the circumstances.

[24] **Civil Procedure Rule 15.02(1)** drives home the point that:

Duty to make disclosure of documents

15.02 (1) A party to a defended action or a contested application must do each of the following:

(a) make diligent efforts to become informed about relevant documents the party has, or once had, control of;

(b) search for relevant documents the party actually possesses, sort the documents, and either disclose them or claim a document is privileged;

(c) acquire and disclose relevant documents the party controls but does not actually possess.

[25] Finally ss. (2) of Rule 15.02 places a further onus on each party. It states:

(2) The party must also disclose information about all of the following:

(a) a relevant document the party once controlled but no longer controls, such as a lost document or a document given away;

(b) a claim that a document in the control of the party is subject to a privilege in favour of the party or another person, to the extent it is possible to inform another party without infringing the privilege;

(c) a relevant document newly created, discovered, or acquired;

(d) a relevant document that has ceased to be privileged.

[26] It is clear from a review of the Rules that a party must disclose all relevant documents that are not otherwise privileged.

[27] **Civil Procedure Rule 14.01** offers the following in relation to the meaning of relevance:

Meaning of “relevant” in Part 5

14.01 (1) In this Part, “relevant” and “relevancy” have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:

(a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant;

(b) a judge who determines the relevancy of information called for by a question asked in accordance with this Part 5 must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the information relevant or irrelevant.

(2) A determination of relevancy or irrelevancy under this Part is not binding at the trial of an action, or on the hearing of an application.

[28] There have been many attempts by judges and scholars to define “relevance.” One of the better ones I have found is from a decision of The Honourable Justice James Donnelly of the Ontario General Division (now the Ontario Superior Court of Justice ) in the case of *R. v. Morin* (1991), O.J. No. 2528, 1991 Carswell Ont 5969. Justice Donnelly stated that:

Relevant evidence is evidence which, either by itself or in conjunction with other evidence, tends to show the existence or non-existence of a fact in issue. There must be a logical nexus between the fact sought to be adduced and the matter about which the inference is to be drawn. The primary fact must be logically probative of the conclusionary fact. Evidence that is not probative of a fact in issue tends to prove nothing and is inadmissible. The general principle is that all relevant evidence is admissible subject to exclusionary considerations.

[29] In order for evidence to be relevant, it must have some probative value. According to *R. v. Arp*, [1998] 3 S.C.R. 339 (S.C.C.) at p. 360, The Honourable Justice Peter Cory stated:

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". See Sir Richard Eggleston, *Evidence, Proof and Probability* (2nd ed. 1978), at p. 83. As a consequence, there is no minimum probative value required for evidence to be relevant. See *R. v. Morris*, [1983] 2 S.C.R. 190, at pp. 199-200.

[30] Once the determination is made that evidence is relevant and therefore admissible, it is left to the trier of fact to decide what weight, if any, to apply to it.

[31] At this stage of proceedings, the Court can only determine trial relevancy of sought-after disclosure based on the assumption that the allegations contained in the pleadings can be established. It is not for the Court to make a preliminary determination of the Applicants’ chances of success. It is, after all, not a summary judgment motion under Rule 13.

[32] There are numerous other decision from our own jurisdiction, both from this Court and from the Nova Scotia Court of Appeal, that deal with the presumptive rule

that for justice to prevail there must be full disclosure of all relevant documents not otherwise protected by privilege. I refer, once again, to **Civil Procedure Rule 14.08**.

[33] A judge ordering disclosure must not lose sight of proportionality. It has not been argued that the cost for producing the financial information sought by the Applicants outweighs any probative value it might have.

**RULING ON THE MOTION:**

[34] Considering the meaning and intent of the rules the request for disclosure of financial information pertaining to UWGC Limited is reasonable. I have arrived at this decision based on a review of the relief sought by the Applicants and the grounds advanced in the Amended Notice of Application. I have also considered the grounds of contest contained in the Respondents' Notice of Contest.

[35] My decision begins with the allegation found in para. 5 on p. 2 of the Amended Notice of Application under the sub-heading "Background" found immediately below the general heading "Grounds for Order."

[36] This paragraph asserts that Mr. Patterson and Ms. Paquin are the sole directors and directing minds of Unison Resources Incorporated. It goes on to assert that Mr. Patterson is the sole director and directing mind of UWGC Limited. Furthermore, at para. 6, it is stated that the registered office for both Unison and UWGC is Mr. Patterson's home address – 12 Quinn Court, Bedford, Nova Scotia.

[37] Taking into consideration the common ties that bind these two corporate entities, it would be difficult to argue that the right hand did not know what the left had was up to and *vice versa*.

[38] Furthermore, I am not persuaded by Respondents' counsel's suggestion that the only factual assertion relating to UWGC is contained in para. 37 of the Amended Notice of Application. UWGC's involvement, under the directing mind of its sole director, Mr. Patterson, is alleged to have played an active part in what the Applicants argue is a breach of contract.

[39] Alternatively, the Applicants argue that UWGC was used by Unison and Mr. Patterson to assist in committing either fraudulent or negligent misrepresentation. These allegations can be found in paras. 23(b), 28 and 38 of the Amended Notice. They are not confined to para. 37 as counsel for the Respondents suggests.

[40] The relevance of the documents sought by the Applicants is further supported by the position advanced by the Respondents in their Notice of Contest. They aver that there was no contractual relationship between UWGC and the Applicants but even if there was, UWGC, like Unison, did not have the funds to assist Unison in completing the Settlement Agreement.

[41] UWGC's financial status is made relevant by the alleged actions of the individual who controlled its activities as well as the position advanced on its behalf in the Notice of Contest.

**RESULT:**

[42] In the final result, the Applicants' Motion for Production is granted but I would confine it to the period beginning on January 1, 2013 up to and including the present day.

[43] Disclosure shall include:

(a) UWGC's tax returns, financial statements, balance sheets, relevant general ledger accounts and monthly bank statements for any and all bank accounts (or similar financial institutions) maintained by the Company from January 1, 2013 up to and including today's date – January 4, 2017; and,

(b) UWGC's Minute Books from the time of its incorporation to date.

[44] You will note that I have expanded the disclosure to include monthly bank statements for any and all accounts UWGC Limited has or had during the relevant period in any bank or other similar financial institution used for that purpose.

**COSTS:**

[45] Costs in the amount of \$500.00 shall be paid by the Respondents to the Applicants in any event of the cause but payable when the matter is finally determined.

McDougall, J.