

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hamilton Port Authority v. National Petroleum Products Corp.,
Isabella Skalin, Kelly Skalin, Alex Shulman, Henry Russel Powell,
Lake Trust II, Mary Anne Elistve, Gordon Roy Baker and
Suleiman Abdalla

BEFORE: The Honourable Mr. Justice P.B. Hambly

COUNSEL: L. Frapporti, for the applicant

R. Slaght, for the respondent, National Petroleum Products Corp.

B. Van Niejenhuis, for the respondents, Powell, Baker, Elistve and Lake Trust II

No one appearing for Isabella Skalin, Kelly Skalin, Alex Shulman and Suleiman
Abdalla

HEARD: July 30, 2007.

ENDORSEMENT

This is a motion to quash an application.

Background

[1] The facts are set out in detail in the Reasons For Decision of Justice Cumming dated July 13, 2004 reported as Abdalla v. Skalin, 2004h Can LII 2555. I will refer only to the facts in summary form that are necessary for this decision.

[2] National Petroleum Products Corp. (NP) was incorporated by Isabella Skalin and Alex Shulman on November 10, 1998. On January 1, 1999 NP entered into a lease with the Hamilton Port Authority (HPA) of property in Hamilton Harbour. NP intended to construct a jet fuel

distribution terminal on the leased property. On March 3, 1999 Isabella Skalin and Alex Shulman entered into an agreement with Suleiman Abdalla (Abdalla) to sell their shares to him for \$300,000. This changed the control of NP, which gave the HPA the right to terminate the lease. To avoid this, Abdalla and Isabella Skalin entered into an agreement dated September 27, 1999, which recited that they each owned 50% of the shares of NP. Abdalla could call upon Isabella Skalin to join with him in causing NP to subdivide each of the two issued shares into 100 shares and convey to him 37% of the shares of NP. This would leave Isabella Skalin with 13% of the shares of NP.

[3] HPA commenced an action (the HPA action) against NP for an order declaring that NP had forfeited the lease. NP denied that it had forfeited the lease and counterclaimed for its damages based on an allegation that HPA had denied it quiet enjoyment under the lease. Abdalla commenced an action (the Abdalla action) against Isabella Skalin, Kelly Skalin, Alex Shulman, Gordon Roy Baker, Henry Russel Powell, Lake Trust II and Mary Anne Elistve. He sought enforcement of the September 27, 1999 agreement by an order compelling the defendants to transfer to him 87% of the shares of NP, which in effect would require that he be declared the owner of these shares and for an order rectifying the share registry of the corporation accordingly. He alleged that Kelly Skalin, the husband of Isabella Skalin, had been running NP. He also alleged that Isabel Skalin and Gordon Roy Baker (Baker) had caused NP to issue shares to Lake Trust II, which was a family trust of which Baker was the sole trustee, and to Henry Russel Powell (Powell) who was a business associate of Baker. He alleged further that Isabella Skalin and Powell transferred shares of NP to Mary Anne Elistve. The defendants Kelly Skalin, Powell, Lake Trust II, Mary Anne Elistve and Baker will be referred to as the Baker defendants.

[4] A single statement of defence was filed in which it was alleged that the agreements of March 3, 1999 and September 27, 1999 transferring shares to Abdalla were conditional upon Abdalla raising twenty million dollars to fund NP, which he had not done. The defendants denied that Abdalla was the owner of any shares at NP. The statement of defence referred to an agreement between Abdalla and HPA dated February 20, 2004. The agreement provided that HPA would pay Abdalla immediately \$325,000 in satisfaction of personal claims of Abdalla against HPA. It required him to vigorously pursue his action. In the event he was successful, HPA would pay him a further \$325,000. This would settle the HPA action. The agreement gave Abdalla an advance of \$60,000 on the second payment of \$325,000. It also gave HPA an option to purchase Abdalla's shares for \$1000.

[5] HPA has brought an application against NP, Isabella Skalin, Abdalla, Alex Shulman, and the Baker defendants. It seeks an order declaring that Abdalla is the owner of 87% of the shares of NP and that he be so recorded in the share registry of NP. The Baker defendants have brought a motion to quash the application on the grounds that it is an abuse of the process of the court. They are supported by NP.

Analysis

[6] The Baker defendants are included in the Abdalla action and in the application. The relief sought by HPA in its application is in essence the same relief sought by Abdalla in his action.

[7] Justice Farley denied an application by NP when it was acting on instructions from the Baker defendants to consolidate the two actions in his endorsement dated October 26, 2001. He stated the following:

Motion to consolidate the proceedings is dismissed. Costs payable forthwith by October 26/01 by National Petroleum to the HHC of \$1500.

The only connection between the two matters – the “oppression remedy” case 00-CL-3844 and the lease action in Hamilton 00/643 is that the applicant in the “OP” case Abdalla was granted intervenor status by Fedak RST in the Hamilton action. Motion (emphasis added) re payment into court – see tab E (motion to intervene) and tab F (Fedak RST endorsement). This motion has now been heard and decided. Abdalla is not an intervenor in the proceedings (emphasis added).

The “OP” case appears to me to be a question as to who controls National Petroleum. There is no judicial connection between this dispute and the lease action.

There is of course the functional aspect that the Abdalla side indicates that if in control of National Petroleum, there would be a negotiated/resolution initiative to see whether the litigation now underway could be settled or if it had to continue.

It seems to me that the most satisfactory, efficient, effective and appropriate way to proceed would be to have the “OP” case dealt with and decided forthwith. That litigation in my view is not complex or complicated.

[8] Justice Farley, in effect, accepted the position of the HPA at that time which was articulated in its factum as follows:

1. National Petroleum has requested the consolidation or trial together in Toronto of an application for oppression and an action for breach of lease. These proceedings are factually and legally disparate, have been commenced in different jurisdictions and involve different parties. An order for the consolidation of these proceedings or their trial together would impose upon the Hamilton Harbour Commissioners (“HHC”) a substantial increase in expense, inconvenience and delay and would deprive the plaintiff of its right to have a matter of some local significance adjudicated in the jurisdiction in which the proceedings were commenced.

18. In the present circumstances there is no question of law or fact in common. Nor does the relief claimed in the two proceedings arise from the same transaction or series of transactions. The oppression proceeding involving Mr. Abdalla and various current and former principals of National Petroleum involve issues of corporate governance and the interpretation and application of various shareholders agreements. Neither the issue of governance nor the issue of the application and interpretation of the shareholders agreements involve HHC and its lease with National Petroleum in any meaningful way.

[9] A motion by the HPA to intervene in the Abdalla action was denied by Justice Farley. In his endorsement dated March 1, 2004 he stated the following:

[1] The motion to intervene is dismissed. Unfortunately for the HHC position on this, it opposed the consolidation motion in 2001 on the basis that the two cases had nothing in common. The law with respect to *res judicata*, including its *issue estoppel* aspect was reviewed in *Bank of Montreal v. Mitchell* (1997), 143 D.L.R. (4th) 697 (Ont. Gen Div.), affirmed (1997), 151 D.L.R. (4th) 574 (C.A.). The HHC had knowledge at that time of the consolidation motion as a result of the Abdalla motion before Fedak R.S.J. with respect to the issue of a possible change of control. Thus the new change of the pleading in the HHC case vs. National Petroleum does not save this on the basis that HHC ought to have raised this aspect earlier in the consolidation motion.

[2] To be clear though, this decision on this motion in no way is to be interpreted as precluding in any way, HHC from raising – and if possible, proving – the question of change of control, which may allow HHC to cancel/terminate the lease in question in its case.

[10] In the Abdalla action, Justice Farley in an endorsement dated May 25, 2004 denied a motion by the Baker defendants to dismiss the action, but made an order that Abdalla pay into court \$60,000 within 30 days, failing which Abdalla would be required to show cause why the Abdalla action should not be dismissed.

[11] In an endorsement dated August 31, 2004, Justice Farley granted a motion by the Baker defendants dismissing the Abdalla action if Abdalla did not pay \$60,000 into court by 4:00 p.m. on September 3, 2004. He stated that HPA was at liberty to pay the \$60,000 into court on behalf

of Abdalla. The money was not paid into court. Justice Farley, in an endorsement dated September 17, 2004, confirmed the dismissal of the Abdalla action on September 3, 2004.

[12] Mr. L. A. Frapporti, who has represented the HPA throughout, stated in his factum at paragraph 13:

At the core of this dispute is the foundational question as to whether the HPA is entitled to advance a claim under section 250 the *Ontario Business Corporations Act*, as a consequence of the existence of an option to purchase shares in NPPC owned by Suleiman Abdalla which option was granted by Abdalla in settlement of certain claims he, personally, had against the HPA, which provides to HPA an option to purchase shares owned by Suleiman Abdalla. The Option Agreement was part of a settlement agreement executed by the parties (which) also resolved the lease litigation, as between NPPC and the HPA. Although the question of the propriety of the Option agreement has been adjudicated (and found to be proper), the exercise of the option on the part of the HPA necessitates a finding with respect to Abdalla's share interest prior to the adjudication of the lease litigation.

[13] It was decided by Justice Farley in his endorsement dated March 1, 2004 on the motion by HPA to intervene in the Abdalla action that this question was to be decided in the HPA action. This issue is *res judicata*.

[14] In *Toronto (City) v. C.U.P.E. Local 79*, 2003 SCC 63, the Supreme Court of Canada in the decision of Justice Arbour stated the following:

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 scc 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible

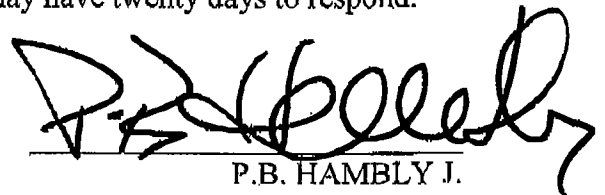
doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p.358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. (emphasis added)

Result

[15] I agree with the Baker defendants that it would be an abuse of process to permit the application to continue. The order requested by the Baker defendants quashing the application is granted.

[16] The Baker defendants and National Petroleum may make submissions on costs in writing within twenty days of receipt of these reasons and the HPA may have twenty days to respond.


P.B. HAMBLBY J.

DATE: August 8, 2007