ORIGINAL

COURT FILE NO.: 308/08 (Toronto)
DATE: 20080902

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

RE: HAMILTON PORT AUTHORITY

Appellant

- and -

NATIONAL PETROLEUM PRODUCTS CORP. and others

Respondents

BEFORE: CARNWATH, SWINTON & NORDHEIMER JJ.

COUNSEL: *Louis Frapporti*, for the appellant

Brendan Van Niejenhuis, for the respondents, Gordon Roy Baker, Henry Russel Powell, Lake Trust II and Mary Anne Elistve

Michael Hunziker, for the respondent, National Petroleum Products Corp.

No one appearing for the respondents, Isabella Skalin, Kelly Skalin, Alex Shulman and Sulciman Abdalla

HEARD at Toronto: August 18, 2008

ENDORSEMENT

NORDHEIMER J.:

[1] This is an appeal by the Hamilton Port Authority from the decision of Hambly J. dated August 8, 2007 in which he quashed an application commenced by the appellant under s. 250 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16. Hambly J. found that the application constituted an abuse of process. The appeal raises two questions:

(i) Did the motions judge correctly conclude that the application should be quashed as an abuse of process?
(ii) Was the appellant an "aggrieved person" within the meaning of s. 250 of the *OBCA*?

Background

[2] While this appeal represents yet another episode in the long running dispute between these parties, a brief summary of that history is sufficient for the purposes of this appeal.

[3] The appellant is the landlord under a lease agreement dated January 1, 1999 (the "Lease") with National Petroleum Productions Corp. as tenant. A dispute arose between the appellant and National Petroleum that lead to the termination of the Lease. As a consequence of that dispute, an action was commenced (the "Lease Action") between the appellant and National Petroleum in which each made various claims against the other. Included in the claims in the Lease Action is a claim by the appellant for a declaration that it was entitled to terminate the Lease.

[4] The appellant latterly claimed it was entitled to terminate the Lease because a change of control of National Petroleum occurred without the consent of the appellant. In particular, it is alleged that Suleiman Abdalla acquired control of National Petroleum in two transactions in 1999 and 2000. Under the terms of the Lease, any change of control of National Petroleum operated as an assignment of the Lease that required the consent of the appellant. The failure to obtain the consent then operates as a breach of the terms of the Lease.

[5] This change in control is, itself, a matter of dispute between various entities. That dispute led, in 2000, to the commencement by Abdalla of an oppression proceeding, initially against the Skalins but to which the Baker respondents were subsequently added, in which he sought to enforce two agreements under which he claimed he had acquired the controlling interest in National Petroleum (the "Shareholder Action").

[6] The appellant sought leave to intervene in the Shareholder Action because the issue of who had control over National Petroleum was relevant to the Lease Action. On March 1, 2004, Farley J. dismissed that motion. He did so, in part, on the basis that the appellant had, three years earlier, argued successfully against the consolidation of the Lease Action and the Shareholder Action because, according to the appellant, there was nothing in common between the two proceedings. In dismissing the motion to intervene, however, Farley J. expressly stated that his decision:

> ... in no way is to be interpreted as precluding [the appellant] from raising – and if possible proving – the question of change in control, which may allow [the appellant] to cancel/terminate the lease in question in its case.

[7] An ensuing event that is central to the application of the abuse of process doctrine is that, on February 20, 2004, the appellant entered into an agreement with Abdalla by which the appellant purported to settle the claims between it and Abdalla arising out of the Lease Action. In fact, it appears that the chief purpose of that agreement was to effect an overall settlement of the Lease Action. The agreement is, itself, titled "Settlement Agreement". It should be noted that the existence of the Settlement Agreement was known at the time of Farley J.'s decision on the motion to intervene.

[8] The Settlement Agreement refers to Abdalla as "the sole or controlling shareholder" of National Petroleum. Under the Settlement Agreement, the appellant agreed to make a first

payment to Abdalla of $325,000. Abdalla, in turn, agreed to "vigorously" pursue the Shareholder Action. He further agreed that the action could not be settled without the consent of the appellant. The appellant agreed to make a second payment of $325,000 if, and only if, Abdalla was successful in the Shareholder Action and thereby became the absolute owner of eighty-seven percent of the shares of National Petroleum. However, the appellant advanced $60,000 of that second payment to cover Abdalla's legal fees with respect to the Shareholder Action.

[9] If Abdalla was successful in the Shareholder Action, the Settlement Agreement gave the appellant the option to purchase all of the shares held by Abdalla in National Petroleum. The appellant would then own shares representing no less than eighty-seven percent of the issued and outstanding shares of National Petroleum.

[10] Following the Settlement Agreement, Abdalla did not vigorously pursue the Shareholder Action prompting the Baker defendants to move to dismiss the action for delay. In response to that motion, Farley J. ordered Abdalla to pay the sum of $60,000 he had received from the appellant into court within thirty days. Abdalla did not make that payment. Consequently, on September 17, 2004, Farley J. ordered that the Shareholder Action had been dismissed effective September 3, 2004.

[11] In response to the dismissal of the Shareholder Action, the appellant commenced this application against National Petroleum and the Baker respondents. In the Notice of Application, the appellant claims various orders under the rectification provisions of the *OBCA*, the thrust of which is to have Abdalla declared the controlling shareholder of National Petroleum.

[12] In response to the application, both National Petroleum and the Baker respondents brought motions claiming similar relief. In particular, the respondents sought orders striking out the Notice of Application and supporting affidavit and permanently staying the application.

[13] It is important to note that the respondents advanced several grounds for the relief sought in their notices of motion. Among other arguments, the respondents submitted that the application was duplicative, that the appellant was not a person who could claim relief under s. 250 of the *OBCA* and that the application was an abuse of process.

[14] The motions judge quashed the application on the latter basis, that is, that the application was an abuse of process. In doing so, the motions judge emphasized the following passage from the decision in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) where Goudge J.A. (in dissent but subsequently approved by the Supreme Court of Canada at [2002] 3 S.C.R. 307) said, at para. 56:

> 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 re-litigate a claim which the Court has already determined.

[15] The motions judge also observed that Farley J., in his March 1, 2004 endorsement on the appellant's motion to intervene, had said that the question of Abdalla's share interest was to be decided in the Lease Action. The motions judge concluded that this issue was *res judicata*.

Analysis

[16] The appellant challenges the motions judge's order to quash the application, whether that order is based on abuse of process or, possibly, through the application of *res judicata*. It points out that there has been no determination of the issue that is raised in the application. In other words, the appellant says the issue regarding the control of National Petroleum is still outstanding, no adjudication has been made regarding it and therefore there is no prior litigation that can be seen to be re-litigated such as to properly invoke the abuse of process doctrine.

[17] The respondents submit that the doctrine of abuse of process is not limited to cases where there is an attempt to re-litigate a claim. The respondents say that the principle of abuse of process can be applied in any situation where the process of the court is misused. The respondents contend that the application is a misuse of the court's process when one considers the history of these proceedings and particularly that the appellant retains the right to address the issue regarding the control of National Petroleum in the Lease Action.

[18] There are two problems with the respondents' submissions in this respect. First, on a fair reading of the endorsement of the motions judge, he did not rely on that broader application of the abuse of process doctrine. Rather, he expressly referred to the above passage from *Canam* that, in turn, refers to the re-litigation of a claim that has already been determined. The appellant is correct that there has not been any determination of the issue of control of National Petroleum.

[19] Second, there is nothing in the endorsement of the motions judge to demonstrate that he considered the various factors relating to the proper exercise of the discretion given to dismiss a proceeding based on the broader application of the abuse of process doctrine. This same concern formed the basis upon which the Supreme Court of Canada reversed the lower courts in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 where those courts had barred an action based on a subset of abuse of process, namely, issue estoppel. In the course of that decision, Mr. Justice Binnie said, at para. 66:

> In my view it was an error of principle not to address the factors for and against the exercise of the discretion which the court clearly possessed. This is not a situation where this Court is being asked by an appellant to substitute its opinion for that of the motions judge or the Court of Appeal. The appellant is entitled at some stage to appropriate consideration of the discretionary factors and to date this has not happened.

[20] Having said that, however, all the parties accept that if the conclusion ultimately reached by the motions judge is the correct one, and there exists on the record a basis to support that conclusion, then the appeal ought to be dismissed even if the reasoning that lead the motions judge to that conclusion might be flawed.

[21] There is ample evidence on the record to justify a conclusion that the application brought by the appellant ought not to be allowed to proceed. First, it essentially repeats the issues raised in the Shareholder Action. That action was dismissed because Abdalla failed to respect an order of this court. Abdalla, or those claiming through him, should not gain the benefit through a separate proceeding that he was not prepared to pursue in the original proceeding. Second, it

appears that Abdalla is not interested, or otherwise not willing, to pursue his alleged rights regarding National Petroleum. If the principal claimant has insufficient interest in pursuing the issues, it is unfair to "vex" the respondents with responding to the same claim in a different proceeding at the instance of a third party who essentially asserts the claim of the principal claimaint. Third, there is no prejudice to the respondents flowing from the rejection of its application. The issue of control of National Petroleum, insofar as it relates to the Lease, remains alive in the Lease Action. Fourth, the appellant sought leave to intervene in the Shareholder Action and was refused. If the appellant is permitted to proceed with this application, it effectively circumvents that decision. Fifth, when Mr. Justice Farley dismissed the Shareholder Action, he noted that the appellant could have paid the $60,000 on behalf of Abdalla if it felt a need to keep the Shareholder Action alive. The appellant chose not to. It should not now be allowed to effect the same result through the application while avoiding the obligation to make that court ordered payment.

[22] The conclusion that the application should be quashed as an abuse of process is therefore justified on all of these grounds.

[23] Further, and in any event, there is another basis upon which the application should have been quashed and that is that the appellant has no standing to bring the application. This was one of the alternatives that was argued before the motions judge but not decided by him.

[24] The appellant brought its application under s. 250 of the *OBCA*. That section reads:

> (1) Where the name of a person is alleged to be or have been wrongly entered or retained in, or wrongly deleted or wrongly omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the court for an order that the registers or records be rectified.
>
> (2) In connection with an application under this section, the court may make any order it thinks fit including, without limiting the generality of the foregoing,
> (a) an order requiring the registers or other records of the corporation to be rectified;
> (b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend or making any other distribution or payment to shareholders before the rectification;
> (c) an order determining the right of a party to the proceedings to have the party's name entered or retained in, or deleted or omitted from, the registers or records of the corporation, whether the issue arises between two or more security holders, or between the corporation and any security holders or alleged security holders;
> (d) an order compensating a party who has incurred a loss.

[25] The appellant says that it is an "aggrieved person". It is only through that mechanism that it can bring itself within the scope of the section. Counsel have advised that they are unaware of any authority on the meaning of that expression as it is used in s. 250. However, similar expressions have been considered in the context of bankruptcy legislation.

[26] Lord Justice James in *Ex Parte Sidebotham* (1880) 14 Ch. B. 458 considered the proper meaning to be accorded to the expression "person aggrieved" and said, at p. 465:

> But the words 'person aggrieved' do not mean a person who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

[27] Similarly, Leitch J. in *Calford v. Royal Bank of Canada* (1998), 7 C.B.R. (4th) 94 (Ont. Gen. Div.) considered the meaning of the words "any other person aggrieved". Relying on *Sidebotham,* she also concluded that some legal grievance needed to be shown for a person to bring themselves within that term. There are certain parallels between the position of the Royal Bank in that case and the appellant in this case. The Royal Bank was the defendant in an action brought by a person who subsequently went bankrupt. The Trustee was intending to return the action to the bankrupt as it did not appear to be an asset of any value to the estate. The Royal Bank tried to oppose that relief and leave the action with the Trustee, presumably in an effort to ensure that the action did not continue. Leitch J. concluded that the Royal Bank was not an aggrieved person under the bankruptcy legislation.

[28] The appellant has not suffered any legal grievance arising from the dismissal of the Shareholder Action such as would constitute it an aggrieved person under s. 250. Indeed, it is difficult to see how any third party who, like the appellant, has only a contingent claim to shares of a corporation, could fit within any proper definition of that term. Considering the section as a whole, I find that it is directed towards rectifying the registry of a corporation where that registry has failed to record the direct holding of shares by a person in that corporation. The indirect nature of the appellant's claim to ownership of shares in National Petroleum is too vague and uncertain to fall within the intended purpose of the section.

[29] This conclusion is also consistent with the provision in s. 67(4) of the *OBCA*. It reads:

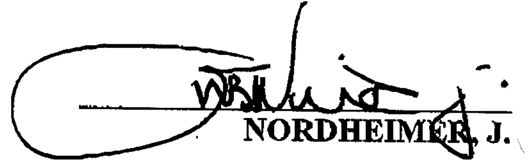
> An issuer is not required to inquire into the existence of, or see to the performance or observance of, any duty owed to a third person by a registered holder of any of its securities or by anyone whom it treats, as permitted or required by this section, as the owner or registered holder thereof.

If the appellant were permitted to bring itself with the definition of aggrieved person in s. 250, its application would effectively compel the corporation to do that which s. 67(4) expressly states it has no obligation to do.

[30] For this reason alone, the application is properly quashed.

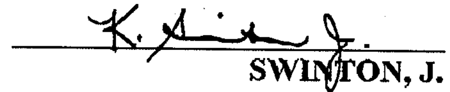
[31] The appeal is dismissed. In accordance with the agreement reached by counsel, the Baker respondents and the respondent, National Petroleum, are both entitled to their costs of the

appeal fixed for each at $4,000 inclusive of disbursements and GST and payable within thirty days.



NORDHEIMER, J.

CARNWATH, J.



SWINTON, J.

DATE: September 2, 2008