Court File No. CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE APPLICANT
Motion for Second Preservation Order

(Motion returnable November 5, 2019)

GOODMANS LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jason Wadden LSO# 46757M
jwadden@goodmans.ca

Christopher G. Armstrong LSO#: 55148B
carmstrong@goodmans.ca

Andrew Harmes LSO#: 73221A
aharmes@goodmans.ca

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for Del Equipment Inc.

Index

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INDEX

1

2016 ONSC 4092
Ontario Superior Court of Justice

3Genius Corp. v. Locationary Inc.

2016 CarswellOnt 10581, 2016 ONSC 4092, 268 A.C.W.S. (3d) 191

3Genius Corporation, Plaintiff / Moving Party and Locationary Inc., Grant Ritchie and Sergejs Marin, Defendants / Responding Parties

Edward P. Belobaba J.

Heard: June 15, 2016
Judgment: July 5, 2016
Docket: CV-14-497239

Counsel: David Vaillancourt, for Moving Party
Bruce Stratton, Sangeetha Punniyamoorthy, for Responding Parties
Monique Jilesen, for Non-Party, Apple Inc.

***Edward P. Belobaba J.*:**

1 It is well-recognized that an order for the interim preservation of property pending judgment is "a limited exception to the law's deep-seated aversion to providing a plaintiff with execution before trial." [1] It therefore follows that Rule 45.02, which allows a court to order that a "specific fund" be paid into court pending trial, is an "extreme" [2] remedy that must be "exercised with caution." [3]

2 The court has adopted a three-part test in deciding a Rule 45.02 request: (i) does the plaintiff claim a right to a specific fund? (ii) is there a serious issue to be tried regarding the plaintiff's claim to that fund? and (iii) does the balance of convenience favour granting the relief sought by the plaintiff? [4]

3 The threshold question of "specific fund" actually asks two sub-questions: one, is there a reasonably identifiable fund, and two, is the plaintiff claiming a legal right to the fund or just making a claim in damages? [5] If the latter, then no order under Rule 45.02 will be made. [6]

4 On the unusual facts in this case, I agree with the plaintiff that there is a fund that is reasonably identifiable. Nonetheless, the plaintiff's motion under Rule 45.02 must be dismissed because the claim is, in essence, a claim for damages. If I am wrong on this point, I would still dismiss the motion because the balance of convenience does not favour the plaintiff.

Background

5 This action arises out of an intellectual property dispute between two brothers, Arlen and Grant Ritchie. The plaintiff company, 3Genius (owned by Arlen) says that the defendant company, Locationary (owned by Grant) misappropriated the plaintiff's software to develop its own product and then sold the product to Apple for a significant amount of money. [7]

6 The defendants [8] deny any such misappropriation and say that the plaintiff has been fully compensated for the very limited uses that were made of its technology.

7 The matter is proceeding to trial. [9]

The holdback amounts

8 The Apple transaction in question closed in 2013. The plaintiff says that the bulk of the purchase price was paid to the defendants on closing but certain amounts were held back by Apple based on the provisions in the sale agreements. The holdback amounts are now due and owing.

9 The plaintiff brings this motion under Rule 45.02 for an order that Apple pay these holdback amounts into court pending the outcome of the trial. The plaintiff says it is "concerned" that any holdback amount paid to Locationary will be immediately paid out to shareholders. The plaintiff is also "concerned" that Grant now works for Apple, resides in California and is thus beyond the reach of Ontario litigation. Apple is not a party to this motion but has advised counsel that they will await and abide by this court's decision.

Analysis

10 The case law on "specific fund" is not easily reconciled. Some judges conflate the two sub-questions in the specific fund requirement blurring the analysis; others seem more preoccupied with the serious issue or balance of convenience requirements and give short shrift to the threshold "specific fund" requirement. Also, any attempt to reconcile the case law is complicated by the fact that many of the decisions turn on whether the claim to the specific fund was a "proprietary claim" — a requirement that was rejected in 2012 by the Court of Appeal in *Sadie Moranis*. [10] The Court made clear that the plaintiff's claim to the specific fund does not have to be a proprietary claim. [11]

11 In my view, it makes sense to restate the threshold "specific fund" requirement post-*Sadie Moranis* by focusing on each of the two sub-questions. I believe that the case law to date can be best understood as saying two things about this threshold requirement: one, there must be a reasonably identifiable fund of money; [12] and two, the plaintiff must be claiming a legal right to that fund and not just making a claim for damages. [13]

12 It is only after the two-part threshold requirement has been satisfied that one goes on to consider the second and the third requirements, 'serious issue to be tried' and 'balance of convenience.'

13 I will now turn to the facts herein.

(1) A reasonably identifiable fund

14 The first part of the "specific fund" requirement can be satisfied if the plaintiff shows that a specified and differentiated sum of money exists under the control of the defendant or a third party. The money in question does not have to be physically separated or segregated from other monies. It does not have to be bound in a rubber band and secured in a safety deposit box, or hidden under a mattress. Most 45.02 claims are for funds that are "sitting in" a bank account. But modern banking does not keep actual funds in a bank account or even trust account. The account holder's right to the monies in her bank account is based on related and supporting documentation. To accord with modern banking practices, it is enough if the specified amount is sufficiently differentiated by a book-keeping entry or line-item description in an accounting ledger or other related financial documentation. The key requirement is not actual or physical segregation but a sufficient differentiation.

15 A claim to an amount that remains undifferentiated and will simply be paid out of the defendant's or third party's corporate bank account is not a specific fund. As Brown J., (as he then was) noted in *Deol v. Morcan Financial Inc.*, [14] which involved a disputed claim for unpaid finder's fees:

> What the plaintiff really seeks is an order compelling the defendants to put to one side general corporate funds to stand as security for a judgment which the plaintiff hopes to secure at trial. That sort of execution before judgment is not available under Rule 45.02.

16 It is important to understand, however, that a specific fund can sometimes be found in a defendant's or third party's general corporate funds. This will happen when the claimed fund is, or is likely to be, differentiated by a book-keeping entry or line-item description in a financial ledger. The point is not that the monies are not co-mingled or inter-mingled because they always are - whether in trust accounts or general bank accounts. The question is whether the claimed fund is reasonably identifiable (i.e. differentiated) by a book-keeping entry or other line-item descriptor.

17 In my view, this is the best explanation for the case law that has found specific funds in trust accounts, [15] bank accounts, [16] and even in general corporate funds if the fund being claimed from general corporate funds has been differentiated as an undisputed amount that is owing or payable. [17]

18 On the evidence before me, I am satisfied that there is a reasonably identifiable fund of money — namely the payments that Apple has held back and is now ready to pay out to the defendants. The holdback amounts are specified and undisputed, and they are due and owing. They may well be sitting in Apple's general corporate account but if so, they are no doubt differentiated by book-keeping entries showing the monies as "payables" owing to the two defendants. Further, in recent emails to counsel, Apple's legal counsel has explicitly confirmed both the existence of the holdback funds and the fact that "the holdback monies will not be paid pending the Court's disposition of [this] motion." All of this taken together is more than enough for the plaintiff to clear the 'reasonably identifiable' hurdle.

19 The defendant Grant Ritchie submits that the holdback owing to him is a retained employment payment that is owing to him because he stayed on as an Apple employee for the required period of time. Grant can make use of this point when he argues that the plaintiff cannot claim a legal right to these monies, or cannot show that there is a serious issue to be tried in its claim to these particular funds, but he cannot deny that the funds in question are reasonably identifiable.

20 The plaintiff has therefore satisfied the first part of the "specific fund" requirement. But, in my view, the plaintiff has not satisfied the second part of the requirement.

(2) The claim is really a damages claim

21 Rather than dealing with the claims against the two defendants separately, and addressing Grant's submission that the plaintiff has no legal right to his employment-related payment, I will focus on the broader proposition that applies to the plaintiff's claim against both of the defendants.

22 The plaintiff's claim, in essence, is a claim for damages. The case law is clear that "a claim for damages is entirely different than a claim for relief involving a special fund ear-marked for the litigation." [18] As the Court of Appeal noted in *Sadie Moranis*, the Rule 45.02 remedy is not available where the claim is a claim for damages. And this is so, "even if a specific fund is identifiable in the factual matrix of the litigation, because a claim for damages is not a claim to a legal right to that fund." [19]

23 The plaintiff's claim is primarily a claim for some $30 million in damages — against Grant for breach of fiduciary duty, and against Locationary for knowing receipt, knowing assistance and inducing the alleged breach of fiduciary duty. The plaintiff also claims an accounting of the net profits [20] earned by the defendants from the entire Apple transaction (not just the net profits from the much smaller holdback amounts) and the right to trace the monies received by the defendants from the entire Apple transaction into any property acquired with these monies (and not just properties acquired with the monies from the holdback amounts).

24 Neither the accounting nor tracing claims are claims alleging a right to the actual holdback amounts. The two remedies are directed at the net profits made or properties acquired with the sales transaction proceeds, not just the holdback amounts. It is important to note, as did Master Muir in *Retrocom Investment* [21] , "that the statement of claim does not seek a declaration that the defendant is holding any specific fund for the benefit of the plaintiff." [22]

25 There is certainly no such claim or assertion as against the defendant Grant Ritchie. However, there is (arguably) such a claim as against Locationary — the statement of claim asks for a mandatory order requiring Locationary to pay into court "any further payments made to Locationary arising from the Apple Transaction." Read literally, however, this claim is triggered *after* the holdback amount has been paid out to Locationary not before; and, in any event, this is a stand-alone claim that is overshadowed, indeed overwhelmed, by the balance of the claim, which is, in essence, a claim for some $30 million in damages.

26 I therefore find that the plaintiff has not satisfied the second part of the "specific fund" requirement in showing that it is claiming a legal right to the fund in question Rather, it is making a claim for damages for breach of fiduciary duty. The Rule 45.02 remedy is therefore not available.

(3) Balance of convenience

27 If I am wrong in the analysis set out above, I would still have dismissed this motion on the balance of convenience requirement. In doing so, I acknowledge that the defendants have also advanced compelling submissions that the plaintiff has failed to clear the second requirement, a serious issue to be tried. However, I prefer to focus on the balance of convenience requirement because it can be explained more succinctly.

28 The balance of convenience does not favour the plaintiff. There is no evidence that either of the defendants intends to flee the jurisdiction or otherwise dissipate monies in an effort to avoid real or potential creditors. Grant is a senior Apple employee who lives in California. He is not beyond the reach of Ontario litigation or the reciprocal enforcement of judgments. Locationary is based here in Ontario. And there is no evidence that the company intends to do anything on the facts herein that is in any way unusual, improper or unfair.

29 Granting the relief requested and requiring that the holdback amounts owing by Apple to these defendants be paid into court pending trial would be tantamount to execution before judgment. It would fly in the face of "the law's deep-seated aversion to providing a plaintiff with execution before trial." [23]

30 There is no good reason on the facts herein to exercise the "extreme" Rule 45.02 remedy. The matter should be decided on the merits and on a level playing field — and this should be done at trial.

Disposition

31 The plaintiff's motion is dismissed with costs.

32 The holdback amounts may be paid to the defendants.

33 The question of costs was discussed with counsel at the hearing of the motion. I have since been advised that the defendants would prefer to make further submissions. If costs cannot be resolved by the parties, I would be pleased to receive brief written submissions from the defendants within 10 days and from the plaintiff within 10 days thereafter.

34 I thank counsel for their assistance.

Motion dismissed.

Footnotes

1 *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, [2012] O.J. No. 3029 (Ont. C.A.) at para. 17.

2 *Stearns v. Scocchia* [2002 CarswellOnt 3700 (Ont. S.C.J.)], 2002 CanLII 7745 at para. 22.

3 *American Axle & Manufacturing Inc. v. Durable Release Coaters Ltd.* (2007), 86 O.R. (3d) 53 (Ont. S.C.J.) at para. 22.

4 *Sadie Moranis*, *supra*, note 1, at para. 18.

5 *Ibid.*, at para. 19. I note that the Court of Appeal uses the phrase "readily identifiable fund" but the case law up to this point has used the phrase "reasonably identifiable fund": see for example, *Rotin v. Lechcier-Kimel* (1985), 3 C.P.C. (2d) 15 (Ont. H.C.) at 18; and *American Axle*, *supra*, note 3, at para. 27. In my view, there is no significant difference between "readily" and "reasonably" at least not for the purposes of a Rule 45.02 analysis.

6 Ibid., at para. 21. Also see the analysis in *Retrocom Investment Management Inc. v. Davies Smith Developments Inc.*, [2014] O.J. No. 4938 (Ont. S.C.J.) and the discussion below.

7 The sales price was not made public and the defendants have asked that the price remain confidential.

8 The third defendant, Sergejs Marin, is not involved in this motion.

9 A motion for summary judgment brought by the defendants was dismissed in *3 Genius Corp. v. Locationary Inc.*, 2015 ONSC 1439 (Ont. S.C.J.).

10 *Sadie Moranis*, *supra*, note 1.

11 *Ibid.*, at para. 27. Some decisions and legal texts published after the Court of Appeal's decision in *Sadie Moranis* continue to refer to "a proprietary claim" requirement (see, for example, *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2014 ONSC 1992 (Ont. S.C.J.) at para. 8) or continue to misstate *Sadie Moranis* as requiring a propriertary claim: see Watson and McGowan, *Ontario Civil Practice 2016* (2015) at 1015.

12 *Miller v. Carley*, [2006] O.J. No. 1813 (Ont. S.C.J.) at para. 19; *Sadie Moranis*, *supra*, note 1, at para. 21.

13 As an aside, I agree with Goudge J.A.'s comment in *Sadie Moranis*, *supra*, note 1, at para. 19, that adding "earmarked for the litigation" is not "a helpful descriptor."

14 *Deol v. Morcan Financial Inc.*, [2011] O.J. No. 5371 (Ont. S.C.J. [Commercial List])

15 See, for example, *DIRECTV Inc. v. Gillott* (2007), 84 O.R. (3d) 595 (Ont. S.C.J.)

16 *Miller v. Carley*, [2006] O.J. No. 1813 (Ont. S.C.J.) and the comment at para. 19 that if the funds had not been dispersed and were still in the hands of the Ontario Lottery and Gaming Corporation (and sitting in their bank account) that they would constitute a specific fund.

17 *Conn v. Twenty Two Degree Energy Corp.*, [2010] O.J. No. 3563 (Ont. S.C.J.). And see *Retrocom Investment*, *supra*, note 6, and the cases discussed therein at para. 11.

18 *Stearns*, *supra*, note 2, at para. 17.

19 *Sadie Moranis*, *supra*, note 1, at para. 21.

20 Waddams, *Law of Damages* (Looseleaf ed.) at 5.840.

21 *Retrocom Investment*, *supra*, note 6,

22 *Ibid.*, at para. 9.

23 *Sadie Moranis*, *supra*, note 1, at para. 17.

2

2011 ONSC 7113
Ontario Superior Court of Justice [Commercial List]

Deol v. Morcan Financial Inc.

2011 CarswellOnt 13652, 2011 ONSC 7113, [2011] O.J. No. 5371, 210 A.C.W.S. (3d) 378, 38 C.P.C. (7th) 348

Harpinder Deol, Plaintiff and Morcan Financial Inc. o/a/R/E Active Mortgages, Guiseppe Taibi and Harold Kennedy, Defendants

D.M. Brown J.

Heard: October 21, November 15, 2011
Judgment: November 30, 2011
Docket: CV-11-9243-00CL

Counsel: S. Schneiderman, for Plaintiff
E. Snow, for Defendants

***D.M. Brown J.*:**

I. Motion for the interim preservation of funds

1 Ms. Harpinder Deol sues the defendants for damages for breach of an oral contract under which she provided mortgage agent services to Morcan Financial Inc. Those parts of the motion concerning discovery-related relief I dealt with by way of handwritten endorsements dated October 21 and November 15, 2011. Ms. Deol also seeks interim relief under Rule 45 of the *Rules of Civil Procedure*, specifically an order:

> Directing the Defendants to preserve, pending the outcome of this litigation, such finders' fees and volume bonuses in their possession on account of mortgage transactions for which the Plaintiff claims commissions are owing to her, where those funds have not already been used.

2 For the reasons set out below, I dismiss that part of her motion.

II. Background facts

3 In her Amended Statement of Claim Ms. Deol pleaded that she was retained by Morcan as a mortgage agent in 2004. Under the terms of her oral retainer contract she would find clients for Morcan and arrange mortgage funds for them from financial institutions. Deol and Morcan would then split the lender's finders' fees 90:10. Ms. Deol sues Morcan for her share of finders' fees which she alleges are owing to her for mortgages which she arranged during the period December, 2006 through to June, 2008.

4 As part of her pleading Ms. Deol alleges that the defendants held her share of the finders' fees in trust and that each defendant stood as a trustee of those funds towards her. Ms. Deol also invokes the oppression remedy under the *Ontario Business Corporations Act*, alleging that she is a "complainant" and that the defendants' failure to pay her a share of the finders' fees was oppressive conduct.

5 Morcan denies any liability, contending that Ms. Deol failed to submit required documentation to support her claim for a share of some finders' fees and that otherwise Morcan has paid her all commissions earned by her. The defendants deny the existence of any trust relationship and contend that Ms. Deol lacks standing to bring an oppression claim. Morcan has counterclaimed for an alleged overpayment of commissions to Ms. Deol.

6 The plaintiff commenced her action on December 29, 2008. She amended her Statement of Claim earlier this year to assert the breach of trust and oppression claims. Examinations for discovery have been held, although the defendants owe some answers to undertakings.

III. The principles governing the application of Rule 45.02

7 The plaintiff relies primarily on the "specific fund" rule, Rule 45.02, to support her request for a pre-trial preservation order. Rule 45.02 provides:

> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

8 Morden & Perell, in *The Law of Civil Procedure in Ontario*, write that "the purpose of the motion under rule 45.02 is to protect before trial a claimant who is asserting a proprietary claim to or proprietary interest in a specific asset." [1] They explain the policy underlying Rule 45.02 as follows:

> Rule 45.02 is an exception to the general rule that a plaintiff cannot obtain execution before judgment, and it is not to be used just as a means to obtain security for a debt or potential indebtedness of the defendant. While a *Mareva* injunction and an order under rule 45.02 share several policy concerns about prejudgment remedies, they are discrete or mutually exclusive interlocutory remedies, and a plaintiff does not have to satisfy the requirements for a *Mareva* injunction in order to obtain a remedy under rule 45.02. [2]

9 In *Stearns v. Scocchia* the Court emphasized the extraordinary nature of a Rule 45.02 order and the resulting need to scrutinize any request with care:

> Because of the extreme nature of a rule 45.02 order and/or a *Mareva* injunction, they are remedies that should be available only when it is necessary to balance the interests of the plaintiff and defendant. Both orders maintain the status quo until trial in a way that is fair to both the plaintiff and defendant and must not place the interests of the plaintiff before those of the defendant. Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have the potential to injure a defendant before the plaintiff has proven its case at trial. Furthermore, it can place a defendant in an unfair position because it freezes a fund that would otherwise be available to the defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a plaintiff on the basis of unproven allegations. Judicial discretion is therefore to be carefully exercised when considering a rule 45 order or the granting of a *Mareva* injunction given the severe prejudicial consequences that can result. [3]

10 The jurisprudence which has developed under Rule 45.02 indicates that in order for a moving party to obtain an order under Rule 45.02 it must meet three criteria:

> (a) the plaintiff must claim a right to a specific fund, defined as "a reasonably identifiable fund earmarked to the litigation in issue", and that claim must be proprietary in nature;
>
> (b) there must be a serious issue to be tried respecting the proprietary claim; and,
>
> (c) the balance of convenience must favour granting the relief sought. [4]

11 As to the first requirement to demonstrate the existence of a "specific" fund", Morden & Perell write:

> Funds held in trust may constitute a specific fund, but a specific fund is not limited to trust funds; rather, a specific fund refers to a reasonably identifiable fund earmarked for the pending litigation. The rule has been used when the property at issue is a claim to pension funds held for employees. The rule has been applied with respect to sale proceeds held in a trust account.

> A deposit payable in a real estate transaction has been held not to constitute a specific fund. Revenue from the operation of a parking lot does not constitute a specific fund. *A claim to funds due under a contract does not constitute a specific fund*.
>
> Although the tracing of the fund may be done in the appropriate circumstance to prevent an injustice, the right to a remedy under the rule may be lost if before the motion is brought the specific fund is intermingled with other funds.
>
> *Where the specific fund is no longer available, an order may not be made under this rule requiring the defendant to pay other monies into court.* [5]

12 On the last point MacFarland J. (as she then was) commented on the specificity requirement under Rule 45.02:

> Were I to make an order requiring this sum of money to be paid into court, the defendant against whom the order was made would have to obtain funds from other sources or his/its own resources. In my view, that is not what is contemplated by Rule 45.02. The rule provides jurisdiction, in my view, only for the "specific fund" to be paid into court and not, where that fund is no longer available, for other monies to be paid into court in lieu thereof. [6]

IV. Analysis

13 The plaintiff has not demonstrated, on the evidence before me, the existence of a specific fund to which she is asserting a proprietary claim. In her Amended Statement of Claim the plaintiff contends that Morcan owes her $666,359.09 in unpaid finders' fees and pleads that that amount "was at all material times being held in trust by the Defendants..." On his examination for discovery Mr. Taibi testified that during the relevant time period Morcan only operated one bank account and financial institutions would deposit finders' fees into that account either directly or by cheque. Having reviewed the references to other evidence contained in the parties' factums, there does not appear to be any evidence that Morcan held in trust portions of finders' fees due to Ms. Deol.

14 Nor, under the legislation in force at the relevant time, was Morcan required to hold finders' fees in trust. Section 6 of Ont. Reg 798 made under the former *Mortgage Brokers Act*, R.S.O. 1990, c. M.39 provided:

> 6. (1) All funds received by a mortgage broker in connection with a mortgage transaction other than those which are clearly made as payment for fees earned shall be deemed to be trust funds. [7]

15 Moreover, the evidence strongly suggests that finders' fees received by Morcan from financial institutions prior to the termination of Ms. Deol's retainer in June, 2008 have since been used by Morcan for operating expenses.

16 As I assess the evidence, no specific fund exists in the hands of Morcan. What the plaintiff really seeks is an order compelling the defendants to put to one side general corporate funds to stand as security for a judgment which the plaintiff hopes to secure at trial. That sort of execution before judgment is not available under Rule 45.02.

V. Conclusion

17 For these reasons I dismiss that part of the plaintiff's motion brought under Rule 45.02.

18 I would encourage the parties to try to settle the costs of all aspects of this motion. If they cannot, the plaintiff may serve and file with my office written cost submissions, together with a Bill of Costs, by Friday, December 9, 2011. The defendants may serve and file with my office responding written cost submissions by Monday, December 19, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Motion partly dismissed.

Footnotes

1 John Morden and Paul Perell, *The Law of Civil Procedure in Ontario, First Edition* (Toronto: LexisNexis, 2010), p. 186.

2 *Ibid*.

3 *Stearns v. Scocchia* (2002), 27 C.P.C. (5th) 339 (Ont. S.C.J.), para. 22.

4 *Ibid.*, para. 9. As to the "proprietary nature" of the claim, see *Sadie Moranis Realty Corp. v. 1667038 Ontario Inc.*, 2011 ONSC 671 (Ont. Div. Ct.), para. 7.

5 *Morden & Perell*, *supra*., pp. 186-7 (emphasis added).

6 *Rosen v. Homelife/St. Andrew's Realty Inc.*, [1994] O.J. No. 2887 (Ont. Gen. Div.), para. 11.

7 Emphasis added.

3

2004 CarswellOnt 1366
Ontario Superior Court of Justice [Estates List]

Leung Estate v. Leung

2004 CarswellOnt 1366, [2004] O.J. No. 1417, 130 A.C.W.S. (3d) 218, 7 E.T.R. (3d) 290

In the Estate of Leung Wai Kit Roger, deceased, late of Hong Kong

Sammy Lee and Kin Bun Ng, estate trustees without a Will of the estate of Roger Wai Kit Leung, May Ling Leung, Jacqueline Seen Man Leung, Rebecca Seen Wei Leung and Alfred Sai Kit Leung, Plaintiffs and Robert Leung, Dennis Sai-Tat Leung, Leung Wait Kit Enterprises Inc., Maria Leung and Leung Management Inc., Defendants

Greer J.

Heard: December 5, 15, 2003
Judgment: April 5, 2004
Docket: 01-2778/00

Counsel: Brian A. Schnurr for plaintiffs Sammy Lee and Kin Bun Ng, estate trustees without a will of the estate of Roger Wai Kit Leung
Jeanie Demarco for plaintiffs May Ling Leung, Jacqueline Seen Man Leung, Rebecca Seen Wei Leung and Alfred Sai Kit Leung
Howard J. Feldman for defendants Robert Leung, Dennis Leung and Leung Wai Kit Enterprises
James Chow for defendants Maria Leung and Leung Management Inc.

***Greer J.*:**

1 Roger Wai Kit Leung ("the deceased") died on March 21, 1996, intestate, leaving an estate of approximately $55,000,000 in Ontario and Hong Kong. He was a resident of Hong Kong at his death. The deceased was survived by his widow, May Ling Leung, and children from two marriages, all of whom are involved in the litigation affecting the estate in both jurisdictions. The children involved in the proceedings are named, as is Maria Leung, spouse of Robert Leung. Two of the children of the first marriage, Eric and Lina, are not named parties. Where necessary, in these Reasons, I shall refer to each child by his or her first name. Two corporations, resident in Ontario, are also Defendants in the proceedings. In the Estate, the assets situate in Ontario and Hong Kong are being administered separately by different administrators appointed in each jurisdiction to deal with such assets

2 There is a Motion before me, brought on by the Estate Trustees, which is supported by the second family members. There is also a Cross-Motion before me brought on by the first family members. There is also a Motion and Cross-Motion brought on by Maria and Leung Management Inc. that essentially was not dealt with during the two days of hearing and I make no findings with respect to that Motion and Cross-Motion.

1. The Motion

3 The Estate Trustees without a Will, Sammy Lee ("Lee") and Kin Bun Ng ("Ng"), move for the following relief:

> 1. For an Order directing the Registrar to issue a Certificate of Pending Litigation with respect to each of 4 properties in Ontario as described in the Schedules to the Notice of Motion.
>
> 2. For an interim, interlocutory and permanent injunction preventing Robert and Leung Wai Kit Enterprises Inc. or any other defendant from disposing, depleting, transferring or encumbering any assets that Robert or Enterprises Inc. or

any other defendant obtained directly or indirectly from the deceased during the time period of Robert's appointment as attorney for the deceased, pursuant to a power of attorney dated December 30, 1981, to the present time;

3. For an Order that, pending the trial of this action, Robert or Enterprises Inc. pay into Court the following amounts:

(a) $2,079,000 plus interest at 6% from March 6, 1996, or if such Order is not granted, an Order requiring Robert to pay the balance remaining in Nesbitt Burns Account No. 415-12681-9;

(b) $154,979 plus interest;

(c) $150,000 plus interest; and

(d) $50,000 plus interest.

4 The Plaintiffs move in this regard since Robert is said to have managed the deceased's assets in Ontario from December 30, 1981, to the date of his death under power of attorney and continued to manage things after his father's death. They allege that Robert appropriated to himself and his wife Maria and to Enterprises Inc. assets by using the power of attorney and thereby breached his fiduciary duty and duty of care to the deceased and hence to the beneficiaries of his estate, of which they are some of the next of kin. The Plaintiffs further say that they will suffer irreparable harm if the injunction is not granted to them.

5 It is the Plaintiffs' position that the sums in paras. 3(a) and (b) above were transferred by Robert from the deceased's brokerage account to Hong Kong about 15 days before the deceased's death and were then transferred back to Ontario 6 days after the death, where the monies went into Enterprises Inc., a company controlled by Robert, Dennis and Eric (the brother of Robert and Dennis.

6 The Estate Trustees without a Will, Lee and Ng, were not appointed to act in Ontario until July 2000, 4 years after the deceased's death. Attempts were made by them to realize the undisputed assets in Ontario but they were not successful in doing so. By Order of Madam Justice Haley made May 25, 2001, Robert was ordered to account for his dealings with the assets from December 30, 1981, to March 21, 1996. Madam Justice Haley made a further Order for Directions on December 6, 2001, directing Robert to produce Accounts for that period during which he exercised his father's power of attorney, and allowing cross-examination on the entries in the Accounts. These cross-examinations were lengthy and it was not until March 2003 that a Statement of Claim was issued by the Plaintiffs.

7 There is concurrent litigation taking place in Hong Kong in this Estate over the effect of the deceased's second marriage on an earlier Will of the deceased. I am told that the Court in Hong Kong ruled that the marriage revoked the Will and found that the deceased had died intestate. I am further told that, on an intestacy in Hong Kong, the widow is entitled to 50% of those assets and that each of the 7 children will receive approximately 7% each. The Plaintiffs allege that Robert took $1,200,000 of the funds he had transferred before his father's death and later transferred to Enterprises Inc. after death to pay for legal fees incurred by the first family in Hong Kong.

8 Robert alleges that the deceased made gifts of $50,000 in 1991 and $450,000 in 1995 to him while the deceased was in the hospital, which Robert effected by use of the Power of Attorney. Robert says this was done to protect the first family, of which Robert and his two brothers are the children. These two sums were transferred to Robert's personal account, and if the monies were owing to the deceased, Robert says that his late father forgave those amounts. Robert also transferred in 1996 the sum of $150,000 from his father's Nesbitt Burns Account and takes the position that it was also a gift.

9 The Plaintiffs, in their Facta, set out what transpired in connection with the 4 properties they are asking that the Court issue Certificates of Pending Litigation for. Forty per cent of one was transferred to Leung Management Inc., a company solely owned by Maria, with 60% of it transferred to Enterprises Inc. Another is owned as tenants in common by Robert and the deceased. A third is the matrimonial home of Robert and Maria, where monies were transferred as "loans" and then forgiven, says Robert. The fourth property was paid for by the deceased and then transferred into Robert's and Dennis' names as trustees to uses.

2. The Cross-motion by the Defendants

10 The Defendants move by Cross-Motion to stay the proceedings and relief asked for by the Plaintiffs in their Motion in Ontario until the Hong Kong proceedings have been completed. This would mean that any distributions made by the Hong Kong Trustees to the children would come into their hands while the Ontario proceedings are stayed. They take this position saying that there is a common evidentiary identity in both actions involving the two families of the deceased and the issue of whether gifts were made. Robert believes that the Estate Trustees in Ontario have a conflict of interest in being plaintiffs, together with the widow and the son Alfred, since the latter two are being sued by the Hong Kong administrators for approximately $15,750,000. They see the Estate Trustees in Ontario as having some advantage over the legal proceedings in Hong Kong where there is no real discovery given to litigants.

11 Robert also says that the proceedings in Ontario should be stayed for harassment and abuse of process by Ng and counsel for the second family having breached the implied undertaking rule by reason of them having moved for security in two jurisdictions against Robert and providing some financial figures to the Hong Kong Administrators. He also says that the evidence in the Hong Kong action will be relevant to the trial in Ontario. He further points out that he is being sued long after his father's death and that, in essence, the Plaintiffs are seeking prejudgment execution on assets in Ontario. He therefore asks that the Plaintiffs post security in Ontario for $1,000,000.

12 Robert says that it is an abuse of process for the Ontario litigants to try to obtain a freeze in Ontario of his undisputed Hong Kong inheritance.

3. Certificates of Pending Litigation

13 Robert has now consented to allow the Estate Trustees in Ontario to register Certificates of Pending Litigation against three of the four properties in question, namely, the Hurontario property in Mississauga, the Spadina property and the Dundas Street West property in Toronto. He asks that no Certificate be registered against the 2338 Doulton Drive property, which is his matrimonial home with Maria. He does undertake, however, not register any further mortgages against the property if no such Certificate is issued. Robert's concern is that this property, which is said to have a value of approximately $2,000,000, has a first mortgage registered against it for $193,000, has a collateral mortgage for $725,000 registered against it as collateral securing 4 lines of credit, presumably of Robert and/or Maria and/or Enterprises Inc. or Management Inc.

14 Given Robert's consent respecting the three Ontario properties, Order to go that Certificates of Pending Litigation issue with respect to these three properties in accordance with each such property's legal description.

15 With respect to the Doulton Drive property, I am not prepared to grant a Certificate of Pending Litigation over it. It was purchased by Robert and Maria in 1988 and it was not until 1994 that it is alleged that the deceased lent Robert the sum of $450,000 with respect to the building of the home on the property. A further $150,000 was transferred from the deceased's account at Nesbitt Burns to go into the home, both sums being said by Robert to have been gifts to him from his father. While the veracity of this has yet to be tested, I am satisfied if Robert and Maria provide written Undertakings to the Court that neither of them will further encumber this property until this litigation is determined finally by the Court or by Settlement in writing among the parties, this will protect the property. They shall, in addition, undertake not to increase the lines of credit from what is said to be about $386,037 (for purposes of this Order fixed at $390,000) during the litigation, on the same terms as their other Undertakings. In the event that Robert and Maria decide to sell the property, they shall inform the Plaintiffs immediately, in writing, of such intention and shall provide a copy of the listing agreement to them. Counsel may then move before me as to whether $600,000 from any sale of such property shall be paid into Court to be held there until the final determination of the litigation.

4. Payment into Court by Robert

16 The Plaintiffs are asking that Robert or Enterprises Inc. pay into Court the amounts of $2,079,000 and $154,979, being the two amounts removed by Robert from his late father's brokerage account under Power of Attorney, which amounts were transferred to Hong Kong and then after his father's death, transferred to Enterprises Inc.

17 Robert has filed a Declaration dated 1998 that the value of his undisputed assets is $2,170,000. On the second day of the Motion and Cross-Motion, Robert filed an updated list of assets and liabilities as of December 4, 2003, said to be "estimated amounts." The outline does not provide a net total but it appears to be in the low range of $5,000,000 and the high range of $8,200,000, depending on what the inheritance from Hong Kong is valued at after the litigation is Hong Kong is completed.

18 Enterprises Inc., the company into which the money in question was funnelled, has mutual funds and a GIC valued at about $757,000. The company also owns an interest in the Dundas property but this is not a liquid asset. The mutual funds and GIC could be liquidated and the cash paid into Court, pending the outcome of the Ontario proceedings.

19 The siblings have offered to sign a direction to the Hong Kong administrators directing that their $500,000 estimated distribution be paid into Court in Ontario, to be held there until the outcome of the Ontario litigation has been determined by the Ontario Court. This would mean that funds would be available to protect the interests of the second family in any Ontario assets found by the Court to be owned by the deceased at his death. If each of Robert, Dennis, Eric and Lina signs such directions, the sum of $2,000,000 would be held by the Court, pending the outcome of the Ontario proceedings.

20 The Plaintiffs say that these sums should be paid into Court, as they meet the appropriate test for relief under R. 45.02 of the *Rules of Civil Procedure*. It reads as follows:

> 45.02 Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

21 It is clear on the facts that the sums removed by Robert from his late father's Nesbitt Burns Account 15 days prior to his death and sent to Hong Kong, came back to Ontario after the death and were deposited in the account of Enterprises Inc. I find it to be a "specific fund" as noted in R. 45.02. There is a serious issue to be tried in connection with its movement under Power of Attorney and its subsequent deposit in a company in which the deceased had no interest in his lifetime. In my view, the balance of convenience favours the position of the Plaintiffs that these monies should be paid into Court, pending the outcome of the litigation.

22 The test with respect to such a Motion under R. 45.02 is set out in *Sun v. Ho*, [1998] O.J. No. 1025 (Ont. Gen. Div.), Court File No. 97-CV-127825CM, by Mr. Justice Rivard in para. 3 thereof. The third part of the test was expanded upon by Mr. Justice Nordheimer in *News Canada Marketing Inc. v. TD Evergreen*, [2000] O.J. No. 3705 (Ont. S.C.J.), Court File No. 00-CV-188234CM, where he added the words, " . . . potential harm that would be incurred by the moving party if relief is not granted" and said it must be looked at by the Court in determining if the balance of convenience favours granting the relief the moving party is requesting. In para. 20 thereof, Mr. Justice Nordheimer notes that the situation under this Rule is different than relief being sought in a Mareva injunction Motion, where a defendant is prevented from dealing with his own assets. I adopt and apply the reasoning of Mr. Justice Nordheimer in the case before me.

23 The fund in question has been traced from the deceased's account and was deposited in the account of Enterprise Inc. Unfortunately, that money does not now remain intact in that company's account. Approximately $1,200,000 has been used up, allegedly by Robert to conduct the first family's case in Hong Kong. I order the liquid assets in the company, namely, the mutual funds and the GIC, to be cashed in and the gross sum be paid into Court to the credit of this action. It will amount to approximately $747,000 of the total.

24 In addition, Robert, Dennis, Eric and Lina (on consent of Eric and Lina who are not parties in the Ontario proceedings) shall each direct the Hong Kong administrators, in writing, to pay to the Accountant of the Superior Court of Justice, to the credit of this action, the sum of $500,000 each for the net proceeds he is entitled to receive from the Hong Kong estate. The total fund shall be held by the Accountant of the Superior Court of Justice to the credit of the action, pending its final determination. Orders to go accordingly

5. The Injunction

25 Under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Court may grant an interlocutory injunction or a mandatory order where it appears to be just or convenient for the Court to do so. The Plaintiffs say that they have met the three-part test for the granting of such an interlocutory injunction, in that there is a serious question to be tried, the Plaintiffs will suffer irreparable harm if the injunction is not granted, and they will suffer greater harm than the Defendants if this is not done, pending a decision by the Court on the merits of the case.

26 In the case before me, the factual record is largely settled in that the monies that left the deceased's account under the Power of Attorney have been traced. The three real properties, for which I have ordered Certificates of Pending Litigation to issue, are the properties in which either Robert or Dennis or Enterprises Ltd. has an interest. They cannot be sold or in any manner dealt with while the litigation remains outstanding. In my view, this secures the balance of any monies in question until the litigation is determined. Whichever way one looks at it, Robert, Dennis, Eric and Lina among themselves, are entitled on an intestacy in Ontario to $^{4}/_{7}$ of the remainder of the estate, after the widow's entitlement is determined. They, therefore, have a vested interest in some of the monies in question. I am therefore not prepared to grant a broad, sweeping injunction preventing dealings with all aspects that the Plaintiffs are asking for. The payment into Court that I have ordered and the Certificates of Pending Litigation and the Undertakings of Robert and Maria respecting their matrimonial home give protection enough. Had I not so ordered that payment under R. 45.02, I would have ordered some injunctive relief to protect assets into which the deceased's money could be traced until Robert passed his Accounts and a determination on the issues surrounding those assets was determined.

6. The Request by the Defendants of a Stay of Proceedings in Ontario

27 The exercise by the Court of its power to stay proceedings before it should be exercised sparingly. In the case before me I do not see the proceedings as harassment of the Defendants, nor do I see it as an abuse of power for the Plaintiffs to carry on the litigation they have set down in Ontario. In my view, the Hong Kong proceedings are a completely separate process exercised under the jurisdiction where the deceased had most of his assets and where he was resident. The administrators in each jurisdiction are separately appointed by the Courts in each jurisdiction and they are obviously not the same persons. The law with respect to an intestacy in the two jurisdictions is not the same. The fact that there is a similar question of what gifts the deceased made in his lifetime to the two families, in each jurisdiction, does not affect the separate administrations. Nor can I see that there has been any breach of the implied undertaking rule in Ontario, when Ng and the second family's counsel, provided certain figures to the administrators of the Hong Kong estate. It is the position of counsel in Ontario for the Ontario Estate Trustees and for the second family that the estate is domiciled in Hong Kong and that the "chart" sent to the Hong Kong administrators does not breach the implied undertaking rule. I agree with them in that regard.

28 In *Canadian Express Ltd. v. Blair* (1992), 11 O.R. (3d) 221 (Ont. Gen. Div.), Mr. Justice Blair set out the general principles that have been followed by the Court in this regard. Firstly, a stay should only be ordered when special circumstances are shown to exist. It will only be ordered in the clearest of cases. In quoting from McNair J. in *Varnam v. Canada (Minister of National Health & Welfare)* (1987), 12 F.T.R. 34 (Fed. T.D.), at p. 36 of that decision, Mr. Justice Blair quotes the following:

> In order to justify a stay of proceedings two conditions must be met, one positive and the other negative: (1) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant. Expense and inconvenience to a party or the prospect of the proceedings being abortive in the event of a successful appeal are not sufficient special circumstances in themselves for the granting of a stay.

29 I cannot see that this is the case before me. The continuance of the action is neither oppressive nor vexatious to the Defendants, nor is it an abuse of the process. The granting of a Power of Attorney by a father to a son, where there are 6 other children in the family to consider, must be looked at very carefully, since it can be open to abuse by that child, given that no other person is acting in conjunction with that attorney. Further, there was no voluntary move by the attorney to pass his accounts after his father's death, even though he must have been aware that his father died intestate in both Ontario and

Hong Kong. This cannot help but raise the suspicions of the other children and widow of the second family. Thus, the litigation was commenced in Ontario.

30 As was pointed out by Mr. Justice Somers in *Geac Computer Corp. v. Park* (1996), 45 C.P.C. (3d) 99 (Ont. Gen. Div.), at p. 103, the action in the other jurisdiction is going to go ahead, in any event. This is the case before me. Only Hong Kong residents can be administrators of the Hong Kong estate. The two estates cannot be administered conjunctively. There must therefore be two separate actions in any event. See also *General Dynamics Corp. v. Veliotis* (1985), 53 O.R. (2d) 371 (Ont. H.C.).

31 The Defendants' Cross-Motion is therefore dismissed. Order to go accordingly.

7. Costs

32 In my view each party must bear his or her or its own Costs on this Motion and Cross-Motion. There has been divided success. Order to go accordingly.

33 I told counsel at the end of the Motion and Cross-Motion that I was of the view that the parties should quickly enter into the mediation process, given the length of time that has elapsed since the deceased died. I again urge them to use this process to help settle their differences respecting the Ontario Estate.

Order accordingly; cross-motion dismissed.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DEL EQUIPMENT INC.

Applicant

Court File No: CV-19-629552-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE APPLICANT (Second Preservation Order)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Jason Wadden LSO# 46757M
jwadden@goodmans.ca

Christopher G. Armstrong LSO#: 55148B
carmstrong@goodmans.ca

Andrew Harmes LSO#: 73221A
aharmes@goodmans.ca

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Del Equipment Inc.