IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Daum v. Gorrell,
2018 BCSC 225

Date: 20180219
Docket: S179209
Registry: Vancouver

Between:

Tyrone Daum

Petitioner

And

Dr. Arthur Ross Gorrell and Petromin Resources Ltd.

Respondents

Before: The Honourable Madam Justice Iyer

Reserved Reasons for Judgment

The Petitioner, appearing on his own behalf:	T. Daum
Counsel for the Respondents, Dr. Gorrell and Petromin Resources Ltd.:	E. Bojm
Place and Date of Hearing:	Vancouver, B.C. January 8, 2018
Place and Date of Judgment:	Vancouver, B.C. February 19, 2018

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INTRODUCTION

[1] This proceeding arises out of a much-litigated dispute between the Petitioner, Mr. Daum and the Respondents, Petromin Resources Ltd. ("Petromin"), a company in which Mr. Daum invested, and Dr. Gorrell, director of Petromin's Board. In his capacity as a shareholder, Mr. Daum applies for relief from oppression and unfair prejudice under s. 227(2) of the *Business Corporations Act,* S.B.C. 2002, c. 57 (the "Act"). Mr. Daum also seeks to have this Court remove Dr. Gorrell from the board of Petromin and appoint Mr. Daum in his stead, and orders requiring specific amendments to Petromin's audited financial statements.

[2] As Mr. Daum himself described it in his opening statement, this petition is related to two prior proceedings that he commenced with Ivano De Cotiis, another minority shareholder of Petromin, in early 2016. One of those proceedings was for leave to commence a derivative action and the other was for an oppression remedy under s. 227 of the Act. Various applications in those proceedings were heard by Justices Ehrke, G.C. Weatherill and Grauer of this Court over the last two years, see: 2016 BCSC 364, 2016 BCSC 1408 and 2017 BCSC 514. Mr. Daum was unsuccessful in all of these proceedings and has not appealed any of them.

[3] The Respondents argue that these decisions, in particular those of Justices Weatherill and Grauer have conclusively determined the matters Mr. Daum has raised in the petition before me and that he should not be permitted to re-litigate them. They rely on the principles of *res judicata*, issue estoppel and abuse of process. They also argue that Mr. Daum is not entitled to the relief he seeks because his petition does not plead the facts necessary to support those remedies, and the evidence does not support his claims. They ask that the petition be struck under Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. In the further alternative, they say that the claims in this petition should be heard together with the existing oppression petition, as it is still outstanding.

BACKGROUND

[4] The history of the relationship between Mr. Daum and the Respondents, including the prior legal proceedings, is set out in detail at paras. 1 to 42 in Justice Grauer's decision, which was issued on March 30, 2017, and I will not reiterate it. The following facts are salient to the proceeding before me.

[5] In 2007, Petromin purchased shares in a company named Terrawest, which was investing in an exploration project in China. Petromin purchased 40% of Terrawest's share capital and another company, Mega Investment Development Corp. ("Mega"), described by Petromin as its "nominee" also purchased another 40%.

[6] In 2013, the Chinese government expropriated some of the lands in the Terrawest project and the resulting dispute went to an international arbitration tribunal. That proceeding is ongoing. If successful, Terrawest may be awarded a very substantial sum of money, which Mr. Daum says could be $1.8 billion.

[7] Mr. Daum and Mr. De Cotiis purchased shares of Petromin in 2015. Some months afterwards, they sought to gain control of Petromin's board through a proxy drive. This was completely unsuccessful.

[8] Shortly before the 2015 Annual General Meeting in December 2015 ("2015 AGM"), Mr. De Cotiis (later joined by Mr. Daum), filed a petition for leave to commence a derivative action. The petition alleged that, through a series of sham transactions, Petromin had transferred some of its shares to other companies controlled by Petromin or its directors as part of a scheme to dissipate the 80% shareholding in Terrawest (the "Derivative Action Petition").

[9] At the 2015 AGM, Mr. Daum sought election to the board, but was unsuccessful.

[10] Shortly after the 2015 AGM, Mr. Daum and Mr. De Cotiis commenced a proceeding alleging oppression and unfair prejudice in relation to the 2015 AGM.

They named Petromin, Dr. Gorrell and another Petromin director as defendants/respondents (the "First Oppression Proceeding"). Although the petition in the First Oppression Proceeding was not put before me, it is evident from the response to the petition (which was in evidence) that the primary basis of this petition was the same as in the Derivative Action Petition. Mr. Daum and Mr. De Cotiis also raised some additional alleged deficiencies relating to conduct of and disclosure made in the 2015 AGM.

[11] In February 2016, Mr. Daum and Mr. De Cotiis applied for interlocutory relief in the two proceedings, essentially seeking a *Mareva* injunction against Terrawest. Those allegations included Mr. Daum's assertion that a statement made by Dr. Gorrell in para. 28 of his affidavit in the proceeding was false. The statement in issue is Dr. Gorrell's assertion that Mega was not related or affiliated, directly or indirectly, with Petromin or Terrawest (the "Gorrell Statement"). Mr. Daum and Mr. De Cotiis claimed that the Gorrell Statement is false because Mr. Jimmy K.K. Lau, who was a director of Petromin, was also a director of Mega. However, they did not have any evidence to support this assertion. Justice Ehrcke dismissed the application and cautioned Mr. Daum and Mr. De Cotiis against making unsubstantiated allegations of fraud.

[12] In July 2016, Justice G.C. Weatherill heard further interlocutory applications in the Derivative Action Petition. One of the issues raised before him as a basis for the relief being sought was the Gorrell Statement. Mr. Daum and Mr. De Cotiis put some evidence before the court in support of their claim. After considering all of the evidence, Justice Weatherill dismissed all of the applications and awarded lump sum special costs against Mr. Daum and Mr. De Cotiis. He stated,

> [73] It is plain in my view that the petitioners are attempting through their tactics to delay the hearing of the [Derivative Action Petition] as long as possible to cause havoc to the management of Petromin and its ability to focus on Petromin's business. . .

[13] At Petromin's AGM in December 2016, Mr. Daum again sought election to the board and was defeated.

[14] The relationship between Mr. Daum and Mr. De Cotiis soured. On February 9, 2017, Mr. Daum filed a notice of civil claim against Mr. De Cotiis relating to Mr. Daum's shares in Petromin that he says he transferred to Mr. De Cotiis (the "Daum Action"). Mr. Daum seeks a declaration that Mr. De Cotiis holds the shares in trust for Mr. Daum, and an order compelling Mr. De Cotiis to transfer title to the shares to Mr. Daum. Mr. Daum claims that the transfer of the shares was pursuant to a trust agreement, which Mr. De Cotiis allegedly breached. The Daum action is ongoing and there has been no determination of whether Mr. Daum has any ownership interest in the Petromin shares.

[15] In March 2017, the Derivative Action Petition was heard by Justice Grauer. Two conditions must be met before leave to file a derivative action is granted: the plaintiffs to the proposed action must show that they are acting in good faith, and that the proposed action is in the best interests of the company. Justice Grauer found against Mr. Daum and Mr. De Cotiis on both conditions.

[16] With respect to the requirement of good faith, Justice Grauer characterized Mr. Daum's and Mr. De Cotiis's actions since investing in Petromin as "predatory" and referred to their "long-held goal of taking over the company." With respect to the best interests of the company, Justice Grauer stated:

> [59] . . . the claim of wrongful appropriation rests on the allegation that Mega, which acquired half of the opportunity to purchase an 80% interest in the share capital of Terrawest, was substantially and beneficially owned and controlled by Petromin's directors. . .
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> [60] Turning to the evidence, there is nothing that ties three of the four Petromin directors to Mega. There is, however, evidence that one Kwok Kwong Lau was a director of Mega as of September 11, 2007, although we know nothing about the extent, if any, of his control of that company. Mr. Shewfelt [counsel for the petitioners] asks me to infer that Kwok Kwong Lau is the same person as Petromin director Jimmy K.K. Lau, and for the purposes of this application, I conclude that it is reasonable to do so though I make no finding in that regard.

[17] Justice Grauer held that there was a possibility that this aspect of the proposed action might succeed, but said that it hangs "by the slenderest of threads."

Based on all of the evidence, he held that the proposed action was not in the best interests of the company.

[18] Mr. Daum commenced the present proceeding on October 3, 2017. The primary focus on his petition is relief from oppression and unfair prejudice arising from the Gorrell Statement. Under the Heading "Orders Sought," the first two orders listed are:

> An Order pursuant to s. 227(2)(a) and 142 of the . . . [Act], that the affairs of the company have been conducted (the authorization of Petromin to Gorrell to swear paragraph 28 of the Gorrell Affidavit #1 on January 26, 2016 in Supreme Court of British Columbia No. S-160090, Vancouver Registry and subsequently used and referred to in Supreme Court of British Columbia No. S1510524, Vancouver Registry), and or the powers of the directors have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant.
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> An Order pursuant to s. 227(2)(b) and 142 of the . . . [Act], that the affairs of the company have been conducted (the authorization of Petromin to Gorrell to swear paragraph 28 of the Gorrell Affidavit #1 on January 26, 2016 in Supreme Court of British Columbia No. S-160090, Vancouver Registry and subsequently used and referred to in Supreme Court of British Columbia No. S1510524, Vancouver Registry) has been done, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[19] Mr. Daum also seeks relief for what he says are irregularities in Petromin's audited financial statements and related documents, orders removing Dr. Gorrell from the board of Petromin and appointing Mr. Daum to it. He seeks damages, punitive and aggravated damages.

[20] At the hearing before me, Mr. Daum eventually conceded that the evidence before me is precisely the same as the evidence that was before Justice Grauer.

ISSUES

[21] The issues are as follows:

a) Is the present proceeding an abuse of process because Mr. Daum's position in this proceeding is inconsistent with his claim in the Daum Action?

b) In light of Justice Grauer's decision in the Derivative Action, is the present proceeding barred as *res judicata*, issue estoppel or abuse of process?

c) Should the petition be struck under Rule 9-5(1)?

DISCUSSION

Abuse of Process Arising from Inconsistent Rights

[22] Taking inconsistent positions in different proceedings or pursuing inconsistent claims can constitute an abuse of process: *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5; *Peppers Produce Ltd. v. Medallion Realty Ltd*., 2012 BCCA 247.

[23] In *Vanmills Establishment v. Coles,* [1992] B.C.J. No. 881 (S.C.), referred to in the above Court of Appeal cases, the plaintiff's claim was found to be an abuse of process because he was advancing inconsistent rights. In another action the plaintiff had sued a former trustee in bankruptcy alleging that as a result of negligence and breach fiduciary duty he had suffered damage and loss arising from the sale of particular shares, including his legal and beneficial interest. In the instant action commenced against the owner of the shares, the plaintiff alleged he retained a beneficial interest. The court granted the defendant's application to strike the claim, describing the plaintiff's allegations in the actions as diametrically opposed.

[24] In his affidavit dated November 20, 2017, in this proceeding, Mr. Daum deposes simply: "I became and am currently still a shareholder of Petromin since March 2015." However, in the Daum Action, filed in February 2017, he seeks return of the Petromin shares that he acknowledges he transferred to Mr. De Cotiis.

[25] As noted, the Daum action is ongoing. It is certainly possible that Mr. Daum is not a shareholder of Petromin. His bald statement of ownership in his affidavit is at odds with the claim he is advancing elsewhere. However, his positions are not "diametrically opposed" in the sense required to establish an abuse of process. In the Daum Action, Mr. Daum is asserting that he has a beneficial interest in the

shares that he has deposed he owns in this proceeding. Although he has been less than forthright in his affidavit, Mr. Daum's claim is not an abuse of process on the basis that he is advancing inconsistent rights.

Res Judicata, Issue Estoppel or Abuse of Process Arising from Derivative Action Petition

[26] The concepts of *res judicata* (or cause of action estoppel), issue estoppel, and abuse of process are succinctly summarized by the Court of Appeal in *Erschbamer v. Wallster*, 2013 BCCA 76, at para. 12:

> 12 . . . In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[27] There are four requirements for cause of action estoppel (*Erschbamer*, at para. 15):

(1) There must be a final decision of a court of competent jurisdiction in the prior action;

(2) The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;

(3) The cause of action in the prior action must not be separate and distinct; and

(4) The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[28] Although Justice Grauer's decision was final and no appeal was taken from it, the decision he made was to deny leave to bring the proposed derivative action. That is not the same as deciding the merits of the underlying action. As Justice Ross stated in *Creative Realty Corp. v. Scholz*, 2013 BCSC 2355 at para. 17:

> 17 . . . While an assessment of the merits of the proposed claim is a relevant factor in such an inquiry, there is no final determination of the merits of the proposed claim in the context of an application for leave to commence a derivative action.

[29] Had the merits of the underlying derivative action been decided, cause of action estoppel might well have applied. However, it does not apply in these circumstances.

[30] Issue estoppel requires that the issue before the court be the same as one previously decided, that the prior decision was final, and that the parties are the same: *Erschbamer*, at para. 13. For the same reasons that cause of action estoppel does not apply here, the test for issue estoppel is not met in this case.

[31] As the Court of Appeal stated in *Erschbamer*, the doctrine of abuse of process may be available where the technical aspects of issue estoppel or cause of action estoppel do not apply.

[32] Judges have residual discretion to prevent an abuse of the court's process through relitigation: *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, at para. 35. In *Lamb v. Canada (Attorney General)*, 2017 BCSC 1802 at para. 81, Chief Justice Hinkson stated the discretionary doctrine of abuse of process is "intended to preserve the integrity of the court's process and is concerned with fairness and the proper administration of justice": para. 79. He also stated,

> [81] This doctrine is flexible. It precludes re-litigation where one or more of the requirements of issue estoppel typically, privity, are not met, but where allowing the litigation would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice: *Henry v. H.M.T.Q.,* 2015 BCSC 1798 (CanLII) at para. 18, and *Toronto,* at paras. 139-42.

[33] In *Skender v Farley*, 2007 BCCA 629, Justice Smith in concurring reasons set out the four pre-conditions to be met for this kind of abuse of process (para. 41):

1. The parties are not the same in both actions;

2. The prior judicial decision is final;

3. The second action seeks to relitigate an issue decided in the prior action; and

4. To relitigate the issue would have the effect of impugning the authority and finality of the judgment in the prior action and concerns would arise in the minds of reasonable observers

> about the integrity of the justice system if the judgments should be inconsistent.

[34] Abuse of process is not available for the same reasons that the estoppels do not apply: the issue sought to be decided in this proceedings is the merits of the derivative action, which was not what Grauer J. decided.

[35] Petromin argues that Weatherill J. "made a judicial finding of fact" respecting Mr. Lau and ownership of Terrawest that Mr. Daum cannot now relitigate based on principles of estoppel and abuse of process. However, neither Justice Weatherill nor Justice Grauer made such findings of fact in their decisions. Petromin cannot succeed on this basis.

Application of Rule 9-5(1)

[36] Rule 9-5(1) provides as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
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> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[37] Rule 9-5(1)(d) of the *Supreme Court Civil Rules* permits a court to strike out a petition if it is "plain and obvious" that it is abuse of the court's process: *Concord Kingsway Project Limited Partnership v. Ivanhoe Cambridge II Inc.,* 2017 BCSC 282 at paras. 42-43. As this court stated at paras. 30 and 33 of *Acumar Consulting Engineers Ltd. v. Assn. of Professional Engineers and Geoscientists of British Columbia*, 2014 BCSC 814:

> [30] The categories of abuse of process are open. Abuse of process may be found where "the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression" *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.).
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> . . .
>
> [33] Moreover, subsequent actions by the same person against the same defendants or respondents based upon the same factual matrix are an abuse of process: *Lacharity v. University of Victoria Students' Society*, 2012 BCSC 1819 (CanLII) at para. 24. The usual remedy for such an abuse is to stay one of the actions. This is the fourth proceeding initiated by the petitioners against the Association, all of which centre on the 2005 disciplinary proceedings against Mr. Randhawa.

[38] Multiple or successive proceedings causing vexation or oppression are also a basis for striking a pleading. In *Concord Kingsway Project Limited Partnership*, Madam Justice Fitzpatrick held:

> [95] In my view, looking at the substance of the dispute between the parties (per *Freshway Specialty Foods*) there is little doubt that the Action and the Petition can be described, perhaps not as "parallel" proceedings, but as mirror images of each other. The parties are essentially the same. The factual basis for both the Action and the Petition are identical. The same questions, issues and remedies are raised in both the Action and Petition, with the dispute raised in the Petition essentially being subsumed with that raised in the Action. Any distinctions as between the Petition and the Action are minor or "cosmetic": *Lacharity* at para. 26.

[39] Mr. Daum's petition is fundamentally defective. It does not plead the material facts necessary to support a claim of oppression or prejudicial treatment under s. 227 of the Act. In particular, it does not plead that Mr. Daum was affected in any way different from the other shareholders of Petromin in their capacities as shareholders. In fact, the conduct pleaded is a harm to the company itself. Such harm is properly addressed by way of a derivative action, and Justice Grauer has already determined that a derivative action brought by Mr. Daum and Mr. De Cotiis, based on precisely the same facts and evidence, was not in the interests of the company and was not brought in good faith. Leaving aside the many other defects in the petition, it is clear that Mr. Daum is attempting to use this proceeding as a way of

doing an end run around Justice Grauer's decision. That is the kind of abuse of process prohibited by Rule 9-5(1).

CONCLUSION

[40] Mr. Daum's petition is dismissed.

[41] Petromin seeks an award of special costs. Special costs are punitive in nature and are a consequence of reprehensible conduct or conduct deserving of rebuke. Determining whether they should be ordered is a case-specific and fact-driven inquiry. In my view, an award of special costs is warranted here. Despite previous decisions of this Court, including cautions and an award of lump sum special costs, Mr. Daum proceeded with this petition to advance the fundamentally the same claim against Petromin that he has previously litigated. I award special costs against Mr. Daum in the amount of $6,000.

[42] Petromin also requested that I make an order requiring Mr. Daum to obtain leave of the court before commencing any further proceedings against these respondents. As other judges of this court have noted, Mr. Daum appears determined to use the courts and every other means available to interfere with Petromin. I order Mr. Daum not to commence any further proceedings against Petromin or Dr. Gorrell without first obtaining leave of this court.

"IYER J."