

CANADA / JUDGMENT

Landmark Solutions Ltd. v. 1082532 B.C. Ltd.

2020 BCCA 74

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 74 Landmark Solutions Ltd. v. 1082532 B.C. Ltd. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Landmark Solutions Ltd. v. 1082532 B.C. Ltd., 2020 BCCA 74 Date: 20200218 Docket: CA46543 Between: Landmark Solutions Ltd. and Woodland Spirit Contracting Ltd. Respondents (Plaintiffs) And 1082532 B.C. Ltd. and Edward John Raspberry Appellants (Defendants) Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated November 6, 2019 (Landmark Solutions Ltd. v. 1082532 B.C. Ltd., Vernon Docket VER-S-55914). Oral Reasons for Judgment Counsel for the Appellants (appeared via teleconference February 18, 2020): S.D. Dvorak Counsel for the Respondents (appeared via teleconference February 18, 2020): K. Burnham Place and Date of Hearing: Vancouver, British Columbia February 14, 2020 Place and Date of Judgment: Vancouver, British Columbia February 18, 2020 Summary: This is an application for leave to appeal from an interim interlocutory injunction, in the context of a non-solicitation agreement between the parties, restraining the appellants from behaviours that are substantially the same or in competition with the services supplied by the respondents, and soliciting any customers or prospective customers of the respondents. Held: Application granted. The appeal, involving as it does issues of rectification in the context of the formation of the contract and the breadth of persons described as being beyond the proper range of the appellants permitted activity, meets the merits criteria for the granting of leave, and the subject matter of the injunction and consequences for all parties supports the granting of leave to appeal in the interests of justice.

- [1] SAUNDERS J.A.: On November 6, 2019, Madam Justice McDonald issued an interlocutory injunction restraining 1082532 B.C. Ltd. and Mr. Raspberry from behaviours in respect to supplying goods or services "that are substantially the same or in competition with the services supplied by" the respondent Woodland Spirit Contracting Ltd. ("Woodland") and "directly or indirectly canvassing or soliciting any person or company who has been a customer or supplier or has been canvassed or solicited by" Woodland in the 24-month period before May 1, 2018. The injunction is several additional paragraphs long, and I will not set them out in detail here. It is enough to say that the injunction also enjoins behaviour in respect to employment, supplying goods or services, interference with Woodland's

business, and making disparaging comments concerning Woodland. The injunction is interim, in the sense it extends until April 30, 2022.

- [2] The numbered company and Mr. Raspberry apply for leave to appeal. On a leave application, this court generally looks at four issues, all under the rubric of the interests of justice: the apparent merits of the proposed appeal; is it *prima facie* meritorious or on the other hand frivolous; the significance, if any, of the point on appeal to the practice or the public; the significance of the point raised to the action itself; and whether the appeal will unduly hinder the progress of the action. The answer on a leave application is not dictated by the answer to any single one of these issues and it is an overall assessment that must be made. I refer to *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 in turn referring to *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Kepis & Pobe Financial Group Inc. v. Timis Corporation*, 2018 BCCA 293.
- [3] It is to be remembered that if the order appealed is one made in the exercise of judicial discretion, the degree of merit of the proposed appeal is affected by the standard of review applied by this court to orders made in the exercise of judicial discretion: *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.*, 2011 BCCA 317.
- [4] The respondent Woodland is in the business of performing earthwork contracts specializing in environmentally sensitive areas as well as integrity services, which the judge said she understood to include maintenance work for gas and utilities lines. In 2016, the respondent Landmark Solutions Ltd. ("Landmark") purchased 100% of the shares of Woodland, previously owned and operated by Mr. Raspberry's parents. At the time of that purchase, shares were issued to the numbered company owned by Mr. Raspberry, giving it 20% ownership in Woodland, and Mr. Raspberry agreed to work for Woodland following the sale. In late 2017, Mr. Raspberry ceased working for Landmark, offered to sell it the numbered company's shares in Woodland, and the parties entered into a purchase agreement for the shares and an agreement entitled "Non-Solicitation, Non-Disparagement and Confidentiality Agreement".
- [5] The judge recognized Landmark's agreement that to remove all competition terms from the earlier draft agreement. Mr. Raspberry and the numbered company say that Mr. Raspberry was opposed to the inclusion of non-competition language and the respondents met his objections by that removal.
- [6] The terms of the agreements contain language protecting the purchasers from predation by the vendors. The issue in the litigation is the extent of the protection, and the effect of language in the agreements that are said by the respondents to support the injunction.
- [7] The present issue is whether leave to appeal should be granted. One cannot say that the proposed appeal is of significance to the practice - the law of injunctions in the context of restrictive covenants is quite well understood and this case does not raise a unique aspect, but the case is of importance to the parties because the commercial interests of both the appellants and the respondents are affected for a substantial period of time, and there is

some risk that the interlocutory injunction will give, effectively, most of the relief sought as final relief in the action. The appeal will not interfere with the progress of the action.

- [8] The contest before me was on the merits of the proposed appeal. Mr. Raspberry and the numbered company contend that the judge erred: in failing to consider the defence of common mistake and the plea of rectification, in the context of the narrow issue of removal of non-competition language and retention of a bar to solicitation; in failing to give effect to the unenforceability of the clauses for reason of their silence on a geographic limitation; and in failing to give effect to uncertainty present in the agreements concerning the persons outside the proper range of the vendors' permitted activity. Mr. Raspberry and the numbered company say these questions raise questions properly considered by the court as potential errors in the exercise of discretion, and have sufficient merit to meet the test for leave to appeal.
- [9] The respondents rely upon *Payette v. Guay Inc.*, 2013 SCC 45 for the proposition that the language of the Non-Solicitation Agreement is enforceable and different from a full-fledged non-competition clause. They remind me that the appeal will address the exercise of discretion and thus the appellants will face a high hurdle in this court.
- [10] The merits criterion for leave to appeal itself is not onerous, but must have an eye to the task of the appellants at the hearing of the appeal. It seems to me that the relatively low merits threshold of this criterion is established here in that the proposed grounds of appeal, particularly the first and third, ask questions which, if the appellants are correct, (and that is not beyond reasonable argument), would support interference with the injunction, even if only in its breadth. Further, given that this interlocutory injunction may have the effect of substantially providing the entire relief sought in the action, depending on when the case can be tried, and given that the subject matter of the injunction affects both the fields of work protected for the respondents and available for participation by the appellants, I consider the granting of leave to appeal is consistent with the interests of justice.
- [11] Accordingly, the application is allowed. I would urge the parties to comply punctiliously with the filing requirements of the Court of Appeal Rules. With diligent pursuit, there is no reason this cannot be heard in the early fall, if not sooner. "The Honourable Madam Justice Saunders"

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