

CANADA / JUDGMENT

Lomas v. Clark

2020 BCSC 553

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 553 Lomas v. Clark

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lomas v. Clark,

2020 BCSC 553

Date: 20200408

Docket: S1911321

Registry: Vancouver

Between:

Rand Alexander Lomas, Lynda Irene Lomas and Sarah Alexis Stewart

in their capacity as trustees of The Rand Alexander Lomas Family Trust

Petitioners

And

George Ross Clark and IMCD Canada Limited

Respondents

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Petitioners:

T.M. Pontin

Counsel for the Respondent,

George Ross Clark:

S.R. Schachter, Q.C.

K.K. Strong

The Respondent, IMCD Canada Limited

No Appearance

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 8, 2020

- [1] This is an application by the respondent, George Ross Clark ("Clark"), to strike the petition pursuant to Rules 9-5(1)(b) and (d) of the Supreme Court Civil Rules. Clark takes the position that the petition is an abuse of process in that it largely duplicates a parallel proceeding ongoing in Ontario.

Background

- [2] Clark is the former chief financial officer ("CFO") of L.V. Lomas Ltd. ("LVLL").
- [3] The shares of LLVL were formerly beneficially owned by The Rand Alexander Lomas Family Trust (the "Trust") through a holding company, Silver Birch Holdings Limited ("Silver Birch").
- [4] LLVL and Silver Birch were originally incorporated in Ontario but through a series of transactions, they were continued in British Columbia, amalgamated and ultimately merged with another company to form the respondent IMCD Canada Limited ("IMCD"). As part of this transaction, IMCD purchased all of the shares of LLVL from the Trust. That sale was completed on August 31, 2017. It was a term of the transaction that LLVL would continue to operate under that name until September 1, 2018, at which time it would become known as IMCD.
- [5] Pursuant to the share purchase agreement that effected the sale, the Trust together with the petitioner Rand Lomas ("Lomas"), a trustee of the Trust and then chief executive officer ("CEO") of LLVL, provided IMCD with certain representations and warranties concerning employee benefits, as well as an indemnity for any inaccuracies or breaches of those representations and warranties.

- [6] Clark was CFO of LLVL throughout the period in which these various transactions occurred and was involved in the process that resulted in the formation of IMCD.
- [7] During the time Clark was employed by LLVL, the company had an executive bonus program (the "Executive Bonus Program") that entitled eligible employees to receive an annual bonus calculated as a percentage of the "executive bonus pool" (the "Bonus Pool"). The Bonus Pool was established each year if LLVL reached a set profitability threshold based on net income before taxes ("NBIT"). The size of the pool was dependant upon the extent to which LLVL met or exceeded the annual NBIT threshold. The establishment of the annual Bonus Pool and the calculation of bonuses to eligible employees was based on an algorithm that the petitioners allege was created solely by Clark, which he denies.
- [8] While the evidence was somewhat vague on this point, it appears from the materials that the Executive Bonus Program, including the methodology for calculating bonuses, was in place dating back to at least 2008.
- [9] In 2017, LLVL advised eligible employees that the NIBT target for that year was \$11.3 million which, if met, would result in a Bonus Pool of \$490,000. Based upon the applicable formula, Clark's share of the pool would be \$75,541.
- [10] LLVL did better financially in 2017 than expected. In January of 2018, Clark prepared a spread sheet showing anticipated NBIT of \$17.995 million, which resulted in a Bonus Pool of \$8.195 million, of which \$1,262,692 was payable to Clark.
- [11] In March 2018, Clark received a letter from IMCD indicating that his 2017 bonus was \$454,772. Clark then advised IMCD of his intention to dispute that amount. IMCD in turn provided the Trust and Lomas with a notice of claim for indemnification dated March 28, 2018. The indemnification notice was based on an alleged "inaccuracy in the representations and warranties of the Seller [the Trust] and principal [Lomas] contained in the Share Purchase Agreement pertaining to the executive bonus program".
- [12] On August 17, 2018, Clark filed a statement of claim in the Ontario Superior Court of Justice against LLVL (the "Ontario Action") seeking damages in the amount of \$1,262,692, which again is the amount he says he is entitled to for 2017 under the Executive Bonus Program.
- [13] A statement of defence and counterclaim was filed by LLVL on October 8, 2018, although by that time LLVL was controlled by IMCD.
- [14] Clark filed a reply and defence to counterclaim on November 1, 2018, and then on December 4, 2018, he filed a third party claim against Lomas and two other parties.
- [15] On October 8, 2019, this petition (the "BC Petition") was filed.
- [16] As determination of this application involves a comparison of the Ontario Action and the BC Petition, it is useful to highlight the key elements of each proceeding.

The Ontario Action

- [17] In the Ontario Action, Clark again seeks damages in the amount of \$1,262,692, which is what he claims is owing to him as a bonus for 2017. The action is framed as a claim in contract against LLVL.
- [18] In its statement of defence, LLVL (which name is used interchangeably with IMCD) alleges:
- a) As an officer and director of LLVL, Clark owed a fiduciary duty to LLVL and IMCD;
 - b) The methodology for calculating annual bonuses was introduced and used solely by Clark, who never advised Lomas, LLVL's CEO, of that methodology;
 - c) Clark failed to disclose the implications of the bonus methodology for 2017 to IMCD as part of its due diligence process, despite representing that he had provided all information concerning LLVL employees' salary and bonus entitlements;
 - d) The bonus methodology devised by Clark leads to fiscal absurdities and would impose a financial hardship on LLVL and IMCD; and,
 - e) If Clark is entitled to a bonus as claimed, Clark is liable to IMCD for the same amount as a result of his breach of contract, breach of fiduciary duty, breach of his duty of care owed to the company and unjust enrichment.
- [19] In its counterclaim, LLVL claims damages against Clark for breach of contract, breach of fiduciary duty and duty of care, conflict of interest and gross negligence.
- [20] In his reply and statement of defence to counterclaim, Clark denies that he designed the bonus methodology. He alleges that was done by Lomas and an outside consultant and that Lomas had full knowledge about the bonus program. He alleges further that he explained the full implications of the Executive Bonus Program to IMCD as part of its due diligence.

The BC Petition

- [21] The BC Petition is brought pursuant to ss. 227-229 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. The petitioners are Lomas and two related individuals who collectively are the trustees of the Trust. Clark and IMCD are named as respondents. The BC Petition is directed at Clark's alleged conduct, specifically the design and implementation of the Executive Bonus Program. It seeks declarations that the affairs of IMCD are or have been conducted in a manner that is oppressive to the petitioners as shareholders and that some act of IMCD, i.e. the Executive Bonus Program, is unfairly prejudicial to them. The BC Petition further seeks orders varying or setting aside the Executive Bonus Program.
- [22] The essential factual allegations underpinning the relief sought include:
- a) Clark was an executive of LLVL and owed fiduciary duties to the company;

- b) Bonus calculations under the Executive Bonus Program were based on a methodology introduced and used solely by Clark;
- c) That methodology and its outcome is to the detriment of, and is oppressive to and unfairly prejudicial to, the interests of LLVL and its ultimate shareholder, the Trust;
- d) The petitioners, as shareholders of LLVL, had reasonable expectations that Clark would act in accordance with his fiduciary obligations; and,
- e) Clark breached those reasonable expectations by creating a methodology for calculating bonuses under the Executive Bonus Program, which served his personal interest.

The Parties' Positions

- [23] Clark submits that the BC Petition is an abuse of process in that it is largely duplicative of the Ontario Action. He submits that central to both proceedings is the allegation that he devised the bonus methodology for his own benefit and that in doing so he breached his fiduciary duty to LLVL. Clark submits that if both proceedings are permitted to continue in parallel, there is a serious risk of inconsistent findings. Additionally, it is fundamentally unfair to require Clark to litigate essentially the same facts and issues in two different proceedings in different jurisdictions.
- [24] The petitioners submit that the Ontario and BC proceedings are not parallel or duplicative proceedings. The petitioners herein are not parties to the Ontario Action and the relief sought in the two proceedings is different. Further, the remedies that the petitioners seek, namely to vary or set aside the Executive Bonus Program on the basis that it is oppressive or unfairly prejudicial, are only available in a British Columbia proceeding brought under the BCA.

Legal Framework

- [25] Rules 9-5(1)(b) and (d) provide:

- (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
 - (b) it is unnecessary, scandalous, frivolous or vexatious,
 - (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.

- [26] The test for striking a pleading under R. 9-5 is that it must be plain and obvious that the pleading is improper within the meaning of one of the subrules: *Huang v. Silvercorp Metals Inc.*, 2016 BCSC 278 at para. 20.

- [27] In *Freshway Specialty Foods v. Map Produce LLC, et al*, 2005 BCSC 1485 at paras. 50-51, Mr. Justice Macauley identified the particular concerns that arise when it is alleged that there are parallel proceedings:
- [50] The bringing of multiple proceedings respecting the same subject matter is often a hallmark of vexatious proceedings. In *Tompkins Contracting Ltd. v. Northern Clearing Enterprises Ltd.* (1965), 50 W.W.R. 246 (C.A.), Davey J.A. confirmed that the court has jurisdiction to stay proceedings as vexatious and oppressive when the plaintiff has commenced litigation over the same subject matter in another jurisdiction but indicated that the court should not direct a stay if there is real reason to anticipate prejudice to a party arising out of differences in rights, remedies and procedures. Freshway did not argue such prejudice here.
- [51] The underlying policy concerns militating against permitting parallel proceedings are well identified. In *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 67 B.C.L.R. (3d) 278, [1999 BCCA 243] at paras. 28 and 29, Rowles J.A. stated:

Taking a narrow, particular, and formalistic approach to determining whether proceedings are parallel is also not consonant with the policy rationale for avoiding parallel proceedings. There are two policy concerns with parallel proceedings. Litigating the same dispute twice, in two sets of proceedings in different jurisdictions creates obvious inefficiencies and waste. More importantly, parallel proceedings raise the possibility of inconsistent or conflicting judgments being given. ...

If additional costs and inconvenience and the possibility of conflicting decisions are to be avoided, the focus of the inquiry as to whether there are parallel proceedings should remain on the substance of the dispute and not on how it is framed in any given action.

- [28] As noted in *Freshway*, in considering whether to strike a proceeding as an abuse of process on the basis that it duplicates another proceeding elsewhere, the focus must be on the substance of the two proceedings rather than on formalistic or nominal differences.
- [29] However, the fact that a proceeding is commenced in British Columbia that is similar in many respects to a proceeding commenced elsewhere, does not necessarily mean that the British Columbia proceeding is vexatious or an abuse of process, particularly if striking or staying the proceeding would prejudice one of the parties: *Tompkins Contracting Ltd. v. Northern Clearing Enterprises Ltd.* (1964), 50 W.W.R. 246 at 251 (B.C.C.A.).

Discussion

- [30] There is merit in both parties' positions. I agree with Clark that there is considerable overlap between the two proceedings. It is apparent that the factual matrix underlying both proceedings is virtually identical and that a central factual issue, if not the central factual issue, in both is the role that Clark played in designing and implementing the Executive Bonus Program and the bonus methodology. This gives rise to a serious risk of inconsistent factual findings if the two proceedings are permitted to go ahead at the same time.

- [31] Further, the allegations levelled against Clark in both proceedings are similar, i.e. that he breached his fiduciary duties. While the BC Petition alleges a breach of the shareholders' reasonable expectations, which is the touchstone for a claim of oppression, the reasonable expectations alleged are that Clark would act in accordance with his fiduciary obligations.
- [32] However, I also agree with the petitioners that the relief sought in the BC Petition differs from that in the Ontario Action and that the oppression remedies sought are only available in a British Columbia proceeding brought under the BCA. It is also true that the defendant in the Ontario Action, LLVL, is different from the petitioners in the BC Petition, who are the trustees of the Trust, LLVL's former principal shareholder. That said, there is an alignment of interest between those parties in that both seek to limit or avoid Clark's claim under the Executive Bonus Program.
- [33] In the circumstances, it is not plain and obvious that the BC Petition must be struck as an abuse of process. To do so would unfairly prejudice the petitioners' right to pursue relief under the BCA in their capacity as trustees of LVLL's former shareholder.
- [34] However, there is considerable potential for prejudice if the two proceedings are permitted to proceed at the same time, not the least of which is again the possibility of inconsistent findings.
- [35] Rule 9-5(1) confers a wide discretion on the court, including the power to stay a proceeding, in order to safeguard the court's processes. Here, while I am not prepared to strike the BC Petition, I am prepared to stay it pending resolution of the Ontario Action. I acknowledge that neither party sought this relief, however, in my view, a stay of the BC Petition strikes the most appropriate balance between the competing interests of the parties and it falls within the discretion of the Court to make such an order. Although striking the BC Petition would prejudice the petitioner, it does not appear, on the facts before me, that a stay would cause any such prejudice, despite the potential for delay. Further, a stay mitigates the serious risk of inconsistent factual findings if the two actions were to proceed in parallel.
- [36] Lomas will undoubtedly be a central witness for LVLL in the Ontario Action (as he would be in the BC Petition), and will give evidence on the key factual issues underlying both proceedings, which will, if proven, likely support the Trust's position in the BC Petition. Depending upon the outcome of the Ontario Action and the findings made therein, it may be unnecessary to proceed with the BC Petition. Nonetheless, the petitioners retain the right to do so should the circumstances warrant.

Conclusion

- [37] The BC Petition is stayed pending resolution of the Ontario Action. Costs of this application will be in the cause.

"Skolrood J."

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