

CANADA / JUDGMENT

PHS Holdings Ltd. v. Cansteel Machine Works Ltd.

2002 BCSC 1350

COURT

Supreme Court of British Columbia

DECIDED

23 September 2002

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2002BCSC1350

Citation: PHS Holdings Ltd. et al v. Cansteel Machine Works et al

Date: 20020923
2002 BCSC 1350Docket: L000556
Registry: Vancouver
IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE COMPANY ACT
R.S.B.C. 1996 c. 62BETWEEN: PHS HOLDINGS LTD. AND MOHAN LEHRY
PETITIONERSAND: CANSTEEL MACHINE WORKS LTD.,
WILLIAM PETER CARSON
AND QUORUM HOLDINGS LTD.
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE GOEPEL

Counsel for Applicant,

E. Sands & Associates Inc.:

J.G. Shatford

Counsel for Respondents Cansteel Machine Works Ltd. and William P. Carson:

William P. Carson

In Person

Date and Place of Hearing/Trial:

August 15, 2002

Vancouver, BC

INTRODUCTION

[1] E. Sands & Associates Inc. ("Sands"), was appointed by court order Liquidator of the defendant Cansteel Machine Works Ltd. ("Cansteel"). Sands applies for the following orders:

1. The winding up proceedings of the business and undertaking of the respondent Cansteel Machine Works Ltd. ("Cansteel") pursuant to the Order of the Honourable Mr. Justice Singh made March 21, 2000, be and is hereby stayed absolutely;
2. The Liquidator of Cansteel, E. Sands & Associates Inc., appointed pursuant to the Order of the Honourable Mr. Justice Curtis made May 24, 2000, be and is hereby discharged;
3. The Liquidator's accounts in the form of the Statement of Receipts and Disbursements attached and marked Exhibit "A" to the Affidavit of Gregory L. Best filed herewith with the Liquidator's Fees adjusted and set at \$40,000 and Legal Fees adjusted and set at \$27,000 be and is hereby approved;
4. The Liquidator forthwith return to the Respondent, Cansteel Machine Works Ltd., possession and control of all remaining assets, corporate records and business records of Cansteel; and
5. The Liquidator forthwith notify the Registrar of Companies of its discharge as Liquidator of Cansteel.

[2] Mr. Carson, is the sole shareholder of Cansteel. He appears in person. He does not oppose the granting of the relief set out in paragraphs 1 and 4, but opposes the balance of the application.

[3] Mr. Carson has also filed an outline seeking leave of the court to commence an action against Sands for alleged misconduct during the course of the liquidation. No notice of motion, however, was filed seeking such relief and no submissions were made before me concerning that application. If Mr. Carson desires to pursue such relief he will have to file a notice of motion and set the matter for hearing in Chambers.

BACKGROUND

- [4] This litigation began as a dispute between the shareholders of Cansteel. In the course of the litigation Mr. Justice Singh, on March 21, 2000, made an order for the winding up of Cansteel. On May 24, 2000, Mr. Justice Curtis appointed Sands as Liquidator. The order of Mr. Justice Curtis set out in detail the powers of the Liquidator and included a provision that no action or other proceeding shall be taken against the Liquidator without leave of the court first being obtained. The order set out that the Liquidator pass its accounts before the District Registrar of the Supreme Court and that, at the time of the passing of such accounts, the Registrar may recommend in its report the amount of remuneration of the Liquidator such remuneration to be fixed by this court.
- [5] In due course the underlying shareholders dispute was resolved. Mr. Carson became the sole shareholder of Cansteel.
- [6] Sands took out an appointment to pass its accounts on May 8, 2002. Mr. Carson attended to contest the accounts. A pre-hearing conference was conducted. At the conclusion of the conference the passing of accounts was set for a 4-day hearing in late July.
- [7] Subsequent to the pre-hearing conference Mr. Carson retained Mr. Hobbs as counsel. On June 12, 2002, Mr. Hobbs wrote to Mr. Shatford, counsel for Sands, proposing a settlement of all outstanding issues between the Liquidator, Cansteel and Mr. Carson. The letter was marked 'without prejudice'. On June 19, 2002, Mr. Shatford responded suggesting some modifications in the proposal that had been made by Mr. Hobbs. On June 20, 2002, Mr. Hobbs wrote advising that he had been instructed to accept Mr. Shatford's counter offer as expressed in his letter of June 12, 2002, (sic) subject to clarification of one matter which had been the subject of subsequent discussions between Mr. Shatford and Mr. Hobbs. In his letter of June 20, 2002, Mr. Hobbs advised that he would proceed quickly to document the settlement and obtain the court order necessary for its implementation. Neither Mr. Shatford's letter of June 19 nor Mr. Hobbs' letter of June 20 were marked 'without prejudice'.
- [8] The settlement as set out in the correspondence contemplated that the Liquidator, with the consent of Mr. Carson, would forthwith apply for orders of the court (a) staying the winding-up proceedings, (b) discharging the Liquidator and (c) passing the Liquidator's account on a summary basis. The Liquidator's fees would be fixed in the amount of \$40,000 while legal fees to the conclusion of the Liquidator's discharge would be set at \$27,000. Under the terms of the agreement neither Mr. Carson nor Cansteel would initiate any proceedings to have the accounts taxed. There was to be a full and final mutual release executed by the Liquidator, Mr. Carson and Cansteel. Upon discharge of the Liquidator all corporate, financial and business records and any other assets of Cansteel within the Liquidator's control or possession would be forthwith returned to Cansteel and upon discharge the Liquidator would attend to entry of the order, and file with the Registrar of Companies notice of its removal as Liquidator of Cansteel.

- [9] On July 2, 2002, Mr. Hobbs forwarded to Mr. Shatford a copy of a draft motion and proposed affidavit of Mr. Carson. He asked Mr. Shatford to expedite delivery of his proposed form of mutual release and to provide a final statement of receipts and disbursements, which could be attached to Mr. Carson's affidavit. The draft motion prepared by Mr. Hobbs was in terms nearly identical to the application which has now been brought by Sands.
- [10] On July 5, 2002, Mr. Shatford forwarded a proposed form of release and a final statement of receipts and disbursements. He also commented on the terms of the notice of motion and suggested that the term of the Order being sought should merely be one approving the accounts of the Liquidator as set forth in the proposed affidavit.
- [11] Shortly thereafter Mr. Hobbs was discharged as solicitor by Mr. Carson. On July 12, 2002, Mr. Carson wrote to Mr. Shatford. In that correspondence he advised that he believed that the taxation could be done in two hours as opposed to four days. In response Mr. Shatford advised that in his opinion all outstanding issues had been settled and he intended to rely on the correspondence between himself and Mr. Hobbs, of June 12, June 19 and June 20, which set forth the terms of the settlement. This application then followed.
- [12] Sands takes the position that the exchange of correspondence between Mr. Hobbs and Mr. Shatford has resulted in a settlement, which settlement should be enforced by the Court. Mr. Carson's response is that his counsel had no authority to enter into a binding agreement. He says that he understood that the letters exchanged between counsel were "without prejudice" and that he would not to be bound to any settlement until all documentation, including the form of release were agreed to his satisfaction.
- [13] The material filed by Mr. Carson lends some substance to his position that he was under a misapprehension as to the ability of his solicitor to bind him to a settlement. In this regard there was evidence from a taped conversation between Mr. Carson and his solicitor Mr. Hobbs of June 20, 2002. In that conversation Mr. Carson questioned Mr. Hobbs on the fact that Mr. Shatford's correspondence of June 19 does not say it is without prejudice. He was advised by Mr. Hobbs that any settlement discussion is at law without prejudice, so it is not necessary that those words be placed on a letter.

- [14] On July 2, 2002, Mr. Carson wrote to Mr. Hobbs as follows:

Dear Mr. Hobbs

Thank you for your time on Friday evening June 28th, to discuss my file.

Please correspond to Mr. Shatford and ask for a copy of the release document he is creating for the Liquidator. One line should be adequate.

Please take delivery of his release document and forward a copy of it to me without releasing to him a copy of your draft, without prejudice, settlement agreement.

Please continue to correspondence with Mr. Shatford on a without prejudice basis, and I will look forward to see a copy of his response.

Yours very truly,

Peter Carson

- [15] Both the telephone conversation of June 20 and the correspondence of July 2 support Mr. Carson's stated belief that he did not understand the correspondence relied on by Sands in this application was binding on him. In this regard the letter of July 2 is of particular importance because it suggests that Mr. Carson did not appreciate at the time of writing that letter that a final settlement had been concluded.
- [16] I do not have before me any evidence from Mr. Hobbs. Given the summary nature of this application neither party could compel him to provide an affidavit.

DISCUSSION

- [17] The correspondence between the solicitors, on its face, sets out a concluded agreement. There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The authorities were reviewed in *Hawitt v. Campbell* (1983), 46 B.C.L.R. 260 (C.A.). McFarlane J.A. said this at pp. 264-265,

The law as to such compromises was clearly stated in *Shepherd v. Robinson*, supra, at pp. 477-79, which was cited with approval in *Propp v. Fleming*. Bankes L.J. had this to say:

"There are two distinct lines of authority relating to compromises said to have been made by counsel against the wishes or instructions of their clients. The first is that represented by *Strauss v. Francis* (1866), L.R. 1 Q.B. 379; *Matthews v. Munster* (1887), 20 Q.B.D. 141 (C.A.); and *Welsh v. Roe* (1918), 87 L.J.K.B. 520. In all those cases the question was whether the act of counsel had been within the scope of his authority. It is clear that counsel has an apparent authority to compromise in all matters connected with the action and not merely collateral to it; and if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority, the client will be bound by the agreement made by his counsel and embodied in some order or judgment of the Court. If Mr. Powell could bring this case within that line of decisions I should agree that this compromise must stand.

"But there is a second and different line of cases which decide that before a consent order has been drawn up and perfected the consent given by counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension. In such cases the Court will not proceed further with the drawing up and perfecting of the order, and will not lend its authority to compel observance of an agreement arrived at through a mistake. This is the line represented by *Holt v. Jesse* (1876), 3 Ch.D. 177, and by *Neale v. Gordon-Lennox*, [1902] A.C. 465 [at] 469 (H.L.), where Lord Halsbury L.C. said: 'The Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest

to me that a Court of justice is so far bound by the un-authorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard.'

"The only question here is whether, the order never having been drawn up, the facts bring the case within the class of authorities of which *Holt v. Jesse* is an example. In my opinion they do. Counsel acted under a misapprehension. It is immaterial whether the mistake was as to some particular matter forming part of the basis of the settlement or whether it was as to his authority to make a settlement. No order has been drawn up. The Court has been asked to give effect to a compromise consented to under a misapprehension and not yet effective."

The case at bar falls within the second line of cases referred to by Bankes L.J. It is a case where the settlement has yet to be perfected, and where it is still open to the court to exercise "its general authority over justice between the parties".

It is to be observed that, at p. 479 of the judgment of Bankes L.J. he said that the mis-apprehension which would give rise to refusing to give effect to a compromise is not limited to a misapprehension as to the solicitor's authority to make a settlement but is extended to a misapprehension of "some particular matter forming part of the basis for the settlement". The misapprehension, therefore, may be as to the instructions of the solicitor or as to the real facts.

- [18] *Bank of Montreal v. Arvee Cedar Mills Ltd.* (No.2) [1979] W.W.R. 219 and *Yannacopoulos v. Maple Leaf Milling Co. Ltd.* (1962), 37 D.L.R. (2d) 562, are examples of cases where this court has refused to enforce a settlement in circumstances where there has been a misunderstanding of instructions by the solicitor and the court's assistance is needed to carry out the settlement.
- [19] As noted earlier in these reasons there is some evidence that suggests that the letter agreement between the solicitors was reached without the approval of Mr. Carson. I do not have, however, the evidence of Mr. Hobbs concerning his instructions or any limitations that may have been placed on his ability to enter into a settlement agreement. Absent that evidence I cannot determine whether Mr. Hobbs was under any misapprehension as to his instructions.
- [20] If the settlement would have been otherwise enforceable I would have directed a trial of an issue to determine Mr. Hobbs' instructions and whether he was under any misapprehension as to authority to make a settlement. I have concluded, however, that even if the agreement is otherwise binding, the agreement is not one that is enforceable.
- [21] The Liquidator was appointed by an order of this court. That order requires the Liquidator to pass its accounts before the District Registrar and gives power to the District Registrar to recommend the appropriate level of remuneration, which remuneration is ultimately to be fixed by this court. In my opinion the Liquidator cannot contract out of its obligations to pass its accounts before the District Registrar.

- [22] Further Sands also seeks to be discharged pursuant to Section 296 of the Company Act, R.S.B.C. 1996 c. 62. A discharge would release the Liquidator from all liability in respect of any act done or default made in the administration of the affairs of the company. This relief is not available to the Liquidator by way of a consent order. A consent order would unduly limit the court's power to oversee the activities of its officers. The settlement is not enforceable, as the effect of the settlement is to oust the supervisory jurisdiction of the court.
- [23] In the result I am prepared to stay the winding up proceedings as that application is not opposed. The balance of the relief sought is dismissed. The Liquidator will have to pass its accounts before the District Registrar as contemplated in the order upon which it was appointed. In due course it will have to apply to be discharged. At that hearing, or earlier, Mr. Carson, if he so determines, can renew his application for leave to commence proceedings against the Liquidator. I offer no opinion as to whether there is any merit to the complaints set out by Mr. Carson in his material. I am not seized of any further applications.
- [24] I will not order at this time that Sands return to Cansteel possession and control of all remaining assets, courtroom records and business records. Until Sands is discharged as Liquidator it is entitled to continue to hold those records.
- [25] Given the letter agreement reached by counsel, Sands cannot be faulted in bringing this application. There is no evidence that Sands was aware of any limitation on Mr. Hobbs' authority. Given the circumstances I would order that there be no costs of this application.

"R.B.T. Goepel, J."

The Honourable Mr. Justice R.B.T. Goepel

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