

CANADA / JUDGMENT

Pope & Talbot Ltd. (Re)

2010 BCSC 1889

COURT

Supreme Court of British Columbia

DECIDED

13 December 2010

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2010 BCSC 1889 Pope & Talbot Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pope & Talbot Ltd. (Re),

2010 BCSC 1889

Date: 20101213

Docket: S077839

Registry: Vancouver

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,

R.S.C. 1985, c. C-36

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF POPE & TALBOT LTD., POPE & TALBOT, INC., MACKENZIE PULP LAND LTD., P&T FUNDING LTD., PENN TIMBER, INC., POPE & TALBOT LUMBER SALES, INC., POPE AND TALBOT PULP SALES U.S., INC., POPE & TALBOT RELOCATION SERVICES INC., P&T POWER COMPANY, AND P&T FINANCE THREE LLC

Corrected Judgment: The text of the judgment was corrected at para. 8 on January 13, 2011.

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

Counsel for PriceWaterhouseCoopers (Receiver)

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Counsel for class plaintiffs

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Counsel for XL Specialty Insurance

R.J. Kaardal, B. Johnston

Counsel for Lionel Dodd and certain other of former directors of Pope & Talbot Ltd.

J. MacLean

Counsel for certain former directors, Maria Pope and Ken Taylor

Z. Ansley

Counsel for ACE Insurance

B. Rhodes

Place and Date of Hearing:

Vancouver, B.C.

December 13, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 13, 2010

- [1] THE COURT: I now wish to deal with the application for an order that XL Specialty Insurance ("XL") pay special costs. This decision should be read in conjunction with the ruling made earlier this morning following a joint hearing of this Court and the United States District Court for Delaware, indexed at 2010 BCSC 1885. My previous decisions concerning jurisdiction simpliciter, forums conveniens, and choice of law are indexed at 2009 BCSC 1014 and 2009 BCSC 1552.
- [2] Since the inception of the insolvency concerning the Pope & Talbot companies, starting with the CCAA regime through to the current bankruptcy, nearly all parties having an interest in the insolvency have sought to have the issues determined by the most cost effective and efficient processes possible. They have done so for their benefit and in order to promote judicial economy in the Courts in Canada and the United States.
- [3] All of the insurers who issued directors and officers' liability policies have participated throughout the proceedings. The insurers attorned to the jurisdiction of this Court by the applications that they brought in this Court, concerning the issues of jurisdiction simpliciter, forums conveniens, and choice of law, which were preliminary to the determination of whether coverage is afforded under any of their policies.

- [4] The issue of whether Pope & Talbot, Inc. ("P & T, Inc.") stood as a de facto director of Pope & Talbot Ltd. ("P & T Ltd.") was raised during the course of one of the hearings concerning jurisdiction; it was then subsequently and formally raised when the class action proceeding was commenced on behalf of certain former employees of the Harmac Mill, which is located near Nanaimo, British Columbia (I am not aware if the issue was formally raised by the parties prior to the issuance of the class action proceeding).
- [5] For some time, many of the parties have appeared in this Court to participate in what I will describe as the lead-up to the hearing scheduled to take place in this Court tomorrow. That hearing concerns the appropriate process to be applied by the Court to determine the liability of any or all of the directors and officers of P & T Ltd., including the issue of the liability of P & T, Inc. as a de facto director of P & T Ltd. ("the process dispute").
- [6] The insurers have been asked repeatedly by the parties involved in the process dispute and by the Court to identify all procedural or substantive issues related to the process dispute that would impact upon them. The insurers have been asked to provide their submissions as to whether a determination of liability under one of the proposed processes would not be sufficient to trigger the contractual obligations under their policies. For example, the insurers have been asked to advise whether the Court's determination following any of the proposed processes could be said not to constitute a "judgment" such that their policies would not be engaged. The parties and the Court asked the insurers to provide their submissions concerning these procedural issues in advance of the hearing of the process dispute to prevent the parties and the Court from engaging in a hearing that is a waste of resources and the parties' time and expense.
- [7] I am satisfied that XL has been aware, in a formal way, of the claim that P & T, Inc. acted as a de facto director of P & T Ltd. since at least the writ of summons was issued in the class action proceeding in 2009. I am also satisfied that the issue was raised before the Court, in the presence of XL, during the jurisdiction hearing that took place in June 2009.
- [8] XL has taken the position that it has not been provided with formal notice of the claim against the directors and officers of P & T Ltd. (including P & T, Inc.) even though it is aware that the claim is being advanced. In order to break the procedural deadlock concerning the requirements (contained in XL's policy) surrounding the provision of formal notice of the claim to XL, I granted relief on an application brought in late November 2010 by former Harmac employees. My order allowed notice of the claim to be served upon the receiver of P & T, Inc. located in Vancouver. My order also permitted the receiver to deliver that notice of claim to XL. I also ordered that delivery of that notice upon XL, through delivery upon its solicitors in Vancouver, Hunter Litigation Chambers, by the receiver constituted good and sufficient notice of the claim to that insurer.

- [9] I have invited XL to advise me of any procedural or substantive concerns that it may have that bear upon the process dispute and its policy. I was advised by XL's counsel in July 2010 that it would return to Court once instructions were obtained. XL committed to provide the Court with any concerns that it had. It did not.
- [10] XL now says that it is concerned that if it participates in the hearing of the process dispute in any way, or if it were to defend P & T, Inc. in this Court (or to consider doing so), it may run afoul of United States Bankruptcy law and practice.
- [11] XL did not advise the Court of those concerns. Instead, XL decided to seek relief from the United States District Court in Delaware. XL initiated proceedings by filing a document known as a "complaint." That document contains three counts. In summary, XL seeks relief from the United States District Court concerning its coverage obligations under its policy. However, the relief sought by XL is not limited to the claims made against P & T, Inc. as a de facto director. The relief sought by XL from the United States District Court is broad in scope: it is in respect of all of its coverage obligations for all of the individual directors and officers of P & T Ltd. and P & T, Inc., including those that may arise from the insolvency proceedings in this Court.
- [12] XL did not provide notice to the Court or the parties involved in the process dispute that it had filed its complaint in the United States District Court. On November 30, 2010, after I was made aware that the complaint had been filed, I raised my concern to counsel for XL that the relief it was seeking before the United States District Court was broad in scope because, on the face of the complaint, XL seeks a complete determination of its obligations under the policy.
- [13] A summary of the relief sought by XL in the complaint is set out at the end of the complaint: WHEREFORE, XL requests that the Court enter judgment in its favour as follows:
- A. On Count 1, a judicial declaration that PTI is not an Insured Person under the A-Side Policy, that PTI is not entitled to coverage under the A-Side Policy and, thus, XL has no obligation to pay any sums, including defense expenses, to or on behalf of PTI in connection with the Harmac employees' Lawsuit;
- B. On Count II, a judicial declaration that because PTI is not an Insured Person under the A-Side Policy, neither the A-Side Policy nor its proceeds are property of the estate;
- C. On Count III, a judicial declaration that coverage for the Harmac employees' Lawsuit Action is barred or limited pursuant to additional terms and conditions of the A-Side Policy;
- D. an award to XL of all of its costs and expense incurred in this matter, including reasonable attorneys' fees; and
- E. such additional declaratory and other relief as shall be found to be appropriate in the circumstances.

- [14] Counsel for XL advised the Court that its purpose in filing the complaint was to avoid falling afoul of United States bankruptcy law:

Now, as I understand it, the assertion is made that it is here. The receiver is asserting that, well, this is an asset of the estate as I understand it. So there is an issue about how this is properly characterized. And that characterization relates, My Lord, to the application of the stay. And I'm instructed that this is not an unusual thing for an insurer to have to address as to whether -- because as I understand it under U.S. law an insurer can't do anything in relation to a policy that may be subject to the automatic stay without potentially being in violation of that stay. So we're in a position where if PTI is an insured person, then the automatic stay governs, and XL, as any insurer, is at risk if it deals in any way with the policy without first seeking relief from the automatic stay. So that's why we're here. That's the fundamental essence of the complaint.

- [15] This morning, during the joint hearing conference, XL would not confirm to this Court or the United States District Court that it would not proceed to seek certain relief sought in relation to count III of the complaint (i.e., that it would not seek relief from the United States District Court concerning its coverage obligations for the individual directors and officers of P & T, Inc. and P & T Ltd.). Despite my previous rulings concerning jurisdiction simpliciter, a decision that XL did not appeal, XL would only say that it would leave the issue in abeyance.
- [16] I am satisfied that if XL had come before the Court and expressed its concern that it did not wish to fall afoul of United States bankruptcy law and practice, as it did so eloquently on November 30, 2010, then the matter could have been dealt with by this Court and by Judge Sontchi (of the United States District Court) in a more orderly, efficient, and cost effective way, one that promoted judicial economy and which has been consistent with the approach taken by nearly all parties of interest while these insolvency proceedings have been before this Court.
- [17] I am satisfied that not all of the counsel who today appeared in this Court and the United States District Court today would have had to do so or to be briefed. I am satisfied that XL's concerns arising from the automatic stay in the bankruptcy proceedings in the United States could have been dealt with in a more cost-effective manner (e.g., desk orders or the focused hearing set before Judge Sontchi on January 24, 2011).
- [18] As Judge Sontchi noted in his colloquy with counsel for XL this morning during the joint hearing conference, it is striking, that despite the statements made by its counsel to this Court on November 30, 2010, XL never specifically asked the United States District Court for relief from the provisions of the automatic stay.

- [19] In my opinion, the position taken by XL this morning, and the relief it seeks in the complaint, appear to be an attempt to circumvent the effect of the jurisdiction rulings I previously made following applications that XL participated in (and which were, in some cases, applications that they had brought before this Court). The position that XL took this morning is not consistent with the position that it took before this Court on November 30, 2010.
- [20] I am satisfied that XL's conduct is worthy of rebuke. Its conduct runs counter to the process that has been undertaken by all of the parties since the inception of this insolvency proceeding. I am satisfied that XL should be ordered to pay special costs of all of the parties who attended in Court in opposition today as well as those who did not attend but had to brief the issues raised by its recent conduct. Those costs should be payable forthwith.

"P. Walker J."

The Honourable Mr. Justice Paul Walker

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