

CANADA / JUDGMENT

Pope & Talbot Ltd. (Re)

2011 BCSC 139

COURT

Supreme Court of British Columbia

DECIDED

7 February 2011

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2011 BCSC 139 Pope & Talbot Ltd. (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Pope & Talbot Ltd. (Re), 2011 BCSC 139 Date: 20110207 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 Before: The Honourable Mr. Justice Walker Reasons for Judgment Appearing by video conference: Judge Sontchi Counsel for the Class Plaintiffs: P. Roberts Counsel for PricewaterhouseCoopers Inc.: R. Berrow Counsel for Lionel Dodd and certain other of former Directors of Pope & Talbot Ltd.: J.I. MacLean, Q.C. Counsel for certain former Directors, Maria Pope & Ken Taylor: Z. Ansley Counsel for XL Specialty Insurance Company: R.J. Kaardal B. Johnston Counsel for Federal Insurance Company appearing by videoconference: K. Ventrell K. Biffer Counsel for Trimac and Suncor appearing by videoconference J. Waxman Counsel for United States Trustee appearing by videoconference: J. Carroll Counsel for PricewaterhouseCoopers appearing by videoconference: S. Ross Place and Date of Hearing: Vancouver, B.C. January 24, 2011 Place and Date of Judgment: Vancouver, B.C. February 7, 2011

- [1] On November 30, 2010, I enjoined XL Specialty Insurance Company ("XL") from proceeding with the hearing of its action filed in the United States Bankruptcy Court for the District of Delaware ("U.S. District Court") pending a joint hearing conference between this Court and Judge Sontchi of the U.S. District Court who is presiding over the Pope and Talbot insolvency in that jurisdiction.
- [2] XL filed that action in the U.S. District Court by way of a "complaint" on November 26, 2010.
- [3] I also granted short leave to parties of interest to bring an anti-suit injunction.

- [4] Included in the relief sought in XL's complaint were declarations from the U.S. District Court concerning its coverage obligations to Pope & Talbot, Inc. ("P & T, Inc.") and Pope & Talbot Ltd. ("P & T Ltd."). XL had previously attorned to the jurisdiction of this Court in respect of its coverage obligations. My reasons for judgment in respect of applications concerning jurisdiction and proper law issues are indexed at 2009 BCSC 1014 and 2009 BCSC 1552.
- [5] The joint hearing conference took place on December 13, 2010. My reasons for judgment, indexed at 2010 BCSC 1885, set out the joint decision of this Court and the U.S. District Court. Judge Sontchi ordered limited stay relief pending a further hearing in the U.S. District Court concerning XL's application to proceed with the hearing of its complaint. The injunction I ordered against XL remained in effect pending that hearing. That further hearing proceeded on January 24, 2011 by way of a joint hearing conference. Canadian counsel made oral submissions to the U.S. District Court at the invitation of Judge Sontchi.
- [6] I also issued reasons for judgment on December 13, 2010, where I ordered special costs against XL. They are indexed at 2010 BCSC 1889.
- [7] The following sets out Judge Sontchi's reasons for judgment on the application heard in the U.S. District Court on January 24, 2011: JUDGE SONTCHI: Okay. I'm ready to go. The issue before the court obviously is whether the court has exclusive jurisdiction over the coverage dispute and, if not exclusive, then should the court abstain. The precise issue as I see it is whether, assuming that PTI is deemed to be acting as a director under Canadian law, is it nonetheless not an insured person under the Side A policy and, thus, not entitled to coverage. That's what it comes down to. There are other defences, et cetera, to coverage that are referenced in the complaint, but that is the main thrust of the issue. The proceeding going forward in front of Justice Walker at this time is really dealing or has been dealing directly with the assuming arguendo point, which is whether PTI was in fact acting as a director and whether any liability goes on with that. The receiver in Canada has made a demand on behalf of PTI for coverage by XL in that case. As I discussed at some length with counsel for XL, I really view it as a chicken/egg problem. In order for XL to be on the hook in this case to pay anything, there has to be a determination that a corporation can in fact be a de facto director, that this corporation was acting as a de facto director, and that this corporation is liable for damages arising from acting as that de facto director, and then, after all of that is said and done, if there is coverage available because that corporation is an insured party. Only that last piece is really in front of me. All of the other pieces are in front of Justice Walker in Canada, where they belong, because the issues are all issues relating to business being done in British Columbia, are the subject of both Canadian and British Columbia law, and the parties that are directly affected are in Canada, their counsel who is more familiar with the issues are in Canada. Obviously the centre of that litigation is in Canada. So, to take the last piece first, I don't think there is any question whatsoever that if this court does not have exclusive jurisdiction, and I'll discuss that in a minute, but I believe I do not have exclusive jurisdiction, whether I should abstain or not I think it's frankly, to use a colloquial phrase, a no-brainer that this court should and will discretionarily abstain from

hearing any of these matters. Let me go through -- I want to go through the factors really quickly on discretionary abstention. They arise under 28 U.S.C. §1334(c)(1) and it's a 12-point test:

- (1) the effect or lack thereof on the efficient administration of the estate,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficulty or unsettled nature of the state law,
- (4) the presence of a related proceeding commenced in a state court or a nonbankruptcy court.
- (5) the jurisdictional basis, if any, other than section 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than the form of the asserted "core" proceeding,
- (8) the feasibility of severing state law claims from the bankruptcy claims,
- (9) the burden on the court's docket,
- (10) the likelihood that the commencement of the proceeding in bankruptcy involves forum shopping, and
- (11) the existence of a right to a jury trial, and
- (12) the presence of non-debtor parties. Frankly, I think other than the right to a jury trial, I think all 12 of those favour strongly the court abstaining from this matter, and I think frankly while it certainly was not improper for XL to file what it did in the United States, XL had the right to file what they did in the United States and in this court, and this court would have at least related to jurisdiction to decide the issues before the court. Given the context and history over the last two years of what was going on in Canada, I have no doubt whatsoever in my mind that this is nothing more than forum shopping, by XL especially, and I will not countenance that whatsoever. That is the overwhelming reason for abstaining and also the efficient administration of justice begs for the issues related to these claims to be decided in the same forum. Clearly I am not going to decide anything other than, at most the coverage issue, and given the fact that all of those other issues have to be decided and will be decided by another court of competent jurisdiction, who could also decide this issue in the exercise of its competent jurisdiction, that is another overwhelming reason for the court to discretionarily abstain. As to exclusive versus nonexclusive jurisdiction, first of all the exclusive jurisdiction under 1334 is the case, i.e. if you want to file a Chapter 11 in the United States of America you come to a bankruptcy court. Everything else is nonexclusive. Section 541 talks -- and 1334 (e) references 541 and talks about the determination over property of the estate and says that the court has exclusive jurisdiction over property of the estate. I think that a narrow reading of that as a jurisdictional piece is important. Certainly if you want to sell a piece of land that is property of the estate, you need to come to this court and get my approval to sell that and I'll enter an order. If there are issues -- so say, for example,

there is an issue as to whether the debtor or his cousin is the proper person referenced in a will that is pending in probate in County Court, the issue of who that proper person is, that's not going to get exclusively referred to me. I am not going to make a decision as to how the probate court, in wherever county in Tennessee, is going to decide whether the cousin or the debtor is the proper person to receive a piece of property. I am going to -- certainly I am going to abstain and I can only abstain if I have nonexclusive jurisdiction and I think it would be -- nobody would have any doubt whatsoever that I would have nonexclusive jurisdiction and the ability to abstain in that matter. Now, it may be that the debtor would seek to remove the case to federal court and transfer it back here to Delaware and we could deal with that. The point I am raising is one of exclusive jurisdiction and I think it is a fine distinction, but one that is very important, because to rule that I have exclusive jurisdiction on cases such as this is to agree with -- Mr. Waxman who I think said that it would vastly expand this court's jurisdiction. So, to cut to the chase, I will enter an order and I'd ask counsel to circulate and submit it, a finding that the court does not have exclusive jurisdiction, but rather has non-exclusive jurisdiction, and discretionarily abstaining from all issues related to the complaint and staying the complaint pending further order of the court. When I say staying the complaint, staying the adversarial proceeding pending further order of the court. Any questions? MS. VENTRELL: I have a question. A question as to whether then there is any bankruptcy impediment of XL taking any act in connection with the policy or its proceeds, if there are -- JUDGE SONTCHI: No, and I meant to mention that. I apologize. As far as I am concerned the automatic stay is lifted, so that you can fully participate and defend your rights in the Canadian action. I don't know what you mean by so you can exercise your rights. MS. VENTRELL: Well, if we are going to take any actions with respect to the policy or the proceeds that's the question. We want to make sure that we're not -- there's no bankruptcy impediment such that if -- I mean if -- if there is no effect on the estate -- JUDGE SONTCHI: You're going to enter -- MS. VENTRELL: -- that could say apply -- JUDGE SONTCHI: You're going to enter into a settlement that impacts property of the estate and then we won't have an issue -- MS. VENTRELL: Well, that -- that's the question. JUDGE SONTCHI: -- without coming back here for approval, but -- so in other words if you reach a settlement of the matter -- yes, I think if you reach a settlement of the matter that implicates that insurance proceeds are going to be spent, yes, I think you would need to come back here for approval of the settlement, but that would be the extent of having to come back. MS. VENTRELL: And what about any other actions with respect to the policy? I mean right now we're being asked to defend. JUDGE SONTCHI: Yes. No, I think you could fully exercise those -- your rights to make that decision and to proceed accordingly. MS. VENTRELL: Okay. Thank you. JUDGE SONTCHI: The stay is definitely lifted to allow you to do that, only I think if you were going to come to a final disposition under a settlement would you need to perhaps come back to the court for a hearing. All right. Justice Walker, anything from your side? THE COURT: Thank you very much. What I will do then is after I make a determination on the liability and coverage issues, I will send you a copy of my reasons for judgment. JUDGE SONTCHI: Okay. Thank you. THE COURT: All right. Thank you very much, Judge Sontchi. I think -- JUDGE SONTCHI: Mr. Carroll, yes? MR. CARROLL: Your Honour, just a

question. One of the goals is to be able to close out the pending bankruptcy case and I'm wondering why the deck action remains to -- open and why it can't be -- JUDGE SONTCHI: It will be dismissed without prejudice. MR. CARROLL: Thank you, Your Honour. JUDGE SONTCHI: Anything else? All right. Thank you. Submit an order. We are adjourned. THE COURT: Thank you very much, Judge Sontchi. I'll ask counsel here to remain. You can disconnect the feed.

- [8] Given Judge Sontchi's decision, the injunction that I issued against XL on November 30, 2010 remains in effect. "P. Walker J."

The Honourable Mr. Justice Paul Walker

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