COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Northmont Resort Properties Ltd. v. Goldberg,* 2017 BCCA 404

Date: 20171110
Docket: CA44833

Between:

Northmont Resort Properties Ltd.

Respondent
(Plaintiff)

And

Brian Goldberg and Collette Goldberg

Appellants
(Defendants)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated September 21, 2017 (*Northmont Resort Properties Ltd. v. Goldberg*, 2017 BCSC 1680, Vancouver Registry S159447).

Oral Reasons for Judgment

Counsel for the Appellants (appeared via teleconference):	B. King
Counsel for the Respondent (appeared via teleconference):	F. Sauvageau
Place and Date of Hearing:	Vancouver, British Columbia November 10, 2017
Place and Date of Judgment:	Vancouver, British Columbia November 10, 2017

Summary:

Application to quash an appeal on the basis that the appeal is devoid of merit. The appeal was of an order striking certain defences in an amended pleading on the basis that they were an abuse of process because they should have been raised earlier in the litigation and were inconsistent with the basis on which the litigation had proceeded to date. Application granted: This Court concluded that the appeal was so devoid of merit it should be quashed.

[1] **HARRIS J.A.**: We have three applications before us. The first is an application to quash the appeal on the basis that it is so devoid of merit that to permit it to continue would be an abuse of process. The second is an application to admit new evidence. The third is an application to have the appellants declared vexatious litigants.

[2] The appeal arises out of a judgment striking the liability and contractual interpretation defences of the appellants in an Amended Response to Civil Claim ("ARCC") on the grounds that the liability defences were an abuse of process and the contractual interpretation defences were also *res judicata*.

[3] The procedural history leading to this judgment is complex, involving other litigation in this province and elsewhere. Although the judgment related to a particular action involving the appellants, it is common ground that there is privity between these parties and others in what is referred to as the Geldert Group and that this Group had effectively sponsored earlier litigation referred to as the JEKE action as a test case. Consequently, the effect of the judgment is to bind all members of the Group, but not other defendants not members of the group.

[4] I do not propose to attempt to summarize the procedural history. It is set out in detail in the reasons for judgment indexed as 2017 BCSC 1680. That judgment should be read in conjunction with this.

[5] The application to quash is responsive to the Amended Notice of Appeal which seeks an order setting aside the decision of the judge to dismiss the defences raised in the ARCCs and directing that the matters proceed to trial on issues of

liability and quantum. At the hearing of the motion, counsel for the appellants acknowledged, what he submitted he had conceded before the judge, that issues adjudicated in the JEKE action and appeal were *res judicata* and no appeal was being taken from them. His position was that the judge erred in striking defences based on alleged individual misrepresentations and a defence based on *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), the theory being that the contracts at issue in the litigation were standard form contracts which members of the Group did not understand and that inadequate direction to the contract's significant terms had been given to them when the contract was entered.

[6] As a result of this concession, it is only necessary to examine the merit of the alleged grounds of appeal as they were explained to us. The test to be applied is whether they are so devoid of merit that to permit them to go forward would amount to an abuse of process.

[7] The judgment under appeal analyzed whether the entirety of the pleaded defences was an abuse of process. It also, however, focused on the new defences, the individual misrepresentation and Tilden defences, raised for the first time by the Group in the context of this proceeding. We are, therefore, in a position to assess the merits of any appeal in relation to those matters.

[8] The starting point is that there is no dispute that the judge correctly formulated the test he had to apply in deciding whether the pleadings were an abuse of process. He noted, quoting authority, that the doctrine evokes the public interest in a fair and just trial process and the proper administration of justice. Although grounded in a specific rule, the doctrine engages the inherent power of a court to prevent the misuse of its procedure in a manner that would bring the administration of justice into disrepute. He acknowledged that the doctrine is flexible and unencumbered by specific requirements such as issue estoppel, but has been applied in circumstances that amount in essence to an attempt to relitigate a claim which has already been determined. At root, the judge's analysis was informed by his conclusion that, in light of the procedural history of the litigation between the

parties, permitting these new issues to be brought forward now would bring the administration of justice into disrepute and was inconsistent with a fair and just trial process and the proper administration of justice because the issues ought to have been raised earlier. At a minimum, the Group should have made clear that it was reserving its right to raise those issues once other issues had been adjudicated.

[9] The judge also made it clear that it was the cumulative effect of multiple circumstances that underpinned his decision. He was explicit in recognizing that any one of the factors that he took into account may, standing alone, have been insufficient to justify the result he reached. Rather he examined the totality of the circumstances. He considered the initial efforts to state a special case, while acknowledging that the order stating the special case was overturned on appeal on procedural grounds. He examined the arrangement endorsed by the Group to sponsor the JEKE action as a representative test case, focused on common issues of contract interpretation without reserving the right to advance individual misrepresentation cases and a Tilden defence later. He noted the application the defendants brought to stay all other Northmont actions because the JEKE action was a test case and also on the basis the multiple claims raised identical issues differing only on the quantum of the claim. He noted the issues taken on appeal of the JEKE case, including the alleged failure of the trial judge to consider the parties' intentions and the circumstances at the time the contract was made. He observed that the Court of Appeal treated the case as a test case resulting in many other cases being stayed pending its outcome.

[10] The judge also relied on the costs decision resulting from the JEKE trial, representations made by counsel at the so-called super conference, without reserving rights to raise individual defences later, the failure to take advantage of available and expeditious procedural mechanisms, such as a class action and the opportunity to seek clarification of the vesting order under which Northmont took the contracts in issue on the basis that they were valid and enforceable, and, finally, the timing of advancing the individual defences, which the judge concluded should have been put in issue much earlier.

[11] I have summarized this litany of topics considered by the judge to illustrate the point he made. No single factor was determinative of the result; it was the cumulative effect of multiple factors. As the judge put it at para. 74:

> Although the ability of a court to strike all or part of a claim based on abuse of process is carefully circumscribed as set out above, I find that the plaintiff has met its heavy burden of establishing that the overarching conduct over the course of this dispute has reached the requisite standard. The defendants have taken and are taking too many inconsistent positions over too long a period of time. They had a full opportunity to air out issues in a case they themselves described as a "test case". If they believed aspects needed to be held in reserve, they could and should have said so. Their last ditch effort to save themselves through these late arriving amendments is too little, too late, particularly given the weakness in these new defences. I rely on concerns about relitigation, but my concerns are broader. This Court has already found the defendants' conduct in these various interrelated matters to be highly problematic, meriting a special costs award. I conclude that we have reached a stage where continued efforts to keep the analysis of the enforceability of the VIAs alive for another round of litigation would indeed bring the administration of justice into disrepute.

[12] The order made by the judge engaged the exercise of his discretion. At its core, the order is one intended to protect the integrity and fairness of the administration of justice in the Supreme Court. Such an order is one to which this Court will defer, unless the well-known test for interfering with a discretionary order is satisfied. It is important to observe here that certain of the judge's findings underlying the exercise of his discretion involved findings rooted in the evidence about the significance of statements made, and positions taken, in the preceding litigation. A division of this Court will not lightly interfere with the judge's assessment of the factual matrix to which he applied the principles concerning an abuse of process. In short, the appellants face a significant challenge in overcoming the deference that this Court will show to an order of the kind under appeal.

[13] With this context in mind, I turn to consider the alleged errors said to demonstrate sufficient merit to the appeal to justify dismissing Northmont's application to quash.

[14] The first alleged error involves the judge's reliance on comments by counsel at the "super conference" held to determine the most expeditious way to resolve all

of the Northmont actions. At that conference, counsel for the Group was explicit that a misrepresentation claim did not form part of the defence or counterclaim in respect of individual circumstances of the members of the Group.

[15] The appellants say that there is an issue about whether such a comment should be treated as without prejudice to the rights of the clients if it is not reduced to a formal order or formal direction arising out of the conference. The appellants contend that the judge's conclusion that this comment amounted to "litigation misdirection" is unfounded.

[16] With respect, I see nothing in this alleged error. The purpose of the "super conference" was clear. It was to define the issues in an effort to determine the most expeditious way to resolve the multiple claims. In that context, counsel identified what was and was not in issue. Contrary to the appellants' submission, the judge did not conclude that the Group was bound by counsel's representation. Rather, the judge rightly observed that if it was the intention to reserve the right to raise issues later in the process, that reservation of rights should have occurred early in the process on an occasion such as this. The parties adjusted their positions in reliance on what was said at the "super conference". As the judge noted, Northmont agreed to hold all of its actions in abeyance. In my view, these facts are material to an assessment of whether an attempt to raise individualized issues later in the litigation is an abuse of process, regardless of whether the outcome of the conference was reduced to a formal order or direction. In making this point I do not intend, in any way, to comment on the legal status of "orders" or "directions" made in such a setting. In any event, this factor is only one of many contributing factors underpinning the judge's conclusion that to permit the raising of these issues at this stage would bring the administration of justice into disrepute. In my opinion, there is no prospect that a division of this Court would identify the judge's reliance on the events of the "super conference" as erroneous or capable of providing a ground to interfere with the exercise of the judge's discretion.

[17] The second ground is that it was inequitable and unfair for the judge to reach a conclusion binding all members of the group, who number in the hundreds, on the basis of the conduct of the JEKE case and counsel in that case. As I understand it, the suggestion is that the judge failed to take into account the interests of other members of the Group. Again, I see no merit in the suggestion. The judge was obviously aware of and concerned about the manner in which the litigation as a whole was conducted and the way in which members of the group acted collectively to advance their interests through the use of a "test" case, achieving individual actions being held in abeyance, and so forth. The judge was aware of the privity between particular named parties and the group in this process. Indeed, the appellants acknowledge that insofar as the JEKE case determined contract issues, each of them are bound by the result. In short, I do not think the judge overlooked the impact of the order on the interests of members of the group and, moreover, his analysis was predicated on the manner in which the group had acted collectively. Again, I see no prospect that a division of this Court would interfere with the results of the judge's analysis and the exercise of his discretion in respect of this matter.

[18] The third ground focuses on whether the judge erred in relying on the timing of the individual issues being pleaded in this action. The appellants argue that the judge focused erroneously on the fact that the amendments were advanced only after the abuse of process application had been brought and on the eve of the applications being heard. I do not read the judgment in that way. Certainly the judge was concerned about the timing of the amendments, but the fundamental underlying point is that the issues that they raise ought to have been raised much earlier in the process, at a time when decisions were being made about how to proceed to resolve the issues between the parties. In my view, that is the gravamen of the judge's reasoning, and I see no prospect that a division of this Court would treat the matter differently.

[19] Fourthly, the appellants suggest that the judge misapprehended the effect of the vesting order by which Northmont acquired the contracts through the CCAA process. The judge suggested that if there were any ambiguity about the effect of

the contracts, clarification ought to have been sought without appreciating, it is contended, that the individual contract holders have no standing in that process, or at least there was a significant question about their standing.

[20] The answer to this argument is that provision was made to provide notice to each of the contract holders in respect of the application for a vesting order. It would seem that there was no issue as to standing. The judge was not wrong to take into account the fact that there was an opportunity provided to the contract holders to put in issue in the CCAA proceedings whether Northmont would, or did, acquire the contracts free and clear of any liability issues arising when the contracts were entered into. But again, this is but one factor among many.

[21] In short, taken individually or collectively, I am of the opinion that there is no prospect that a division of the Court would rely on these alleged errors to interfere with the conclusion reached by the judge.

[22] Finally, I observe that the courts in this province have proceeded on the basis that the test case would resolve all liability issues. Certain issues, which arguably could have been put in issue, were not put in issue. For example, in the JEKE case, this Court expressly referred to the fact that the case had not been put on a standard form contract basis. The Court concluded that the judge did not err in failing to consider the parties' intentions in circumstances at the time the agreement was made as it might have done if JEKE had pleaded that the contracts were standard form contracts. It is evident that the Courts have proceeded on a certain premise that is inconsistent with the position that the appellants now seek to advance.

[23] In the result, in my opinion, the appeal is devoid of merit and the test to quash it has been satisfied. I would quash the appeal.

[24] I would not admit the new evidence, since the application can be decided without reference to it.

[25] I would dismiss the application for a vexatious litigant order on the basis that the Group's conduct in this Court has not demonstrated the necessary pattern of vexatious behaviour.

[26] **KIRKPATRICK J.A.**: I agree.

[27] **FENLON J.A.**: I agree.

[28] **KIRKPATRICK J.A.**: The order will go in the terms said by Mr. Justice Harris.

"The Honourable Mr. Justice Harris"