COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Popat v. MacLennan,*
2015 BCCA 219

Date: 20150508
Docket: CA042363

Between:

Zahir Popat and Laroche Capital Group Inc.

Appellants
(Petitioners)

And

Alistain MacLennan, Jasbinder Sanghera, Roger Kuypers and Signalchem Lifesciences Corporation

Respondents
(Respondents)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Savage

On appeal from: an order of the Supreme Court of British Columbia dated November 17, 2014 (*Popat v. MacLennan*, 2014 BCSC 2363, Vancouver Registry No. S143832)

Oral Reasons for Judgment

Counsel for the Appellants:	T.D. Goepel N.G.D. Ayling
Counsel for the Respondents: A. MacLennan, J. Sanghera, R. Kuypers	R.W. Cooper A. Crabtree
Counsel for the Respondent, Signalchem Lifesciences Corporation	G. Cameron
Place and Date of Hearing:	Vancouver, British Columbia May 8, 2015
Place and Date of Judgment:	Vancouver, British Columbia May 8, 2015

Summary:

Fresh evidence application in oppression action succeeded. Had the evidence been available in lower court, it would have granted the motion to remit petition to trial list.

[1] **NEWBURY J.A.**: We have heard today part of the appeal brought by Mr. Popat and Laroche Capital Group from the order of the chambers judge below. He dismissed the appellants' petition for an oppression remedy under the *British Columbia Corporations Act*, R.S.B.C. 1996, c. 35, after a one-day hearing. The petitioners' primary position, the chambers judge noted at para. 2 of his reasons, was that the petition could not be decided on the basis of affidavit evidence alone and that a full trial should be ordered. The judge rejected this argument, noting the possible adverse effects of delay on the respondent company and the fact that oppression actions are to be heard and decided promptly. He therefore proceeded to determine the action on the affidavits.

[2] It is fair to say the action was very dependent on the facts, and as it turned out, the facts were highly contested. I will not try to recount the facts found by the chambers judge here, but will note that he found that a share "re-allocation" carried out by the company, which had the effect of severely diluting the shareholdings of the appellants, had been based on the report of an independent or 'outside' consultant; that the re-allocation was intended to "preserve [the company] from the risk of serious damage to its interests" in the form of the threatened departure of valuable employees; and that the so-called "adjustment shares" were paid for in the form of "past services" to the company.

[3] At the hearing today, we were referred to evidence on a fresh evidence application by the appellants. This evidence has been recently disclosed by the respondents in another action, yet to be tried in the Supreme Court of British Columbia, brought by Mr. Popat against the company. The evidence was not available to the appellants at the time of the hearing.

[4] The evidences does, as Mr. Goepel has argued, bring into serious question, or at least put a different light on, some of the findings of the chambers judge, including those I have mentioned.

[5] The criteria that are considered in a fresh evidence application are well-known: *R. v. Palmer*, [1980] 1 S.C.R. 75. One of these is due diligence – about which we have heard a great deal this afternoon. It appears that there were proposed changes in counsel during the late summer and fall of 2013; and ultimately new counsel was retained, Mr. Goepel. He sought disclosure of documents before the chambers judge. Unfortunately this was not dealt with specifically by the judge. Given all we have heard, I am not persuaded there was a lack of diligence on counsel's part.

[6] The more important factor is whether the admission of the fresh evidence would bring about a different result than was reached below. I do not say at this point that the court's conclusions in the oppression action *per se* would necessarily have been different. I am persuaded, however, that in light of this evidence it was not in the interests of justice (or in the words of *Inspiration Management*, it was "not just") for the case to have been decided on the affidavit evidence alone. I do say that the result on the application to convert the petition to a notice of civil claim and send it to the trial list would have been different if counsel had been able to bring the fresh evidence to the Court's attention. It is clear that there was relevant evidence that would have given the Court a more complete picture, and that the persons who provided their affidavits should, in all fairness, have been cross-examined.

[7] Accordingly, without expressing any view as the to the merits of the oppression claim, I would allow the appeal, set aside the judge's order in its entirety, and order that there be a trial of the petition, which will stand as a notice of civil claim and that the *Rules of Court* applicable to an action shall be applicable to the petition. I would also order that the costs of this appeal be costs in the cause.

[8] **GROBERMAN J.A.**: I agree.

[9] **SAVAGE J.A.**: I agree.

"The Honourable Madam Justice Newbury"