In the Court of Appeal of Alberta

Citation: McDonald v Brookfield Asset Management Inc., 2016 ABCA 375

Date: 20161205
Docket: 1501-0131-AC
Registry: Calgary

2016 ABCA 375 (CanLII)

Between:

Lanny K. McDonald

Appellant
(Plaintiff)

- and -

Brookfield Asset Management Inc., Brookfield Special Situation Partners Ltd. and Hammerstone Corporation

Respondents
(Defendants)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J. Strekaf
Dated the 30th day of April, 2015
Filed on the 25th day of May, 2015
(2015 ABQB 281, Docket: 1401-05797)

Memorandum of Judgment

The Court:

[1] The plaintiff appeals the summary dismissal of this action: ***McDonald v Brookfield Asset Management Inc.***, 2015 ABQB 281. The action was a proposed class action on behalf of shareholders arising from a failed investment known as Birch Mountain Resources. Birch Mountain was initially thought to own a quarry with a value of $1.6 billion, but it was unable to fund its operations, and its assets were sold under receivership for less than $50 million.

Facts

[2] Birch Mountain Resources Limited was a publicly traded company focussed at the relevant time on developing a limestone quarry it had discovered in northern Alberta. At one point the quarry was valued at $1.6 billion, but Birch Mountain had trouble funding its operations from the outset. Birch Mountain eventually lost the quarry in receivership proceedings when it was unable to meet its obligations.

[3] The plaintiff McDonald was a director and shareholder of Birch Mountain. He brings this action as a potential class action on behalf of all those who held common shares of Birch Mountain between April 2005 and November 2008.

[4] The defendants Brookfield Asset Management Inc., Brookfield Special Situations Partners Ltd. (sometimes known as "Brookfield Capital Partners Ltd." or "Tricap Partners"), and Hammerstone Corporation are a part of a group of venture capital companies that attempt to identify and then invest in companies with potential, but facing business challenges. The defendants' business model is to provide financial and operating experience, as well as capital, to these companies with a view to eventual profit.

[5] The ultimate demise of Birch Mountain, and the source of this claim, can be traced to a number of financial transactions and events between 2006 and 2008:

a) Birch Mountain issued $30 million of Convertible Unsecured Subordinated Debentures in November 2006 (EKE A65). Great Pacific Capital Corp. was or became the holder of $29.28 million of those debentures.

b) In March 2007 Birch Mountain obtained a $15.5 million senior secured one year term credit facility from Brookfield Bridge Lending Fund, which was designed to bridge cash requirements pending an expected increase in sales from operations by December 2007.

c) The anticipated increase in sales did not materialize, and Birch Mountain committed events of default under the bridge loan between May and August 2007. Brookfield

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Bridge Lending agreed to waive those defaults in July, August and September 2007, on various conditions.

d) In September 2007, Birch Mountain established a special committee to explore strategic alternatives for the company.

e) In December 2007, Tricap subscribed for a $31.5 million Convertible Secured Senior Debenture (EKE A71) under the terms of a blanket Loan Agreement. The proceeds were to be used to pay off the $15.5 million bridge loan to Brookfield Bridge Lending Fund, and to provide additional capital. The Birch Mountain Directors recommended this transaction, and in May 2008 it was approved by a 94% vote of the shareholders.

f) In June and July 2008, Birch Mountain defaulted on interest payments due under the Convertible Secured Senior Debenture. Tricap and Birch Mountain entered into a Waiver and Amending Agreement in August 2008 with respect to these defaults, in return for a fee of $3 million which was funded by an increase in the principal indebtedness. This agreement waived certain existing defaults, and granted Birch Mountain a "covenant holiday" under the Loan Agreement.

g) In August 2008 the American Stock Exchange signalled an intention to delist the Birch Mountain shares because of the company's impaired financial condition, and Birch Mountain advised in a press release that it was experiencing serious financial difficulty.

h) On October 31, 2008 Tricap commenced enforcement of its security. Birch Mountain executed a waiver of the notice period, and consented to the enforcement of the security.

i) On November 3, 2008, Birch Mountain issued a press release advising that it was unable to pay its indebtedness, and that Tricap had commenced enforcement of its security. The press release noted that a receiver might be appointed, but that the receiver might not continue to operate the business of the Company.

j) An Interim Receiver and Manager was appointed by the Court on November 5, 2008. The application for a receiver was made on notice to Birch Mountain, and was not opposed by Birch Mountain or any other party.

k) At this time Great Pacific Capital Corp. was the holder of $29.28 million of the Convertible Unsecured Subordinated Debentures issued in November 2006. On November 20, 2008 Great Pacific entered into an agreement with Tricap to assign its interests to Tricap's subsidiary Hammerstone.

l) The receiver attempted to find a buyer for the Birch Mountain quarry, but was unsuccessful despite contacting approximately 146 potential purchasers. On December 17, 2008 Tricap offered to purchase all of the assets of Birch Mountain through Hammerstone for $42.4 million, through a combination of forgiveness of debt and assumption of third party claims against Birch Mountain.

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m) The receiver recommended acceptance of the Tricap offer, and the sale was approved by the Court on January 8, 2009. None of the orders granted in the receivership proceedings (including the receivership order itself and the order selling the Birch Mountain assets to Hammerstone) were appealed.

As a result of the defaults and the eventual judicial sale of the quarry to Hammerstone, the shares of Birch Mountain lost all of their value, motivating this action.

[6] Another shareholder initiated the claim in Ontario, but the action was stayed because there was no real and substantial connection to that jurisdiction: ***Bond v Brookfield Asset Management Inc.***, 2011 ONSC 2529, aff'd 2011 ONCA 730, 18 CPC (7th) 74. The claim was then continued in Alberta in this action by the new representative plaintiff. Before an application could be heard to certify it as a class proceeding, the defendants brought an application for summary dismissal.

[7] The chambers judge summarily dismissed the action, concluding that there was no substantial evidence on the record showing any "merit" to the claims (reasons, para. 25). She concluded that, to a large extent, the claim amounted to a collateral attack on the unopposed and unappealed receivership order (reasons, para. 33).

[8] The chambers judge concluded that the plaintiff class did not qualify as "complainants" for the purposes of the corporate oppression remedy (reasons, para. 45). The statement of claim alleges that the defendants were "affiliates" of Birch Mountain, because if the Convertible Secured Senior Debentures were in fact converted to common shares, the defendants would fall into the definition of "affiliate" in s. 2 of the *Business Corporations Act*, RSA 2000, c. B-9. Alternatively, the statement of claim alleged that the defendants were "affiliates" because of certain provisions of the loan agreements. If the defendants were affiliates, then the plaintiff alleged that they had conducted the business of Birch Mountain in a way that was oppressive or unfairly prejudicial to the proposed class. The chambers judge rejected the argument that the defendants were "affiliates" of Birch Mountain (reasons, para. 42). The chambers judge agreed with the Ontario decision in ***Bond v Brookfield Asset Management*** that a creditor is not to be regarded as a shareholder for the purpose of determining if two companies are affiliates prior to actual conversion of a debt instrument into shares (reasons, para. 43).

[9] The chambers judge dismissed the claim based on the "good-faith doctrine", on the basis that this claim was a part of the law of contract, the proposed class did not have any contractual relationship with the defendants, and there was no independent tort of bad faith (reasons, para. 47).

[10] The chambers judge outlined the requirements for a claim of negligent misrepresentation, as set out in cases like ***Queen v Cognos Inc.***, [1993] 1 SCR 87 at p. 110. She concluded that the "special relationship" needed to maintain this claim did not exist between a creditor and a borrower (reasons, para. 51). In any event, there was no evidence to suggest that the representations complained of were false, that they were made negligently, or that they were relied on (reasons, paras. 53-4).

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[11] The end result was that the chambers judge dismissed the claim in its entirety, because the plaintiff failed to provide any substantive evidence to support the oppression, the misrepresentation, or the bad faith claims. The plaintiff appeals, and seeks to introduce fresh evidence on appeal.

Standard of Review

[12] Questions of law, such as the interpretation of the Rules of Court and any conclusions about the applicable law arising in the summary judgment application are reviewed for correctness. The chambers judge's assessment of the facts based on the record before the court, the application of the law to those facts, and the ultimate determination on whether summary judgment is appropriate are all reviewed for palpable and overriding error: ***Hryniak v Mauldin***, 2014 SCC 7 at paras. 81-4, [2014] 1 SCR 87; ***Amack v Wishewan***, 2015 ABCA 147 at para. 27, 24 Alta LR (6th) 44; ***Windsor v Canadian Pacific Railway Ltd.***, 2014 ABCA 108 at para. 10, 94 Alta LR (5th) 301, 572 AR 317.

The Test for Summary Dismissal

[13] Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

[14] Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial, which comes down to whether the chambers judge is able to reach a fair and just determination on the merits on the application for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. The summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: ***Hryniak v Mauldin*** at paras. 4, 5, 49; ***Amack v Wishewan*** at para. 26; ***Windsor v Canadian Pacific Railway*** at para. 13.

The State of the Record

[15] A plaintiff who is responding to a summary dismissal application cannot just rely on the contents of the pleadings, or speculation about what might be proved at trial. The respondent must "put its best foot forward" and meet the application for summary dismissal with evidence showing merit:

> A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future: ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 19, [2008] 1 SCR 372.

This action was dismissed primarily because the plaintiff failed to provide any substantive evidence showing merit.

[16] The defendants applied for summary dismissal based on a detailed affidavit rebutting and denying all of the allegations made. The only evidence the plaintiff brought to the summary dismissal application was an affidavit of David Johnson, a consultant working with the plaintiff's counsel; neither the named plaintiff nor any member of the proposed class provided any evidence. Johnson had no personal involvement with or personal knowledge about the events underlying the claim. His affidavit primarily identified, and attached as exhibits, a large number of publicly available documents relating to the business and financing of Birch Mountain. The defendants accurately describe it as a "secretarial affidavit" that "occasionally makes bald unsupported assertions about [their] motives and supposed wrongdoing". The chambers judge concluded that the affidavit and the attached documents, on their face, did not show any possible merit to the claim.

[17] The chambers judge's assessment of the plaintiff's evidence was:

> 24 . . . Mr. Johnson had no involvement with Birch Mountain until he was retained in the fall of 2010 to prepare a report based upon his review of various documents. He was not presented or qualified as an expert. His affidavit consists entirely of hearsay and his non-expert interpretation of various documents. It is of little or no evidentiary value. . . .

The plaintiff argues that this passage discloses reviewable error, because a respondent to a summary dismissal application can rely on hearsay. He cites R. 13.18(3), which provides that hearsay evidence can be used when the relief requested is not "final", and ***Court v Debaie***, 2012 ABQB 640 at para. 34, 550 AR 231.

[18] It is, however, too narrow a reading of the reasons to conclude that the only objection to the evidence was its hearsay nature. The chambers judge's overall assessment of the evidence was that it had no probative value for many reasons, including the fact that it deserved little weight because it was all hearsay: ***Murphy Oil Co. v Predator Corp.***, 2006 ABCA 69 at paras. 38-40, 55 Alta LR (4th) 1, 384 AR 251. For example, a contract exhibited to the affidavit would show that there was a contract, but would not show any breach. Other documents may have shown representations, but

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they would not show that those representations were inaccurate, were negligently made, were relied on, or that any reliance was reasonable. Merely appending these documents to the affidavit did not show any merit to the claims set out in the statement of claim. The affidavit purports to provide opinions and draw conclusions on issues of business management, banking and finance, public investment, accounting, and law, and speculates imaginatively on the motives and intentions of the defendants. As noted, Mr. Johnson was not qualified as an expert witness, and it is unlikely that he is a mind reader. The chambers judge did not err in attributing "little or no evidentiary value" to this affidavit.

[19] The plaintiff sought to overcome this evidentiary deficiency by applying to introduce fresh evidence on appeal in the form of an affidavit of the named plaintiff. The test for introducing fresh evidence originates in ***Palmer v The Queen***, [1980] 1 SCR 759 and has been applied in civil cases like ***Xerex Exploration Ltd. v Petro-Canada***, 2005 ABCA 224 at paras. 116-117, 367 AR 201:

a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial,

b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,

c) The evidence must be credible in the sense that it is reasonably capable of belief, and

d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

It is immediately apparent that the tendered affidavit of the plaintiff does not meet the first part of the test, because there is no reason why he could not have sworn an affidavit before the original application.

[20] The plaintiff argues that the substantive parts of the new evidence could not be produced at the application, even with due diligence, because some of it has only recently been discovered. The plaintiff deposes that the widow of Mr. Rowe, a former president of Birch Mountain, provided a computer hard drive to the plaintiff in June 2014. The plaintiff deposes that it took two months to obtain a computer that could read the hard drive, and a full 14 months to download all the documents. The summary dismissal application was argued on October 9, 2014, and the defendants' objections to the insufficiency of the record would have been well known at that time. The reserved decision was released on April 30, 2015, suggesting that there was ample time to supplement the record, or at least advise the chambers judge that further critical evidence was being uncovered during the downloading from the hard drive.

[21] The absence of due diligence on the part of the plaintiff is significant in a summary dismissal application. As was pointed out in ***Lameman***, it undermines the rationale of the summary judgment rule if the plaintiff can ignore the obligation to produce evidence of merit

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before the trial court, and then rely on a fresh evidence application on appeal to defeat summary dismissal.

[22] The plaintiff Bond in the Ontario case apparently had sufficient particulars to commence her action advancing the same claims. The present plaintiff's counsel had drafted a lengthy, detailed statement of claim in September 2010, and turned it into a 69 page (168 paragraph) amended statement of claim by May 2014. The causes of action now being advanced, and many of the particulars, were known by then, and there was no reason why the named plaintiff could not have sworn an affidavit deposing to any merit in the claim. Counsel for the plaintiff advised the chambers judge (reasons, para. 25) that the plaintiff "would provide evidence in due course"; this is directly contrary to the rule in ***Lameman***. The hard drive from the Rowe estate may have provided more evidence, but the appellant only had to introduce enough evidence to show an issue requiring a trial. As previously noted the respondent to a summary dismissal application does not have to prove the case on a balance of probabilities. Given the amount of detail in the statement of claim, it is difficult to believe that the plaintiff was not able to depose to any merit prior to the summary dismissal application being argued.

[23] In addition to the absence of due diligence, the tendered new evidence cannot reasonably be thought to affect the outcome, as will be seen from the balance of these reasons.

The "Merit" of the Action

[24] The plaintiff proposes to advance three causes of action on behalf of the class of shareholders:

a) negligent misrepresentation,

b) oppressive conduct in the operation of the business of Birch Mountain, and

c) what is described as "the good faith doctrine".

The ultimate issue on the summary dismissal application was whether the plaintiff had shown sufficient "merit" in these claims to send the matter to trial. Put another way, was the state of the record such that the chambers judge could reach a fair and just determination on the merits on the motion for summary judgment. An analysis shows that the chambers judge correctly concluded that there is no merit shown on this record to any of these claims.

Negligent Misrepresentation

[25] The plaintiff acknowledges five essential components of a claim of negligent misrepresentation:

(a) a duty of care based on a special relationship,

(b) misrepresentations that were untrue, inaccurate or misleading,

(c) negligence in making the misrepresentations,

(d) detrimental reliance, and

(e) resulting damage.

The weight of the case law suggests that creditors are not generally in a special relationship with borrowers giving rise to a duty of care: ***Canada Trustco Mortgage Co. v Pierce Estate*** (2005), 254 DLR (4th) 79 at paras. 26-7, 197 OAC 369 (CA); ***CareVest Capital Inc. v Chychrun***, 2008 BCSC 201 at para. 17, 55 CCLT (3d) 75. The shareholder class has an even more remote connection to the defendant lenders than Birch Mountain, the principal debtor. It is, however, not necessary to resolve whether the defendants, as financiers of Birch Mountain, owed any duty to the class of shareholders of that corporation, as the proposed negligent misrepresentation claim fails to meet several of the other requirements.

[26] The amended statement of claim pleads a number of discrete misrepresentations. The chambers judge summarized at para. 52 the misrepresentations complained of:

a) A statement on the Brookfield website that Tricap has a "long term perspective", that it "targets transactions in which it can invest between $50 million and $500 million", and that it "has a 3 to 7 year investment horizon".

b) Various press releases stating that Tricap was established to provide a "source of patient, long term capital and strategic assistance to mid-market companies".

All of the alleged misrepresentations are related to the Brookfield group's stated corporate philosophy, and were said to be made on its public website. They disclosed that Brookfield's business model was to provide "strategic assistance" to companies with potential but experiencing financial or operational difficulties, and to provide the necessary operational and financial assistance to turn them around. It is clear that these alleged misrepresentations were known well before the fresh evidence was received from the Rowe estate.

[27] In December 2007 Tricap and Birch Mountain both issued press releases, on the issuance of the Senior Secured Convertible Debenture, which noted that Tricap's business model was to be a "source of patient, long term capital". The Loan Agreement allowed Tricap to review (acting reasonably) any public disclosures relating to "this Agreement or the Credit Facilities". The plaintiff argues that this provides some link between the representations about Tricap's business model and the business of Birch Mountain. There is, however, no evidence that any press release was inaccurate, or negligently prepared, or that any member of the shareholder class reasonably relied on one.

[28] The plaintiff's essential complaint is that the defendants arguably did not follow their own corporate philosophy and guidelines in their investment in Birch Mountain. Firstly, the plaintiff notes that Brookfield only invested about $35 million in Birch Mountain, below its target threshold

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of $50 million. Further, when the loans went into default the defendants commenced enforcement proceedings before their own 3 to 7 year investment horizon had been reached. The plaintiff alleges that "long term patient capital" would have waited longer. The argument is therefore not that the representations were inaccurate when made, but that with hindsight the defendants' corporate objectives were not achieved.

[29] It is clear that there is no "merit" to the allegations that these general statements of corporate philosophy could support a claim in negligent misrepresentation, either in their original form on the defendants' website, or as repeated in the press releases:

- There is no evidence that these statements are in any respect inaccurate. There is no evidence that Brookfield's corporate philosophy was other than as stated.

- There is likewise no evidence that the statements are in any respects "negligent". There is no evidence that someone at Brookfield negligently set out the corporate philosophy on the website.

- There is no evidence that any class member relied on the representations prior to making an investment in Birch Mountain.

- There is, in any event, no evidence that any class member relied on the particular interpretation of the representations alleged by the plaintiff. In other words, no class member has deposed that he or she thought Brookfield would unconditionally keep investing money until it reached the $50 million threshold. There is no evidence that any class member thought that Brookfield would not enforce its lending agreements, notwithstanding any defaults, for at least three years.

- Finally, and conclusively, if any class member did purport to rely on this latter interpretation of the representations, such reliance would be patently unreasonable. It would be unreasonable for any investor to rely on a general statement of corporate philosophy as if it was a guarantee that no less than $50 million would be invested for no shorter than a three year period, notwithstanding any defaults, and no matter what happened with the investment along the way.

When considered holistically and in context, it is clear that the claim based on negligent misrepresentation has no merit.

Oppressive Conduct

[30] The plaintiff alleges oppressive conduct in the operation of Birch Mountain's business. The underlying theory is that the defendants lent money to Birch Mountain as part of a long term scheme to obtain the limestone quarry, which had been valued at $1.6 billion, for a fraction of that value. The theory is that the defendants instigated or participated in a number of transactions that

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had little or no legitimate business purpose, and were designed to unjustly transfer the value of the limestone quarry to the defendants.

[31] Many of the plaintiff's complaints relate to transactions that allegedly damaged Birch Mountain. Any claim for damages arising from those transactions would properly belong to the corporation, not the shareholders; the shareholders could only apply to advance a derivative claim.

[32] Secondly, many of the complaints involve a collateral attack on the orders made in the receivership proceedings:

(a) An allegation that is inconsistent with one of the fundamental or necessary findings of an order amounts to a collateral attack; it is not necessary that there be an application to set aside the order: ***574095 Alberta Ltd. v Hamilton Brothers Exploration Co.***, 2003 ABCA 34 at paras. 47, 52, 10 Alta LR (4th) 23, 320 AR 351; ***Ernst and Young Inc. v Central Guaranty Trust Co.***, 2006 ABCA 337 at paras. 47-51, 66 Alta LR (4th) 231, 397 AR 225.

(b) Any argument that there were in fact no genuine defaults of the loan agreements, or that the loan agreements were somehow unenforceable or breached by the defendants would be inconsistent with the orders made during the receivership.

(c) Further, the plaintiff alleges that the affidavits provided in support of the receivership order were "misleading", and that material information was withheld from the Court. It must be remembered that the application for the receivership order was not *ex parte*; it was on notice, unopposed, and unappealed. Any allegation that the receivership order was improperly obtained is a clear collateral attack on that order.

(d) Likewise, it is alleged that the affidavits in support of the eventual sale of the Birch Mountain assets to Hammerstone were incomplete, or inaccurate, or failed to disclose some information. These arguments all amount to collateral attacks on the unappealed sale order.

To the extent that the claim for an oppression remedy relies on any of these arguments, the claim is barred by the rule against collateral attacks on final orders of the Court.

[33] The plaintiff relies on the anomalous decision in ***Royal Bank of Canada v W. Got & Associates Electric Ltd.***, [1999] 3 SCR 408. That case is distinguishable, because the claim for damages was advanced in a counterclaim in the receivership action itself. The effect of the decision was that the *in rem* portion of the action represented by the receivership order was allowed to proceed, while the *in personam* claim for damages was preserved: ***David M. Gottlieb Professional Corp. v Nahal***, 2012 ABCA 88 at para. 19, 522 AR 25.

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[34] In any event, the record does not support the plaintiff's overall theory that the defendants were engaged in a scheme to obtain the quarry below its actual value. There were at least three occasions when the defendants made decisions which were inconsistent with any such plan:

(a) Brookfield Bridge Lending agreed to waive defaults under the bridge loan in July, August and September 2007.

(b) In December 2007, Tricap subscribed for the $31.5 million Convertible Secured Senior Debenture to pay off the $15.5 million bridge loan to Brookfield Bridge Lending Fund which was in default.

(c) In August 2008 Tricap agreed to waive defaults under the Convertible Secured Senior Debenture.

If the defendants were engaged in a long term plan to obtain the quarry, they let it slip through their fingers on at least these three occasions. Rather than waiving defaults, or providing additional funds to cure defaults, the defendants could have commenced enforcement of their security. Their conduct in attempting to keep Birch Mountain going is inconsistent with the plaintiff's thesis.

[35] Most, if not all, of the oppression claim depends on the plaintiff class demonstrating that the defendants and Birch Mountain were "affiliates". That involves showing that the defendants were deemed by statute to have a controlling interest in Birch Mountain by reason of the convertible debt they held, even though the debt had not been converted into shares. The argument then picks up the definition of oppressive conduct in s. 242(2) of the *Act*, that the "corporation or any of its affiliates" conducted the business of the corporation (i.e., Birch Mountain) in an oppressive way. The shareholder class argues that the financial decisions that the defendants (as "affiliates") made respecting their dealings with Birch Mountain actually amounted to "conducting the business of Birch Mountain", not conducting the defendants' own business.

[36] The *Act* defines "affiliate" as follows:

> 2(1) For the purposes of this Act,
>
> (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and
>
> (b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.
>
> (2) For the purposes of this Act, a body corporate is controlled by a person if
>
> (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are

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held, other than by way of security only, by or for the benefit of that person, and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

When affiliation is said to arise as a result of "control" there is a two part test: holding 50% of the votes plus the ability to elect a majority of the directors.

[37] A person holding unexercised rights to convert securities into voting shares has no votes, much less 50% of the votes. Such a person does not have the ability to elect a majority of the directors. Absent "control" as defined in the statute, there is no affiliation. The *Act* does not contemplate any sort of *de facto* "control" apart from that specifically defined in s. 2.

[38] For the reasons given by the chambers judge (*supra*, para. 8) and by the Ontario courts in ***Bond v Brookfield Asset Management***, the members of the proposed class do not qualify as "complainants" for the purposes of advancing the pleaded oppression claim. A lender holding a convertible debt instrument does not obtain voting rights until the conversion option is actually exercised. Accordingly, Birch Mountain and the defendants were not "affiliates" under the *Act*. Whether companies are affiliates for the purposes of the oppression remedy depends on the definitions in the statute, not the terms of the loan agreements between them.

[39] On behalf of the class, the plaintiff alleges oppressive conduct arising from a number of discrete transactions: the "contrived interest default", "death spiral stock trading", the terms of the Tricap Amending Agreement, and the Great Pacific transaction. Even if the members of the proposed class qualified as complainants, the record does not disclose any merit to these claims.

The "Contrived Interest Default"

[40] The factual context relates to the South Haul Road that was built to access the Birch Mountain quarry. The South Haul Road was built by Birch Mountain, but it was entitled to receive proceeds (approximately $4.8 million) from some of the major oil companies that had acquired an interest in the road.

[41] Birch Mountain wanted to use the South Haul Road proceeds as part of its general cash flow. The original Loan Agreement did not deal with these funds other than as part of "all present and after acquired personal property" of Birch Mountain. The August 2008 Waiver and Amending Agreement (EKE R287), however, specifically dealt with the issue. It provided that the South Haul Road proceeds would be held in escrow, but they could be released to pay pre-approved expenditures, on certain conditions, one being that Birch Mountain was not in default under the Loan Agreement.

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[42] Interest was payable by Birch Mountain on the Convertible Unsecured Subordinated Debentures. The failure to pay that interest would adversely affect Birch Mountain's financial reputation in the public markets, and likely be deemed a further default under the Tricap financing as well. Birch Mountain did not have funds available to pay that interest, but Tricap consented to the interest being paid out of a new issue of equity. Birch Mountain wanted to pay the interest out of the South Haul Road funds, but Tricap would not agree. Tricap took the position that it would not agree to payments to junior creditors while there were any defaults under the senior debt. In the end, Tricap's position prevailed, which was one of the events that led to Birch Mountain's eventual receivership.

[43] The plaintiff alleges that Birch Mountain's default in paying the interest was "contrived". He alleges that under a proper interpretation of the Loan Agreement, the South Haul Road cost recovery was not within the category of funds that had to be paid to Tricap. Thus, the plaintiff alleges that any default was "contrived" because of conduct of the defendants in refusing to acknowledge that the South Haul Road proceeds were freely available to Birch Mountain to pay the interest on the Debentures. The obvious barrier to this argument is that it is inconsistent with the uncontested and unappealed receivership order. That order found that the Tricap Loan Agreement was valid and enforceable, and implicitly held that there were no defaults by Tricap precluding enforcement. Any inconsistent argument is a collateral attack on the receivership order.

[44] Secondly, this argument ignores the detailed covenants in the Waiver and Amending Agreement that specifically dealt with the use of the proceeds of the South Haul Road. Whatever the status of the South Haul Road proceeds under the general wording of the Loan Agreement, the specific terms of the later Waiver and Amending Agreement would prevail.

[45] In addition, the position taken by the plaintiff is inconsistent with that taken by Birch Mountain at the time. The officers of Birch Mountain essentially conceded that Tricap was entitled to control the South Haul Road proceeds; the efforts of the officers were to obtain Tricap's consent to the use of these funds to pay the interest, not to convince it that it was not entitled to control the funds in the first place. Tricap was entitled to assert its claim to the proceeds of the South Haul Road. When Birch Mountain acquiesced in or conceded that claim it effectively conceded any argument it might have had about entitlement. Tricap's ultimate success in advancing its position does not generate any actionable claim against it, and it certainly does not fall under the definition of "oppressive" conduct.

[46] There is no merit to the claim that there was an artificial default, nor that it was generated by any actionable misconduct of the defendants. Any lingering doubt terminated when the receivership order confirmed the enforceability of the Tricap Loan Agreement. The chambers judge correctly determined that there is no merit to this claim.

"Death Spiral Stock Trading"

[47] The price of the Birch Mountain common shares collapsed between 2006 and 2008. Given Birch Mountain's financial circumstances, and the eventual delisting of its shares, this is hardly surprising. There was evidence that short selling contributed to the collapse. The statement of claim alleged that the defendants were responsible for this decline, as part of the scheme to obtain the Birch Mountain quarry at below its real value. The defendants deposed that they had never owned any Birch Mountain shares, they never engaged in trading in the shares, and they therefore had nothing to do with the collapse of the share price. The chambers judge correctly noted that this evidence was uncontradicted, and there was no merit shown to this portion of the claim (reasons, para. 57).

The Tricap Amending Agreement

[48] In June and July 2008, Birch Mountain defaulted on interest payments due under the $31.5 million Convertible Secured Senior Debenture granted to Tricap to pay out the bridge loan to Brookfield Bridge Lending Fund (which at the time was in default), and to provide further capital for Birch Mountain. Rather than commencing enforcement proceedings, in August 2008 Tricap entered into a Waiver and Amending Agreement with Birch Mountain with respect to these defaults.

[49] The consideration paid by Birch Mountain for the waiver of the default was significant: a fee of $3 million, an increase in the interest rate, more favourable terms and price on the conversion option, and other amendments to the terms of the loan. The plaintiff argues that these terms were so onerous as to be "oppressive".

[50] This argument is one premised on Tricap and Birch Mountain being "affiliates". The argument is that by imposing such strict terms the "corporation or any of its affiliates" conducted the affairs of Birch Mountain in a manner that was unfairly prejudicial to or unfairly disregarded the interest of the shareholders (to paraphrase s. 242(2) of the *Act*). As previously noted (*supra*, para. 38) the two companies are not affiliates, which is fatal to this argument.

[51] As to the substance of the allegation, Birch Mountain agreed to the terms of the Acknowledgment, Waiver and Amending Agreement. There was no evidence that its agreement was anything other than voluntary. At this point Birch Mountain and Tricap were doing business on an arms-length basis. The officers of Birch Mountain obviously faced a difficult choice: they could default on the Debenture or accept the terms offered by Tricap. A creditor negotiating with a debtor in default might well impose strict terms, but such a transaction does not amount to "conducting the affairs of the borrower corporation"; the lender is conducting its own affairs, not the affairs of the borrower.

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[52] It cannot be argued that the terms of the loan were so unreasonable as to be unconscionable; that argument would be a further collateral attack on the receivership order. There is no expert evidence tendered to show what type of terms a lender might ordinarily extend to a borrower in default. All things considered, the chambers judge correctly determined that there was no merit to this argument.

The Great Pacific Capital Transaction

[53] Great Pacific Capital Corp. was controlled by James Pattison, who was at the relevant time a director of Brookfield. Great Pacific was the holder of $29.28 million of the Convertible Unsecured Subordinated Debentures issued by Birch Mountain in November 2006. This appears to be close to 100% of the debentures actually issued. In September 2008 Birch Mountain arranged a private and confidential tour of the quarry by a number of potential investors, including Pattison. The plaintiff vaguely hints that Pattison's participation in this tour was somehow nefarious or ominous, but there is nothing on this record to indicate that it was anything more than an earnest attempt by the officers of Birch Mountain to access more capital.

[54] The granting of the receivership order would obviously cause all the creditors of Birch Mountain to consider the status of their debts, and the options open to them. On November 20, 2008, two weeks after the receivership order was granted, Great Pacific entered into an agreement with Tricap to assign its interests to Hammerstone, a wholly owned subsidiary of Tricap. In exchange for the assignment, Great Pacific acquired the option to obtain either:

(a) 30% of the Senior Secured Convertible Debenture owned by Tricap (see *supra*, para. 4(e)), or

(b) 30% of the shares in Hammerstone, if Hammerstone ended up acquiring Birch Mountain's assets through the receivership process.

The option was open for three years. The option price, payable on exercise of the option, was $11.8 million in the first year, increasing through a formula by 25% for each subsequent year. In substance, on payment of the formula option price Great Pacific:

(a) under the first option, would effectively trade Unsecured Subordinated debt for Senior Secured Convertible debt, or

(b) under the second option, would have a right to purchase 30% of the equity in the Birch Mountain assets, but only if Hammerstone was successful in acquiring those assets through the receivership.

The advantage for Tricap, in addition to receiving the option price, was that it gave Tricap greater control and flexibility in the enforcement of its own debts. Tricap's acquisition of the Convertible

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Unsecured Subordinated Debentures was publicly reported, but the details of the consideration obtained by Great Pacific were not.

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[55] The plaintiff raises a number of issues with respect to the Great Pacific transaction:

(a) The parties "dealt without restriction with a Birch Mountain asset". This categorization is inaccurate, because the parties dealt only with their own assets, namely the various debentures and loans and the shares of Hammerstone. To the extent that Birch Mountain assets were indirectly involved, they were not dealt with "without restriction" because the receivership was under the supervision of the Court.

(b) The transaction is said to have breached insider trading rules, or material change rules, or was not properly disclosed to the public as required. A "cover-up" of the transaction is alleged, but that depends on demonstrating that further disclosure was required by law. Securities regulation is a highly technical area, and no particulars are given of these alleged breaches. At the time of this transaction the common shares had been delisted, and the receivership order granted, which further complicates the situation. In any event, the remedies lie with the regulatory agencies that oversee the securities industry.

(c) The transaction is said to allow Great Pacific to either convert the nature of its debt, or obtain an equity interest in the underlying assets. This merely describes the effect of the transaction, and does not disclose any actionable wrong.

(d) The transaction granted Great Pacific and Pattison preferences and advantages not available to other debenture holders and common shareholders. Great Pacific appears to have owned nearly 100% of the issued Unsecured Subordinated Debentures; there were no other debenture holders left behind. Even if there were, the shareholder class has no standing to pursue any claim they may have. Since none of the shareholders owned any of the debentures, there was no reason why they would be extended any of the rights obtained by Great Pacific in the transaction.

(e) Great Pacific was granted a "preference" over other unsecured creditors. Great Pacific did not receive any preference through this transaction. It merely exchanged its debt interests for other contractual rights. The obligations of Birch Mountain under the Subordinated Debentures were unchanged, and the rights obtained by the transferee Hammerstone were in no way enhanced.

Efforts of Tricap and Great Pacific to reorganize and coordinate their interests in Birch Mountain after the receivership order was granted were to be expected. Once insolvency proceedings commence, the priority of obligations becomes critical: the secured debt would rank ahead of the unsecured debt, and both would rank ahead of the equity position of the shareholders. In the face of the receivership there was nothing "oppressive" about the efforts of the various creditors to consolidate or improve their position.

Summary

[56] In summary, the chambers judge correctly concluded that there was no merit to the proposed claim of corporate oppression. With respect to the bulk of the allegations, the claim fails because the defendants were not "affiliates" of Birch Mountain, an assumption which underlies much of the argument. Many of the allegations represent a collateral attack on the receivership orders. On this record, the various identified transactions were shown to be legitimate business transactions that did not amount to "oppression". This portion of the claim was properly summarily dismissed. Whether a lender might in some circumstances be liable to a borrower in tort, contract or on another basis can be left for another day.

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"The Good Faith Doctrine"

[57] The plaintiff proposes to rely on what is described as "the good faith doctrine". The simple answer to this proposed claim is that there is no such freestanding cause of action, and the good faith doctrine is only a "general organizing principle of the common law of contract". The applicable cause of action is "breach of contract". In ***Bhasin v Hrynew***, 2014 SCC 71, [2014] 3 SCR 494 the Supreme Court of Canada concluded that contracting parties have a general obligation to perform their obligations under a contract honestly. The circumstances in which this doctrine will come into play are rare, but it will never come into play absent a contract. If there is no contract, there are no contractual obligations to perform. If there is nothing to perform, it cannot be performed in bad faith.

[58] The defendants depose that they have never entered into contracts with any of the members of the proposed class. This evidence is uncontradicted, even if the proposed fresh evidence is considered. If there are no contracts, there can be no breach of contract, nor any application of the related "honest performance doctrine" relating to the performance of contracts. This portion of the claim was properly summarily dismissed.

[59] It is possible that the plaintiff class intended to assert that the defendants did not perform in good faith contracts the defendants had with Birch Mountain. That would be a claim in the hands of the corporation Birch Mountain, not the shareholders. The assertion of that claim would also amount to a collateral attack on the receivership orders. It is potentially inconsistent with the "whole agreement" clauses in the lending agreements. Many of the specific allegations overlap, in any event, with the asserted examples of oppressive conduct. If this was the claim being asserted by the class of shareholders, it too has no merit.

Conclusion

[60] In conclusion, the chambers judge correctly concluded that there was no merit to the proposed claim, and the Court could reach a fair and just determination on the merits on the motion for summary judgment. The claim fails because the appellant failed to adduce sufficient evidence

of oppressive conduct, misrepresentations or bad faith on the part of the defendants. The application to admit fresh evidence and the appeal are both dismissed.

Appeal heard on June 15, 2016

Memorandum filed at Calgary, Alberta
this 5th day of December, 2016

Fraser C.J.A.

Slatter J.A.

O'Ferrall J.A.

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Appearances:

J.W. McDonald
for the Appellant

H. Gorman, Q.C. and A. Badami
for the Respondents

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