Court of Queen's Bench of Alberta

Citation: McDonald v Brookfield Asset Management Inc, 2015 ABQB 281

Date:
Docket: 1401 05797
Registry: Calgary

Between:

Lanny K. McDonald

Plaintiff

- and -

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

Defendants

Reasons for Judgment
of the
Honourable Madam Justice J. Strekaf

I Introduction

[1] This claim involves a putative class action in which the proposed representative Plaintiff, Lanny K. McDonald, seeks to bring an action for oppression, breach of good faith and negligent misrepresentation on behalf of all primary and secondary market purchasers who held common shares in Birch Mountain Resources Limited ("Birch Mountain") between April 1, 2005 and November 5, 2008. Mr. McDonald is a shareholder and was a director of Birch Mountain from the time it was incorporated in 1995 until 2009.

[2] The Defendants are Brookfield Asset Management Inc. (known as "Tricap"), its parent Brookfield Capital Partners Ltd. ("Brookfield Capital") and its wholly-owned subsidiary Hammerstone Corporation (previously known as 149342 Alberta Ltd and referred to herein as "Hammerstone").

[3] This is an application by the Defendants to have the claim struck and/or for summary dismissal on the basis that the claim has no merit.

[4] The claim alleges that Birch Mountain discovered a major limestone deposit on its oil sands properties in 2002 which was valued in August 2006 at $1.6 billion and that Brookfield Capital, Tricap and Hammerstone engaged in oppressive conduct which included death spiral

stock trading that caused the price of Birch Mountain shares on the TSX to collapse from $7.99 on May 25, 2006 to $0.01 on November 5, 2008, as well as a contrived interest default and contrived receivership which culminated in Hammerstone acquiring Birch Mountain for less than $50 million. It is alleged that the Defendants breached duties of good faith owed to Birch Mountain and made negligent representations regarding the extent of their commitment to Birch Mountain. The claim alleges that Birch Mountain is an affiliate of the Defendants and that the members of the proposed class qualify as a "complainant" for the purpose of bringing an oppression action under the *Alberta Business Corporations Act,* RSA 2000, c B-9 (the "ABCA") to recover damages for oppressive conduct and breach of their reasonable shareholder expectations.

[5] The Defendants submit that the essence of the action is a collateral attack on orders granted in the receivership proceedings which were not appealed and that judicial acts are not actionable. They further submit that the action is *res judicata* and barred by cause of action estoppel as the current objections could have been put forward in the course of the receivership proceeding and as an Ontario Court already has determined that members of the proposed class do not have standing to bring the action under the similar oppressions provisions in the *Ontario Business Corporations Act,* RSO 1990, c B-16 (the "OBCA"). They deny that any negligent representations were made or that any duties of good faith were owed or breached.

II Facts

[6] Birch Mountain was incorporated in 1995 and was a publicly-traded company that had focused since 2003 on developing a limestone quarry in the Athabasca region of northern Alberta. Birch Mountain had obtained a valuation of its limestone deposits at a pre-tax net present value of $1.6 billion in 2006; however, it sustained operating losses from the outset.

[7] On November 20, 2006 Birch Mountain issued $30 million of 6.0% Convertible Unsecured Subordinated Debentures.

[8] On March 30, 2007, Birch Mountain obtained a $15.5 million senior secured one-year term credit facility from Brookfield Bridge Lending Fund Inc. ("Brookfield Bridge Lending") to bridge an expected increase in sales from operations estimated at 5.9 million tonnes from April through December 2007.

[9] Sales during the period were only 750,000 tonnes and Birch Mountain committed several events of default between May and August 2007. Brookfield Bridge Lending agreed to waive events of default for the months ending July 31, 2007, August 31, 2007 and September 30, 2007 subject to the conditions set out in waiver letters dated September 27, 2007 and November 14, 2007.

[10] On September 20, 2007, Birch Mountain issued a press release advising that it had established a special committee of its Board of Directors to explore strategic alternatives to enhance shareholder value, including a joint venture, merger, sale of the company or other corporate transactions and had appointed RBC Financial Markets as financial advisor.

[11] On December 21, 2007, Tricap subscribed for a Convertible Secured Senior Debenture in the principal amount of $31.5 million to enable Birch Mountain to repay the bridge loan and to provide additional capital. The Loan Agreement of the same date included an "entire agreement" clause. The Birch Mountain Board of Directors approved the Debenture and recommended to the

Birch Mountain shareholders that they do so, which resolution was approved by 94% of the shareholders at the May 30, 2008 meeting.

[12] In June and July 2008, Birch Mountain defaulted on interest payments due under the Debenture. Tricap and Birch Mountain entered into a Waiver and Amending Agreement dated August 1, 2008 for a fee of $3 million by way of an increase to the principal indebtedness.

[13] Birch Mountain issued a Press Release on August 14, 2008 stating that it had been advised that the American Stock Exchange intended to delist its shares because "the Company had sustained losses that are so substantial in relation to its overall operations, or its financial condition has become so impaired, that it appeared questionable as to whether the Company would be able to continue its operations and/or meet its obligations as they mature". In a Press Release issued on August 27, 2008 Birch Mountain advised that it was experiencing "serious financial difficulty" and provided details of the Waiver and Amending Agreement.

[14] Tricap delivered a demand for repayment and Notice of Intention to enforce its security on October 31, 2008 pursuant to s. 244 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "BIA"). Birch Mountain executed a waiver of the notice period and consented to enforcement of Tricap's security.

[15] On November 3, 2008, Birch Mountain issued a Press Release stating that it had received a demand from Tricap to enforce its security and that it was unable to pay its indebtedness to Tricap at that time. The Press Release went on to state:

> It is expected that Tricap will begin enforcement proceedings this week. Whether or not a receiver will be appointed and whether or not such a receiver would continue the business operations of the Corporation is not known. ... At this time there appears to be little likelihood that there will be any recovery by the shareholders in the event of a liquidation or sale of the Corporation's assets. Upon appointment of a receiver, the powers of the board of directors will be suspended and ongoing decisions related to the Corporation will be undertaken by the receiver.

[16] On November 4, 2008, Tricap commenced action #0801-13706 in the Court of Queen's Bench of Alberta against Birch Mountain to appoint a receiver. On November 5, 2008, Justice LoVecchio appointed Pricewaterhouse Coopers Inc. as Interim Receiver and Manager of Birch Mountain, the application having been on notice to Birch Mountain and unopposed by it or any other party.

[17] On November 28, 2008, Tricap entered into an Assignment and Option Agreement whereby Great Pacific Capital Corp., the holder of $29.28 million of the Convertible Unsecured Debentures, assigned its interest to 1439442 Alberta Ltd (now Hammerstone).

[18] On December 17, 2008, Tricap offered to purchase all the assets of Birch Mountain for approximately $42.4 million through a combination of forgiveness of debt and the assumption of certain third party claims against Birch Mountain.

[19] The Receiver filed a report recommending acceptance of the Tricap offer and applied to the Court for an order approving the offer. That application was heard and granted on January 8, 2009 at which time the Court granted an order vesting all of Birch Mountain's assets free and clear (subject to the interests of Canadian Western Bank), in Tricap or its designated nominee, Hammerstone.

[20] None of the orders granted in the receivership proceedings was appealed or otherwise challenged in that action by Birch Mountain or any other party.

III Analysis

A. The modern test for summary dismissal and striking pleadings

[21] The Defendants apply for summary dismissal of the claim pursuant to Rule 7.3 and/or to strike the claim pursuant to Rule 3.68. Rule 7.3(1)(b) provides that a party may apply to the Court for summary judgment on the basis that "there is no merit to the claim or part of it". Rule 3.68(2)(c) and (d) provide that the Court may order all or any part of a claim to be struck out where the pleading is frivolous, irrelevant or improper or where it constitutes an abuse of process.

[22] Recent decisions of the Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7, 1 SCR 87 and of the Alberta Court of Appeal in ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108, 572 AR 317 provide guidance as to the modern approach to applications for summary judgment or to strike pleadings. As was noted in ***Windsor*** at paras. 12 and 13:

> Modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes. In ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para. 10, [2008] 1 SCR 372 the Supreme Court reacted to the traditional restrictive view by stating: "The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial." In ***R v Imperial Tobacco Canada Ltd.***, 2011 SCC 42 at para. 19, [2011] 3 SCR 45 the Supreme Court made similar comments about striking pleadings: "The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial." The test is whether there is "a reasonable prospect that the claim will succeed", not whether it is "plain and obvious" that no claim is disclosed (paras. 17, 21).
>
> This modern trend has now been confirmed in ***Hryniak v Mauldin***:
>
> > Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
> >
> > Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to

> the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> Summary judgment motions provide one such opportunity. ...
>
> In interpreting these [new summary Judgment] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion 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 modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

[23] Once an applicant for summary judgment establishes its case on a balance of probabilities, the evidentiary burden shifts to the respondent. As was noted by the Supreme Court of Canada in ***Lameman*** at para 11:

> For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts... [Citations omitted.]

B Evidence on the Application

[24] The evidence put forward by the Defendants on this application is the affidavit of Richard Eng, Vice-President of Tricap, sworn June 19, 2014. The Plaintiff filed no evidence other than an affidavit of a consultant, David Johnston, who had no personal involvement in any of the matters alleged in the Amended Statement of Claim. 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 nonexpert interpretation of various documents. It is of little or no evidentiary value. Both Mr. Eng and Mr. Johnson were questioned on their affidavits.

[25] The Plaintiff, who was present in Court at the application, provided no affidavit evidence, despite having been a shareholder of Birch Mountain and a director thereof from its inception until the receivership in 2009. His counsel represented at the hearing of the application that Mr. McDonald would provide evidence in due course. The prospect of additional evidence being submitted at a later date is of no assistance to the Respondent in opposing the application before the Court, which is to be decided on the basis of the evidence that has been tendered. As the Supreme Court of Canada noted in ***Lameman*** at para. 19:

> We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. 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. ...

C Collateral Attack

[26] The Plaintiff submits that Justice LoVecchio was not informed of various matters in the course of the receivership proceedings and that the default on the convertible debenture and the receivership were "contrived", with the result that Hammerstone was able to acquire the assets of Birch Mountain that had been valued at $1.6 billion for $50 million. The Plaintiff claims that the proposed class should be entitled to damages as a result.

[27] The Defendants submit that the essence of the action constitutes a collateral attack on the receivership proceedings that culminated in a Court order approving the sale of Birch Mountain's assets to Hammerstone.

[28] Birch Mountain, its directors and its shareholders (to the extent they reviewed public documents and press releases issued by Birch Mountain) were well aware of the financial difficulties Birch Mountain was facing and the steps being taken by the Defendants to realize on the Debenture, including seeking the appointment of a receiver and the sale of the assets. The Order appointing the receiver and subsequent orders were not opposed by Birch Mountain, by the Plaintiff, by any members of the proposed class or by any other party, and were not appealed or otherwise challenged by any party.

[29] The well-established principle which prohibits a collateral attack on a final valid court order was summarized by McIntyre J in ***Wilson v R***, [1983] 2 SCR 594 at pp 502-503:

In the Manitoba Court of Appeal, Monnin J.A. said:

> The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

> I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

[30] In ***Nash v CIBC Trust*** (1996), 7 CPC (4th) 263 (Ont Gen Div), Ground J applied the prohibition against collateral attack and summarily dismissed a class action brought on behalf of investors in certain companies where a receiver and manager had been appointed by court order. He stated at para. 38:

> Essentially, the principle of collateral attack states that an order made by a court having jurisdiction is binding and conclusive, and cannot be attacked in a proceeding where the object of that proceeding is other than the reversal, variation or nullification of the order or judgment.

[31] The Plaintiff submits that the collateral attack doctrine was not applied in ***Royal Bank v W Got & Associates Electric Ltd*** (1994), 150 AR 93 (QB) and should not be applied in this case. However, there is a key distinction between this case and ***Got*** where, as noted by McDonald J at para. 11, the challenge to the propriety of the *ex parte* receivership order was brought by way of a counterclaim in the receivership action:

> As the application was essentially *ex parte*, the plaintiff had to act in the utmost good faith and make full, fair and candid disclosure of the facts. See the authorities cited in Stevenson & Côté, Civil Procedure Guide, R. 387(2) (p. 958). Such disclosure must include facts which would militate against the application: ***Caisse Pop. de Morinville v Pasay***, (1982) 47 A.R. 311, at 316. If the order was obtained by fraud, or non-disclosure or misleading disclosure, the order might be challenged directly, as by an application to set it aside, or by appeal, but not collaterally i.e. not in a proceeding in which an attack is made on the order incidentally to the cause: ***Wilson v R*** [1983] 2 S.C.R. 594 at 603. In my view, where, as in the present case, the validity of the order is challenged directly in the very action in which it was made, the challenge being made in the statement of defence and counterclaim, such a challenge may be the equivalent of a direct attack by an application to set the order aside or an appeal. I do not say that the challenge is bound to succeed if made in that manner, only that it is not barred if made in that manner. Whether, at trial, the challenge should succeed will depend upon a variety of circumstances.

[32] I agree with the conclusion of the Court in ***Nash*** at para. 37 that ***Got*** is distinguishable because the challenge there was made directly in the receivership action, rather than collaterally.

[33] To the extent that this action purports to challenge the propriety of the sale of the Birch Mountain assets to Hammerstone, it constitutes a collateral attack on the order for sale granted in the receivership action and the Defendants are entitled to summary dismissal of those aspects of the claim.

D Res Judicata and Issue Estoppel

[34] The Defendants submit that the oppression claims advanced in the Statement of Claim are *res judicata* because the Ontario Courts have determined that members of the proposed class did not have standing to bring this action under the comparable provisions of the OBCA.

[35] In ***Bond v Brookfield Asset Management Inc***, 2011 ONSC 2529, affd 2011 ONCA 730, 18 CPC (7^{th}) 74, Perell J granted an order staying a similar action against the same defendants brought by another Birch Mountain shareholder on the grounds that the action had no real and substantial connection to Ontario and that Alberta was the proper forum.

[36] In the course of his decision, Perell J concluded that even if Birch Mountain was a corporation for purposes of the OBCA, the plaintiff did not qualify as a "complainant" under the OBCA because she had not established that any of the Defendants was an "affiliate" of Birch Mountain. However, his decision on a procedural issue and his *obiter* comments on the meaning of "affiliate" under the OBCA, while they may be persuasive, do not give rise to *res judicata* in respect of an action brought in Alberta under the ABCA by another plaintiff.

[37] The Defendants also submit that this action is barred by cause of action estoppel because the facts upon which the action is based were known to the Plaintiff at the time of the receivership and, with reasonable diligence, could have been put before the Court in that action. Cause of action estoppel arises where a question has been the subject of a final judicial decision involving the same parties where the basis of the subsequent cause of action was or could have been argued in the prior action if the parties had exercised reasonable diligence: ***574095 Alberta Ltd v Hamilton Brothers Exploration Co***, 2002 ABQB 238, 319 AR 119. The essence of the Ontario decision was a procedural determination that Alberta, rather than Ontario, was the appropriate forum. The Plaintiff and the proposed class were not parties to the receivership action. As a result, this doctrine does not apply in the circumstances.

E Oppression Claim

[38] The Plaintiff submits that he and the proposed class qualify as a "complainant" for the purpose of bringing an oppression claim under s. 242 of the ABCA. Section 239(b) defines complainant:

> (b) "complainant" means
>
> > (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliate,
> >
> > (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
> >
> > (iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

[39] The Defendants submit that neither Mr. McDonald nor the proposed class qualify as "complainants" as they are not shareholders, former shareholders, directors, former directors or creditors of the Defendants or of an affiliate of the Defendants. The Defendants deny that Birch Mountain was an "affiliate" of any of them as defined in the ABCA.

[40] The Plaintiff submits that he and the proposed class qualify as "complainants" as they were shareholders of Birch Mountain, which they submit was an affiliate of the Defendants as defined in the Loan Agreement dated December 21, 2007. I need not determine whether the Plaintiffs meet that definition and make no comment in that regard. For the Plaintiff and/or the class to qualify as "complainants" for purposes of the oppression remedies under the ABCA, Birch Mountain must be an "affiliate" of the Defendants under the terms of that statute. Falling within the definition of "affiliate" under the Loan Agreement is not sufficient. Whether Birch Mountain in an "affiliate" of the Defendants for purposes of ss. 239(b) and 242 of the ABCA must be determined based upon the definitions in section 1(1)(b) and 2(1) the ABCA, which are:

In this Act,

...

(b) "affiliate" means an affiliated body corporate within the meaning of section 2(1);

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 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.

> **(3)** For the purposes of this Act, a body corporate is the holding body corporate of another if that other body corporate is its subsidiary.
>
> **(4)** For the purposes of this Act, a body corporate is a subsidiary of another body corporate if
>
> (a) it is controlled by
>
> (i) that other,
>
> (ii) that other and one or more bodies corporate, each of which is controlled by that other, or
>
> (iii) 2 or more bodies corporate, each of which is controlled by that other,
>
> or
>
> (b) it is a subsidiary of a body corporate that is that other's subsidiary.

[41] The Plaintiff submits that if the Convertible Debentures were converted to Birch Mountain shares, Tricap would have held more than 50% of the votes that may be cast to elect Birch Mountain's directors. The Plaintiff further submits that the Convertible Debentures were held as an "investment" rather than "by way of security".

[42] I do not accept this submission as the Convertible Debentures were never converted into Birch Mountain shares and, until that occurred, the affiliate test was not met. I need not decide whether the shares were held "by way of security only".

[43] I note that Justice Perell reached the same conclusion in ***Bond*** at paras. 60-62 when considering the comparable provisions of the OBCA, which finding was upheld by the Ontario Court of Appeal at para. 1.

[44] The Plaintiff then submits that the Court should exercise its discretion under s. 239(b)(iv) of the ABCA to qualify the Plaintiff as a complainant for the purpose of bringing an oppression action. There is no evidence before me that would justify doing so in these circumstances.

[45] As a result, neither the Plaintiff nor the proposed class qualifies as a "complainant" entitled to bring an oppression claim under the ABCA. Accordingly, the Defendants' application for summary dismissal of the portions of the claim based upon alleged oppression and s. 242 of the ABCA is granted.

F Breach of Good Faith

[46] The Plaintiff submits he is relying on the good faith doctrine pursuant to which courts have found that a party who acts in a manner that substantially nullifies the objectives of a contract contrary to the original expectations of the parties breaches the implied duty of good faith in the performance of an agreement. He alleges that the Defendants eviscerated or defeated the objectives of the Loan Agreement, the Unsecured Subordinated Convertible Debenture and the Senior Secured Convertible Debenture for their own monetary gain.

[47] The Supreme Court of Canada recently reviewed the scope of the doctrine of good faith in ***Bhasin v Hrynew***, 2014 SCC 71, 3 SCR 494. However, the doctrine has no application in the circumstances of this case where the Defendants were not in a contractual or fiduciary

relationship with the Plaintiff or the members of the purposed class. In the absence of such a relationship, the Defendants owed no duty of good faith to the Plaintiff or the members of the proposed class and there is no independent tort of bad faith. The Defendants' application for dismissal of the portions of the claim based upon an alleged breach of a duty of good faith is granted.

G Negligent Misrepresentation

[48] In the ***Queen v Cognos***, [1993] 1 SCR 87 at para 33, the Supreme Court of Canada identified the five elements that must be established in a claim for negligent misrepresentation:

a) a duty of care based on a "special relationship" between the parties

b) representations that were untrue, inaccurate or misleading

c) the representor must have acted negligently in making the misrepresentations

d) the representee must have relied, in a reasonable manner, on the misrepresentations; and

e) the reliance must have been detrimental in the sense that damages resulted.

[49] In ***Hercules Managements Inc v Ernst & Young***, [1997] 2 SCR 165 at para 20, the Supreme Court confirmed the usual test to determine whether a duty of care in tort exists:

a) Is there sufficient proximity between the parties that the defendant would reasonably contemplate that carelessness on its part might cause damage to the plaintiff?

b) Are there any considerations which ought to limit the scope of that duty?

[50] The Plaintiffs allege that the Defendants were in a special relationship with Birch Mountain, that of wealthy professional investor and under-funded developing borrower, and owed a duty of care to the Birch Mountain common shareholders arising out of the terms and conditions of various agreements, including the Loan Agreement, the Unsecured Subordinated Convertible Debentures and the Senior Secured Convertible Debenture.

[51] The agreements in question were between Birch Mountain and the Defendants and their debtor/creditor relationship was governed by the terms of those agreements. Absent some unique special relationship or exceptional circumstances, a lender owes no duty of care to a borrower: ***Avco Financial Services Realty Ltd, v Bhabha*** (1994) 3 CCLS 264 (Ont Gen Div) at para 51 and ***CareVest Capital Inc v Chychrun***, 2008 BCSC 201, 55 CCLT (3d) 75 at para 17. The relationship between the Birch Mountain shareholders and the Defendants is even more remote. There is no evidence before me that establishes any special relationship between the Defendants and the shareholders of Birch Mountain that would give rise to a duty of a care.

[52] The alleged representations upon which the Plaintiff relied include the following:

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".

[53] These alleged representations were general statements about Tricap's business rather than specific representations directed at Birch Mountain or its shareholders. To the extent that these are viewed as representations of a past or existing fact, there is no evidence to suggest that they are false. To the extent they are viewed as a representation as to future conduct, they are not actionable.

[54] There is no evidence that the statements were made negligently or that they were relied upon by any members of the proposed class. Moreover, it is not apparent how any such reliance could be reasonable in the face of Birch Mountain entering into detailed loan agreements that set out the rights and obligations of each party, some of which contained "entire agreement" clauses.

[55] The Plaintiff's claims based upon negligent representation raise no genuine issue requiring trial and are dismissed.

H Allegations of Death Spiral Stock Trading

[56] The Plaintiff alleges that the Defendants are responsible for death spiral stock trading that caused the price of Birch Mountain common shares on the TSX to collapse from $7.99 on May 26, 2006 to $0.01 on November 5, 2008.

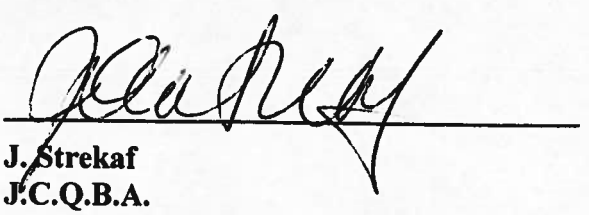
[57] In his affidavit, Rick Eng stated that at no time did Tricap or Hammerstone exercise any right to convert any Birch Mountain debt into Birch Mountain shares, that none of the Defendants ever owned or was a short seller of Birch Mountain shares, that the Defendants have no knowledge of and did not participate in trading any Birch Mountain shares. No evidence has been put forward by the Plaintiff that contradicts this evidence. Therefore, the Defendants have established that there is no genuine issue requiring trial in respect of this allegation.

V Conclusion

[58] The Plaintiff's action is dismissed it its entirety as I am satisfied that there is no merit to the claim, or any part of the claim.

[59] If the parties are unable to agree on costs, they may file written submissions within 30 days of the date of these reasons.

Heard on the 9th day of October, 2014.
Dated at the City of Calgary, Alberta this 30th day of April, 2015.



J. Strekaf
J.C.Q.B.A.

Appearances:

John W. McDonald
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