Court of Queen's Bench of Alberta

Citation: Flesch v Apache Corporation

Date:
Docket: 1901 09160
Registry: Calgary

Between:

Stephen Flesch, Marshal Thompson, Tyler Maksymchuk and Reid Chamberlain

Plaintiffs

- and -

Apache Corporation, Paramount Resources Ltd., William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R Joyce and Charles J. Pittman

Defendants

Endorsement on Sequencing of Applications
of the
Honourable Mr. Justice G.H. Poelman

I. Introduction

[1] The plaintiffs were employees of Apache Canada Ltd., a corporation owned by Apache Corporation, based in the United States.

[2] On July 6, 2017, it was announced that Apache Corporation would sell all the shares of Apache Canada to Paramount Resources Ltd. The sale closed effective August 16, 2017. As of January 1, 2018, Apache Canada was amalgamated into Paramount.

[3] Prior to the sale of shares, the plaintiffs and members of the proposed class were employees of Apache Canada. They were recipients of various forms of deferred compensation in the form of restricted share units, performance awards and stock options, issued pursuant to the terms of Apache Corporation's "Omnibus Equity Compensation Plan" ("Plan"). On grants of various instruments being awarded, vesting periods had to elapse before the recipients received

their value. When the sale of Apache Canada's shares was effected, the plaintiffs had received various grants for which the vesting periods had not expired.

[4] When the sale was announced, the plaintiffs and other employees were advised that the grants of their units, awards and options were cancelled. They were not compensated for the cancellation.

[5] The plaintiffs commenced this action on July 2, 2019. Service on all defendants was finally effected in November 2019 (the individual defendants, all directors or former directors of Apache Corporation, being residents of the United States).

[6] At the first case management meeting on February 28, 2020, the defendant directors and Paramount advised that they would be bringing summary dismissal applications of the claims against them. The plaintiffs submitted that their certification application should be heard before the defendants' applications; the defendants argued that their applications should be heard first. I directed that the application materials be filed, following which there would be a case management meeting to address the sequence of the applications.

[7] As a result of interruptions caused by COVID-19, it is only now that we have been able to address sequencing.

II. Nature of the Applications

[8] Paramount's application for summary dismissal is based on its contention that the Plan was issued by Apache Corporation and that each of the grant agreements expressly provided that they were not part of the recipient's employment agreement. Thus, Paramount argues, the plaintiffs have no claim against it as the successor employer of Apache Canada. If there is a claim, it must be against someone else, such as Apache Corporation.

[9] In the directors' summary dismissal application, it is alleged that there is no privity or contractual relationship between the plaintiffs and the directors of Apache Corporation, no other form of legal duty owed by Apache Corporation directors to Apache Canada or Paramount employees, the claim is an improper attempt to pierce the corporate veil, and in any event an exclusionary clause in the Plan provides that none of the directors "shall be liable for any action, omission, or determination made in good faith."

III. Principles of Law

[10] There are many helpful authorities in Alberta on whether and in what circumstances defendants' applications should be heard before a certification application. Recent summaries of the principles are found in *Briton v Ford Motor Company of Canada Ltd.*, 2020 ABQB 344, and *Carlson v Transalta Corporation,* 2018 ABQB 343. The Court of Appeal addressed the issue in *WP v Alberta*, 2014 ABCA 404.

[11] Briefly, while an application for certification will usually be heard first, there is no presumption to that effect. As neatly summarized by Eamon J., it is a matter of discretion "guided by considerations of efficiency, judicial economy and fairness": *Briton*, paras 8 and 15.

IV. Findings

[12] To some degree, the plaintiffs complain about lack of diligence by Paramount and the directors in prosecuting their summary dismissal applications, and those defendants make the same allegation about the plaintiffs' prosecution of their action. In my view, none of these parties can be faulted for not acting with reasonable diligence in bringing these matters forward. Thus, that is not a factor that weighs against either position.

[13] On the other hand, some of the cases note that if the plaintiffs are dilatory in moving towards certification, that may be a reason why defendants should be given the opportunity to argue dismissal applications before certification. In *Stewart v Enterprise Universal Inc.*, 2010 ABQB 259, the defendants had been left "in limbo" for over two years after a stigmatizing statement of claim had been filed, and forcing them to wait until the motion to certify "would not be fair or efficient": para 42. In this case, the plaintiffs have moved with reasonable dispatch in seeking certification.

[14] The principle considerations in this case, in my view, are the efficiency with which the defendants' applications can be determined and the likelihood that a successful application would entirely dispose of the application against either of them.

[15] Paramount's application would have the best chance of being determined efficiently, because it does not rely upon evidence. Rather, it argues that its position is based solely on whether Apache Canada was a party to the Plan and the grant agreements issued thereunder, and whether the long term compensation provided under the Plan formed part of the plaintiffs' employment agreements.

[16] The matter is not, however, necessarily so tidy. Terms of employment contracts may be implied as well as express. Exclusionary clauses are often construed strictly against an employer who drafts them. In some cases of affiliated corporations, both a subsidiary and parent corporation may be liable for employment benefits.

[17] Of course, I make no findings on these points because they have yet to be argued on their merits. My concern is that Paramount's arguments are based on construction of documents. The interpretation of those documents may require evidence of a factual matrix and a finding on what terms constitute the employment contract; who is bound by it may also require evidence. Also, it is possible that the plaintiffs might adduce evidence in response to Paramount's application. In other words, I cannot conclude confidently at this early stage whether the simple record upon which Paramount relies can determine its further involvement in this action.

[18] The application of the directors is premised mainly on the argument that they are protected by the corporate veil: that is, if the plaintiffs' action is against Apache Corporation (the issuer of the Plan and the various instruments granted thereunder), the liability can only be corporate. The affidavits submitted in support of the directors' application stress that they had no direct role that would tend to establish a separate identity or interest from the corporation, such as would enable the plaintiffs to pierce the corporate veil.

[19] This argument, however, misses the main thrust of the plaintiffs' allegations. They rely upon a provision in the Plan providing that if there is a merger, the directors "shall . . . make appropriate provision for the adoption and continuation of the Plan by the acquiring or successor corporation and for the protection of any holders of such outstanding Awards." It is at least

arguable that the reference to "company" in this provision includes affiliates of Apache Corporation such as Apache Canada.

[20] The directors respond to this allegation by relying upon a provision that directors will not be liable "for any action, omission, or determination made in good faith," which appears in another part of the Plan.

[21] The focus of the director's application is on their protection of the corporate veil for contractual actions brought against Apache Corporation. As I have indicated, that is not the main argument of the plaintiffs. The evidence submitted by the directors does not address the asserted obligation of the directors to protect employees of an affiliate that is merged into another corporation. Thus, while the primary argument of the directors might be capable of resolution on a summary dismissal application, it is likely other arguments against them would remain.

[22] Furthermore, the plaintiffs would conduct extensive cross-examinations of the directors on their affidavits and require additional information as part of that process. Even if the plaintiffs do not file responding evidence, it would therefore be some time before the directors' summary dismissal application could be heard.

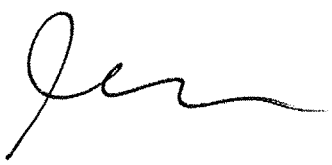
[23] Of course, it is not necessary that I treat the two summary dismissal applications the same for sequencing purposes. If one could be dealt with fairly and efficiently, there might be a compelling argument for it to be heard before the certification application. However, for each application I am concerned that it would not necessarily be dispositive of all of the allegations made by the plaintiffs. Additionally, especially for the directors' application, I am concerned about the likelihood of lengthy of pre-hearing procedures, thus delaying hearing of the application and, ultimately, the certification application.

[24] Against these concerns is the fact that the application and supporting affidavits for certification were filed in March, thus enabling it to be scheduled in the near future (allowing time, of course, for the defendants to file their responding materials, if any). Further, while I cannot prejudge the certification arguments of the defendants, the issues to be argued on certification seem relatively straightforward.

[25] Thus, in my view considerations of efficiency, judicial economy and fairness mean that the application for certification should be heard before the summary dismissal applications filed by Paramount and the directors.

[26] I invite counsel to contact my office to arrange a case management meeting for the purpose of scheduling next steps.

Heard on the 29th day of October, 2020.
Dated at the City of Calgary, Alberta this 3rd day of November, 2020.



G.H. Poelman
J.C.Q.B.A.

Appearances:

David Rosenfeld and Eugene Bodnar
for the Plaintiffs

D. Robb Beeman and John A. Legge
for the Defendant, Paramount Resources Ltd.

Bryan C. Duguid, Q.C., Andrew Wilson and Charlotte Stokes
for the Defendants, Apache Corporation, William C. Montgomery, Annell R. Bay, Daniel W. Rabun, Rene R. Joyce and Charles J. Pittman