Court File No. CV-15-530726

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

VERITAS INVESTMENT RESEARCH CORPORATION and WEST FACE CAPITAL INC.

Defendants

BOOK OF AUTHORITIES OF THE MOVING PARTY, WEST FACE CAPITAL INC.

May 8, 2017

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LIST OF AUTHORITIES

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TAB 1

Indexed as:

771225 Ontario Inc. v. Bramco Holdings Co.

Between
771225 Ontario Inc. and 648002 Ontario Limited, Applicants,
and
Bramco Holdings Co. Ltd. and Her Majesty The Queen in Right of Ontario, Respondents

[1992] O.J. No. 1772

Action No. B-12/92

Ontario Court of Justice - General Division
Windsor, Ontario

Farley J.

Heard: April 10, 1992
Judgment: April 15, 1992

(14 pp.)

Colin Campbell, Q.C., for the Applicants.
No one appearing for the Respondent Bramco.
D. Thomas H. Bell, for Her Majesty The Queen.

FARLEY J.:-- The Crown moved to have this application removed from the Commercial List. So far as I know this is the first such request made. I therefore thought it helpful to write on the point and its quasi- corollary - the transfer of a matter onto the list. I am grateful to the Crown, and Mr. Bell specifically, for the research involved and the vigour with which this motion was pursued as it allowed many aspects to be canvassed. The Crown's materials were intimidatingly exhaustive - they included, for example, excerpts in great detail of the legislation mentioned in the two practice Directions applicable to the List. The operative Practice Direction is now that found in (1992), 6 O.R. (3rd) 383 and in Quicklaw.

In general the application relates to "correcting" a 1988 transfer of real estate by 771225 Ontario Inc. ("7 company") on a nunc pro tunc basis so that title will not be taken by 648002 Ontario Limited ("6 Company"), a non-resident for Ontario land transfer tax purposes, but rather by an Ontario resident corporation. The shareholding of the 6 Company is a combination spaghetti-junction and tangled web. It was said that beneficial ownership of the 6 Company rested in Audrey No, who first came to Canada as a student in 1968, was granted immigrant status in 1973, and became a Canadian citizen in 1979. She claims to have been an Ontario resident since 1968 and to have been taxed as such for over 20 years. The Crown has assessed the Land transfer as a foreign involved transaction with the resultant tax owing of over a million dollars. The request for correction is essentially based on a claim that the transaction was completed without realizing the tax impact of using the 6 Company. The use of a Ho controlled company which did not involve foreign excursions (as the 6 Company did with intervening Liberian and Hong Kong companies and trusts) was said not to attract the higher foreign involved transaction tax rate.

On consent of all parties, including the Crown which was being joined as a party respondent, the applicants requested that this application be placed on the Commercial List. After reviewing the application record, I concluded that it was suitable for the basket clause (see now paragraph 6(j) of the 1992 Practice Direction) as being "such other commercial matter as judge presiding over the Commercial List may direct to be listed on the Commercial Lists. This decision by the presiding judge is one of discretion - but certainly not one of "indiscretion" based on what side of the bed the judge gets up on in the morning. I recall being persuaded by the factors of the intricate element of the corporate ownership tree, the knife-edge of foreign involvement affecting the land transfer tax assessability, the aspect of legal counsel's firm having in its possession corporate minute books and other records of the 6 Company and 7 Company, the contractual element of whether the relief requested could be wanted and the resultant interplay of the various "commercial" legislation and facts vis-a-vis the question of equitable juridical discretion related to the alleged mistake. As well there would be the possibility of the paper trail including a review of various and multiple commercial documents. The hearing date was canvassed and all counsel including the Crown agreed to February 19, 1992. Not quite on the eve of the hearing the Crown requested an adjournment. I reluctantly granted this, especially since the reason related to the taking of preliminary motions on items which appeared to have been contemplated by the Crown prior to the establishment of the February 19th agreed data. My reluctance related to the policy of the List that there should be adherence to agreed fixed dates. Otherwise there will be an unwarranted blockage of those parties in other litigation who wish to use the List. However I accepted the explanation after advising counsel (not Mr. Bell) of the policy and recognizing that there is a necessary transition time to ensure that all counsel who use the List are (or should be) familiar with the List's policies. I would trust that the publication of the 1992 Practice Direction in the Ontario Reports and in Quicklaw will have the benefit of alerting counsel to the practice and procedures of the List as there set out. This should minimize this type of problem for the future.

The Crown's motion to remove this application from the List was brought in conjunction with various other items. These other matters were not pursued by the Crown upon receiving some additional information and upon reflections except for a request that No reattend to answer some refused questions on her March 10, 1992 cross-examination.

CONSIDERATION OF POINTS RAISED ON REMOVAL FROM LIST

I would commence by saying that these views are my own and that they should not be regarded as forming any binding policy of the Court. However I did have the benefit of being part of the Bench and Bar group involved in assisting the formulation of the subject Practice Direction. It is true that the practice in the List is an evolving one and that the Court welcomes constructive (and, if warranted, negative) criticism concerning the operation of the List.

The setting forth of various matters under various legislation that can automatically qualify for the List should not be read as the enumeration of a roster that should be read strictly ejusdem generis.

> "6. Matters which may be listed on the Commercial List are applications, motions and actions in respect of the following:
>
> (a) Business Corporations Act (Ontario) and Canada Business Corporations Act, including:
>
> - oppression remedies applications - winding-up applications - appointment of inspectors - takeover bids - shareholder remedies - arrangements - liquidations
> - fair value determinations;
>
> (b) Securities Act, relating to take-over bids and issue bids;
> (c) receivership applications
>
> - all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
>
> (d) Companies' Creditors Arrangement Act;
> (e) Personal Property Security Act;
> (f) Bank Act, relating to realizations and priority disputes;
> (g) Winding-up Act;
> (h) Bankruptcy Act;
> (i) Pension Benefits Act;
> (j) such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List."

Otherwise the basket clause (j) would have been simply stated in terms of "other matters as a judge presiding over the Commercial List the terms are of a similar nature to those set out above". However if one is able to analogize to the situations set out in the first nine areas I would think that this would be of assistance in convincing a judge to allow a matter to be listed as a basket clause matter.

I think it desirable as well to reflect that those judges available to sit in the List are some of those who have experience, expertise and an interest by aptitude and inclination in "corporate/commercial matters", of a complex or intricate nature. To put it another way, one would trust that an objective observer on determining the nature of the case and the identity of the judge would say something to the effect that the two are well-suited. The List is not a separate Court. Membership of the Judicial team will change from time to time. A Commercial List Judge will sit in the List but as well in the General Division generally (civil, criminal, family, etc.). I think it appropriate to

note that the Court generally has evolved into some degree of specialization in other areas as well. That is not to say that most, if not all, Judges will have extended periods of time being generalists (possibly the most difficult task for a judge). Each judge is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction.

At the present time going on the List is a voluntary matter - subject of course to judicial approval if the basket clause is involved. Coming off the List is not a free choice. In my view once there has been a determination of suitability by a judge, one would have to show that there had been such a material change in the perceived facts that a judge would on those "new" facts conclude that the matter was not suitable for the List. This was not the case here. As to those areas automatically on (if desired), since there was no judicial involvement, one would expect a much lower standard for removal - probably nothing more than a demonstration that the transfer out was not part of a stall tactic. I pause to note that item (h) Bankruptcy Act matters should of course always be heard on the List. This aspect is a natural emanation of the fact that the hearings on the Commercial List incorporate bankruptcy hearings and are in fact a graft thereon.

Mr. Bell as a good soldier went over various aspects with me and responded with candour to my enquiries. I found the exchange to be quite helpful.

The Crown compared the List with the Commercial Court in the U.K.

> "The purpose of the Commercial Court is to provide for the mercantile community a simplified procedure with briefer pleadings and more expeditious hearings and trials before experienced judges in commercial actions. For this purpose, "commercial action" includes any cause arising out of the ordinary transactions of merchants and traders and, without prejudice to the generality of the foregoing words, any cause relating to the construction of mercantile documents, the export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usage." Halsbury's Laws Of England, Volume 371 Practice and Procedures, para. 591.

However it should be noted that the practice in the Commercial Court is dictated by those matters which are of commercial import to the commerce of the U.K. Generally, it could be said without too much exaggeration that the matters dealt with in that Court are those that matter to those in the "city". Canadian/Ontarian/Torontonian "commercial" matters would be significantly different although there will be areas of overlap. This is obvious from the fact that corporate reorganizations are dealt with by the Companies Court in the U.K. and ship scuttling by the Commercial Court. Those interested in the U.S. Commercial Court are referred to Anthony D. Colman, The Practice and Procedure of the Commercial Court (3rd Edition, 1990) Lloyd's of London Press Ltd.

It was suggested that the interpretation of a taxing statuti was not suitable for the List. It was noted that taxing statutes are the grist of specialized tribunals. However to the extent that the Federal Courts do not have exclusive jurisdiction, the General Division would deal with tax matters in Ontario. I noted that I had just heard a lengthy business tax assessment case at the request of the parties including the Ontario Ministry.

Mr. Bell raised the aspect of the List being able to deal with matters in an expeditious fashion. He expressed concern for this in two ways: (a) that the floodgates to the List not be opened wide

with the result that "more deserving" cases are blocked out or delayed, and (b) that the Ministry may well prefer a slower (although, I presume, ever forward) pace for this litigation. As for (a) I see no immediate concern as to this. Each case is reviewed for inclusion via the basket clause on a case by case basis. While one would expect cases on all fours to be accorded the same listing treatment I would think that if the List were overwhelmed the Court would be able to communicate at Assignment Court or otherwise that the sluice was being choked down a bit in certain areas. Concerning (b) I would note that the Court is not interested in a fast pace for the mere sake of a fast pace - I make this point as to the General Division in all its aspects, not just the Commercial List. The Practice Direction now incorporates a Case Timetable by which the parties can mutually establish their own pace. In the event that the parties cannot agree then the 9:30 a.m. chambers judge in the List could fix the Case Timetable after submissions from the parties. The only concern of the court here is that there be a reasonable cause for any "delay" and that it not be simply a question of stalling or stonewalling. There is a recognition - a foundation recognition - that the parties must allow a reasonable time in all the circumstances to carry out all incourt and out-of-court matters before the case is heard on the "final merits". If the parties get off the Case Timetable schedule, they are expected to get the case back on schedule unless it has completely come off the rails. If there has been an unforeseeable derailment then a new Case Timetable will have to be established.

Mr. Bell recognized the limited resources (judge-power and physical) available to the commercial List. However this is a condition which affects the whole of the General Division. Again, I pause to note that a case in the General Division is heard by a General Division Judge whether wearing a Commercial List hat (as I was on this matter on Friday) or a General hat (as I am the next Monday). It is nothing more than a variation of robbing Peter to pay Paul. As well in that respect I do not find persuasive the submission that the case will, in Mr. Bell's view, have to be turned into a trial of an Issue(s) from an application since there are questions of credibility involved. A judge sitting in the List does not don ear plugs in this regard - a judge sitting in the List is able to deal with a trial of an Issue involving credibility aspects.

I therefore conclude that it is not appropriate to remove this matter from the commercial List. I suggested to counsel that they attempt to resolve - mutually agreeable timetable. I also note that such a motion (and the obvious great amount of research that went into same) might have been obviated if the Ministry had come in or arranged a conference call with other counsel to discuss the point.

REFUSALS

The only remaining refusals were Ho's refusal to provide: (i) her tax returns since 1968; and (ii) the identity of her family tax advisors and legal counsel in Hong Kong. Mr. Bell relied on Seaway Trustco et al. vs. Markle et al. (1988), 35 C.P.C. (2d) 64 (Master) for the proposition that questions were to be answered if relevant to the application and if fair. However Master Sandler also indicated that the question must be tested to see if it were in a bona fide way being directed to an issue on the matter or to the credibility of the witness. It did not appear to me that the groundwork for relevance was established on this motion. As well there appeared to be a lack of foundation in the examination itself - that is on the basis of the relevance of the questions refused did not leap out from the terms of the application or the material filed in its support. without that basis of relevance, in my view, the questions are a piscatorial excursion. Mr. Campbell indicated that No would not object to a co-operative discussion in these two areas as it was not his intention to deprive the Min-

istry of any truly relevant material. Mr. Bell readily acknowledged that he would not need the whole history of the tax returns. The motion is dismissed as to the refusals.

GENERAL

The Court depends on counsel cooperatively resolving as many matters as are reasonably possible while recognizing that there will be frequent incidents of problems that only can be solved by a judicial decision. Counsel of course may take advantage of the informality of a 9:30 a.m. chambers judge attendance (or a special appointment with the "seized" judge if appropriate) to resolve or narrow issues. In this regard I referred counsel to paragraph 38 of the Practice Direction. while they were correct in pointing out that the Practice Direction ended at paragraph 57, I reminded them that paragraph 58 was the unwritten rule of using common sense.

COSTS

I did not ask for submission on costs. The removal element motion was novel although perhaps not necessary to be dealt with in the way that it was. While the Crown was unsuccessful on the remaining two refusals, I note that the other questions were answered a day or so before the hearing. My preliminary view would be that there should be no costs. If counsel have a contrary view I would request a short letter submission within 10 days of the release of these reasons. Such submissions should also address the amount.

FARLEY J.

TAB 2

Case Name:

Gyles v. Mytravel Canada Holidays Inc. (c.o.b. Sunquest Meetings and Incentives)

Between
Cynthia Gyles, Plaintiff, and
Mytravel Canada Holidays Inc., c.o.b. as Sunquest Meetings and Incentives, Defendant

[2006] O.J. No. 2497

149 A.C.W.S. (3d) 394

[2006] O.T.C. 545

Court File No. 06-CV-311292PD1

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: June 15, 2006.
Judgment: June 21, 2006.

(22 paras.)

Civil procedure -- Courts -- Application by the plaintiff to transfer a matter to the commercial list -- Application allowed -- The matter concerned a restrictive covenant in her employment contract -- The courts were flexible regarding what was placed on the commercial list.

Application by the plaintiff, Gyles, for an order transferring this action to the commercial list -- Gyles claimed against her former employer regarding restrictive covenants in her employment agreement -- She argued that after she left her employer and obtained another job, her former employer informed her new boss that she could not work there because of a restrictive covenant -- She claimed the clause was void for being against public policy -- HELD: Application allowed -- The action was transferred to the commercial list -- The courts were flexible regarding what was placed on the commercial list -- The commercial list dealt with matters expeditiously and Gyles wanted her employment situation resolved.

Counsel:

George S. Glezos, for the plaintiff

Andrew Balaura, for the Defendant

ENDORSEMENT

P.A. CUMMING J. (endorsement):--

The Motion

1 The plaintiff, Cynthia Gyles, moves to have this civil action transferred to the Commercial List. She claims against the defendant, Mytravel Canada Holidays Inc., c.o.b. as Sunquest Meetings & Incentives ("Sunquest"), her former employer, in respect of restrictive covenants in her employment agreement. Ms. Gyles' employment as an apparently successful "Business Development Manager & Account Executive" with Sunquest ended March 31, 2006.

2 Ms. Gyles delivered her Statement of Claim May 12, 2006. Both parties are resident in Toronto. Ms. Gyles seeks a declaration that the restrictive covenant provisions of her employment agreement are unenforceable, being void as against public policy. She also sues for damages for alleged intentional interference with commercial relations. It is alleged Sunquest contacted Ms. Gyles' new employer April 20 and 26, 2006, with the intent and result of having her new employment terminated on the basis the restrictive covenant in favour of Sunquest was operative. Her employment with her new employer was reportedly terminated April 27, 2006.

The Issue

3 On May 15, 2006, Ms. Gyles served the defendant with a notice of motion to transfer this action to the Commercial List. Counsel for Sunquest advised May 16 he would "vigorously" oppose the motion.

4 The issue is whether this action is to be transferred to the Commercial List under subparagraph 1(l) of the April 1, 2002, *Practice Direction* Concerning *the Commercial List ("Practice Direction")*, being the so-called basket clause'.

5 At the conclusion of submissions, I ordered that the transfer to the Commercial List take place and I set forth a timetable by which the action would proceed expeditiously. I advised my written reasons for decision would follow. These are my reasons.

6 The *Practice Direction* lists the matters eligible for the Commercial List:

> 1) Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve the following:
>
> a) Bankruptcy and Insolvency Act;
> b) Bank Act relating to realizations and priority disputes;
> c) Business Corporations Act (Ontario) and Canada Business Corporations Act;
> d) Companies' Creditors Arrangement Act;
> e) Limited Partnerships Act;
> f) Pension Benefits Act;
> g) Personal Property Security Act;

h) Receivership applications and all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;
i) Securities Act;
j) Winding-Up and Restructuring Act;
k) Credit Unions and Caisses Populaires Act, relating to credit unions and caisses populaires under administration or that are being wound up or liquidated; and
l) Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List ....

In considering whether to make a direction under sub-paragraph 1(1), the judge may take into account the current and expected caseload of matters listed on the Commercial List.

7 The wording of the *Practice Direction* is permissive, not mandatory, saying that matters *may* be listed. The basket clause of subparagraph 1(l) allows a judge, in his/her discretion, to direct "other commercial matters" beyond the specific matters lists in clauses (a) to (k), to be placed on the List.

8 The normative approach in considering the application of the basket clause is to analyze whether matters are "analogous" to the enumerated specific items listed in clauses (a) to (k). See generally the comments of Farley J. in *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1992] O.J. No. 1772 (Gen. Div.); O'Driscoll J. in *Fenix Developments G.P. Inc. v. Willemse* [1993] O.J. No. 285 (Gen. Div.); Farley J. in *National Trust Co. V. Furbacher* [1994] O.J. No. 1367 (Gen. Div.); and Greer J. in *Ontario Inc. v. Metropolitan Toronto Condominium Corp. No. 963* [2005] O.J. No. 2383 (S.C.J.). Courts consider whether the matter is commercial in nature, then consider such factors as the complexity of the subject matter and whether a number of parties are involved.

9 In *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce* [1992] O.J. No. 2610 (Gen. Div.), Blair J., as he then was, also stated that "the current and expected caseload of matters listed on the Commercial List" is a factor for consideration and indeed, this consideration has been made express in the latest, current version of the *Practice Direction*.

10 In *Bankten Communication Services Ltd. v. General Motors of Canada Ltd.* [1996] O.J. No. 1803 (Gen. Div.) Jarvis J. denied a motion for transfer to the Commercial List. The essential issue in the litigation before him was simply whether the plaintiff charged the defendant in accordance with the parties' agreement. He viewed the case before him as not commercially complex, opined that the apparent accounting evidence would be straightforward and common, the quantity of production of documents was not extraordinary, and no specialized familiarity by the trial judge with commercial matters was seen to be an advantage.

11 Overall, the basket clause has been applied broadly and with flexibility. Although the Commercial List is oftentimes quite busy, the Court is accommodating where appropriate.

Disposition

12 Sunquest submits that the issues involved in the dispute at hand are not factually or legally complicated such that there is no compelling need to transfer the action to the Commercial List. Sunquest also says the alleged need for the plaintiff to advance her claim urgently is an irrelevant

factor. Sunquest expresses the concern that if the transfer is granted "it will open the floodgates for all breach of contract claims to be transferred ...."

13 The essential issue in the case at hand is the interpretation and enforceability of contractual terms of an employment contract that seek to restrain a departing, terminated employee in offering her services to a competing business. The dispute involves a commercial matter.

14 Moreover, there are underlying important public policy issues relating to restraint of trade and the conduct of commercially sophisticated business employers in the marketplace in placing fetters upon departing employees. Such clauses have a particular contemporary significance given the accelerating forces of globalization, freer trade and information technology.

15 The Commercial List strives to provide the benefits of so-called real time' litigation, where parties can quickly gain access to justice and receive timely dispositions of their disputes involving commercial matters.

16 The plaintiff, Ms. Gyles, is reportedly prevented in pursuing employment and commercial activity within her sphere of expertise because of the zeal of Sunquest in enforcing its restrictive covenant. The position of Sunquest is that its rights are clear and straightforward and that the restrictive covenant is enforceable.

17 Understandably, Ms. Gyles is anxious to obtain an early determination of the dispute given that she cannot easily work in her area of experience and expertise during the 12 month duration of the restrictive covenant, being enforced at present on a continuing basis by Sunquest.

18 The current and expected case load of the Commercial List, while extensive and demanding, is such that this action can be dealt with expeditiously on the Commercial List and quite probably, more quickly than it would be dealt with otherwise if it remained on the general Civil List. As well, the Commercial List more easily facilitates active case management, including through the 9:30 a.m. appointment process on short notice. Sunquest does not raise any possible prejudice to it through the action being transferred to the Commercial List. Moreover, while professing to wanting an expeditious determination of the dispute, Sunquest insists upon the action remaining on the Civil List where it is more likely that a determination of the dispute will take longer than if the case is dealt with on the Commercial List.

19 I make the inference in all the circumstances, and after hearing the submissions of Sunquest, that its objections to the transfer are based solely upon the belief that it may gain an advantage over the plaintiff through delaying the otherwise expeditious progress of the litigation that would be seen by the action being placed on the Commercial List.

20 In my view, and I so find, the circumstances of the commercial matter at hand mandate that there is a particular importance to the plaintiff in being able to gain as early as possible an interpretation of the legal effect of the restrictive covenant and that this is a proper factor in considering the exercise of my discretion as to whether the request for a transfer is to be granted.

21 Accordingly, for the reasons given, the motion to transfer the action to the Commercial List is granted. The Order also provides a detailed schedule for the progress of the litigation, culminating in a two to three day trial for a determination of the declaratory relief October 4-6, 2006, unless the matter is disposed of by the defendant's announced intent for a summary judgment motion, or otherwise, in the interim.

22 Given all the circumstances, and my view that there was no arguable merit to the defendant's opposition to the motion, costs on a substantial indemnity scale of $2500.00, inclusive of GST and all disbursements, are awarded to the plaintiff, payable forthwith by the defendant.

P.A. CUMMING J.

cp/e/qw/qlyxh/qlcem/qljxl/qlcal

TAB 3

Indexed as:

Lehner v. Gottfried

Between
Erika Lehner, plaintiff, and
Allan Stewart Gottfried, defendants

[1999] O.J. No. 4083

107 O.T.C. 126

18 C.B.R. (4th) 76

42 C.P.C. (4th) 206

92 A.C.W.S. (3d) 386

Court File No. 99-CV-68046CM

Ontario Superior Court of Justice
Commercial List

Molloy J.

Heard: October, 18, 1999.
Judgment: October 29, 1999.

(26 paras.)

Practice -- Motions -- Place of hearing.

This was a motion by the defendant Gottfried for an order transferring Lehner's action against him to the Commercial List. Lehner and Gottfried were each 50 per cent shareholders in a corporation. Lehner brought an action against Lehner for damages for breach of contract and breach of fiduciary duty, an accounting by Gottfried, an audit of the corporation and a winding up order. Gottfried argued that he was entitled to the judicial expertise and expeditious procedures of the Commercial List. Lehner argued that deference should be accorded to her choice of forum. She further argued that the matter was straightforward and easily within the expertise of any Superior Court Judge.

HELD: Motion allowed. The pith and substance of the action was precisely within the ambit of the Commercial List. Gottfried had put forward good reasons for transferring the action to the Commercial List. The smooth administration of the courts supported transferring the action to the Commercial List. Lehner had failed to advance any viable reason for preferring the regular list or any disadvantage to her if the action was placed on the Commercial List.

Statutes, Regulations and Rules Cited:

Ontario Business Corporations Act, R.S.O. 1990, c. B16.

Ontario Rules of Civil Procedure, Rule 77.02(c), 77.12(1).

Counsel:

C. Anthony Carroll, for the responding party (plaintiff).
Robert W. Wilson, for the moving party (defendant).

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1 **MOLLOY J.**:-- The defendant moves for an order transferring this action to the Commercial List. The plaintiff takes the position that she deliberately commenced her action on the regular civil list in Toronto and objects to it being transferred to the Commercial List.

2 The plaintiff and the defendant are each 50% shareholders in Bistro 1206 Corp. ("the corporation") and are the corporation's sole officers and directors. The corporation operates a restaurant and catering business in Toronto. There is a written shareholders agreement between the parties executed on September 29, 1998.

3 The shareholders agreement contains a shotgun buy/sell provision. On February 9, 1999 the plaintiff offered her shares in the corporation to the defendant for $47,500.00. On February 25, 1999 the defendant declined that offer and required the plaintiff to purchase his shares at the same price. She refused to do so, alleging that at the time of her offer she was unaware of the corporation's true state of affairs.

4 This action was commenced on April 20, 1999. The plaintiff seeks a declaration that both her offer and the defendant's response render the buy-sell provisions of the shareholders agreement to be of no force and effect. She alleges various instances of misconduct by the defendant in his handling of the affairs of the corporation. In addition, the plaintiff claims:

(i) damages for breach of contract and breach of fiduciary duty;
(ii) an accounting by the defendant;
(iii) an audit of the corporation;
(iv) appointment of a receiver and manager of the corporation;
(v) an order requiring the defendant to produce financial records of the corporation;
(vi) orders with respect to tax liabilities of the corporation;
(vii) a winding up of the corporation under the Ontario Business Corporations Act, R.S.O. 1990, c. B16 ("OBCA"); and
(viii) oppression remedies under the OBCA.

(para5) The defendant has counter-claimed seeking specific performance of the purchase agreement under the buy-sell provisions of the shareholders agreement, or in the alternative, damages against the plaintiff for breach of that contract.

(para6) As preliminary matter, counsel drew to my attention the apparent conflict between Rule 77.12(1) (which provides that motions in a case managed action can only be brought before a case management judge or master) and paragraph 8 of the Commercial List Practice Direction (which provides that only a judge on the Commercial List can transfer an action onto the Commercial List. I do not see Rule 77.12(1) as being an impediment to my dealing with this motion. A case management judge cannot grant transfer of a matter to the Commercial List. It therefore makes no sense that this motion be made to a case management judge. Rule 77.02(c) contemplates that the case management rules do not apply to matters "placed on the Commercial List". It is a logical extension that Rule 77 does not apply to motions to accomplish that result. While this is an area which could certainly benefit from clarification when the Rules are next reviewed for amendment, in the meantime I am satisfied that I have jurisdiction to grant the relief sought. Indeed, in my view, only a Commercial List judge is able to grant the relief sought.

7 Paragraph 1 of the Practice Direction Concerning the Commercial List sets out the matters eligible for the Commercial List. It provides:

> Matters which may be listed on the Commercial List are applications, motions and actions which in essence involve the following:
>
> (a) Bankruptcy and Insolvency Act;
> (b) Bank Act, relating to realizations and priority disputes;
> (c) Business Corporations Act (Ontario) and Canada Business Corporations Act;
> (d) Companies' Creditors Arrangement Act;
> (e) Limited Partnerships Act;
> (f) Pensions Benefits Act;
> (g) Personal Property Security Act;
> (h) Receivership applications and all interlocutory motions to appoint, or give directions to receivers and receiver/managers;
> (i) Securities Act;
> (j) Winding up Act; and
> (k) Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List. (Emphasis added)

8 Much of the relief claimed in the statement of claim falls squarely within categories enumerated under the Practice Direction as being automatically eligible for the Commercial List: e.g. a winding up order under the OBCA; oppression remedies under the OBCA; and the appointment of a receiver and manager. Other claims are directly related to such relief: e.g. an accounting, an audit, production of financial records; and orders with respect to tax liability. All of the claims in the action flow directly from a shareholder dispute and require an interpretation of the shareholders agreement and in particular the shotgun buy/sell provision. The pith and substance of the action are matters which are precisely within the ambit of the Commercial List, and indeed the very subject matter which the Commercial List was set up to accommodate.

9 The defendant seeks to have this action transferred to the Commercial List. Mr. Carroll, counsel for the plaintiff, argues that the plaintiff has chosen a forum which was open to her under the Rules, and that deference should be accorded to her choice. He further argues that this is a relatively straightforward matter depending on a finding of credibility and that it is easily within the

expertise of any judge of this court, including those who are not sitting on the Commercial List. He submits that placement on the Commercial List is a voluntary matter and that the plaintiff's choice of forum should only be interfered with if there are compelling reasons, such as commercial complexity.

10 The plaintiff relies upon the decision of Farley J. in 7712225 Ontario Inc. v. Bramco Holdings Co., [1992] O.J. No. 1772 (O.C.G.D.) and of Blair J. in Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce, [1992] O.J. No. 2610 (O.C.G.D.) as support for the propositions advanced. However, neither of these cases dealt with the situation before me. In Bramco, supra, Farley J. dealt with a motion to remove a case already on the Commercial List and declined to do so. In Maple Valley Acres, supra, the issue was whether an action properly commenced in Brampton could be transferred to Toronto on the grounds that it would be eligible for the Commercial List in Toronto. Blair J. held that this could not be the basis for a change of venue. Although in both these cases, reference was made to the "voluntary" nature of the Commercial List, these statements must be seen in the context of the case in which they were made.

11 In Bramco, Farley J. held at p. 3:

> At the present time going on the List is a voluntary matter - subject of course to judicial approval if the basket clause is involved. Coming off the List is not a free choice. In my view once there has been a determination of suitability by a judge, one would have to show that there had been such a material change in the perceived facts that a judge would on those "new" facts conclude that the matter was not suitable for the List. This was not the case here. As to those areas automatically on (if desired), since there was no judicial involvement, one would expect a much lower standard for removal - probably nothing more than a demonstration that the transfer out was not part of a stall tactic. (emphasis added)

12 Blair J. held in Maple Valley Acres, at p. 3:

> There is no question that access to the Commercial List is initially voluntary. The introduction to the Practice Direction makes this clear, and Farley J. confirmed as much in Bramco, supra. In my view, however, the "voluntariness" of the Commercial List is at the instance of the party bringing the proceeding, not those opposing. (emphasis added)

13 It is clear that a plaintiff is not obliged to place an action on the Commercial List even if the action would automatically qualify. It is in that sense that initial placement on the Commercial List can be described as "voluntary". I do not see the decisions of Farley J. and Blair J. referred to above as going any further than that, in so far as voluntariness is concerned. Neither case dealt with the issue of the extent to which the court will interfere with that initial voluntary choice by a plaintiff.

14 In the case before me, the plaintiff was entitled to place the action on the Commercial List because of the nature of much of the relief claimed. If the defendant had acquiesced in the plaintiff's choice of the general civil list, that would have been the end of the matter. However, the Practice Direction makes provision for a defendant to apply to have the action transferred to the Commercial List. Such a motion does not require the consent of the plaintiff. The Practice Direction therefore clearly contemplates situations in which a plaintiff who initially did not choose the Commercial List may nevertheless have his or her action transferred to it. The issue before me is the appropriate cir-

cumstances in which to make such an order. As far as I have been able to determine, there is no case law on this point.

15 The plaintiff argues that commercial complexity is a pre-requisite to an order transferring an action to the Commercial List and relies in that regard on Bankten Communications Services Ltd. v. General Motors of Canada Ltd., [1996] O.J. No. 1803 (O.C.G.D.) in which Jarvis J. held, at para 8:

> The essential liability issues in this case are not commercially complex and no unusual procedure will be required to litigate them. The assessment of damages will no doubt involve difficult concepts and sophisticated and complex evidence but I do not consider these factors to be determinative of the question. It appears to me that the primary characteristic of a case which qualifies for the Commercial List is that the liability issues involve questions of commercial complexity. I do not consider the issues that arise in this case are sufficiently commercially complex to qualify. For these reasons, this motion is therefore dismissed.

However, that case involved the application of the so-called "basket clause" at paragraph 6(k) of the Practice Direction which applies to "such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List". The considerations which apply to whether a case should be placed on the Commercial List under the "basket clause" are not necessarily the same as those which apply to cases falling within the categories enumerated in paragraphs 6(a) to (j). That is not to say that commercial complexity is not a factor to be taken into account in a motion such as the one before me. On the contrary, commercial complexity would be a compelling factor likely to result in an action being transferred to the Commercial List. However, it does not follow that a defendant cannot be successful in having an action transferred to the Commercial List unless the action is commercially complex. Complexity is a factor; it is not a prerequisite.

16 On the other hand, it cannot be the case that any action which falls within one of the enumerated heads is automatically transferred to the Commercial List at the behest of a defendant. The Practice Direction contemplates that this can only be done by order of a judge. It follows that there will be situations in which cases clearly eligible for the Commercial List will nevertheless remain elsewhere. It seems to me, however, that it will be more difficult for a plaintiff to avoid the Commercial List in a case which falls within the enumerated categories in the Practice Direction than would be the case if access to the List was only through the basket clause.

17 Mr. Carroll argues that there should be deference to the plaintiff's choice of forum. I do not see the Commercial List as a separate "forum". It is simply an administrative division of this Court designed to deal with cases of a particular type. The plaintiff's choice of "forum" was the Ontario Superior Court of Justice. Therefore, traditional rules and case law dealing with deference to the plaintiff's choice of forum have no application to a consideration of whether the plaintiff's case should proceed under the administrative rules of the Commercial List or under one of the other administrative teams for civil actions. Again, that is not to say that the plaintiff's choice of list is an irrelevant consideration. The plaintiff has carriage of the action and the plaintiff's preferences as to which administrative list should deal with the case will not be ignored. But neither will they be deferred to.

18 Mr. Wilson, on behalf of the defendant, argues that the defendant should be entitled to take advantage of the judicial expertise and expeditious procedures of the Commercial List. It is generally acknowledged that the Commercial List is able to deal with commercial matters in a more ex-

peditious manner because the judges on that List tend to have particular expertise in the subject area. The introduction to the Commercial List Practice Direction refers to the establishment of the Commercial List in 1991 and notes:

> The special procedures adopted for the hearing of matters on the Commercial List which expedite the hearing and determination of these matters have met with considerable approval and they have expedited the hearing and determination of these matters.

As stated by Farley J. in Bramco, supra, at p.3:

> I think it desirable as well to reflect that those judges available to sit in the List are some of those who have experience, expertise and an interest by aptitude and inclination in "corporate/commercial matters" of a complex and intricate nature. To put it another way, one would trust that an objective observer on determining the nature of the case and the identity of the judge would say something to the effect that the two are well-suited. The List is not a separate Court. Membership of the judicial team will change from time to time. A Commercial List Judge will sit in the List but as well in the General Division generally (civil, criminal, family, etc.). I think it appropriate to note that the Court has evolved into some degree of specialization in other areas as well. That is not to say that most, if not all, Judges will have extended periods of time being generalists (possibly the most difficult task for a judge). Each judge is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction.

19 Obviously, there is nothing about this case which places it beyond the expertise of any judge of this Court, whether on the Commercial List or not. However, it cannot be denied that commercial matters can be more effectively dealt with on the List specially designed and administered for that purpose. This is one of the factors to be taken into account in deciding whether to accede to a defendant's request that the action be transferred to the Commercial List. This is particularly the case where, as here, a defendant has asserted a counter-claim that is also of a commercial nature.

20 I turn now to a consideration of the particular circumstances of this case. In my view, the appropriate analysis is a balancing process in which the advantages and disadvantages of the Commercial List, as opposed to the regular list, are considered from the perspectives of all parties.

21 When the plaintiff filed her statement of claim, her action was randomly selected for Case Management. I see this as a neutral factor as both parties acknowledge that the administration of the Commercial List produces the same advantages as the case management system. The situation might be different if the action was on a regular civil list. The defendant's argument that the Commercial List would result in a more expeditious determination of his case would have even more weight if the action was not being case managed.

22 However, the particular expertise of the Commercial List in cases of this nature remains a factor that is clearly to the defendant's benefit on this motion. As I have stated above, this factor has additional importance when the defendant has a counter-claim that is commercial in nature. Further, the very essence of the plaintiff's action is a commercial dispute between two shareholders in a business and all of the relief claimed flows directly from that commercial dispute. Buy-sell clauses, the interpretation of shareholders agreements, oppression remedies, interim receivers and the wind-

ing-up of corporations are all routine matters on the Commercial List and are squarely within the special expertise of the List.

23 The plaintiff was unable to point to any disadvantage to her if the action is transferred to the Commercial List. She relies solely on the fact that she chose not to go on the List and therefore should not be forced onto it. I do not consider this to be a compelling reason to deny the defendant's motion.

24 In my opinion, the case is much more easily dealt with on the Commercial List. The court has an inherent jurisdiction to control its own process. In terms of court resources and time, it is more convenient and cost effective to deal with cases of this nature on the Commercial List. This is also an appropriate, although of course not determinative, factor to be considered.

25 Thus, the defendant has brought forward good reasons for transferring the action to the Commercial List, the smooth administration of our courts supports transferring the action to the Commercial List, and the plaintiff has failed to advance any reason for preferring the regular list or any disadvantage to her if the action is placed on the Commercial List. In these circumstances, I have no hesitation in concluding that the action should be transferred to the Commercial List.

26 An order shall issue transferring this action to the Commercial List. I understand that the parties have scheduled a mediation session for December 13, 1999. Techniques of alternate dispute resolution are specifically recognized and encouraged in the Commercial List Practice Direction. Accordingly, it is appropriate to wait until the resolution of mediation before imposing further time schedules on the parties. Counsel shall attend before a Judge of the Commercial List in Chambers to speak to scheduling matters at 9:30 am on January 6, 2000. If counsel cannot agree on costs, written submissions may be sent to me, including submissions as to quantum, the defendant's submissions by November 8 and the plaintiff's submissions by November 15, 1999.

MOLLOY J.

cp/d/qlrme

TAB 4

Indexed as:

Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce (CIBC)

Between
Maple Valley Acres Limited, Applicant, and
Canadian Imperial Bank of Commerce, Respondent

[1992] O.J. No. 2610

13 C.P.C. (3d) 358

37 A.C.W.S. (3d) 331

Action No. All92/92

Ontario Court of Justice - General Division
Toronto, Ontario

Blair J.

December 4, 1992

(8 pp.)

Ellen Bessner, for Moving Party (Respondent).
Brian Jenkins, for Responding Party (Applicant).

BLAIR J.:--

Overview

This Motion is for the transfer of a matter to the Commercial List. It raises some issues of general interest relating to the practice on the Commercial List, and counsel have requested that I give Reasons for my decision.

The proceeding is a Brampton Application. It involves a dispute over priorities under a construction mortgage. The Applicant's business operations are located in Peel Region. The lands in

question are in Peel. The branch of the Defendant Bank involved in the transaction is in Metropolitan Toronto, and the Bank's solicitors are in downtown Toronto.

The reasons advanced for the transfer are these:

1) The Application involves a matter which should be transferred to the Commercial List;
2) The Brampton Court does not have a Commercial List, and the Defendant's solicitors practise law in Toronto.

The "Basket Clause"

The subject matter of the proceeding is not one which falls within one of the enumerated heads of paragraph 6 of the March 24, 1992 Practice Direction. Such matters automatically qualify for placement on the Commercial List. Accordingly, if the Application is to be transferred to the Commercial List the transfer must be by virtue of clause 6(j) or "the basket clause" as it has come to be known.

Clause 6 of the Practice Direction, in its entirety, reads as follows:

"6. Matters which may be listed on the Commercial List are applications, motions and actions in respect of the following:

(a) Business Corporations Act (Ontario) and Canada Business Corporations Act, including:

- oppression remedies applications
- winding-up applications
- appointment of inspectors
- take-over bids
- shareholder remedies
- arrangements
- liquidations
- fair value determinations;

(b) Securities Act, relating to takeover bids and issuer bids;
(c) receivership applications

- all interlocutory motions to appoint, or give directions to, receivers and receiver/managers;

(d) Companies' Creditors Arrangement Act;
(e) Personal Property Security Act;
(f) Bank Act, relating to realizations and priority disputes;
(g) Winding-up Act;
(h) Bankruptcy Act;
(i) Pension Benefits Act; and,

(i) such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List." (Underlining added)

As Farley J. pointed out, in 771225 Ontario Inc. v. Bramco Holdings Co., [1992] O.J. No. 1772, there is a flexibility in the application of the basket clause. What fruit is selected for the basket may depend somewhat on how heavily loaded the Commercial Lift wagon is with work at a given time. It is not necessary, however, that the selection be based on the ejusdem generis principle of similarity in nature to the enumerated items in subclauses (a) to (i). The practice on the List is an evolving one, and an ability to analogize between the circumstances of the case sought to be transferred and the enumerated heads may be of assistance to the Commercial List judge hearing the motion for transfer. If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved -- or a combination of these varying factors -- it will be considered. As the Practice Direction notes:

> "A continuous re-evaluation process determines whether other matters should be added to those matters which may be listed on the Commercial List or whether the Commercial List procedures should be further modified or continued."

Here, the proceeding concerns a priority dispute under a land mortgage. This is not a subject matter which automatically qualifies for the Commercial List. Whether it could qualify for the List, via the "basket clause", is not something I have to determine for the purposes of this Motion because I have concluded that the proceedings should not be transferred, for other reasons set out below.

The Responding Party's Arguments

Mr. Jenkins, on behalf of the out-of-Toronto Applicant which has commenced its proceeding in Brampton as it is entitled to do, makes two primary submissions in opposing the transfer. They are:

1) that access to the Commercial List is voluntary, and that out-of-Toronto parties ought not to be compelled to litigate on the Commercial List, in Toronto, against their wishes; and,
2) that out-of-Toronto proceedings cannot be transferred to the Commercial List, by virtue of the Practice Direction, save "for special reasons" (and upon the consent of all parties), and this Application does not fall into the "special reasons" category.

The Voluntary Nature of the Commercial List

There is no question that access to the Commercial List is initially voluntary. The introduction to the Practice Direction makes this clear, and Farley J. confirmed as much in Bramco, supra. In my view, however, the "voluntariness" of the Commercial List is at the instance of the party bringing the proceeding, not those opposing. The Practice Direction states:

> "These procedures also continue to be, in the first instance, voluntary. Applicants and plaintiffs may continue to set matters that qualify for the

> Commercial List down for hearing either on the Commercial List or elsewhere. There is, however, provision for any party to have the matter transferred to, or removed from, the Commercial List." (Underlining added)

Thus, if a matter is a Toronto Region "commercial matter", as defined by clause 6, the applicant or plaintiff is entitled to have access to the Commercial List and the respondent or defendant is not entitled to deny that access by declining to consent. Were it otherwise an opposing party could place an unwarranted roadblock in the path of the party commencing the proceeding and perhaps frustrate the very kind of efficiency and economy of procedure which the Commercial List is designed to promote.

Place of Hearing

> Clause 9 of the Practice Direction provides as follows:
>
> 9. For the time being, only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the supervising judge) and matters listed on the Commercial List will only be heard in Toronto. (Underlining added)

Mr. Jenkins argues that there are no compelling reasons for transferring this Application from Brampton to Toronto Region in the guise of placing it on the Commercial List. The subject matter of the proceeding might qualify it for the Commercial List, he submits, but that is not, in itself, sufficient reason for the transfer. It is not enough to say that there is a Commercial List in Toronto and none in Brampton. Nor is it of much significance that the Defendant's counsel are in downtown Toronto. Meaning must be given to the phrase "for special reasons", in clause 9 of the Practice Direction, and more is necessary than simply that the matter would qualify for the List if commenced in Toronto.

I agree.

To hold otherwise would be to deprive clause 9 of the Practice Direction of its meaning. It would also expose out-of-Toronto parties and counsel to the cost and inconvenience of litigating in Toronto in an era when the Rules of Civil Procedure have recently been amended to counteract that very prospect.

I do not think that "balance of convenience" considerations such as apply to a change of venue under Rule 46.03 are useful in this context, as submitted by Ms. Bessner. If a case can be made for changing the place of hearing on such principles, those arguments stand on their own feet. The existence of a Commercial List of judges in Toronto is not a factor that creates its own "balance" for a transfer. As Farley J. noted, in Bramco, supra, "each [General Division] judge [in the Province] is dedicated to ensuring that Ontario is well-served in all aspects of the General Division's jurisdiction". Judges in the other Regions of Ontario can deal aptly with these matters too.

Disposition

Accordingly, for the foregoing reasons, the Motion is dismissed. As it raised a matter of practice not previously canvassed in respect of the Commercial List, there will be no costs.

BLAIR J.

TAB 5

Case Name:

Piedra v. Tsx Inc.

Between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Tsx Inc., Tsx Group Inc., William Stearns Vaughan and John Gammon, Defendants/Respondents
And between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Copper Mesa Mining Corporation, William Stearns Vaughan and John Gammon, Defendants/Respondents
And between
Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero, Plaintiffs/Moving Parties, and Copper Mesa Mining Corporation, Tsx Inc., Tsx Group Inc., William Stearns Vaughan and John Gammon, Defendants/Respondents

[2009] O.J. No. 5351

257 O.A.C. 112

Court File No. 464/09

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

S.N. Lederman J.

Heard: November 27, 2009.
Oral judgment: November 27, 2009.

(26 paras.)

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Interlocutory or final orders -- Standard of review -- Correctness -- Motion by plaintiffs for leave to appeal order transferring actions to commercial list dismissed -- Plaintiff brought claims against defendants based on negligence but pleaded and relied on commercial statutory provisions and raised issue of principle of corporate social responsibility governance -- No good reason to doubt correctness of order or way motion judge exercised discretion in considering wording of practice direction or pleading -- Importance of motion judge's decision did not transcend private interests of parties, raised no ques-

tions of public importance for administration of justice generally and did not require further judicial elucidation of general principles underlying practice direction.

Statutes, Regulations and Rules Cited:

British Columbia Business Corporations Act,

Rules of Civil Procedure, Rule 62.02(4)(b)

Securities Act, R.S.O. 1990, c. S.5,

Toronto Stock Exchange Act, R.S.O. 1990, c. T.15,

Counsel:

Murray Klippenstein and *W. Cory Wanless*, for the Plaintiffs.

Peter H. Griffin and *Andrew Parley*, for the Defendants.

John A. Keefe and *Peter Kolla*, for the Defendants.

ORAL REASONS FOR JUDGMENT

1 **S.N. LEDERMAN J.** (orally):-- The plaintiffs seek leave to appeal the interlocutory order of the Motions Judge, Newbould J., transferring three related actions from the civil list to the Commercial List of the Court.

2 The plaintiffs base their leave motion on Rule 62.02(4)(b), the test being that there is good reason to doubt the correctness of the order and the proposed appeal involves matters of such importance that leave to appeal should be granted. In order to succeed, the plaintiffs must satisfy both branches of this subrule.

3 In the actions, which are to be consolidated, the plaintiffs allege that the defendant, Copper Mesa Mining Corp. ("Copper Mesa"), a Canadian public company, in engaging in mining exploration in Ecuador has participated in a campaign of intimidation, harassment and violence against individuals who are opposed to its open pit mining operation.

4 The plaintiffs allege that the TSX defendants were negligent in breaching their duty of care by listing Copper Mesa on the Toronto Stock Exchange, thereby allowing Copper Mesa to raise substantial amounts of capital which has been used to finance unlawful actions against the plaintiffs, causing them harm.

5 The plaintiffs also allege that the defendants Vaughan and Gammon, who were Directors of Copper Mesa, were negligent and breached their duty of care by operating the company in a manner that created a high risk of violence to and did result in harm to the plaintiffs.

6 The plaintiffs allege that Copper Mesa is vicariously libel for the alleged harms caused to the plaintiffs by the two Directors.

7 The plaintiffs submit that the claims against the TSX defendants and the two Directors of Copper Mesa are based on the common law of negligence and are not founded on any statutes.

8 The plaintiffs oppose the transfer of the actions to the Commercial List on the grounds that they do not raise commercial issues and that no commercial relationship between the parties is in question. They say it is at heart a negligence action at common law.

9 As to the first branch of the test for granting leave under Rule 62.02(4)(b) i.e., there is good reason to doubt the correctness of the order, the plaintiffs make the following argument.

10 The Practice Direction that governs what matters may be on the Commercial List mandates an "in essence" test, namely, the matter must, in essence, involve a commercial statute or a commercial matter.

11 The plaintiffs submit that it is not enough that the law suit merely involves defendants who are commercial entities or could impact commercial interests. They argue that what must be shown is that the core legal issues in question are commercial in nature. They submit the actions must be in pith and substance commercial.

12 The Motions Judge concluded that the actions "clearly involve commercial issues". The plaintiffs submit that the Motions Judge failed to apply the specific wording of the Practice Direction and in error applied an "involving" test rather than the more rigorous "in essence involving" or a pith and substance test.

13 The plaintiffs argue that amounts to an error in law and in the exercise of discretion. Because of this failure to apply the correct test, the plaintiffs say there is good reason to doubt the correctness of the order.

14 The Motions Judge found that the actions clearly involve commercial issues because the plaintiffs, in their Statement of Claim against the Directors, plead and rely on the statutory duties and obligations of Directors under the *British Columbia Business Corporations Act*, and in their claim against the TSX defendants there is reference to the duties and obligations that the Motions Judge stated are defined in part by the *Securities Act*, the TSE Company Manual and the TSX Recognition Orders of the OSC.

15 Having regard to paragraphs 77, 92 and 109 of the proposed consolidated Statement of Claim, the plaintiffs in fact do rely on such commercial statutes as the *Toronto Stock Exchange Act* and the *British Columbia Business Corporations Act*, (similar to provisions in the OBCA) as being germane to the actions because they impose statutory legal duties of care on the defendants.

16 By pleading these provisions, the plaintiffs themselves acknowledge that the actions have a commercial law component. Even if the plaintiffs' intention is to plead and raise the statutory provisions merely to inform the common law duties of care that otherwise independently exist, an understanding and appreciation of these commercial statutes in the context of these proceedings would be helpful and these statutory provisions are part of the regular diet of the Commercial List.

17 Moreover, the pleading raises the issue of the principle of corporate social responsibility governance frameworks when the company is engaged in mining operations in developing countries.

18 Whether the degree of commercial issues amounts to being substantial or, "in essence" so as to be eligible for listing, is within the discretion of the Motions Judge. No hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question.

19 As pointed by Cumming J. in *Gyles v. My Travel Canada Holidays Inc.* [2006] O.J. No. 2497 at para. 11, "Overall, the basket clause has been applied broadly and with flexibility".

20 Even consideration of a non-commercial factor may enter into the exercise of discretion in deciding what is to be listed under the basket clause. The Practice Direction states that the Motions Judge may take into account the current and expected case load of the commercial list.

21 There is no disadvantage to a party in having the case listed on the Commercial List. In fact, procedures on the Commercial List allow for greater expediency. Moreover, the judges on the Commercial List not only have specialized knowledge about commercial issues but are part of the Superior Court of Justice and are generalists as well, quite capable of deciding issues of negligence and causation at common law.

22 The Motions Judge was engaged in a discretionary case management exercise, that is, on which list of the Court should the actions proceed. He had regard to the wording of the Practice Direction and the pleading of the plaintiffs in deciding to exercise his discretion. In doing so, he did nothing contrary to any established judicial principles. I see no good reason to doubt the correctness of the way he exercised that discretion or the order itself.

23 As to the second branch of Rule 62.02(4)(b), the Motions Judge used his discretion in applying the Practice Direction to the particular circumstances of the case before him. It was a fact specific exercise.

24 The importance of the Motions Judge's decision does not transcend the private interests of the parties. It raises no question of public importance for the administration of justice generally. It does not require any further judicial elucidation by the Divisional Court of the general principles underlying the Practice Direction. In this regard, it is instructive that counsel could point to no appellate decision reviewing a Practice Direction of any kind.

25 As neither part of the test under Rule 62.02(4)(b) has been met, the motion is dismissed.

26 I have endorsed the Record to read: "For oral reasons delivered, the motion is dismissed. Each group of the TSX defendants and the defendant directors will have their costs fixed at $1,500.00 all inclusive."

S.N. LEDERMAN J.

cp/e/qlrds/qljxr/qlaxw/qlhcs

TAB 6

2002 CarswellOnt 3852
Ontario Superior Court of Justice

Royal Bank v. Société Générale (Canada)

2002 CarswellOnt 3852, [2002] O.J. No. 4327, 118 A.C.W.S. (3d) 212

Royal Bank of Canada, Plaintiff and Société Générale (Canada) et al, Defendants

Ground J.

Heard: November 5, 2002
Judgment: November 5, 2002
Docket: 02-CV-235945CM2

Counsel: None given

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Civil practice and procedure

XIX Pre-trial procedures
XIX.2 Setting down or listing for trial

Headnote
Practice --- Pre-trial procedures — Setting down or listing for trial

MOTION by bank to transfer proceeding to Commercial List.

***Ground J.* (Orally):**

1 It appears to me that the issues in this action, vis-à-vis the financial institutions, are clearly issues of a commercial nature. The claims in negligence and conversion are to be determined based on banking practice and bank to bank and bank/customer relationships. It also seems to me that the claims against the insurers will involve the same factual and legal findings pertaining to the alleged forgeries as the claims against the financial institutions and that such claims are substantially intertwined.

2 I do not think that to approve the transfer of proceeding to the Commercial List in accordance with the reasons of Blair J. in Maple Valley requires a finding that all of the issues in the proceeding are exclusively commercial. Obviously, many proceedings on the Commercial List involve issues of real estate, insurance, labour and even family law. For example, proceedings are regularly brought in an insolvency situation against insurers under a Directors and Officers Liability Policy.

3 It is also my view that the disadvantages cited by Mr. Greene in transferring the proceeding to the Commercial List are not persuasive. I am not convinced that case management by case management masters on the Civil List is necessarily more efficient or more stringent than case management by a Commercial List Judge. In fact, the Commercial List Judge may take a more hands-on approach to case managing a proceeding and appointments with the Commercial List Judge are more readily obtainable. The access to mediation, either with a Commercial List Judge or by referral

to private mediation, is not only available, but is actively encouraged by the Commercial List. It is also my view that forcing this proceeding on to mandatory mediation when certain of the parties may not be ready or may be reluctant to participate would be, at a minimum, counter productive.

4 Accordingly, an order will issue:

1. approving the transfer of this action to the Commercial List

2. appointing myself as Case Management Judge and directing counsel to arrange an early case conference to deal with procedural matters generally and

3. directing that Statements of Defense be delivered or motions with respect to the Statement of Claim be brought by December 16, 2002.

5 Costs payable by the insurers to the Plaintiff in the amount of $3,000 in the cause.

Motion granted; proceeding transferred.

End of Document

TAB 7

Case Name:

Toronto Dominion Bank v. Bank of Nova Scotia

RE: The Toronto Dominion Bank, Applicant, and Bank of Nova Scotia, Respondent

[2013] O.J. No. 4355

2013 ONSC 6029

Court File No. CV-13-483985

Ontario Superior Court of Justice
Commercial List

D.M. Brown J.

Heard: September 20, 2013.
Judgment: September 25, 2013.

(8 paras.)

Counsel:

B. van Niejenhuis, for the Applicant.

B. Harrison, for the Respondent.

REASONS FOR DECISION

D.M. BROWN J.:--

I.

Motion to transfer a derivatives contract proceeding to the Toronto Region under the "basket clause"

1 The request by The Toronto Dominion Bank to transfer this proceeding to the Toronto Region Commercial List initially came before me at a 9:30 appointment. Counsel for the Bank of Nova Scotia opposed the request and asked for an opportunity to file materials in that regard. As a result, I heard a formal motion to transfer at a further 9:30 appointment on September 20. Notwithstanding the vigorous submissions of BNS, I granted the motion to transfer, with written reasons to follow. These are those reasons.

II.

General principles governing transfer requests to the Commercial List

2 The Commercial List is not a separate court, but a group of Toronto Region judges assigned to hear insolvency and commercial matters. The List possesses several key attributes: (i) the judges who sit on the list possess or develop expertise in insolvency and commercial disputes; (ii) the List affords quick access to judges by litigants to meet the needs of the "real-time" nature of many of the cases on it; (iii) to that end the 9:30 system of appointments enables parties to get before a judge within 24 hours, when required; and, (iv) a significant number of the proceedings on the List are case managed by judges through case conferences to ensure the fair, timely and cost-effective adjudication or resolution of the disputes on their merits.

3 However, the flexibility and accessibility offered by the Commercial List, when combined with the modest number of judges assigned to the List, necessitates that some limits be placed on the types of cases which may be heard on it. To that end the Commercial List Practice Direction identifies the matters eligible to be heard on the List. In addition to the proceedings commenced under or relating to specified statutes, paragraph 1(m) of the Practice Direction contains a "basket clause" which reads as follows:

> 1(m). Such other commercial matters as a judge presiding over the Commercial List may direct to be listed on the Commercial List, including: suitably complex cases under the *Arthur Wishart Act* (Franchise Disclosure), suitable commercial matters under the *International Commercial Arbitration Act* (Ontario), *Arbitration Act*, 1991 (Ontario) and *Commercial Arbitration Act* (Canada). (See *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1992] O.J. No. 1772 and *Maple Valley Acres Limited v. CIBC*, [1992] O.J. No. 2610), *Piedra v. TSX Inc.*, [2009] O.J. No. 5351 (Div. Ct.)).
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> In considering whether to make a direction under sub-paragraph 1(m), the judge may take into account the current and expected caseload of matters listed on the Commercial List.

4 As can be seen from the language of the basket clause, a broad discretion exists in determining which matters may be transferred on to the List. How that discretion should be exercised has been

addressed over the years in the case law:

(i) As stated by Lederman, J., sitting as a Divisional Court judge, in *Piedra v. TSX Inc.*:

> "The Practice Direction that governs what matters may be on the Commercial List mandates an 'in essence' test, namely, the matter must, in essence, involve a commercial statute or a commercial matter";[1]

(ii) Whether the degree of commercial issues amounts to being substantial or, "in essence", so as to be eligible for listing, is within the discretion of the motions judge. No hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question;[2]

(iii) Judges usually first consider whether the matter is commercial in nature, and then may go on to consider such factors as the complexity of the subject matter and whether a number of parties are involved;[3]

(iv) As Cumming J. once pointed out.: "Overall, the basket clause has been applied broadly and with flexibility";[4]

(v) Factors other than the strict subject-matter of a proceeding, such as the level of the workload on the Commercial List at any point of time, may enter into the decision whether to transfer a matter on to the List. As stated by Blair J., as he then was, in *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, in turn quoting Farley J.:

> As Farley J. pointed out, in *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772, there is a flexibility in the application of the basket clause. What fruit is selected for the basket may depend somewhat on how heavily loaded the Commercial Lift wagon is with work at a given time. It is not necessary, however, that the selection be based on the ejusdem generis principle of similarity in nature to the enumerated items in subclauses (a) to (i). The practice on the List is an evolving one, and an ability to analogize between the circumstances of the case sought to be transferred and the enumerated heads may be of assistance to the Commercial List judge

> hearing the motion for transfer. If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved -- or a combination of these varying factors -- it will be considered.[5]

(vi) As well, the ability of an urgent matter to be heard elsewhere in the Court or the need for a proceeding to be subject to the style of case management practised on the Commercial List may enter into the consideration of a transfer request;

(vii) Further, as Lederman J. observed in the *Piedra* case:

> There is no disadvantage to a party in having the case listed on the Commercial List. In fact, procedures on the Commercial List allow for greater expediency. Moreover, the judges on the Commercial List not only have specialized knowledge about commercial issues but are part of the Superior Court of Justice and are generalists as well, quite capable of deciding issues of negligence and causation at common law.[6]

(viii) Finally, the location of the parties can play an important role in any decision to transfer a matter to the Commercial List. Paragraph 8 of the Practice Direction states:

> Only Toronto Region matters can be listed on the Commercial List (unless, for special reasons, authorization is given by the supervising judge). Aside from urgent insolvency matters, there should be a material connection to the Toronto Region over and above the location of counsel. Matters listed on the Commercial List shall only be heard in Toronto.

III.

Application of these principles to the facts of the present case

5 As pleaded in the Notice of Application, the dispute between TD and BNS involves two series of equity derivative transactions - specifically, cash settled equity basket options - entered into by the parties in 2009. One of the equities in the basket covered by two standard ISDA confirmations was EnCana Corporation. EnCana's equity was restructured after the parties had entered into the derivative transactions. TD pleads that the parties had agreed upon a method to adjust the settlement

mechanisms of both derivative transactions in light of EnCana's re-organization, but TD discovered in 2012, when some transactions were settled, that BNS had changed the adjustment mechanism. At least that is the pleading made by TD; no doubt BNS will give its side of the story in its responding materials.

6 Disputes involving the interpretation or performance of derivative transactions generally are heard on the Commercial List involving, as they do, commercial contracts at the more complex end of the spectrum. Given that subject-matter of the present application, I concluded that it was appropriate to transfer TD's application to the Commercial List.

7 I ordered that the parties appear before me on October 2, 2013, at a 9:30 appointment, to finalize a schedule and to set a hearing date.

8 Since this motion only consumed 10 minutes on a 9:30 appointment, I made no order as to costs.

D.M. BROWN J.

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1 2009 CarswellOnt 7823 (Div. Ct.), para. 10.

2 *Ibid*., para. 18.

3 *Gyles v. Mytravel Canada Holidays Inc.*, [2006] O.J. No. 2497 (S.C.J.), para. 8.

4 *Ibid.*, para. 11.

5 (1992), 13 C.P.C. (3d) 358 (Ont. Gen. Div.), p. 361.

6 *Piedra, supra.*, para. 21.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VERITAS INVESTMENT RESEARCH CORPORATION et al.
Defendants

Court File No. CV-15-530726

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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