CITATION: Austin v. Overs et al., 2010 ONSC 7194
COURT FILE NO.: 06-00CL6270
DATE: 20101224

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SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL COURT

RE: LAWRENCE BERNARD AUSTIN, Plaintiff

LIZA OVERS AND RICHARD WINTER as Estate Trustees for the Estate of MICHAEL OVERS, TESARI HOLDINGS LIMITED and PIZZA PIZZA LIMITED, Defendants

BEFORE: Justice Newbould

COUNSEL: Peter Jervis and Rebecca La Flamme, for Plaintiff

Peter H. Griffin, for the Defendants

DATE HEARD: December 21, 2010

E N D O R S E M E N T

[1] The plaintiff seeks to amend his statement of claim by delivering a second fresh as amended statement of claim in which new allegations are made against the current defendants and four new defendants are added. These changes are resisted by the defendants on a number of grounds.

[2] This action was begun in 2006. At its core is a claim by the plaintiff that he had an agreement with Michael Overs made on February 13, 1996 that upon the sale or other disposition of Pizza Pizza (PPL) or a substantial portion of its assets, the plaintiff would receive a portion of the proceeds, being 10% of the first $10 million in excess of $70 million, 20% of the next $10 million in excess of $80 million and 25% on any amounts in excess of $90 million. The alleged agreement was contained in a cryptic one-page handwritten note signed by the plaintiff and Mr. Overs. Mr. Overs started PPL in 1967 and at the time of the alleged agreement, owned 100% of PPL through his holding company Tesari Holdings Limited.

Applicable rules

[3] Rule 26.01 provides the on a motion to amend a pleading, the court shall grant leave to amend on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment. A pleading will not be permitted where the proposed amendment is not tenable in law, such as an amendment that is frivolous, vexatious or an abuse of process or does not disclose any reasonable cause of action or defence. The onus is on the moving party to show that the claim sought to be added is tenable that law. The responding party bears the onus of showing that the amendment should be denied because it would result in prejudice. See *Hartman Estate v. Hartfam Holdings Limited* (2006), 200 O.A.C. 369 at para. 25 per Gillese J.A.

[4] Further, in considering whether to grant leave to amend, a court should not examine whether there is sufficient evidence to sustain the pleading, weigh evidence or make findings of fact. To do so would turn the motion to amend into a summary judgment motion. Unless the facts alleged are based on assumptive or speculative conclusions that are incapable of proof, they must be accepted as proven. See *Griffiths v. Canaccord Capital Corp*. [2005 O.J. No. 4897 at para. 10 per Carnwath J. and *Andersen Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576 (C.A.) at paras. 34 and 35 per Moldaver J.A.

[5] Rule 5.04 (2) provides that a court may add a party on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment. Unlike rule 26.01, this is a discretionary power rather than a mandatory direction. See *Mazzuca v. Silvercreek Pharmacy Limited* (2001), 56 O.R. (3d) 768 at paras. 25-6 and 30 (C.A.) per Cronk J.A.

Nature of the amendments

[6] There is some history to the statement of claim. It was first issued on February 1, 2006. It was amended on April 18, 2006. In that claim the plaintiff alleged the existence of the February 13, 1996 agreement with Mr. Overs under which the plaintiff claimed to be entitled to the proceeds of a sale or disposition of PPL or a substantial portion of its assets. He pleaded that in July 2005 PPL had engaged in a transaction under which the PPL goodwill and intellectual

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property was conveyed to a limited partnership and trust fund for $231,922,750, and that as a result he was entitled to be paid his share of the proceeds of that transaction in accordance with the February 13, 1996 agreement. He claimed damages of $45 million and a declaration that the defendants had engaged in oppressive conduct contrary to section 248 of the OBCA.

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[7] The defendants moved to strike the statement of claim in its entirety or, in the alternative, striking out various claims including the claim for oppression. By reasons released June 7, 2006, Ground J. permitted the pleading to stand but struck the oppression claim as well as a claim for breach of fiduciary duty. In his endorsement, Ground J. held that the claim by the plaintiff as pleaded at that time was essentially a claim for breach of contract and thus the oppression claim could not stand. He stated:

> [24] In the case at bar, Austin was clearly a former officer of PPL at the time of the alleged oppressive conduct being the summer of 2005. As stated above, in my view, the conduct complained of is conduct which is alleged to be a breach of contract by PPL in retaining all of the proceeds of the income trust transaction contrary to the provisions of the 1996 Agreement. The essence of that claim is not that it detrimentally affected Austin in any way as a former officer of PPL but that the retention of all the proceeds of the income trust transaction by PPL is alleged to be a breach of the 1996 Agreement whereby Austin claims he is entitled to a percentage of the proceeds. The claim is essentially a claim for damages for breach of contract and not for a remedy to redress the impact of oppressive contract on behalf of the Defendants toward Austin in his capacity as a former officer of PPL. The conduct complained of was not in any way oppressive to Austin in his capacity as a former officer of PPL and accordingly, cannot, in my view, form the basis for an oppression claim against any of the defendants and that claim must be struck.

[8] The plaintiff now seeks to plead a new cause in oppression. The nub of the new claim, which the plaintiff asserts was discovered only from supplementary productions delivered by the defendants in February 2010 and from the examinations for discovery in July and September 2010, is that in 1999 the defendants engaged in an estate freeze transaction in which the shares of PPL and Tesari were transferred to Overs' family-owned companies and that the proceeds of the July 2005 transaction, being approximately $232 million, were paid out of PPL to a related corporation 1373153 Ontario Limited, then to the Flower Trust, then to Liza Overs and back to

Michael Overs. It is claimed that 1373153 and the Flower Trust were created as part of the 1999 estate freeze and that Liza Overs was a beneficiary of the Flower Trust.

[9] It is claimed that under the February 13, 1996 agreement between the plaintiff and Overs, the plaintiff had a beneficial equitable ownership interest in the shares or assets of PPL in accordance with the formula contained in that agreement, which based upon the $232 million price, amounted to a 25% beneficial equity ownership interest in the shares or assets of PPL. It is claimed that as the proceeds of the 2005 transaction were thus not retained by PPL but transferred out through to Liza Overs and her father Michael Overs, those actions constituted oppression that have unfairly disregarded and prejudiced the plaintiff's interest as a beneficial equity owner of shares or assets of PPL.

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Issues

[10] The defendants take the position that the proposed amendments relating to the oppression remedy against them are barred because of action estoppel, issue estoppel and the doctrine of abuse of process. The proposed defendants assert that there is no basis for an oppression claim relating to PPL and Tesari to be made against them and thus the plaintiff cannot be a complainant under section 248 of the OBCA. It is also asserted that the remedy against the defendants and proposed defendants is statute barred because of the *Limitations Act.* They also take the position that because Michael Overs died on March 31, 2010 before the motion to amend the statement of claim was brought, the defendants are prejudiced by this new oppression claim.

(a) Estoppel and abuse of process

[11] The defendants assert that the oppression remedy sought to be pleaded is barred as a result of the decision of Justice Ground of June 7, 2006.

[12] The principles of estoppel are well settled and need not be repeated here. See *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.R. 460 at paras. 20 and 33 per Binnie J. and *Martin v. Goldfarb* [2006] O.J. No. 2768 at paras. 55 to 58 per Perell J. The doctrine of abuse of process is

also well settled and need not be repeated here. See *Toronto (City) v. CUPE*, [2003] 3 S.C.R. 77 at para. 37 per Arbour J.

[13] The defendants assert that the oppression claim sought to be added is nothing more than the breach of contract claim that led Ground J. to conclude that the oppression claim then pleaded was to be struck. That order was a final order insofar as the claim that was struck is concerned.

[14] I do not agree that the decision of Ground J. precludes the amendment sought. The new oppression claim is fundamentally different from the claim that was before Ground J. The plaintiff pleads that he has a beneficial equitable ownership interest in PPL and its underlying assets and that the steps taken as result of the estate freeze in 1999 and the transfer of the approximately $230 million out of PPL in 2005 to 1373153 Ontario Limited, then to the Flower Trust, then to Liza Overs and back to Michael Overs is oppressive to his interest. The claim is not simply a claim against PPL for breach of agreement. It is essentially that as result of the facts pleaded in the proposed amended claim, the steps complained of denuded PPL and Tesari of their assets in which it is asserted the plaintiff has a beneficial equitable ownership.

[15] The plaintiff pleads that the 1999 estate freeze resulted in the transfer of the ownership of PPL to a numbered company and then to an offshore family trust, the Flower Trust, for the Benefit of Liza Overs and Michael Overs and that the proceeds of the 2005 transaction were paid out through the numbered company to the Flower Trust and then to Liza Overs and back, in part, to Michael Overs. This was not the cause of action that was dealt with by Ground J., nor could it have been as the facts relied upon by the plaintiff for his new oppression claim regarding the transfer of money were not known to him at the time of the motion before Ground J.

[16] This is not a situation in which the plaintiff has gone to trial and lost a claim for breach of contract arising from the alleged agreement that he says he had with Mr. Overs and then attempted to start another action arising from the same factual situation, this time based on an oppression claim.

(b) The plaintiff as a complainant

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[17] The proposed defendants assert that on the proposed amended pleadings, the plaintiff was only a beneficial holder of shares of PPL and thus any oppression remedy could only be asserted against PPL or its directors, none of which the proposed new defendants were. Thus it is claimed that there is no valid cause of action pleaded against these new proposed defendants and that the plaintiff should not be entitled to act as a complainant against them.

[18] I hesitate at this stage of the proceedings to come to the conclusion asserted by the proposed new defendants. First, whether a plaintiff may be a complainant as defined in section 245 of the OBCA is a matter normally to be determined by the trial judge. It should be taken out of the hands of the trial judge on a motion such as this only if there is clearly no tenable pleading on the facts or at law such that an amendment should not be permitted.

[19] Section 245 of the OBCA defines a complainant to mean:

> (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

[20] The plaintiff pleads that he has a beneficial ownership interest in the shares of PPL, which if proven would make him a complainant within the meaning of section 245(a). See *Fedel v. Tan* (2010) 70 B.L.R. (4th) 157 (Ont. C.A.) at para. 69 per O'Connor A.C.J.O. The defendants take the position that the plaintiff obtained no beneficial share ownership interest in PPL, but that will be a matter for determination by the trial judge. It cannot be said that the alleged facts regarding his ownership interest are incapable of proof and thus for the purposes of this motion to amend the pleading, they must be taken as proven.

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[21] Section 245 (c) gives an unfettered discretion to the trial judge to determine whom should be a complainant. In *Olympia & York Developments Limited (Trustee of) v. Olympia & York Realty Corp.* (2003) 68 O.R. (3d) 544 (C. A.) Goudge J.A. stated:

> [45] …s. 245(c) confers on the court an unfettered discretion to determine whether an applicant is a proper person to commence oppression proceedings under s. 248. This provision is designed to provide the court with flexibility in determining who should be a complainant in any particular case that accompanies the court's flexibility in determining if there has been oppression and in fashioning an appropriate remedy. The overall flexibility provided is essential for the broad remedial purpose of these oppression provisions to be achieved. … It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

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[22] Section 248 of the OBCA gives a court a wide discretion to rectify the matters complained of. In this case the allegations are that Mr. Overs, the controlling shareholder and director of PPL, took steps to cause assets to be transferred out of that company into related persons' hands. There are many cases in which an oppression remedy has been provided when assets have been transferred out of a corporation into the hands of related third parties. Indeed they are commonplace. Whether or not there is any valid claim for relief under section 248 against the proposed new defendants is, of course, something entirely for the trial judge and I am in no position to make any comment whatsoever regarding the merits other than to say that is not possible at this stage on a pleadings motion to say that the proposed claim is frivolous and vexatious or clearly one that is bound to fail.

(c) The *Limitations Act, 2002*

[23] The new oppression claim which the plaintiff seeks to assert arises from the estate freeze in 1999 and the July 2005 transaction. The defendants take the position that the claim is thus statute barred under the *Limitations Act, 2002*. Under section 4 of the *Limitations Act, 2002*, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. Section 5(1)(a) provides that a claim is discovered on the earlier of the dates on which the person with the claim first knew or ought to of known that the injury, loss or damage had occurred. Section 5(2) provides that a person with the claim shall be

presumed to have known of the matters referred to in section 5(1)(a) on the day the act or omission of which the claim is based took place, unless the contrary is proved.

[24] The defendants assert that the plaintiff has not proved a lack of knowledge of the facts pleaded at the time of those acts or within two years of them and thus he is presumed to have known of them when they occurred.

[25] The defendants also assert that the plaintiff in fact was aware, or ought to have been aware, of the facts relied upon in the amended pleading to support the new oppression claim. They assert that the estate freeze was pleaded by them in their statement of defence delivered on August 11, 2006 and further disclosed in a document produced by them in their first affidavit of documents in July 2007.

[26] In their statement of defense delivered on August 11, 2006, the defendants pleaded -

> "Some years later, the holdings of the corporate structure of PPL and its share ownership were substantially reorganized, including a transfer as part of an estate freeze, which reflected the fair market value of Tesari's interest as the owner of PPL was substantially less than $70 million."

[27] One of the approximately 2000 documents produced by the defendants in July 2007 was a five page memorandum dated July 23, 2001 which summarized Tesari's minute book. An entry in the memorandum dated November 30, 1999 stated the following-

> "The Corporation entered into an agreement with Pizza Pizza Limited to exchange its 899,900 common shares of Pizza Pizza Limited in exchange for 1000 preference shares of Pizza Pizza Limited
>
> The Corporation issued a new share certificate representing one special share of the Corporation to Michael Overs pursuant to affidavit of loss From Michael Overs
>
> Michael Overs transferred 1,779,837 common shares to 1373154 Ontario Inc."

[28] It may be inferred from this information that someone in the position of the plaintiff or his legal advisers may have realized that some kind of estate freeze had taken place involving PPL in which the equity of Tesari and Mr. Overs was frozen.

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[29] It is common ground, however, that on February 2 and 11, 2010, Michael Overs delivered supplementary productions, including all of the documents relating to the estate freeze. These documents disclosed the companies involved in the estate freeze, the existence of the Flower Trust and the fact that Liza Overs became the beneficiary of the Flower Trust. No explanation has been provided by the defendants why these documents were not produced with the productions made in July 2007.

[30] Examinations for discovery were first held in this case in 2010. Mr. Feltner, the CFO of PPL, was examined on April 29, 30 and July 9, 2010 on behalf of Tesari and PPL. Mr. Richard Winter, Q.C. was examined on September 21, 2010 on behalf of the estate of Michael Overs.

[31] On his examination for discovery on July 9, 2010, Mr. Feltner disclosed the transfers of the $232 million proceeds from the 2005 transaction, after-tax, from PPL to 1373153 Ontario Inc., then to the Flower Trust, then to Liza Overs and then to Michael Overs. On his examination on September 21, 2010, Mr. Winter provided evidence with respect to the structure of the estate freeze. He provided a document that contained a summary of the steps taken to enact the estate freeze and three flowcharts depicting the steps taken in the estate freeze.

[32] The defendants assert that the information provided in 2006 and 2007 set out above was sufficient to inform the plaintiff of the estate freeze. The plaintiff asserts otherwise and relies on details disclosed this year. Thus there is a factual dispute regarding when sufficient details of the estate freeze were discoverable to base a cause of action. There is no dispute that the information regarding the payment of money out through the various entities to Lisa Overs and Michael Overs was not known to the plaintiff until the examinations for discovery were held this year. That payment is central to the new oppression claim, but not the entire basis for the claim.

[33] Where a factual dispute exists as to the discoverability of sufficient information to enable a cause of action to be asserted, and thus as to when a limitation period begins to run, it is a question of fact that should be left for determination to the trial judge on a full evidentiary record, and in those circumstances the amendment sought to a statement of claim will normally be allowed and the responding party will be given leave to plead the limitation period as a defence. See *Frohlick v. Pinkerton Canada Ltd.* (C.A.) at para. 32, per Rouleau J.A. and *Zapfe*

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v. Barnes (2003), 66 O.R. 93d) 397 (C.A.) paras. 26 and 29 per Feldman and Cronk JJ.A. In my view such a result is appropriate in this case.

(d) Prejudice

[34] The defendants rely upon the principle that the proper interpretation of rule 26.01 is that the expiry of a limitation period gives rise to a presumption of prejudice which will be determinative unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption. See *Frohlick v. Pinkerton Canada Ltd, supra*, at para. 17. As to what constitutes special circumstances, Rouleau J.A. stated:

> [25] There is no exhaustive list of what constitutes special circumstances in the context of rule 26.01. They are often procedural or informational mistakes made by a party that have not misled the opposite party or induced the opposite party to defend the claim differently than it would have if the amendment had been made before the limitation period expired.

[35] In light of the fact that whether the limitation period has expired in this case is a matter for the trial judge, the presumption of prejudice relating to the expiry of a limitation period is not one for determination at this stage.

[36] The defendants also assert that they are prejudiced because these amendments to the statement of claim that are sought were only raised after the death of Mr. Overs on March 31, 2010. They contend that the allegation of the plaintiff that he has an ownership interest in the shares or assets of PPL arising from the agreement of February 13, 1996 is a new allegation and they are now unable to know the views of Mr. Overs on such a crucial issue. Thus they assert that there is prejudice within the meaning of rule 26.01.

[37] I have difficulty with this assertion. The original statement of claim issued on February 1, 2006 referred in paragraphs 12, 18 and 19 to the plaintiff's ownership interest in PPL and to an agreement that upon the sale or other disposition of PPL or a substantial portion of its assets, the plaintiff would receive a percentage of the proceeds. The amended statement of claim issued on April 18, 2006 contained the same and expanded assertions of the plaintiff's ownership interest. Mr. Overs was well aware of these allegations and in his statement of defence delivered August

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11, 2006, he pleaded in paragraph 27 that the plaintiff was never promised, nor entitled to, an equity interest in PPL. While the proposed amendments include particulars of the ownership interest asserted by the plaintiff, the basic pleading that the plaintiff has an ownership interest has not changed such that it is not possible for the defendants to deal with the amendments. Mr. Overs, while alive, denied any equity interest of the plaintiff. It is difficult to see how the defence would be materially different to the claim that the plaintiff has a beneficial equitable ownership in PPL and its assets.

[38] The most fundamental change sought to be pleaded by the plaintiff is the oppression resulting from the estate freeze and the transfer of money from PPL out to Liza Overs and Michael Overs. All of the information regarding this has been in the hands of the defendants and proposed defendants since the acts complained of. No explanation has been given as to why the documentation and information was not produced at the time of the original productions in 2007. At the time they were produced in 2010, no change to the pleadings had taken place since the statement of defence was delivered. This is a factor I take into account as the tardy production lies at the feet of Mr. Overs. Had they been produced earlier, the plaintiff would have been in a position to assert the proposed amendments much earlier.

[39] The plaintiff first retained Mr. Fuller of Ogilvy Renault to act for him. After Mr. Fuller left the practice of law, the plaintiff retained Mr. Jervis in the spring of 2009. Mr. Jervis attended at 9:30 a.m. attendances on various occasions to try to expedite discovery so that it could be held in the fall of 2009 or January 2010. This proved not possible, partly because of positions taken on behalf of Mr. Overs regarding the need for a *Waag* order, and partly because of scheduling difficulties of Mr. Griffin. While I do not in any way fault Mr. Griffin, the fact remains that had the discoveries taken place as requested by Mr. Jervis, they would have occurred before Mr. Overs' untimely death.

[40] Unlike the presumption of prejudice arising from the expiry of a limitation period, the prejudice said to have been caused by Mr. Overs' death is one which the defendants bear the onus of establishing in order to prevent the amendment being allowed. See *Hartman Estate v.*

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Hartfam Holdings Limited (2006), 200 O.A.C. 369 at para. 25 per Gillese J.A. In all of the circumstances, I am not satisfied that the defendants have met that onus.

Conclusion

[41] The plaintiff is granted leave to amend his claim in the manner set out in the Second Fresh as Amended Statement of Claim attached as schedule A to the notice of motion dated November 23, 2010 and to add 1373153 Ontario Limited, 1373154 Ontario Limited, Maria Christina Louisa Overs, aka Liza Overs, aka Liza Goddard and The Flower Trust as defendants. The defendants are granted leave to plead the *Limitations Act* as a defence.

[42] My inclination is that the plaintiff is entitled to his costs of the motion but if the defendants wish to assert otherwise, they may do so in brief written submissions. If the quantum of costs cannot be agreed, brief written submissions regarding costs may be made, including the delivery of a cost outline in accordance with the rules for costs that are sought.

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NEWBOULD J.

DATE: December 24, 2010

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