

COURT OF APPEAL FOR ONTARIO

CITATION: Adler v. Deloitte Touche Tohamtsu, 2022 ONCA 855

DATE: 20221208

DOCKET: C70604

Simmons, Benotto, and Favreau JJ.A.

BETWEEN

Edie Dearing Adler

Applicant (Respondent)

and

Deloitte Touche Tohamtsu Limited, AP Valuations Limited, Cohen Hamilton Steger & Co. Inc., Crowe Soberman LLP, Duff & Phelps Canada Ltd., Eagle Capital Investment Corp, KK Sun Corporation, Sky Power Service ULC (ULC) 1, KK Sunshine Holdings Inc., KK Sunshine Holdings LP, Skypower Ltd, Skypower Operations Ltd, 2329557 Ontario Inc., 2138747 Ontario Inc., 6785671 Canada Inc., Bank of Montreal, Canadian Imperial Bank of Commerce, Citibank Canada, Diners Club International, HSBC Bank Canada, Raymond James Limited, Richardson GMP Limited, Royal Bank of Canada, the Toronto Dominion Bank and Rachel Bellisimo

Respondents (Appellants)

Jason Wadden and Judith Manger, for the appellants

Shaun Laubman and Cole Pizzo, for the respondent

Heard: October 26, 2022

On appeal from the order of Justice James F. Diamond of the Superior Court of Justice, dated April 7, 2022.

Benotto J.A.:

[1] This appeal involves disclosure sought in Ontario, pursuant to letters of request from a California court, in the context of a divorce action. The Ontario

application judge granted the request, subject to minor refining. For the reasons that follow, I would dismiss the appeal, which seeks to set aside the order.

Facts

[2] Kerry Adler and the respondent, Edie Adler, are engaged in divorce proceedings in the Superior Court of the State of California for the County of Los Angeles. Ms. Adler alleges that Mr. Adler has a complex web of corporations, which he uses to shield his substantial income and assets. Several of the corporations are in Canada.

[3] Mr. Adler is a successful businessman. He is a sole or majority shareholder in four of the corporate appellants: Eagle Capital Investment Corp. (“Eagle”), 2329557 Ontario Inc. (“232”), 2138747 Ontario Inc. (“213”), and 6785671 Canada Inc. (“678”). He also has a 33% interest in SkyPower, a corporation based in Toronto, which he helped found. SkyPower produces solar power in 35 countries. He also has an interest in the corporate respondents Eagle Capital Investments, the “KK” group of companies.

[4] The record discloses multiple attempts by Ms. Adler to obtain financial information about Mr. Adler’s financial interests in the corporations. The information is necessary for her claims in the divorce action.

[5] Mr. Adler has not complied with court orders requiring disclosure. The California court held more than six hearings to compel compliance and issued a sanction of \$25,000 against him. Still, compliance was incomplete. Ms. Adler sought Letters Rogatory to obtain the information required for her claims for property, spousal and child support.

[6] The California court issued two Requests for International Judicial Assistance in May and August of 2021. Although not named in the requests, Mr. Adler delivered responding material on behalf of these corporations, as well as on his own behalf. Most of the corporate respondents either entered into agreements with Ms. Adler for the production of certain documents or did not oppose the relief sought in the application.

[7] Ms. Adler issued an application in the Superior Court of Justice in Ontario to enforce the letters rogatory issued by the California court. The letters required production from the corporate appellants and from Mr. Adler’s personal assistant. The application judge ordered that the letters be recognized, with a “reading down” of the information sought from the personal assistant.

[8] Mr. Adler seeks to appeal on behalf of the four corporate appellants, as well as the Skypower corporations. Neither Mr. Adler nor Skypower are named as appellants.

Issues

[9] Mr. Adler raises several issues on appeal, dealing with both procedural and substantive issues. Procedurally, he submits that the application judge should not have heard the application because he and Skypower were not served. Substantively, he submits that the application judge applied the wrong test and did not follow this court's decision in *Actava TV, Inc. v. Matvil Corp*, 2021 ONCA 105, 457 D.L.R. (4th) 138.

Analysis

[10] I begin with a general discussion of the applicable principles, then address the issues raised by Mr. Adler.

[11] A letter rogatory is a request from a judge to the judiciary of a foreign country for the performance of an act which, if done without the sanction of the foreign court, would constitute a violation of that country's sovereignty. In this case, the request is for production of documents from corporations in Canada.

[12] The decision to grant or refuse a foreign request is a matter of judicial discretion, entitled to deference on appeal: *Presbyterian Church of Sudan v. Rybiak*, [2006] 275 D.L.R. (4th) 512 (Ont. C.A.), at para. 19. According to this court's decision in *Perlmutter v. Smith*, 2020 ONCA 570, 152 O.R. (3d) 185, at para. 31, the appropriate standard of review for the grant of letters rogatory is palpable and overriding error.

[13] The authority to enforce letters rogatory is set out in the *Canada Evidence Act*, R.S.C. 1995, c. C-5, at s. 46(1), as well as in the *Evidence Act*, R.S.O. 1990, c. E.23, at s. 60(1). The requirements are:

- a) a foreign court, desirous of obtaining testimony in relation to a pending civil, commercial or criminal matter, has authorized the obtaining of evidence;
- b) the party from whom the evidence is sought is within the jurisdiction of Ontario;
- c) the evidence sought from the Ontario party is in relation to a pending proceeding before the foreign court or tribunal; and
- d) the foreign court or tribunal is a court or tribunal of competent jurisdiction.

[14] In *Perlmutter*, this court addressed six factors which must be considered when deciding whether to enforce letters rogatory:

- Is the evidence sought relevant?
- Is the evidence sought necessary for trial and will it be adduced at trial if admissible?
- Is the evidence sought not otherwise obtainable?
- Is the order sought contrary to public policy?
- Are the documents sought identified with reasonable specificity?
- Is the order sought not unduly burdensome, having in mind what the relevant witnesses would be required to do and produce if the action was tried here?

[15] This court also addressed the enforcement of letters rogatory in *Actava*. In that case, at para. 42, three elements relevant to the enforcement of letters rogatory were identified: (1) comity, (2) public policy of the jurisdiction to which the request is directed, and (3) the absence of prejudice to the sovereignty of the citizens of that jurisdiction. Canadian courts have refused to order testimony for use in foreign proceedings in various situations, including:

- where a request for production of documents was vague in general;
- where discovery was sought against a non-party to a litigation in violation of local laws of civil procedure; and
- where the main purpose of the examination was to serve as a “fishing expedition”.

[16] I now turn to Mr. Adler’s submissions.

(a) Procedural Issue

[17] Mr. Adler submits that the application should not have proceeded because he was not a party. I would not give effect to this ground of appeal, as it ignores the reality of the situation. Even though Mr. Adler was not a formal respondent in the underlying application, he was given standing in California to make submissions both on his own behalf and on behalf of the other corporate entities. He was also given standing in the Ontario application.

[18] Although not raised before the application judge, Mr. Adler now submits that Skypower was not served with the application material and the order against it should be set aside. I would reject this ground for two reasons. First, Skypower has not appealed the application judge’s order. Second, Mr. Adler is the CEO of Skypower. He was served with the application on behalf of Skypower.

(b) Substantive Issues

[19] Mr. Adler submitted that the application judge erred by finding the production relevant; by failing to recognize a fishing expedition; and by putting the burden on him to prove that the documents were not “otherwise obtainable”. In this way, he submits the strictures outlined in *Actava* were not followed.

[20] The application judge found that the information sought by Edie was relevant to the issues in the California proceedings because they related to the nature, scope and extent of Kerry’s business interests in the various appellant corporations, production of which is consistent with Ontario family law. Mr. Adler submits that the documents would not have been ordered produced under Ontario law. I disagree.

[21] The obligation of financial disclosure in family law litigation is basic. Despite extensive jurisprudence and rule amendments, litigants continue to resist disclosure. Full financial disclosure is immediate and absolute. Failure to disclose has been called “the cancer of family law litigation”: *Michel v. Graydon*, 2020 SCC 24, 449 D.L.R. (4th) 147, at para. 33. This court has repeatedly echoed similar comments. The documents are clearly relevant and would be required to be produced in Ontario.

[22] I note that the application judge articulated concerns about relevancy with respect to the communication between Mr. Adler and his assistant. That is why he ordered that the letters rogatory be read down to only include communications pertaining to the specific matters upon which her examination was requested.

[23] I do not accept Mr. Adler’s characterization of the order as a “fishing expedition”. Production of documents that are required in order to assess responsibility for family law obligations is not a “fishing expedition”, but, instead, a normal part of the disclosure process.

[24] Mr. Adler submits that, when the application judge considered whether the information requested was otherwise obtainable, he referred to Mr. Adler’s “self-serving” statements that the documents had been produced. Mr. Adler says that this reversed the onus on Ms. Adler and required him to prove that the documents were otherwise obtainable. This submission ignores the record before the court. There were multiple attempts, court orders and sanctions in play to obtain disclosure. It is clear from the record that the documents were not otherwise obtainable.

[25] I disagree with Mr. Adler’s overarching submission that the application judge’s analysis ran afoul of this court’s decision in *Actava*. The application judge’s

reasons plainly show that he carefully considered the record, finding no public policy reason why the California court should not be shown deference by the Ontario court, as well as independently considered whether the requests complied with Ontario's legal requirements for enforcement. It is clear from the reasons that the application judge meaningfully addressed the criteria for granting letters rogatory and, therefore, I see no error in his reasoning.

Conclusion

[26] I would dismiss the appeal with costs to the respondent in the amount of \$20,000, inclusive of disbursements and HST.

Released: December 8, 2022 "J.S."

"M.L. Benotto J.A."

"I agree Janet Simmons J.A."

"I agree L. Favreau J.A."