COURT OF APPEAL FOR ONTARIO

CITATION: Petrochemical Commercial Company International Ltd v. Nexus Management Group SDN BHD, 2023 ONCA 308
DATE: 20230503
DOCKET: COA-22-CV-0123

Miller, Trotter and Favreau JJ.A.

BETWEEN

Petrochemical Commercial Company International Ltd,
PCCI Ltd and Navak Asia Kish Trading Co (PJS)

Applicants/Responding Parties (Respondents)

and

Nexus Management Group SDN BHD,
Asian Trade Investment Bank Ltd, Medhi Ebrahimieshratabadi (aka Mike Robertson aka Mike Robinson aka Tony Newman), Maleksabet Ebrahimi, Omid Ltd, ATIB Ltd, 5M Investment Holding Ltd, Khadijeh Taghavi Sabzevari, Mohammad Ebrahimieshratabadi (aka Emanuele Ebrahimi), Mehraneh Ebrahimi Eshratabadi, Amir Kargar Neghab, Ali Vashaee, 5M Capital Investment Pty Ltd, 5M Capital Investment Pty Ltd, 5M Investment Ltd, Mediville Investments Ltd, Global Newman Pty Ltd, Horizon Investment Holding Ltd, EBM Corporation, IMBS SDN BHD and MPO Ltd

Respondents/Moving Parties (Appellants)

Arkadi Bouchelev, Andrew Wray and Juan Echavarria, for the appellants

Jonathan Stainsby and Mary Murray, for the respondents

Heard: February 16, 2023

On appeal from the order of Justice Bernadette Dietrich of the Superior Court of Justice, dated July 15, 2022, with reasons at 2022 ONSC 3721.

REASONS FOR DECISION

[1] The individual appellants, father and son, are together suspected of defrauding the corporate respondents of over US $71 million. The respondents are Iranian companies that engage in the sale of petroleum and other commodities. The respondents employed the appellants as intermediaries in order to evade US sanctions on Iranian produced petroleum products. The respondents allege that the appellants embezzled substantially all of the funds they obtained on the respondents' behalf from the international sale of the respondents' oil.

[2] The respondents brought civil actions against the appellants in many jurisdictions, including Portugal, Malaysia, Singapore, Australia, Cyprus, and Canada, and obtained a *Mareva* injunction in support of a world-wide freezing order from the Ontario Superior Court of Justice. In addition, criminal proceedings against the appellants were commenced in Iran, and International Criminal Police Organization ("Interpol") Red Notices[1] were issued for the arrest of the appellants.

[3] Subsequently, the parties agreed to settle all proceedings between them and memorialized their agreement in a document entitled "Mutual Agreement". The Mutual Agreement contemplated that the parties' respective obligations would

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[1] The motion judge explained that "Red Notices are issued for fugitives wanted either for prosecution or to serve a sentence. A Red Notice is a request to law enforcement worldwide to locate and provisionally arrest a person pending extradition, surrender, or similar legal action."

be particularized in written “Minutes of Settlement”, which would be filed with the court registries in the various jurisdictions.

[4] Pursuant to the Minutes of Settlement, which were finalized shortly after the Mutual Agreement, the appellants agreed to deliver to the respondents millions of dollars worth of property, including real estate, cash, cryptocurrency, gold bullion, and shares in private companies. In return, the respondents agreed to discontinue proceedings against the appellants.

[5] The scope of the respondents’ obligations to discontinue proceedings is at the heart of this appeal.

[6] The respondents have discontinued civil proceedings in various jurisdictions, and the appellants have delivered up a significant proportion of the promised assets. But the appellants assert that the respondents have failed to uphold their end of the settlement because the criminal proceedings in Iran have not been discontinued, and the Interpol Red Notices have not been withdrawn.

[7] The appellants brought a motion compelling the respondents to fulfil their obligations by having the Red Notices withdrawn and the criminal proceedings discontinued. In the alternative, they sought to set aside the Minutes of Settlement based on non-performance, or because the respondents acted in bad faith.

[8] The motion judge dismissed the motion. On her interpretation of the settlement, the respondents did not agree to dismiss the criminal

proceedings in Iran or remove the Red Notices, but only to request the Iranian prosecutor do so, which the respondents had in fact done, albeit not promptly. Further, the motion judge found that the respondents had no capacity to dismiss the proceedings or withdraw the Red Notices; these were procedural steps that could only be taken by entities over which the respondents had no control. She further found that the respondents did not act in bad faith. They did not mispresent to the appellants that they could bring the criminal proceedings in Iran to an end and, furthermore, the appellants did not act in reliance on the respondents representing they were able to do so.

[9] As set out below, we do not agree that the motion judge made any reviewable error, and we dismiss the appeal.

Issues

[10] On appeal, the appellants argue that the motion judge made four interrelated errors:

1. Failing to interpret the Minutes of Settlement in light of the Mutual Agreement;
2. Relying on evidence of surrounding circumstances to overwhelm the clear meaning of the Minutes of Settlement;

3. Failing to find that the respondents acted in bad faith by agreeing to have the criminal prosecution discontinued when they knew they could not; and,

4. Misapprehending evidence regarding the independence of the Iranian prosecutor.

Analysis

(1) The Mutual Agreement and Minutes of Settlement

[11] On October 4, 2020, the parties signed the Mutual Agreement, which memorialized certain terms of settlement. It contemplated that these terms would be further particularized in the Minutes of Settlement, which would be filed with the courts in the various jurisdictions, including Iran, to affect the dismissal of proceedings, conditional on the transfer of settlement assets.

[12] The Mutual Agreement, in clause 7, also addressed the "dismissal of the Interpol case":

> Information disclosed to the public related to the Interpol will be terminated after the issuance of the consent order in Canada and Cyprus. Complete dismissal of the Interpol case is dependent on the completion of clause 3 of this agreement and the submission of the Minutes of Settlement to the Iranian court and transfer of ownership of all assets in the mentioned countries in this agreement and the transfer of the Iranian assets to the First Party.

[13] On October 19, 2020, the parties signed the Minutes of Settlement, which stated the parties' intention to thereby "fully and finally resolve all matters

between them in respect of all issues and matters raised in the various Actions, and in any other proceedings that have been commenced by any of the First Party against any or all of the Second Party in any jurisdiction around the world".

[14] The Minutes of Settlement set out the mechanics for the execution of the agreement, including several provisions addressing the removal of the Interpol Red Notices:

> 29. On the Completion Date in Iran, a request will be sent to Interpol to remove all information related to this case and to close any files related to this case including and not limited to the Red Notice issued against Mr. Mehdi Ebrahimieshratabadi and Mr. Maleksabet Ebrahimi
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> 30. The First Party agrees the responsibility and commits to cooperate fully in order to ensure the complete and final removal of the Interpol Red Notices.
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> 31. Second Party's Iranian lawyer will release the signed Appendix 4 document to the First Party once the Red Notice removal document is sent to Interpol.
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> …
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> 33. Immediately after the Completion Date in Canada and in Cyprus, the First party as part of its obligation under these Minutes of Settlement, is going to remove the information related to Mr. Maleksabet Ebrahimi and Mr. Mehdi Ebrahimieshratabadi from the public website of Interpol.

[15] The motion judge interpreted the Minutes of Settlement as providing that "the applicants agreed to take certain steps to cooperate in securing the withdrawal of criminal proceedings in Iran, and the removal of the Interpol Red Notices, but

they did not guarantee these results". She also found they did not "have the capability to unilaterally deliver these results."

[16] With the exception of para. 33, the motion judge found the meaning of the Minutes of Settlement to be unambiguous and easily ascertained on a plain reading of the text as a whole. Regarding the respondents' obligations with respect to the Iranian criminal proceedings and the Interpol Red Notices, she found the Minutes obligated the respondents "to make requests of others and to cooperate with others to ensure that certain steps are taken, but not to take those steps themselves, which, in any event, are beyond their capability."

[17] The only analytical difficulty identified by the motion judge was with the interpretation of para. 33, which stipulated an obligation to "remove the information related to Mr. Maleksabet Ebrahimi and Mr. Mehdi Ebrahimieshratabadi from the public website of Interpol". She was uncertain from a plain reading of the text as to what information was referred to, what the public website is, and how the respondents were to remove it. Accordingly, she sought recourse to the surrounding circumstances known to the parties at the time of the drafting of the Minutes of Settlement. She considered the evidence given by the appellants' and respondents' respective expert witnesses on Iranian law and prosecutorial independence. Her conclusion was, as stated above, that all parties knew that the Iranian prosecutors were independent from the respondents and the respondents had no control over their decisions:

"The obligation, in my view, is to make the request, and to cooperate, in ways available to them, to facilitate the withdrawal of the criminal proceedings and the removal of the Interpol Red Notices." She concluded that the respondents had done so, albeit not in strict accordance with the timetable set out in the Minutes of Settlement. She dismissed the motion.

[18] The appellants' argument is that the motion judge erred by not using the terms of the Mutual Agreement to interpret the Minutes of Settlement. Had she done so, they argue, she would necessarily have concluded that the Minutes of Settlement obligated the respondents to have the Iranian criminal proceedings permanently stayed, and the Interpol notices withdrawn.

[19] We do not agree that the motion judge erred by not using the Mutual Agreement as an interpretive aid in the manner proposed by the appellants. The motion judge's interpretation of the Minutes of Settlement is accorded substantial deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. It was not unreasonable, nor an error in principle, for the motion judge to have concluded that the Mutual Agreement was superseded by the Minutes of Settlement, and that the latter was the sole contract governing the parties' obligations. As the motion judge noted, several provisions of the Minutes of Settlement contradicted the Mutual Agreement, which supports her conclusion that the two documents were not meant to be coordinate, but instead that the Minutes of Settlement displaced the Mutual Agreement.

Furthermore, there was no need to use the Mutual Agreement as part of the factual matrix for interpretation, as the text of the Minutes of Settlement was not ambiguous. The only uncertainty was with respect to para. 33, which was resolved both by the surrounding circumstances and the text of the Minutes of Settlement read as a whole.

[20] The motion judge was not required to interpret the Minutes of Settlement in a manner that would give interpretive priority to the Mutual Agreement. She made no error in not doing so.

(2) Use of Surrounding Circumstances in Interpretation

[21] The appellants further argue that the motion judge erred in law by using evidence of the surrounding circumstances to contradict the clear wording of the Minutes of Settlement obligating the respondents to discontinue the Iranian criminal proceedings and remove the Interpol Red Notices. That is, the motion judge relied heavily on the evidence of Dr. Morteza Zahraei that the Iranian prosecution service is independent of the respondents, that the respondents could only make requests that these things be done, and that any qualified Iranian lawyer would understand this. She concluded that the Minutes of Settlement could not mean that the respondents were obligated to do anything more than request a discontinuation because they lacked such authority. This was an error,

the appellants argue, because the nature of the Iranian prosecution service has no bearing on the clear contractual obligation undertaken by the respondents.

[22] We do not agree that the motion judge erred. The analytical process she followed is apparent from her reasons. Following *Sattva*, she started with the text of the agreement and came to her conclusion as to its meaning before considering surrounding circumstances. She found it clear from the text that the respondents did not and could not undertake the obligation articulated by the appellants. Her recourse to surrounding circumstances was limited: for the interpretation of para. 33. As stated above, that interpretation is entitled to deference from this court.

(3) Bad Faith Misrepresentation

[23] The appellants argue, in the alternative, that the respondents entered into the Minutes of Settlement in bad faith, knowing that they did not have the authority to do what they had committed to doing. In the result, the appellants committed to restoring over US$71 million to the respondents, and still face the prospect of criminal prosecution in Iran. They argue that the motion judge erred in finding there was no misrepresentation and seek a rescission of the Minutes of Settlement.

[24] We do not agree that the motion judge erred. Having found that the motion judge’s interpretation of the Minutes of Settlement is reasonable entails that

the respondents did not make the misrepresentation complained of. This ground of appeal therefore also fails.

(4) Failure to Consider Contradictory Evidence

[25] The appellants' final ground of appeal is that the motion judge failed to consider the evidence of Dr. Erfan Lajevardi, who the appellants say contradicted the evidence of other witnesses preferred by the motion judge.

[26] The motion judge made only one reference to the evidence of Dr. Lajevardi, in which she stated that "Dr. Lajevardi acknowledged in his affidavit evidence that the applicants could only make the request" for the withdrawal of the criminal prosecution and Red Notices. The appellants argue that not only did the motion judge substantially neglect Dr. Lajevardi's evidence, but in this sole reference to his evidence she misapprehended it, as he in fact testified that the respondents were obligated to discontinue the criminal proceedings in Iran.

[27] Again, we find there is little substance to this submission. Dr. Lajevardi was one witness among others. He testified as to various meetings that took place between representatives of the parties and the Iranian prosecution office and offered opinion evidence on the nature of the respondents' obligations. The appellants believe his evidence ought to have been accepted where it conflicted with the evidence of others, and had it been accepted it would have been dispositive of the scope of the respondents' authority over

the prosecution decision. The appellants of course acknowledge that the motion judge was under no obligation to find this evidence persuasive. But they argue she erred in largely overlooking the evidence and, to the extent she did not overlook it, misapprehended it.

[28] We do not agree. Having cited the evidence of Dr. Lajevardi, the motion judge clearly did not overlook it. Although the appellants would have preferred the motion judge to have been more impressed with Dr. Lajevardi's evidence than she was, she was not required to address it in any greater measure than she did. The only remaining question is whether she misapprehended his evidence, having found that he had "acknowledged" that the respondents were only in the position to make requests of the Iranian prosecution.

[29] Although Dr. Lajevardi advanced the proposition in his affidavit that the respondents were in breach of their obligations because they had "failed to take the necessary steps to dismiss the proceedings" and "failed to withdraw the Interpol Notices", his account of the various meetings and telephone calls between his clients and various individuals from the prosecution office in Iran support the motion judge's characterization of his evidence as an acknowledgment (whether intended or not) that withdrawing the criminal charges was solely within the authority of the prosecution office.

[30] Accordingly, this ground of appeal fails as well.

DISPOSITION

[31] The appeal is dismissed. The respondents are entitled to costs of the appeal from the appellants in the amount of $17,500 including HST and disbursements, as agreed between the parties.

"B.W. Miller J.A."
"Gary Trotter J.A."
"L. Favreau J.A."