

CAYMAN ISLANDS

COURT OF APPEAL

Nedgroup Trust (Jersey) Limited -v- Renova Industries Limited and ors (Unreported) (22 July 2014)

DERIVATIVE ACTION - ABUSE OF PROCESS - GCR O.15 - TEST FOR GRANT OF LEAVE

An application was made by the Plaintiff pursuant to GCR O.15, R.12A (2) for leave to continue a multiple derivative action. The parties are very closely related to the litigation *Renova Resources Private Equity Limited -v- Gilbertson and others* [2012] 2 CILR 416, which involved the same investment fund and company/exempted limited partnership structure known as the Pallinghurst Structure. However, this particular action concerned the first Defendant's ("RIL") acquisition and subsequent sale of a shareholding in an Australian mining company ("Consmin") and whether or not that acquisition was made as another investment of or for the same investment fund as part of the Pallinghurst Structure.

The Plaintiff is the trustee of the Gilbertson family trusts and owns 50% of the shares in Pallinghurst (Cayman) General Partner LP (GP) Limited (the "Company"). The Claim was brought by the Plaintiff on behalf of the Company. The second Defendant, Mr. Kuznetsov, is the chief investment officer of RIL, and the third Defendant, Mr. Vekselberg, is the ultimate owner and chairman of RIL. The Plaintiff claimed that it was agreed between the Company, as the ultimate general partner of the sixth Defendant (the "Master Fund"), and RIL, that RIL would acquire the shares in Consmin for the benefit of the Master Fund. The Plaintiff further claimed Mr. Kuznetsov and Mr. Vekselberg were aware of the agreement but instead sold the shares and kept the profit for themselves.

The relief sought against RIL on behalf of the Company was damages for breach of contract, breach of trust, breach of agency and an account of the profit made by RIL on the subsequent sale of the shares in Consmin.

Mr. Justice Foster identified the appropriate test for the grant of leave to continue a derivative action as the, *prima facie*, case test, which was set out in the *Renova -v- Gilbertson* ruling at para 32:

"...where a Defendant in a derivative action has given notice of intention to defend, the Plaintiff must satisfy the Court that the company has a prima facie case against the Defendant (and that the action falls within the applicable exception the rule in Foss -v- Harbottle)".

It was agreed the action fell within the applicable exception to the Rule in *Foss -v- Harbottle*, and so Justice Foster went on to consider whether the Plaintiff could show that it had a *prima facie* case against the Defendants on the merits. In this respect, Justice Foster again referred to the *Renova -v- Gilbertson* ruling where he stated that:

"I must be satisfied in the exercise of my discretion that the [Plaintiff's] case is not spurious or unfounded, that it is serious as opposed to a speculative case, that it is a case brought bona fide on reasonable grounds, on behalf of and in the interest of the Company and that it is sufficiently strong to justify granting leave for the action to continue rather than dismissing it at this preliminary stage".

Justice Foster found the Plaintiff had nothing more than a very weak case on the merits, on the basis that RIL had purchased the shares in Consmin at its own risk and that any understanding otherwise was likely subject to a condition which was never met. Further, that Mr. Gilbertson, through the Plaintiff, was using the Company to further pursue his personal fight with Mr.

Vekselberg, as highlighted in *Renova -v- Gilbertson*, and therefore the Claim was not brought *bona fide* or in the interests of the Company. In the circumstances, Justice Foster refused leave to continue the derivative action.

His Lordship then went on to consider the Defendant's contention that the Claim amounted to an abuse of process, following the principle set out in the case of *Henderson -v- Henderson* (1843) 3 Hare 100. It was recognised by the Court that abuse of process cases must now be read in light of the more recent House of Lords decision in *Johnson -v- Gore Wood & Co (a firm)* [2002] 2 AC 1, and that:

"The bringing of a claim or the raising of a defence in later proceedings may amount to abuse of process if the Court is satisfied that the claim or defence should have been raised in the earlier proceedings... The Court should take a broad, merits-based approach which takes account of all the facts of the case and focusing on whether a party is misusing or abusing the process of the Court".

The Judge found overwhelming similarities between the Claim and the *Renova -v- Gilbertson* litigation: both involved the same investment fund structure, background, Company and individuals. The only difference being the *Renova -v- Gilbertson* litigation involved the proposed investment of the Master Fund in Fabergé rights as opposed to an investment by the Master Fund in Consmin shares, however, the latter was also the subject of evidence and comment in the first litigation.

In defending the abuse of process allegations, the Plaintiff relied heavily on the fact that it was not party to the *Renova -v- Gilbertson* litigation, which was brought on behalf of the Company by Renova Resources rather than the Plaintiff (Fairbairn). However, the Judge found although in each case the claim was brought on the Company's behalf by a different shareholder, it was substance and not form that was relevant, and, in that respect, there was no difference between the two proceedings because in each case the real Plaintiff is the Company. Further the non-party argument failed because Mr. Gilbertson, who is a Defendant in *Renova -v- Gilbertson* and a beneficiary of the trust to which the Plaintiff is trustee, has an interest in the outcome of both proceedings. Thus, the degree of identity between Mr. Gilbertson and the Plaintiff is such that the Plaintiff should be treated as a party common to both actions for the purpose of the abuse of process principles.

Justice Foster then considered the second stage of the test for abuse of process and determined the present claim should have been heard in the previous action. His Lordship found no compelling reason why the claims could not have been made in

Renova -v- Gilbertson, and that commencing separate proceedings caused an unnecessary duplication of time, effort and costs, which was not in the interests of the public or the administration of justice. His Lordship rejected the Plaintiff's argument that it had reserved the right to bring the Claim in the present proceedings by giving notice of a potential claim to the Defendants during the *Renova -v- Gilbertson* litigation. In the circumstances, the Plaintiff and/or Mr. Gilbertson should have sought directions from the Court so the appropriate orders and/or case management directions could have been made, which would have been to bring both claims in the same proceedings.

Justice Foster also found, in any event, the Claim should be dismissed pursuant to the principles set out in *Nurcombe -v- Nurcombe and another* [1985] 1 All ER 65. Firstly, in *Renova -v- Gilbertson*, Mr. Gilbertson was found to be in breach of his fiduciary duties as a director of the Company on behalf of which the Plaintiff, which is also the trustee of Mr. Gilbertson's trust, brought the present proceedings. Secondly, a subsidiary of the Plaintiff, Autumn Holding Assets Inc., is pursuing an appeal as one of the Defendants in *Renova -v- Gilbertson*. That appeal is plainly against the interests of the Company, whose interests the Plaintiff was proposing to represent in the present proceedings. His Lordship considered in the circumstances the Claim was being used in an inequitable manner and should not be allowed to continue.

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