

COURT FILE NUMBER 1703 12327
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON



IN THE MATTER OF THE
COMPANIES' CREDITORS
ARRANGEMENT ACT, RSC 1985 c
C-36, AS AMENDED

AND IN THE MATTER OF A PLAN
OF ARRANGEMENT OF 667402
ALBERTA LTD., 18512398
ALBERTA LTD., 1371047
ALBERTA LTD., 1919209
ALBERTA LTD. AND CANADA
NORTH GROUP LP HOLDINGS
LTD.

DOCUMENT BENCH BRIEF OF 726 MODULAR
FINANCE LTD.

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
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Nature of the Application:

1. 726 Modular Finance Ltd. ("726") is seeking relief with respect to two upcoming hearings scheduled for special chambers on November 7th, 2018 in Court of Queen's Bench Actions No. 1603 21142 ("the Kingdom Action") and 1703 23860 (the "Replevin Action").
2. Kingdom Properties Ltd. and Kingdom Cats Ltd. (collectively, "Kingdom") have indicated their want to proceed on November 7th, 2018 with the special chambers applications.
3. 726 seeks a stay with respect to the Kingdom Action until the Kingdom appeals of the disallowed claims can be heard and that the ownership issue in the Replevin Action be heard alongside the application regarding ownership in the within action on December 4th and 5th, 2018.

Factual Background

4. The Kingdom Action is by Kingdom for damages against Kilometer 147 LP and Kilometer 147 GP Ltd. arising from a lease agreement, and against Canada North Camps Inc. ("185") and 726 Modular Finance Ltd. ("726") as indemnitors of Kilometer 147 LP and Kilometer GP Ltd.
5. The Replevin Action was an action commenced by 726 for recovery of dorm equipment which was on lands held by Kingdom Properties Ltd.

The Extension of the Stay

6. On October 25th, 2017, Paul and Shayne McCracken applied for an extension of the stay granted in the Initial Order to 726 in the Kingdom Action. Nielsen J. granted the order, with the express exception of the ability of Kingdom to set down a summary judgment application against 726 in master's special chambers.
7. As can be seen from the transcript of the October 25th, 2017 application, the reasoning for the exception to the stay was due to scheduling for special chambers applications occurring around one year after the date is requested.
8. It was anticipated by the parties at that time that the within matter would be concluded by January 31st, 2018, which was at that time the date to which the stay from the Initial Order was extended.
9. The stay extended to 726 is directly tied to the stay granted to the parties listed in the Initial Order.
10. While the transcript (attached to the Affidavit of Georgina McMinn at Exhibit "D") speaks to the stay being extended to 726 through January 31st, 2018 at page 24, there is further discussion as to the extension of the duration of the stay at page 26, wherein 726's counsel indicates (and the Court indicates agreement) that the summary judgment date "must fall", subject to further application of Kingdom.
11. Kingdom made no further application with respect to the stay.
12. The stay in the Initial Order has been extended a number of times since then and is currently set to expire December 31st, 2018.

Notices of Disallowance

13. 185 and 726 have been sued in the same capacity in the Kingdom Action: both as indemnitors of Kilometer 147 LP and Kilometer 147 GP Ltd.
14. On February 16th, 2018, the Monitor disallowed the entirety of the Kingdom claims.
15. Kingdom has appealed the Monitor's disallowance, though that appeal has not been heard or scheduled.

The Replevin Action

16. The Replevin Action was commenced following the order of Nielsen J. extending the stay.
17. Master Schulz was not satisfied of 726's ownership interest in the application for replevin, and as such she ordered 726 post a bond pending a hearing with respect to ownership of the equipment which was the subject of the Replevin Action (the "Kilometer 147 Equipment"). That was scheduled at the same time as the summary judgment application in the Kingdom Action.

Ownership Issues

18. Unbeknownst to 726 at the time of the order of Master Schulz in the Replevin Action, 185 also asserted an ownership interest over the Kilometer 147 Equipment.
19. Since then, there have been extensive discussions and evidence filed with respect to 726's ownership over the Kilometer 147 Equipment. Indeed, pursuant to the order of Hillier J. in the within action, 726 filed an Affidavit on October 5th, 2018 which set out the equipment it owned on various Canada North camps, including the Kilometer 147 Equipment.
20. While the ownership issues were initially set to be heard on October 23rd, 2018, the Monitor at present intends to bring that issue before this Honourable Court on December 4th-5th, 2018.

Law and Argument

21. Many things have transpired since October 25th, 2017 and it is now patent that there is significant overlap between the issues in the Kingdom Action, some of the issues in the Replevin Action and the within action. Moreover, many of these issues are already scheduled to be heard soon.
22. It is respectfully submitted that allowing Kingdom to proceed with the special chambers applications scheduled for November 7th, 2018 brings with it the risk of inconsistent verdicts.
23. When considering then-rule 229, the Court of Appeal noted the abhorrent prospect of inconsistent verdicts over the same issue or facts.¹

¹ *Alliance Pipeline L.P. v. C.E. Franklin Ltd. et al.*, 2007 ABCA 285, TAB 1, paragraph 6.

24. It is respectfully submitted that the issues set to be heard at the special chambers hearing scheduled for November 7th, 2018 in the Kingdom and Replevin actions should be heard alongside those in the within action.

All of which is respectfully submitted this 12th day of October, 2018.

McAllister LLP

Per:



Darcy Christian McAllister
Solicitors for 726 Modular Finance Ltd.

In the Court of Appeal of Alberta

Citation: Alliance Pipeline Limited v. Universal Ensco, Inc., 2007 ABCA 285

Date: 20070913

Docket: 0701-0135-AC

Registry: Calgary

Between:

Alliance Pipeline Limited Partnership and Alliance Pipeline L.P.

**Respondents
(Plaintiffs)**

- and -

**C.E. Franklin Ltd., Stream-Flo Industries Ltd.,
Entech Deutschland GmbH and
Mannesmann Demag A.G., now known as
Mannesmann Demag Krauss-Maffei GmbH**

**Respondents
(Defendants)**

- and -

**Mannesmann Demag A.G., now known as
Mannesmann Demag Krauss-Maffei GmbH,
Entech Deutschland GmbH, Dresser Valves Europe GmbH,
and Colt Engineering Corporation**

**Respondents
(Third Parties)**

- and -

**C.E. Franklin Ltd., Stream-Flo Industries Ltd.,
Mannesmann Demag A.G., now known as
Mannesmann Demag Krauss-Maffei GmbH,
Entech Deutschland GmbH, Dresser Valves Europe GmbH
and Nuovo Pignone S.p.A.**

**Respondents
(Fourth Parties)**

And Between:

**Alliance Pipeline Limited Partnership and
Alliance Pipeline L.P.**

**Respondents
(Plaintiffs)**

- and -

Colt Engineering Corporation

**Respondent
(Defendant)**

- and -

Universal Ensco, Inc.

**Appellant
(Defendant)**

- and -

Nuovo Pignone, S.p.A.

**Respondent
(Third Party)**

The Court:

**The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Keith Ritter
The Honourable Madam Justice Patricia Rowbotham**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Order of
The Honourable Mr. Justice D.K. Miller
Dated the 22nd day of February, 2007
Filed on the 27th day of May, 2007
(Dockets: 020121074; 050100724;
Consolidated Number: 70105256)

**Memorandum of Judgment
Delivered from the Bench**

Paperny J.A. (For the Court):

[1] This is an appeal from an order consolidating two actions. There was lengthy argument by counsel that raised, *inter alia*, the prematurity of the application, the difference in parties in the subject actions, the limited commonality of issues, the different stages of the proceedings and prejudice to the parties named in only one of the actions. Despite this, the chambers judge held that the pleadings defined the issues sufficiently to determine whether an order for consolidation should proceed, that the parties need not be identical and that there was sufficient commonality of issues to meet the test outlined in *Mikisew Cree First Nation v. Canada*, 1998 ABQB 675, 224 A.R. 157.

[2] *Alberta Rules of Court*, Alta. Reg. 390/68, r. 229 provides:

Where there are two or more actions or proceedings that

(a) have a common question of law or fact, or

(b) arise out of the same transaction or series of transactions.

or where for any other reason it is desirable to make an order under this Rule, the court may order that the actions or proceedings be consolidated or be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

[3] An order to consolidate is discretionary. The standard of review is reasonableness. A decision may be unreasonable if the chambers judge failed to consider relevant factors, did not give them proper weight or made an error of law. While failure to give adequate or any reasons is not itself unreasonable, an appellate court must assess the case itself: *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38, [2002] 2 S.C.R. 417.

[4] The chambers judge had no evidence before him to determine whether there were common questions of fact and law. While reliance on pleadings alone is permissible, it should only be done where the pleadings clearly contain the same factual allegations. That is, the extent of the commonality must be clear on the face of the pleadings, such that it is relatively simple to determine the nature and extent of the common and distinct issues arising in each action. See *Northland Bank v. Willson* (1997), 214 A.R. 181 at para. 27, 56 Alta. L.R. (3d) 130 (Q.B.).

[5] However, in complex litigation, it is often useful, if not imperative, to have some evidentiary foundation upon which to make the determination that consolidation is appropriate. Here, there was none.

[6] The purpose of consolidation is to enhance the administration of justice. A court should consider the possibility of inconsistent verdicts, the prospect of prejudice to the parties and the impact of consolidation and non-consolidation, both at the pre-trial and trial stages on scarce resources, including administrative, judicial and financial. In other words, a court must be able to conclude that having regard to all the circumstances, on balance, it is in the interests of justice that the actions be consolidated. Some of the relevant factors that should be considered are discussed in *Mikisew*. These, however, are not necessarily the only relevant factors, nor are they in themselves determinative. Each case must be assessed on its own merits and should include consideration, not just of the common claims, but the extent of the distinct claims between the parties. The focus in each case must be on the impact of consolidation on the parties and on the administration of justice.

[7] In this case, the chambers judge failed to identify any of the issues he considered common or distinct. He also failed to articulate which factors he considered to be relevant to his analysis in making the order. In our view, his failure to do so is an error of law. Accordingly, we must consider the matter afresh.

[8] This case on its pleadings appears to involve two complex actions with multiple parties. Some of the parties are common as are some of the issues raised. However, the extent of the commonality and the diversity of issues is not apparent on the face of the pleadings. Discoveries have been commenced in one action and have not yet begun in the other. It is difficult without some discovery or other evidence, particularly given the early stage of the proceedings, to satisfactorily determine whether consolidation would be beneficial or not. In our view, given the complexity of these two law suits, we are unable to conclude at this stage that the matters should be consolidated. The order for consolidation is set aside. The appeal is accordingly allowed.

[9] Counsel has advised that a case management judge has been appointed who will be well-positioned to assist the parties in the efficient prosecution of these actions. While the appeal is allowed, we do not preclude the parties from reapplying for consolidation or for trial of the matters together or consecutively when a further evidentiary basis has been established, either as a result of discovery or other forms of evidence.

Appeal heard on September 10, 2007

Memorandum filed at Calgary, Alberta
this 13th day of September, 2007

Paperny J.A.

Appearances:

R.J. Simpson
for the Respondents
Alliance Pipeline Limited Partnership and Alliance Pipeline L.P.

E.B. Mellet
for the Respondent
Entech Deutschland GmbH et al

W.J. Kenny, Q.C. & D.C. Lister
For the Appellant
Universal Ensco, Inc.