CITATION: Yaiguaje v. Chevron Corporation, 2017 ONSC 2251
DIVISIONAL COURT FILE NO.: 58/17
DATE: 20170411

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: DANIEL CARLOS LUSITANDE YAIGUAJE and others v. CHEVRON CORPORATION and others

BEFORE: NORDHEIMER J.

COUNSEL: *A. Lenczner, Q.C., B. Morrison, K. Baert, C. Poltak & G. Myers*, for the moving parties/plaintiffs

C. Hunter, Q.C., A. Kirker, Q.C., R. Frank, L. Lowenstein & L. Fric, for the responding party/defendant, Chevron Corporation

HEARD at Toronto: written submissions

ENDORSEMENT

[1] The plaintiffs seek leave to appeal from the decision of Hainey J., dated January 20, 2017, in which the motion judge struck out some paragraphs of the statement of defence of Chevron Corporation, but dismissed the motion to strike out many others.

[2] Before turning to the motion itself, I need to address the fact that the plaintiffs filed a reply factum on this motion. As r. 61.03.1(11) makes clear, a reply factum is permitted only where a new issue is raised by the responding party. The plaintiffs' reply factum does not satisfy that requirement. It merely reargues matters that either were, or ought to have been, canvassed in its main factum. As Gillese J.A. said in *Dennis v. Ontario Lottery and Gaming Corp.* (2012), 110 O.R. (3d) 318 (C.A.) at para. 8:

> A reply factum should not be permitted where it merely confirms or reinforces points already made or which could have been made in the moving party's initial factum.

As a result, I have given little consideration to the contents of the reply factum.

[3] In order to obtain leave to appeal, a moving party must satisfy one of the two tests set out in r. 62.02(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that reads:

> Leave to appeal shall not be granted unless,

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

The plaintiffs rely on both tests on their motion.

[4] The plaintiffs are residents of Ecuador who hold a judgment of U.S. $9.5 billion against Chevron Corporation ("Chevron"). The Ecuadorian judgment was obtained against Chevron in February 2011. Chevron has failed to pay the Ecuadorian judgment. It has no assets in Ecuador. As a result, in 2012, the plaintiffs commenced an action in this court for the recognition and enforcement of the Ecuadorian judgment against Chevron and Chevron Canada.

[5] In 2013, Chevron and Chevron Canada challenged the jurisdiction of this court to recognize and enforce the Ecuadorian judgment. That challenge was dismissed. The dismissal was subsequently upheld by the Court of Appeal for Ontario and then again by the Supreme Court of Canada.

[6] Chevron has now filed its Statement of Defence to the enforcement action. Before the motion judge, the plaintiffs moved, pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike out Chevron's Statement of Defence in its entirety. While the motion judge allowed the motion in part, he dismissed a much larger part of the challenge and permitted many paragraphs of the Statement of Defence to stand.

[7] At the same time that this challenge was heard, the motion judge also heard motions for summary judgment brought by all of the parties, save and except for Chevron Canada Finance Limited. The motion judge granted the summary judgment brought by Chevron Canada Limited and dismissed the claim against it. The motions for summary judgment were otherwise dismissed. The plaintiffs have appealed the motion judge's decision regarding Chevron Canada to the Court of Appeal. The parties have also agreed that, if leave to appeal is granted on this motion, that appeal should be transferred to the Court of Appeal to be heard with the summary judgment appeal.

[8] In terms of the first test for leave to appeal, the plaintiffs must be able to show that there are conflicting decisions in Ontario (or decisions by which Ontario courts are bound) regarding the issues that arise.[1] In this case, the plaintiffs assert that the motion judge's decision conflicts with the decision in *Beals v. Saldanha*, [2003] 3 S.C.R. 416. The first problem with that assertion is that the decision in *Beals* did not deal with a motion with respect to pleadings. It was an appeal from a trial decision regarding the enforceability of a Florida judgment. In an effort to avoid that difficulty, the plaintiffs attempt to establish some principled difference between the rules relating to pleadings in an action to enforce a foreign judgment, and every other form of action. However, the plaintiffs are unable to point to any authority that would support such a distinction. In reaching

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[1] In order for decisions to be conflicting under this test, the decisions must be from Ontario courts: *International Formed Tubes Ltd. v. Ohio Crankshaft Co. et al.: Travelers Indemnity Co., Third Party* (1965), 1 O.R. 621 (H.C.J.).

his decision in this case, the motion judge properly applied the well-established principles applicable to motions to strike under r. 21.01(1)(b).

[9] The second problem is that the plaintiffs have not satisfied me that the decision of the motion judge departs, in any way, from the principles established in *Beals* regarding the defences that a party may advance to avoid the enforcement of a foreign judgment. The defences advanced by Chevron fall within one or others of the three categories of defences established in *Beals*, namely, fraud, public policy and lack of natural justice. In addition to those defences, however, the jurisdiction of the foreign court must also be established, as *Beals* makes clear. The impugned paragraphs of the Statement of Defence are all directed at one or more of those issues.

[10] It must be remembered that it is not a question, at this stage, whether Chevron will be successful in its defence. The plaintiffs appear to confuse a motion to strike pleadings with a summary judgment motion, like the one in which they were unsuccessful. The merits of the defence are not to be tested through a motion to strike. Rather, the allegations in the statement of claim are taken as being true or capable of being proven unless they are patently ridiculous or incapable of proof: *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.). The latter is not the situation here.

[11] Further, I do not find it desirable to grant leave to appeal in this situation. As I said on an earlier occasion:

> Accordingly, it should be the rare or unusual case where a pleadings issue ought to warrant the time and attention of a reviewing court by way of an appeal.[2]

The mere fact that this case is a "notorious" one, in terms of its factual background and some of the issues raised, does not make it a rare or unusual case in terms of the issue of proper pleadings.

[12] In terms of the second test for leave to appeal, the plaintiffs have not satisfied me that there is good reason to doubt the correctness of the motion judge's decision. In particular, I am not satisfied that his decision is open to "very serious debate".[3] The motion judge correctly took the factual allegations in the pleadings as true and concluded that it was not "plain and obvious" that the defences had no chance of success. In particular, I agree with the motions judge that the earlier decisions in this case did not determine whether the Ecuadorian Court properly assumed jurisdiction over Chevron. Rather, those decisions were directed at deciding whether this court could properly take jurisdiction over Chevron, as the result of a preliminary motion to strike out the action. As the Supreme Court of Canada said in its decision, it is always open to a judgment debtor to make a jurisdiction argument in the enforcement proceeding.[4] Whether Ontario can properly take jurisdiction over Chevron for enforcement proceedings is a very different issue than whether the Ecuadorian court properly took jurisdiction over Chevron with respect to the underlying claim.

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[2] *Apotex Inc. v. Pfizer Ireland Pharmaceuticals,* 2016 ONSC 7193 at para. 10
[3] *Ash v. Lloyd's Corp.* (1992),8 O.R. (3d) 282 (Gen. Div.)
[4] *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69 at para. 54

[13] Further, and in any event, the issues of fraud, public policy and lack of natural justice are very much live issues in this case, especially given the plaintiffs' concession that the allegations, that the trial judge in Ecuador was bribed and his decision was ghostwritten by the plaintiffs' counsel, are permissible defences under *Beals*. It is this very fraud/corruption issue that occupies the majority of the paragraphs of the statement of defence that the motion judge refused to strike out.

[14] For example, if Chevron can establish that the judgment was ghostwritten by the plaintiffs' counsel and adopted by the trial judge as a result of bribery, it would not be enforced in Ontario. On that point, it must be pointed out that this is not the usual situation, where the fraud alleged has to do with the proceeding itself, such as false evidence for example. Rather, here the allegation is that the court itself was the source of the fraud. Consequently, issues regarding the discoverability of the fraud do not play the same role. As Major J. said in *Beals*, at para. 72:

> Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

[15] On this point, I do not accept the plaintiffs' contention that the defences raised by Chevron will result in the re-litigation of the Ecuadorian judgment or the equivalent of a "trial de novo". The defences that are advanced go, not to the merits of the claim, but to whether Ontario ought to enforce the judgement that resulted. Consequently, I do not doubt the conclusion of the motion judge that it is not "plain and obvious" that these defences cannot succeed.

[16] In addition, I also do not find that the issues, raised by this pleadings motion, are of such importance that leave to appeal ought to be granted. In support of an assertion of general importance, the plaintiffs say that:

> ... the sheer number of occasions upon which foreign judgments are sought to be enforced in Ontario confirms that this proposed appeal would affect a vast number of untold persons in Ontario in a variety of enforcement proceedings.

[17] No evidence or other foundation is provided for this assertion. I am not aware that this court is experiencing a flood of enforcement actions on foreign judgments of the type that is involved here. While I have no doubt that the issues here are important to the parties, I fail to see that the issues are of overriding importance to the administration of justice as a whole.

[18] Consequently, the motion for leave to appeal is dismissed. The plaintiffs will pay to the Chevron the costs of the motion, in the requested amount of $3,494.41, inclusive of disbursements and HST, within thirty days.

NORDHEIMER J.

DATE: April 11, 2017