ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL/ENDORSEMENT SLIP

CITATION: Imperial Ace Capital Group Inc v. Accencis Investment Corp, 2024 ONSC 5443

DATE: October 1, 2024

COURT FILE NO.: CV-24-00713067-00CL

NO. ON LIST: 4

TITLE OF PROCEEDING: Imperial Ace Capital Group Inc. v. Accencis Investment Corp. et al.

BEFORE: Justice Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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For Defendant, Respondent, Responding Party:

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ENDORSEMENT OF JUSTICE OSBORNE:

[1] This case conference was requested to settle the form of order arising from a decision of Wilton-Siegel, J. Justice Wilton-Siegel has retired from this Court.

[2] The main issue is whether the order should include language proposed by the Respondents with respect to relief that the Applicant maintains was not sought by any party, and was not at issue before Wilton-Siegel, J: a return of the shares of the Applicant in the Respondents Accencis Investment Corp., and 269132 Ontario Inc. The Applicant denies that it has any obligation to return the shares.

[3] In particular, the Respondents seek to have included in the draft order at paragraph two, the following language:

> 2. → **THIS COURT ORDERS** that upon payment by Accencis and 269 of the amount set out in the preceding paragraph, all indebtedness owed by Accencis and 269 under the loan agreements (the "**Loan Agreements**") between Accencis, 269, the Applicant and 11714872 Canada Ltd. ("**117**") shall have been indefeasibly paid, in full, that any security registrations filed by the Applicant and 117, including but not limited to any financing statements filed under the *Personal Property Security Act* (Ontario), shall be discharged by the Applicant and 117 at their own cost and that all shares held by the Applicant and 117 in Accencis and 269 shall be returned to Accencis and 269. ¶

[4] For the reasons that follow, I have determined that the order should not include the additional language proposed by the Respondents. I am satisfied having reviewed the materials filed, and having heard the submissions of counsel, that Wilton Siegel, J. made no determination about entitlement to the return of the shares (which is the principal issue today), or the other issues sought to be captured in the proposed language, since those issues were not before the Court.

[5] In circumstances in which a judge is required to interpret the order of another judge, a broad and liberal interpretation to achieve the intention of the court that made the order should be applied.

[6] As stated by Penny J. in *Bradshaw v. Langley*, 2015 ONSC 4909, at para. 42:

> Court orders must be interpreted using the same principles as those used to interpret contracts and statutes. The overriding concern is to determine the intent of the instrument, giving the words their ordinary meaning consistent with the surrounding circumstances at the time the order was made. Both court orders and contracts must be interpreted through the lens of commercial reasonableness. They should not be interpreted in such a way as to bring about an absurd or inconsistent result.

[35] That is consistent with the approach of the court in *Royal Bank of Canada v. 1542563 Ontario Inc.*, 2006 CanLII 32639 (Ont. S.C.), at para. 4 (quoted with approval in *Forbes v. Forbes*, 2022 ONSC 545, at para. 98). This is applicable here notwithstanding that it arose in the context of a family law proceeding:

Rather, I am following those cases that have held, where there is a dispute, a Judge can make an order to ensure the original order is carried out in a manner that makes sense. I refer to the following principles from some of the jurisprudence in this area. These cases make it clear that courts should interpret the language in order to give:

- "a broad and liberal interpretation to achieve the objective of the court in making the order". See, *C & K Mortgage Services Inc. v. Fasken Campbell Godfrey* (2000) Carswell Ont. 2119 at paragraph 2.

- "In accordance with the general rules of interpretation, the language used in a judgment or order must be construed according to its ordinary meaning and not in some unnatural or obscure sense." See, *Brosseau v. Berthiaume* (1993) Carswell Ont. 3118, at paragraph 9.

- "Even when lawyers take the greatest amount of care in drafting Consent Agreements geared towards resolving problems, every eventuality cannot be covered. Developments beyond the contemplation of the parties often appear. Life is fluid. It is not static. A certain flexibility must be given to the interpretation of Court Orders. See, Tatarenko v. Tatarenko (2005) Carswell Alta 588 at para. 14.

- "Instead, Courts should, on the one hand, examine the context in which the order was issued, and evaluate it according to the specific and particular circumstances of the case and, on the other hand, ask themselves whether or not the defendant could have reasonably been aware that his acts or omissions fall under the order.

In other words, a defendant cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery of it and of the administration of justice." See, *Bhang v. Chau* (2003) 2003 CanLII 75292 (QC CA), 229 D.L.R. (4th) 298 (Que. C.A.) at paragraphs 31 and 32.

See: *The Toronto-Dominion Bank v. Strathcona Energy FIT 2LP*, 2023 ONSC 801; affirmed 2023 ONCA 710.

[7] The chronology of events in this matter is relevant.

[8] In the Notice of Application issued on January 17, 2024 by which this proceeding was commenced, the Applicant sought the appointment of a receiver and other relief, including an order requiring Phoenix Law LLP to pay over certain funds.

[9] The hearing of the application was returnable on March 27, 2024. Just prior to the commencement of the scheduled hearing, the parties settled all issues except for costs and a claim relating to interest, which they could not resolve. They so advised the Court.

[10] Accordingly, Wilton Siegel, J. issued a brief Endorsement and a consent order that had been negotiated by the parties.

[11] The Endorsement of March 27, 2024 (the date of the hearing) states in full: "On consent, order to go in the form attached. The Applicant's claims for costs and foregone interest will be addressed at a hearing at 10:00 AM on April 24, 2023 (2 ½ hours) before me."[1] [Emphasis added].

[12] The negotiated consent order was to the same effect. It included five operative paragraphs, the key paragraph of which is paragraph four. It provides, in relevant part, a brief list of the issues that were reserved to be determined at a future hearing to be scheduled. Those issues include costs and foregone interest but do not include or make any reference to a claim for the return of shares.

[13] With the consent of the parties who had negotiated that language, the order was issued by Wilton Siegel, J.

[14] A hearing in respect of the two remaining issues then proceeded as scheduled on April 24, 2024.

[15] The fact that the subject matter of the hearing was limited to the two issues is patently clear from paragraph nine of the factum of the Accencis Respondents themselves filed with respect to that hearing, which states in full: "The only issue before the Court as it relates to the Accencis Respondents is whether that Court, in exercising its discretion under Section 131 of the CJA, should grant the costs sought by Imperial Ace in the amount of $90,000 on a full indemnity basis?" [Emphasis added].

[16] I pause to observe that the other issue of foregone interest related to the Respondent 117 and as such was not an issue for the Accencis Respondents.

[17] The hearing on those two issues then proceeded on the basis of a written record in submissions from counsel for all parties.

[18] I pause again to observe that the fact that the hearing took place with respect to those two issues only is reinforced yet again in the aide memoire of the Respondents themselves filed in respect of this hearing today, which states at paragraph three that: "[T]he matter of costs and Imperial Ace's claim against 117 for foregone interest were reserved and a hearing took place on April 24, 2024."

[19] Wilton-Siegel, J subsequently issued his Endorsement dated April 24, 2024.

[20] Paragraph one of the Endorsement clearly defines the two issues to be determined: costs and foregone interest. It states: "The Applicant … seeks costs against the Respondents … as well as costs and foregone interest from the Respondent [117] in respect of certain monies held by Phoenix Law LLP … For its part, 117 seeks costs from the Applicant." There is no reference to any relief being sought with respect to the return of shares.

[21] The Endorsement continues, and after Wilton Siegel, J. set out the chronology of the matter leading to the hearing of the application scheduled for March 27 and the settlement between the parties reached that day, the Endorsement confirms that the terms were embodied in the consent order of March 27 (referred to above).

[1] There is no issue between the parties that the reference to the scheduled hearing for April 24 ought to have been to 2024, rather than 2023.

[22] Thereafter, under the heading “Observations”, Wilton Siegel, J. set out his analysis of the two issues before the Court - interest and the claims for costs.

[23] The disposition of those two issues before the Court is then captured in paragraph 55 of the Endorsement, under the heading “Conclusion”, which states: “Based on the foregoing, the Borrowers shall pay the Applicant $18,000 and 117 shall pay the Applicant $12,000. By agreement, the parties shall bear their own costs of this motion.”

[24] There is no conclusion or disposition of the issues sought to be addressed in the proposed language submitted by the Respondents, and certainly not with respect to the return of shares. In my view, this is not remotely surprising given the Endorsement of February 27, the factum filed by the Respondents themselves, and the language of the Endorsement of April 24 all which I have excerpted above.

[25] The Applicants submit that the first time the issue of the return of the shares was raised was when the Respondents sought to have the disputed language included in the draft order now before me.

[26] The parties are in agreement that no issue was ever raised with Wilton Siegel, J. either following the release of his Endorsement dated March 27 which referred to the only two live issues, or following the release of his Endorsement dated April 24 which determined those same two issues. Again, it was certainly not addressed in the negotiated consent order of March 27 either.

[27] The argument of the Respondents rests exclusively on the last sentence of paragraph four of the April 24 Endorsement, which states: “Under the arrangements pertaining to the Loan, the Lenders were also shareholders of each of the Borrowers until the Loan was repaid.”

[28] The Respondents submit that their proposed language should be included in the order given the fact that Wilton Siegel, J. made the factual findings reflected in the sentence excerpted immediately above.

[29] For the reasons set out above, I am satisfied that Wilton Siegel, J. made no factual finding, nor any legal determination as to an entitlement in the Respondents to the return of the shares, and nor was he asked to do so since the issue was plainly not before the Court. Even if I were in error in this regard, the sentence in paragraph four at its highest states that the Lenders were shareholders until the Loan was repaid. Again, at the risk of being repetitive but to be clear, nothing in that language reflects a determination that the shares should be returned.

[30] Finally, in my view, there is no material prejudice to the Respondents in this result, as they presumably could commence a proceeding to compel the return of the shares if they wished to do so. In contradistinction, however, the prejudice to the Applicants if the disputed language were included in the order now, is real, given their position that the issue was never litigated or argued before Wilton Siegel, J, and they should not be deprived of an opportunity to be heard on the issue.

[31] For all of these reasons, I decline to include in the order the additional language proposed by the Respondents. The order is settled in the form submitted by the Plaintiffs.

[32] Order to go in accordance with these reasons.