

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Carbopego-Abastecimento De Combustiveis S.A. v. AMCI Export Corporation, 2007 NSSC 248

Date: 20070823

Docket: SH 259728

Registry: Halifax

In The Matter of the *Canada and United Kingdom Reciprocal Recognition and Enforcement of Judgments Act*, R.S.N.S. 1989, c.52

And In The Matter of an application to register a Judgment of the English High Court of Justice, Queen's Bench Division, Commercial Court

Between:

Carbopego-Abastecimento De Combustiveis S.A.

Plaintiff

v.

AMCI Export Corporation

Defendant

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: June 22nd, 2007, in Halifax, Nova Scotia

Counsel: James Gould, Q.C. & Lisa Wight, for the plaintiff
David Coles, Q.C. & Shelley Martin, for the defendant

By the Court:

[1] In a decision dated April 20, 2007, I concluded that an attachment order in favour of Nova Scotia Power (NSPI) did not take priority over a registered judgment held by Carbopego-Abastecimento De Combustiveis S.C. (Carbopego),

arising out of an English judgment. Both parties are plaintiffs in actions against AMCI Export Corporation (AMCI). The NSPI proceeding is in Nova Scotia while the Carbopego proceeding, as noted, is in the English courts. The background to the proceeding will be found in that decision: 2007 NSSC 118.

[2] The Interlocutory Notice (Application *inter partes*) filed by Carbopego included a request for the lifting of the Stay of Execution imposed by Robertson J. in her orders February 16 and February 24, 2006. Robertson J. registered Carbopego's English judgment as a judgment of this Court. However, the Order (I will refer to the February 24 order, which determined the final quantum of Carbopego's judgment) notes that "there is a dispute between Carbopego and NSPI with respect to entitlement to some or all of the Attached Property" and states that:

a hearing (the "Entitlement Hearing") will be required following NSPI's application for summary judgment hearing to determine any issue of priority, if any, and/or entitlement, as between Carbopego and NSPI with respect to the Attached Property.

[3] As such, execution was to be stayed "for such period as until the Entitlement Hearing can be heard and determined or until further order of the Court". It was left in the hands of the parties to see that the entitlement hearing was heard and

determined, and “[a]ll issues of priorities, if any, between the Judgment of Carbopego and the claim of NSPI shall be the subject of a future application or applications as the said parties may instruct”.

[4] The stay of execution was not addressed by the parties in any detail in their written or oral submissions on the present application. The decision was, accordingly, directed entirely to the priority issue. The decision – which has not yet been embodied in an order – went no further than to determine that NSPI’s Attachment Order does not have priority over Carbopego’s judgment.

[5] Subsequently counsel for Carbopego requested that I add an addendum to the decision to explicitly lift the stay of execution. Counsel supplied a form of order reflecting this addendum. Counsel for NSPI objected that this form of order did not reflect the result of the decision. According to NSPI, my conclusion was not that NSPI would never have an interest in the attached property, but only that the Attachment Order did not give it priority over judgment creditors such as Carbopego. Thus, NSPI’s share in the proceeds of the attached property would only be established by an eventual determination of whether NSPI should Have judgment against AMCI. As the NSPI claim was proceeding towards trial, counsel

submitted that the decision did not grant Carbopego priority over NSPI if NSPI attains the status of judgment creditor.

[6] Counsel for Carbopego responded that the decision did not indicate that NSPI, should it obtain judgment, would share rateably. Suggesting that the effect of the order proposed by NSPI would be leave the matter in abeyance indefinitely, until such time (if ever) that NSPI obtained judgment. Given that Carbopego expressly sought the lifting of the stay, counsel submitted that it would be left without any relief if the requested addendum was not made.

[7] I invited counsel to make further submissions.

Functus officio

[8] Rules 15.07 and 15.08 provide:

Amendment of judgments and orders

15.07. Clerical mistakes in judgments or orders, or errors arising therein from any accidental mistake or omission, or an amendment to provide for any matter which

should have but was not adjudicated upon, may at any time be corrected or granted by the court without appeal.

Reversal or variation of order

15.08. Where a party is entitled to:

* * *

(e) any further or other relief than that originally granted,

he may apply in the proceeding for the relief claimed.

[9] No order has been issued. I do not believe that I am *functus officio* at this stage, and am therefore satisfied that I can review the matter, based on the additional submissions provided by counsel.

Arguments

[10] NSPI submits that its entitlement to the attached property was not before the Court on the application, and that this issue cannot come before the Court until it is determined whether NSPI will receive judgment. NSPI further argues that Carbopego is attempting to reopen its case in order to introduce a new issue or, at least, to reargue a point after the application has been heard and determined. NSPI goes on to argue that the requirements for lifting the stay, as set out in the Order of Robertson J., have not been met. As a result, it is submitted, the stay should remain in place “until such time as a determination can be made as to NSPI’s entitlement to the Attached Property.” This position is premised on the submission that the application was decided solely on the issue of priority, without any repercussion as to entitlement.

[11] Carbopego submits that the stay of execution should be lifted, permitting it to execute on its judgment. Counsel submits that it logically follows from the conclusion that NSPI has no priority that Carbopego has priority to all of the attached property, as a judgment creditor. Because NSPI is not a judgment creditor,

it is argued, the effect of the decision is to give Carbopego priority to the whole of the attached property. The stay was intended as a temporary remedy, until an ‘Entitlement Hearing’ and determination of priorities took place. Carbopego notes that the Order did not require the stay to be maintained until NSPI’s action against AMCI is decided, as NSPI would have it. Such a conclusion, it is claimed, would not accord with the *Creditors Relief Act*, which grants interest and priority only to judgment creditors.

[12] Carbopego suggests that the two previous applications to lift the stay filed because the requirement for an Entitlement Hearing had not yet been met. There were no written decisions or orders arising from those decisions, and I therefore refrain from speculating about the reasons the applications were dismissed.

[13] Carbopego also takes the view that NSPI’s partial success on its summary judgment application – in a decision released after my own earlier decision – has no effect on its right to execute on its judgment because NSPI does not have a final damage award or an execution order. In the alternative, should NSPI’s “pro rata sharing” interpretation of the decision prevail, Carbopego asks to be permitted to

execute on its own pro rata share of the attached property as per the summary judgment, without awaiting a final adjudication between NSPI and AMCI.

[14] In addition to the lifting of the stay, Carbopego seeks the removal of all restraints on the attached property.

Conclusion

[15] The effect of NSPI's position, should it prevail, would be that the matter would be held up until NSPI obtains a final determination of its proceeding against AMCI. If that is the case, there would be nothing to be gained by deciding the issue of priority before final judgment is obtained on the NSPI claim. If I lift the stay, NSPI will be forced to pursue other assets in order to satisfy any judgment it obtains. However, to refuse to lift the judgment may amount to simply preventing a judgment creditor, Carbopego, from realizing on its judgment.

[16] I cannot conclude that the stay of execution was intended to remain in place indefinitely. With the priority issue addressed, there is no convincing reason why Carbopego, as a judgment creditor, should be prevented from realizing on its

judgment. In the circumstances, I am satisfied that it is appropriate to lift the stay of execution.

[17] The parties may provide written submissions on costs within three weeks of the release of this decision.

J.