

**CITATION:** Contacare Inc. v. CIBA Vision Corporation, 2011 ONSC 4276  
**COURT FILE NO.:** CV-10-395904  
**DATE:** 20110720

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Contacare Inc. (Plaintiff/Responding Party) and CIBA Vision Corporation  
(Defendant/Moving Party)

**BEFORE:** Justice Carole J. Brown

**COUNSEL:** *David Kent*, for the Defendant/Moving Party  
*Krystyne Rusek.*, for the Plaintiff/Responding Party

**HEARD:** April 4, 2011

**ENDORSEMENT**

[1] The Defendant, CIBA Vision Corporation (“CIBA”), moves to recognize a foreign judgment against the Plaintiff, Contacare Inc. (“Contacare”), rendered in New York State, and to strike Contacare’s duplicative Ontario Statement of Claim and dismiss this action as being *res judicata* and an abuse of process or, alternatively, staying the Plaintiff’s Ontario Claim on the ground that this Court lacks jurisdiction *simpliciter*.

[2] The subject New York State litigation, commenced in 2001, was dismissed on its merits by the Supreme Court of the State of New York in 2007; Contacare’s appeal to the Supreme Court of the State of New York, Appellate Division, was dismissed and the decision below affirmed on March 14, 2008; and leave to appeal to the Court of Appeals of the State of New York was denied on June 25, 2008; thereby exhausting Contacare’s rights of appeal in New York. Contacare thereafter commenced litigation on the same issues in Ontario on January 28, 2010.

[3] Throughout the New York litigation, the Plaintiff was represented by its New York attorneys who examined witnesses, produced a voluminous court record and made written and oral submissions to the New York State Courts.

**The Background Facts and Proceedings**

[4] The actions in New York and Ontario arise from a licensing agreement concluded in 1985 between CIBA (a Delaware corporation) and Contacare’s predecessor, Trans Canada Contact Lenses Limited (Trans Canada”), a Canadian Corporation with headquarters in Toronto. The Licensing Agreement is expressly governed by New York State law pursuant to the choice of law provision in the Agreement.

[5] The Licensing Agreement involves contact lens technology Know How which was delivered to CIBA to be developed, marketed and exploited, with royalties to be paid to Contacare. In 1999, Contacare alleged that CIBA had breached the Agreement by failing to develop the Know How and pay royalties to it, and in 2001, it commenced proceedings in New York State.

### **The New York State Litigation**

[6] Both parties conducted depositions, with the Plaintiff deposing two CIBA executives, Stephen Martin and Dr. Nicholson. According to Contacare's President, Frederick Hawa's supporting affidavit in this motion, the New York litigation generated over 30,000 pages of materials including pleadings, productions and deposition transcripts, and the Appeal Record included over 3,000 pages of material "which comprise all the documents necessary for this proceeding" (Hawa's Affidavit, para 25).

[7] After completion of the discovery process, CIBA brought a motion before the Honourable Justice Curran of the Supreme Court of New York for summary judgment dismissing the New York Litigation. There was a voluminous written record. Contacare filed, among other things:

- (a) a 30 page Affirmation in Opposition to Defendant's Motion for Summary Judgment by one of its New York attorneys, asserting that summary judgment could not be granted because "genuine issues of material fact" existed that must be submitted to a jury at trial;
- (b) a Statement of Contested Material Facts, in which Contacare responded to CIBA's Statement of Facts by either acknowledging that each alleged fact was undisputed or by providing details of the basis upon which it was disputed; and
- (c) a 30 page Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment.

[8] Justice Curran held an oral hearing on the summary judgment motion, and attorneys for each party made submissions. Thereafter, at Justice Curran's request, the attorneys for both parties filed additional written submissions regarding a specific point of New York contract law dealing with the reconciliation of inconsistent contractual provisions.

[9] Justice Curran granted CIBA's motion for summary judgment and dismissed Contacare's New York Litigation by Memorandum Decision dated May 2, 2007 holding, *inter alia*:

- (i) "[O]n a motion for summary judgment, a Defendant 'must affirmatively establish the merits of [its]...defense and cannot meet [its] burden by noting gaps in [its] opponent's proof... Until the movant establishes its entitlement to judgment as a matter of law, the burden will not shift to the

opposing party to raise an issue of fact, and the motion should not be granted...”.

- (ii) Contacare relied in part on its discovery depositions of Martin and Nicholson, but otherwise provided no evidence of anyone with personal knowledge of relevant facts regarding the formation of the contract in the mid-1980s.
- (iii) The parties agreed that the key issue on the breach of contract allegation was whether the License Agreement was exclusive or non-exclusive. If non-exclusive, CIBA had no obligation to develop or market the Know How and thus could not have breached the License Agreement by failing to do so.
- (iv) Pursuant to New York law, the proper construction of the License Agreement was that it was non-exclusive, and the breach of contract claim of Contacare, therefore, failed.
- (v) All apart from having no obligation to exploit the Know How, CIBA did not in fact do so and so breached no obligation to pay for actual use. Nicholson’s testimony distinguished the Know How from products actually marketed by CIBA. Frederick Hawa “lacked the knowledge and expertise to express an opinion on the subject”.
- (vi) Based on the evidence, Contacare “failed to establish a trial” as to fraud.

[10] Contacare appealed the New York Judgment. It filed an appeal record that included over 3,000 pages of material, a 42 page Brief and a 10 page Reply Brief. The Appellate Division of the Supreme Court of New York dismissed Contacare’s appeal and affirmed the New York Judgment on March 14, 2008 (the “Appeal Decision”) holding, in part, as follows:

- (a) Justice Curran properly considered the Option Agreement and the draft license alternatives attached to it as a matter of New York law, and properly concluded that the License Agreement was non-exclusive; and
- (b) CIBA had met its movant’s burden by leading evidence establishing that its lenses were not derived from the Know How, “and [Contacare] failed to raise a triable issue of fact in opposition”. The only, inadequate, evidence from Contacare was “the affirmation from an attorney [Frederick Hawa] who lacked personal knowledge of the issue...and who was not an expert in the relevant field”.

[11] Contacare sought leave to appeal the appeal decision. The Court of Appeals of the State of New York denied Contacare’s motion for leave to appeal on June 25, 2008.

[12] The New York State judgments were based on the merits of the action, and the voluminous record before the Courts.

[13] Thus, in summary, the New York State action was determined on a motion for summary judgment, with Curran J. finding there was no issue requiring a trial. The Respondent appealed to the New York State Supreme Court, Appellate Division, which appeal was dismissed. It then sought leave to appeal to the New York State Appeals Court. Leave was denied, which brought the New York action to an end.

### **The Ontario Action**

[14] Contacare issued its Statement of Claim in the Ontario Litigation (the “Ontario Claim”) on January 28, 2010, eight months after it had exhausted its New York appeals and the New York Judgment had become final. Contacare alleges, *inter alia*, that CIBA breached the License Agreement by not compensating Contacare for using and marketing contact lenses using the contact lens technology Know How delivered to CIBA, defrauded Contacare based on alleged representations by CIBA that it would commercialize and exploit the Know How, and claims damages for the unpaid royalties. The New York State litigation alleged breach of the License Agreement by failure to pay royalties on the contact lenses, fraud on the part of CIBA based on alleged representations that it would “develop, market and exploit” the Contacare Know How and damages for the unpaid royalties. The Plaintiff further requests that the New York State litigation be continued in the Ontario Superior Court of Justice on the ground that the New York State decision breached basic principles of natural justice and fairness, occurred without the basic right to a hearing, to examine and cross-examine witnesses, and was made without a trial.

### **The Issues**

[15] The issues before me in this motion are as follows:

1. Whether this Court should recognize the New York State judgment;
2. If so, whether this Court should:
  - (a) strike the Plaintiff’s Ontario claim as an abuse of process pursuant to R.21.01(1)(b), as it discloses no reasonable cause of action, being, *res judicata*;
  - (b) dismiss or permanently stay the action as an abuse of process pursuant to R. 21.01(3)(d); or
  - (c) dismiss or permanently stay the action on the ground that this Court lacks jurisdiction *simpliciter*.

### **Analysis**

[16] I find that the New York State judgment should be recognized and that the Plaintiff’s Ontario claim should be struck pursuant to R.21.01, for the reasons set forth below.

## Recognition and Enforcement of Foreign Judgments

[17] The Supreme Court of Canada in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, sets forth a two stage approach for the recognition and enforcement of foreign judgments. Firstly, the moving party must establish that the foreign court took jurisdiction according to Canadian conflict of laws rules, *i.e.* there must be a “real and substantial connection” to the jurisdiction. This test requires a significant connection between the cause of action and the foreign court and is “the overriding factor in the determination of jurisdiction”. As the Court noted, while “a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court”. If such is proven, and subject to valid defences, the foreign judgment will be recognized.

[18] Secondly, the responding party/the party resisting the foreign judgment bears the burden of establishing any applicable defences, including fraud, public policy and lack of natural justice.

[19] Contacare relies on the defence of lack of natural justice.

[20] In *Beals*, in describing the nature of the natural justice defence, the Supreme Court held as follows at paragraphs 60-64:

The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario Defendants by the foreign court.

The enforcing court must ensure that the Defendant was granted a fair process. ... [I]t is not the duty of the [party seeking enforcement] to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the [party resisting enforcement].

Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. ... In the case of judgments made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.

In the present case, the Florida judgment is from a legal system similar, but not identical, to our own. If the foreign state’s principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. ....

The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

[21] *The Beals* case clearly states that the natural justice defence is restricted to the form of the foreign process, to due process and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

[22] I note that the Plaintiff/Responding Party has not produced evidence of the applicable New York State law, rules and procedures in the form of an Affidavit from a witness who has expertise in that jurisdiction's law. Rather, it has simply included the rules in its materials. The jurisprudence is clear that foreign law is a question of fact which must be proven through a witness expert in the subject foreign law.

[23] In this case, Contacare agreed to the jurisdiction of New York State in the Licensing Agreement it executed and chose that jurisdiction to litigate its claim through the Appeals Courts. The first part of the test is therefore met as the Plaintiffs agreed to the jurisdiction of the foreign court in the Licensing Agreement.

[24] Contacare now contests the recognition of that judgment in Ontario and relies on the defence of lack of natural justice in the New York State courts to oppose recognition of the New York State judgment.

[25] In essence, Contacare's arguments regarding a denial of natural justice in the New York State proceedings are that Mr. Hawa, Contacare's President, was not accepted as an expert witness, that it was denied the opportunity to examine and cross-examine witnesses and to have a trial of the issues, as the Plaintiff/Respondent's claim was dismissed in a summary judgment proceeding. Its arguments in this regard are summarized at paragraphs 78-111 of its Statement of Claim in this action.

[26] Regarding its first argument that Hawa was not accepted as an expert, the Defendant/Moving Party submits that the natural justice defence does not relate to the merits of the case, but is restricted to the procedure by which the foreign court arrived at its decision. The Supreme Court of Canada has made this clear in the *Beals* case, cited above at paragraph 21, *supra*.

[27] The Defendant/Moving Party submits that Contacare was not denied the right to cross-examine witnesses, as it completed discovery of CIBA prior to the summary judgment motion, deposing two key CIBA witnesses, and relied on those depositions in the summary judgment proceeding. Contacare had the benefit of New York attorneys throughout the proceedings who conducted depositions of two CIBA executives, had discovery of voluminous documentation, produced voluminous materials and, defended a summary judgment motion.

[28] While the Plaintiff did not properly introduce evidence of New York State law, rules and proceedings, Curran J., in his decision, set forth the New York State summary judgment test, which, according to his decision, is similar to the Ontario test. Contacare submits that it was denied a trial in New York State due to the summary judgment procedure and therefore was denied natural justice. However, in both New York State and Ontario, summary judgment is granted where a court is satisfied that there is no trial required.

[29] Based on the Supreme Court of Canada's analysis of the natural justice defence, as set forth at paragraph 21, *supra*, I find that minimum standards of fairness have been applied to the Ontario Defendants by the New York State courts, the Ontario Defendants were afforded fair process and, the Respondent had the full benefit of New York State's procedures through its New York State attorneys including two levels of appeal of the judgment. Based on all of the evidence before me, I find that there is nothing which offends our concept of natural justice. I find that the Respondent has not established the defence of a denial of natural justice.

[30] Accordingly, I find that the New York State judgment should be recognized in Ontario, and I so order.

### **The Plaintiff's Ontario Claim**

[31] As this Court has recognized the New York State judgment, it must be determined what is to be done with the Plaintiff/Responding Party's action.

[32] The Moving Party submits that the claim should be struck pursuant to R.21.01(1)(b) or dismissed or permanently stayed as an abuse of process pursuant to R.21.01(3)(d); or on the ground that this Court lacks jurisdiction *simpliciter*.

[33] The New York State and Ontario actions involve the same parties, the same fact situation, the same contractual breaches and claims for damages for breach of the Licencing Agreement. Having reviewed both the New York State and Ontario claims, I find this action to be, in essence, a re-litigation of the New York State action. The New York State action was dismissed on the merits at first instance and on appeal and leave to appeal further was denied, thus exhausting all appeal routes and making the judgment final.

[34] Having considered all the evidence adduced in this action, the case law and the parties' submissions, and having recognized the New York State judgment, this Court finds that the Plaintiff's Ontario action CV-10-395904 is a clear attempt to re-litigate the New York State action in Ontario. The case law is clear that such constitutes an abuse of process: *Soderstrom v. Hoffman-La Roche Ltd.*, 2006 CanLII 201; 2008 CanLII 15778 (ON.SCJ). I find that this action should be dismissed on the ground that it is frivolous, vexatious and an abuse of this Court's process, and I so order.

### **Costs**

[35] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the Costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

---

Carole J. Brown J.

**Date:** July 20, 2011