

**Licences are not “Real Estate” - Judicially Pruning *REBBA***  
**By Thomas Arndt**

In 1951 the Supreme Court of Canada characterized the definitions for trade, real estate and business in the Real Estate and Business Brokers Act (“REBBA”) as artificial and greatly extended when it held that the sale of shares of a business is outside the scope of REBBA.<sup>1</sup> In the decades following, the courts have interpreted REBBA using a purposive approach armed with the plain and ordinary meaning definitions. For example a single transaction has been divided into portions that are and are not captured by REBBA<sup>2</sup> and by requiring clear and unqualified proof that a transaction engages REBBA, the preliminary stay provisions have been clipped.<sup>3</sup> The judicial work of restraining REBBA continues.

Recently the courts were asked for the first time to consider whether the sale of a licence independently owned from an operating business trips the prohibitions in *REBBA*.<sup>4</sup>

In *Geofre v. Ki Kit Li*, Li engaged Geofre to find a buyer for his two “Licenses” and agreed to pay Geofre a “Consulting Fee” on closing based on a selling price of \$1.75 Million. Geofre found a buyer for the Licenses and that buyer paid for the Licenses. The Ministry of Health transferred the Licenses and started depositing the revenues from the Licenses to the buyer’s bank account.

The Licenses at issue enjoy special OHIP<sup>5</sup> billing privileges because they are grandfathered designated physiotherapy clinics. This grandfathered status facilitates the smooth payment of physiotherapy fees from OHIP for services provided to patients and is the core value of the businesses. Geofre took the position that the bricks and mortar clinics sold with the Licences are ancillary, as the medical services were also performed off-site at day-care facilities. As such, the parties referred to the clinics and the Licences interchangeably and without distinction.

Geofre introduced the buyer to Li and Li’s lawyer confirmed that the deal was closed. Geofre’s obligations under the agreement were satisfied and he sought payment of the Consulting Fee. Despite repeated demands for payment, Li refused to pay. Geofre brought a claim to enforce payment and in response, Li moved for a preliminary stay of proceedings to have the lawsuit thrown out of court.

Li’s position in the stay motion was that:

- (a) Geofre sought a commission or remuneration for services contrary to *REBBA*, and thus the proceeding should be stayed summarily per section 9 of *REBBA* and Section 106 of the *Courts of Justice Act* (the “REBBA Argument”); and in addition or in alternative,

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<sup>1</sup> *Roche v. Marston*, [1951] S.C.R. 494 (“*Roche*”) at 500, 501.

<sup>2</sup> *Market Leadership Inc. v. Loretta Foods Ltd.* (2005), 144 A.C.W.S. (3d) 395 (“*Loretta Foods*”).

<sup>3</sup> *Neiman v. Duffmits Holdings Inc.*, 2010 ONSC 4643 (“*Duffmits*”).

<sup>4</sup> *Geofre v. Ki Kit Li*, 2012 ONSC 5777

<sup>5</sup> Ontario Health Insurance Plan

- (b) The action was premature and thus was an abuse of process per Rule 21.01(3)(d) of the *Rules of Civil Procedure* under the *Courts of Justice Act* (the “Premature Argument”).

In response, Geofre took the position that:

- (a) *REBBA* does not apply as there was no “trade in real estate” for which a commission or other remuneration for services was sought. The Consulting Fee as set out in the Consulting Agreement was for the sale of the Licenses, not real estate; and,
- (b) the Licenses had been sold, their ownership and control had transferred and the Purchase Price had been paid in full. As such the Consulting Fee was payable. Thus, Li’s Premature Argument was a contorted attempt to place form over substance.<sup>6</sup>

After canvassing the facts and framing the law as set out by earlier courts, the Court found that:

“[24] From the materials before me, it appears to me that the lion’s share of the \$1,700,000 received by the defendants was for the fair market value of the two licences owned by Li personally. It also appears to me that the principles of *Roche v. Marston* would apply to the value attributed to the licences owned by Li personally to exclude the value of the licences sold by Li personally from the requirements of the *REBBA*. This interpretation appears to accord with a purposive interpretation of the *REBBA*, adequately protects the public and does not distort the provisions of *REBBA*.” [Emphasis added]

Having clearly articulated that a license falls outside the definition of real estate in *REBBA* the Court went further to state that this would hold true even though the balance of the business sold may have “little independent value from the licences.”

“[25] I also infer from the material filed before me that the value of the ongoing operation of the two clinics owned and operated by the numbered company would have little independent value from the licences. ...

[26] As confirmed by Cronk J.A. in *Loretta Foods*, a transaction may have a mixed result, where part of one overall transaction is covered by *REBBA* and part is not.”

Thus the Court cleanly pruned the sale of a licence from the prohibitions found in *REBBA*.

For good measure to deal with the stay motion before it, the Court went on to adopt the reasoning in *Duffmits* to refuse to grant the stay of proceedings on the basis that it was not *absolutely clear and beyond doubt* that the prohibition in *REBBA* applied thus the Court’s

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<sup>6</sup> The Court dealt with Li’s Prematurity Argument by confirming that it relates to form only and ignores the substance of the transaction – Li had been paid in full with the exception of \$1.

discretion to stay an action should not be exercised summarily *without clear and unqualified proof* that the plaintiff falls within the ambit of section 9 of *REBBA*.<sup>7</sup>

The result was not surprising in the circumstances, granting a stay on the facts before the court would have been ungainly. The real questions are: What are we going to see in the future? Will the Court continue to prune the artificial and greatly extended meaning of trade, real estate and business in *REBBA* in favour of their ordinary and natural meanings? How far will the courts go using the purposive approach and ordinary and natural meanings to restrain terms defined in *REBBA* and in other statutes? These and other questions remain open.

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<sup>7</sup> *Geofre* at 27, 28, *Duffmits* at 39 adopting *Strangier v. Liebeck* (1975), 5 O.R. 767, [1974] O.J. No. 2126 (H.C.J.).