IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCSC 970

Date: 20180504
Docket: S174308
Registry: Vancouver

Between:

Industrial Alliance Insurance and Financial Services Inc.

Plaintiff

And

Wedgemount Power Limited Partnership
Wedgemount Power (GP) Inc.
Wedgemount Power Inc.
The Ehrhardt 2011 Family Trust
Points West Hydro Power Limited Partnership
by its general partner Points West Hydro (GP) Inc.
Calavia Holdings Ltd.
Swahealy Holding Limited
Brent Allan Hardy
David John Ehrhardt
28165 Yukon Inc.
Paradise Investment Trust
Sunny Paradise Inc.

Defendants

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

Counsel for the Plaintiff:	C. Brousson J. Bradshaw
Counsel for BC Hydro and Power Authority:	M. Verbrugge L. Hiebert
Counsel for the Receiver, Deloitte Restructuring Inc.:	V. Tickle

Place and Date of Hearing:	Vancouver, B.C. May 3, 2018
Place and Date of Judgment:	Vancouver, B.C. May 4, 2018

THE COURT:

Background

[1] By a receivership order dated May 12, 2017 (the "Order"), Deloitte Restructuring Inc. was appointed as receiver and manager (the "Receiver") of all the assets, undertakings and properties of Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc. (collectively, "Wedgemount").

[2] Wedgemount is the owner and developer of a run-of-river power generation project near Whistler, British Columbia. When the Order was made, the project was not finished, and it remains unfinished, although I am told it is more than 90% complete.

[3] The Order, which is in the standard form, was made on the application of Industrial Alliance Insurance and Financial Services Inc. ("IA"), the secured creditor and primary lender to Wedgemount.

[4] Wedgemount entered into a long-term electricity purchase agreement (the "EPA") dated March 6, 2015, with British Columbia Hydro and Power Authority ("BC Hydro") for sale of the power that would be generated by the project.

[5] Since the Order was made, the Receiver has been working towards completing the construction of the project and implementing the EPA. The Receiver wants to sell the project and Wedgemount's rights under the EPA to maximize recovery for the creditors, including IA.

Applications before the Court

[6] Two applications were set down to be heard by me on an urgent basis. The Receiver brings an application for a declaration that BC Hydro may not terminate the EPA on the basis of any existing ground or fact. The Receiver's application was prompted by the delivery, on January 19, 2018, of BC Hydro's application seeking

leave of the court to lift a stay imposed by the Order, in order to allow BC Hydro to exercise purported rights of termination under the EPA (the "First Application").

[7] The First Application was brought pursuant to paras. 8 and 9 of the Order, which are standard provisions in a receivership order. Paragraph 8 is the stay provision which provides that all rights and remedies against Wedgemount or affecting Wedgemount's property are stayed except with the Receiver's consent or leave of the court.

[8] Paragraph 9 prevents any person from terminating any right, contract or agreement held by Wedgemount without the consent of the Receiver or leave of the court. It is not disputed that the EPA is fundamental to the value of the project and that termination of the EPA would have a significantly adverse effect, not only on Wedgemount, but also on the creditors and other stakeholders, including the Lil'wat First Nation and the province.

[9] After receiving the Receiver's application, BC Hydro brought the second urgent application that is set before me. BC Hydro seeks to have the Receiver's application stayed on the basis that the Receiver's application for declaratory relief involves a determination of rights under the EPA. The EPA contains an arbitration clause that provides that any "dispute under or in relation to this EPA shall be referred to and finally resolved by arbitration". Pursuant to s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, if a party to an arbitration agreement commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, the court must stay the legal proceedings. BC Hydro says the effect of the arbitration clause and this provision in the *Arbitration Act* is that this Court has no jurisdiction to hear the Receiver's application.

[10] The other relevant procedural history is that the two applications before me were originally set down at the same time as the First Application. On April 6, 2018, Madam Justice Fitzpatrick heard the applications. She dismissed the First Application. The reasons for judgment from that application are not yet available. I am advised by counsel that she found there was no need to lift the stay, as BC

Hydro would not suffer prejudice of any significance if the stay was left in place. The dismissal was without prejudice to BC Hydro's right to apply to have the application re-heard. Madam Justice Fitzpatrick adjourned the two applications that are now before me and directed that they be heard at the same time.

[11] The delay in having these applications heard since April 6, 2018 was caused by a lack of available court time. Whatever the reason, there is no doubt that there is urgency to the matters before the Court.

[12] Yesterday, the parties agreed that BC Hydro's application must be heard and determined first; the Court cannot hear the Receiver's application without first determining the jurisdictional issue raised by BC Hydro. In addition, BC Hydro has not been able to file a substantive response to the Receiver's application, given its position on the court's lack of jurisdiction. However, BC Hydro has delivered unfiled copies of its affidavits and application response to the Receiver and IA on a confidential basis.

[13] Accordingly, I heard the BC Hydro stay application yesterday. I indicated to the parties that I would provide my ruling this morning. The following is my ruling on that application. As always, I reserve the right to edit this ruling should the transcript be ordered. Needless to say, my decision on the stay application has serious consequences. I heard extensive argument that occupied a full day. Given the short time frame which I have had to make my ruling, my reasons are relatively brief. Accordingly, and given the importance of this issue, I also reserve the right to supplement the reasons if the transcript is ordered.

[14] I will commence this ruling by setting out the positions of the parties. I will then give my ruling and explain why I arrived at that decision.

Position of BC Hydro

[15] BC Hydro says that where a receiver elects to perform and benefit from a contract of the debtor, it is bound by the terms of that contract. While BC Hydro's ability to pursue rights against Wedgemount is stayed by the Order, none of those

rights are rendered void or otherwise modified. BC Hydro says that the Receiver's application seeks a determination of BC Hydro's rights (and those of Wedgemount) under the EPA. In other words, it is asking the Court to do exactly that which Wedgemount cannot do; seek a remedy under the EPA in a court proceeding. In effect, the Receiver is seeking a permanent injunction against BC Hydro in terms of its contractual rights.

[16] BC Hydro says it is clear that the provisions of the *Arbitration Act* apply, and the Court is required to stay the Receiver's application. The *Arbitration Act* applies to any arbitration agreement, and the arbitration clause in the EPA clearly meets that definition. Section 15(1) of the *Arbitration Act* allows a party to apply to stay a court proceeding prior to filing a response to the claim. Section 15(2) provides that a court "must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed" (emphasis added). The onus is on the Receiver to establish one of those three exceptions and BC Hydro says it cannot do so. BC Hydro says the Receiver has provided no legal or factual basis on which the Court could find that the arbitration clause is void, inoperative or incapable of being performed. Accordingly, BC Hydro says the Court must order the stay of the Receiver's application.

[17] BC Hydro also says the Receiver's arguments to avoid the operation of s. 15 are based on authorities that are distinguishable. The arguments rely on cases decided under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. The powers of the court under s. 11 of the *CCAA* are very broad and have no analog in receivership proceedings or under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[18] In a receivership, the court is concerned with liquidation and realization, not restructuring. BC Hydro says that restructuring cases are of limited utility in receivership proceedings because of the different policy goals governing those proceedings. There is no reason to import into a receivership the kind of broad discretion that is granted under s. 11 of the *CCAA*.

[19] BC Hydro says that the Receiver's reliance on paramountcy is misplaced. Section 72(1) of the *BIA* specifically provides that provisions of the *BIA* shall not "abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act". Arbitration rights in British Columbia are governed by the *Arbitration Act,* and the rights created are substantive rights. BC Hydro says that there is no operational conflict between any general power of the court under s. 243(1) of the *BIA* and s. 15 of the *Arbitration Act*.

[20] BC Hydro relies on the Supreme Court of Canada decision in *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, for the proposition that the powers given to the bankruptcy court under the *BIA* do not confer authority to make unilateral declarations about the protected rights of third parties that are affected or governed by other statutory schemes. This is confirmed by s. 72(1) of the *BIA*.

[21] BC Hydro says the powers granted by the Order that allow the Receiver to initiate or continue proceedings do not provide any support for the position taken by the Receiver. The Order merely allows the Receiver to do what Wedgemount could have done, and Wedgemount could not have brought this application to court. It would have had to bring it to arbitration.

[22] Finally, BC Hydro says that the urgency of the present situation does not assist the Receiver in any way. Urgency, speed of resolution and convenience are not enumerated in the *Arbitration Act* as reasons for the court to deny a stay.

[23] The Receiver does not take the position that the dispute cannot be resolved at arbitration but merely that it is advantageous to have it resolved in this proceeding. BC Hydro argues that the Receiver has known since January that BC Hydro was going to take this position; it could have proceeded to arbitration in the interim. The urgency is thus self-created.

[24] Moreover, the Receiver must take Wedgemount's contracts as it finds them; it cannot take the benefit of terms it likes and avoid terms that are not to its advantage. If the Receiver wants to dispute BC Hydro's right to terminate, it must do that in accordance with the rules and procedures agreed to in the EPA.

Position of the Receiver and IA (collectively, the "respondents")

[25] The respondents' primary position is that the *Arbitration Act* does not apply to the Receiver and it has no application in the situation before the Court. If it does have any application, they say the *BIA* is paramount to the *Arbitration Act* and should prevail.

[26] The Receiver argues that the *Arbitration Act* does not apply to it, as it is not a party to the arbitration agreement. That is a requirement for the application of s. 15 of the *Arbitration Act*. Rather, it is a court-appointed receiver and its obligations and duties are those imposed under the *BIA* and by the Order. Pursuant to s. 243(1) of the *BIA*, a court-appointed receiver must, under subsection (b), exercise any control that the court considers advisable over the insolvent person's property, and, under subsection (c), "take any other action that the court considers advisable."

[27] The Receiver says that there are strong reasons why the issues it asks the Court to resolve do not fall within s. 15(1) of the *Arbitration Act*. The facts it relies on in support of the application arise from steps taken by the Receiver acting in its court-appointed role, and, more particularly, on representations made by BC Hydro in June 2017 after its court appointment. In these circumstances, it cannot be said that it is bringing issues to court that fall within the EPA: this is not a "dispute under or in relation to this EPA". Rather, this is a dispute that arises from representations made by BC Hydro in the course of the administration of Wedgemount's receivership.

[28] The powers granted to the Receiver under the Order include initiating and prosecuting any action, marketing the property of Wedgemount, and taking "any steps reasonably incidental to the exercise of these powers or the performance of

any statutory obligations" (subparas. 2(j), (k) and (s) of the Order, respectively). Of course, the Receiver may apply to the court for advice and directions in the discharge of its powers and duties (para. 24 of the Order and s. 249 of the *BIA*). The Receiver says it has no alternative but to bring the application for a declaration given the urgency created by the circumstances.

[29] One of the important duties of the Receiver is to manage the property of the insolvent person in a commercially reasonable manner. The Receiver must take steps to maximize the realization of the estate of Wedgemount. In order to do that, it needs to determine the status of the EPA. The position of BC Hydro, which was not taken until January of this year, has created great uncertainty about the value of the main asset of the estate. The Receiver's application has been brought to determine if the EPA is available to the Receiver to market and sell as an asset of Wedgemount; this is at the core of the duties of the Receiver.

[30] The respondents say the position of BC Hydro is procedurally unfair; if the Receiver is required to proceed to arbitration under the arbitration clause, the project will be at an end. BC Hydro has only recently taken the position that it can terminate the EPA. However, given the circumstances, it could achieve its desired result – that termination – without having any adjudication of the rights of the parties. This would be unfair not only to creditors and contractors, but also to the other third parties, including First Nations bands and the province.

[31] The respondents say that the court has a wide jurisdiction to interfere with contractual rights that should be exercised here. They rely on the statements by Frank Bennett in his text, *Bennett on Receiverships*, 2nd. ed. (Toronto: Carswell, 1999) at 341, for the proposition that a receiver may ask the court to break or vary an onerous or material contract so long as it acts reasonably and exercises good business sense.

[32] The respondents also rely on two decisions of Mr. Justice Walker in insolvency proceedings for the company Pope & Talbot Ltd. (the decisions are collectively referred to as *Pope & Talbot*). In *Pope & Talbot Ltd. (Re)*, 2009 BCSC

1014 [*P&T #1*], Mr. Justice Walker concluded that the court has considerable jurisdiction to suspend private contractual rights where it is appropriate to do so, both under *CCAA* proceedings and in bankruptcy proceedings. In *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1552 [*P&T #2*], in circumstances that are similar to those before the court, Mr. Justice Walker concluded that all of the parties and participants involved in the insolvency needed to know if coverage under an insurance policy was available. He refused to stay the proceedings under a mediation and arbitration ("ADR") clause in the insurance policy and relied on the inherent jurisdiction of the court to effect an orderly and expeditious resolution of that issue in the insolvency proceedings.

[33] The respondents say that *P&T #2* is on all fours with the current application. All parties need to know if the EPA can be terminated based on the existing facts and circumstances. The only way to have this issue determined is by the court. The respondents say it is necessary to dismiss BC Hydro's application for a stay of the Receiver's application to allow for the orderly, expedient and effective resolution of the insolvency. It is relevant that the time sensitivity is acute; any delay will be fatal to the viability of the project.

[34] The respondents emphasize that while a dismissal of BC Hydro's application will affect a contractual right to arbitrate, this is a relatively small compromise in the furtherance of the objectives of the insolvency regime. Further, granting the BC Hydro application would negate the ongoing supervision of this Court in this insolvency.

[35] Finally, the respondents say that the harm suffered by all the stakeholders would eclipse any prejudice to BC Hydro.

Urgency

[36] The urgency in the present situation arises because of a combination of circumstances. First, the project will require the investment of significant funds within the next two to four weeks to deal with the spring snow melt. I was advised that this

investment will be in the neighbourhood of $150,000. The funds are required to protect the project and the environment from the high runoff that is expected. If the issue about the right of BC Hydro to terminate the EPA is not resolved, it is extremely unlikely that IA will provide funds to do this work. No other party will provide the funding.

[37] If the funds are not provided, that will be the end of the project. This in turn will result in a serious reduction in the value of the assets of Wedgemount and that will impact third parties. The third parties include creditors, contractors, the Lil'wat First Nation and the Province of British Columbia. The province may be left without any recourse to deal with decommissioning and environmental remediation issues under the *Land Act*, R.S.B.C. 1996, c. 245, and the *Water Sustainability Act*, S.B.C. 2014, c. 15, and the Lil'wat First Nation will get no benefit from their agreement with Wedgemount.

Ruling

[38] I dismiss BC Hydro's application for a stay of the Receiver's application. I am doing so on the basis that the Receiver has the jurisdiction, in the unusual circumstances of this case, to bring the application for a declaration and directions. It falls within the powers granted to the Receiver under subsections 243(1)(b) and (c) of the *BIA* and under the terms of the Order.

[39] The application is necessary in these circumstances to facilitate the preservation and realization of the assets for the benefit of all creditors. As set out in *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.*, [1995] O.J. No. 1482 at para. 18 (Ont. Ct. J. (Gen. Div.)), that is the purpose of the receivership:

> The purpose of a general receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of all of the creditors, including secured creditors: *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 at p. 88, 59 D.L.R. (3d) 492 (C.A.); *Re Winmil Holidays Co.* (1984), 10 D.L.R. (4th) 572 (B.C.C.A.) at pp. 579-80. The debtor's property comes under the administration and supervision of the court, through the receiver and manager, which is the agent of the court and not of the creditors at whose instance it is appointed. This being the case, the integrity of the receivership process requires that the court perform its role as

> supervisor in connection with whatever happens to the property that comes under its administration: see Bennett, supra, at pp. 110-11.

[40] The only reason the Receiver might not have the ability to bring the application is the existence of the arbitration clause in the EPA. As the parties have argued, that raises two issues: is the Receiver a party to an arbitration agreement; and is the proceeding in respect of a matter agreed to be submitted to arbitration?

[41] The argument that the Receiver is not a party to the EPA and has not assumed the EPA has some merit. However, it is a difficult point of principle on which to rest my decision.

[42] If I were to conclude that a receiver is never bound by an arbitration agreement, that would have potentially wide-ranging implications. My decision is not based on that point of principle. Rather, it is the particular circumstances of this case that permit the Receiver to bring the issue it has raised to the court for determination.

[43] As the respondents argue, where a receiver is court-appointed, it is not bound by existing contracts made by the debtor. They refer to *New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154 at paras. 16 and 17. In *New Skeena*, the court determined that a receiver has the common law power to disclaim contracts and (at para. 17) referred with approval to *Bennett on Receiverships* at 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor.... However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach.

[44] BC Hydro says that that power of a receiver cannot apply here because where a receiver chooses to disclaim or break a contract, the debtor remains liable

for damages. It says the nature of BC Hydro's loss from a failure to be bound by the arbitration clause cannot be remedied by damages, and so this principle cannot apply. I disagree. The fact that BC Hydro cannot demonstrate any loss that is compensable by damages or sue for damages is merely a factor for this Court to take into account in deciding whether to allow the Receiver to take this step. The point taken from the principle outlined in *Bennett on Receiverships* is that a court-appointed receiver has wide powers that can extend to the position taken here by the Receiver.

[45] The second issue raised by the respondents in relation to s. 15(1) of the *Arbitration Act* – whether the application brought by the Receiver is in respect of a matter agreed to be submitted to arbitration – has more merit. The issue raised by the Receiver's application, as I presently understand it, is not "a dispute under or in relation to the EPA". Rather, the dispute relates to representations made by BC Hydro to the Receiver. The representations took place after May 12, 2017, and while the Receiver was acting in its court-appointed role.

[46] BC Hydro says that is still a dispute under the EPA. I disagree. It is not the type of dispute that the arbitration agreement provided would be referred to arbitration. The Receiver is seeking directions of the Court based on representations made to an officer of the court. Of course, I appreciate that the determination of those issues likely also involves questions that, but for the receivership and the matters alleged by the Receiver, may have fallen within the arbitration agreement. In other words, the issues to be considered by the Receiver's application may well be hybrid questions. Some are within the arbitration agreement and some are not. However, given the present circumstances, those issues must be considered together for the proper administration of the receivership.

[47] However, if I am wrong in coming to that conclusion, I nevertheless conclude that the Court has the inherent jurisdiction to consider the Receiver's application. In doing so, I rely on the decisions of this Court in *Pope & Talbot* and the decision in *Hayes Forest Services Limited (Re)*, 2009 BCSC 1169.

[48] As Mr. Justice Walker noted at paras. 149-150 of *P&T #1*, the *BIA* confers jurisdiction on superior courts to disrupt private contractual rights. In *P&T #2*, he stated as follows at paras. 119-121:

> [119] The rationale underlying that point is well set out in the decision of Topolniski J., whose reasoning was affirmed by the Alberta Court of Appeal in *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABQB 236, 62 Alta. L.R. (4th) 168, aff'd 2006 ABCA 293, 65 Alta. L.R. (4th) [32]:
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> > [25] A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of the bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.
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> [120] Resort to inherent jurisdiction may be made to further the objects of the *BIA* where the *Act* does not provide a specific mechanism. In essence, failing specific provision in the statute, the "gap" may be filled by statutory construction, or failing that, then by resort to inherent jurisdiction. According to Topolniski J., the *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Resort to inherent jurisdiction is "maintained and available as an important but sparingly used tool". At para. 26, he wrote:
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> > The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.
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> [121] Topolniski J. also remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:
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> > [27] Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis.

[49] The circumstances in *Pope & Talbot* were similar to those here. Insurers brought a stay application relying on an ADR provision in an insurance policy and

sought to have coverage determined in accordance with that provision rather than by the court. Mr. Justice Walker refused the stay and determined (at para. 134) that there was "no good reason for the ADR clause to stand in the way of an orderly and expeditious resolution of the insolvency proceedings."

[50] I arrive at the same conclusion here. When I balance the competing interests, it is clear that the benefit of granting the relief outweighs the relative prejudice to those affected by it. The relief I am granting is, of course, very limited; I will hear the Receiver's application. This allows the dispute between the Receiver and BC Hydro to be determined expeditiously and on its merits. It is significant that if I did not allow the Receiver to bring this application, it is probable that the dispute would not be resolved on its merits. The prejudice to BC Hydro is very limited. It has retained the right to have the issues it wants to raise adjudicated. I understand that it has prepared the relevant affidavit evidence and is prepared to proceed.

[51] I wish to make one final observation. I accept the position of the respondents about the nature of this receivership and accept that the consideration of this issue in the circumstances of this case is the proper way to further the objects of the *BIA*. I do not accept BC Hydro's submission that as a receivership this is a mere liquidation of assets and that the principles that animate the court's role in restructuring situations have no application here. As the respondents argue, the actions the court takes under the *BIA* cover a broad range of situations. This receivership has elements of a restructuring. There are significant interests beyond those of the creditors that the Court can consider, including those of the Lil'wat First Nation and the province.

[52] In summary, BC Hydro's application is dismissed. I will hear the Receiver's application.

"Butler J."