COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-022267-116
(500-11-041305-117)

DATE: APRIL 12, 2012

PRESIDING: THE HONOURABLE ALLAN R. HILTON, J.A.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

STATOIL CANADA LTD.
PETITIONER – Impleaded party
v.

HOMBURG INVEST INC.
RESPONDENT – Debtor-Petitioner
and

THE CADILLAC FAIRVIEW CORPORATION LIMITED
BOS SOLUTIONS LTD.
CANADIAN TUBULAR SERVICES INC.
KEYWEST PROJECTS LTD.
MHI FUND MANAGEMENT INC.
SPT GROUP CANADA LTD. formerly NEOTECHNOLOGY CONSULTANTS LTD.
PREMIER PETROLEUM CORP.
TUCKER WIRELINE SERVICES CANADA INC.
SURGE ENERGY INC.
MOE HANNAH MCNEIL LLP
LOGAN COMPLETION SYSTEMS INC.
CE FRANKLIN LTD.
IMPLEADED THIRD PARTIES – Impleaded parties
and

SAMSON BELAIR/DELOITTE & TOUCHE INC.
IMPLEADED PARTY – Monitor

JUDGMENT

[1] The Debtor Homberg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,[1] and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homberg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

[2] Statoil urges a barrage of reasons why leave should be granted,[2] which are conveniently summarized in paragraph 52 of its motion:

> a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?
>
> b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?
>
> c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

[3] A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,[3] there are four such criteria:

- whether the point on appeal is of significance to the practice;
- whether the point raised is of significance to the action itself;

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1 R.S.C. c.-36.

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding, thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

3 [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

- whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;

- whether the appeal will unduly hinder the progress of the action.

[4] Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.[4] In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

[5] Without disputing the applicability of these four criteria, Statoil urges me to consider that they need not be cumulative, but weighed together, even if one or more of them are not established. In this respect, it points to the reasons of Yamauchi, J., of the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*,[5] who was hearing a *CCAA* leave application of the type before me. In doing so, Yamauchi, J. referred to reasons given in Alberta that advocate a different approach than the one that has been unanimously followed by judges of this Court. Here is what he said:

> 24 For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd. (Re)*, 2009 ABCA 360 at para. 10, where the court said:
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> > The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.
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> 25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at paras. 28-29, the court held that:

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4 See, for example, *4370422 Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.*, 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25–29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relative à)*, 9 C.B.R. (5th) 103, per Bich, J.A. at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.*, J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

5 72 C.B.R. (5th) 261, 2010 ABQB 637.

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
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> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

26 In *Smoky River Coal Ltd. (Re)* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the CCAA's history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
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> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[...]

29 *Fairmont Resort* provides us with the "test for leave." The test is but one test, in which "there must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after "weighing all the factors." In other words, success or failure to prove one or more

> of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.
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> [Emphasis added.]

[6] In analyzing whether I should follow what was suggested in the foregoing extract or the judicial history that has prevailed in this province, I am mindful that the Supreme Court of Canada granted leave to appeal[6] the judgment of my colleague Chamberland, J.A. in *Newfoundland and Labrador v. AbitibiBowater*[7] in which he dismissed an application for leave to appeal. I can only assume the Court decided to hear the appeal to look at the merits of the Superior Court judgment of Gascon, J., as he then was,[8] rather than to decide whether Chamberland, J.A. had erred by refusing leave. Only time will tell once the Court's judgment on the merits is released.[9]

[7] That being said, unless and until the Supreme Court determines a different test to apply by an appellate judge hearing a *CCAA* leave application, or until a panel of this Court holds that the test articulated in the extract I have quoted in paragraph [5] above is the one that should be followed, I believe that the better course for me is to apply the principles that have been repeatedly stated by judges of this Court. Counsel in Quebec are entitled to stability in knowing what test they will need to satisfy in bringing a *CCAA* leave application. The parameters of that test should not depend on who, as a matter of chance, happens to be the judge in chambers on the day they present their motion. I will therefore consider Statoil's application on the basis that the four recognized criteria are cumulative.

[8] I turn now to the three grounds of appeal mentioned in paragraph [2] above.

[9] With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a *CCAA* application of the type with which he was seized because the orders issued were not "necessary"[10] to facilitate Homburg's reorganization and to achieve the *CCAA* objectives. Instead, it says that he adopted what it characterizes as a "broad and result-driven" approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a "fair, equitable, practical and efficient solution to HII's[11] default under the Head Lease".

[10] To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 *CCAA* refers not to necessity but to the power of a supervising judge "to

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6 Supreme Court of Canada file 33797.
7 *Supra* note 3.
8 2010 QCCS 1061.
9 The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.
10 Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.
11 For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

make any order that it considers appropriate in the circumstances". It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the *CCAA* by enhancing the possibility of a successful restructuring.

[11] Next is the issue of standing.

[12] Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac Fairview under the Head Lease between it and Statoil, the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

[13] As for Homburg, it says that it is at the centre of the various agreements whereby Statoil undertook to step into its shoes in the event of its default under the agreements, which has now happened. All that it sought by the conclusions of the motion, therefore, is a declaration that Statoil live up to the obligations it had contractually undertaken, and acknowledged subsequently in writing.

[14] Finally, there is the issue of the interference with the contractual rights of third parties by the effect of the orders, in this case not only Statoil, but also Cadillac Fairview and the subtenants of the premises. All of them are third party non-debtors, and Statoil says that Gouin, J. simply lacked the authority to interfere with the exercise of their respective contractual rights between themselves. Statoil acknowledges what it describes as a "certain jurisprudential controversy on this issue", but says the controlling case is that of the Ontario Court of Appeal in *Stelco Inc. (Re)*.[12] Blair, J.A., for the Court, remarked that the *CCAA* contains "no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves",[13] and that the trial judge had been "very careful to say that nothing in his reasons should be taken to determine or affect the relationship between (categories of debenture holders)."[14]

[15] I note immediately that the issue in *Re Stelco* arose in a very different context, namely, the classification of categories of debenture holders for voting purposes on a proposed plan of arrangement or compromise of a debtor company. The proposed classification was dismissed at trial and confirmed on appeal by the same panel that granted leave. The ratio of the judgment does not appear to be of much significance to the resolution of the issues that were before Gouin, J.

[16] In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any

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12 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.
13 *Ibid.*, para. 32.
14 *Ibid.*, para. 33.

relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

[17] In my view, whether individually or collectively, I do not consider that Statoil has satisfied the test incumbent upon it to be granted leave.

[18] Any appeal would have to proceed based on the trial judge's findings of fact. Whatever may be said of them, Statoil's motion does not satisfy me that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given *CCAA* supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised. In addition, although some of the legal issues appear interesting from an objective standpoint, they fall short of being significant to the action in the overall scheme of things, nor do they appear to be *prima facie* meritorious, although I would hesitate to characterize them as frivolous.

[19] One final point, which is in and of itself dispositive, leads to the motion failing.

[20] The judgment of Gouin, J. granted the relief claimed with provisional effect notwithstanding appeal, and no attempt was made to suspend provisional execution of the judgment. To the extent the terms of the judgment may already have been implemented, it would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented, not to mention the uncertainty that would be created by the mere fact of leave being granted.

[21] Statoil's motion is accordingly dismissed with costs.

ALLAN R. HILTON, J.A.

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Unrepresented
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Date of hearing: March 1, 2012