COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership,* 2018 BCCA 283

Date: 20180709
Dockets: CA45324; CA45325

Between:

Industrial Alliance Insurance and Financial Services Inc.

Respondent
(Plaintiff)

And

Wedgemount Power Limited Partnership, Wedgemount Power (GP) Inc. and Wedgemount Power Inc.

Respondents
(Defendants)

And

British Columbia Hydro and Power Authority

Appellant
(Applicant/Respondent)

Before: The Honourable Mr. Justice Groberman
(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated May 4, 2018 and May 18, 2018 (*Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCSC 970 and 2018 BCSC 971, Vancouver Registry Docket No. S174308).

Oral Reasons for Judgment

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Place and Date of Hearing:	Vancouver, British Columbia July 6, 2018
Place and Date of Judgment:	Vancouver, British Columbia July 9, 2018

Summary:

The developer of a hydro project ran into financial difficulties, and its major financier brought proceedings for appointment of a receiver under the Bankruptcy and Insolvency Act and the Law and Equity Act. The receiver attempted to sell the project, including an agreement by BC Hydro to purchase electricity. BC Hydro threatened to terminate the purchase agreement. The receiver applied for a declaration that BC Hydro could not do so, and BC Hydro applied to stay the application, arguing that the dispute was required to go to arbitration. The judge dismissed the application for a stay, and granted a declaration that BC Hydro was not entitled to terminate the agreement. BC Hydro filed notices of appeal from the decisions outside the ten-day appeal period under the Bankruptcy and Insolvency Act. The financier applied to quash the appeals. BC Hydro argued that the abbreviated limitation period for appeals under the Bankruptcy and Insolvency Act did not apply. In the alternative, it sought to convert the notices of appeal to applications for leave, and sought an extension of time. Held: the appeal period and appeal rights are defined by the Bankruptcy and Insolvency Act. The notices of appeal are converted to applications for leave to appeal. The applications for extension of time are denied. It would be unjust to grant leave to appeal, as the existence of an appeal would severely impact the prospect of a sale of the project.

[1] **GROBERMAN J.A.**: The Wedgemount respondents ("Wedgemount") are the owners and developers of a five-megawatt run-of-river power project located on Wedgemount Creek, near Whistler, British Columbia. Industrial Alliance Insurance and Financial Services Inc. ("Alliance") has provided substantial financing for the project. Unfortunately, the project experienced significant delays, and Wedgemount encountered financial problems. In May 2017, Alliance applied under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and under the *Law and Equity Act*, R.S.B.C. 1996, c 253 for the appointment of a receiver. The Supreme Court of British Columbia appointed Deloitte Restructuring Inc. ("Deloitte") as receiver over Wedgemount. Deloitte has made considerable efforts to complete the project and to sell it.

[2] The viability of the project is closely tied to an agreement between Wedgemount and the British Columbia Hydro and Power Authority ("BC Hydro") under which BC Hydro has committed to purchasing electricity generated by the project. The agreement (which the parties have referred to as the "Electricity Purchase Agreement" or "EPA") set September 30, 2015 as the target date for

commercial operation of the project. It gave BC Hydro a right to terminate the agreement if commercial operations did not commence within two years of that date.

[3] Deloitte engaged in considerable communications with BC Hydro in an effort to ensure that BC Hydro would not terminate the agreement. Very shortly before the date on which BC Hydro would have the right to terminate the agreement, however, BC Hydro indicated that it was not committed to maintaining the agreement in place.

[4] The parties disagreed as to whether BC Hydro had the right to terminate the agreement. I need not describe all of the communications between the parties, or the procedures taken by them. What is important, for our purposes, is that Deloitte brought an application before the BC Supreme Court for a declaration that BC Hydro did not have the unilateral right to terminate the EPA. BC Hydro sought to stay that application, arguing that all issues concerning the EPA were, under the terms of the agreement, to be decided by arbitration.

[5] On May 4, 2018, a judge of the Supreme Court dismissed B.C. Hydro's application to stay Deloitte's application. On May 18, 2018 the same judge acceded to Deloitte's application, finding that an estoppel prevented BC Hydro from terminating the agreement.

[6] On June 1, 2018, BC Hydro filed notices of appeal in this Court in respect of both the May 4 and May 18 judgments. Alliance applies to quash the notices of appeal on the grounds that the appellant was required to obtain leave to appeal, and on the basis that appeals have been brought out of time.

[7] BC Hydro resists the applications to quash, arguing that the statutory provisions requiring leave to appeal and providing for an abbreviated appeal period are not applicable to these appeals. In the alternative, it seeks orders converting the notices of appeal to applications for leave to appeal, extending the time to apply for leave, and granting leave.

[8] The various applications, except the actual leave applications, came on before me on July 6, 2018. At the end of the hearing, I advised that I would be

declaring that the provisions of the *Bankruptcy and Insolvency Act* and of the *Bankruptcy and Insolvency General Rules* are applicable to the appeals. I further advised that while I would be converting the notices of appeal to notices of application for leave to appeal, I would be refusing the application for extension of time. I am now making those declarations and orders.

Is The Bankruptcy and Insolvency Act Applicable?

[9] Alliance commenced the action for appointment of a receiver under both the *Law and Equity Act* and under the *Bankruptcy and Insolvency Act*. Counsel advised that this is a common practice. It allows flexibility as to the appropriate course of proceeding and remedies in the receivership.

[10] Section 183(1) of the *Bankruptcy and Insolvency Act* gives the Supreme Court of British Columbia plenary authority to exercise jurisdiction under the Act:

> 183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act ….
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> …
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> (c) in the Province … of … British Columbia, the Supreme Court ….

[11] Section 183(2) confers jurisdiction on this this Court to hear appeals under the statute:

> (2) … [T]he courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

[12] Section 193 authorizes appeals and sets out leave requirements:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
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> …
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> (e) in any other case by leave of a judge of the Court of Appeal.

[13] It is common ground among the parties that ss. 193(a) through (d) are inapplicable to these proceedings, and that, assuming the proceedings are properly characterized as appeals under the *Bankruptcy and Insolvency Act*, leave is required pursuant to s. 193(e).

[14] Rule 31 of the *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368) sets out the time limit for appeals and leave applications:

> 31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.
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> (2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

[15] Section 6 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 is the general provision governing appeals to this Court:

> 6 (1) An appeal lies to the court
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> (a) from an order of the Supreme Court or an order of a judge of that court, and
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> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
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> (2) If another enactment of British Columbia or Canada provides that there is no appeal, or a limited right of appeal, from an order referred to in subsection (1), that enactment prevails.

[16] Section 14(1) of the *Court of Appeal Act* sets out the general time limit for an appeal:

> 14(1) The time limit for bringing an appeal or an application for leave to appeal is
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> (a) 30 days, commencing on the day after the order appealed from is pronounced, or
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> (b) if another enactment specifies a different period, that different period.

[17] BC Hydro contends that the appeal provisions of the *Bankruptcy and Insolvency Act* apply only to proceedings filed in the Bankruptcy registry of the

Supreme Court, and that those proceedings must comply with Rules 9(1) and (4) of the *Bankruptcy and Insolvency General Rules*:

> 9 (1) All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words “in Bankruptcy and Insolvency”.
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> …
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> (4) Every document used in the course of a receivership must be entitled “In the Matter of the Receivership of …”.

[18] The initiating documents for the action in the Supreme Court did not describe the court as sitting “in Bankruptcy and Insolvency”, nor did it include the words “In the Matter of the Receivership of [Wedgemount]”. Citing *Taylor Ventures v. All Investors*, 2002 BCSC 699, particularly at paras. 42-46, BC Hydro says that the failure to use language in the forms that conform with the *Bankruptcy and Insolvency General Rules* means that the provisions of the *Act* and *Rules* are inapplicable.

[19] In my view, *Taylor Ventures* does not support that conclusion. The question in *Taylor Ventures* was whether Notices of Disallowance were effective, given that they had not been filed in a bankruptcy action, and had not provided the bankruptcy action style of cause. The judge found that the documents were “calculated to mislead” and were, therefore, not proper notices of disallowance.

[20] No one suggests, in this case, that any filings were improper or calculated to mislead. The parties knew, at all times, that the proceeding was brought pursuant to the *Bankruptcy and Insolvency Act*, and that remedies were being sought in reliance on that statute. Where a party obtains remedies in reliance on the *Bankruptcy and Insolvency Act*, it is the appeal provisions of that statute that govern: see, for example, *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48. To require special notations or words on the documents, would, in these circumstances, elevate form over substance.

[21] I acknowledge that, in a case such as the present one, where relief is sought under both common law equitable principles and the *Law and Equity Act* as well as under the *Bankruptcy and Insolvency Act*, there can be some question as to whether

the appeal provisions of the *Bankruptcy and Insolvency Act* are engaged. In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable.

[22] In the case before us, there are two orders under appeal. The first is the May 4, 2018 order declining to stay Deloitte's application for a declaration against BC Hydro. In making that order, the judge relied on jurisdiction conferred on him by the *Bankruptcy and Insolvency Act*:

> [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 [*Bankruptcy and Insolvency Act*] and under the terms of the Order.
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> [Emphasis added.]

[23] In his analysis, the judge also referred at para. 32 to *Pope & Talbot Ltd.* (Re), 2009 BCSC 1014 for the proposition that "the court has considerable jurisdiction to suspend private contractual rights where it is appropriate to do so, … in bankruptcy proceedings. [Emphasis added.]"

[24] It is clear, then, that the judge was purporting to act pursuant to powers conferred on him in the *Bankruptcy and Insolvency Act*. Accordingly, the appeal provisions of that statute govern.

[25] The jurisdiction exercised in the May 18 decision is that described in the May 4 reasons. Again, in the May 18 decision, the judge referenced provisions of the *Bankruptcy and Insolvency Act*, as well as provisions in agreements between BC Hydro and Wedgemount referencing bankruptcy. The May 18 decision, then, was also a decision invoking powers conferred by the *Bankruptcy and Insolvency Act*.

[26] In the result, I am in no doubt that the appeal provisions of the *Bankruptcy and Insolvency Act* are applicable to these proceedings.

Conversion of the Notices of Appeal to Applications for Leave

[27] All of the parties acknowledge that, in the circumstances of this case, it is appropriate to convert the notices of appeal to applications for leave to appeal. I direct that the notices of appeal are, for all purposes, deemed to be applications for leave to appeal.

Should the time to Apply for Leave be Extended?

[28] I turn, then, to the question of whether the time to apply for leave ought to be extended.

[29] I begin by observing that in a case such as the present, it would have been most efficient for the parties to be prepared to argue the leave applications, themselves, together with the applications for extensions. The considerations on the extension applications include considerations that overlap with those that bear on the granting or withholding of leave.

[30] That said, I am able to dispose of this matter on the applications for extension of time. The parties agree on the considerations applicable to the application for an extension. They are the considerations generally applied by this Court in exercising discretions to extend time. As applied to the extension of time to apply for leave in the present case, I would describe the considerations as follows:

a) Was there an intention to apply for leave before the expiry of the time for doing so?

b) Did the appellant communicate the intention to the respondents?

c) Was the delay lengthy?

d) Did the applicant act expeditiously to seek an extension of time?

e) Is there an explanation for the delay?

f) Is there prejudice to the respondents consequent on the delay?

g) Is there merit to the application for leave?

h) Is it in the interests of justice that the extension be granted?

[31] It is important to recognize that this is not a checklist. The answers to the various questions are not added together or dealt with in some mathematical or algorithmic approach. Rather, they are simply considerations that guide the exercise of judicial discretion.

[32] In this case, most of the considerations favour an extension. The delay was not extensive. In the case of the first appeal, the application for leave ought to have been filed by May 14, and it was filed June 1. The second appeal ought to have been filed by May 28, but was filed June 1.

[33] While there is no definitive evidence showing that BC Hydro formed the intention of appealing within the appeal period, there is evidence that it was considering bringing an appeal, and that, at least in respect of the second appeal, it gave some indication to the respondents that an appeal was under active consideration.

[34] The material before the Court does not explicitly explain the delay, but does imply that BC Hydro considered that the abbreviated appeal period under the *Bankruptcy and Insolvency Act* was inapplicable.

[35] In *Knight v. Thorne Ernst & Whinney Inc.* (1990), 49 B.C.L.R. (2d) 158 (B.C.C.A.), at 160, Lambert J.A. said:

> Time and again counsel are unaware that under federal legislation special appeal periods may apply of which the short period of 10 days under the *Bankruptcy Act* is one. In my opinion, that constitutes in itself a special circumstance and tends particularly to diminish the significance which should be attached to the first two tests set out by Mr. Justice Craig, namely, that the appellant had a bona fide intention to appeal, formed within the appeal period, and that he notified the respondent of that intention within that period. Those two tests would apply with their usual vigour after 30 days had expired but if the appeal is ready for filing and filed within the period between 10 days and 30 days, then, in my opinion, those two tests have diminished importance or no importance at all.

[36] Lambert J.A. was simply recognizing that, as there is widespread unawareness of the abbreviated appeal period under the *Bankruptcy and Insolvency Act*, it would be overly harsh to treat a mistaken belief that the 30-day appeal period

applied as culpable. I do not see his statement as obviating the need for a party seeking an extension to provide an explanation.

[37] In the case before us, the parties are sophisticated, and their counsel specialize in bankruptcy and insolvency. While I accept that BC Hydro may have considered that it could argue that the *Bankruptcy and Insolvency Act* provisions were inapplicable, I am not prepared to assume that it was unaware of the statutory provisions. Still, in light of the short delay, and the circumstances of this case, it is my view that little weight ought to be attached to the absence of clear evidence of an intention to appeal within the time limited for appeal.

[38] In assessing the prejudice occasioned by the delay in filing the leave application, it is important to recognize what is being considered is prejudice arising between the end of the appeal period and the date that the leave application was filed: see *Re Braich*, 2007 BCCA 641. While the evidence in this case is equivocal, I am prepared to accept that no great expenditures or prejudice arose between May 28, 2018 – the last day for timely filing of the application from the second judgment – and June 1, 2018 when the document was filed.

[39] Accordingly, apart from a consideration of the merits of the leave application, and general issues of justice, I would have been inclined to grant the extension.

[40] I am, on this application, not in a position to assess the substantive merits of the appeals. I am prepared to accept, for the purpose of this application, that arguments can properly be advanced to the effect that the questions ultimately decided by the Court ought, instead, to have been put to an arbitrator. In saying this, I am not suggesting that an appeal would be successful; only that it would be arguable. Indeed I do not see the argument as a particularly strong one.

[41] It is less obvious that the judge's May 18 decision, finding that BC Hydro is estopped from terminating the EPA is vulnerable to appeal. On the face of it, the decision involves findings of fact, and I am not, at present, persuaded that any meritorious argument can be advanced to the effect that the judge made a palpable

and overriding error in reaching his conclusions. That said, if the appeal from the May 4 decision were successful, it is at least arguable that the May 18 order would fall as a consequence. I am, therefore, prepared to accept, for the purposes of this application, that the appeal would not be doomed to failure.

[42] I am, however, of the view that the leave application, itself, does not have any prospect of success. One of the factors to be considered in a leave application is whether the granting of leave will unduly hinder the progress of the action.

[43] In *Edgewater Casino Inc.,* 2009 BCCA 40, Tysoe J.A. noted that in cases arising under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36*,* this factor will often be decisive of a leave application:

> [21] The fourth of the above factors [i.e., "whether the appeal will unduly hinder the progress of the action"] relates to the detrimental effect of an appeal on the underlying action. In most non-CCAA cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. CCAA proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to CCAA proceedings as "real-time" litigation.
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> [22] The fundamental purpose of CCAA proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.
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> …
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> [24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing CCAA proceeding. However, not all of the above considerations will be applicable to some orders made in CCAA proceedings. Thus, in *Westar Mining* [*Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16], McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease* [*Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368], believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the CCAA proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* [*Re New Skeena Forest Products Inc.*, 2005 BCCA 192] at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[44] The current litigation, while not under the *Companies' Creditors Arrangement Act*, is of the nature discussed by Tysoe J.A. in *Edgewater*. This is "real-time" litigation, where the ability of the receiver to realize on the assets of Wedgemount will depend on being able to move quickly, and without entitlement issues being clouded by an appeal. The evidence before the court convinces me that there is a very real chance that delays and uncertainties inherent in an appeal will drastically reduce the amount that Deloitte can ultimately realize on a sale of the project.

[45] I am therefore of the view that a judge hearing the leave applications would inevitably conclude that leave should not be granted. As I find the leave applications themselves would be doomed to failure, I decline to extend time to bring the application.

[46] The applications to extend time are denied, and the appeals stand dismissed.

"The Honourable Mr. Justice Groberman"