Court of King's Bench of Alberta

Citation: Angus A2A GP Inc (Re), 2024 ABKB 769

Date:
Docket: 2401 15969
Registry: Calgary

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c. C-36, AS AMENDED AND IN THE MATTERE OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ANGUS A2A GP INC., ANGUS MANOR PARK A2A GP INC., ANGUS MANOR PARK A2A CAPITAL CORP., ANGUS MANOR PARK A2A DEVELOPMENTS INC., HILLS OF WINDRIDGE A2A GP INC., FOSSIL CREEK A2A GP INC., FOSSIL CREEK A2A, A2A DEVELOPMENTS INC., SERENE COUNTRY HOMES (CANADA) INC. and A2A CAPITAL SERVICES CANADA INC.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC (the "US LLC Applicants") and the remainder of the debtor companies (the "Canadian Applicants") seek an extension of time to commence an application for leave to appeal the Initial Order granted in these proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, s 14(2). Together the US LLC Applicants and the Canadian Applicants will be referred to as the Applicants.

[2] The question of granting an extension of time to seek leave to appeal pursuant to *CCAA* s 14(2) is not a frequent subject of consideration by courts. The parties were only able to identify one case on point which was from British Columbia. The present application requires me to determine the appropriate criteria to guide my discretion whether to extend time to permit the Applicants to make an application for leave to appeal the Initial Order.

II. Procedural Background

[3] A group of investors applied for an Initial Order pursuant to the *CCAA* before me on the Commercial List on November 14, 2024. The investors presented themselves as contingent creditors and adduced evidence to show that the Applicants had more than $5 million in debt, were not meeting their obligations as they came due, and were woefully delinquent in their communications with investors. The facts presented by the investors were consistent with a failing business or possibly a fraudulent scheme. The application was presented as an urgent

matter on the basis that the Angus Manor property north of Toronto, Ontario – one of the three main properties owned by the Canadian Applicants – was to be sold the next day on questionable terms. The Applicants were represented at the Initial Order hearing by their corporate counsel who advised that he had not had enough time to provide a substantive response to the application.

[4] Before granting the Initial Order, I canvassed the appropriateness of other remedies with the parties, including a receivership or an injunction. An injunction was not an appropriate remedy given the short time prior to the possible sale of the Angus Manor property and the complexities of multi-jurisdictional recognition and enforcement. Proceeding pursuant to the *CCAA* appeared to be less intrusive than a receivership which would unseat management. I was satisfied on a *prima facie* basis that the statutory requirements for an Initial Order were met, and I took additional comfort from the fact that a comeback hearing before Justice Simard was already scheduled for November 21, 2024.

[5] Justice Simard presided over the comeback hearing on November 21, 2024. The investors asked Justice Simard to extend the Initial Order and to make certain revisions to the Initial Order while the Applicants, now represented by Calgary and Toronto litigation counsel, asked Justice Simard to set aside the Initial Order. Simard J gave an oral decision on November 25, 2024. He accepted some of the proposed revisions to the Initial Order and rejected others, found that the Court had jurisdiction over the US LLC Applicants, and granted an amended and revised Initial Order (the "ARIO"). He determined that he did not have a sufficient evidential record to decide the Applicants' request to set aside the Initial Order, so he extended the ARIO to December 18, 2024 "to allow the [Applicants] to provide the Monitor with the necessary information to allow the Monitor to create a comprehensive report for [the Court] and for other stakeholders, so that we have a proper record, and [the Court] can properly decide whether a continuation after that date is appropriate; and, if so, on what terms." The hearing on December 18, 2024 was intended to be a continuation of the comeback hearing dealing with, among other things, the Applicants' motion to set aside the Initial Order.

[6] On December 16, 2024, the US LLC Applicants wrote to the Court to advise that they had retained Bennett Jones LLP and wanted an extension of time to apply for leave to appeal the Initial Order. Justice Simard, having been a partner of Bennett Jones LLP prior to his appointment to the bench, recused himself from presiding over any further substantive applications in this case. He adjourned the December 18, 2024 continuation of the comeback hearing to December 20, 2024. He also extended the ARIO for the period of the brief adjournment. At the commencement of the hearing on December 20, 2024, all parties advised that they had agreed that the continuation of the comeback hearing be further adjourned to permit cross-examinations to take place and scheduled to be heard January 16 and 17, 2024 before me. I granted the adjournment.

[7] Also on December 16, 2024, the Applicants filed an application for leave to appeal Justice Simard's decision granting the ARIO with the Court of Appeal. The leave to appeal application is scheduled to be heard by a single judge of the Court of Appeal on February 13, 2025.

III. Extension of Time to Seek Permission to Appeal Pursuant to the *CCAA*

[8] *CCAA* s 13 and 14 provide the rules for appealing orders made pursuant to the *CCAA*. Section 13 specifies that a person "may appeal from the order or decision on obtaining leave of

the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs." The usual practice is to seek leave to appeal from the Court of Appeal. Subsection 14(2) provides that appeals must be commenced within 21 days after the order or decision being appealed was made. Subsection 14(2) further provides that an extension of time to commence an appeal is in the exclusive discretion of the court appealed from. Wittmann JA, as he then was, held in ***Bank of Montreal v Cage Logistics Inc***, 2003 ABCA 36 at para 17:

> Parliament has indicated that ... the discretion to extend time is vested solely in the court appealed from. In other words, in the supervising judge who is in a unique and informed position to exercise that discretion according to the particular circumstances and stage of the C.C.A.A. proceedings then before her.

[9] The parties submit that the appropriate criteria to guide the discretion of the Court in determining whether to grant an extension of time to commence an appeal of an order made pursuant to the *CCAA* are set out in ***Port Capital Development (EV) Inc. (Re),*** 2022 BCSC 1655. But the criteria set out in ***Port Capital*** do not constitute a distinctive *CCAA* extension of time test. Justice Fitzpatrick at para 21 adopted the criteria used by the BC Court of Appeal to determine the appropriateness of extending time to commence an appeal set out by Groberman JA in ***Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership***, 2018 BCCA 283 at para 30. The criteria are essentially the standard criteria the BC Court of Appeal uses to guide its discretion as to whether to grant an extension of time to appeal: ***Su v Atom Holdings***, 2024 BCCA 386 at para 28. The criteria stated by Fitzpatrick J in ***Port Capital*** are:

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?

[10] Groberman JA in ***Wedgemount Power*** emphasized at para 31 that the criteria are not a "checklist" but instead "are simply considerations that guide the exercise of judicial discretion."

[11] The Alberta Court of Appeal's approach to requests to extend time to commence an appeal is similar to that of the BC Court of Appeal. The Alberta approach was established in ***Cairns v Cairns***, [1931] 4 DLR 819 (Alta SC (AD)) at 826-27. Grosse JA summarized the ***Cairns*** factors in ***Waddy v 289904 Alberta Ltd***, 2024 ABCA 253 at para 9. According to Grosse JA, a court must consider:

1. whether there was a *bona fide* intention to appeal while the right to appeal existed, and whether there was some special circumstance that would excuse or justify the failure to appeal in time;

2. any explanation for the delay and whether the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;

3. whether the appellant has taken the benefits of the judgment from which appeal is sought; and

4. whether the appeal would have a reasonable chance of success if allowed to proceed.

[12] Justice Slatter explained in ***Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited***, 2015 ABCA 206 at para 5 that, in addition to the ***Cairns*** factors, "surrounding circumstances must be considered and weighed collectively in deciding whether an extension of time is warranted." Justice Watson further observed that the Court has jurisdiction to extend time where it is required by the "interests of justice" even where not all the ***Cairns*** factors have been satisfied: ***Jose v Baby***, 2023 ABCA 137 at para 7 *per* Watson JA.

[13] As Wittman JA indicated in ***Bank of Montreal v Cage Logistics Inc*****,** a court's evaluation of an application for the extension of time to seek leave to appeal an order made pursuant to the *CCAA* must account for the distinctive features of the *CCAA* regime and the circumstances of the specific *CCAA* proceeding. Since Parliament allocated the decision to extend time to the *CCAA* judge, not the Court of Appeal, it stands to reason that the *CCAA* judge must consider the status of the *CCAA* proceeding, the importance of the appeal to the parties and the *CCAA* proceeding, and the effect of granting an extension of time to appeal on the *CCAA* proceeding. This is a context-specific iteration of the "surrounding circumstances" and "interests of justice" considerations that the Court of Appeal weighs along with the ***Cairns*** factors.

[14] Justice Wakeling concurring in ***Diao v Bank of Montreal***, 2024 ABCA 402 at paras 96 and 97 held that the *bona fide* intention to appeal and explanation for delay must be established with affidavit evidence. The absence of evidence on an application to extend time for an appeal may be grounds for dismissal: ***Sparks v Horvath***, 2023 ABCA 231 at para 4 *per* Feehan JA and ***Jose v Baby*** at para 12. Perhaps the best way to summarize the Court of Appeal's approach to evidence on applications to extend time to commence an appeal is this: parties are required to adduce evidence of their *bona fide* intention to appeal and their explanation for delay, but in exceptional circumstances where the interests of justice require, an extension of time may be granted despite shortcomings in the evidence.

IV. The *Cairns* Factors, *CCAA* Proceedings, and the Interests of Justice

[15] The Applicants rely on the previously filed Affidavit of Allan Whitford Lind sworn November 21, 2024 (the "Lind Affidavit"). No new evidence was filed in support of their applications to extend time for seeking leave to appeal the Initial Order. The Lind Affidavit was sworn for the purpose of the comeback hearing in front of Justice Simard on November 21, 2024. Mr. Lind explained at para 38: "I swear this Affidavit in support of a stay of the Initial Order and adjournment of the Monitor's comeback Application pending an Application to set aside or vary the Initial Order." The Applicants submit that the Lind Affidavit is evidence of the Respondents' *bona fide* intention to appeal.

[16] Parties subject to a *CCAA* Initial Order have two options if they disagree with the Court: (1) they may seek leave to appeal the Initial Order to the Court of Appeal; or (2) they may move

to set aside the Initial Order in the Court of King's Bench. The options are not exclusive; they may be pursued in tandem.

[17] The Lind Affidavit details objections to the Initial Order, many of which the Applicants now seek to advance by way of appeal. However, the Lind Affidavit does not aver an intention to appeal the Initial Order, only an intention to apply to set aside the Initial Order is stated. Indeed, nothing was said to anyone about an intention to appeal until after Bennett Jones LLP was retained by the US LLC Applicants on December 13, 2024. The Applicants concede that no intention to appeal was communicated until December 16, 2024 when the US LLC Applicants wrote to the Court. There is no evidence before the Court of the existence of a *bona fide* intention to appeal within the appeal period.

[18] At the time that the Lind Affidavit was sworn, there were approximately two weeks left to commence an application for leave to appeal. Since the Lind Affidavit is the only evidence relied upon by the Applicants, there is no evidence of an explanation for why an application for leave to appeal was not commenced within the statutory period. The Lind Affidavit was silent on this point because there was no reason for Mr. Lind to explain why an application for leave to appeal was not commenced when the period for making such an application had not yet expired. Instead of relying on evidence, the Applicants ask the Court to take notice of the complexity of the proceedings and the demands placed on the Applicants and conclude that this explains and excuses their delay in commencing an application for leave to appeal.

[19] I decline, in the absence of evidence, to conclude that there is a reasonable explanation for the Applicants' delay in commencing an application for leave to appeal the Initial Order. Based the facts evident from the Court record, the most reasonable inference is that the decision to seek leave to appeal was taken after the US LLC Applicants retained Bennett Jones LLP. It is not uncommon for new counsel to look at a proceeding with fresh eyes and decide on a different strategy. That, however, is not a reason for extending time to commence an application for leave to appeal when a party was previously represented by competent counsel. The US LLC Applicants, acting with the benefit of the advice of their previous counsel (both firms remain counsel for the Canadian Applicants), chose to pursue an application to set aside the Initial Order, not an appeal. That was a rational choice even if now with the benefit of advice from new counsel the US LLC Applicants wish that they had made a different choice. The Canadian Applicants do not even have the excuse of retaining new counsel.

[20] Rather than critically examine my decision to grant the Initial Order to determine whether the proposed appeal has a reasonable chance of success, I assume that it is potentially meritorious. There is no value and possibly some harm in me embarking on an assessment of the merits of the proposed appeal when many of the same issues are scheduled to be heard before me on January 16 and 17, 2024 in the context of the continuation of the comeback hearing where the Applicants' motion to set aside the Initial Order will be heard. In addition to assuming that the proposed appeal is potentially meritorious, I note that the proposed appeal concerns, among other issues, whether contingent creditors (or equity investors) may invoke the *CCAA* process which is a novel question of significant interest to commercial courts and insolvency and restructuring law practitioners.

[21] The application for leave to appeal Justice Simard's November 25, 2024 decision is scheduled to be heard by a single judge of the Court of Appeal on February 13, 2025. If the applications to extend time to make applications for leave to appeal the Interim Order are

granted, I understand that the leave applications in respect of the Interim Order will also be heard on February 13, 2025.

[22] By the time that the leave applications are heard by the Court of Appeal, I will have heard the continuation of the comeback hearing and decided the set aside application. Because a comeback hearing is a *de novo* hearing in the sense that the onus remains on the original applicants (***Muscletech Research and Development Inc., Re***, 2006 CanLII 1020 (ON SC) at para 5 and Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed, (Toronto: Thomson Reuters, 2013) at 59) and new evidence may be adduced, there will be a fresh decision made in respect of all issues that were before the Court on the application for the Initial Order except those decided by Justice Simard on November 25, 2024 and which are the subject of the application for leave to appeal his decision.

[23] There are two possible outcomes of the set aside application on January 16 & 17, 2024. First, the Initial Order and ARIO may be set aside in which case the Applicants agree that any appeal of the Initial Order and ARIO would be moot. Second, the Initial Order may be confirmed in which case the Applicants would have the right to commence an application for leave to appeal, the scope of which would include all issues before the Court on the Initial Order application. There is no prejudice to the Applicants if they are not permitted additional time to commence an application for leave to appeal the Initial Order because seeking leave to appeal a decision to uphold the Initial Order made at the continuation of the comeback hearing is effectively the same thing.

[24] There is prejudice to stakeholders in permitting an extension of time to commence an application for leave to appeal the Initial Order. The duplication of processes – the proposed appeal and the set aside application raise the same issues – will deplete the assets of the debtor companies and, in turn, potentially reduce the recovery of stakeholders. I am skeptical that this case can bear the kind of over-lawyering sometimes seen in insolvency and restructuring matters.

[25] The interests of justice also demand consideration of what makes a good appeal. An appeal of the Initial Order would provide the Court of Appeal with a thin record on which to decide potentially important issues for insolvency and restructuring practice. The whole point of a comeback application is for a Court to make a decision with the benefit of a more robust evidential record and, as in this case, more developed argument from responding parties. This, in turn, provides a better foundation for an appellate court to decide an appeal. The Court of Appeal will be in a much better position to hear and decide the issues raised by the Applicants on an appeal arising from the continuation of the comeback hearing on January 16 & 17, 2024.

[26] Counsel for the Canadian Applicants argued that an extension of time to appeal the Initial Order should be granted because Justice Simard's decision is already subject to an application for leave to appeal. As he put it, the Court of Appeal would benefit from seeing the whole picture. Regardless of whether I grant an extension of time to apply for leave to appeal, the Court of Appeal has the power to expand the record before it on the appeal of Simard J's decision to include the transcripts of the Initial Order application and any material filed for the Initial Order application. Justifying granting an extension of time to apply for leave to appeal on the basis that it would expand the record before the appeal court is to have the tail wag the dog.

V. Conclusion

[27] The Applicants have not adduced any evidence to show that they had a *bona fide* intention to seek leave to appeal within the appeal period nor have they adduced any evidence to explain their failure to seek leave to appeal within the appeal period. There is no overriding interest of justice that demands that an extension of time to apply for leave to appeal be granted despite the lack of evidence supporting the application. Indeed, to the contrary, the interests of justice weigh against granting an extension of time to apply for leave to appeal. The Applicants are not prejudiced by the denial of their application for an extension of time to apply for leave to appeal because their set aside application will be heard at the continuation of the comeback hearing and, if they are unsuccessful, they will have the right to seek leave to appeal that decision. The application to extend the time for leave to appeal the Initial Order is dismissed.

Heard on the 20th day of December, 2024.
Dated at the City of Calgary, Alberta this 23rd day of December, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Kelsey J. Meyer and Luc Rollingson, Bennett Jones LLP
for Fossil Creek A2A Developments, LLC and Windridge A2A Developments, LLC

Daniel Jukes, Miles Davison LLP
Sammy Lee, and Stephen Barbier, Metcalfe, Blainey & Burns LLP
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Kyle Kashuba, Torys LLP
for Pillar Capital Corp. (the Interim Lender)