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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Coast Capital Savings Credit Union v. The Symphony Development Corporation,* 2011 BCSC 333

Date: 20110208
Docket: H091522
Registry: Vancouver

Between:

Coast Capital Savings Credit Union

Petitioner

And:

The Symphony Development Corporation, Gurmel Singh Kainth, Shminder Johal, 497308 B.C. Ltd., 0769932 B.C. Ltd., Emco Corporation, Pacific Utility Contracting Ltd., Unlimited Excavating & Landscaping Ltd., Jack Cewe Ltd., C&C Trucking (1988) Ltd., Ocean Construction Supplies Limited, Nora Rosalie Marvin, Bassi Brothers Framing Ltd., United Rentals of Canada Inc., McRae's Environmental Services Ltd., Graestone Ready Mix Inc., Valley Geotechnical Engineering Services Ltd., D.K. Bowins & Associates Inc., Vancouver City Savings Credit Union and Malkit Singh Johal and Tejwant Kaur Kainth

Respondents

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

In Chambers

Counsel for PricewaterhouseCoopers Inc	S.D. Dvorak
Counsel for Malkit Singh Johal	A.H. Brown
Counsel for Tejwant Kaur Kainth and 0769932 B.C. Ltd.	R. A. Millar
Counsel for Bassi Brothers Framing Ltd.	R. McFee, Q.C.
Counsel for 497308 B.C. Ltd.	G. Johnson
Place of and Date of Hearing:	Vancouver, B.C. February 8, 2011
Place and Date of Judgment:	Vancouver, B.C. February 8, 2011

Nature of Application

[1] **THE COURT:** This is an application to determine the process to be followed by persons seeking to appeal the receiver's determinations of certain claims. In each instance, the receiver's determinations followed a claims process that is enshrined in a court order.

[2] The issue on this application is whether the appeals from the receiver's decisions should be *de novo* or whether they are in the nature of a true appeal as set out in the bankruptcy and insolvency legislation. If the latter, the Court should follow the approach taken by Madam Justice Newbury in *Galaxy Sports Inc. (Re)*, 2004 BCCA 284.

[3] At paras. 38 - 40, Newbury J.A. spoke of the process for Courts to follow when faced with an appeal taken from a decision in respect of claims under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("*BIA*"):

> [38] Proceeding on the basis that the "pragmatic and functional" approach can be applied to the decisions at issue here, the nature of the question being decided — whether it is one of fact, or mixed fact and law, and whether it involves consideration of "polycentric" factors — is another important factor in deciding where on the (three-point) "continuum" the decision falls. Indeed, it was said by Donald J.A. in *Aquasource, supra*, that "whether an administrative tribunal's decision will attract curial deference largely depends on the question involved. It is no longer appropriate to grant blanket deference to the tribunal . . . ." (Para.16.) It cannot be said that any of the decisions at issue here involves the balancing of polycentric interests. On the other hand, the chair's determination as to "what effect" to give to creditors' "views and wishes" and the trustee's power to allow or disallow a claim (for which the trustee must give written reasons) under s. 135 (which in turn also involves the requirements of s. 124) seem to be decisions more of law than fact. On these matters, a judge of the Supreme Court may be assumed to have equal expertise. Further, these questions have important legal consequences, in that a person whose proof of claim is disallowed or rejected may not participate as a creditor in the bankruptcy generally or in the distribution of the bankrupt's estate.
>
> [39] On a consideration of all the "contextual" factors mandated by the "pragmatic and functional" approach, I see no reason to disagree with the long-standing principle enunciated in *Re McCoubrey, supra*, which requires the application of a "correctness" standard where compliance with a "mandatory" provision (which I would equate to a question of law or statutory compliance) is involved, and the application of a "reasonableness" standard where the determination of a factual matter or an exercise of true discretion is

called for. In the former category, I would place the chair's decision under s. 108 rejecting a proof of claim for voting purposes and the trustee's decision disallowing a proof of claim under ss. 124 and 135(2). In the latter category, I would place the trustee's role in valuing contingent and unliquidated claims under s. 135(1.1). This general approach conforms with the objective, which I see as implicit in the *BIA*, of enabling debtors to have their proposals voted upon expeditiously and permitting creditors to have their rights and claims determined in a business-like manner, while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases.

[40] I am also of the view that the Supreme Court's hearing of an appeal under s. 135(4) of the *BIA* is not intended to be a trial *de novo* but a true appeal. With all due respect to *Re Eskasoni, supra,* the law in British Columbia is clear that unless the statute that provides an appeal also states that it is to take the form of a trial *de novo* (as do, for example, s. 119(4.1) of the *Social Service Tax Act*, R.S.B.C. 1996, c. 431, and s. 822(4) of the *Criminal Code*, R.S.C. 1985, c. C-46), the appeal will be an ordinary appeal. Thus in *McKenzie v. Mason* (1992) 72 B.C.L.R. (2d) 53, this court held that a statutory appeal to the Chief Gold Commissioner provided by s. 35 of the *Mineral Tenure Act* did not envisage a trial *de novo*. In the course of his reasons for the Court, Toy J.A. cited a passage from *R. v. Dennis* [1960] S.C.R. 286, where Ritchie J. wrote:

> . . . the distinction between "an appeal by holding a trial de novo" and an appeal to the provincial Court of Appeal is that although the object of both is to determine whether the decision appealed from was right or wrong, in the latter case the question is whether it was right or wrong having regard to the evidence upon which it was based, whereas in the former the issue is to be determined without any reference, except for purposes of cross-examination, to the evidence called in the Court appealed from and upon a fresh determination based upon evidence called anew and perhaps accompanied by entirely new evidence. [at 290-91]

McKenzie v. Mason was confirmed by a five-judge panel of this court in *Dupras v. Mason* (1994) 120 D.L.R. (4th) 127. There, Mr. Justice Lambert, speaking for the Court, reviewed the complaint procedure provided in the *Mineral Tenure Act* and said:

> Running through the consideration of s. 35 must be an understanding of the function and expertise of the chief gold commissioner. He or she may be expected to have had many years of experience with respect to the mining industry in general and the locating and recording of mineral claims in particular. That expertise will imbue the carrying out of his or her functions under s. 35. It will also make his or her decision under s. 34 about good faith non-compliance a decision which is well informed by practical experience of what constitutes a good faith attempt to comply with the Act and Regulations, and about whether a failure to comply was calculated to mislead other free miners.

> If an appeal were to be taken by trial *de novo* the chief gold commissioner's expertise would no longer be available in the process of decision-making under ss. 35 and 34. For that reason and for the other reasons set out by Mr. Justice Toy for this court in *McKenzie v. Mason*, including particularly the fact that the appeal is not specified in the statute to be by trial *de novo*, I conclude that s. 35(10) of the *Mineral Tenure Act* does not contemplate or permit an appeal to a Supreme Court judge by trial *de novo*.
>
> Having reached that conclusion, it follows that the appeal to the Supreme Court must be a true appeal confined to whether the chief gold commissioner made a reviewable error of fact, of law, or of procedure. [at 134-35; emphasis added]

Facts

[4] The receivership in this case is not tied to the *BIA* or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"): it is consensual in nature following a consent court order that I made on March 25, 2010.

[5] The receivership emanated from foreclosure proceedings commenced by the petitioner, Coast Capital Savings Credit Union, on a mortgage provided to it from the respondent, The Symphony Development Corporation. The foreclosure arose because the principals of Symphony were not cooperating with each other. Their relationship was dysfunctional. This, in turn, caused the operation of Symphony's business to become dysfunctional, and its affairs reduced to a complete state of disarray. The mortgage was in default. In the circumstances, the receiver was appointed, with the consent of Symphony's principals, to operate the company under limited terms (i.e., to realize Symphony's assets, including property, and to sell its real estate holdings).

[6] The question to be determined now is the nature of the appeals taken by certain creditors from the receiver's determination of their claims. The receiver's decisions were made in the context of a claims process established as part of the consent receivership.

[7] The receiver proposed a claims process in its first report dated March 9, 2010, at clause 8.4:

> The Receiver proposes that the claims process as approved by the Court follow the similar process as outlined in the *Bankruptcy and Insolvency Act* ("BIA"). The proposed process is summarized in the following table:

[8] That table is found on the next page. One of the items on the table reads "Claims Review and Disallowance of Claims." The third bullet point contained within that item states:

> Upon receipt of a notice of disallowance from the Receiver, the claimant may object to the disallowance by filing a notice of motion supported by affidavit evidence within 15 days of the notice of disallowance. A Court review of the claim will result.

[9] Although the previous section of the receiver's report, which is the preamble, refers to the claims process outlined in the *BIA*, the word "appeal" does not appear in this portion of the report where the actual details outlining the claims process are contained.

[10] The parties and interested creditors did not initially agree to all of the terms of the claims process. After negotiation, they agreed to a consent order, which I issued on March 25, 2010.

[11] Paragraph18 of that order sets out the claims process under the heading "claims dispute":

> Any Creditor who disputes the revision or disallowance of a Claim as set forth in a Notice of Revision or Disallowance shall, within 30 days of delivery of the Notice of Revision or Disallowance to such Creditor in accordance with this Order, seek a determination by the Court of the validity and/or value of the Claim by filing and serving a Notice of Motion and supporting affidavit material with the Court.

[12] Paragraph 19 of the order states:

> Any Creditor who fails to file and serve a Notice of Motion within the deadline set forth in paragraph 18 hereof shall be deemed to accept the allowance, revision or disallowance of the Claim as set out in the Notice of Revision or Disallowance and in such Notice of Revision or Disallowance shall constitute a Proven Claim.

[13] That consent order was amended, in part, on July 8, 2010, to permit paragraph18 to be expanded to allow any creditor to dispute a determination of a claim made by the receiver. Paragraph 18.4 reads:

> Any Creditor (the "Disputing Creditor") who disputes the determination of the Receiver to accept or revise the Claim of any other Creditor (a "Disputed Claim") shall, within 30 days after the date of service of the Report, seek a determination by the Court of the validity and/or value of the Disputed Claim by serving a Notice of Application together with other documents upon which the Disputing Creditor intends to rely upon the Receiver and the Creditor whose Accepted Claim or Revised Claim is disputed by the Disputing Creditor.

[14] I am advised by counsel that the words in paragraph 18.4 that read, "together with other documents upon which the Disputing Creditor intends to rely", are in error, and that these words were supposed to have been removed in the final form of order to be entered. I am told that those words were left in by mistake and that an amended order will be presented for entry.

[15] The word "appeal" is not referred to in either order; instead, the process available to a disputing creditor speaks of a "determination by the [C]ourt".

Determination

[16] The receivership is not tied directly to the *BIA* or the *CCAA*. Nonetheless, it is my opinion that the language used in the consent orders is closer to the processes contemplated by the *CCAA* than the *BIA*.

[17] It is important to keep in mind that this case is unlike *Galaxy* and other cases where the receiver has certain statutory powers to compel information and documents (e.g., as is found in ss. 163 and 164 of the *BIA*). Here, the regime established by the consent orders does not provide direct authority to the receiver to engage in those tasks. The most that can be said is that the receiver has liberty to apply to Court for directions.

[18] Unlike *Galaxy* and other cases, no formal record is being kept by the receiver that can be reviewed by the Court on an appeal.

[19] Further, there is no adversarial process of the type described in *Re Pine Valley Mining Corporation (Re)*, 2008 BCSC 356 at paras. 6, 9 - 10,13 - 16, and *Big Sky Farms (Re)*, 2010 SKQB 255 at paras. 8 - 10.

[20] At the same time, however, the Court's review of the receiver's determinations must be conducted on a principled basis; the review must not trample upon the integrity of the claims process. The review or appeal process should not detract from the requirement that parties who choose to engage in the claims process in the first instance must take it seriously. Further, the review process should be one that maintains the onus on any party who disputes the receiver's decision.

[21] I agree with the receiver's submissions that to permit a *de novo* examination of each of the contested claims is not appropriate. It is unprincipled, and it renders pointless the claims process undertaken to date. In my opinion, considerable guidance must be taken from the *dicta* of Newbury J.A. in *Galaxy*, from *Pine Valley*, and from *Re Bankruptcy of Davies Wong*, 2005 BCCA 574.

[22] However, even if a strict interpretation of *Galaxy* is taken, as is urged by at least one of the creditors, a hearing before the reviewing Court is permitted. As well, further evidence beyond that which was before the receiver may be admitted in order to avoid a miscarriage of justice: *Galaxy* at paras. 41 - 42, *Re Wong* at paras. 4, 7- 8, and *Kamloops Forest Products*, 2007 BCSC 907 at paras. 3 - 8.

[23] I take great comfort from the remarks of Newbury J.A. found at paras. 7 - 8 of *Re Wong*, that new evidence not before the receiver may be admitted by the reviewing Court in order to avoid a miscarriage of justice to the disputing creditor. I wish to add to those remarks in order to avoid a miscarriage of justice of another kind. Although the claims process taken in this case is consensual and not tied to the *BIA* or *CCAA*, the claims process followed by the receiver and creditors to date should not be trampeled upon; the review process must be principled.

[24] The integrity of the claims process followed by the receiver and the creditors to date is both maintained and promoted if the review process to be undertaken by the Court in respect of each of the receiver's impugned decisions is carefully determined on a case-by-case basis, having regard to the following factors:

(a) the dollar amount involved;

(b) relevance of the further evidence proposed to be adduced;

(c) historical context including *laches*; and

(d) the sources of new evidence sought to be adduced.

[25] For example, with respect to the Bassi Brothers dispute over the receiver's disallowance of their claim, it may be that the review should be conducted in a summary way with limited cross-examination on affidavit in order to explore and possibly explain their failure to provide key information to the receiver at an earlier date.

[26] With respect to the dispute taken of the receiver's decision to allow the claim arising from Mrs. Kainth's mortgage, I am not persuaded from the evidence and submissions I have reviewed thus far that a fulsome review process incorporating all of the procedural mechanisms of the *Rules of Court* is appropriate. The nature and scope of the review of the receiver's decision must be determined with respect to the issues involved (i.e., the validity of the mortgage). A review process that involves a trial, or even a mini-trial, of an outstanding oppression claim that is not presently before the Court is not appropriate.

[27] Therefore, in conclusion, it is my opinion that the review process is not in all cases an appeal that follows a strict approach from *Galaxy*. Care should be taken to ensure that a principled process is taken in respect of each disputed claim in order to avoid a miscarriage of justice to the disputing creditors and to all of the parties who participated throughout in the claims process. The starting point is that deference must be afforded to the receiver. A review by way of *de novo* is not a

matter of right. The process to be engaged for the review of each of the disputed claims depends upon the factors I have set out in para. 24 above.

The Honourable Mr. Justice Paul Walker