COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364

Date: 20201217
Docket: CA47138

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

In the Matter of the *Sea to Sky University Act*, S.B.C. 2002, c. 54

In the Matter of A Plan of Compromise and Arrangement of Quest University Canada

Between:

Southern Star Developments Ltd.

Appellant

And

Quest University Canada

Respondent (Petitioner)

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

On appeal from: An order of the Supreme Court of British Columbia, dated November 16, 2020 (*Quest University (Re)*, 2020 BCSC 1883, Vancouver Docket S-200586).

Counsel for the Appellant (via teleconference):	P.J. Reardon K. Strong
Counsel for the Respondent (via teleconference):	J.R. Sandrelli T.R.M. Jeffries V.L. Cross
Counsel for Primacorp Ventures Inc. (via teleconference):	G.W. Umbach P.L Rubin

Counsel for PricewaterhouseCoopers Inc., in its capacity as Monitor of Quest University Canada (via teleconference):	V.L. Tickle
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd. (via teleconference):	K.M. Jackson
Counsel for Vanchorverve Foundation (via teleconference):	C.D. Brousson
Counsel for 1114586 B.C. Ltd. (via teleconference):	K.E. Siddall
Place and Date of Hearing:	Vancouver, British Columbia December 7, 2020
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia December 7, 2020
Place and date of Written Reasons:	Vancouver, British Columbia December 17, 2020

Summary:

Application for leave to appeal an order approving a transaction in CCAA proceedings. Held: Application dismissed, reasons following. Given the high degree of deference shown to discretionary decisions by supervising judges in CCAA proceedings, and the finding that this transaction is the only viable transaction with the potential to protect the interests of stakeholders, the interests of justice do not justify granting leave, even if the appeal raises some issues that would be of interest to the practice.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] The appellant, Southern Star Developments Ltd. ("Southern Star"), seeks leave to appeal the order below pursuant to s. 13 of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 [*CCAA*], and that the order be stayed pending the outcome of that appeal.

[2] At the conclusion of the argument, I dismissed the applications for leave and a stay with reasons to follow. These are those reasons.

Background

[3] Quest University ("Quest") is a not-for-profit post-secondary educational institution operating in Squamish, B.C. On 16 January 2020, Quest obtained creditor protection under the *CCAA* to enable it to restructure its debts. Quest subsequently sought approval under the *CCAA* for a transaction with Primacorp Ventures Inc. ("Primacorp") as a restructuring solution.

[4] On 16 November 2020, Justice Fitzpatrick, the supervisory judge for the *CCAA* proceedings, approved the transaction with written reasons to follow which were dated 2 December 2020: *Quest University Canada (Re)*, 2020 BCSC 1883 (Chambers). She found that the transaction with Primacorp was "the *only* viable option to avoid the devastating social and economic consequences to [Quest's] stakeholders if a liquidation results": at para. 178(p). She also found the Primacorp transaction to be the best option available to maximize recovery for Quest's creditors and preserve Quest's university operations: at para. 180.

[5] Southern Star, one of Quest's stakeholders, objected to the transaction. The Primacorp proposal required Quest to disclaim certain subleases it had executed in favour of Southern Star, as they were not economical for Quest (the "Subleases"): paras. 91–93, 97–98. The Subleases concern campus residence buildings located on four lots of land ("Lots A–D") that have been sitting largely vacant as a result of the COVID-19 pandemic. Quest and Southern Star had executed an unregistered lease of a fifth lot, "Lot E", in 2017. When the parties executed the documents, the Ground Lease contained a number of incomplete or blank terms, including a legal description, lease term and information about Southern Star's lender: at para. 32. Southern Star objected to the judge vesting off any interest it had in the unregistered Lot E Ground Lease: at para. 35, arguing that the judge did not have the jurisdiction to do so because of s. 32(9)(d) of the *CCAA*.

[6] Fitzpatrick J. concluded the parties did not intend for the Ground Lease to become effective between them until certain conditions were satisfied; namely, that Quest would decide to build a residence building on Lot E and Southern Star would arrange financing to construct the building. At that point, the Ground Lease would come into effect, in conjunction with the registration of a Sublease and the execution and registration of Southern Star's mortgage. Those conditions were never satisfied, and the supervisory judge concluded that no valid and enforceable lease yet existed between the parties in respect of Lot E: at paras. 36–39. Accordingly, Lot E could be vested off to Primacorp because to do so did not conflict with any prohibition in the *CCAA*.

[7] Southern Star also applied to the court, pursuant to s. 32(2) of the *CCAA*, for an order disallowing any disclaimer by Quest of the Subleases for two of the lots (Lots C–D). In evaluating this application, the chambers judge had regard to s. 32(4) of the *CCAA* which provides:

> Factors to be considered
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;

> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[8] Fitzpatrick J. dismissed Southern Star's application. The Disclaimer of the Subleases had been approved by the court-appointed Monitor for the *CCAA* proceedings: at para. 98. She agreed with the Monitor that the Disclaimers would enhance the prospects of Quest making a viable compromise or arrangement: at para. 104. She found that "[m]aintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances", as evidenced by Primacorp's requirement that the Subleases be disclaimed: at para. 102. She also noted that Quest and Primacorp had already made efforts to find a middle ground by withdrawing disclaimers which had initially been filed in relation to the two other lots (Lots A–B): at para. 106. She finally stated that any hardship imposed on Southern Star would be no less if she disapproved the Disclaimers, as Quest would have no funds to pay rent under the Subleases if the sale did not go through: at paras. 111–12.

[9] Fitzpatrick J. also granted a reverse vesting order ("RVO") approving the sale to Primacorp. That form of order was also supported by the Monitor: at para. 122. She found that she had jurisdiction to grant the order under ss. 11 and 36 of the *CCAA.* Section 11 provides:

> General power of court
>
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act,* if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 36(6) provides:

> Assets may be disposed of free and clear
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other

> assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[10] This type of order was sought especially in light of Southern Star's dissent, as it enabled the transaction to close without creditors' approval, but in a way that preserved overall economic recovery for creditors. The size of Southern Star's claim relative to other creditors created the possibility that Southern Star could effectively veto the restructuring plan if approval was required: at para. 116.

[11] While there is no specific jurisdiction in the *CCAA* to grant RVOs, Fitzpatrick J. canvassed a number of cases in which courts had relied on ss. 11 and 36 to do so: paras. 127–49. While an RVO had only been ordered once previously in a contested proceeding (*Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488), it had been approved in a number of other proceedings which were not contested. She also relied on case law referring to the broad discretionary authority conferred on courts by the *CCAA*, by which courts are able to be innovative and creative when called upon to approve solutions for which there is no explicit authority in the *CCAA*, as long as they do so in light of its objectives: at paras. 153–55.

[12] The transaction between Quest and Primacorp must close by 24 December 2020, or Primacorp has the right to walk away and Quest loses its funding. Conditions precedent of the transaction are the Disclaimer of the Subleases with Southern Star and the RVO.

Positions of the Parties

Appellant (Applicant)

[13] The appellant's grounds of appeal are:

> 1. The chambers judge erred in law in finding she had the jurisdiction under the *CCAA* to approve the transaction which included the transfer of lands legally described as PID 030-469-074, Lot E District Lot 512 Group 1 New Westminster District Plan EPP77026 ("Lot E") free and clear of the leasehold interest of the appellant in Lot E.

> 2. The chambers judge erred in principle in approving the disclaimer of two subleases between the appellant and Quest University Canada ("Quest") pursuant to s. 32 of the *CCAA*.
>
> 3. The chambers judge erred in principle in approving a reverse vesting order specifically designed to deprive the appellant of its right under sections 4 and 6 of the *CCAA* to participate in a plan of arrangement process that effected a fair and equitable compromise of its claims.

[14] Southern Star argues that leave to appeal should be granted. It contends that the interpretation of the disclaimer provisions in the *CCAA* and the approval of an RVO in a contested proceeding is of significance to the practice, especially given lack of appellate authority on this point. It argues that the appeal is important to the action and the parties, as Southern Star's claim and potential loss is substantial. Southern Star also suggests that the appeal would not unduly hinder the restructuring proceedings as it proposes to have the appeal heard on an expedited basis and because the judge's order below permitted Quest and Primacorp to extend their closing date to 31 January 2020.

[15] While acknowledging the deference conferred on supervisory judges in *CCAA* proceedings, Southern Star nonetheless maintains that all three of its grounds of appeal are meritorious. It argues that the judge engaged in improper balancing under s. 32(4) by approving the Disclaimers. It also contends that granting the RVO was not within the judge's discretion under the *CCAA*, as it was "a last minute reverse vesting order expressly targeted at one creditor" and was in any case not necessary under the circumstances. Finally, it contends that the sale of Lot E is expressly prohibited by s. 32(9)(d) of the *CCAA*, which does not permit disclaimers to be issued in the case of "a lease of real property or of an immovable if the company is the lessor."

[16] The Lot E ground of appeal featured prominently in Southern Star's oral submissions. Southern Star argues that the judge below fundamentally misinterpreted the parties' intention as to when the Ground Lease for Lot E would become effective between them. Specifically, it suggests that the blank terms in the lease documents for Lot E were present in all the leases between the parties at the time of their execution, and that the leases contemplated those terms being filled out

at the time of registration, which was flexible under the agreements. However, the leases became effective the moment they were executed. Accordingly, the judge's approval of the sale of Lot E was barred by s. 32(9)(d) of the *CCAA* by virtue of the Ground Lease between Quest and Southern Star attaching to that property.

[17] With respect to the stay, Southern Star argues that the appeal is meritorious, that it would suffer irreparable harm if a stay was not granted because its appeal would be rendered moot by the closing transaction, and that the balance of convenience favours granting the stay. In terms of the latter, Southern Star suggests that the harm to Quest of granting a stay is minimal, again because Quest can extend its closing date with Primacorp, and because the appeal will be sought on an expedited basis. By comparison, Southern Star suggests it will suffer irreparable harm because its claim will far exceed the pool of available funds allocated to unsecured creditors. It argues that this transaction has been approved unfairly at its expense.

Respondent

[18] Quest argues that leave to appeal should not be granted and that the RVO and Disclaimers should not be stayed. Quest acknowledges that jurisprudence on RVOs might be of interest to the practice, but contends that this factor is outweighed by the catastrophic effects leave would have on the progress of the *CCAA* proceedings. It further argues that the points on appeal are only of significance to Southern Star, personally, for strategic purposes; namely, to levy a negotiation with Primacorp for rent related to the residence buildings. Quest maintains that Southern Star will be better off financially with the transaction than without it in a liquidation scenario.

[19] Quest also contends that the appeal is frivolous, as the court's broad and flexible authority to make a range of orders in *CCAA* proceedings has recently been confirmed by the Supreme Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 53–54. Quest points out that, in this case, the judge had been overseeing the *CCAA* proceedings for over ten months. Quest says that the

judge's decisions are well within her discretion and expertise—including vesting off the Lot E lease, approving the disclaimers, and approving the RVO—and are entitled to deference. Finally, Quest argues that it is not in the interests of justice to grant leave to appeal given the devastating impacts that doing so would have on Quest's attempt to restructure, and because Southern Star is only seeking leave to appeal for strategic purposes related to ongoing negotiations with Primacorp.

[20] Quest also argues that the relevant factors do not support staying the RVO and Disclaimers. Southern Star cannot succeed in its appeal. Furthermore, Southern Star will not suffer irreparable harm if the orders are not stayed. Notably, Southern Star will be worse off without the transaction than if it closes, as Quest will be able to continue paying rent on two of the Subleases after the deal closes. By contrast, if a stay is granted, Quest will be unable to survive and/or to offer a Winter 2021 semester to students, faculty and staff. All of Quest's stakeholders, including Southern Star, will be prejudiced if a stay is granted and the deal does not close. The balance of convenience does not favour granting a stay.

Law & Analysis

Legal Framework

[21] Leave to appeal is required by the *CCAA* and can be sought from this Court:

> Leave to appeal
>
> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act 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.
>
> Court of appeal
>
> 14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

[22] The criteria for leave to appeal were stated by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers), at para. 10:

> [10] The criteria for leave to appeal are well known. As stated *in Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
>
> (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; and
>
> (4) whether the appeal will unduly hinder the progress of the action.
>
> See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.).

[23] Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 27 (Smith J.A. in Chambers).

[24] Where the order under consideration is discretionary, leave to appeal will generally only be granted where the order is clearly wrong, where a serious injustice would occur if leave were refused, or where discretion was exercised on a wrong principle: see e.g., *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286 (Chambers). A high degree of deference is owed to the discretionary decisions of judges supervising *CCAA* proceedings as they are "steeped in the intricacies of the *CCAA* proceedings they oversee": *Callidus* at para. 54. In *Callidus*, at para. 54, the Supreme Court quoted with approval the words of Justice Tysoe in *Edgewater Casino Inc., (Re)*, 2009 BCCA 40 at para. 20:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[25] Accordingly, leave in *CCAA* proceedings is only granted sparingly: *Edgewater* at paras. 12–14.

Application

[26] I dismissed the application for leave to appeal for the following reasons.

[27] Southern Star accepts that with one exception the judge had the jurisdiction to reach the conclusions she did. In substance, the complaint is about the manner in which the judge exercised her discretion. I will deal shortly with the issue of Lot E and the suggestion that the alleged error in relation to that issue entailed that the judge could not approve the transaction.

[28] I accept, for the purpose of this application, that the nature of the order sought to be appealed, at least so far as approval of the RVO is concerned, is unusual in *CCAA* proceedings and is of significance to the practice and to the parties. Additionally, in the recent words of the Alberta Court of Appeal, the disclaimer of contracts under the *CCAA* "is a significant issue in insolvency practice generally" and can significantly impact *CCAA* proceedings: *Bellatrix Exploration Ltd. v. BP Canada Energy Group ULC*, 2020 ABCA 178 at paras. 21–24.

[29] However, I am not persuaded the appeal is meritorious. I consider the prospects that a division of this Court would interfere with the judge's exercise of discretion to be remote. This is especially so in light of the judge's assessment, grounded in months of experience of managing the proceedings, that the consequences of not approving the transaction would be catastrophic. The grounds of appeal advanced by Southern Star raise essentially the same arguments which were dismissed by Fitzpatrick J., with one exception as to the argument for Lot E, which I will address below. I do not think she erred in principle, as alleged by the applicant. I agree with Quest that the orders she made were well within her broad discretion and considerable expertise as a supervisory judge of ten months in the matter, who was alive to the intricacies of the commercial realities confronting the parties.

[30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus,* which affirm the broad and flexible discretion of judges under the *CCAA* to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the *CCAA*: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37–40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.

[31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance: at paras. 46, 164–66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.

[32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.

[33] Southern Star argued in oral submissions that Fitzpatrick J.'s interpretation of the Lot E Ground Lease was not an exercise of her discretion as a supervisory judge, but rather was a legal error. She wrongly concluded that the parties had only agreed to agree, and not entered into a binding lease agreement that meant that Quest was a lessor for the purposes of s. 32(9)(d) of the *CCAA.* As I understood the argument, the judge had misapprehended the facts in reaching her conclusion. I will not rehearse the details of those alleged misapprehensions here. I do not accept Southern Star's argument, however, that the judge's interpretation of the Ground Lease turned on the existence of blank terms in a document and the impact of certain other documents; rather, I think that she made an assessment of the parties' objective intentions with respect to when the lease would be valid and effective between them. She concluded that would occur when Quest decided to construct a building on Lot E and Southern Star arranged for financing to facilitate that construction. This, it appears to me, was a conclusion open to her on the evidence.

[34] It is well settled now that, as a general rule, a judge's conclusions about matters of contractual interpretation are reviewed on a highly deferential standard. As I see the matter, a division of this Court would have to be persuaded that the judge made palpable and overriding errors in her conclusion. I am not persuaded that Southern Star has advanced anything more at its highest than an arguable, but hardly a strong case, that the judge erred as alleged. The likelihood that, even if this issue stood alone, a division of this Court would interfere with the judge's conclusion, is remote, in my opinion.

[35] Southern Star argues that if the judge erred on the Lot E issue, she could not have approved the transaction. Even if I accepted that the merits threshold had been met by the Lot E issue, and that the appeal raises issues that are, in an abstract sense, of interest to the parties, I would not have granted leave to appeal. These factors are overwhelmed by other elements of the test such as the fourth factor of the test for leave. This factor has traditionally been considered the most important factor in the test for leave to appeal, and that is true of the case at bar: see *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at para. 20 (Wallace J.A. in

C.A. Chambers). In this case, granting leave to appeal would unduly hinder the progress of the action, with catastrophic effects. As the supervisory judge recognized, time is of the essence in this proceeding: para. 87. The Primacorp transaction, which she viewed to be the only viable option to save Quest and all those interested in it, would collapse if the transaction was not approved.

[36] In my opinion, granting leave would most probably have equally disastrous consequences for the myriad stakeholders affected by Quest's financial circumstances. There is no realistic prospect, in my view, that this Court could reasonably be expected to hear and decide this appeal on a timeframe that would preserve the transaction if the appeal were to be dismissed, as it surely would be given its merits. The fundamental and overarching question ultimately is whether it is in the interests of justice to grant leave. In my opinion, it would defeat the interests of justice and frustrate the purposes of the *CCAA* to grant leave. It is for these reasons, I dismissed the application. As a result, the application for a stay was also dismissed.

[37] I am grateful to counsel for their submissions.

"The Honourable Mr. Justice Harris"