COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Inc. v. 994697 Ontario Inc., 2023 ONCA 126
DATE: 20230227
DOCKET: C70732

Benotto, Roberts and Harvison Young JJ.A.

BETWEEN

Guy Gissin, in his capacity as the Foreign Representative of Urbancorp Inc. and the Israeli Court Appointed Functionary officer of Urbancorp Inc. and Downing Street Financial

Plaintiffs
(Respondents)

and

994697 Ontario Inc., KJ Equity Inc., Ned Holdings Inc., Peakhill Investments Ltd., Wellesley Residences (2014) Corp. formerly 2000 Jane Street Inc., Yonge-Abell GP Limited in its capacity as the general partner of the Yonge-Abell Limited Partnership

Defendants
(Appellants)

Chris E. Reed, for the appellants

Jeremy Sacks, for the respondents

Heard: November 25, 2022

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated May 11, 2022.

By the Court:

[1] The appellants appeal the motion judge's order that struck out various paragraphs of their amended statement of defence.

[2] On October 6, 2016, Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., and Edge Residential Inc. (the "Urbancorp Companies") were placed under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-38 ("CCAA") and The Fuller Landau Group Inc. was appointed as their Monitor. The order at issue in this appeal arose in an action ("the claim") that was originally commenced by the Monitor in April 2018. On May 9, 2018, Myers J. authorized the assignment of the Monitor's claim to the CCAA creditors. The Monitor assigned the claim to Guy Gissin in his capacity as the Foreign Representative of the CCAA creditors of the Urbancorp Companies ("the respondents").

[3] In their statement of claim, the respondents seek to set aside or invalidate transfers of condominium units to the appellants on various bases, including oppression under s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), transfers at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), fraudulent conveyances under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and/or fraudulent preferences under the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33.

[4] The respondents brought a pleadings motion to strike allegations in certain paragraphs of the appellants' amended statement of defence on the basis that they are irrelevant in that they are related to the events connected with the appointment and knowledge of the Foreign Representative. The motion judge agreed and struck certain sections of the amended statement of defence that contained the irrelevant allegations.

(1) Is leave to appeal required?

[5] The court raised the preliminary question of whether leave to appeal is required under s. 13 of the CCAA. Section 13 reads that:

> 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.

[6] The appellants argue that leave to appeal is not required because the motion judge's order was not made under the CCAA or in CCAA proceedings but in an independent action, and that the order under appeal related to pleadings and could have been made in any action. Moreover, the appellants submit that as the order related to portions of the defence made in response to the respondents' oppression remedy claim, they have an automatic right of appeal to the Divisional Court under s. 255 of the OBCA, as from "any order made by the court under this Act".

[7] The respondents submit that leave is required under the CCAA and the OBCA does not apply. In any event, the order under appeal is interlocutory so leave to appeal must be obtained from the Divisional Court under s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[8] For the reasons that follow, we conclude that the motion judge's order was "made under" the CCAA such that leave to appeal is required pursuant to s. 13 of the CCAA.

(a) Analytical framework

[9] The correct analytical framework to be followed in determining whether an order requires leave to appeal under s. 13 of the CCAA was set out by Brown J.A., sitting as a single motions judge, in *Essar Steel Algoma (Re)*, 2016 ONCA 138, 33 C.B.R. (6th) 172. He advanced a purpose-focused inquiry that was informed by the legislative purpose underlying the s. 13 leave requirement and reflected in his survey of Canadian cases.

[10] As Brown J.A. concluded, the leave requirement in s. 13 reinforces the CCAA goal of enabling a company to deal with creditors while carrying on business by resolving matters and obtaining finality without undue delay: *Essar*, at para. 20. As a result, the words, "made under this Act" in s. 13 must be given a broad interpretation to achieve the Act's legislative purpose: *Essar*, at para. 22.

[11] Brown J.A. very helpfully set out a summary of relevant indicia for an appellate court to consider when determining whether an order requires leave to appeal under s. 13 of the CCAA, at para. 34:

> To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the CCAA. In [*Redfern Resources Ltd. (Re)*, 2011 BCCA 333, 94 C.B.R. (5th) 53], Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the CCAA" or "incidental to any order made under the CCAA": at paras. 9 and 10. In [*Monarch Land Limited v. CIBC Mortgages Inc.*, 2014 ABCA 143, 575 A.R. 46], O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the CCAA proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in [*Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91], Paperny J.A. stated that s. 13 of the CCAA would apply if "CCAA considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the CCAA": at paras. 16 and 17. [Emphasis added.]

See also: *Hemosol Corp. Re*, 2007 ONCA 124, 31 CBR (5th) 83.

[12] This framework is also consistent with and similar to the approach followed by this court and the Supreme Court of Canada in determining whether leave to appeal should be granted under other statutes with similar language and similar legislative purpose: see, for example, 1) with respect to leave to appeal provisions under the BIA: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13; *Dal Bianco v. Deem Management*

Services Ltd., 2020 ONCA 585, 82 C.B.R. (6th) 161; *Ting (Re)*, 2021 ONCA 425, 90 C.B.R. (6th) 32, leave to appeal refused, [2021] S.C.C.A. No. 307; *Rusinek & Associates Inc. v. Arachchilage*, 2021 ONCA 112, 87 C.B.R. (6th) 1; and 2) with respect to the leave provisions under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA") and the OBCA: *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235 (CBCA); *Ontario Securities Commission v. McLaughlin*, 2009 ONCA 280, 75 C.P.C. (6th) 26; and *1186708 Ontario Inc. v. Gerstein*, 2016 ONCA 905 (OBCA).

(b) Framework applied

[13] The motion judge's order striking out the paragraphs of the amended statement of defence was bound up with and incidental to the CCAA proceedings out of which the present proceedings arose.

[14] The foundation of the motion judge's decision was that the struck paragraphs were irrelevant to the assigned claim of the Monitor that was brought for the benefit of all creditors in the CCAA proceedings.

[15] The struck paragraphs 3, 6, 22, 25 and 26 read as follows:

> 3. The plaintiff Guy Gissin (the "Foreign Representative") is an Israeli lawyer. He has been recognized as a "foreign representative" for Urbancorp Inc. under section 45 of the *Companies Creditors Arrangement Act* by an order of this Court on May 18, 2016.
>
> …

> 6. Urbancorp Inc. became insolvent within months of the Israeli debentures being sold. The Foreign Representative was appointed functionary officer over Urbancorp Inc. on April 25, 2016. The functionary's role is to manage the operations of Urbancorp Inc. and its subsidiaries in the interests of the creditors of Urbancorp Inc., i.e. in the interests the Israeli debenture holders.
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> …
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> 22. The Termination occurred before Urbancorp Inc., which the Foreign Representative represents, sold any debentures to Israeli investors. It occurred before Urbancorp Inc. had any creditors.
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> …
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> 25. Title to the condominium units held, respectively, in the names of Edge and of the defendants to this lawsuit was a matter of public record through the land registry. At the time that Urbancorp Inc. began to carry on active business and sold its debentures, it was a matter of public record that the defendants in this lawsuit owned 100% of the Transferred Units and that members of the Urbancorp Group owned 100% of the Assets Transferred to Urbancorp (other than any of these assets that had been disposed of by the Urbancorp Parties in the meantime).
>
> 26. Full details of assets owned by the Urbancorp Parties was provided to the Israeli underwriters of the debenture issue. A copy of the Termination Agreement was made available to those underwriters. The underwriters and the Israeli public knew, or ought to have known, that Urbancorp Inc. and the Urbancorp Parties had no direct or indirect ownership interest in the Transferred Units. They knew, or ought to have known, that the Transferred Units formed no part of the assets that were collateral for, and provided support for, Urbancorp Inc.'s sale of debentures to the Israeli public.

[16] The portions struck from paragraphs 5, 9 and 31 read as follows:

> 5. … There were no creditors of Urbancorp Inc. prior to December 2015. The only material creditors of Urbancorp Inc. are the Israeli debenture holders.
>
> …
>
> 9. As set out below, the Termination took place at a time when Urbancorp Inc. was a shell company, had not carried on any material business, and had no debt. … Urbancorp Inc. and its creditors never had any interest in, and did not expect any recovery from, the property transferred to the defendants in the Termination.
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> …
>
> 31. …
>
> > (a) The Termination occurred before Urbancorp Inc. began to carry on business in any material way.
> >
> > (b) The result and effect of the Termination was known or should have been known to Urbancorp Inc. and any investors in Urbancorp Inc.

[17] The motion judge struck the sections in issue because she determined that those statements relating exclusively to Guy Gissin in his personal capacity are irrelevant. They would not be considered if the Monitor had pursued the claim. Relying on well-established principle, the motion judge held that, by virtue of the assignment, Mr. Gissin stands in the shoes of the Monitor and pursues the claim for the benefit of all creditors: see *Shaw Estate v. Nichol Island Development Incorporated*, 2009 ONCA 276, 51 C.B.R. (5th) 12, at paras. 69-72; *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1993), 140 A.R. 1 (K.B.), at para. 55, aff'd 1994 ABCA 261, 155 A.R. 241.

[18] The motion judge concluded that pleading facts that relate to the unique circumstances of Mr. Gissin would indirectly and impermissibly convert the character of the claim from that of the Monitor to one of the assignee creditors, which would lead to distraction and an unfair trial into areas that are not properly considered on an assignment of the claim.

[19] We do not accept the appellants' submissions that the order in issue relates to the oppression remedy pleaded by the respondents. Respectfully, this narrow approach ignores the entirety of the respondents' claims. Moreover, it risks devolving the requisite analysis into a parsing exercise and undermines the broad functional inquiry that this court must apply in determining whether the order in issue was "made under" the CCAA.

[20] Where the jurisdiction of a court emanates from both the CCAA and another statute, it is unhelpful to deconstruct the proceedings to determine which elements of the case fall under the CCAA and therefore require leave. Rather, as Paperny J.A. noted in *Sandhu*, at para. 17, "if a claim is being prosecuted by virtue of or as a result of the *CCAA*, section 13 applies."

[21] In *McLaughlin*, this court followed the same broad approach in determining whether an order dismissing a motion to amend a statement of defence was made under the OBCA such that s. 255 required the appeal to proceed before the Divisional Court. O'Connor A.C.J.O. rejected the appellant's argument that the

order dismissing his motion was made under the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, and not the OBCA, so s. 255 of the OBCA did not apply, and as an appeal of a final order, the appeal would properly lie to the Court of Appeal under the *Courts of Justice Act*, s. 6(1)(b): at para. 12. In dismissing this argument, O'Connor A.C.J.O reasoned that the power exercised by the motion judge was "sufficiently 'close'" to a legislative source under the OBCA, "namely, the power to adjudicate on oppression claims under s. 248" and that, "[i]mplicit in that power is the authority to allow or deny certain claims and defences": at para. 16. He also relied on the same policy grounds that are applicable to CCAA proceedings, concluding that his interpretation was consistent with the legislative purpose of providing "a fast and effective remedy": at para. 18.

[22] The appellants rely on *McLaughlin* and argue that the case at hand is distinguishable because it dealt only with an appeal of an order made under the OBCA, whereas this appeal involves claims based on both the CCAA and the OBCA, and the order to strike pleadings was made based on the court's inherent jurisdiction to control its own process, as codified in the *Courts of Justice Act*. While the court held that the legislative power exercised by the motion judge in *McLaughlin* was "sufficiently close" to the OBCA, the appellants argue that because the order on appeal in this case involves the adjudication of claims under two statutes and a final order made under a common law power, it does not meet the "sufficiently close" test set out in *McLaughlin*. Specifically, the appellants

contend that since the dismissal of the oppression remedy addresses a defence under the OBCA alongside the underlying CCAA proceedings, the appeal does not arise from the exercise of a legislative power that is "sufficiently close" to either the CCAA or the OBCA to constitute an appeal of a decision made under either Act. Accordingly, the appellants argue that their appeal lies properly to this court under the *Courts of Justice Act*.

[23] We disagree. The struck pleadings are connected to the knowledge of the Foreign Representative to whom the claim was assigned. They are aimed specifically at the transfers at undervalue, which is directly connected with the Urbancorp Companies' insolvency and the creditors' claims under the CCAA. Moreover, the order striking the paragraphs potentially impacts the restructuring under the CCAA as it defines the scope of available defences in relation to the s. 96 BIA claims. Circumscribing the breadth of the defence may impact the potential success of the insolvency-related causes of action and the resulting recovery on the part of the creditors. The tangential impacts on the oppression remedy defence referenced by the appellants do not affect our conclusion that the appeal is of a decision made under the CCAA.

[24] We therefore conclude that the appeal fits within the scope of the CCAA, and as such, the appellants require leave to appeal under s. 13 of the CCAA.

(2) Should leave to appeal be granted?

[25] We start with the well-established principle that leave to appeal under s. 13 of the CCAA is granted sparingly and only where there are "serious and arguable grounds that are of real and significant interest to the parties": *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

[26] In *Urbancorp Toronto Management Inc. (Re)*, 2022 ONCA 181, at para. 3, this court recently reiterated the following factors for consideration in determining whether leave should be granted:

> a. the proposed appeal is *prima facie* meritorious or frivolous;
>
> b. the points on the proposed appeal are of significance to the practice;
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> c. the points on the proposed appeal are of significance to the action; and
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> d. the proposed appeal will unduly hinder the progress of the action. [Citations omitted.]

[27] The appellants meet none of the criteria for leave. We see no error in the motion judge's analysis or conclusions in striking as irrelevant the paragraphs from the amended statement of claim; no grounds of the appeal are of significance beyond the parties to this litigation; the amended statement of defence does not depend on the struck paragraphs with the result that the outcome of the proposed appeal will have little real effect on the action other than create unnecessary delay; and the proposed appeal will unduly hinder the progress of the action which is

arrested at the pleadings stage. We also note that the proposed appeal equally hinders the progress of the CCAA proceedings and the distribution of assets to creditors.

Disposition

[28] Accordingly, we deny leave to appeal and dismiss the appeal.

[29] The respondents are entitled to their costs of the appeal. If the parties cannot agree on the amount, they may make brief written submissions of no more than two pages within seven days of the release of these reasons.

Released: February 27, 2023. “MLB”

“M.L. Benotto J.A.”
“L.B. Roberts J.A.”
“A. Harvison Young J.A.”