COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. Ten 4 System Ltd., 2023 ONCA 839
DATE: 20231215
DOCKET: COA-23-OM-0304

Brown J.A. (Motions Judge)

BETWEEN

Royal Bank of Canada

Applicant
(Responding Party/Respondent)

and

Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc.

Respondents
(Moving Parties/Appellants)

Manjit Singh, for the moving parties/appellants

Roger Jaipargas and Douglas O. Smith, for the responding party/respondent

Heard: in writing

On appeal from the order of Justice Peter Osborne of the Superior Court of Justice, dated October 18, 2023.

ENDORSEMENT

I. OVERVIEW

[1] Ten 4 System Ltd., 1000043321 Ontario Inc., and 1000122550 Ontario Inc. (the "Debtors") move, pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, for an order granting them leave to appeal the order of

Osborne J. dated October 18, 2023 (the "Appointment Order"), which appointed msi Spergel inc. as receiver of the Debtors' assets, undertakings, and properties. The Appointment Order was made pursuant to *BIA* s. 243(1) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*").

[2] Several key facts were not in dispute before the application judge:

- the Debtors owed their creditor, the respondent Royal Bank of Canada, approximately CAD$14.7 million and USD$453,000;
- They were in default of their obligations to RBC; and
- RBC holds valid security, including three general security agreements that give RBC the contractual right to appoint a receiver.

[3] Very late in the life of the appointment application process, the Debtors filed a commitment letter they submitted would solve their financial problems with RBC. The application judge explained, in considerable detail, why he was not satisfied that the highly conditional commitment letter would answer the problems in a timely way. After taking into account a variety of relevant factors and circumstances, the application judge concluded it was just and convenient to appoint a receiver, as requested by RBC.

II. ANALYSIS

[4] The exercise of granting leave to appeal under *BIA* s. 193(e) is discretionary and must be exercised in a flexible and contextual way. The prevailing

considerations for a court to take into account are summarized in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. I shall consider each.

A. Merits of the proposed appeal

[5] I start by considering the merits of the Debtors' proposed appeal. In their notice of motion for leave to appeal, the Debtors identify four grounds on which they intend to appeal.

First ground of appeal

[6] As their first ground of appeal, the Debtors contend the application judge denied them a fair hearing. Their notice of motion states:

> The learned Applications Judge erred in law by incorrectly relying upon [RBC's] characterization of evidence it had compiled in a so-called "confidential brief" that was neither served upon or made available to the Defendants or their counsel, nor filed with the Superior Court of Justice or put before the learned Applications Judge.

[7] Assessing the merits of this ground of appeal requires some understanding of the background facts, including what the Debtors refer to as the "confidential brief".

[8] RBC's application for a receiver was supported by the affidavit of Tro DerBedrossian, Director of RBC's Special Loans and Advisory Services ("SLAS"). In para. 24 of his affidavit, Mr. DerBedrossian deposed that the Debtors'

accounts were transferred to SLAS on August 17, 2023 “due to unusual account activity resulting in the full utilization of the operating line and an account excess of CA$2,489,450.90 and US$452,915.45.”

[9] In para. 8 of his reply affidavit, Mr. DerBedrossian repeated that there had been unusual activity involving the Debtors’ accounts and went on to provide considerable details of that unusual activity in paras. 9 through 14 of his reply affidavit. At paras. 24 and 25 of his endorsement, the application judge reproduced some of the details about the unusual activity described in Mr. DerBedrossian’s reply affidavit.

[10] After providing details of the unusual account activity, in para. 14 of his reply affidavit Mr. DerBedrossian went on to depose:

> A confidential brief (“Confidential Brief”) evidencing the unusual account activity of the Debtors has been prepared and will be made available to the Court, if the Court requests same at the hearing of this application. In the event that the Court requests that the Applicant produce the Confidential Brief, I understand that counsel for the Bank will request that the Court grant a sealing Order in respect of same, until further Order of the Court.

[11] There is no dispute that the application judge did not request disclosure of the confidential brief referred to by Mr. DerBedrossian nor did he review it. His reasons make no mention of a confidential brief. However, paras. 24 and 25 of his reasons do refer to the unusual activity described by Mr. DerBedrossian in his

affidavits. As well, para. 22 summarizes the position advanced by RBC on the appointment motion as follows:

> RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

[12] The Debtors contend three errors arise from that factual background:

- First, RBC's failure to disclose the confidential brief "irretrievably tainted the hearing from the outset". I have difficulty seeing how. RBC disclosed the existence of the brief and indicated it would be disclosed if subject to a sealing order. However, there is no suggestion in the record that the Debtors ever asked the application judge to obtain disclosure of the brief;
- Second, the Debtors contend their right to a fair hearing "was further exacerbated by [RBC's] self-serving characterization of the documents in the so-called secret confidential brief as suggestive of 'unusual activity' in the [Debtors'] bank accounts". If a party views language in a document filed in court as "scandalous, frivolous or vexatious", it can request the court to strike out the offending language: *Rules of Civil Procedure*, r. 25.11(b). The record does not disclose any such request from the Debtors; and

- Third, the Debtors argue the application judge erred by repeating in his reasons some of the language used in the DerBedrossian affidavits and adding to the deponent's word "unusual" his own word "suspicious" in describing the account activity. A judge is entitled to summarize a party's submissions using the language employed by the party, which the application judge did at para. 22 of his reasons. I read his use of the word "suspicious" as simply a synonym for "unusual".

[13] In any event, the unusual activity RBC observed in the Debtors' accounts was not one of the facts upon which the application judge rested his decision to appoint a receiver: Reasons, at paras. 35 to 40. Consequently, the Debtors' first ground of appeal is not *prima facie* meritorious.

Second ground of appeal

[14] Second, the Debtors assert the application judge erred in law by incorrectly applying *CJA* s. 101 notwithstanding the fact that the relief sought in the application was for a final and not an interlocutory order.

[15] I confess I have difficulty following the Debtors' argument: an initial order appointing a receiver, such as the form of order used in this case, does not finally determine any rights. Instead, it appoints a receiver to preserve a debtor's assets for distribution to its creditors following a review of their respective rights and determination of a proper allocation. In any event, RBC applied under *BIA* s. 243(1)

as well as *CJA* s. 101; the final/interlocutory distinction does not play the same role under the *BIA* as it does for civil litigation under the *CJA*. The application judge clearly had the authority to make the order that he did.

[16] The Debtors' second ground of appeal is not *prima facie* meritorious.

Third and fourth grounds of appeal

[17] The Debtors' third and fourth grounds of appeal are related. The Debtors contend the application judge made a palpable and overriding error of mixed fact and law by concluding that it was just and convenient to appoint a receiver notwithstanding the fact that reasonable alternatives were available in the circumstances and that the Debtors' assets exceeded the value of their liabilities.

[18] Although the Debtors obviously disagree with the weight the application judge assigned to different factors in his analysis, his reasons do not disclose that he applied incorrect or inapplicable legal principles. And while the evidence may have shown that the Debtors' assets exceeded their liabilities, there was no dispute about the amount of their indebtedness to RBC or their default under the loans.

[19] These are very weak grounds of appeal on which to seek to set aside a discretionary order. In my view, they stand a very low possibility of success.

B. Issue of general importance to insolvency practice or the administration of justice

[20] Since the record does not disclose any merit in the first two grounds of appeal, they cannot raise issues of general importance. The third and fourth grounds of appeal are rooted in the application of established principles to the specific facts of the case before the application judge; they do not give rise to issues of general importance.

C. Effect of granting leave on the specific insolvency proceeding

[21] I accept RBC's submission that granting leave to appeal would unduly hinder the progress of the administration of the receivership. The consequent automatic stay under *BIA* s. 195 would halt the receivership. Given the level of indebtedness of the Debtors to RBC, their default, and the absence of firm replacement financing, the interests of justice would not be served by granting leave.

D. Conclusion

[22] Considering the criteria as a whole, I would not grant leave to appeal. The grounds of appeal either lack any merit or are very weak; they do not raise any issue of general importance; and permitting the Debtors to appeal, thereby staying the receivership, in the absence of firm replacement financing would pose a serious risk to the rights of creditors in the circumstances.

III. DISPOSITION

[23] The Debtors' motion for leave to appeal is dismissed.

[24] As the successful party, RBC is entitled to its costs of this motion. Under the terms of the security, the Debtors are liable for "all costs, charges and expenses reasonably incurred by RBC … in preparing or enforcing …" the security. RBC seeks its costs of this motion on a full recovery basis. RBC filed a bill of costs stating that is actual legal costs for the motion amounted to $35,225.00. I am not satisfied that the full amount of those costs constitutes "reasonably incurred" costs. This was a simple motion, yet RBC's bill of costs records time spent by two partners, an articling student, and a law clerk. In my view, costs "reasonably incurred" should be set at $25,000, inclusive of disbursements and applicable taxes, and I order the appellants to pay RBC such costs within 30 days of the date of this order.