COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Alderbridge Way Limited Partnership v. Romspen Investment Corp.,* 2024 BCCA 69

Date: 20240215
Docket: CA49597

Between:

Alderbridge Way Limited Partnership, Alderbridge Way GP Ltd., 0989705 B.C. Ltd., Gatland Development Corporation, REV Holdings Ltd., REV Investments Inc., South Street Development Managers Ltd., South Street (Alderbridge) Limited Partnership, Samuel David Hanson and Brent Taylor Hanson

Appellants
(Plaintiffs)

And

Romspen Investment Corp.

Respondent
(Defendant)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 19, 2023 (*Alderbridge Way Limited Partnership v. Romspen Investment Corp.*, Vancouver Docket S232583).

Oral Reasons for Judgment

Counsel for the Appellants:	H. Shapray, K.C. N. Pandey
Counsel for the Respondent:	P. Bychawski R. Lou
Place and Date of Hearing:	Vancouver, British Columbia February 8, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 15, 2024

Summary:

The application is for leave to appeal an order denying production of documents. The documents sought concern the defendants' dealings with third parties, dealings the applicants say demonstrate a breach of the duty of good faith and /or duty of honesty in contractual performance. The action arises from a failed contract to finance a development project. The failure in financing has led to proceedings under the Companies' Creditors Arrangement Act, and this litigation is related to those proceedings. Held: The application is dismissed, considering the discretionary nature of the order sought to be appealed and the time sensitivity under the CCAA.

[1] **SAUNDERS J.A.**: The appellants apply for leave to appeal the interlocutory order of the supervising judge, Madam Justice Fitzpatrick, made on December 19, 2023, reasons for judgment indexed as 2023 BCSC 2298, dismissing their application for the production of documents in their action for breach of contract.

[2] The appellants 0989705 B.C. Ltd., Alderbridge Way GP Ltd., and Alderbridge Way Limited Partnership, are the developers of a significant real estate project in Richmond, British Columbia. I refer to them as the Alderbridge Appellants. The development involves the construction of seven residential and commercial office towers spanning an entire city block.

[3] The respondent Romspen Investment Corp. is the lender that provided initial construction financing to the Alderbridge Appellants. It agreed to provide funds of $422 million, $212 million itself and the balance of $210 million from contemplated syndication.

[4] The loan advanced is guaranteed by the other appellants, Gatland Development Corporation, REV Holdings Ltd., REV Investments Inc., South Street Development Managers Ltd., South Street (Alderbridge) Limited Partnership, Samuel David Hanson and Brent Taylor Hanson. I will refer to them as the Guarantor Appellants.

[5] The Guarantor Appellants are all either shareholders of the general partner or limited partners of the Alderbridge Appellants. For this reason, the Alderbridge and Guarantor Appellants are aligned in interest and are represented by the same counsel.

[6] By March 2020, Romspen had advanced about $169 million to the Alderbridge Appellants, leaving about $43 million to come from the initial $212 million before the syndication monies would be used in the project. Counsel for the appellant says this amount was critical to bringing the project to a more complete excavation stage for security of the work already performed.

[7] In March 2020, Romspen refused to advance further funds to the Alderbridge Appellants. This freeze on funds stalled the development as the Alderbridge Appellants suffered financial difficulties.

[8] Two years later, on April 1, 2022, the judge granted initial relief to the Alderbridge Appellants under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[9] At the time the *CCAA* proceedings were commenced, three major creditors were secured against the development. Romspen was the first priority creditor, and at the time was owed approximately $176 million. The third priority creditor was GEC Education City (Richmond) Limited Partnership. It was owed approximately $94 million.

[10] GEC, the third priority creditor, is a party in the proceedings below.

[11] On March 28, 2023, the appellants commenced the underlying action claiming damages for breach of contract, including in its pleadings allegations of breach of the "duty of good faith ... and/or duty of honesty in contractual performance".

[12] The judge described GEC's and the appellants' claims against the respondent as follows:

> [19] In broad terms, the gravamen of GEC and Alderbridge's claims is that Romspen executed loan documentation by which Romspen was committed to provide funding of $212 million and seek syndication of further amounts to reach a maximum funding for the Development of $422 million. On this application, I have been referred to various provisions in a Loan Agreement dated November 6, 2019 between Romspen and Alderbridge.

> [20] GEC and Alderbridge say that Romspen reneged on its own funding commitment and, also, that Romspen did not make commercially reasonable efforts to syndicate the remainder of the loan, as was required by the loan documentation.
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> [21] Both GEC and Alderbridge place some emphasis on specific wording found in the March 31, 2020 letter by which Romspen advised that it would no longer fund the Development. In that letter, Romspen refers to the effect of the COVID-19 pandemic on financial markets and, also, that Romspen had not been successful in obtaining commitments from other lenders to participate in the loan.
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> [22] GEC and Alderbridge then allege that Romspen had the funds and available investors to fund the Development, but that Romspen chose instead to proceed with its "most favoured projects" rather than fund the Development.
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> [23] The foundational cause of action in GEC and Alderbridge's pleadings is that Romspen breached its contractual obligation to fund. They further allege that Romspen breached its duty of good faith performance, in accordance with the well-known authorities in *Bhasin v. Hrynew*, 2014 SCC 71; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [*Callow*]; and, *Wastech Services Ltd. v. Greater Vancouver Sewerage*, 2021 SCC 7 [*Wastech*].
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> [24] I acknowledge GEC's emphasis from *Callow* that the good faith issue will involve a "highly fact-specific determination": para. 91. Having said that, good faith obligations are not "free-standing" and apart from the contract. Good faith issues must still have regard to the contract in issue that is alleged to have been not been performed in good faith: *Callow* at paras. 2 and 44; *Wastech* at para. 50.
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> [Emphasis added.]

[13] On this application, the appellants say their action has independence from the *CCAA* proceedings, but I am satisfied that in a "Carriage and Case Plan Order" in the *CCAA* proceedings, dated October 3, 2023, the judge linked the actions together, relating the action within the broader scope of proceedings under the *CCAA*. She ordered that this underlying action, and two others, would be tried together "in the context of the within *CCAA* proceedings". She stayed further court proceedings in this underlying action "save and except as are brought forward for determination in [the *CCAA*] proceeding", while recognizing pre-trial and procedural rights in the action, subject to court direction.

[14] In that order, the judge set out a timeline for pre-trial discovery, including a deadline for the parties to exchange lists of documents. In accordance with that order, the parties have exchanged these lists. Since then, the parties have made

further demands for documents under R. 7-1 of the *Supreme Court Civil Rules* and, dissatisfied with the response, have applied to the judge for production orders, giving rise to the order now sought to be appealed.

[15] The judge dismissed the applications for document disclosure. Romspen does not appeal the order dismissing its own application; the appellants seek leave to appeal the order dismissing theirs.

[16] The appellants' application was for disclosure of a number of unredacted documents relating to Romspen's funding of other projects and business ventures during the period of January 1, 2020 to January 1, 2021, the year during which it ceased funding the project. Romspen says those documents number in the thousands. It is apparent they are documents of transactions between Romspen and third parties with privacy interests that are not *prima facie* engaged in these proceedings.

[17] In seeking leave to appeal, the appellants say that the documents are required to advance their case. Their position is that Romspen ceased funding their project, giving as reasons the COVID-19 pandemic and saying it had a lack of success in obtaining commitments for syndication. The appellants say the documents requested could demonstrate that Romspen was able to continue funding the project, but instead chose to fund other, more favoured projects in arrangements with third parties not before the court. The appellants say if this is so, this would demonstrate a breach of Romspen's contractual duty of good faith in performance.

[18] The judge did not agree. She held, in a passage that is the focus of the applications for leave to appeal:

> [34] GEC's argument is, in my view, without substance. In its termination of funding letter, Romspen did not say that it "cannot" continue funding the Development. Rather, Romspen said it "cannot" waive conditions for continued funding under the commitment letter. Further, at no point did Romspen allege in its termination letter that it did not have sufficient liquidity to continue to fund the Development.
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> ...

> [37] I do not doubt that Romspen weighed many factors, including its liquidity, in terms of its decision to terminate funding of the Development and also to continue with its other projects and embark upon new projects and investments. However, the essential question that arises from the pleadings is whether Romspen was contractually obliged to continue funding the Development, not whether it had the funds to do so.
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> [38] In all of the above circumstances, I fail to see how providing details about the Other Projects, as sought by GEC and Alderbridge, would contribute to proving or disproving a material fact at the trial. The fact that Romspen funded the Other Projects while also deciding to terminate funding of the Development is not an issue raised in the pleadings as relevant to whether Romspen was required to fund or otherwise breached its contractual obligations to Alderbridge and GEC. The fact that Romspen funded the Other Projects rather than the Development is not an issue in dispute.
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> [Emphasis added.]

[19] The application for leave to appeal is brought under R. 11(1)(a)(iii) of the *Court of Appeal Rules* because the order of Madam Justice Fitzpatrick was made under R. 7-1 of the *Supreme Court Civil Rules* and so is a limited appeal order within the meaning of s. 13(2) of the *Court of Appeal Act*.

[20] This application for leave to appeal engages the well-known specific criteria described in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326:

> [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:
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> 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.

These criteria are all considered under the umbrella of the interests of justice, and even where the criteria have been met, leave may be denied if it is not be in the interests of justice to grant the leave: *Vancouver (City) v. Zhang*, 2007 BCCA 280; *Movassaghi v. Aghtai*, 2010 BCCA 175.

[21] To determine whether leave should be granted, the single judge must consider the issues sought to be advanced. Here, the appellants say the judge erred by:

a) misapprehending or failing to consider critical aspects of the pleadings and evidence;

b) misconstruing their argument;

c) misapplying or failing to observe established principles relating to document production under Rules 1-3 and 7-1 of the *Supreme Court Civil Rules*, the law of contract, and the duty of good faith;

d) unreasonably exercising her discretion based on an error of principle or misapprehension of the facts; and

e) denying the appellants the requisite level of natural justice and procedural fairness.

[22] These issues, say the appellants, all have merit and involve three considerations that are significant to the action and to the practice at large. First, they say that the documents they seek are critical to their ability to advance their case at trial. Second, they say that the judge's reasons make broad statements about the scope of relevance and materiality of the issues which restrict the scope of issues they can canvass at oral discovery. Third, they say that the appeal will address issues relating to the redaction of documents on the basis of "commercial sensitivity", including whether such concerns can be addressed through undertakings or protective orders. This third issue, they say, is not a settled area of law.

[23] The appellants contend that the appeal will not hinder the progress of any legal proceedings in the Supreme Court of British Columbia and observe that if necessary, the appeal can be expedited to minimize that risk.

[24] The respondent submits that the appeal lacks merit in substance and as it is from a discretionary order it is most unlikely that a division of this court would interfere with it given the significant deference such an order attracts.

[25] The respondent says, further, that the proposed appeal does not involve an issue of importance to the practice because the law on document production is well settled. It notes that the judge did not make any final determination on the merits of the action, and that accordingly the order does not prevent the appellants from pursuing their theory of the case at trial.

[26] Finally, the respondent says an appeal will unduly hinder the underlying action, as well as the *CCAA* proceeding. It says the procedural order granted by the judge, which set out the timeline for pre-trial discovery, was made because there was an urgent need to resolve the claims between the parties. It notes that there is a case conference scheduled for February 23, 2024 to set trial dates, with trial dates mentioned as early as May 2024, dates it says may be confounded by insertion of an appeal into the process.

[27] In my view, the appellants have not met the criteria for leave to appeal. Three issues weigh heavily against the application.

[28] First, as to the merits, I cannot foresee a division of this court interfering with the order given it was made in the exercise of the judge's discretion in handling *CCAA* proceedings. Such proceedings are recognized as requiring a high degree of deference in respect of their discretionary decisions. In *Southern Star Development Ltd. v. Quest University Canada*, 2020 BCCA 364, Justice Harris addressed this feature at paras. 24 and 25, citing authority from this court and the Supreme Court of Canada:

> [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": [*9354-*

> *9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10] 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:
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> > ... 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.
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> [25] Accordingly, leave in *CCAA* proceedings is only granted sparingly: *Edgewater* at paras. 12–14.

[29] Second, the judge herself noted the degree of urgency of the application before her. Her observation lends weight to the concern that delay inherent in an appeal, even one pressed on an expedited basis, is a negative factor for the application.

[30] Third, it remains open to the judge to amend the order for pre-trial discovery, for good reason, as the case develops, including even during the trial of the action.

[31] I have considered the issues sought to be varied. Madam Justice Fitzpatrick was alive to the appellants' concerns but, with her knowledge of the critical questions before the court, simply did not agree with the appellants and saw urgency to advancing the resolution of this action in the context of the significant project at stake in the *CCAA* proceedings.

[32] It seems to me that an appeal from this order will interfere with the schedule set to achieve resolution of the substantive issues before the court in respect of the project, without a significant expectation that this court would interfere with the discretionary and interlocutory order made by the judge. And, to the extent the judge's reasons for judgment are said to advance reasoning that will restrict oral discovery, I could not foresee a division of this court saying anything other than the appellants' rights to oral discovery are framed by their pleadings as they exist at the

time, and the *Supreme Court Civil Rules*. Last, to the extent the appellants would wish this court to definitively address issues of redactions of documents, such an ambition is unlikely to be realized given the judgment-laden and case specific nature of redactions, features that do not call for a concrete formula.

[33] For these reasons, I do not consider that the interests of justice favour granting leave to appeal. The application is dismissed.

"The Honourable Madam Justice Saunders"