COURT OF APPEAL FOR ONTARIO

CITATION: Surefire Dividend Capture, LP v. National Liability & Fire Insurance Company (Berkshire Hathaway Specialty Insurance), 2024 ONCA 644
DATE: 20240828
DOCKET: M55318 (COA-23-CV-0891)

Zarnett J.A. (Motions Judge)

BETWEEN

Surefire Dividend Capture, LP

Plaintiff
(Appellant/Responding Party)

and

National Liability & Fire Insurance Company
c.o.b. as Berkshire Hathaway Specialty Insurance* and
Arthur J. Gallagher Canada Limited

Defendants
(Respondent*/Responding Party*)

Raj K. Datt and Marie-Pier Nadeau, for the appellant

Reid Lester, for the respondent

Gemma Healy-Murphy, for the proposed intervener The Honourable Mark Falk (Ret.), in his capacity as U.S. Ancillary Receiver for Broad Reach Capital, LC

Heard: in writing

ENDORSEMENT

Introduction

[1] The Honourable Mark Falk (Ret.), in his capacity as U.S. Ancillary Receiver (the "Ancillary Receiver") for Broad Reach Capital, LC ("BRC"), seeks leave to

intervene as an added party in the within appeal under r. 13.01 of the *Rules of Civil Procedure*. The motion for leave to intervene was brought on August 20, 2024. I imposed an expedited timetable for its determination, as the appeal is scheduled to be heard on September 9, 2024.

[2] Rule 13.01 imposes a two-part test for intervention as a party. Under the first part of the test, the proposed intervener must satisfy one of three conditions. It must show: (a) that it has an interest in the subject matter of the appeal; or (b) that it may be adversely affected by a judgment in the appeal; or (c) that there exists between the proposed intervener and one or more of the parties to the appeal a question of law or fact in common with one or more of the questions in issue in the appeal. The second part of the test requires consideration of "whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding". Granting leave to intervene is discretionary; the court may "make such order as is just".

[3] The judgment under appeal results from a claim by the appellant Surefire Dividend Capture, LP ("SDC") on a fidelity bond (the "Bond") issued by the respondent National Liability & Fire Insurance Company ("Berkshire"). The claim is for losses alleged to have resulted from the operation, by BRC's CEO, of a Ponzi scheme. In the course of his reasons dismissing SDC's claim, the trial judge referred to BRC as an insured entity under the Bond.

[4] BRC has been in receivership since 2020. It was not a party to the proceeding below, which the Ancillary Receiver maintains first came to the attention of BRC's receiver after the judgment was granted. The Ancillary Receiver argues that he should be allowed to intervene as a party at the appellate stage as the trial court made two findings that are favourable to BRC in its own dispute with the respondent insurer (including that BRC is an insured entity under the Bond) and those findings are in issue on the appeal. The Ancillary Receiver submits that a claim on behalf of BRC will be prejudiced if those findings are reversed on appeal[1] and BRC's perspective on these issues should therefore be before the panel hearing the appeal. He also argues that no delay or prejudice will result from allowing the Ancillary Receiver to intervene—an adjournment of the appeal will not be required and his own submissions on the issues that are of concern are brief, focussed, and address matters already in play on the appeal.

[5] SDC consents to the intervention. Berkshire opposes it.

[6] For the reasons that follow, I grant the motion on terms.

[1] No one argues that BRC is unaffected by findings made in a proceeding to which it was not a party; accordingly I accept for the purpose of this motion that it would be affected by them.

The Action

[7] SDC's claim related to investments that had been made, in the 2018-2019 time frame, in BRC, which at the time operated as a hedge fund.

[8] SDC alleged that it had invested about $4.5M USD in BRC, and had acquired, by "in-kind" transfer, accounts which had invested another $26.7M USD in BRC. SDC sought to redeem the entire investment in 2019, but no funds were returned. SDC later discovered that the investment was lost because Brenda Smith, the CEO of BRC at the relevant time, had operated a fraudulent Ponzi scheme. In September 2021, Smith plead guilty to securities fraud, under an Indictment that alleged she had misrepresented to investors that she would invest funds provided to BRC in particular trading strategies, but instead had diverted tens of millions of dollars of investor funds out of BRC for purposes inconsistent with the trading strategies, including for personal use and to pay out funds to other investors.

[9] SDC claimed that the Bond required Berkshire to indemnify it for the loss of its investment. It asserted that it had obtained the Bond to protect it against losses "resulting from theft or fraud by underlying investment funds or subadvisors" in which SDC had placed funds.

[10] SDC was a named Insured under the Bond. The Bond referred to BRC as a “Subsidiary”. SDC and Berkshire did not agree on the meaning or effect of that reference. SDC asserted two bases of coverage under the Bond:

(a) Insuring Agreement A(1) which provided that Berkshire would indemnify the Insured for: “Loss resulting directly from dishonest or fraudulent acts … committed by an Employee”; and

(b) Insuring Agreement A(4) which provided that Berkshire would indemnify the Insured for “Loss resulting directly from the Theft of Customer Property by a Registered Representative”.

The Judgment Below

[11] The trial judge dismissed SDC’s action. I briefly summarize his reasons only to the extent necessary to the disposition of this motion.

[12] With respect to the claim under Insuring Agreement A(1), the trial judge noted that SDC did “not assert that … Smith was an ‘Employee’ of SDC, a named Insured”. He rejected SDC’s position “that BRC is not an insured entity under the Bond, [and] that the effect of naming BRC as a "Subsidiary" … with respect to its operations or activities on behalf of the SDC is that an additional peril was insured against, that is, peril from a dishonest or fraudulent act committed by an "Employee" of BRC [and that] Insuring Agreement (A)(1) should be interpreted to provide coverage for the loss claimed”.

[13] Instead, the trial judge interpreted the Bond's reference to BRC as a "Subsidiary" to mean that BRC was an "insured entity" under the Bond, and "would have coverage under the Bond". He noted Berkshire's concession that "SDC [was] entitled to make a claim for indemnification for any loss sustained by BRC, as an insured entity, and resulting directly from dishonest or fraudulent acts committed by an "Employee" of BRC", as well as Berkshire's position that there would, however, be no coverage for fraud of Smith because she was BRC's alter ego. He found that he did not have to consider that issue, because in his view there was no such claim. He stated:

> It is not necessary for me to decide whether, if BRC had made a claim for coverage for loss resulting from Ms. Smith's Ponzi scheme, or if SDC, as a named Insured, had made such a claim on behalf of BRC, there would be coverage under the Bond. SDC does not seek coverage for a loss claimed by BRC.

[14] With respect to Insuring Agreement A(4), the trial judge held that there had been no theft of SDC's property, as once SDC's funds were invested with BRC, SDC did not retain any property interest in the funds. He stated: "Only BRC had a property interest in the money stolen or diverted by Ms. Smith".

The Issues on Appeal

[15] SDC challenges the trial judge's interpretation of the Bond. Of particular relevance to the intervention motion, it argues that "[a] fair interpretation of [Insuring Agreement] (A)(1) is that SDC may advance a claim for its own losses in

relation to a fraud perpetrated by its Subsidiary's employee." As part of that argument, it contests the trial judge's proposition that BRC is an insured entity under the Bond and what it takes as the consequence of that characterization — that BRC, or SDC on its behalf, could claim for BRC's losses. SDC asserts that "BRC is not a named Insured under the Bond" and that coverage is afforded only for "fraudulent act[s] … committed with the intent to cause the Insured … loss". SDC further asserts that the Bond only permits actions or proceedings by the named Insured and makes no reference to loss of property of a Subsidiary.

[16] SDC goes on to argue that if it has coverage for fraud of an employee of BRC that caused SDC a loss, that coverage is not defeated by Berkshire's position that Smith is BRC's alter ego. Although the trial judge did not decide that issue, SDC asks this court to decide it.

[17] For its part, Berkshire in its respondent's factum on the appeal argues that BRC is an "additional insured under the Bond which enjoyed the same coverages as the other insureds". It maintains that it was BRC that "sustained a direct loss when Smith stole the funds from BRC's bank accounts". Berkshire submits that SDC could have claimed under the Bond on behalf of BRC for BRC's loss, but SDC chose to claim for its own losses, and the trial judge properly rejected that claim. It goes on to argue that in any event this court should find that Smith was BRC's alter ego, vitiating coverage on any theory.

The Proposed Intervention

[18] The Ancillary Receiver's evidence for this motion explains that, as a result of Smith's fraud, the United States District Court for the District of New Jersey (the "U.S. Court") appointed a receiver for BRC and other entities in 2020. The receiver was unaware that BRC was an insured under the Bond, or that there was an issue about that as between SDC and Berkshire until, in September 2023, the receiver was provided with a copy of the trial judge's decision of August 4, 2023.

[19] On May 9, 2024 the Ancillary Receiver was appointed by the U.S. Court for the purpose of analyzing BRC's entitlement to coverage under the Bond. In July 2024 the Ancillary Receiver advised Berkshire that he was preparing a proof of loss under the Bond.

[20] On August 20, 2024 the Ancillary Receiver brought this motion to intervene in the appeal. He seeks to make submissions (i) in support of the trial judge's finding that BRC is an insured under the Bond, and (ii) in support of the trial judge's decision not to make any finding on the alter ego issue. He argues that if this court made determinations on either of these issues that are inconsistent with or adverse to an entitlement of BRC to coverage under the Bond, "BRC's ability to claim and recover under the Bond stands to be adversely affected". The Ancillary Receiver notes that his arguments on these issues overlap with those of the parties. But he

says BRC's perspective on these issues, and the effect on it of any variation of them by this court, should be before the panel hearing the appeal.

[21] The Ancillary Receiver has provided a proposed factum that he would deliver if granted leave to intervene on the appeal. He does not ask that the appeal be adjourned.

[22] SDC consents to the intervention.

[23] Berkshire opposes the intervention. First, it argues that the party seeking to intervene, the Ancillary Receiver, has no authority to engage in litigation as a representative of BRC. Second, it argues that BRC has no legitimate interest in the appeal or its outcome. Third, it argues that even if BRC could claim under the Bond, such a claim would be out of time. Finally, it argues that there is no added benefit to the court in allowing BRC to participate in the appeal and that permitting it to do so would cause prejudice to Berkshire since BRC is attempting to add new issues to the appeal.

Analysis

[24] I asked for reply submissions (not originally contemplated by the timetable) from the Ancillary Receiver on one issue — whether he has standing to bring an intervention motion and to participate in the appeal. In his reply affidavit dated August 27, 2024, the Ancillary Receiver deposes that he believes he already has that authority but, importantly, he has requested an order from the U.S. Court

providing specific confirmation of his authority to intervene in the appeal. In my view, the Ancillary Receiver's authority stands or falls on whether the U.S. Court issues the confirmatory order. An order permitting intervention must therefore be conditional on that confirmatory order being obtained promptly. I address this in the terms of the order, and now turn to the other grounds of opposition.

[25] To paraphrase the Ancillary Receiver's position, BRC, through its court appointed representative, is or will be pursing its own claim against Berkshire under the Bond. It is currently in a position to use or attempt to use the trial judge's finding that BRC is an insured under the Bond to assist its position that it has an entitlement to make its own claim under the Bond for its losses. It recognizes that it will have to face an alter ego defence from Berkshire, and is content that that issue was not decided by the trial judge and therefore remains open for determination in a contest between BRC and Berkshire. If on appeal, the trial judge's interpretation that BRC is an insured entity under the Bond were overturned in favour of SDC's contention that BRC does not have that status, or if this court were to decide it was appropriate to rule in favour of Berkshire's alter ego defence, BRC's claim would be prejudiced, something that should not occur without the Ancillary Receiver having had a chance to be heard on those two issues.

[26] I am satisfied that the Ancillary Receiver meets the third prong of the first part of the intervention test. There exist between BRC and the parties to the

appeal questions of law or fact — whether BRC is an insured entity and whether the court should decide if Berkshire has an alter ego defence to coverage — which are questions in common with questions in issue in the appeal.

[27] Berkshire's argument that BRC has no relevant interest in the appeal is unpersuasive at this juncture. It largely turns on Berkshire's proposition that it would have a defence to a claim by BRC under the Bond. For example, Berkshire says that although BRC is an insured entity under the Bond, the Bond does not permit BRC to make a claim under it.

[28] The Ancillary Receiver's concern is that this court might replace the trial judge's finding that BRC is an insured entity under the Bond with a finding aligned with SDC's argument that BRC is not an insured at all. Whether or not it follows from a finding that BRC is an insured entity that it is allowed to make its own claim under the Bond, a finding that BRC was not an insured at all would seem to foreclose that ability entirely. Moreover, in interpreting the Bond to decide the rights of SDC, the trial judge considered some of the implications of BRC being an insured entity, referring to "coverage", "indemnification…for its losses" (see, for example, para. 115 of his decision) and the absence of a claim by BRC or by SDC on its behalf (see para. 112). I make no comment at this point on the correctness or significance of those statements, other than to observe that the panel on appeal may have to consider them. The panel may be assisted by submissions on what follows from considering BRC an insured entity under the Bond, to the extent

necessary to decide the issues between SDC and Berkshire raised by SDC's appeal.

[29] Similarly, Berkshire may or may not be right that any claim by BRC under the Bond would be barred by the lapse of time. But absent a determination of this point in the forum in which BRC's claim against Berkshire is made, I do not consider it appropriate to assume the point in Berkshire's favour to foreclose intervention.

[30] Turning to the second part of the test, there is an explanation for the failure to seek to intervene on behalf of BRC in the proceeding at the trial level. There has been delay in seeking to intervene in the appeal, for which the explanation is at best incomplete. However, given the focussed nature of the Ancillary Receiver's intervention, I am satisfied it will not unduly delay or prejudice the determination of the rights of the parties to the appeal. Contrary to the position of Berkshire, the Ancillary Receiver is not raising any new issues. In my view, the interests of justice favour the determination of these issues with the benefit of BRC's perspective on them.

Disposition

[31] Conditional on counsel for the Ancillary Receiver advising, on or before August 30, 2024, that the U.S. Court has granted the confirmatory order in the form attached to the Ancillary Receiver's affidavit sworn August 27, 2024 and filing a

copy of the issued order, leave is granted for the Ancillary Receiver to intervene in the appeal as a party, on the following terms:

(a) the Ancillary Receiver shall deliver, as his factum on the appeal, a factum in substantially the form of the draft factum for the appeal provided as part of his intervention motion materials. The factum shall be amended, before delivery, to exclude any references to evidence not part of the appeal record submitted by SDC and Berkshire. For greater certainty, leave is not granted to file the affidavit of Mr. Falk as evidence on the appeal. The Ancillary Receiver's appeal factum, so amended, shall be delivered no later than August 30, 2024.

(b) Berkshire may file a supplementary factum not exceeding 3 pages addressing any arguments of the Ancillary Receiver Berkshire considers it has not fully addressed in its existing factum, by no later that September 5, 2024.

(c) the Ancillary Receiver is not permitted to raise any issues in oral argument other than those in its factum. The appeal shall remain listed for hearing on September 9, 2024. The time allotments for oral argument shall be as follows: SDC — 2 hours; Berkshire — 1.5 hours; the Ancillary Receiver — 15 minutes. Additional time for SDC or Berkshire to reply to the Ancillary Receiver's oral submissions shall be in the discretion of the panel.

(d) There shall be no costs of the motion to intervene. Costs of the appeal, including costs for or against the Ancillary Receiver relating to its participation in the appeal, shall be in the discretion of the panel hearing the appeal.

[32] If counsel for the Ancillary Receiver does not advise that the confirmatory order of the U.S. Court has been obtained and has not filed it by August 30, 2024, the motion to intervene is dismissed. In that case, the parties may make written submissions on the costs of the motion to intervene, limited to 3 pages each, by no later than September 6, 2024.

"B. Zarnett J.A."