COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *GEC (Richmond) GP Inc. v. Romspen Investment Corporation,* 2024 BCCA 343

Date: 20241008
Dockets: CA50095; CA50098

Docket: CA50095

Between:

GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership

Appellants
(Plaintiffs)

And

Romspen Investment Corporation

Respondent
(Defendant)

- and -

Docket: CA50098

Between:

0989705 B.C. Ltd., Alderbridge Way GP Ltd., Alderbridge Way Limited Partnership, 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 Corporation

Respondent
(Defendant)

Before: The Honourable Madam Justice DeWitt-Van Oosten
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 7, 2024 (*Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433, Vancouver Docket S222758).

Counsel for the Appellants in CA50095:	J.P. Sullivan S.Y. Bhura
Counsel for the Appellants in CA50098:	S.D. Coblin M. Hashmi
Counsel for the Respondent:	P. Bychawski J.A. Hutchinson
Place and Date of Hearing:	Vancouver, British Columbia September 27, 2024
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia September 27, 2024
Place and Date of Written Reasons:	Vancouver, British Columbia October 8, 2024

Summary:

The appellants sought leave to appeal a Supreme Court judgment deciding various liability issues that arose in civil actions filed between real estate developers, lenders and a third party, in relation to a large commercial and residential development project in Richmond. The appellants took the position that leave was not required. However, they brought applications for leave out of an abundance of caution on the understanding that the respondent would likely submit that s. 13 of the Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36, applied. The respondent did take that position. Consequently, it was necessary to determine the issue. HELD: In the particular circumstances of this case, leave to appeal was not required. The order sought to be appealed is not an order "made under" the CCAA. Moreover, the supervising CCAA judge explicitly preserved the appellants' rights of appeal in respect of the civil actions. The leave requirement prescribed by s. 13 of the CCAA has no application.*

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Overview

[1] On September 27, 2024, I heard applications for leave to appeal an August 7, 2024 order issued by Justice Majawa in the Supreme Court. The related reasons for judgment are indexed as *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433 (the "RFJ").

[2] The applicants in the first leave application (CA50095), are GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership (collectively, "GEC").

[3] The applicants in the second leave application (CA50098), are 0989705 B.C. Ltd., Alderbridge Way GP Ltd., Alderbridge Way Limited Partnership, 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 (collectively, "Alderbridge").

[4] The respondent is the same in both: Romspen Investment Corporation ("Romspen").

[5] After hearing submissions, I concluded that leave to appeal is not required. I made a direction to that effect, with reasons to follow. These are those reasons.

Background

[6] Justice Majawa's order arose out of interrelated and overlapping civil actions that are being tried together and involve disputes between lenders, real estate developers, and a third party in relation to a large commercial and residential development project in Richmond. As explained at para. 1 of the RFJ:

> … The lender stopped financing the project on March 31, 2020, while construction was at its early stages but after a significant amount of money had been advanced by the lender and used by the developers in the project. The developers were unable to secure other financing to proceed with the project and, ultimately, faced insolvency and entered into proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 …

[7] The proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA Proceedings") referred to in para. 1 of the RFJ are currently supervised by Justice Fitzpatrick. Various disputes arose in the context of the CCAA Proceedings. Ultimately, those disputes "… crystallized in a number of [civil] actions filed in [the Supreme Court] …": RFJ at para.1. The parties before me are all involved in the civil actions. The Alderbridge parties consist of the developers (now debtors), and their guarantors. Romspen and GEC each provided funds to the developers.

[8] In October 2023, Justice Fitzpatrick ordered that the civil actions (the "Related Actions") be tried together within the context of the CCAA Proceedings. See, *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718. Justice Majawa understood that this order was intended to facilitate a timely resolution of the Related Actions:

> [2] … On October 3, 2023, following a contested hearing, Fitzpatrick J. ordered that the Related Actions would be tried together on common evidence in the context of the CCAA Proceedings: *Alderbridge Way GP Ltd. (Re),* 2023 BCSC 1718 … Given certain exigencies arising from particular aspects of the CCAA Proceedings, in particular the need to facilitate a sales and investment solicitation process in a timely manner, and the fact that priority issues have moved to the foreground in that sales process because of the nature of the Related Actions, Fitzpatrick J. determined that, in these unique circumstances, it was critical to determine who holds debt and security against

> the development and in what priority. Fitzpatrick J. held that there is a considerable interconnection between the Related Actions and the CCAA Proceedings and that the stakeholders did not have the luxury of the time usually afforded to litigants to bring such matters to trial. Various deadlines were set regarding the filing of pleadings, listing of documents, and examinations for discovery with a goal to having the trial of the Related Actions heard in the spring 2024.
>
> [Emphasis added.]

[9] In March 2024, Justice Fitzpatrick ordered bifurcation of the trial in the Related Actions, with liability to be determined first. See, *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 382.

[10] The orders issued by Justice Fitzpatrick were sought by Romspen. The applications were opposed by GEC and Alderbridge on numerous bases, including jurisdictional challenges and a challenge to the appropriateness of the orders.

[11] In reasons specific to the October 2023 order, Justice Fitzpatrick noted that "in the main", GEC and Alderbridge opposed Romspen's application because they wanted the Related Actions to be "… resolved in the fullness of time and in the usual civil trial process outside of [the] *CCAA* proceeding without the *CCAA* court imposing any case management deadlines at any time": at para. 4. She rejected that position, granted the order sought, and "… brought [the Related Actions] into the *CCAA* umbrella for adjudication": at para. 56.

[12] In making this order, Justice Fitzpatrick relied on s. 11 of the *Companies' Creditors Arrangement Act* [*CCAA*], which provides:

> **11** Despite anything in the Bankruptcy and Insolvency Act [R.S.C., 1985, c. B-3] or the Winding-up and Restructuring Act, [R.S.C., 1985, c. W-11] 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.
>
> [Citations added.]

[13] In discussing the scope and effect of the October 2023 order, Justice Fitzpatrick stated that:

- the order "… allows for the usual civil litigation process …" (at para. 84);
- it "… fully preserves the rights asserted by GEC and [Alderbridge] …" (at para. 85), which those parties described to her as the "… 'full panoply of procedural rights that an action entails'" (at para. 81);
- adjudication "within the ambit" of the CCAA Proceeding would not "… do away with the need to assert claims based on recognized legal or equitable principles, or avoid a costs award or preclude any procedural rights, such as appeal rights" (at para. 86);
- the order "… simply moves [the Related Actions] along, per the usual civil litigation process, in a fairly expedited manner to get the parties to a point where the question of how the claims will be resolved can be considered properly" (at para. 109);
- the litigation process established by the order "… substantially reflects the normal litigation process contemplated by the [*Supreme Court Civil Rules*, B.C. Reg. 168/2009], thereby preserving the "full panoply" of procedural rights that a litigant would otherwise have …" (at para. 120(i), citation added); and
- no party involved in the Related Actions would be "… prejudiced or gain any tactical advantage …" from the order (at para. 120(j)). [Emphasis added.]

[14] The entered October 2023 order contains the following provision:

> 6. Further Court applications in the Related Actions are stayed save and except as are brought forward for determination in this proceeding. Adjudication within the context of these CCAA proceedings does not preclude any pre-trial procedural rights or appeals right in the Related Actions, subject to any directions from this Court as may be required.
>
> [Emphasis added.]

[15] The first part of the trial in the Related Actions was heard by Justice Majawa in April and May 2024, and focused on liability. Justice Majawa decided the liability issues in favour of Romspen.

[16] Among other things, he found that Romspen was entitled to suspend further advances to the development project when it did, and it did not breach any duties of good faith or honest performance. On the other hand, the developers were found to have breached the relevant loan agreement by failing to repay the amounts advanced to them, interest, and other fees. The developers and guarantors (Alderbridge) were found jointly and severally liable to Romspen for its losses: RFJ at para. 334. GEC was found to be in breach of contract: RFJ at para. 335.

Applications for Leave to Appeal

[17] GEC and Alderbridge take the position that they have appeals as of right from Justice Majawa's order. Accordingly, they have filed notices of appeal (files CA50094, CA50099, and CA50100).

[18] However, because the Related Actions were tried "within the context" of the CCAA Proceedings (this is the language used by Justice Fitzpatrick at para. 119 of her October 2023 reasons), GEC and Alderbridge also filed separate applications for leave to appeal.

[19] In its application book, GEC explains its rationale for seeking leave:

> GEC has an appeal as of right from the decision in the GEC Action, and has filed a notice of appeal accordingly. GEC has also filed a notice of appeal from the CCAA Proceeding in light of the order that the GEC Action be tried "in the context of" the CCAA Proceeding, and s. 13 of the CCAA. GEC does so out of an abundance of caution. The trial judge is not the supervising CCAA judge, and made no orders in the CCAA Proceeding. All orders were made in the Related Actions …
>
> [Emphasis added.]

[20] Alderbridge provides a similar rationale:

> Section 13 of the *CCAA* creates an across-the-board requirement to obtain leave to appeal any order made under the *CCAA*. However, the Related Actions were not decided under the CCAA, they were merely heard "in

> the context of the within CCAA Proceedings". The Carriage Order expressly preserves all "appeal rights in the Related Actions". Accordingly, the Appellants have filed a notice of appeal, as of right, in each of the relevant Related Actions. Out of an abundance of caution, the Appellants have sought leave to appeal in the *CCAA Proceeding*, notwithstanding that the Trial Judge did not invoke any CCAA jurisdiction and expressly did not make any orders in the *CCAA Proceeding*.
>
> [Emphasis added.]

[21] Before me, counsel for GEC and Alderbridge advised that they took this approach, at least in part, because they expected Romspen to object to the notion of an appeal as of right and bring a challenge to that effect. The applications for leave to appeal allow for a determination of the issue.

[22] In responding to the applications for leave, Romspen takes precisely the position anticipated by GEC and Alderbridge. It says Justice Fitzpatrick ordered that the Related Actions be adjudicated and determined within the context of the CCAA Proceedings. Consequently, Justice Majawa's order engages s. 13 of the *CCAA*, which reads as follows:

> **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.
>
> [Emphasis added.]

[23] In a written response specific to GEC's position, Romspen argues that:

> … GEC misstates the statutory context in which the trial judge dismissed GEC's arguments. GEC's position that the claims made by and against GEC were not determined under the CCAA is not correct. The court presiding over the underlying CCAA proceeding held, over the objections of GEC, that it possessed the jurisdiction under section 11 of the CCAA to order that the claims by and against GEC be determined under the CCAA. Such an order was granted on the grounds that this would likely further the remedial purpose of the CCAA. GEC did not appeal the CCAA order.
>
> [Footnote removed.]

[24] In response to Alderbridge's position, Romspen says:

> The court presiding over the CCAA proceedings held, after argument and over the objections of the Alderbridge Parties, that (a) the CCAA mandates

> that the claims by and against the Alderbridge Parties who are CCAA debtors must be determined under the CCAA pursuant to section 20 of the CCAA; and (b) it was appropriate to determine the claims by and against the other Alderbridge Parties within the CCAA proceedings pursuant to section 11 of the CCAA. The Alderbridge Parties did not appeal the order of the CCAA court.
>
> [Emphasis and footnote removed.]

Analysis

[25] I disagree with Romspen that Justice Fitzpatrick's October 2023 order substantially narrowed the appeal rights that would otherwise be available to the parties in the Related Actions by rendering them subject to a leave requirement.

[26] First, I see nothing in her October 2023 reasons that compels me to conclude the order issued by Justice Majawa is an order "made under" the *CCAA*, within the meaning of s. 13 of that statute (emphasis added).

[27] There is no question that the first part of the trial in the Related Actions was adjudicated within the context of the CCAA Proceedings. However, in making his liability findings and issuing the order that he did, Justice Majawa did not invoke or exercise any statutory provision or authority under the *CCAA.* Instead, he adjudicated common law actions and applied common law liability principles.

[28] As noted by Justice Tysoe in *Redfern Resources Ltd. (Re)*, 2011 BCCA 333 (Chambers), "… it does not follow from the fact that [an] order was made in [a] *CCAA* proceeding that it was necessarily an order made under the *CCAA*": at para. 9, emphasis added. In *Redfern*, Justice Tysoe determined that leave to appeal was not required to challenge an order deciding the ownership of certain equipment, even though it was made during the course of proceedings under the *CCAA.* It was an order that "… could have properly been made in a normal civil action without any regard to the *CCAA* or the *CCAA* proceeding": at para. 9. The same can be said here. The liability claims adjudicated in the Related Actions were commenced and advanced on a stand-alone basis independent of the CCAA Proceedings, and Justice Fitzpatrick then pulled them in. See also, *Monarch Land Limited v. CIBC Mortgages Inc.*, 2014 ABCA 143 at paras. 7–12.

[29] In *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 138, the chambers judge suggested that when requested to determine whether a particular order is caught by s. 13 of the *CCAA* and requires leave to appeal, the appeal court should ask whether the "… order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the financial affairs of the debtor company, either by way of a plan or arrangement or compromise, sale, or liquidation …": at para. 33, emphasis added, citation removed.

[30] In my view, that is not what Justice Majawa did. Rather, he determined liability issues in civil actions. Because of their relationship to matters at stake in the CCAA Proceedings, those findings will, in turn, logically inform the work of the supervising judge in exercising her discretion for purposes of the *CCAA.* The civil actions before Justice Majawa were grounded in pleadings that originated independent of the CCAA Proceedings, to my understanding did not require an interpretation of substantive orders made under the *CCAA*, and his liability findings were not informed by *CCAA* considerations. For a helpful discussion of factors to consider in deciding whether an order is made "under" the *CCAA*, see para. 34 of *Essar*.

[31] Second, as I read the October 2023 reasons, Justice Fitzpatrick brought the Related Actions under the umbrella of the CCAA Proceedings so that they could be trial managed in a way that facilitated a timely resolution, thereby preventing undue delay in the civil litigation process from impeding the ability to do what is required under the *CCAA.* That was the predominant objective of the order, not to substantively alter the parties' otherwise-existing procedural rights. In my view, the following passages from the October 2023 reasons make this clear:

- the Monitor in the CCAA Proceedings considered it essential to receive clarity on the "… relative priorities and amounts of the secured claims …" at issue in those Proceedings and an "expeditious resolution" of the Related Actions would assist in that regard (at paras. 16, 69);

- the circumstances of the CCAA Proceedings were such that the "… stakeholders [could not] enjoy the luxury of taking their time to have the litigation unfold in the Related Actions to resolve those claims in the [fullness] of time … the clock is ticking in terms of the need to achieve a resolution as soon as possible for an asset that is expensive to maintain and where further delay may seriously compromise the outcome" (at para. 77);

- the order sought by Romspen in October 2023 was aimed at "… active pre-trial management to ensure that the proceedings move[d] along at an appropriate pace …" (at para. 101);

- the order "… moves the matter along, per the usual civil litigation process, in a fairly expedited manner to get the parties to a point where the question of how the claims will be resolved can be considered properly" (at para. 109); and

- there is "… an urgent need to resolve the claims in the Related Actions as soon as reasonably possible …" (at para. 117). [Emphasis added.]

[32] Third, and most significantly, Justice Fitzpatrick was explicit in her reasons about her intention to preserve the procedural rights that GEC and Alderbridge—as parties to the Related Actions—would "otherwise have" in the civil litigation process: at para. 120(i), emphasis added. This included appeal rights: at para. 86.

[33] When before me, counsel for GEC and Alderbridge advised that they expressed concern to Justice Fitzpatrick that the order sought by Romspen in October 2023 would curtail their appeal rights. They say Justice Fitzpatrick's explicit mention and preservation of those rights was in direct response to that submission. I accept this proposition in light of the reasons and the wording of the entered order. Had Justice Fitzpatrick intended to limit GEC and Alderbridge's entitlement to appeal any final order emerging from the Related Actions through the imposition of a stringent leave requirement, I would have expected that to be made clear. Instead,

she emphasized that GEC and Alderbridge would not be prejudiced by the October 2023 order.

[34] In the particular circumstances of this case, I do not consider it a requirement that GEC and Alderbridge apply for leave to appeal Justice Majawa's order.

[35] In my view, that order is not an order made under the *CCAA*.

[36] Furthermore, on a plain reading of the October 2023 reasons, Justice Fitzpatrick intended to preserve full appeal rights for GEC and Alderbridge in the Related Actions. In its submissions before me, Romspen suggested that this interpretation of the reasons provides GEC and Alderbridge with something extraordinary—an entitlement that runs contrary to the objective and terms of the *CCAA.* Consequently, it is an interpretation that will introduce considerable uncertainty and unpredictability in practice.

[37] However, as noted by Justice Fitzpatrick in her October 2023 reasons: "It is not unheard of in *CCAA* proceedings that procedures are implemented to allow litigants more procedural rights and protections than the statute provides for …": at para. 107. Furthermore, the type of order she crafted clearly requires an individualized determination that occurs case-by-case and is contextually informed. The powers conferred to judges under the *CCAA*, including s. 11, are meant to be flexible: *Canada v. Canada North Group Inc.*, 2021 SCC 30 at paras. 21, 138. The fact that full appeal rights were preserved in this case does not mean they will be preserved in every case. That is a matter for argument and determination as the issue arises.

[38] Given my conclusion, it is not necessary to address the parties' arguments for and against leave to appeal, including the merits of the proposed grounds of appeal. Romspen can raise its concerns about the merits of the appeals before a division in the ordinary course.

Disposition

[39] For these reasons, I directed that GEC and Alderbridge do not require leave to appeal Justice Majawa's order of August 7, 2024.

"The Honourable Madam Justice DeWitt-Van Oosten"