COURT OF APPEAL FOR ONTARIO

DATE: 20140127
DOCKET: C54560 (M43281)

Pepall J.A. (In Chambers)

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton, in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Appellant (Respondent)

and

407 ETR Concession Company Limited and
Matthew David Moore

Respondent
(Moving Party)

and

Michael Dow, Gwendolyn Miron and Peter Teolis

Interveners

J. Thomas Curry, Andrew C. Parley and Jonathan Erik Laxer, for the moving party

Liz Tinker, for the Respondent

David Thompson and Matthew G. Moloci, for the interveners

Heard: January 20, 2014

ENDORSEMENT

Nature of Relief Requested

[1] The moving party, 407 ETR Concession Company Limited ("ETR"), seeks a stay of this court's order of December 19, 2013 pending the determination of: (i) its application for leave to appeal to the Supreme Court; and, (ii) any resulting appeal, should leave be granted. The Superintendent of Bankruptcy opposes the request.

[2] At the commencement of the hearing of the motion, ETR advised that its application for leave to appeal to the Supreme Court is prepared and would be served within two days of the hearing of this motion.

[3] There are two main issues to address: (i) the jurisdiction of this court to grant the relief requested; and (ii) the application of the test for a stay.

[4] As a preliminary matter, ETR challenged the standing of the interveners on this motion. The November 26, 2012 order of Blair J.A. permitting them to intervene on the appeal as friends of this court was limited in its scope. ETR's counsel indicated that he did not vigorously oppose the making of submissions by the interveners and that it was within my discretion to hear from them but that they did not have status as parties. Under the circumstances, the interveners were permitted to make submissions. That said, I agree that they do not have status as a party.

Jurisdiction

[5] ETR and the Superintendent agree that this court has jurisdiction to grant a stay pending the determination of ETR's application for leave to appeal before the Supreme Court. They disagree on whether this court has jurisdiction to grant a stay in the event that leave is granted by the Supreme Court; ETR argues that this court does have jurisdiction and the Superintendent argues to the contrary.

[6] Under s. 65(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended, when a notice of appeal is served and filed, with some exceptions, there is an automatic stay of execution. Section 65.1(1) of that Act states:

> The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

[7] The *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") specifically addresses appeals to the Supreme Court. Section 194 of that Act states:

> The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.

[8] Section 196 states:

> An appeal to the Supreme Court of Canada does not operate as a stay of proceedings, except to the extent ordered by that Court.

[9] In *Re Stelco Inc. (No. 2)* (2005), 75 O.R. (3d) 31 (C.A.), Feldman J.A. addressed the issue of this court's jurisdiction to grant a stay of proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("*CCAA*") pending the Supreme Court's decision on a leave application. Section 15(3) of the *CCAA* provides that:

> No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by that Court.

[10] Feldman J.A. concluded that s. 15(3) of the *CCAA* only applied once leave had been granted by the Supreme Court. As such, she had jurisdiction to grant a stay pending the determination of the leave application.

[11] ETR submits firstly that the language of s. 15(3) of the *CCAA* differs from that of s. 196 of the *BIA*, and secondly, it makes sense as a matter of judicial economy that this court have jurisdiction to grant a stay pending determination of the leave application and in the event that leave is granted as well.

[12] I fail to see a meaningful distinction between s. 15(3) of the *CCAA* and s. 196 of the *BIA*. In my view, the commentary in *Re Stelco* relating to *CCAA* proceedings applies equally to *BIA* proceedings. Moreover, jurisdiction here is not a matter of discretion.

[13] As such, I agree with the Superintendent that I have no power to deal with the second arm of the relief requested by ETR. That said, this court clearly has

jurisdiction to address the issue of the stay pending leave to appeal, to which I will now turn.

Stay Application

(1) Applicable Test

[14] The Supreme Court established a three part test for a stay in *RJR MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311 at p. 334:

(i) is there a serious question to be tried;

(ii) will the moving party suffer irreparable harm if the stay is not granted; and

(iii) does the balance of convenience favour granting the stay?

[15] The three components of the test are interrelated. The overriding question is whether the moving party has shown that it is in the interests of justice to grant a stay.

(i) Serious Issue to Be Tried

[16] Dealing firstly with the serious issue to be tried component of the test, in para. 35 of its factum, the moving party states that it only needs to show that the proposed application for leave to appeal is arguable. It states that even where the chances of obtaining leave to appeal are not strong, so long as the application is not frivolous or vexatious, then the court will find that the serious question test has been met.

[17] That said, additional consideration should be given to the leave requirements found in the *Supreme Court Act*. See also *BTR Global Opportunity Trading Limited v. RBC Dexia Investor Services Trust*, 2011 ONCA 620.

[18] The Superintendent concedes that there is a serious issue to be tried although not necessarily for the reasons relied upon by ETR. In light of the Superintendent's position on the first component of the test, I will turn next to the issue of irreparable harm.

(ii) Irreparable Harm

[19] On this issue, ETR advances two main arguments. Firstly, if a stay is not granted, ETR will have to reconfigure its operations including the handling of thousands of customer accounts. According to Randy Luyk, Vice President of Business Process Management for ETR and the deponent of an affidavit filed in support of the stay motion, the absence of a stay would require ETR to make significant, costly and permanent changes in its billing and management of accounts. This is an irreparable cost and reflects irreparable harm. In addition, ETR would likely be required to let a significant number of customers out of plate denial which would be nearly impossible for ETR to reverse. This too constitutes irreparable harm, according to ETR.

[20] The Superintendent submits that Mr. Luyk's affidavit is vague and that any required changes to billing operations should be reasonably straightforward.

Moreover, ETR is the author of its own difficulties since it knew, or should have known, that it might have to change its system for debt collection. It is argued that the harm is exaggerated, can be quantified in monetary terms and can be recovered if ETR is successful. Lastly, ETR has over 6 million accounts and the number of accounts potentially affected is limited.

[21] At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect ETR's own interests that the harm could not be remedied if ETR is successful on appeal: *RJR MacDonald*, at p. 341. Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other: *RJR MacDonald*, at p. 341.

[22] I accept that Mr. Luyk's affidavit is rather vague. That said, I am satisfied that there may be some irreparable harm associated with the proposed reconfiguration and ETR's inability to recover pre-discharge debt in the event that it receives leave and is ultimately successful on the appeal.

(iii) Balance of Convenience

[23] ETR submits that a stay would not require any steps to be taken by any party. Given his settlement, Mr. Moore is unaffected and the Superintendent

would not suffer any prejudice or harm. On the other hand, if a stay is not granted, ETR would have to reconfigure its operations.

[24] The Superintendent argues that the public interest must also be considered. This includes a consideration of the public's confidence in the bankruptcy and insolvency system and the fresh start purpose of the *BIA*. ETR reported revenues of $596,700,000 for the nine-month period ending September 30, 2013 (up from $546,800,000 for the same period in 2012) and operating expenses of $91,400,000 (down from $93,300,000 million for the same period in 2012). In contrast, many discharged bankrupts have few assets and yet a serious need for a vehicle permit.

[25] At the third stage of the test, I must consider the balance of convenience as between the parties, including which party will suffer the greater harm: *RJR MacDonald*, at p. 342. Harm to a respondent and any alleged harm to the public interest are considered at this third stage of the analysis: *RJR MacDonald*, at p. 340-341. Indeed, in constitutional cases, the public interest is a special factor: *Manitoba (A.G.) v. Metropolitan Stores*, [1987] 1 S.C.R. 110, at p. 129. Public interest includes the concerns of society generally and the particular interests of identifiable groups.

[26] Based on the submissions of counsel, it is anticipated that the leave motion would be heard by the Supreme Court within three to four months.

[27] There is obviously no prejudice to Mr. Moore but there is prejudice caused to those members of the public who are discharged bankrupts and who are required to pay ETR's pre-discharge indebtedness in order to secure a vehicle permit. Certainly, ETR appears to have capacity to absorb any losses. On the other hand, it is in the public interest to have the reconfiguration of ETR's systems done correctly and with care, and in the meantime, to maintain the *status quo* and ensure certainty and predictability.

[28] In all these circumstances and given the timeframe, I conclude that the balance of convenience favours the granting of a stay pending disposition of the leave application by the Supreme Court. In my view, a stay is justified in the interests of justice.

Conclusion

[29] Accordingly, the motion for a stay is granted in part. The December 19, 2013 order of this court is stayed pending the determination of the application for leave to appeal to the Supreme Court.

[30] As agreed, the Superintendent is to pay ETR $2,000 in costs, inclusive of disbursements and applicable taxes, on account of this motion. The interveners will bear their own costs.