

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***West Bay SonShip Yachts Ltd. (Re)***,
2009 BCCA 31

Date: 20090130
Docket: CA035080

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36

and

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

Between:

West Bay SonShip Yachts Ltd.

Respondent
(Petitioner)

And

Gerald Esau

Appellant
(Respondent)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

S. Kent

Counsel for the Appellant

R.A. Millar

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
October 8, 2008

Place and Date of Judgment:

Vancouver, British Columbia
January 30, 2009

VANCOUVER

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**COURT OF APPEAL
REGISTRY**

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, Gerald Esau, appeals from the order of a Supreme Court chambers judge made May 3, 2007, in the course of proceedings involving the respondent, West Bay SonShip Yachts Ltd., under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Mr. Esau claims, among other grounds of appeal, that the chambers judge erred in ruling that he was a creditor subject to the terms of the Plan of Arrangement (the "Plan").

[2] ... For the reasons that follow, I would dismiss the appeal.

Background

Facts

[3] On December 16, 2005, West Bay filed for protection under the CCAA. Mr. Esau had been an employee of West Bay since 1991. On January 17, 2006, he received notice that his employment in the position of Vice President, Production, would be terminated, effective June 6, 2006. Mr. Esau sued West Bay for damages for wrongful dismissal, but did not file a Proof of Claim in the CCAA restructuring. West Bay sought a declaration that Mr. Esau's claim was compromised by the Plan, and an order that the wrongful dismissal action be stayed.

The CCAA Proceedings

[4] In the initial order in the CCAA proceedings, made on December 16, 2005 (the "Filing Date"), the court imposed a stay of proceedings against West Bay, including any proceeding pursuant to labour or employment standards legislation (s. 2(c)). The initial order provided for West Bay to continue to pay obligations incurred by it after the Filing Date, including wages and "other monies owing to or in respect of its employees", but expressly prohibited the payment of "any amounts that are due on account of severance pay arising at law or under Statute" (s. 5). The order permitted West Bay to downsize its operations and terminate its employees. The financial consequences of downsizing were to be dealt with in the Plan to be filed (s. 6):

5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").

6. THIS COURT FURTHER ORDERS that, subject to the terms of this Order, the Petitioner shall remain in possession of its undertaking, property and assets, wherever situate (collectively, the "Assets") with full power and authority to relocate to British Columbia those Assets currently situated within other jurisdictions including, without limitation, the State of

California, the State of Florida and the State of Washington and shall continue to carry on its business in the ordinary course, provided that:

...

(b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:

(i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;

...

all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.

[Emphasis added]

[5] By final order in the CCAA proceedings, pronounced June 23, 2006, the court approved West Bay's Plan. All claims falling within the definition of "Claim" in Article 1.1 of the Plan were compromised as against West Bay and others:

"Claim" means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising

subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:

- (a) as set forth in a Proof of Claim which has either:
 - (i) been admitted by the Company pursuant to the Plan for all purposes; or
 - (ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or
- (b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;

provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim include interest for the period subsequent to the Filing Date.

[Emphasis added]

The Reasons of the Chambers Judge

[6] The chambers judge held that Mr. Esau's claim for damages for wrongful dismissal was a "contingent liability" at the Filing Date, and, as such, fell within the definition of "Claim" in the Plan. She relied on two superior court decisions, *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 21 B.C.L.R. (3d) 91 (S.C.), and *Rizzo and Rizzo Shoes Ltd. (Re)* (1991), 6 O.R. (3d) 441 (Gen. Div.), aff'd. (on other grounds), [1998] 1 S.C.R. 27, in concluding that the claim for damages for breach of Mr. Esau's employment contract accrued from the outset of his employment, and was therefore a liability of West Bay at the Filing Date.

[7] The chambers judge ordered that Mr. Esau's claim was a "pre-filing claim" and was compromised by the Plan. She permanently stayed the action, and refused to grant Mr. Esau an extension of time to file a Proof of Claim.

[8] Her reasons may be found at *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCSC 1553, 37 C.B.R. (5th) 253.

Issues on Appeal

[9] On appeal, the parties joined issue on two alternative interpretations of the definition of "Claim" in the Plan, under which Mr. Esau's claim for damages for wrongful dismissal may be considered to be a "pre-filing claim": if it was a contingent liability at the Filing Date, or it was a claim under an executory contract.

[10] Thus, there are two issues in this appeal:

1. Is a wrongful dismissal claim a contingent liability prior to the termination of employment?
2. Is an employment contract an executory contract?

Analysis

Contingent Liability

[11] Mr. Esau takes the position that his claim for damages for breach of his employment contract did not accrue throughout his employment, but only arose when he was terminated. Thus, he argues, West Bay had no liability, contingent or otherwise, until the termination of his employment, which occurred after West Bay filed for protection under the CCAA. Thus, he says, his claim for damages is not compromised by the Plan.

[12] West Bay argues that while Mr. Esau's right to bring an action for damages for wrongful dismissal may not have crystallized until notice of termination was given, West Bay's obligation to pay severance was in existence "in whole or in part" as of the filing date. Thus, Mr. Esau's claim for damages for wrongful dismissal is a pre-filing claim and is compromised by the Plan.

[13] Both *Eland Distributors* and *Rizzo and Rizzo Shoes*, relied on by the chambers judge and West Bay, dealt with severance under employment standards legislation. The present case, however, involves a common law claim for damages for wrongful dismissal. As explored in three recent decisions of the British Columbia Employment Standards Tribunal, citing the decision of the Supreme Court of Canada in *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027, this distinction is significant.

[14] In *Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515 at paras. 11 and 14, the adjudicator drew the following distinction between statutory and common law claims:

Compensation for length of service payable under section 63 of the [Employment Standards] Act is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027).

...

"Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo*, supra.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette*, supra.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the Act.

[Emphasis added]

[15] This view was affirmed in *Rupert Title Search Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 70 at paras. 25 and 32, and in *Taylor (Re)*, [2003] B.C.E.S.T.D. No. 82 at para. 11. In *Rupert Title Search*, the Tribunal described the statutory liability of an employer as "an 'earned' benefit to the employee that accumulates as the length of service of the employee increases", and distinguished this "length of service compensation" from common law damages for wrongful dismissal.

[16] *Sitter*, *Rupert Title Search*, and *Taylor* were recently approved by this Court in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220, 66 B.C.L.R. (4th) 373 at paras. 5-7. Madam Justice Huddart, for the Court, held that the Tribunal's understanding of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, and the distinction between statutory compensation payments and reasonable notice under an employment contract "merits respect". Common law claims for damages for wrongful dismissal are distinguishable from statutory claims for severance under employment standards legislation in terms of how they arise and are calculated.

[17] It is not necessary for the purpose of this appeal to determine whether a statutory claim for severance is properly characterized as a contingent liability prior

to termination of employment. For present purposes, it is sufficient to conclude that *Eland Distributors* and *Rizzo and Rizzo Shoes* do not assist in the analysis of Mr. Esau's claim.

[18] The first step in determining whether Mr. Esau's claim for damages for breach of his employment contract represents a contingent liability is to consider the meaning of that term. This was recently discussed by the Supreme Court of Canada in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 at paras. 17–18, where Rothstein J. for the majority referred to the "well-accepted test for a contingent liability" as that described by Lord Guest in *Winter v. Inland Revenue Commissioners*, [1963] A.C. 235 at 262 (H.L.):

I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

[19] Similarly, *Black's Law Dictionary*, 8th ed. 2004, defines contingent liability as a "liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event."

[20] For financial reporting purposes, threatened and pending litigation are considered to be contingent liabilities of a company: *Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981) at s. 3290; Errol C. Soriano, *Understanding Financial Analysis in Litigation* (Scarborough: Carswell, 2004) at 64-65; *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28 at para. 126 (Ont. S.C.J. [Commercial List]). That is,

threatened or pending litigation is characterized as a contingent liability. Actual liability will arise only when there is a judgment against the company.

[21] The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

[22] This conclusion finds support in the following definition of "liability" from *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 at para. 119 (Sask. Q.B.):

These statutory provisions [s. 125(1) and (3) of *The Land Titles Act*] envisage three kinds of obligations that can be secured by a registrable mortgage: a debt, a loan, or a liability that is future or contingent. No case was cited to me that clarifies what is meant by these terms used in s. 125. The term "liability" is a broad term and is most often used to describe an unliquidated or unspecified legal obligation which arises due to negligence, breach of contract, etc. The term "debt" is a narrower term and means a specific kind of obligation for a liquidated or certain sum incurred pursuant to an agreement. The term "loan" is even narrower and means a specific type of debt.
[emphasis added]

[23] Further support can be found in the American case of *Grant-Howard Associates v. General Housewares*, 472 N.E.2d 1 at 3-4 (N.Y. 1984), approved in *Climatrol Industries Inc. v. Fedders Corp.*, 501 N.E.2d 292 at 294-295 (Ill.App. 1 Dist. 1986), in the context of a product liability claim:

An uninjured party simply is not a “contingent liability” in the usual sense of that term (see, e.g., Black’s Law Dictionary [5th ed.], p. 291 [“A potential liability; e.g. pending lawsuit”]). There is no liability or claim before injury occurs. Granted that “contingency” invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur. [emphasis added]

[24] I conclude that the liability to pay damages if an employment contract is breached for failing to give reasonable notice of termination is not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there is no injury. The possibility of a breach of contract is not sufficient to give rise to a contingent liability.

[25] Therefore, Mr. Esau’s wrongful dismissal claim did not accrue from the outset of his employment and it did not represent a contingent liability of West Bay at the Filing Date. Consequently, Mr. Esau’s claim is not a pre-filing claim on this basis.

Executory Contract

[26] West Bay argues in the alternative that Mr. Esau’s contract of employment was an executory contract. As a result, it maintains that his claim for damages for its termination after the Filing Date and before the date of the meeting of General Creditors to approve the Plan on June 12, 2006 (the “Meeting”), was a “Claim” within the meaning of, and compromised by, the Plan. It says that the characterization of an employment contract as an executory contract is consistent with the legal definition of executory contracts and the purpose of the CCAA.

[27] Mr. Esau submits that when his employment contract was terminated it was not an executory contract because the only remaining performance to be tendered was the payment of money. He cites in support of his argument *re U.S. Metalsource Corp.*, 163 B.R. 260 at 269 (Bankr. W.D. Pa. 1993), in which it was held that where the only obligation of the debtor was the obligation to pay severance pay to terminated employees, “[t]his type of contractual duty to pay a debt is insufficient to create an executory contract.”

[28] If the contract was an executory contract at the Filing Date, however, a claim arising subsequent to that date as a result of termination of the contract is a “Claim” as of the date of termination. That is, if Mr. Esau’s contract of employment was an executory contract at the Filing Date, his claim for damages for wrongful dismissal, arising as a result of his termination subsequent to that date and before the Meeting, became a “Claim” as of the date of termination.

[29] Thus, the question is whether a contract of employment such as Mr. Esau’s, under which he promised to render services in return for West Bay’s promise to pay him, was an executory contract at the Filing Date.

[30] The Alberta Court of Appeal recently considered the meaning of “executory contract” in *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 at para. 19, 371 A.R. 339:

A contract is said to be executory if anything remains to be done under it by any party, and executed when it has been wholly performed by all parties: Halsbury's Laws of England, 4th ed. reissue, vol. 9(1) (London: Butterworths, 1998) at 341, para. 606; S. W. Mackay & Associates Ltd. v. Park Lane Ventures Ltd. (1997), 32 B.C.L.R. (3d) 338 at para. 8 (S.C.).

[Emphasis added]

[31] In "A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals – Joint Task Force on Business Insolvency Law Reform – March 15, 2002", the authors cited the following meanings for "executory contract":

What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:

a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

(Countryman, "Executory Contracts in Bankruptcy" (1974) 57 *Minnesota Law Review* 439 (Part 1), at 460).

[32] The authors included an employment contract as an executory contract in this sense. See also: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, a Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at 131, and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 177-178, where employment contracts were characterized as executory contracts in the context of the discussion

of insolvency laws. Professor Sarra noted (at 178-179) that damage claims resulting from termination or repudiation of executory contracts after the initial order are unsecured claims for damages.

[33] None of these sources discussed the application of the U.S. definition of executory contract for bankruptcy purposes to an employment contract. It is not clear to me, because of the nature of the employment relationship, that that definition will generally apply. As a matter of contract law, if the employee fails to provide the promised services, or the employer fails to pay for services rendered, subject to any other terms of the contract, that would ordinarily be a material breach excusing the performance of the other party. Whether that conclusion would ordinarily apply to an employment contract is, however, a question I do not need to decide for the purposes of this case. The ordinary legal definition of executory contract covers these circumstances.

[34] An ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, is an executory contract as there are obligations on both parties that are yet to be completed. Thus, Mr. Esau's employment contract was, at the Filing Date, an executory contract.

[35] Accordingly, Mr. Esau's claim against West Bay for damages for wrongful dismissal fell within the definition of "Claim" in the Plan.

[36] That Mr. Esau's rights arising on termination of his employment contract were compromised under the Plan is consistent with the purpose of the CCAA, as recently

considered by this Court in *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, (sub nom. *Skeena Cellulose Inc. (Re)*) 13 B.C.L.R. (4th) 236 at para. 34:

...[C]ourts appear to have given full effect to the "broad public policy objectives" of the [CCAA], which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:

Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders. Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.

[Emphasis added]

[37] The Plan permitted West Bay to rationalize its business affairs with a view to a reorganization that would make it viable in the future. The stated purpose of the Plan was to allow West Bay to “settle payment of its liabilities arising both before and after the Filing Date and to compromise the indebtedness owed to Creditors of the Company on a fair and equitable basis” (Plan, s. 2.1). It needed to retain its employees in order to complete existing orders for the construction of yachts, and to use the sale proceeds from the yachts to fund payments to its creditors on a compromised basis, on the basis that all of its creditors would “derive a greater benefit from the Plan than would result from the bankruptcy of the Company and so as to allow the Company to continue in business in the future”. West Bay’s tangible assets were sold to a related company to provide cash to further fund payments to creditors. It was intended that the company would remain in business using a revised production financing model, using private capital raised after the effective date of the Plan.

[38] In *Skeena*, the issue addressed by the Court was whether the termination of replaceable forest contracts, which could have “disastrous consequences for many individuals, local governments and communities”, supplanted the intent and purpose of the CCAA to stave off a bankruptcy. The Court upheld the trial judge’s decision that terminated employees were not to be placed in a better position than other creditors (at para. 22), and noted that “[i]n the exercise of their ‘broad discretion’ under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights” (at para. 37). In considering whether the arrangement under the CCAA, as a whole, was “fair, reasonable and

equitable”, the Court noted that “equity” is not necessarily “equality” and that the courts looks to all of the creditors to see if rights are compromised in an attempt to balance interests (at para. 59). The Court concluded (at para. 60):

As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask “Why me?” However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only “upside” is the possibility that bankruptcy and even greater losses will be averted.

Mr. Esau’s Claim

[39] Mr. Esau’s claim was thus subject to the terms of the Plan, which required creditors to file a “Proof of Claim” in accordance with the procedure and before the times set out in the relevant court orders. Mr. Esau did not file a Proof of Claim at any time. He did not receive a “Proof of Claim Package”, as did other creditors, providing notice to file a Proof of Claim. However, West Bay published the notice to creditors, as ordered by the court, in the Vancouver Sun, and on its website. Mr. Esau was advised, through his counsel, that he was not entitled to bring an action against the company because of the stay of proceedings, that his claim as a creditor was compromised in the Plan, and that he could apply for an extension of time to file a Proof of Claim.

[40] In West Bay’s application that is the subject of this appeal, it sought an order extending the time for Mr. Esau to file a Proof of Claim. It was only during the hearing of West Bay’s application that Mr. Esau took the position that the time should be extended.

[41] The chambers judge denied the application for the extension of time, after considering the factors enumerated in *Blue Range Resources Corp. (Re)*, 2000 ABCA 285, 271 A.R. 138 at para. 26:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[42] She concluded that the delay was significant, and was not caused by inadvertence. She further concluded that permitting the claim would result in prejudice that could not reasonably be alleviated (at paras. 32-36).

[43] The chambers judge's decision to deny an extension of time to file a Proof of Claim was discretionary, reviewable by this Court only if it was clearly wrong or has worked a substantial injustice: see *Meuller v. Coronation Insurance* (1995), 12 B.C.L.R. (3d) 90 (C.A.).

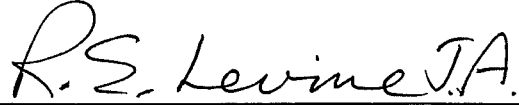
[44] Mr. Esau has not shown that the chambers judge's decision was clearly wrong, and she was in the best position, as the judge supervising the CCAA proceedings, to weigh the relative prejudice to all parties if his claim was allowed to be litigated while all other matters involving West Bay's creditors had been finalized.

[45] I see no basis to interfere with the chambers judge's decision not to extend the time to file the Proof of Claim.

Conclusion

[46] Mr. Esau's claim for damages for wrongful dismissal was a claim under an executory contract, and as such was stayed and compromised by the CCAA proceedings. There is no basis to interfere with the chambers judge's decision not to extend the time to file a Proof of Claim, nor to consider Mr. Esau's claim for misrepresentation.

[47] It follows that I would dismiss the appeal.


The Honourable Madam Justice Levine

I AGREE:


The Honourable Madam Justice Rowles

I AGREE:


The Honourable Mr. Justice Groberman