

COURT OF APPEAL FOR ONTARIO

DATE: 20131101
DOCKET: M42572

Doherty J.A. (In Chambers)

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985,
c. C-36, as Amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Unique
Broadband Systems, Inc.

Clifford I. Cole, Patrick Shea and Benjamin Na, for Unique Broadband Systems,
Inc.

Joseph Groia and Tatsiana Okun, for Gerald McGoey and Jolian Investments
Limited

Rocco Di Pucchio, for the Monitor

Heard: October 31, 2013

ENDORSEMENT

[1] I have considered the four factors identified in the case law (see *Timminco Ltd. (Re)*, [2012] O.J. No. 3931 at para. 2.). I am satisfied that leave to appeal should be granted because:

(1) Having reviewed the facts and listened to oral argument, at least some of the arguments made by the moving party have merit. By merit, I mean I could not, at this point, say which way I would ultimately decide those issues.

(2) The challenged order is not a discretionary order made in the context of an ongoing supervision of a CCAA proceeding in which real time litigation is a feature. This order has more the appearance of a "final" order made at the end of a trial involving a dispute between an employer and a former senior executive. In my view, the strong deference owed to the former kind of order does not apply to the latter, especially, where, as here, some of the grounds of appeal raise questions of law alone. Those questions are reviewable on a correctness standard.

(3) The issues raised on the proposed appeal are potentially determinative of what is by far the largest claim in the CCAA proceeding. Indeed, as counsel for the responding parties noted, this CCAA proceeding is fundamentally a dispute between these parties over the respondent's entitlement to the various amounts adjudicated upon by Mesbur J.

(4) Granting leave will not unduly hinder the progress of the CCAA proceeding. Indeed, the determination of the merits of this claim and the CCAA proceeding are effectively one and same thing. The appeal can be expedited. The submission that granting leave would effectively drain the coffers of the moving party and defeat the responding parties' claims, assumes the appeal will fail. I cannot make that assumption. If the appeal succeeds, the moving party will clearly be better off as will the other creditors.

[2] Leave to appeal is granted. Costs of the appeal to the panel hearing the appeal.

[3] I agree with counsel for the respondents that s. 14(2) of the CCAA does not address cross-appeals and cannot reasonably be read as applying to cross-appeals. Rule 61.07(1) applies. The responding parties may, if so advised, serve a notice of cross-appeal in accordance with Rule 61.07(1)(b). It would appear that the respondents would need leave to pursue the cross-appeal: see Rule 61.07(1.2).

[4] I am prepared to deal with any other motions or matters incidental to the appeal and/or the cross-appeal (if initiated) as long as counsel are agreeable.

A handwritten signature in blue ink, appearing to read "Robert G. Roth".

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

OCT 31

on consent; the motion is
allowed in part. The ~~motion~~ ^{affidavit}
of M^cGoey is admitted on
the motion for leave. The motion
to strike the revised proof of claim
filed as part of the moving party's
material is dismissed. In
my view it had potential relevance
to at least one of the proposed
grounds of appeal (Ground 6) ~~for~~ I
complete would however have grounds
leave even if the revised proof of claim
was struck from the record.

NO COSTS
Whit

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

MOTION RECORD OF THE MOVING PARTIES,
JOLIAN INVESTMENTS LIMITED
AND GERALD MCGOEY

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