

In the Court of Appeal of Alberta

Citation: Export Development Corporation v MNP Ltd, 2025 ABCA 25

Date: 20250127
Docket: 2301-0226AC
Registry: Calgary

Between:

Export Development Corporation

Appellant

- and -

MNP Ltd., as Receiver of Solvaqua Inc., and Arnaki Ltd.

Respondent

The Court:

**The Honourable Justice Michelle Crighton
The Honourable Justice Dawn Pentelchuk
The Honourable Justice Alice Woolley**

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice J. Sidnell
Dated the 6th day of September, 2023
Filed on the 9th day of September, 2023
(Docket: 2201-09319)

Memorandum of Judgment

The Court:

[1] The respondent Arnaki Ltd. lent money to Solvaqua Inc. For each of the three tranches of funds Arnaki advanced, it and Solvaqua entered into a general security agreement, and Arnaki required Solvaqua to obtain insurance prior to the funds being advanced, which Solvaqua did through the appellant Export Development Corporation. Solvaqua provided the appellant with a direction to pay any funds it received to Arnaki's affiliate, Murchinson Ltd.

[2] Solvaqua could not pay its debts to Arnaki and, as permitted by a term of the general security agreements, Arnaki sought and obtained the appointment of a receiver for Solvaqua, the respondent MNP Ltd. The receivership order was granted on August 19, 2022.

[3] The most significant outstanding asset in Solvaqua is claims it submitted under its insurance policies with the appellant. Solvaqua made one claim against the policies which the appellant accepted and paid; the funds from the accepted claim were paid by the appellant to Murchinson pursuant to the direction to pay. Two other claims made by Solvaqua were rejected by the appellant. The primary asset of Solvaqua is thus the possibility that it could successfully dispute the appellant's rejection of its insurance claims, and also the quantum the appellant agreed to pay in respect of the first claim.

[4] The insurance policies entered into between the appellant and Solvaqua prohibit assignment without the appellant's consent. The assignment consent provision states:

You [Solvaqua] cannot assign the Policy or any right, title or interest in it to anyone without our [the appellant's] prior consent.

[5] On August 31, 2023, MNP filed for court approval of the sale of Solvaqua's assets to a company affiliated with Arnaki. The rejected insurance claims were included as assets being sold.

[6] The appellant objected to inclusion of the insurance claims on the basis that it had not consented to the assignment of those claims as required by the assignment consent provision.

[7] The chambers judge rejected the appellant's argument, finding that an insurance "claim" is not a "right, title or interest" in the insurance policy within the meaning of the assignment consent provision and, as such, can be assigned without the appellant's consent. In the alternative, she held that the court's authority in respect of a receivership includes the power to assign a contract despite the counter-party's refusal to provide the required consent. She cited an Ontario decision, *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 [*Urbancorp*], which relied on

s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 [*BIA*] and the inherent jurisdiction of the court for authority to assign a contract without consent. While noting that case was distinguishable on its facts, she found that assignment was also appropriate here. Because of the direction to pay, “this case is not one where an arm’s length third [party] purchaser of assets is seeking to override consent”. The direction to pay meant that the appellant was “aware of the role of Arnaki and [Murchinson] in the Solvaqua business”. In her view, “the close relationship between the beneficiary of the insurance proceeds and the proposed assignee make this a case in which I am of the view it would be appropriate to issue an assignment order”. The chambers judge granted an approval and vesting order.

[8] The appellant submits that the chambers judge erred in her interpretation of the assignment consent provision, noting that this interpretation had not been proposed by the respondent, and that it had no opportunity to make submissions in that respect. It submits she further erred in deciding that she had legal authority to override the assignment consent provision in a receivership proceeding and in her assessment that doing so was appropriate on the facts of this case.

[9] The respondent concedes that the chambers judge erred in relying on an interpretation of the assignment consent provision that was not argued, submitting that as a consequence “it is unnecessary to determine whether the Policies’ consent requirement for assignment of any right, title or interest in the Policy held by the insured covers assignment of ‘claims’”. It submits, however, that the chambers judge had and properly exercised her jurisdiction to override the appellant’s refusal to consent in these circumstances.

[10] The receivership in this case was granted pursuant to various legislative provisions, including section 243 of the *BIA*. The parties agree that section 243 determines the legal authority of a court to authorize a receiver to override a contractual requirement. Section 243 provides:

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

[11] The Supreme Court has held that section 243 gives the court the “broadest possible mandate in insolvency proceedings” and includes the power to permit a receiver to “discharge

onerous contracts”: *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paras 148, 58 [*Petrowest*].

[12] Through section 243 a court may empower a receiver to act, including as the “court considers advisable”, “with a view to enhancing and facilitating the preservation and realization of the debtor’s assets for the benefit of all creditors”: *Petrowest* at para 56. The court must also consider a receiver’s “fiduciary duty to act honestly and in the best interests of *all* interested parties”: *Petrowest* at para 58 (emphasis in original). Indeed, it is the receiver’s multi-faceted duties which require a receiver to apply for judicial approval of any step which would override the debtor’s existing contractual obligations: *Petrowest* at para 58.

[13] In deciding whether to permit a receiver to override a contractual provision, a court must consider “what ‘justice dictates’ but also what ‘practicality demands’”: *Petrowest* at paras 148-149. In *Petrowest* the Court held that practicality demands that in “limited circumstances” a court must have the ability to “decline to enforce an arbitration agreement following a commercial insolvency”, finding that section 243, along with the general jurisdiction given to courts by section 183 of the *BIA*, provides “a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative”: *Petrowest* at para 149.

[14] The Court identified a number of criteria as relevant to deciding whether the circumstances warranted authorizing a receiver to refuse to enforce an arbitration agreement. Not all of those criteria usefully inform a court’s decision as to whether to authorize a receiver to override contractual terms in general, but some clearly do. Those include the need to balance “autonomy and freedom of contract [...] with the need for an orderly and equitable distribution of the debtor’s assets to creditors”, the relative prejudice to the parties from enforcing or overriding the contractual provision, and “[a]ny other factor the court considers material in the circumstances”: *Petrowest* at para 155.

[15] The Court placed the onus for interfering with the contractual relationship on the party seeking to do so, although its identification of that onus as “heavy” may have less application outside the arbitration context: *Petrowest* at para 156.

[16] The parties did not bring *Petrowest* to the attention of the chambers judge or to this Court. Nonetheless, the explanation of the law in *Petrowest*, and its specific finding that a court may override an arbitration agreement, show that the chambers judge clearly had jurisdiction to determine whether to override the assignment consent provision in the contract between the appellant and Solvaqua. Whether or not doing so was appropriate required assessing the contractual rights of the appellant relative to the need to distribute Solvaqua’s assets to its creditor Arnaki, and the relative prejudice to the appellant and Arnaki from either overriding that provision, or failing to do so.

[17] Based on a proper application of that test on the record before her, the chambers judge made no reviewable error in overriding the assignment consent provision. The insurance claims

made by Solvaqua have crystallized; the only issue remaining is whether the appellant acted properly in its assessment and denial of those claims. The orderly and equitable distribution of Solvaqua's assets will be disrupted if only the receiver can dispute those decisions, particularly given the requirement for court supervision of the receiver's activities. The assignment of the insurance claim does not alter the risk born by the appellant; it only changes the identity of its counterparty in litigation. The appellant has raised vague concerns that dealing with Arnaki and its nominee in litigation is less desirable than dealing with the receiver, but those concerns, even if substantiated, do not outweigh the prejudice to the creditor, and the burden on the courts, that would arise by requiring the receiver to litigate the claims on Arnaki's behalf.

[18] The appeal is dismissed.

Appeal heard on January 15, 2025

Memorandum filed at Calgary, Alberta
this 27th day of January, 2025

Authorized to sign for: Crighton J.A.

Authorized to sign for: Pentelechuk J.A.

Woolley J.A.

Appearances:

D.S. Nishimura

E. Carrasco

for the Appellant

J.L. Oliver

D. Marechal

for the Respondent, MNP Ltd, as Receiver of Solvaqua Inc.

E. Birnboim

M. Crampton

for the Respondent, Arnaki Ltd.