

CANADA / JUDGMENT

Houweling Nurseries Ltd. v. Amethyst Greenhouses Ltd.

2003 BCCA 347

COURT

British Columbia Court of Appeal

DECIDED

16 May 2003

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2003BCCA0347 COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Houweling Nurseries Ltd. v. Amethyst Greenhouses et al, 2003 BCCA 347 Date: 20030516 Docket: CA030795 Between: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT R.S.C. 1985, c. C-36 And IN THE MATTER OF THE COMPANY ACT, R.S.B.C. 1996, C. 62 And IN THE MATTER OF HOUWELING NURSERIES LTD. And HNL HOLDINGS Respondents (Petitioners) And Amethyst Greenhouses Ltd. and Paul Houweling Appellants (Respondents) Before: The Honourable Chief Justice Finch (In Chambers) Oral Reasons for Judgment Appellant P. Houweling appearing in person R.A. Millar Counsel for the Respondent Place and Date: Vancouver, British Columbia May 16, 2003

- [1] FINCH, C.J.B.C.: This is an application by Amethyst Greenhouses Ltd. and by Mr. Paul Houweling for directions. As I understand the material put before me and the submissions made by Mr. Houweling on his own behalf and on behalf of Amethyst and the submissions of counsel for the petitioners, what is really sought is an order for leave to appeal orders that were made in these proceedings under the Company's Creditors Arrangement Act. The order of 13 March 2003 approves a plan presented by the petitioners under the provisions of that Act. The Plan presented had the required agreements or consents of the creditors.
- [2] The petitioners sought an order at the time the plan was presented declaring that the proof of claim filed by Amethyst be declared invalid for voting and distribution purposes.
- [3] The order which he seeks to appeal is this: THIS COURT FURTHER DECLARES that:
- (a) the Plan has been agreed to by the requisite percentages of General Creditors in the General Creditors Class created under the Plan in conformity with section 6 of the CCAA;
 - (b) the amendment to the Plan set forth in Schedule "B" is approved; and
 - (c) The Proof of Claim filed by Amethyst Greenhouses Ltd. in the sum of \$32,500,000 is null and void both for voting and distribution purposes under the Plan.
- [4] Today, in addition to the claim of Amethyst in the sum of \$32 million, rejected by the order, Mr. Houweling also presents a personal claim which he says is in the amount of \$1.4 million.

- [5] I do not think it will be useful to attempt to record the full history of proceedings that led to this Plan being presented for approval. Two subsequent orders were made; one on 4 April 2003 amending the plan of arrangement by amending the definition of "effective date" from April 4, 2003 to April 30, 2003. A further order was made by the learned chambers judge on 16 April 2003 in these terms: This Court orders that:
1. the appeal of Paul Houweling from the disallowance of his Proof of Claim filed herein be and hereby is dismissed.
- [6] I had some difficulty in telling from Mr. Houweling's submission which of these various orders leave is sought to appeal against, but for the purposes of these reasons I will treat the applicant's request as one for an order granting leave to appeal in respect of all three of the orders to which I have referred. The petitioner opposes the leave application on the basis that the application is out of time with respect to the first two orders, and that there is no merit to the proposed appeal against the third order.
- [7] Section 14(2) of the Companies Creditors Arrangement Act provides that: no appeal shall be entertained unless within 21 days after the rendering of the order or decision being appealed or within such further time as to the court appealed from allows, the appellant has taken proceedings therein to perfect his appeal
- [8] This provision has been construed to mean not that the leave application must be heard within 21 days but that the appellant must have taken some proceedings to have such an application heard: see *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16 (C.A.). In this case, Mr. Houweling's and Amethyst Greenhouse's notice of appeal, which for these purposes I treat as a notice of application for leave to appeal, was filed on 5 May 2003, the same day on which they filed their notice of motion for "directions".
- [9] It appears, therefore, that the provisions of s. 14(2) of the Act have not been complied with in respect of the orders made on 13 March 2003 and 4 April 2003. The application in respect of those two orders must therefore be dismissed on the basis that it is not brought within the time provided under the Act.
- [10] With respect to the order of 16 April 2003 one must keep in mind that leave to appeal in C.C.A. proceedings is granted sparingly. For leave to be granted, the Court must be satisfied that there are serious and arguable grounds that are of real and significant interest to the parties, and that any appeal proceedings will not unduly delay the balance of the proceedings: see *Re Quinsam Coal Corp* (2000), 20 C.B.R. (4th) 145 (B.C.C.A.).
- [11] The factors to consider on the issue of whether there is sufficient merit include whether the point on appeal is of significance to the practice, whether the point on appeal is of significance to the action, whether there is prima facie merit to the appeal, and whether the appeal will unduly hinder the progress of the action.

- [12] In general, a higher threshold must be met before leave to appeal is granted in C.C.A. proceedings than in other cases, in order to justify the delay and other prejudicial effects on the proposed arrangements that would result from the commencement of an appeal. For that reason this Court is reluctant to alter the balance of interests that the chambers judge has attempted to address in making an order to meet the objectives of the Act.
- [13] I must say that I have been unable to detect or identify any error of law or of principle or any misapprehension of fact or any issue which would give rise to an arguable appeal on behalf of either Mr. Houweling or Amethyst.
- [14] In my respectful view, there is no merit to the appeal sought to be launched against the order of April 16. I may say as well that I can see no merit to any appeal against the earlier two orders, even if the application in respect of those orders had been brought within the time limited. In addition, it is clear to me that an appeal against any of these orders would hinder unduly the progress of proceedings under the C.C.R.A. plan.
- [15] For those reasons the application for leave to appeal is dismissed. "The Honourable Chief Justice Finch"

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