SUPREME COURT OF NOVA SCOTIA

Citation: Aurelius Capital Partners v. General Motors Corporation, 2009 NSSC 100

Date: 20090511
Docket: Hfx No. 308066
Registry: Halifax

Between:

Aurelius Capital Partners, LP, Aurelius Capital Master, Ltd., Drawbridge DSO Securities LLC, Drawbridge OSO Securities LLC, FCOF UB Securities LLC, Appaloosa Investment Limited Partnership I, Palomino Fund Ltd., Thoroughbred Master Ltd. And Thoroughbred Fund LP

Plaintiffs

and

General Motors Corporation, General Motors Nova Scotia Finance Company, General Motors Nova Scotia Investments Ltd., General Motors of Canada Limited, Neil J. Macdonald, Mercedes Michel and John P. Stapleton

Defendants

Judge:	The Honourable Justice Duncan R. Beveridge
Heard:	May 11, 2009, in Chambers, in Halifax, Nova Scotia
Oral Decision:	May 11, 2009
Released:	May 26, 2009
Counsel:	John A. Keith and Pamela Huff, for the Plaintiffs Peter S. Bryson, Q.C., Peter M. Rogers, Q.C. and Lyndon A.J. Barnes, for the corporate defendants S. Bruce Outhouse, Q.C. and Adrienne M. Bowers, for the individual defendants

By the Court:

[1] I am asked today to issue directions to deal with the overall scheduling of what started out to be an application by the plaintiffs for the appointment of an interim receiver.

[2] The initial action was commenced by the plaintiffs on March 1, 2009 against what the parties have referred to, and I will do the same, as General Motors U.S., General Motors Canada, General Motors Finance, General Motors Investments and three individual defendants at least two of which were and are officers and directors of both GM Canada and GM Finance. The third individual defendant, Mercedes Michel, is also alleged to be a director of GM Finance and is, or at least was, a member of the executive of GM U.S.

[3] Defences were filed in due course by the corporate defendants and by the individual defendants.

[4] The plaintiffs then filed a motion for the appointment of a receiver on May 1, 2009. This included the draft order and the affidavit material that the plaintiff wished to rely on. The plaintiffs' request that the court treat the motion for the appointment of a receiver as an emergency motion under Civil Procedure Rule 28, and abridge the time that the Rules would otherwise call for in dealing with this motion. The corporate and individual defendants object. They cite a number of outstanding procedural matters that they contend need to be dealt with at or at the same time as the motion for the interim receiver. In no listing of priority these

include: an application for security for costs; an application for summary judgment on the pleadings; an application for summary judgment on the evidence; and an application to strike portions of the affidavits filed by the plaintiffs on their motion to appoint an interim receiver.

[5] The defendants contend that there is no emergency and that abridgment of the time lines put them at an unfair disadvantage. The defendants also point out that the motion for the appointment of an interim receiver is still not perfected even though it was filed on May 1, 2009. In particular I note that Civil Procedure Rule 23.11 requires the filing of the brief in support of the motion on the same date as the notice of motion and draft order.

[6] The defendants also point out that one of the usual and mandatory requirements of bringing such an application is an appropriate undertaking by the moving party for damages pursuant to Civil Procedure Rule 41.06. The defendants also submit that there really is no emergency; that any emergency is more apparent than real, it having been created by the plaintiffs letting a full two months pass before bringing their motion for the appointment of an interim receiver.

[7] Procedural rules are designed to ensure that each party has adequate notice of the proceedings which they find themselves involved, the tools to gather and present evidence and have a fair and timely hearing of the matters in issue. Neither the moving party here nor the respondent party have submitted any case law that they rely upon in how I am to resolve the issues that have been presented. I would note in passing that the moving party requested this hearing for directions also on

an emergency basis, which request was accommodated not only by the court but by all the parties. The request was first made on May 6 and the parties filed their materials respectively on May 7 and 8 and the hearing is today on May 11.

[8] I would venture to say that most rules of court would provide some discretion in the Court in abridging or extending time requirements. Nova Scotia Civil Procedure Rules are no different. Rule 2.03(1) provides that a judge has the discretions, which are limited by these rules only as provided in Rules 2.02 and 2.03(3), to do any of the following:

> (a) give directions for the conduct of a proceeding before the trial or hearing;
>
> (b) when sitting as the presiding judge, direct the conduct of the trial or hearing;
>
> (c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

[9] All parties here today accept that I have a discretion by the Rules to abridge the time requirements. It seems to me that discretionary decisions must be guided by principle, otherwise decisions may become, or at least suffer from the appearance of being, arbitrary. It also seems to me that the burden should be on the moving party to satisfy the court that without the requested abridgment the remedy they seek to establish an entitlement to would become moot by the mere passage of time, and the respondents will not be unfairly prejudiced by the abridgment of the normal time lines.

[10] However, more specifically, Civil Procedure Rule 28.02(1), which the moving party relies on, provides that:

> The court may provide a time, date, and place for an emergency motion to be heard on notice, if a judge is satisfied on each of the following:
>
> (a) an emergency exists of sufficient gravity to require a speedy hearing;
>
> (b) it is possible for all parties who wish to be heard to be in attendance for the motion;
>
> (c) the gravity of the emergency outweighs any inconvenience to a party.

[11] As I noted earlier, the plaintiffs waited until May 1 to file its motion for interlocutory relief. No affidavit material was provided by the plaintiffs as to why this relief was not requested in its originating documents filed on March 1 or why it was not brought until May 1. In argument it was submitted that the reason was because it became clear, or at least clearer, Chapter 11 proceedings would be occurring in the U.S. depending on the offering made to note holders set out in the SEC filing which was appended as exhibit I to the affidavit of Dan Gropper sworn May 1, 2009. That offering indicates that the note holders, of which the plaintiffs are, must decide whether to swap their notes for GM shares. The deadline being midnight May 26, 2009.

[12] The plaintiff acknowledges that this is really the deadline that they seek to work towards, and in looking at their suggested schedule of the various events and proceedings that have to be attended to, what they seek is to have a hearing on all the various motions, or at least the ones dealing with summary judgment and interim receivership on May 25 to 26, 2009. It strikes me that it would be indeed

advantageous to the note holders to know the outcome of this application before having to decide whether to swap their notes for shares as they may take some comfort or base their decision, at least partly, if Finance's claim against GM Canada was in the hands of a receiver rather than officers and directors of GM Finance who are also officers and receivers of GM Canada and/or GM U.S.

[13] There are a variety of events that may or may not occur on June 1, 2009. There may be an extension of time by either the U.S. or Canadian governments of financial packages to assist those corporations. From the materials filed, that was the date set as a deadline by both the Canadian and U.S. governments for a business plan. There could well be a filing by GM U.S. seeking Chapter 11 bankruptcy protection in which the note holders would indeed, as the parties all agree, would be a party to. If GM Canada and Finance file under the *Companies' Creditors Arrangement Act*, they also have a seat at the table since they are unsecured creditors of GM Finance.

[14] It seems that it is in the event of only GM Canada filing that the moving party suggest the directors would then be in an untenable, irreconcilable conflict of interest.

[15] I do not think it appropriate for me on this motion to make any preliminary or tentative views of the merits of the relief being sought by the plaintiffs, either in their overall action or in their motion for the appointment of interim receiver.

[16] Although I need not decide this issue here, I do think there is some merit in the argument by Mr. Rogers that if the relief being requested in the motion, where the court is being asked to abridge time, is patently without merit, the court should be slow to abridge the time frames required by the usual rules of court. However, this approach should be relied on or utilized only in the clearest of cases. Mr. Keith argues ably that it is unfair to delve into the merits of a moving parties' request for relief when they have not yet had an opportunity to develop the evidence and make submissions to the court that obviously have the potential to influence how a court may ultimately view the merits of any particular motion.

[17] Looking at the criteria that I referred to earlier under C.P.R. 28.02 I am not satisfied that an emergency exists of sufficient gravity to require a speedy hearing. The plaintiffs have not satisfied me that there was a legitimate reason for delaying the bringing of the motion. Even if I was satisfied that there was an emergency and it was otherwise of sufficient gravity to require a speedy hearing, I am still required to then turn my attention to each of the requirements set out in 28.02(1) (b) and (c).

[18] I do not think the responding parties here have suggested that it would be impossible for them to be in attendance for the motion. The real crux of their position is under paragraph (c) with respect to the requirement that the gravity of the emergency must outweigh any inconvenience to a party. No one has suggested to me exactly what meaning to attribute to the word "inconvenience", but it strikes me it is not what you would find in an ordinary dictionary meaning. I think the proper approach to that term would be it works some unfairness, some prejudice to

the responding parties' abilities to marshal their evidence, to prepare for cross-examination and other procedural steps, and ultimately to be in an appropriate situation or position to deal with the merits of the motion.

[19] In looking at the outstanding motions that we have, in my opinion, they are clearly not frivolous. Neither Mr. Keith nor Ms. Huff have suggested in any way they are frivolous. Without commenting more than necessary, they raise serious issues. I would note for example that on the summary judgment motion based on the pleadings, the plaintiffs have responded by their own motion that they want to amend their pleadings.

[20] There is the outstanding motion to strike portions of the affidavit material that the plaintiffs wish to rely upon on its motion for interim receiver; yet on the timetable filed by the plaintiffs, they want them, the responding parties, to file affidavits before knowing if they need to deal with certain allegations that are set out in the moving parties' affidavits.

[21] I accept Mr. Keith's submissions that the court should not simply accept as a legitimate reason the responding parties are busy as sufficient justification for a refusal to abridge the time requirements set out in the Civil Procedure Rules.

[22] As I mentioned earlier, in my opinion, the burden is on the moving party to satisfy me of the requisite criteria. The proposed timetable, in these circumstances and in light of the complexity of the many issues that have been raised, would work an inconvenience on the responding parties, as I defined that term earlier.

The motion to abridge the time requirements as suggested by Mr. Keith on behalf of the moving parties is dismissed. I will hear the parties as to what would be an appropriate timetable to deal with this matter in as expeditiously a way as possible.

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Beveridge, J.