Court of King's Bench of Alberta

Citation: 420 Investments Ltd v Tilray Inc, 2024 ABKB 610

Date:
Docket: 2001 02873
Registry: Calgary

Between:

420 Investments Ltd.

Appellant

- and -

Tilray Inc. and High Park Shops Inc.

Respondents

Reasons for Decision
of the
Honourable Justice Colin C. J. Feasby

I. Introduction

[1] 420 Investments Ltd ("420") owned and operated retail cannabis stores in Alberta. Tilray Inc ("Tilray") and High Park Shops Inc ("High Park") agreed to acquire 420 pursuant to an Arrangement Agreement dated August 28, 2019 (the "Arrangement Agreement") for $70 million plus a potential additional $44 million in contingent consideration. As part of the arrangement transaction, High Park provided $7 million in bridge financing to 420 to continue to develop retails stores in the interim period prior to the closing of the arrangement transaction (the "Bridge Loan"). The terms of the Bridge Loan were memorialized in a Loan Agreement also dated

August 28, 2019 (the "Loan Agreement"). The Bridge Loan was repayable on the later of: (i) 180 days from the advance of funds; or (ii) the termination of the Arrangement Agreement.

[2] Tilray and High Park provided 420 notices of alleged breaches of the Arrangement Agreement on January 28, 2020 and February 4, 2020. 420 rejected these notices on the grounds that Tilray and High Park had not provided particulars of the alleged breaches as required by the Arrangement Agreement. 420 submits that it required the particulars to understand and potentially cure the alleged breaches in accordance with the terms of the Arrangement Agreement. On February 21, 2020, 420 commenced an action against Tilray and High Park for, among other things, specific performance. On February 26, 2020, Tilray and High Park issued a notice of termination on the grounds that 420 had failed to cure the alleged breaches within the 10 days afforded by the Arrangement Agreement.

[3] After purporting to terminate the Arrangement Agreement, on March 11, 2020, High Park issued a notice of acceleration requiring 420 to repay the Bridge Loan. When 420 refused to repay the Bridge Loan, Tilray and High Park counterclaimed seeking repayment of the $7 million. Applications Judge Farrington granted High Park's application for summary judgment in respect of the Bridge Loan in an unpublished endorsement dated February 7, 2024. 420 appeals that decision.

[4] This appeal turns the question of the meaning of the word "termination" in the Loan Agreement provision that the Bridge Loan is repayable upon the termination of the Arrangement Agreement. Does this require only notice of termination, as Tilray and High Park contend, or does it require that the termination be accepted by 420 or determined by a court to be a valid termination, as 420 submits?

II. Applications Judge's Decision

[5] The Applications Judge considered the meaning of Loan Agreement s 7.1 which provides:

> The total outstanding amount of the Loan ... shall be repaid in full on the later of (i) the date falling one hundred and eighty (180) days after the date of the advance of the Loan; and (ii) the termination of the Arrangement Agreement....

[6] The Applications Judge concluded that 420's position "that the matter cannot be determined without determining whether there was a proper termination ... is contrary to the agreement reached between the parties, and contrary to commercial business sense." He went on to say that "[i]f the termination [of the Arrangement Agreement] was improper, High Park and Tilray may be liable as alleged in the statement of claim." But in the meantime, he held, it was appropriate for High Park to enforce the Bridge Loan.

[7] He bolstered his reasoning by referring to Loan Agreement s 6.1 which provides that "payments due and payable" under the Loan Agreement "shall be made ... without any set-off." The Applications Judge found that by providing that there be no set-off the parties had signalled their clear intent "to sever the terms regarding the payment of the loan from the other dealings between the parties."

[8] The Applications Judge further had regard to what he considered to be "commercial business sense." To him, the issue was "which of the parties should have use of the loan funds pending determination of the balance of the action?" The answer was obvious to him because

"[t]here is no doubt that the monies are owed here." He asked rhetorically, "Should a party be able to obtain a stay on the loan repayment obligation simply by filing a pleading and adducing evidence on the Arrangement Agreement aspects of the claim when it agreed to pay the loan without set-off?" He further likened High Park to a third-party lender who would "certainly be entitled" to enforce in similar circumstances.

III. Standard of Review

[9] The parties agree that the applicable standard of review is correctness: ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333 at paras 13-16; ***Bacheli v Yorkton Securities***, 2012 ABCA 166 at para 3; ***Western Energy v Savanna Energy***, 2022 ABQB 259 at para 22 aff'd 2023 ABCA 125.

[10] The critical issue on this appeal is the interpretation of the Loan Agreement. The question that I must ask is whether the Applications Judge correctly interpreted the Loan Agreement. If I conclude that he did not, I must substitute my own interpretation of the Loan Agreement.

[11] Had this appeal been subject to the usual appellate standard of review set out in ***Housen v Nikolaisen***, 2002 SCC 33 I would have been required to treat the interpretation of the Loan Agreement as a question of mixed fact and law pursuant to ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53. If this were the relevant approach, I would have had to consider whether the Applications Judge made a palpable and overriding error as opposed to asking whether his interpretation of the Loan Agreement was correct.

IV. Analysis

A. Summary Judgment Standard

[12] Rule 7.3(1)(a) provides that the Court may grant "summary judgment in respect of all or part of a claim" if "there is no defence to a claim or part of it." The Supreme Court of Canada in ***Hryniak v Mauldin***, 2014 SCC 7 at para 49 set out a three-part test to determine whether summary judgment is appropriate:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[13] Justice Slatter adopted this approach in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 21.

[14] The parties made submissions regarding the appropriate principles to apply on an application for partial summary judgment. Whether partial summary judgment is appropriate raises two issues – fairness and efficiency. Justice Karakatsanis in ***Hryniak*** bundled these together under the rubric of the "interest of justice." She wrote at para 60:

> [I]f some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary

> judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice.

[15] The Applications Judge granted summary judgment in respect of Tilray and High Park's counterclaim. Tilray and High Park's application did not, strictly speaking, seek partial summary judgment as that term is used in Rule 7.3 because a counterclaim is an independent action according to Rule 3.57. With that said, partial summary judgment principles may be applicable to summary judgment on a counterclaim where the counterclaim is based on many of the same facts and raises some of the same legal issues as the main claim: ***Stankovic v 1536679 Alberta Ltd***, 2019 ABCA 187 at para 54.

[16] The Court of Appeal in ***Stankovic*** found at para 54 that the claim and counterclaim were "sufficiently interconnected that it would be unjust" to allow a party to enforce a mortgage on a summary basis prior to the determination of related issues between the parties. Justice Smith in ***Kaspersky Lab, Inc v Bradshaw***, 2010 BCSC 68 at para 22 concluded that partial summary judgment was not an appropriate procedure where one party claimed a breach and the other party made a claim for wrongful termination on the basis that the purported termination occurred without the required notice and opportunity to cure the alleged breach. Smith J held the "issues are inextricably intertwined and it would be unjust to decide only part of the case on this application. It would also not assist the efficient resolution of this proceeding because most of the same evidence would have to be considered on the trial of the counterclaim." The reasoning in ***Stankovic*** and ***Kapersky Lab*** applies to the present case.

B. Interpreting the Loan Agreement

[17] The Applications Judge recognized that Tilray and High Park may be liable in respect of 420's main claim but did not see that as an obstacle to the enforcement of the Loan Agreement. His view was that the money advanced to 420 was owing, and the Loan Agreement provided there was to be no set-off. He concluded that this meant that any claim regarding the Arrangement Agreement should be decided separately. Accordingly, it was appropriate to grant summary judgment in respect of the counterclaim for the amount of the Bridge Loan.

[18] The Applications Judge's approach overlooked the words of Loan Agreement s 7.1. Loan Agreement s 7.1 makes repayment of the Bridge Loan contingent on the termination of the Arrangement Agreement. Put differently, termination of the Arrangement Agreement is a condition precedent to the enforcement of the Bridge Loan. This requires the Court to determine whether the Arrangement Agreement has been terminated.

[19] The Arrangement Agreement can only be terminated in accordance with its terms. Article 7.1 of the Arrangement Agreement provides the grounds on which it may be terminated, and art 4.7 outlines the required contents of a notice to terminate. To determine whether there has been a "termination of the Arrangement Agreement" for the purposes of Loan Agreement s 7.1 it is necessary to determine whether the procedural and substantive requirements for termination under the Arrangement Agreement have been satisfied. The parties have adduced conflicting evidence concerning whether the procedural and substantive requirements for termination of the Arrangement Agreement have been satisfied.

[20] Termination of the Arrangement Agreement is a question that is integral to 420's main claim for specific performance and Tilray and High Park's defence to that claim. Termination of the Arrangement Agreement is not amenable to summary determination. Whether the notices of

termination provided the particulars required by Arrangement Agreement art 4.7 and whether the alleged grounds of termination can be proved are issues for trial. It would be contrary to the interests of justice to decide these issues summarily in the face of conflicting evidence when those issues are central to the main action.

[21] The only way around the interpretation of Loan Agreement s 7.1 that I have outlined is to do what the Applications Judge did and effectively read "termination of the Arrangement Agreement" as meaning "delivery of a notice of termination." This reading is not consistent with the text of Loan Agreement s 7.1 which refers to the Arrangement Agreement and, in my view, thereby requires the Court to consider whether the evidence shows that the termination provisions of the Arrangement Agreement have been satisfied. Further, from a practical standpoint, such an interpretation allows Tilray and High Park to call the Bridge Loan by issuing a notice of termination of the Arrangement Agreement even if they do not have a *bona fide* basis to issue a notice of termination.

V. CCAA Proceedings

[22] 420 is currently engaged in restructuring proceedings pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36. Tilray and High Park provided post-hearing submissions on October 15, 2024 wherein they raised the question of whether an Order granted by Justice Jones on October 2, 2024 in the *CCAA* proceedings approving a Sales and Investment Solicitation Process (the "SISP Order") meant that 420's action against Tilray and High Park could no longer seek specific performance and, in turn, whether that meant that the Applications Judge's decision should be upheld.

[23] The process set in motion by the SISP Order may result in a sale of 420 or its assets. However, if the SISP concludes with a sale of 420 or its assets, specific performance would be impossible. If the Arrangement Agreement cannot be performed, it is effectively terminated. Therefore, upon the SISP being completed with a sale of 420 or its assets, 420 may only continue its claim for relief other than specific performance.

[24] The potential imminent unavailability of specific performance does not change my analysis. My interpretation of the Loan Agreement cannot change just because one party, long after the fact, commences *CCAA* proceedings. A contract is to be interpreted according to its text and the factual matrix known to the parties at the time of contracting: ***Sattva*** at para 47. Events occurring long after the formation of the contract have no bearing on the intention of the parties at the time of contracting.

[25] Tilray and High Park raise the spectre that if I do not uphold the Applications Judge's decision 420 may take the position that High Park is not a creditor in the *CCAA* proceedings. I suppose that is possible. But the law is clear that the *CCAA* "does not limit the claims that may be dealt with by a Plan under the *CCAA* to presently existing liabilities": ***Re SemCanada Crude Company (Celtic Exploration Ltd #2)***, 2012 ABQB 489 at para 24, quoted with approval in ***Repsol Canada Energy Partnership v Delphi Energy Corp***, 2020 ABCA 364 at para 17. Further, if the SISP concludes with a sale of 420 or its assets, the Bridge Loan may become enforceable as a current liability if there is no longer a dispute as to whether the Arrangement Agreement is terminated.

VI. Conclusion

[26] The appeal is allowed. If the parties are unable to agree on costs, they may make submissions in writing of two pages or less supported by a bill of costs.

Heard on October 8, 2024 with additional written submissions on October 15, 2024.
Dated at the City of Calgary, Alberta this 16th day of October, 2024.

Colin C. J. Feasby
J.C.K.B.A.

Appearances:

Robert Hawkes, KC and Sarah Miller, JSS Barristers LLP
for the Appellant

David Tupper and Tom Wagner, Blake, Cassels & Graydon LLP
for the Respondents