TAB 17

Indexed as:

Roberts v. Picture Butte Municipal Hospital

Between
Wanda Mae Roberts, a.k.a. Wanda Mae Lichuk, and Alan Roberts, plaintiffs, and
Picture Butte Municipal Hospital, St. Michael's General Hospital, Dr. Tom Melling, McGhan Medical Corporation and Dow Corning Corporation, defendants

[1998] A.J. No. 817

1998 ABQB 636

[1999] 4 W.W.R. 443

64 Alta. L.R. (3d) 218

227 A.R. 308

23 C.P.C. (4th) 300

81 A.C.W.S. (3d) 47

Action No. 8901-12679

Alberta Court of Queen's Bench
Judicial District of Calgary

Forsyth J.

July 10, 1998.

(14 pp.)

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2(1), 69(1).
U.S. Bankruptcy Code, s. 362.

Bankruptcy -- Practice -- Stay of proceedings -- Proceeding for the recovery of a claim against the bankrupt.

Application by the defendant, Dow, for a permanent stay of the proceedings against it by the plaintiff, Roberts. Roberts brought a claim against Dow and four other parties for problems with her breast implants manufactured by Dow that had been surgically implanted in 1983. Dow was the only

remaining defendant as the actions against the other four parties had been dismissed. There was a class action against Dow in the U.S. which was discontinued when Dow filed for bankruptcy under the U.S. Bankruptcy Code in May 1995. This automatically stayed all claims against Dow which arose before the bankruptcy. Dow's bankruptcy plan set out a process whereby the breast implant claims would be resolved by a series of common issue trials or settlements. This included foreign claimants like Roberts. Roberts had filed a proof of her claim against Dow in the U.S. Bankruptcy Court.

HELD: Application allowed. The imposition of a stay on all claims once bankruptcy proceedings were begun was common to the Canadian bankruptcy legislation as well. The philosophy was to ensure a fair distribution of assets among all creditors and not just those who happen to have begun proceedings prior to the initiation of bankruptcy. Foreign claimants were provided for in Dow's bankruptcy plan. Roberts submitted to the jurisdiction of the U.S. by filing a proof of claim. Therefore, the appropriate forum to deal with all claims concerning Dow was the U.S. Bankruptcy Court.

Counsel:

G.J. Bigg, for the plaintiffs.
K.M. Eidsvik, for the defendant, McGhan Medical Corporation.
F. Foran, Q.C., for the defendant, Dow Corning Corporation.
J. Shriar, for the defendants, Picture Butte Municipal Hospital and St. Michael's General Hospital.
P. Leveque, for the defendant, Dr. Tom Melling.

REASONS FOR JUDGMENT

FORSYTH J.:--

APPLICATION

1 This is an application by the Defendant Dow Corning Corporation ("DCC") for a permanent stay of proceedings against it. DCC is now the only remaining Defendant in this action, as the actions against the other four Defendants were dismissed on the basis of having been commenced outside of the applicable limitation periods. DCC applies for a permanent stay of these proceedings on the grounds that this Court should recognize the jurisdiction of the United States Bankruptcy Court for the Eastern District of Michigan, Northern Division. The Plaintiffs, Wanda and Alan Roberts, argue that a stay is inappropriate.

BACKGROUND

2 The female Plaintiff underwent surgery in 1981 for bilateral fibrocystic disease and mammary dysplasia in both breasts. Also in 1981, she received silicone gel breast implants manufactured by McGhan Medical Corporation ("McGhan"), a former Defendant. After problems with those implants, they were replaced in June 1983 with silicone gel implants manufactured by DCC. Soon after, one implant was found to have ruptured, necessitating surgery to clean up as much silicone as possible from her system.

3 Since that time, the female Plaintiff alleges widespread pain and problems, which she blames on the silicone gel released into her body. For this application, it is not necessary nor appropriate for me to comment on her symptoms or their cause.

4 The Plaintiffs started this action on August 31, 1989. There was also class action litigation in the U.S which coordinated all claims arising out of the failure of both McGhan and DCC implants. That class action collapsed when DCC sought bankruptcy protection on May 15, 1995 under Chapter 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code"). Section 362 of the U.S. Bankruptcy Code imposes an automatic stay on all actions or proceedings against DCC to recover claims that arose before the claims bar date.

5 The U.S. Bankruptcy Court set February 14, 1997 as the foreign claims bar date (the deadline for filing claims in the bankruptcy proceedings). The Plaintiffs filed proofs of claim in that U.S. proceeding on January 17, 1997. More than 700,000 proofs of claim were filed from many countries, including more than 30,000 by Canadian residents.

LEGISLATION

6 DCC is asking that this Court recognize the proceedings in the U.S. Bankruptcy Court. The U.S. Bankruptcy Code provides for an automatic stay once bankruptcy proceedings are commenced in the U.S.:

> 362 (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay, applicable to all entities, of
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> ...
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

Section 541 provides that "property of the estate" is comprised of various types of property "wherever located and by whomever held".

7 Therefore, the stay purports to be extra-territorial, applying, for example, in Alberta. It is then up to this Court to decide whether the principles of comity favour upholding the stay in this jurisdiction. As the Plaintiffs emphasize, comity is a discretionary matter. I am not bound by the stay imposed by the U.S. Bankruptcy Act.

8 I note that the Canadian legislation has a similar provision (Bankruptcy and Insolvency Act ("BIA"), R.S.C. 1985, c.B-3):

> 69(1) Subject to subsections (2) and (3) and sections 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

Under s. 2(1) "property" of the BIA:

> "property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, ...

9 The Plaintiffs accept that the U.S. Bankruptcy Code governs DCC's estate, and that the Plaintiffs are creditors under the jurisdiction of the U.S. Bankruptcy Court.

PLAN OF REORGANIZATION

10 DCC filed a Plan of Reorganization (the "Plan") with the Bankruptcy Court on August 25, 1997. The Bankruptcy Court rejected this Plan, and an amended plan was presented on February 17, 1998. The Bankruptcy Court approved that Plan, which now has to be voted upon by the various classes of creditors. DCC's proposed Plan would allow it to pay most creditors and continue operating. To manage product liability claims, DCC would establish and fund two trusts with up to $2.4 billion U.S. DCC would separately pay approximately $1 billion to commercial creditors over seven years.

11 Breast implant claimants would have four settlement paths, based on their history, symptoms and past and proposed treatment. Any claims not settled by agreement under the Plan process would go to common issue trials. Any claims remaining after common issue trials would undergo individual claims review and mediation. The last resort would be individual litigation. These individual trials would be held in the U.S., dismissed in favour of litigation in the claimant's home jurisdiction, or held in the U.S. using the law of the claimant's home jurisdiction. The Plan is designed to solve as many claims as possible in an orderly and expeditious manner.

12 The U.S. procedure provides that once the Bankruptcy Court approves a Plan, it is sent to the creditors for a vote. The creditors vote by class. All of the Canadian breast implant claimants are in the foreign claimants' class of creditors. If more than two-thirds of those voting in a class approve, the Plan is considered approved by the class. After the vote, the Bankruptcy Court holds a confirmation hearing. It may confirm the Plan if it meets the U.S. Bankruptcy Code requirements. In DCC's words, the Bankruptcy Court must conclude:

> (i) that the Plan was proposed in good faith;
> (ii) that each class of creditors that does not vote to accept the Plan will receive at least as great a recovery as such creditors would have received had the debtor been liquidated under the liquidation procedures provided in Chapter 7 of the Bankruptcy Code; and
> (iii) that the Plan does not discriminate unfairly against any class of creditors that does not vote to accept the Plan.

Therefore, the Bankruptcy Court may approve a Plan even if all classes of creditors do not vote to accept it, as long as that Court finds the Plan does not discriminate unfairly against the rejecting class.

13 The originally proposed Plan did not make it to the creditor review stage. The Bankruptcy Court apparently had a number of concerns, one of which was the treatment of the foreign claimants. The Plaintiffs raise that concern in this Court also. The proposed settlement payments for foreign claimants would range from 35 to 60 per cent of those offered to U.S. claimants, on the theory that product liability litigation yields lower damage awards in non-U.S. jurisdictions. The proposed settlement for Canadian claimants is 60 per cent of the payments offered to U.S. claimants. According to DCC's affidavit (by Craig J. Litherland, dated December 12, 1997), some of the differing factors among U.S.

and foreign jurisdictions are:

a. the absence of contingency fee arrangements;
b. the responsibility of judges rather than juries to asses [sic] liability and damages;
c. the award of costs to prevailing litigants;
d. limitations on theories of liability and recovery;
e. limited pretrial procedures;
f. the absence of the 'deep pocket expectation' prevalent in the United States resulting in lower damage awards;
g. lower damage awards for pain and suffering;
h. less or no punitive damages; and
i. nationalized health care insurance and other benefits that are either directly deducted from an award or operate to reduce the likelihood of a large damage award.

Of course, not all of these factors would apply in any one non-U.S. jurisdiction.

14 The Plaintiffs claim the foreign discount is discriminatory and inequitable. Not all of the factors are applicable in Alberta. Moreover, some simply try to shift the burden from DCC to other entities (such as the Canadian medicare system). In addition, the Plaintiffs claim that taking 40 per cent away from foreign claimants leaves that much more for U.S. claimants. DCC argues that the procedure is fair, not necessarily equal. It also emphasizes that the foreign discount only applies to settlements. Any claims that proceed to individual trials would not be discounted.

15 The amended Plan will be put to the creditors. It may be that the Plan will be confirmed, even if the foreign claimants' class rejects it.

ANALYSIS

General Principles

16 Where an appropriate forum must be chosen, the Courts may grant a stay of proceedings. In the words of the Supreme Court of Canada: "This enables the court of the forum selected by the Plaintiffs (the domestic forum) to stay the action at the request of the Defendant if persuaded that the case should be tried elsewhere." (Amchem Products Inc. v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 at 912).This decision is completely discretionary. I am not bound to defer to the U.S. bankruptcy proceedings.

17 Amchem also discusses the vital principle of comity (at 913-14, citing Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1096):

> 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws....

18 After cautioning against abusing the power to enjoin foreign litigation, the S.C.C. in Amchem outlined the test for restraining foreign proceedings. Although a case on anti-suit injunctions, the first part of the test also relates to stays. The Court must determine if there is a forum other than the domestic forum which is "clearly more appropriate" (at 931). If not, the domestic forum should refuse to stay the

domestic proceedings. At 931-32, the S.C.C. continued:

> In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

19 As La Forest J. stated in Morguard Investments Ltd. v. De Savoye (1990), 76 D.L.R. (4th) 256 (S.C.C.) at 268, modern states "cannot live in splendid isolation". They must follow comity, which is "the deference and respect due by other states to the actions of a state legitimately taken within its own territory."

20 Comity and cooperation are increasingly important in the bankruptcy context. As internationalization increases, more parties have assets and carry on activities in several jurisdictions. Without some coordination, there would be multiple proceedings, inconsistent judgments and general uncertainty. See, for example, comments in Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 20 C.B.R. (3d) 165 (Ont. Gen. Div.); Re Antwerp Bulkcarriers N.V. (1996), 43 C.B.R. (3d) 284 (Que.S.C.); and J.D. Honsberger, "Canadian Recognition of Foreign Judicially Supervised Arrangements" (1989), 76 D.B.R. (N.S.) 86.

21 I also note that U.S. Courts have shown themselves willing to grant comity in similar circumstances. For example, a Bankruptcy Court granted comity in In re American Sensors Inc. (Bkrtcy. S.D.N.Y., 1997). In that case, all proceedings against the Defendant Canadian corporation were stayed under the Companies' Creditors Arrangement Act. The Defendant successfully applied to the U.S. Bankruptcy Court for a stay in the U.S. based on comity. That Court stated that U.S. public policy should recognize the foreign proceedings, thus facilitating the "orderly and systematic distribution" of the debtor's assets. This was especially true for Canada, which has similar procedures and procedural safeguards.

Discussion

22 The U.S. Bankruptcy Code provision imposing a stay once bankruptcy proceedings have begun is comparable to Canada's BIA provision. They also both have the same underlying philosophy - to ensure a fair distribution of assets among all creditors, not just those who happen to have begun proceedings prior to the initiation of bankruptcy. In a situation such as DCC's, there is another motive - if all matters can be stayed, there is a better chance that the DCC will be able to restructure successfully.

23 The number of claims is significant. The U.S. Bankruptcy Court has decided that it is impractical and unfair to have thousands of individual claims going through the adversarial court system. Instead, it agrees with DCC's proposal to settle as many as possible, hold common issue trials as appropriate, then have as many individual trials as still necessary. This appears logical and in the interests of all creditors as a group.

24 An additional consideration is that the Plaintiffs have filed proofs of claim in the U.S. bankruptcy proceedings. The Plaintiffs have, therefore, attorned to the jurisdiction of the U.S. Bankruptcy Court. As

stated in In re Neese, 12 B.R. 968 (Bkrtcy.W.D.Va., 1981) at 971:

> ... [the] defendants voluntarily availed themselves of the jurisdiction of this Court when they filed, by counsel, proofs of claim in the underlying title 11 bankruptcy case....Having filed their proofs of claim in the underlying bankruptcy case, the defendants cannot now deny this Court's personal jurisdiction over them in a proceeding directly related to that case.

The same principles apply in Canada - see, for example, Microbiz Corp. v. Classic Software Systems Inc. (1996), 45 C.B.R. (3d) 40 (Ont. Gen. Div.); and Pitts v. Hill & Hill Truck Line, Inc. (1987), 66 C.B.R. 273 (Alta.Q.B., Master).

25 The Plaintiffs argue that foreign claimants are not treated fairly by the proposed Plan because their settlement package would be at a discount from that given to U.S. claimants. However, there are several safeguards to prevent unfairness. First, the Plaintiffs, along with the rest of the class, have the opportunity to vote against the Plan. If, as a class, they vote against it, the U.S. Bankruptcy Court can only confirm the Plan if it feels the Plan does not "discriminate unfairly" against classes which rejected it. I understand this to mean that treatment can be fair across classes without being equal, as long as there is equality within the class itself. Second, the Plaintiffs are not obliged to settle under the Plan. They may proceed to trial. Third, this Plan actually protects creditors. If there were no stay and no Plan, only the first to trial and judgment would receive any compensation at all, and trials could potentially drag on for many years. Under the Plan, each creditor will receive something and will receive it much sooner.

26 I do not comment on the factors used to assess the discount rate for foreign claimants, except to say that they were not all intended to relate to each foreign jurisdiction. If these factors are accepted by the U.S. Bankruptcy Court in the exercise of its jurisdiction, a jurisdiction to which it is appropriate for me to grant comity and to which the Plaintiffs have attorned, then it is not for me to decide if I would have accepted the factors.

27 The Plaintiffs also argue that the recent Australian case Taylor v. Dow Corning Australia Pty. Ltd. (19 December 1997), No. 8438/95 (Vict.S.C.) should persuade me to dismiss this stay application. There, the Australian Court denied Dow Corning Australia's ("DCA's") application for a stay of proceedings in an action by an Australian plaintiff against DCA. While not binding on me in any event, the reasons in Taylor are clearly distinguishable.

28 DCA is a solvent subsidiary of DCC. DCC was initially a defendant, but that plaintiff discontinued against DCC. The Court ruled that any judgment against DCA would not disadvantage creditors of DCC. Further, the plaintiff was entitled to be treated as a creditor of DCA, not DCC.

29 In addition, that plaintiff did not file a proof of claim in the U.S. bankruptcy proceedings. This is extremely significant. In the present case, the Plaintiffs deliberately attorned to the U.S. jurisdiction by filing proofs of claim. In Taylor, the plaintiff deliberately did not. There is obiter in Taylor, as the Court held attornment was not relevant where a solvent subsidiary, not the insolvent parent, asks for the stay.

30 Finally, the Plaintiffs argue that I should not grant a stay when the U.S. Bankruptcy Court has not been asked to grant an injunction against non-U.S. proceedings such as this. For example, the Australian Court in Taylor queried why DCC had not requested such an injunction and concluded one would have been denied in any event. In the present case, however, an injunction is not necessary. The U.S. Bankruptcy Code itself provides for a stay of all proceedings against DCC. This is not comparable to Taylor, where the defendant was DCA, not DCC itself.

ORDER

31 In the circumstances of this case, the U.S. Bankruptcy Court has apparently decided that fairness among creditors is achieved without having complete equality across all classes of creditors. The Plaintiffs attorned to that jurisdiction. However, even had there been no attornment, I find that common sense dictates that these matters would be best dealt with by one Court, and in the interest of promoting international comity it seems the forum for this case is in the U.S.Bankruptcy Court. Thus, in either case, whether there has been an attornment or not, I conclude it is appropriate for me to exercise my discretion and apply the principles of comity and grant the Defendant's stay application. I reach this conclusion based on all the circumstances, including the clear wording of the U.S. Bankruptcy Code provision, the similar philosophies and procedures in Canada and the U.S., the Plaintiffs' attornment to the jurisdiction of the U.S. Bankruptcy Court, and the incredible number of claims outstanding. Lastly, while not determinative, I found it significant that there has been acceptance of the Plan in Ontario and Quebec. This not only suggests that the Plan proposes a reasonable offer, but it also suggests that the parties affected in these provinces have accepted the principle that international comity should be recognized in these proceedings.

FORSYTH J.

cp/d/drk/DRS