Court File No.: M42404

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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Court of Appeal File No.: M42404
Superior Court File No.: CV-12-9667-00-CL

COURT OF APPEAL OF ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

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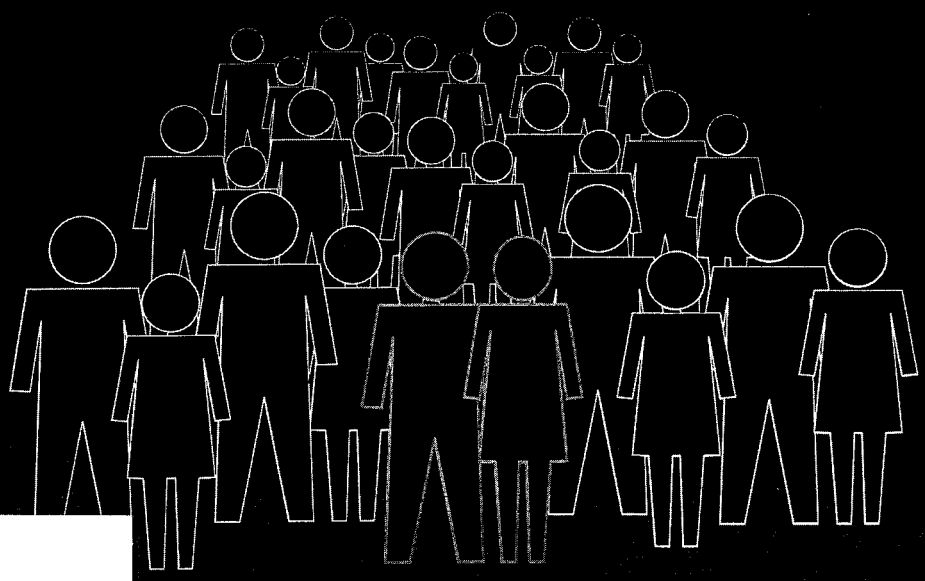
1.	Michael G. Cochrane, *Class Actions A Guide to the Class Proceedings Act, 1992*, (Toronto: Canada Law Book Inc., 1993)
2.	*Dabbs v Sun Life Assurance Co*, [1998] OJ No 3622 (CA)
3.	*Abegweit Potatoes Ltd v JB Read Marketing Inc*, [2003] PEIJ No 80 (CA)
4.	*Air Canada (Re)*, [2003] OJ No 2207 (CA)
5.	*Monteith v Monteith*, [2010] OJ No 346 (CA)

Tab 1

CLASS ACTIONS

A Guide to the Class Proceedings Act, 1992



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dure,[5] may only be held after leave of the court has been obtained. In deciding whether to grant such leave, the court considers the same factors as those considered on granting leave for additional discovery of parties under s. 15(2) and (3) of the *Class Proceedings Act, 1992*. It will be recalled that, in deciding whether to grant leave under s. 15(3), the court considers:

(a) the stage of the class proceeding and the issues to be determined at that stage;
(b) the presence of subclasses;
(c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;
(d) the approximate monetary value of individual claims, if any;
(e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and
(f) any other matter the court considers relevant.

The exception is designed to protect individual class members from harassment by defendants. If further information from individual class members is needed, the court must be satisfied that such an examination would be worthwhile.

PARTICIPATION BY CLASS MEMBERS

Once certification is obtained, the representative plaintiff has full authority to instruct the class lawyer, direct the litigation, participate in discoveries and even authorize settlement. As a safety valve, the Act provides in s. 14 that the court may at any time in a class proceeding permit one or more class members to participate in the proceeding. The court may exercise this authority in order to ensure the fair and adequate representation of the interests of the class or of any subclass or for any other appropriate reason which the court identifies during the course of the proceeding.

Section 14 is not intended as an invitation for malcontents within the class to undermine the authority of the representative plaintiff but rather is designed to ensure that the court has maximum flexibility in dealing with potentially large classes. In the event that individuals came forward asking to participate and had good reason for being dissatisfied with the representative plaintiff's work, the court would have the authority to make an order permitting participation in whatever manner it considered appropriate. This participation might not include the full authority of a party and could be limited to maintaining a "watching brief". It would also likely include terms related to costs.

---

[5] R.R.O. 1990, Reg. 194.

Tab 2

Indexed as:

Dabbs v. Sun Life Assurance Co. of Canada

Between
Paul Dabbs, plaintiff (respondent) moving party, and
Sun Life Assurance Company of Canada, defendant (respondent),
and
Jack Maclean, class member (appellant)

[1998] O.J. No. 3622

41 O.R. (3d) 97

165 D.L.R. (4th) 482

113 O.A.C. 307

7 C.C.L.I. (3d) 38

27 C.P.C. (4th) 243

[1999] I.L.R. I-3629

82 A.C.W.S. (3d) 638

Docket Nos. C30326, M22971 and M23028

Ontario Court of Appeal
Toronto, Ontario

Laskin, Charron and O'Connor JJ.A.

Heard: August 26, 1998.
Judgment: September 14, 1998.

(9 pp.)

Practice -- Persons who can sue and be sued -- Individuals and corporations, status or standing -- Class actions, members of class -- Status to appeal from approval of settlement -- Statutes -- Operation and effect -- Effect on earlier statutes -- Contrariety or conflict between statutes --

General and special statutes.

This was a motion by Dabbs to quash an appeal from an order that this action be certified as a class action and a motion for leave to appeal by Maclean from the certification order. Dabbs was a representative plaintiff in a class proceedings against the defendant Sun Life Assurance Company. The parties entered into a settlement agreement. Maclean, a member of the class, participated in the settlement approval proceedings. He did not ask for party status. Maclean objected to the approval of the settlement. The agreement affected 400,000 class members across Canada and had been approved by British Columbia and Quebec courts. The trial judge approved the settlement pursuant to the Class Proceedings Act and found it to be fair, reasonable and in the best interest of those affected by it. Dabbs argued that Maclean had no standing to bring an appeal.

HELD: The motion by Dabbs was allowed and the motion by Maclean was dismissed. The appeal was quashed. Maclean had no right of appeal pursuant to section 30(3) of the Act as he was not a party and had not applied to be a representative plaintiff or to intervene as an added party. As well, he had no right of appeal under section 6(1)(b) of the Courts of Justice Act, which permitted appeals from final orders of a judge of the Ontario Court (General Division). Section 30(3) took precedence over section 6(1)(b) as section 30(3) was the more recent enactment and specifically addressed the rights of appeal in class proceedings. It was not appropriate to grant Maclean leave to act as a representative party under section 30(5) of the Act for the purpose of allowing him to appeal. There was nothing indicating that Maclean would adequately represent the interests of the class on an appeal. The wishes of one class member was not to govern the interests of the entire class. As well, Maclean could opt out of the class and pursue his claim against Sun Life personally.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 8(3), 9, 10(1), 12, 14, 16(1), 18, 19, 25, 29, 30(3), 30(5).
Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 6(1)(b), 134.
Ontario Rules of Civil Procedure, Rule 13.

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Michael A. Eizenga and Michael J. Peerless, for the plaintiff, respondent.

The judgment of the Court was delivered by

1 O'CONNOR J.A.:-- These reasons deal with two motions. The first is a motion by the representative plaintiff in this class proceeding, Paul Dabbs, to quash an appeal brought by a class member, Jack Maclean. The second is a motion by Maclean for leave to appeal.

THE MOTION TO QUASH

2 Maclean seeks to appeal the judgment of Sharpe J. dated July 3, 1998 in which he ordered that this action be certified as a class proceeding and that a settlement agreement entered into between Dabbs and others as proposed representatives of the plaintiff class and the defendant Sun Life Assurance Company of Canada ("Sun Life") be approved under s. 29 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act").

3 Maclean is a member of the class and had been permitted under s. 14 of the Act to participate in the settlement approval proceedings. He did not ask for and was not granted party status. Maclean objected to the approval of the settlement, raising essentially the same arguments as he makes in the material filed with this court.

4 Sharpe J. rejected those arguments, approved the settlement and found it to be fair, reasonable and in the best interest of those affected by it. The courts in British Columbia and Quebec have also approved the settlement agreement. In all, it affects the interests of an estimated 400,000 class members across Canada.

5 Maclean's notice of appeal raises issues relating to procedural rulings made by Sharpe J. and to the fairness and adequacy of the settlement agreement. Dabbs moves under s. 134 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, to quash the appeal primarily on the basis that Maclean is not a party to the proceeding and therefore has no standing to bring the appeal. Sun Life supports the motion. For the reasons set out below, I agree with their position.

6 One of the objects of the Act is to achieve the efficient handling of potentially complex cases of mass wrongs. See Abdool et al. v. Anaheim Management Limited et al. (1995), 21 O.R. (3d) 453 (Div. Ct.), per O'Brien J. at p. 455. This efficiency is accomplished, in part, by the court appointment of one or more class members under s. 5 to be representative plaintiffs or defendants as the case may be. The criteria for appointment include the ability to fairly and adequately represent the interests of the class. A representative plaintiff or defendant is a party to the proceeding and has the specific rights and responsibilities for the carriage of the litigation on behalf of the class that are set out in the Act.

7 The Act makes a clear distinction between the role of a party and that of a class member.[1] Section 14 gives the court a broad discretion to permit class members to participate in a proceeding and to provide for the manner and terms upon which the participation is permitted. Not surprisingly, s. 14 does not provide that class members who are permitted to participate thereby become parties to the proceeding. The section does not restrict participation to those class members who are able to fairly and adequately represent the class. Indeed, the court may permit participation by those who

oppose the manner in which the party representing the class is conducting the proceeding and who assert positions that differ from those of the majority of the class. While the court may consider it useful to hear from these class members and to permit them to participate in a limited manner, it could frustrate the orderly and efficient management of the proceeding if they became parties simply because of their participation.

8 If class members are dissatisfied with the conduct of a proceeding or do not wish to be bound by the result, they may opt out under s. 9 and pursue their claims or defences in a personal capacity.

9 The rights of appeal to the Court of Appeal in class proceedings are set out in s. 30(3) of the Act. It provides:

> 30(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

10 These rights are conferred on parties. Section 30(5) permits class members in certain circumstances to move for leave to act as representative parties for purposes of bringing an appeal under s. 30(3). It provides:

> (5) If a representative party does not appeal as permitted by subsection(3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as a representative party for the purposes of subsection 3.

Absent leave, class members have no standing to bring an appeal to this court under the Act.

11 Maclean is not a party to this proceeding. He did not apply to be a representative plaintiff nor did he apply to intervene as an added party under Rule 13.[2] He participated in the settlement approval proceedings as a class member not as a party. He therefore has no right of appeal under s. 30(3).

12 Maclean argues that because Sharpe J.'s judgment is a final order of the Ontario Court (General Division), he has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, R.S.O. 1990, c. C.4. Section 6(1)(b) provides:

> 6(1) An appeal lies to the Court of Appeal from,
>
> ...
>
> (b) a final order of a judge of the Ontario Court (General Division), except an order referred to in clause 19(1)(a) or an order from which an appeal lies to

the Divisional Court under another Act.

He argues that if the Act does not provide him with a right of appeal, either because he is not a party to the class proceeding or because s. 30(3) does not provide for a right of appeal from a judgment approving a settlement[3], then s. 6(1)(b) operates to confer a right where the Act has failed to do so. I do not accept that argument.

13 In my view, s. 30(3), which grants specific rights of appeal to this court in class proceedings, takes precedence over and excludes provisions of general application such as s. 6(1)(b) of the Courts of Justice Act. Two rules of statutory interpretation assist in determining the intention of the Legislature. First, a "general statute is made to 'yield' by regarding the special statute as an exception to the general."[4] Second, a more recent statute takes precedence over prior legislation because "the more recent expression of the will of the legislature should be retained."[5] In this case, the Act is the more recent enactment and specifically addresses the rights of appeal in class proceedings. The Courts of Justice Act was enacted earlier and is of more general ambit. These rules support the conclusion that the appeal provisions in s. 30(3) of the Act take precedence over s. 6(1)(b).

14 This conclusion is consistent with the dicta of Doherty J.A. in 792266 Ontario Ltd. v. Monarch Trust Co. (Liquidation) (1996), 94 O.A.C. 384 (C.A.). At p. 389, he said:

> ... I would, however, observe that this court has held that statutory provisions granting a specific right of appeal take precedence over and exclude provisions of more general application: Overseas Missionary Fellowship v. 578369 Ontario Ltd. (1990), 73 O.R. (2d) 73 at 75 (C.A.). that conclusion is consistent with the well-recognized principle of statutory interpretation which provides that where a statutory provision in specific legislation appears to conflict with a provision in a general statutory scheme, the former is seen as an exception to the latter: R. v. Greenwood (1992), 7 O.R. (3d) 1 at 6-7 (C.A.), leave to appeal to S.C.C. refused, [1992] 1 S.C.R. viii.

I agree with that statement.

15 The logic of this interpretation is apparent in this case. The intent of the Act is clear that the rights of appeal to this court are conferred on parties, not class members. A class member requires leave under s. 30(5) to act as a representative party for the purpose of bringing an appeal under s. 30(3). If, as Maclean argues, a class member has a right of appeal under s. 6(1)(b) of the Courts of Justice Act, that intent would be defeated. Further, assuming, as Dabbs and Sun Life argue, that s. 30(3) does not confer a right to appeal a judgment approving a settlement, it would make no sense for the Legislature to have provided for specific limited rights of appeal in s. 30(3) if the general right of appeal in s. 6(1)(b) was also to apply. Section 30(3) would be redundant and whatever limits result from its specific wording would be frustrated.

16 Relying upon the case of Re O'Donohue and Silva et al. (1995), 27 O.R. (3d) 162 (C.A.), Maclean argues that the right of appeal in s. 6(1)(b) can only be excluded by express statutory provision. In that case, the court considered appeal rights under the Municipal Elections Act, R.S.O. 1990, c. M.53, as amended, which provides for an appeal from a judicial recount to a judge of the Ontario Court (General Division). The Municipal Elections Act does not provide for a further appeal. The court found that in the absence of an express statutory exclusion of an appeal from a final order of a General Division judge, the Legislature could not be deemed to have limited the jurisdiction granted to the Court of Appeal by s. 6(1)(b). Significantly, there was no right of appeal to the Court of Appeal set out in the Municipal Elections Act. It is the inclusion of the specific appeal provisions in the Act which, in my view, operate to exclude the jurisdiction under s. 6(1)(b) for proceedings under the Act.

17 In summary I am of the view that s. 30(3) of the Act provides the rights of appeal to this court for class proceedings and that s. 6(1)(b) of the Courts of Justice Act does not supplement those rights.

MACLEAN'S MOTION

18 Maclean brought a motion for leave, if necessary, to appeal the judgment of Sharpe J. During the course of argument he requested that the court consider this motion as a motion for leave under s. 30(5) of the Act to permit him to act as a representative party for purposes of bringing his appeal under s. 30(3). The court indicated that it was prepared to deal with the motion on this basis. In my view, this is not an appropriate case for leave.

19 The court's discretion to grant leave under s. 30(5) is guided by the best interests of the class and in particular by a consideration whether the class member applying would fairly and adequately represent the interests of the class. There is nothing in the record which indicates that Maclean would adequately represent the interests of this class by bringing an appeal which seeks to set aside the settlement agreement. Courts in three jurisdictions have approved the agreement. Maclean is the only class member of an estimated 400,000 who now seeks to set it aside. The wishes of one class member ought not to govern the interests of the entire class.

20 Importantly, if Maclean is dissatisfied with this settlement, he has the opportunity under the terms of Sharpe J.'s judgment and s. 9 of the Act to opt out of the class and pursue his claim against Sun Life in his personal capacity.

21 I would therefore dismiss the motion brought by Maclean under s. 30(5) of the Act. For the reasons above, I would allow the motion under s. 134 of the Courts of Justice Act and quash the appeal. Because the motions involved a novel point raised by an individual class member, I would make no order as to costs.

O'CONNOR J.A.
LASKIN J.A. -- I agree.

CHARRON J.A. -- I agree.

cp/d/ln/mii/DRS

1 See ss. 8(3), 10(1), 12, 16(1), 18, 19 and 25.

2 Section 35 of the Act provides that the rules of court apply to class proceedings.

3 Dabbs and Sun Life argued that even if Maclean is a party, s. 30(3) does not confer a right of appeal from a judgment approving a settlement under s. 29 of the Act.

4 Elmer Driedger, Construction of Statutes, 2nd ed. (1983), at p. 227.

5 Pierre-André Côté, The Interpretation of Legislation in Canada, 2nd ed. (1991), at p. 301.

Tab 3

Case Name:

Abegweit Potatoes Ltd. v. J.B. Read Marketing Inc.; J.B. Read Marketing Inc. v. Maersk Inc.

Between
J.B. Read Marketing Inc., appellant, and
Abegweit Potatoes Ltd., Maersk Inc., Maersk Canada Inc., and Maersk Sealand, a division of the A.P. Moller Group, respondents

[2003] P.E.I.J. No. 80

2003 PESCAD 24

227 Nfld. & P.E.I.R. 151

36 C.P.C. (5th) 203

124 A.C.W.S. (3d) 1045

Docket: S1-AD-0989

Prince Edward Island Supreme Court - Appeal Division

Mitchell C.J.P.E.I., McQuaid and Webber JJ.A.

Heard: June 24, 2003.
Judgment: August 4, 2003.

(35 paras.)

Practice -- Joinder of causes and consolidations -- Joinder of causes of action -- When joinder permitted -- Consolidation of actions and applications -- When not available -- Appeals -- Duty of appellate court regarding discretionary orders.

Appeal by the defendant JB Read Marketing from the dismissal of its motion to consolidate two actions. Read had a contract to supply potatoes to Puerto Rico. It purchased the potatoes from the plaintiff Abegweit Potatoes and contracted with Maersk Inc. to transport the potatoes by sea. Read refused to pay Abegweit the purchase price on the basis that the potatoes were not of merchantable quality when they arrived at the shipping destination. Abegweit sued to recover the purchase price.

In its statement of defence, Read claimed that Abegweit was negligent in not applying a sprout inhibitor prior to shipment. Read then sued Maersk for breach of contract and negligence for failing to ensure that the temperatures in the shipping containers were kept at a level necessary to prevent the potatoes from sprouting. Read brought a motion to consolidate the two actions and to have discovery evidence in the Abegweit action against Read be adopted in its action against Maersk. The motions judge found no commonality of factual or legal issues in the two proceedings. On appeal by Read, Abegweit and Maersk submitted that the decision was a discretionary one on an interlocutory matter and was not clearly wrong, and as such the Court of Appeal had no jurisdiction to intervene.

HELD: Appeal allowed in part. The decision was clearly wrong because the motions judge proceeded on an incorrect principle and misapprehended the legal issues. Not all questions of law and fact had to be common. The common legal issue in the two proceedings was what caused the potatoes to be unmarketable. It was possible for the evidence in relation to the issue of causation to be the same for both proceedings. The motions judge should have addressed his mind to the possibility of two triers of fact arriving at inconsistent verdicts given the commonality of facts and legal issues. The best insurance against any possible prejudice from inconsistent verdicts was to have the two proceedings heard together at the same judge with the same evidence on the issues of commonality. There were residual issues not common to each proceeding, which militated against making an order for consolidation. As Maersk did not have the opportunity to participate in the discovery respecting the Abegweit action, the request to adopt the discovery evidence was denied.

Statutes, Regulations and Rules Cited:

Prince Edward Island Rules of Court, Rules 5, 6.01(1)(d), 6.01(1)(e), 6.01(2), 6.02, 31.
Supreme Court Act, R.S.P.E.I. 1988, c. S-10, s. 59.

Cases cited:

Canada v. Agua-Gem Investments Ltd. (C.A.), [1993] 2 F.C. 425 (F.C.A.).
Housen v. Nikolaisen 2002 SCC 33; [2002] S.C.R. 235 (SCC).
Kuula v. Moose Mountain Ltd., [1912] O.J. No. 133 (Ont. H.C. Justice).
Reference Hillcrest Housing Ltd.; Re Clans Ltd. (1985), 56 Nfld. & P.E.I.R. 237 (P.E.I.S.C.-T.D.).
See: Metro v. McInnis; McInnis v. Mullin, Fortier 2002 PESCTD 79 (P.E.I.S.C.-T.D.).
Northland Bank v. Willson; Canada Deposit Insurance Corp. v. Prisco, [1997] A.J. No. 1069 (Alta. Q.B.).
Shah v. Bakken (1996), 46 C.P.C. (3d) 205 (B.C.S.C.).
Tusa v. Walsh, [1994] O.J. No. 48 (Ont. Sup. Ct.).

Counsel:

David R. Sanderson, for the appellant.
D. Spencer Campbell, for the respondent Abegweit Potatoes Ltd.
Gavin Giles, for the respondents Maersk Inc., Maersk Canada Inc., and Maersk Sealand, a division of the A.P. Moller Group.

Reasons for judgment were delivered by: McQuaid J.A., concurred in by Mitchell and Webber JJ.A.

1 **McQUAID J.A.**:-- J.B. Read Marketing Inc. had a contract to supply 11 loads of potatoes to Puerto Rico. To fulfill the contract it purchased the product from Abegweit Potatoes Ltd.

2 J.B. Read contracted with Maersk Shipping to transport the potatoes in containers by sea. Abegweit delivered the potatoes from its packing facility in Pownal, Prince Edward Island, directly to the shipping point.

3 When J.B. Read refused to pay the purchase price, Abegweit commenced legal proceedings by issuing an originating notice and statement of claim on February 12, 2002 alleging the purchase price was justly due and owing. J.B. Read filed a statement of defence and a counterclaim on March 1, 2002. In this pleading it alleges the potatoes were not of marketable quality when they arrived in Puerto Rico because they had sprouted which was in turn caused by the negligence of Abegweit in not applying a sprout inhibitor prior to shipment. J.B. Read alleges it has no obligation to pay the purchase price and that it has suffered further damages as a result of the loss of the sale of the potatoes.

4 Abegweit filed a defence to the counterclaim on March 11, 2002 stating the potatoes were properly inspected by the relevant authorities prior to shipping and because it was not industry practice to apply a sprout inhibitor at that point in the shipping season, it would not have applied the sprout inhibitor without a specific request to do so. Abegweit further alleges in the defence to the counterclaim that if the potatoes were in fact not of a marketable quality when they arrived in Puerto Rico, it was because of the failure of J.B. Read and/or its agents to transport them in a timely manner and "under proper climate control."

5 On April 17, 2002 J.B Read commenced another proceeding in the trial division against the shipper Maersk alleging the potatoes were not of merchantable quality when they arrived in Puerto Rico and that this was because of the failure of Maersk to ensure that the temperatures in the containers were at a level necessary to keep the potatoes from sprouting. The basis of the claim is that Maersk breached the contract of carriage and was negligent in its handling of the product both in transit and at the terminal in Puerto Rico. Maersk filed a statement of defence on June 18, 2002 denying any liability for the alleged loss on the basis that the action was not commenced within the time specified in the bill of lading and that, if the action was commenced in time, Maersk has no liability because of specific provisions in the bill of lading. Maersk also alleges that if the cargo suffered damage and was unmarketable when it arrived at its destination, it was because the quality of the potatoes was inherently bad upon shipment from Abegweit's packing facility.

6 On June 2, 2002 oral discovery was held in the action between Abegweit and J.B. Read. At this discovery James Read admitted he had not requested Abegweit to apply a sprout inhibitor prior to shipping the potatoes.

7 No further steps were taken in the proceeding between J. B. Read and Maersk prior to the filing of a motion by the former on September 11, 2002 to consolidate the two proceedings pursuant to the provisions of Rule 6.01(1)(d) of the Rules of Court. The motion was heard by a judge of the trial division on November 26, 2002 and on February 3, 2003 he dismissed the motion. See: J.B. Read v. Abegweit Potatoes & Maersk 2003 PESCTD 17; (2003) 222 Nfld. & P.E.I.R. 192. The order was filed on March 14, 2003.

8 J.B. Read filed a notice of appeal on April 2, 2003 requesting that the order of the motions judge be set aside and that this division of the court order that its counterclaim against Abegweit be consolidated with its action against Maersk. The appellant also requests an order pursuant to Rule 6.01(2) directing that the documents produced and the evidence adduced at oral discovery in the proceeding between Abegweit and J.B. Read constitute the discovery evidence in the proceeding between Maersk and J.B. Read.

9 The essence of the grounds of appeal is that the trial judge erred in finding there was not a commonality of factual or legal issues in the two proceedings. The notice of appeal alleges the motion's judge failed to recognize there would be greater prejudice to J.B. Read in denying the motion to consolidate than there would be to the other parties in allowing the motion.

10 In response, both Abegweit and Maersk state that the decision of the motions judge to deny the motion for consolidation is a discretionary decision on an interlocutory matter and thus solely within the power of the motions judge to make. They argue his decision was not clearly wrong and therefore, this division of the court does not have jurisdiction to intervene. They also argue the appeal raises questions of fact or questions of mixed fact and law and as the motions judge made neither a palpable and overriding error nor did he incorrectly apply the facts to the proper legal test, the appeal should be dismissed.

ISSUES

11 The first issue is the scope of this court's power to review an interlocutory order of a motions judge. If the decision of the motions judge is found to be reviewable, the second issue is whether he erred in denying the motion of J.B. Read to consolidate the two proceedings.

DISPOSITION

12 I would allow the appeal, set aside the order of the motions judge and order that the two proceedings be heard at the same time and before the same trial judge.

ANALYSIS

13 The interlocutory order made by the motions judge to deny the motion for consolidation is reviewable because it is clearly wrong in the sense that in exercising his discretion, the motions judge proceeded on an incorrect principle and he misapprehended the legal issues involved in the two proceedings. The motions judge made errors of law which are reviewable by this division of the court on the standard of correctness. See: Canada v. Agua-Gem Investments Ltd. (C.A.), [1993] 2 F.C. 425 (F.C.A.); Housen v. Nikolaisen 2002 SCC 33; [2002] S.C.R. 235.

14 Rule 6 of the Rules of Court provides as follows:

> 6.01(1) Where two or more proceedings are pending in the same court and it appears to the court that:
>
> (a) they have a question of law or fact in common;
> (b) the relief claimed in them arises out of the same transaction or occurrence or series of transactions or occurrences; or
> (c) for any other reason an order ought to be made under this rule, the court may order that,

(d) the proceedings be consolidated, or heard at the same time or one immediately after the other; or
(e) any of the proceedings be,

(i) stayed until after the determination of any other of them, or
(ii) asserted by way of counterclaim in any other of them.

(2) In the order, the court may give such directions as are just to avoid unnecessary costs or delay and, for that purpose, the court may dispense with service of a notice of listing for trial and abridge the time for placing an action on the trial list.

6.02 Where the court has made an order that proceedings be heard either at the same time or one immediately after the other, the judge presiding at the hearing nevertheless has discretion to order otherwise.

15 This Rule provides that proceedings with common issues of fact or law may be either consolidated, heard at the same time or heard immediately after one another. These are distinct remedies in which there are important technical differences, particularly between an order consolidating the proceedings and an order which would have them heard at the same time or immediately after one another. All three remedies have as their objective the saving of time and money by avoiding a multiplicity of proceedings, and they find root in s. 59 of the Supreme Court Act R.S.P.E.I. 1988 Cap S-10 which directs that to the extent possible a multiplicity of proceedings is to be avoided.

16 As Middleton J. states in Kuula v. Moose Mountain Ltd., [1912] O.J. No. 133 (Ont. H.C. Justice) confusion existed over the subject of the consolidation of actions primarily because of the inaccurate use of the word "consolidation." As he points out, it was sometimes referred to in situations where a motion was made to stay one proceeding pending the decision in another where the issues in the two were the same and where the result in one would be conclusive of the result in the other. See: paras. 21, 25 & 26.

17 From this improper use of the term has emanated the test stated by Carruthers C.J.P.E.I in Reference Hillcrest Housing Ltd.; Re Clans Ltd. (1985), 56 Nfld. & P.E.I.R. 237 (P.E.I.S.C.-T.D.) that unless a decision in one case is determinative of the result in another, two actions should not be consolidated. I agree with Campbell J. when he recently rejected this criterion as part of the test in deciding to consolidate two actions pursuant to Rule 6.01(1)(d). See: Metro v. McInnis; McInnis v. Mullin, Fortier 2002 PESCTD 79 (P.E.I.S.C.-T.D.) at para. 14.

18 Pursuant to Rule 6.01(1)(e)(i) where two proceedings arise out of the same transaction or series of transactions and they have common issue of fact and law, a motion may be made to stay one of the proceedings until a decision is rendered in the other. In considering such a motion, one of the tests would be whether the result in one action would be determinative of the result in another.

19 The effect of an order to consolidate two proceedings is that they will thereafter proceed as one as if there had been a joinder of the parties pursuant to Rule 5 of the Rules of Court. Upon con-

solidation, there is one set of pleadings, one set of discoveries, one judgment and one bill of costs. Also upon consolidation, directions should be given as to which party has the carriage of the case.

20 On the other hand, the court has the option of ordering that the proceedings be tried at the same time or immediately after one another. The proceedings would then maintain their separate identity, with separate pleadings, discoveries, judgments and bills of costs. As a matter of practice the trial judge will usually order that the evidence in one proceeding be evidence in the other. In this way, the actions are both tried together with the same judge.

21 Furthermore, pursuant to Rule 6.02 the trial judge has a discretion at any time to order that the matters be not heard at the same time or immediately after one another. Presumably such an order would be made if it became evident to the trial judge that it was uneconomical or inexpedient to do so.

22 The threshold for making any of the orders authorized by Rule 6.01(1)(d) is the same. The proceedings must involve a common question of fact or law, and they must arise out of the same transaction or the same series of transactions. In addition, the court has broad discretion for any other reason to make one of the orders. The application of the Rule requires the striking of a proper balance between the direction in the Supreme Court Act to avoid a multiplicity of proceedings and the requirement that the parties in the proceedings who may object to the consolidation are not prejudiced.

23 Rule 6.01(1) does not require that all questions of law and fact be common; it refers to " . . . a question of law or fact in common; . . . ". See: Northland Bank v. Willson; Canada Deposit Insurance Corp. v. Prisco, [1997] A.J. No. 1069 (Alta. Q.B.). In assessing whether there is a common question of fact or law common to both proceedings so as to meet the threshold test for granting one of the remedies in Rule 6.01(1)(d), the focus should be on whether there is a common issue of fact or law that bears sufficient importance in relation to the other facts or issues in the proceedings which would render it desirable that the matters be consolidated, heard at the same time or after each other. This assessment is to be made by reference to the pleadings. See: Shah v. Bakken (1996), 46 C.P.C. (3d) 205 at para. 12 (B.C.S.C.).

24 If there are no common facts or legal issues of relatively sufficient importance to both proceedings, that would be the end of the inquiry and the motion should be dismissed. If there are such facts and legal issues, the proper exercise of discretion involves an assessment of the prejudice which may accrue to all parties on the granting or denial of the motion. To conduct such assessment the court should make some inquiries which might involve going beyond the pleadings. While this is not intended to be an exhaustive and comprehensive list, it would seem to me the following inquiries are integral to the proper exercise of discretion by the motions judge. See: Shah v. Bakken supra at paras. 14 and 15 where some of these factors are set forth.

(1) Will the order being sought have the effect of saving time in pre-trial procedures?
(2) Will there be a reduction in the number of days required to complete the trials if they are heard at the same time?
(3) What is the potential for a party to be seriously inconvenienced by having to attend a trial in which it may have only a marginal interest?
(4) Will there be a saving in experts' time and the costs of having experts attend at trial?

(5) At what point in the proceedings is the motion under Rule 6 being presented and how far advanced, relatively, are each of the proceedings?
(6) If an order is granted will this have the effect of delaying one of the proceedings and, if so, does any prejudice which a party may suffer as a result of the delay, outweigh the potential benefits of the proceedings being tried together?
(7) Given the existence of the commonality of facts and legal issues, how likely is it that one party might be prejudiced by the rendering of inconsistent and perverse verdicts should the proceedings not proceed to trial at the same time?
(8) What is the manner of trial selected in each of the proceedings?

25 In the two proceedings at issue here, a careful review of the pleadings will reveal there are some common factual questions and a common legal issue prevalent throughout. The counterclaim filed by J.B. Read in the action commenced by Abegweit raises the issue of the merchantable quality or marketability of the potatoes supplied by Abegweit. There is an allegation they were not of marketable quality when delivered for shipment or they were not properly prepared for the market to which they were destined by the application of a sprout inhibitor. Abegweit's defence to the counterclaim is that the potatoes were of marketable quality when delivered and absent a request by J.B. Read to have the sprout inhibitor applied, there was no duty upon Abegweit to apply the product. Alternatively, Abegweit alleges that if the potatoes were of unmarketable quality when they arrived in Puerto Rico, it was due to the negligence of the shipper in the manner in which it transported the potatoes or due to the negligence of J.B. Read in the manner in which it attended to the potatoes when they arrived in Puerto Rico.

26 In the action commenced against Maersk, J.B. Read alleges the potatoes were unmarketable because of a breach of the contract of carriage and/or Maersk 's negligence in the manner in which the potatoes were handled during carriage. In its defence Maersk alleges it did not breach the terms of the contract of carriage and it was not negligent in the carriage of the potatoes. Furthermore, it states that if the potatoes were not of marketable quality when they arrived in Puerto Rico, this was because they were inherently of poor quality when delivered by Abegweit or they were not properly handled by J.B. Read upon arrival.

27 The common legal issue is: what was the cause of the potatoes being unmarketable if in fact they were unmarketable? It is clear the evidence in relation to the common issue of causation could be the same for both proceedings. This is a particularly important concern with respect to the evidence of expert witnesses and the costs associated with securing the attendance of these experts. Because of the commonality of evidence, if both proceedings are heard in one consolidated proceeding or at the same time, there will be a saving in the number of trial days. It is also clear that if the two proceedings were to be consolidated or if they were to proceed to trial at the same time, there will be a saving in the number of pre-trial procedures including pre-trial conferences and oral discovery.

28 Abegweit and Maersk have more than a marginal interest in each of the proceedings. If either of them must attend trial during a time in which issues are being addressed in which they have no interest, each could be adequately compensated in costs for any prejudice they suffer as a result. The action commenced by Abegweit is slightly more advanced than the action commenced by J. B. Read against Maersk because of the fact oral discovery and the disclosure of documents have taken

place. If the two proceedings are consolidated or heard at the same time, the result may be some delay in getting the former action to trial and thus a possible delay in Abegweit securing judgment should it be successful. However, the payment of interest will adequately compensate it for any resulting prejudice. A motion under Rule 6 is to be brought as soon as possible and I can't attribute delay to J.B. Read in bringing the motion here.

29 In balancing the prejudices that might result to each party from a decision on the motion, the issue or the question which should have been addressed was not whether J.B. Read could lose both actions. The motions judge should have addressed his mind to the possibility of two triers of fact arriving at inconsistent verdicts given the commonality of facts and legal issues.

30 Prejudice may result to J.B. Read if the proceedings were heard separately and by a different trial judge because there is a possibility of inconsistent or perverse verdicts on the issue of whether the potatoes were marketable and if they were not, the cause of their being unmarketable. In the proceeding commenced by Abegweit, the court might find on the evidence that the cause of the unmarketability of the potatoes was the negligence of Maersk in the carriage of the product. In the action against Maersk a different trier of fact may find on the same or different evidence that the cause of the unmarketability of the potatoes was the negligence of Abegweit in failing to apply a sprout inhibitor. The result would leave J.B. Read with perverse or inconsistent verdicts each of which might be impervious to review on appeal.

31 J.B. Read could not be compensated for the resulting prejudice. The best insurance against this occurrence is to have the two proceedings heard at the same time before the same trial judge with the same evidence on the issues of commonality. In the result the trial judge may dismiss J.B. Read's counterclaim against Abegweit and its claim against Maersk by finding the potatoes were indeed marketable or if they were not, it was not the result of the negligence or breach of contract of either Abegweit or Maersk. The result would be reached, however, after these issues were tried together, before the same trier of fact and on the same evidence. The likelihood of a verdict, on the common issue of causation, in one proceeding being inconsistent with the verdict on the same issue in another proceeding is eliminated.

32 There are residual or peripheral issues which are not common to each proceeding. While these are not substantive in the context of the issue of causation, they do, nevertheless, militate against making an order for consolidation. Furthermore, the pleadings appear to be complete in each proceeding, and it would cause too much delay to order consolidation with the attendant need to redraft the pleadings.

33 Accordingly, I order that the two proceedings (No. S1-GS-18938 and No. S1-GS-19068) be heard at the same time before the same trial judge who shall give such directions as are necessary with respect to the examination of witnesses and adoption of evidence. I deny that part of the motion requesting that the discovery evidence and the documents produced in the action commenced by Abegweit be adopted in the proceeding commenced against Maersk who did not have the opportunity to appear and participate in that discovery.

34 Oral discovery will now have to be completed in each proceeding. Maersk may wish to examine a representative of Abegweit and Abegweit may in turn wish to examine a representative of Maersk. As the two proceedings have not been consolidated into one, the entitlement to these examinations are not as of right under Rule 31. See: Tusa v. Walsh, [1994] O.J. No. 48 (Ont. Sup. Ct.). If directions are necessary on this or any other matter, they would be more appropriately made

by the trial division in the management of the two proceedings. However, I would hope that if the parties are serious in wanting to expedite these two proceedings, they can agree on a process to complete the oral discoveries and the production of documents.

35 J.B. Read shall have its costs as one bill both on the motion and the appeal. I fix them at $1,500.00. They are payable forthwith and are to be contributed to equally by Abegweit and Maersk.

McQUAID J.A.
Concurred in by:
MITCHELL C.J.P.E.I.
WEBBER J.A.

cp/e/nc/qw/qltlc

Tab 4

Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF a Plan of compromise or arrangement of Air Canada and those subsidiaries listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended

[2003] O.J. No. 2207

173 O.A.C. 154

123 A.C.W.S. (3d) 426

Docket Nos. M29922 and M29923

Ontario Court of Appeal
Toronto, Ontario

Laskin J.A.

Heard: June 3, 2003.
Judgment: June 4, 2003.

(19 paras.)

Practice -- Appeals -- Leave to appeal -- Application for -- Hearing of appeal -- Expediting -- Consolidation of leave motion and appeal on the merits.

Motion by Global Payments to expedite its motion for leave to appeal, and to consolidate the hearing of the leave motion with its appeal from the dismissal of its application under the Companies' Creditors Arrangement Act regarding the insolvency of Air Canada. For a fee, Global provided immediate payment to Air Canada for services purchased by customers on certain credit cards. If the customers cancelled the services before final sale, Air Canada was obliged to return the

funds to Global. However, the judge below refused to provide Global security, under s. 11.3 of the Act, for continued payments to Air Canada during its insolvency. Air Canada agreed that the leave motion could be expedited, but argued that it should be dealt with separately from the appeal on the merits.

HELD: Motion allowed in part. The leave motion was to be expedited. However, if leave were granted, Global did not stand to be prejudiced if the leave and appeal motions were separately heard. Air Canada had reached advantageous agreements with its unions, and Global's exposure to chargebacks against Air Canada was decreasing because of decreased use of Air Canada services. Further, Global did not allege material risk because of the order below.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, ss. 11.3, 13.

Appeal From:

On appeal from the order of Justice James Farley of the Superior Court of Justice, dated May 7, 2003.

Counsel:

Frank J.C. Newbould, Michael J. MacNaughton and Tanya Kozak for the moving parties, Global Payments Direct Inc. and Global Payments Canada Inc.
Peter Howard, for the responding party, Air Canada.
Peter Osborne, for the responding party, Ernest and Young (Monitor).
Jeremy Dacks, for the responding party, GE Capital.

LASKIN J.A.:--

A. INTRODUCTION

1 The moving parties, Global Payments Direct Inc. and Global Payments Canada Inc. ("Global") seek to expedite and consolidate the hearing of their motion for leave to appeal and appeal (if leave is granted) from the order of Farley J. dated May 7, 2003 in the Companies' Creditors Arrangement Act ("CCAA") proceedings for Air Canada.

2 Global acts as an intermediary. For a fee, it pays Air Canada for future flights purchased by customers on Visa and MasterCard. At the beginning of April 2003, based on its admitted insolvency, Air Canada obtained relief from the Superior Court by an initial order under the CCAA.

Paragraph 11 of the initial order required Global to continue to make payments to Air Canada as it had in the past.

3 Global moved for an order under s. 11.3 of the CCAA, which, if granted, would have given it security for continuing to provide services to Air Canada. Farley J. dismissed the motion.[1]

4 Under s. 13 of the CCAA, Global can appeal a dismissal to this court, but only with leave. Our rules require leave motions to be in writing. If leave is granted, the appeal is then heard orally. Global, however, asks that the leave motion and the appeal be heard orally and as a single proceeding before the same panel and that the hearing be expedited.

5 Air Canada agrees that the leave motion be expedited but says that it should be dealt with separately from the appeal in accordance with this court's usual practice. The Monitor also urges the court to expedite Global's review of Farley J.'s order but takes no position on whether the leave motion and the appeal should be dealt with separately or at the same time. For the brief reasons that follow, I propose to expedite both the leave motion and, if leave is granted, the appeal. But the two proceedings shall be heard separately.

B. BACKGROUND FACTS

6 Global's risk of loss comes from exposure to what are called "chargebacks". Its arrangements with Visa, MasterCard and Air Canada work as follows: once a customer of Air Canada buys a ticket for future flight using a Visa or MasterCard, the customer's bank (or card issuer) debits the customer's account for the amount of the ticket. The bank then forwards the payment to Global and, in turn, Global forwards the payment (less agreed charges, including a fee) to Air Canada.

7 If Air Canada does not provide the purchased flight, the customer may request a refund or credit from its credit card issuer. If, as is likely, the credit card issuer agrees to the customer's request, it is entitled to chargeback the amount to Global. The amount of the chargeback is automatically debited to Global's account. Global is then entitled to recover that amount from Air Canada, which is obligated to pay it. If Air Canada were to fail, Global runs the risk of not recovering these chargebacks. In his affidavit sworn April 21, 2003, Mr. Kelly, the Chief Financial Officer of Global, estimated that the exposure for chargebacks was about $432,000,000. Global was an unsecured creditor for that amount at the date of the initial CCAA order.

8 Because of its continuing exposure to chargebacks, Global brought a motion before Farley J. seeking an order under s. 11.3 of the CCAA:

> 11.3 Effect of order -- No order made under section 11 shall have the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration

provided after the order is made; or

(b) requiring the further advance of money or credit.

9 It is not, of course, in Global's interest for Air Canada to stop flying. What Global wants is to continue to provide payment services to Air Canada but to do so with security for its chargeback exposures. That is evident from its alternative request for relief in its motion before Farley J.:

> (c) in the alternative to (b), an order directing Air Canada to provide reasonable protection to Global in respect of its post-filing financial exposure on terms to be agreed between Air Canada and Global, or failing such agreement, on terms established by the Court; and

An order under s. 11.3 would have given it that security. On its motion for leave to appeal, Global contends that in dismissing its motion Farley J. erred in his interpretation of s. 11.3. For the purpose of the motion before me I need not and do not express an opinion on the merits of Global's position.

C. DISCUSSION

10 Two issues arise on this motion. First, do I have jurisdiction to make the order sought by Global; and if so, second, should I make it?

(a) Jurisdiction

11 This court's practice in civil and criminal appeals differs. Where leave is a requirement in criminal appeals -- for example sentence and summary conviction appeals - the request for leave is heard together with the appeal itself as a single oral hearing. In civil appeals, however, the historical practice of this court, except in rare cases, has separated the leave motion from the appeal itself. Under the court's current civil rules the leave motion "shall" be in writing (Rule 61.03.1(1)) and, will be heard by a panel 36 days after the motion is perfected (Rule 61.03.1(2)). The panel either decides the motion or orders an oral hearing (Rule 61.03.1(14)). In practice, virtually every leave motion is dealt with in writing.

12 These rules for leave motions were designed primarily for appeals from the Divisional Court. However, they also apply to appeals to this court from orders of the Superior Court where leave is required. Thus, they apply to appeals from orders made under the CCAA. That this is so is made clear by s. 14 of the CCAA, which states "All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to ...".

13 What Global seeks is an exception not just to our usual practice in civil cases but to the requirements of the rules. Indeed the mandatory language of rule 61.03.1(1) might suggest that I have no jurisdiction to make the order Global seeks. I am satisfied, however, that I do have this jurisdiction. At a minimum I think that it can be found in rule 2.03 which states that "[t]he court may, only where and as necessary in the interests of justice, dispense with compliance with any rule

at any time".

(b) Should the order be made?

14 I begin here by saying that I think it appropriate to abridge the 36 day period for hearing the leave motion and to order that the hearing be expedited. I also think it appropriate to expedite the hearing of the appeal, if leave is granted. Apart from Global's concerns, I agree with the Monitor that certainty and stability in the CCAA proceedings warrant having both the leave motion and, if leave is granted, the appeal itself heard promptly.

15 Thus, the only contentious issue is whether I should go further and order that the leave motion and the appeal itself be heard orally as a single proceeding before the same panel. An order of this kind -- not given to other litigants -- would be exceptional and should rarely be made. I think it would be in the interests of justice to make it only if Global can demonstrate that it will be substantially prejudiced if the order is not made and that Air Canada would not be unfairly prejudiced if it is made. See, for example, Dragon v. Canada (Minister of Citizenship and Immigration), [2003] F.C.A. 139 per Rothstein J.A.

16 In my view the expediting orders I propose to make, which are not challenged by Air Canada, sufficiently protect Global's interests. For at least the following three reasons I am not satisfied that Global will be prejudiced if I do not consolidate the leave motion and the appeal itself:

(1) As a result of the labour negotiations this past weekend, Air Canada has reached agreement with the Unions for all of its employees. Although the agreement with the pilots' union has not been ratified by its members, the fact that it has been reached materially diminishes the risk of Air Canada failing, certainly in the short term. Labour peace will reduce Air Canada's current $5,000,000 daily loss. The Monitor's 6th report recognized the importance of labour peace to a successful restructuring of Air Canada. Paragraph 44 of the report states, "Labour cost reductions are critical to reducing the overall cost structure and to stabilize the situation and allow the Company to pursue the balance of its restructuring";

(2) Every time Air Canada flies a plane Global's chargeback exposure for tickets purchased for that flight on Visa or MasterCard is eliminated. Therefore, because of the decreased volume of Air Canada's business, Global's exposure to chargebacks is decreasing, not increasing;

(3) Global itself has not said that Farley J.'s order has materially increased its risk. Global is a public company trading on the New York Stock Exchange. It has an obligation to make timely disclosure of material changes. It has made no disclosure. Since the order of Farley J., it has not changed its reserves, issued a press release, or announced any material change to its risk of continuing to service Air Canada.

17 I therefore intend to follow the court's usual practice of keeping separate the leave motion and the appeal, and of having the leave motion heard in writing. The expediting orders I propose to make are all that are needed.

D. DISPOSITION

18 I make the following orders:

1. Global's motion for leave to appeal shall be expedited and heard in writing by a panel of this court, unless the panel orders otherwise. Counsel may speak to me this afternoon to fix a date for the hearing of the motion and for the filing of material;
2. If leave is granted, the hearing of the appeal shall be expedited. If a panel is available, the appeal shall be heard before the end of June;
3. I will case manage the proceedings and arrange for the necessary hearing dates; and
4. As agreed by counsel, whichever party is successful on the appeal shall be entitled to the costs of this motion. Neither the Monitor nor GE Capital are asking for costs.

19 I am grateful to counsel for their assistance on this motion.

LASKIN J.A.

cp/e/nc/qw/qlgkw

1 Except that he ordered Air Canada to provide reasonable protection to Global for certain fees and discounts payable.

Tab 5

Case Name:

Monteith v. Monteith

IN THE MATTER OF the Estate of George E. Monteith
Between
Robert George Monteith, Appellant, and
Donald Graham Monteith, Respondent

[2010] O.J. No. 346

2010 ONCA 78

2010 CarswellOnt 416

Docket: (C51050) M38244

Ontario Court of Appeal
Toronto, Ontario

J.C. MacPherson J.A.
(In Chambers)

Heard: January 16, 2010 by written submissions.
Judgment: January 20, 2010.

(23 paras.)

Civil litigation -- Civil procedure -- Appeals -- Time to appeal -- Extension of time -- Perfecting -- Motion by removed estate trustee for time extension to perfect appeal from order removing him allowed -- Trustee provided satisfactory explanation for the delay, as he had moved and did not receive notice of deadline to perfect -- Trustee had problems retaining counsel but proposed early perfection date after finding representation.

Motion by Robert Monteith for an extension of time to perfect his appeal from two orders made in estate proceedings. Pursuant to the orders dated August 11 and October 21, 2009, Robert was removed as trustee of the estate of George Monteith and ordered to pay costs of $35,000 to Donald Monteith, who was continued as the sole estate trustee. Robert's notice of appeal from the order removing him as trustee was filed on September 10, 2009. He was informed by the Registrar on

October 26 that his appeal would be dismissed for delay on November 17, 2009. Robert claimed he never received this letter because his mail was being forwarded to Montreal. The Registrar allowed Robert until November 27 to perfect his appeal or move for a time extension. He filed the within motion on November 25, having served Donald on November 23. His grounds for the motion included the fact he never received notice of the impending deadline for perfecting his appeal, his active but unsuccessful efforts to retain counsel, and his intention to perfect the appeal as soon as he was able to obtain proper representation. He subsequently found a lawyer and proposed to have the appeal perfected by February 19, 2010, more than one month from when his counsel was retained.

HELD: Motion allowed. Robert provided an adequate explanation for his failure to perfect the appeal by the initial deadline, and had taken appropriate steps to retain counsel. His suggested date for perfection of the appeal was reasonable. There was no evidence before the court about the merits of Robert's appeal. Because of the early date proposed for perfection, Robert's motion for a time extension was granted.

Motion to extend time to perfect the appeal.

Counsel:

J. Waldo Baerg, for the appellant/moving party.

Lisa N. Gunn, for the respondent/responding party.

The following judgment was delivered by

J.C. MacPHERSON J.A.:--

A. INTRODUCTION

1 The appellant/moving party Robert Monteith seeks an order granting an extension of time to February 19, 2010 to perfect his appeal from the orders of Tausendfreund J. dated August 11, 2009 and October 21, 2009.

B. FACTS

2 In a judgment dated August 11, 2009, Tausendfreund J. ordered the removal of Robert Monteith as an estate trustee of the estate of George Monteith and ordered the continuation of Donald Monteith as the sole estate trustee.

3 On September 10, 2009, the appellant filed a Notice of Appeal.

4 On October 21, 2009, Tausendfreund J. made a costs order of $35,000 in favour of the respondent. The appellant appealed that order as well.

5 On October 26, 2009, the registrar sent a notice of intent to dismiss for delay (NIDD) to the appellant, setting November 17, 2009, as the deadline to perfect his appeal. On November 18, 2009, when the appellant was informed of the perfection deadline in person, he informed the registrar that he did not receive the NIDD because his mail was being forwarded to Montreal. The registrar allowed the appellant until November 27, 2009, to either perfect his appeal or serve and file his motion to extend. At no time did the registrar actually dismiss the appeal for delay.

6 On November 25, 2009, the registrar received the appellant's notice of motion for an order granting an extension of time to perfect the appeal, dated November 20, 2009, and served on the respondent's counsel on November 23, 2009. Under the heading "Grounds for the Motion", the appellant explained and requested as follows:

> 1. Notice of the impending deadline of November 17, 2009, (dated October 26, 2009), was sent to the wrong address, and never received.
> 2. An active effort to retain counsel to perfect the Appeal has so far not been successful, and a vigorous search for legal assistance in this regard continues.
> 3. As 2 months of interviews has as yet proved fruitless, I request that no date for the deadline be assigned, as firstly counsel must be retained, then time spent on research and preparation of the documents to perfect the appeal.
> 4. As soon as counsel is retained, we will advise the Court, and propose a date for completion of perfecting the appeal.

7 On January 11, 2010, the appellant retained J. Waldo Baerg as his counsel and Mr. Baerg filed a Supplementary Notice of Motion requesting an order extending the time to perfect the appeal to a specific date, namely February 19, 2010.

C. ISSUE

8 The sole issue on the appeal is whether an order should be made extending the time to perfect the appeal to February 19, 2010.

D. ANALYSIS

(1) Preliminary point

9 The respondent submits that in his motion the appellant has not sought to set aside the registrar's order dismissing the appeal for delay. As the respondent asserts, "[u]nless this Order is set aside, the relief requested by the appellant is meaningless."

10 In fact, the registrar never dismissed the appeal for failure to perfect. In keeping with the

registrar's usual protocol, the registrar allowed some leeway for the appellant to perfect his appeal after the deadline on November 17, 2009, rather than dismiss the appeal as a matter of course. On November 18, 2009, the appellant informed the registrar that he did not receive their notice of the impending deadline. In light of this, the registrar allowed the appellant ten extra days to file his motion to extend. The appellant filed his motion ahead of the deadline.

(2) The merits

11 In my view, the test for extending the time for perfecting an appeal should be similar to the test for extending the time for filing a notice of appeal. In *Rizzi v. Mavros* (2007), 85 O.R. (3d) 401 (C.A.) at para. 16, Gillese J.A. listed five factors:

> (1) whether the ... appellant formed an intention to appeal within the relevant period;
> (2) the length of the delay and explanation for the delay;
> (3) any prejudice to the respondent;
> (4) the merits of the appeal; and
> (5) whether the "justice of the case" requires it.

12 The first of these factors is not relevant on this motion because the appellant filed his Notice of Appeal in a timely fashion. Accordingly, I will consider the other four factors from *Rizzi v. Mavros.*

(a) The length of delay and explanation for it

13 The appellant proposes a perfection date of February 19, 2010, which is slightly more than a month after he retained counsel and three months after the registrar put him on notice about his appeal. The reason for this delay, apparent form the record, and in particular from the appellant's original Notice of Motion prepared by himself, is that he was having difficulty retaining a lawyer. He has now succeeded on this front and his counsel has moved with dispatch and proposes, through the suggested perfection date of February 19, 2010, to continue to do so. In these circumstances, the delay in perfection will be relatively brief and the explanation for the delay strikes me as reasonable.

(b) Prejudice to the respondent

14 Delay in court proceedings always encompasses some prejudice. In this case, the settlement of an estate will be delayed. However, the respondent does not assert any specific prejudice if the motion is granted. The delay is brief.

(c) The merits of the appeal

15 The appellant has not provided any evidence or argument about the merits of the appeal.

16 In the original Notice of Appeal, prepared by the appellant himself, the following is found:

> THE GROUNDS OF APPEAL are as follows: No notice was received prior to the hearing by the appellant from either Gunn & Associates or Ledroit-Becket therefore impeding preparation of a suitable defence for this action.

17 However, the formal Judgement of Tausendfreund J. records, *inter alia*, "hearing the submissions of ... the self-represented Respondent".

18 In addition, I note that the appellant has not provided the reasons, if any, of Tausendfreund J.

19 This factor tells in favour of the respondent.

(d) The "justice of the case"

20 In a sense, this is an 'umbrella' factor, requiring the motion judge to step back, balance the preceding factors, and consider any other factor that might be relevant in the particular circumstances of the appeal.

21 In this case, the appellant was self-represented in the early stages of his appeal. He filed a timely Notice of Appeal. When he did not follow through and perfect his appeal in compliance with the rules and discovered that his appeal was in danger of being dismissed for delay, he moved quickly with this motion. Importantly, he has now retained counsel. This counsel has moved with dispatch; he did not seek an adjournment of the motion even though it was scheduled only four days after his retainer, he responded to it, and he proposes an early date, February 19, 2010, for perfection of the appeal. In these circumstances, the balancing of the factors and the "justice of the case" point towards a disposition that permits the appeal to be heard on the merits sometime this spring.

E. DISPOSITION

22 The motion is granted. The appellant is given to February 19, 2010 to perfect his appeal.

23 The appellant seeks his costs of the motion on the basis that the respondent unreasonably withheld his consent to a motion reasonably brought. I disagree. This is a close call. I have, in effect, granted the appellant an indulgence so that the appeal can be heard and determined on the merits. Accordingly, each party should bear its own costs.

J.C. MacPHERSON J.A.

cp/e/qlaim/qljxr/qlgpr

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c.C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION

Court File No.: M42404

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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