

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

	)	F. J. Trippier and
	)	I. Vakurova
	)	<i>for the Appellants</i>
	)	<i>(via teleconference)</i>
)	
LINCOLN WOLFE and 5606269 MANITOBA LTD.	)	R. A. McFadyen
	)	<i>for the Respondents</i>
	)	<i>(via teleconference)</i>
)	
<i>(Applicants) Respondents</i>	)	J. M. Lee, Q.C. and
	)	J. J. Burnell
<i>- and -</i>	)	<i>for Deloitte Restructuring</i>
	)	<i>Inc., the Court-Appointed</i>
DUANNE TAYLOR and 5608067 MANITOBA LTD.	)	<i>Liquidator for Taylor Bros.</i>
	)	<i>Farm Ltd. and Edwin</i>
	)	<i>Potato Growers Ltd.</i>
	)	<i>(via teleconference)</i>
<i>(Respondents) Appellants</i>)	
	)	T. W. Turner
<i>- and -</i>	)	<i>for Pitblado LLP, a</i>
	)	<i>judgment creditor of</i>
TAYLOR BROS. FARM LTD. and EDWIN POTATO GROWERS LTD.	)	<i>Taylor Bros. Farm Ltd. and</i>
	)	<i>Edwin Potato Growers Ltd.</i>
	)	<i>(via teleconference)</i>
)	
<i>(Respondents)</i>	)	<i>Chambers motion heard:</i>
	)	August 5, 2021
)	
	)	<i>Decision pronounced:</i>
	)	September 2, 2021

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, this motion was heard remotely by teleconference.

LEMAISTRE JA

Introduction

[1] Duanne Taylor and 5608067 Manitoba Ltd. (the appellants) have appealed the dismissal of their motion for leave to commence a claim in negligence and breach of fiduciary duty against the liquidator and the order for solicitor-client costs.

[2] Deloitte Restructuring Inc. (the liquidator) seeks an order for security for costs on the appellants' appeal in the amount of \$5,000. It also seeks an order requiring the appellants to pay the costs awarded against them by the motion judge before prosecuting the appeal. Finally, it seeks solicitor-client costs on the motion.

[3] For the reasons that follow, the motion for security for costs on the appeal is granted in the amount of \$5,000. The motion for an order to pay the costs awarded by the motion judge is dismissed.

Background

[4] The history of the parties and the background to the liquidation proceedings are set out in *Wolfe et al v Taylor et al*, 2020 MBCA 44. I will briefly summarize the relevant history.

[5] On April 28, 2017, the motion judge pronounced the liquidation order. The liquidation order appoints the liquidator and allows it to gather in and dispose of the assets, undertakings and property (the property) of Taylor Bros. Farm Ltd. (TBF) and Edwin Potato Growers Ltd. (EPG) under court supervision.

[6] The liquidation order protects the liquidator from liability as follows:

...

. . . [I]n addition to the rights and protections afforded the Liquidator under *The Corporations Act* [*The Corporations Act*, CCSM c C225] or as an officer of this Court, the Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any liability arising out of gross negligence or wilful misconduct on its part.

...

[7] The liquidation order also requires the written consent of the liquidator or leave of the Court to commence any court proceedings, and requires the liquidator to develop a liquidation plan.

[8] On November 21, 2017, the motion judge approved the liquidator's proposed liquidation plan and dismissed a motion brought by the appellants to remove the liquidator. The liquidation plan included a sales process to dispose of the property (the approved sales process).

[9] The appellants made offers to purchase two parcels of land belonging to TBF and EPG that formed part of the property being liquidated. However, their offer was a credit offer without the deposit required by the approved sales process. After notifying the appellants that their offer was non-compliant, and granting them two extensions to submit a compliant offer, the liquidator entered into two purchase agreements regarding the two parcels of land and moved for an order approving the sales.

[10] The appellants opposed the liquidator's motion and filed their own motion seeking to set aside the purchase agreements. They also sought orders

directing the liquidator to accept their purchase offers and to provide particulars of all offers received by the liquidator for the two parcels of land.

[11] On April 13, 2018, the motion judge approved the purchase agreements entered into by the liquidator and dismissed the appellants' motion.

[12] The purchase agreements closed in April 2018.

[13] On September 4, 2020, the appellants sought leave to commence an action in negligence and breach of fiduciary duty against the liquidator. The appellants asserted that the test for leave was whether there was some foundation for the claim and whether it was frivolous or vexatious. They argued that the liquidator improperly determined that their offer did not comply with the approved sales process; that, of the two parcels of land sold, one was sold at an unreasonably low value compared to the appraisal and the appellants' offer to purchase; that the liquidator should have disclosed the appraisals and the other offers; and that the liquidator was under no obligation to accept any particular bid and should have negotiated to obtain the highest value for the land.

[14] The liquidator argued that the issues raised in the proposed claim had been argued and decided by the motion judge. Therefore, the test for leave was whether there was a strong prima facie case of gross negligence or wilful misconduct. It also asserted that the proposed claim amounted to a collateral attack on the motion judge's order.

[15] On February 16, 2021, the motion judge dismissed the leave motion. In doing so, he relied on the liquidator's argument and gave brief oral reasons.

[16] The motion judge agreed with the liquidator that the test to be applied on the leave motion was whether the appellants had established a strong prima facie case establishing gross negligence or wilful misconduct. He concluded that the requirement of a deposit was reasonable and that the appellants' offer did not comply with this requirement. He also concluded that it was appropriate for the liquidator to refuse to disclose the details of the appraisals and the competing offers. The motion judge found that, because the appellants' offer did not comply with the approved sales process, it could not "serve as a benchmark" for fair market value of the land.

[17] The motion judge also found that the Court had approved the impugned sales process and the purchase agreements and, therefore, the issues raised by the appellants on the leave motion amounted to a collateral attack.

[18] Finally, the motion judge expressed concern that the motion for leave was frivolous and that the equity in the estate was being "chewed up" by these court proceedings. He awarded solicitor-client costs to the liquidator, in addition to fixed costs to the other parties.

[19] On June 24, 2021, the liquidator wrote to counsel for the appellants requesting payment of their costs in the amount of \$102,905.33 on or before June 30, 2021.

[20] These costs and approximately nine other sets of costs ordered against the appellants in these proceedings have not yet been paid.

Discussion

[21] Section 31 of *The Court of Appeal Act*, CCSM c C240 provides that “[a] judge of the court in chambers may, under special circumstances, make an order or orders for security for costs of any appeal.”

[22] In *Anneet Holdings Ltd v 79548 Manitoba Ltd et al*, 2003 MBCA 108, Hamilton JA summarized when an order for security for costs may be granted, as follows (at para 7):

The governing principle in an application for security for costs under s. 31 is that such an order must be “just” in the “particular circumstances of the case.” See *Moss (Bankrupt), Re* (2001), 160 Man.R. (2d) 80, 2001 MBCA 166, and *Harvard Investments Ltd. v. Canadian National Railway Co.* (2002), 170 Man.R. (2d) 10, 2002 MBCA 127. As noted by Scott C.J.M. in *Franck Estate v. Webster et al.* (1998), 129 Man.R. (2d) 87 (C.A.) (at para. 32): “An order for security for costs should only be granted where it is essential to do so, in the interests of justice, to provide defendants with some protection for their potential costs.” Scott C.J.M. was speaking about security for costs for trial but the words are equally applicable to such an application on an appeal.

[23] Factors relevant to whether an order for security for costs ought to be granted include the merits of the appeal having regard to the applicable standard of review, the conduct of the parties, the appellant’s financial circumstances and the likely recoverability of costs (see *The College of Pharmacists of Manitoba v Jorgenson*, 2020 MBCA 80 at paras 14-50). These factors must be considered holistically and “the judge or court must reach a conclusion that best accommodates the two competing *desiderata* of not precluding an appeal while at the same time not burdening the respondent with additional expense should the appeal fail” (see Donald JM Brown with the

assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2021) vol 1 (loose-leaf updated 2021, release 2), ch 8 at section 8:92).

Security for Costs on the Appeal

[24] In my view, it is just in the circumstances of this case to order the appellants to pay security for costs on the appeal.

[25] The appellants' core arguments on appeal are that the motion judge misdirected himself by applying the more stringent test (a strong prima facie case) rather than considering whether the action was frivolous or vexatious; that the liquidator's actions in concluding the purchase agreement were improvident; and that the award of solicitor-client costs was "unfair".

[26] The motion judge's decision in denying leave to commence a claim against the liquidator is discretionary and entitled to significant deference. His decision will not be interfered with on appeal unless he misdirected himself or the order is so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at paras 24-28; and see also *Wolfe* at para 30). Appellate courts will very rarely intervene in costs awards (see *Nash v Nash*, 2019 MBCA 31 at para 42).

[27] I am not convinced, on a preliminary examination, that the motion judge applied the wrong test in denying leave to commence a claim against the liquidator. As explained by Blair J in *Bank of America Canada v Willann Investments Ltd*, 1993 CarswellOnt 249 (Ct J (Gen Div)), "leave to commence proceedings against a court-appointed receiver will normally be granted, unless it is perfectly clear that there is no foundation for the claim or the action is frivolous or vexatious" (at para 7). However, where the activities of a

receiver have been approved by the court, appellants must establish a strong prima facie case before leave will be granted (see *1117387 Ontario Inc v National Trust Company*, 2010 ONCA 340 at paras 92-93).

[28] Ultimately, the appeal will be determined by a full panel of this Court. However, in my view, the merits of the appeal are dubious.

[29] The liquidator contends that the appellants have conducted themselves unreasonably by engaging in unnecessary litigation during the liquidation process; that at least ten sets of costs have been ordered against them during the liquidation proceedings; and that the appellants have failed to pay \$102,905.33 in costs ordered against them by the motion judge on the leave motion, despite the written request by the liquidator.

[30] I accept the appellants' submission that their intention has been to deal with outstanding costs prior to any final distribution of the liquidation estate and that they have not paid the costs in the Court below because they have appealed the order for costs. However, it is uncontroversial that the litigation in the liquidation proceedings has been extensive, lasting over more than six years, and I agree with the motion judge that it is depleting the liquidation estate.

[31] Furthermore, in my view, the liquidator has not conducted itself in a manner that would weigh against an order for security for costs.

[32] Despite the appellants' assertion that they are capable of paying an order for costs under the tariff that might arise, I agree with the liquidator that the evidence demonstrates their weak financial position. Having said that, the appellants do not dispute that the evidence provided by the liquidator supports

the contention that an order for security for costs in the amount sought by the liquidator would not stifle their appeal.

[33] In my view, the questionable merits of the appeal and the risk of the liquidator being unable to recover its costs if successful on appeal weigh in favour of granting the order for security for costs.

Costs Awarded by the Motion Judge

[34] While the jurisprudence suggests that there is jurisdiction to order payment of trial costs and that such an order is generally based on the same considerations as those for making an order for security for costs on the appeal, the case law also suggests that additional requirements should be established (see *Carpathia Credit Union Ltd v Kapelus*, 1995 CarswellMan 527 (CA); *Verth v Howrie*, 1995 ABCA 306; *Strata Plan 1229 v Trivantor Investments International Ltd*, 1996 CarswellBC 1178 (CA); *Carpathia Credit Union Ltd v Kapelus*, 1997 CarswellMan 623 (CA); *Ellis v Friedland*, 2001 ABCA 45; *Aikenhead v Jenkins*, 2002 BCCA 234; *Freyberg v Fletcher Challenge Oil and Gas Inc*, 2003 ABCA 208; and Brown ch 8 at section 8:106).

[35] At the end of the day, the primary consideration is the interests of justice.

[36] Despite having concluded that it is just to order security for costs for the appeal, I am not persuaded that the interests of justice warrant an order requiring the appellants to pay the solicitor-client costs awarded against them by the motion judge before prosecuting the appeal. Based on the material before me, it is unclear how the appellants would pay the costs ordered by the

motion judge before proceeding with the appeal. In my view, granting this order would preclude the appeal.

Conclusion

[37] In the result, the motion for security for costs on the appeal is granted. The appellants will post security for costs in the amount of \$5,000 within 30 days of the release of these reasons.

[38] The motion for an order to pay the costs awarded by the motion judge is dismissed.

[39] I have not been persuaded that an order for solicitor-client costs on the motion is warranted. Accordingly, there will be one set of costs to the liquidator in accordance with Tariff D.

leMaistre JA