500-09-027421-189

COURT OF APPEAL OF QUÉBEC

(Montreal)

On appeal from a judgment of the Superior Court, District of Montreal,
rendered on March 16, 2018 by the Honourable Justice Jean-François Michaud

No. 500-11-049737-154 S.C.M.

CALLIDUS CAPITAL CORPORATION

APPELLANT
(Contesting Party / Applicant)

-and-

INTERNATIONAL GAME TECHNOLOGY
DELOITTE S.E.N.C.R.L.
LUC CARIGNAN
FRANÇOIS VIGNEAULT
PHILIPPE MILLETTE
FRANÇIS PROULX
FRANÇOIS PELLETIER

APPELLANTS
(Contesting Parties / Applicants)

v.

9354-9186 QUÉBEC INC. (FORMERLY BLUBERI GAMING TECHNOLOGY)
9354-9178 QUÉBEC INC. (FORMERLY BLUBERI GROUP INC.)

RESPONDENTS
(Debtors / Applicants)

(style of cause continues on next page)

MEMORANDUM OF THE IMPLEADED PARTIES

IMF Bentham Limited and Bentham IMF Capital Limited

(Volume 1, pages 1 to 17)

-and-

ERNST & YOUNG INC.

(Monitor)

-and-

IMF BENTHAM LIMITED
BENTHAM IMF CAPITAL LIMITED

IMPLEADED PARTIES
(Litigation Funder / Impleaded parties)

-and-

SMT HAUTES TECHNOLOGIES

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(Impleaded party)

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9354-9178 Québec Inc.

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Memorandum of the Impleaded Parties, IMF Bentham Ltd. et al.

IMPLEADED PARTIES' ARGUMENT

PART I. FACTS

1. Impleaded Party Bentham IMF Capital Limited is the Canadian arm of IMF Bentham Limited (collectively, "**Bentham**"), one of the oldest and most experienced commercial litigation funders in the world. In its 16-year history, Bentham has funded 166 cases to completion, with a success rate of 90%. Those successful cases generated total recoveries of about $2.1 billion, of which claimants—including creditors in a number of insolvency-related matters—retained about $1.3 billion.

2. Bentham is the litigation funder pursuant to the Litigation Funding Agreement (the "**LFA**") with the Respondents 9354-9186 Québec Inc. and 9354-9178 Québec Inc. (collectively "**Bluberi**"), the purpose of which is to enable Bluberi to undertake legal proceedings against Callidus Capital Corporation ("**Callidus**").

3. The LFA was approved by the Superior Court for the reasons set out in the decision under appeal (the "**Judgment**").[1] In its capacity as litigation funder, Bentham is also a beneficiary of the Litigation Financing Charge (the "**LFC**") created by the Judgment.

4. In the present appeal, Bentham's submissions primarily concern issues relating to litigation funding and access to justice. Bentham refers to the facts set out in the Judgment, and to the statements of facts in the memoranda of Bluberi and of the Monitor.

PART II. QUESTIONS IN ISSUE

5. Callidus has framed the questions in issue as follows (emphasis added):

   a) *Is Callidus entitled to vote on the New Plan Sponsored by it?*

   b) *Does the CCAA Court have the power to authorize the LFA and to create the Litigation Financing Charge sought by Bluberi, without submitting these questions to the vote of the creditors of Bluberi through the implementation of a plan of arrangement?*

   c) *Are the terms of the LFA legal and can the CCAA Court approve the LFA, where Bluberi refuses to disclose to all of the stakeholders, including the creditors whose rights are directly and significantly affected by the Litigation Financing Charge, a complete and non-redacted version of the LFA?*

[1] Judgment dated March 16, 2018 reported at 2018 QCCS 1040 (CanLII), reproduced in the memorandum of the Appellant Callidus Capital Corporation (hereinafter the "**Callidus Memorandum**"), vol. 1, **pp. 31ff**

6. With respect to the first issue, Bentham is unaware of any legal rule that *entitles creditors, in all cases*, to vote in favour of plans of arrangement they have put forward. As for the circumstances under which it would be *appropriate* for a creditor to vote on its own plan, Bentham supports the position of Bluberi and the Monitor with respect to discretion of the judge at first instance, and the deference that should be afforded that discretion.

7. With respect to the second issue, Bentham is unaware of any legal rule that *requires* that a litigation funding agreement or a litigation funding charge be granted only in the context of a plan of arrangement, or be otherwise approved by creditors.[2] As for the circumstances under which it would be *appropriate* for the Superior Court to authorize a litigation funding agreement and create an interim financing charge to secure litigation funding provided to a CCAA debtor, Bentham supports the position of Bluberi and the Monitor with respect to the discretion of the judge at first instance, and the deference that should be afforded that discretion.

8. With respect to the third issue, namely whether the terms of the LFA are "legal", and whether the LFA can be approved without the creditors being provided with a complete and unredacted version of the LFA, Bentham notes that:

   a) the terms of the LFA are identical or virtually identical to litigation funding agreements approved by courts in other jurisdictions in Canada;

   b) the terms of the LFA were found by the Monitor and by the Superior Court, who reviewed the unredacted version, to be commercially reasonable; and

   c) it is accepted practice for particular terms of a litigation funding agreement to be kept confidential out of a concern that the defendant in the litigation will obtain an undue advantage, primarily by learning the details of the plaintiff's financial support that could have an effect on the plaintiff's willingness or ability to pursue the litigation, or otherwise affect the plaintiff's litigation strategy.

9. The ad hoc group of creditors who have appealed the Judgment (the "**Opposing Creditors**") have proposed questions in issue which are along the same lines.

[2] To the contrary, the decisions in *Re Crystallex* and *Strateco* stand for the opposite principle, *see infra*

PART III. ARGUMENT

A. Litigation funding in CCAA proceedings

10. The leading case on the issue of litigation funding in CCAA proceedings is *Re Crystallex*,[3] in which the Ontario Court of Appeal upheld an order of the CCAA judge that approved interim financing necessary for the prosecution of an arbitration claim that was the debtor's principal asset, and created a charge in favour of the interim lender.

11. *Re Crystallex* was applied by the Quebec Superior Court in *Strateco Resources*,[4] in which the court granted, over the objections of a creditor, an administrative charge of $2 million, $1.7 million of which was to guarantee legal fees for the prosecution of a claim against the government that constituted the debtor's principal asset.

12. The parallels to the present case are obvious. Bluberi's claim against Callidus (the "**Retained Claims**") constitutes its only asset, Callidus having acquired all other assets by way of its credit bid.[5] Therefore, contrary to what is asserted by the Opposing Creditors, it is not the Judgment that has "imposed a liquidation" or restructuring alternative without creditor approval.[6] The realization of the Retained Claims is the only remaining element of a liquidation that was well underway when the Judgment was granted—and that will be irrevocable unless the lawsuit against Callidus is successful.[7]

B. The supposed "litigation alternative"

13. Because it has no other assets, Bluberi requires funding in order to realize the full value of the Retained Claims. There was evidence before the court that *with adequate funding*, a claim against Callidus is of significant value. The most compelling evidence is Callidus's own behaviour: at each stage where it appeared that Bluberi was to obtain funding to prosecute the Retained Claims, Callidus made a substantial settlement offer in the form of a plan of arrangement whereby it would provide a settlement fund for Bluberi's creditors in exchange for a release from the Retained Claims.[8]

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[3] 2012 ONCA 404 (CanLII), conf. 2012 ONSC 2125 (CanLII); leave to appeal to the SCC refused: *Computershare Trust Company of Canada v. Crystallex International Corporation et al.*, 2012 CanLII 56139 (SCC)
[4] *Strateco Resources Inc./Ressources Strateco inc. (Arrangement relatif à)*, 2015 QCCS 4671 (CanLII)
[5] Judgment, paras 5-6, Callidus Memorandum **p. 33**
[6] See Memorandum of the Appellants, International Game Technology et al. (hereinafter the "**Opposing Creditors Memorandum**"), para 13, **p. 7**
[7] Judgment, paras 69 and 91, Callidus Memorandum **pp. 50 and 56**
[8] Judgment, paras 19, 22, and 43-44, Callidus Memorandum **pp. 35, 36 and 42**

14. There was also evidence before the court that *without adequate funding* the Retained Claims are of no value: the court found that Callidus had expressed no interest in settling the Retained Claims until the prospect of litigation funding was imminent.[9] Put differently, Callidus's offers of settlement, represented by the plans of arrangement it put forward, would not have been made without the investment of time and resources by Bluberi and Bentham to arrive at the LFA and LFC.

15. In light of the foregoing, the references in the Opposing Creditors' memorandum to the supposed "litigation alternative" are misleading. To settle the Retained Claims before proceedings are filed—which is the very essence of the plans of arrangement put forward by Callidus—is not an *alternative* to litigation, it is *a direct benefit of the supposed "litigation alternative" already underway*, of which the LFA and LFC are an integral part.

16. Bentham's only role is to provide Bluberi with the resources needed to pursue the Retained Claims, and it expresses no position with respect to what plan of arrangement, if any, the creditors should accept in the CCAA proceedings. However, it is inaccurate and misleading for the Opposing Creditors to assert that "the litigation alternative is not the only possible path to recovery by the creditors",[10] and to treat the settlement offers by Callidus as somehow representative of inherent value of Bluberi's estate that is being impaired by the LFA and LFC to the detriment of creditors, when it is only the efforts to secure litigation funding that have generated the prospect of any recovery whatsoever for the unsecured creditors. All of the assets other than the Retained Claims have already been acquired by Callidus, with no realization for unsecured creditors.

17. Consequently, it was not an error for the judge at first instance to have followed *Re Crystallex*[11] and *Strateco* on the grounds that he failed to apprehend that there was some viable alternative to liquidation and prosecution of the Retained Claims, as asserted by Callidus and the Opposing Creditors.[12] (Even if there was some viable alternative that the judge at first instance failed to apprehend, this would constitute an error of law rather than an error of fact, which would have to be palpable and overriding.)

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[9] Judgment, paras 43-44, Callidus Memorandum **p. 42**
[10] Opposing Creditors Memorandum, **p. 12**
[11] And presumably *Re Calpine Canada Energy Inc.*, 2007 ABQB 504 (CanLII), leave to appeal denied 2007 ABCA 266 (CanLII) and *Re Canadian Red Cross Society*, 1998 CanLII 14907 (ON SC), referred to in paras 53-55 thereof
[12] See Callidus Memorandum, para 85, **p. 24** and Opposing Creditors Memorandum, paras 24-26, **pp. 12-13**

18. Now that litigation funding has been obtained and Bluberi is finally in a position to pursue the Retained Claims, the present appeal constitutes an attempt by the defendant to abort the incipient lawsuit by annulling the litigation funding and compelling the plaintiff to accept the defendant's offer of settlement by imposing upon it a plan of arrangement—in respect of which the defendant intends to cast the deciding vote. Whatever else may be said of this proposal, it certainly does not further the principle of access to justice.

19. Callidus also argues that the effect of the Judgment would be to greatly compromise the possibility of creditors generally to file plans of arrangement pursuant to the CCAA,[13] which is a puzzling assertion considering that the exercise of the court's discretion was explicitly based upon the facts of this case. To the contrary, the effect of overturning the Judgment (and repudiating the decision of the Ontario Court of Appeal in *Re Crystallex*) —on the basis that the court *cannot, as a matter of law*, authorize a CCAA debtor to pursue claims without creditor approval, and that a defendant is *entitled, in all cases*, to vote upon the acceptance of its own settlement offer—would limit access to justice in not merely this case but other cases as well.

C. The principles of litigation funding in Canada

20. In light of inaccuracies in the arguments advanced by Callidus and the Opposing Creditors concerning the LFA and the jurisprudence relating to litigation funding agreements, a review of the principles of litigation funding in Canada is in order.

i. Litigation funding is permissible under Quebec law

21. There is no doubt that the Superior Court has the power to approve a litigation funding agreement. The historical objection to litigation funding in some common law jurisdictions was that such arrangements were impermissible for violating the prohibition against champerty. However, over a decade ago this court unanimously confirmed in *Montgrain c. Banque Nationale du Canada* that the common law doctrine of champerty does not apply in this province.[14]

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[13] Callidus Memorandum, para 32, **p. 9**

[14] 2006 QCCA 557 (CanLII); see particularly at paras 51 and 54-55, citing H. Patrick Glenn « L'écho double du champart : y a-t-il des traces en droit civil québécois? » dans Mélanges Jean Pineau, Montréal, Éd. Thémis, 2003, pp. 714-724

22. So far as Bentham is aware, until the Judgment, the only reported decision in Quebec since *Montgrain* to address the subject of commercial litigation funding was *Marcotte c. Banque de Montréal*, in which the court gave effect to a litigation funding agreement in a class action proceeding, noting that that while the practice was not yet widespread in Quebec it is on the increase in Canada.[15]

ii. The litigation funder would not unduly influence the litigation

23. The Opposing Creditors have advanced the argument that by virtue of the LFA, Bluberi's attorneys and Bentham are "in a position to take control of … the Debtors' last remaining assets".[16] However, the LFA specifically provides that the plaintiffs "will have the sole and exclusive right to direct the conduct of the Litigation and to Settle the Litigation," subject only to specific and limited restrictions.[17]

24. Callidus placed great emphasis at first instance on *Houle v. St. Jude Medical Inc.*,[18] in which the Ontario Superior Court declared that it would not approve the litigation funding agreement unless it was revised to limit the pre-approved portion of the contingency fee to the level of the Class Proceedings Fund, and to delete terms viewed by the court as limiting the plaintiffs' autonomy, including the funder's ability to withdraw from the proceedings. However, *Houle* is not binding on the trial judge, who noted that the decision reflects concerns particular to class proceedings, and is presently under appeal.

25. Moreover, the same court remarked in *Schenk v. Valeant Pharmaceuticals International Inc.*, which notably involved a single-party commercial action, that it was not unreasonable for a commercial funder to have "an opportunity to exit the agreement in the circumstances specified in the LFA."[19] The court also remarked that a funder recovery of approximately 50 percent was reasonable, as the case involved "a plaintiff of modest means seeking to pursue significant litigation against corporate defendants involving complicated subject matter and very significant damages being claimed."[20]

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[15] 2015 QCCS 1915 (CanLII), para 43
[16] Opposing Creditors Memorandum, para 23, **p. 12**
[17] See section 5 of exhibit P-3, Callidus Memorandum, **p. 874**
[18] 2017 ONSC 5129 (CanLII), including the termination provision at para 37
[19] 2015 ONSC 3215 (CanLII), para 23, cited at para 82 of the Judgment; see also para 11
[20] *Ibid* paras 8 and 17. Note that although found to be champertous due to the possibility that the funder's recovery could exceed fifty percent, a revised version of the agreement was approved by the court, see: *Schenck v. Valeant Pharmaceuticals International Inc.,* CV-15-10842-CLA (McEwen J., ON SC) July 2, 2015.

26. Similarly, in *Stanway v. Wyeth Canada Inc.,*[21] a class proceeding, the court held:

- *[18] First, in respect of fees and the lack of a commission cap, I find the LFA to be reasonable and fair. The commission outlined in the LFA appears to be consistent with commissions that have been approved in other cases. […]*
- *[19] I do not find that the independence of plaintiff's counsel is compromised by the termination clause set out in section 10 of the LFA relating to BridgePoint's ability to terminate the agreement following a decision to change counsel or otherwise alter the strategic course of litigation [...].*

27. In the present case, the concern that Bentham could exert undue influence over the litigation was adequately addressed in the Judgment by the judge at first instance:

- *[83] Taking into consideration the amount of time and money Bentham has invested so far and given its financial commitments towards the contemplated litigation, it is obvious that Bentham has no intention of terminating the LFA unless it perceives that it would not gain from it. The LFA, as a whole, will not allow Bentham to exert undue influence in the litigation. The Court concludes that the termination clauses, 10.1.5 and 10.1.6, are not overly broad or unreasonable and do not preclude the approval of the LFA.*

28. It also bears mentioning that the potential for undue influence by the litigation funder is vastly more remote than it was in *Re Crystallex*, in which the interim financing agreement provided that the lender would appoint two of five members of Crystallex's board of directors, with a third director being selected by agreement of Crystallex and the lender to sit as special managing director and chairman of the board.[22]

iii. Redactions of certain provisions of the LFA are appropriate

29. The judge at first instance also made no error with respect to the confidentiality of certain provisions of the LFA.[23]

30. In *Seedlings Life Science Ventures v. Pfizer Canada*,[24] the court denied the defendant's motion to be provided with an unredacted version of Bentham's litigation funding agreement with the plaintiff, which is functionally identical to the LFA in the present case.

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[21] 2014 BCSC 931 (CanLII)
[22] *Supra* note 3, para 24
[23] Judgment, paras 84-86, Callidus Memorandum, **pp. 55-56**
[24] Docket: T-608-17 (Tabib J., Fed. Ct.) July 17, 2017

31. The court held in *Seedlings* that portions relating to details of the funding commitment and timing variables could properly be withheld from the defendant. Otherwise, the defendant would get "a tactical advantage in how the litigation would be prosecuted or settled, [which is] the very essence of what the litigation privilege is designed to protect."[25]

iv. The court's supervisory role in determining whether a litigation funding agreement is fair and reasonable

32. Callidus argues in its memorandum that the judge at first instance "failed to consider the similarity between a group of plaintiffs represented by a class representative in the context of a class action and a debtor company seeking to commence legal proceedings in the context of a CCAA matter."[26]

33. Although the judge at first instance was correct to note that class proceedings and CCAA proceedings involve different considerations, it is worth noting that in *Dugal v. Manulife Financial Corporation*, the first reported decision in Canada approving a litigation funding agreement, the court confirmed that litigation funding agreements promote the goal of providing access to justice[27] and held that *it was appropriate for the court's approval to bind class members even before certification of the proceeding in light of the court's supervisory jurisdiction* (emphasis added):

> - *[17] While I recognize that the views of class members are important and deserve consideration in appropriate cases, a part of the court's responsibility in class actions is to protect the rights of prospective class members. One of the most important of those rights is the right to advance a class proceeding. To postpone the decision to post-certification, when the views of class members can be sought, could very well spell the end of this proceeding, because the plaintiffs cannot withstand an adverse costs award on certification. In my view, exercising the court's supervisory jurisdiction over the proceeding, I am entitled to put myself in the shoes of prospective class members and ask whether the proposed agreement is fair and reasonable. For the reasons that follow, I find it is. The fact that it is acceptable to a reasonably representative and informed group of prospective class members is by no means determinative, but it is an important factor I have considered in coming to this conclusion.*

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[25] *Ibid para* 4; See also *Stanway v. Wyeth Canada Inc.*, 2013 BCSC 1585 (CanLII) at para 43 and *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 278 (CanLII) at paras 10-11

[26] Callidus Memorandum, para 96, **p. 26**

[27] 2011 ONSC 1785 (CanLII), supplementary reasons at 2011 ONSC 3147 (CanLII), para 33

34. The very next reported Ontario decision relating to funding agreements, *Fehr v. Sun Life Assurance Company of Canada*, confirmed the holding in *Dugal*, adding that "the court's jurisdiction over the management and administration of proposed and certified class actions entails that a third party funding agreement must be promptly disclosed to the court and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice." [28] The court goes on to state (emphasis added):

- *[93] In this regard, it should be noted that class members are already protected from exposure to an adverse costs award. The third party funding agreement is of most immediate interest and concern to the proposed representative plaintiffs and Class Counsel, and the court has jurisdiction to make an order binding on them. Generally speaking, it would seem that class members would support approval for third party funding, when without the funding, there might be no class action and perhaps no other route to access to justice. I concede that class members would be affected by a third party funding agreement that adversely affected the ability of the representative plaintiffs to control and direct the class action, but that concern should be addressed as an aspect of the approval hearing. Putative class members are also concerned about the extent of the levy of the third party funder, which may be greater than the levy of the Class Proceedings Fund, but, once again, it would be for the court to determine whether the third party funding agreement is fair to the persons who would be bound by it. Thus, I do not see any reason that would justify postponing making a binding decision until after certification.*

35. Indeed, Bentham respectfully submits that, if anything, the judge at first instance relied too heavily on class proceeding jurisprudence from common law jurisdictions in expressing support for the principle that "the third party funding agreement must be necessary to provide a plaintiff access to justice."[29]

36. While Bentham wholeheartedly supports the principle of access to justice, and agrees that litigation funding is often essential to achieving that end, a plaintiff should not be required to establish that it would not be able to take proceedings but for a litigation funding agreement. On the contrary, any plaintiff should be able to consider litigation funding as an option for financing litigation.

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[28] 2012 ONSC 2715 (CanLII), para 89
[29] Judgment, para 74 a), Callidus Memorandum, **pp. 51-52**

37. On this subject, Bentham agrees with the finding in *Metzler Investment GMBH v. Gildan Activewear Inc.* that fact that the plaintiff "is not impecunious and may well have the means to pursue litigation" was no bar to a litigation funding agreement.[30]

38. In any event, the court found at first instance that Bluberi cannot pursue the Retained Claims without litigation funding, so any "economic necessity" requirement would be met in the present case.

PART IV. CONCLUSIONS

39. The appellants have sought to construe the decisions of the trial judge to approve the LFA and LFC as being vitiated by errors of law, but they have not identified any legal rule that would prevent the judge at first instance from reaching the conclusions in the Judgment.

40. Instead, the appellants have made a collateral attack on the exercise of discretion by the judge helming the CCAA proceedings—who is best-placed to weigh all of the competing considerations to arrive at the appropriate result in the circumstances—without citing any palpable and overriding errors that warrant the intervention of this court.

WHEREFORE, MAY IT PLEASE THE COURT:

DISMISS the appeal;

CONFIRM the judgment at first instance;

THE WHOLE with costs at first instance and on appeal.

Montreal, June 29, 2018

(s) Woods LLP

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Attorneys for the IMPLEADED PARTIES,
IMF Bentham Ltd. and
Bentham IMF Capital Ltd.

[30] 2009 CanLII 41540 (ON SC), para 67

PART V. AUTHORITIES

ATTORNEY'S CERTIFICATE

We, the undersigned, Woods LLP, do hereby certify that the above Impleaded Parties' Memorandum does comply with the requirements of the *Rules of Procedure of the Court of appeal* in civil matters.

Montreal, June 29, 2018

(s) Woods LLP

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