Case Name:

Calpine Canada Energy Ltd. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, Applicants

[2008] A.J. No. 965

2008 ABQB 537

46 C.B.R. (5th) 243

2008 CarswellAlta 1163

172 A.C.W.S. (3d) 589

Docket: 0501 17864

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

B.E.C. Romaine J.

August 28, 2008.

(15 paras.)

Civil litigation -- Civil procedure -- Costs -- Assessment or fixing of costs -- Considerations -- Particular circumstances -- Interlocutory proceedings -- Costs of $42,600 awarded to successful parties -- Two applicants had sought re-consideration and amendments of existing orders to allow

them to bid on assets despite contractual obligation not to do so -- Applications had been dismissed as being requests to allow applicants circumvent confidentiality agreement into which they had freely entered -- Two of the three successful parties received a costs award aimed at providing 40 to 50 per cent indemnity, and each received costs of $6,300 against each unsuccessful party -- Third party received costs of $15,000 against each unsuccessful party, as its indemnity costs were substantially higher.

Contracts -- Proceedings in contract -- Costs -- Considerations -- Costs of $42,600 awarded to successful parties -- Two applicants had sought re-consideration and amendments of existing orders to allow them to bid on assets despite contractual obligation not to do so -- Applications had been dismissed as being requests to allow applicants circumvent confidentiality agreement into which they had freely entered -- Two of the three successful parties received a costs award aimed at providing 40 to 50 per cent indemnity, and each received costs of $6,300 against each unsuccessful party -- Third party received costs of $15,000 against each unsuccessful party, as its indemnity costs were substantially higher.

Determination of costs against unsuccessful parties. The two applicants had sought re-consideration and amendments of existing orders that would have allowed them to bid on assets despite a contractual obligation not to do so. The applications had been dismissed as being requests to allow the applicants to circumvent a confidentiality agreement into which they had freely entered. The three successful parties submitted that since the Court had been able to dismiss the applications for lacking merit, the costs award should be made on a full indemnity basis.

HELD: Costs of $42,600 awarded to the successful parties. In proceedings under the Companies' Creditors Arrangement Act, costs were generally not awarded against unsuccessful parties. The policy reasons for the no-costs convention did not apply as the applicants had been sophisticated commercial entitles that entered into the Court voluntarily in an attempt to better their positions. Two of the three parties were to received a costs award aimed at providing 40 to 50 per cent indemnity, and each would received costs of $6,300 against each unsuccessful party. The third party would receive costs of $15,000 against each unsuccessful party, as its indemnity costs were substantially higher as they included the costs of other parties who had the right to seek indemnification for the costs.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36,

Rules of Court, Schedule C

Counsel:

Larry B. Robinson, Q.C., Sean F. Collins, Fred Myers, Jay A.

Carfagnini and Brian F. Empey: for the CCAA Applicants.

Patrick McCarthy, Q.C. and Josef A. Kruger: for the Monitor.

A. Robert Anderson, Q.C. and Michael O'Brien: for the Independent Trustees of Calpine Commercial Trust and the Directors of Calpine Power LP Ltd.

Peter T. Linder, Q.C. and Emi R. Bossio: for HCP Acquisition Inc.

Brian P. O'Leary, Q.C. and Patricia Quinton-Campbell: for Khanjee Holdings (U.S.) Inc., Khanjee Power Generations, LLC, WASP ENERGY, LLC. et al.

Anthony L. Friend, Q.C. and Scott D. Bower: for The Catalyst Capital Group Inc.

Reasons for Decision

1 **B.E.C. ROMAINE J.**:-- Often in proceedings under the *Companies' Creditors Arrangement Act*, costs are not awarded against unsuccessful parties. There are policy reasons for this convention: generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief. The applications brought by Khanjee Holdings (U.S.) Inc. and the Catalyst Capital Group Inc. that are the subject of this decision on costs are different from the usual type of CCAA application in that they were disappointed bidders or potential bidders on the purchase and sale of an asset of one of the Calpine applicants. Catalyst sought re-consideration of an existing order and Khanjee sought an amendment to an existing order that would allow it to bid on the asset despite its contractual obligation not to do so. The parties are sophisticated commercial entities that entered the fray voluntarily in an attempt to better their positions, with respect both to their ability to acquire the Class B Units and the Fund-related contracts of CLP and the take-over bid for the publicly-traded trust units of the Fund. The policy reasons that underlie the no-costs convention are thus not operative in this case, and there is no reason to depart from the general rule awarding costs to the successful parties, not as a punishment but as a recognition of the usual risks of litigation. Thus, there will be costs awarded, and the remaining issue is to whom and in what amount.

2 The successful parties submit that since the Court was able to dismiss the applications without calling on submissions from parties other than the applicants, and for reasons that made it clear that I found the applications lacking substantial merit, there should be a costs award compelling the applicants jointly or separately to pay costs on a full indemnity basis. Although the applications had

little chance of success for the reasons I expressed in my decisions, given the context in which they were brought, I cannot find that they were so improper or vexatious as to warrant an exceptional award of complete indemnity costs. While there was an allegation at least in the case of Khanjee of impropriety in the mere fact that the application was brought in the face of the confidentiality agreement to which it had bound itself, that issue will be addressed more fully in terms of party and party costs.

3 As I noted in my reasons dated February 8, 2007, the process of marketing the Class B Units and Fund-related contracts of CLP was abbreviated and rapidly evolving, largely due to the complication and timing of the take-over bid proceedings for the Fund's A Units. Given the objective of obtaining the best price for the Fund-related assets for the benefit of stakeholders in the CCAA process, I could not afford interested parties the luxury of a lengthy auction process. The situation was further complicated by the Settlement Agreement application and the holiday season, which made it difficult for interested parties to respond to unfolding events. Despite the best efforts of interested parties and the extremely rapid response of the Monitor to competing offers, stakeholders were often put in a difficult position with respect to evaluating information. As I said previously, the process was not pretty, the financial stakes were very high and conduct that in other circumstances may have given rise to penal costs must be viewed with greater tolerance.

4 Khanjee applied to set aside the January 30, 2007 approval of the bid by HCP Acquisition Inc. with a direction that the party that successfully acquired the Fund's Class A Units be required to purchase the B Units at the price fixed by the Court on January 30, 2007. Alternatively, Khanjee submitted that there should be a new auction process, and that it be permitted in that process to submit an offer to purchase the Fund-related assets. I held that Khanjee's application was essentially a request that I allow it to circumvent a confidentiality and standstill agreement into which it had freely entered, that I did not have jurisdiction over an unknown purchaser of the Fund's A Units so as to compel it to purchase the Fund-related assets, and that Khanjee had failed to raise any new material evidence that would justify a reconsideration of my previous decision.

5 Khanjee was a participant in the Fund's search for a white-knight in response to Harbinger's take-over bid for the A Units. As a condition to being allowed access to confidential information in connection with the potential acquisition of the Fund, Khanjee executed a confidentiality agreement that restricted it from being able to submit an offer for the Fund-Related Assets. Khanjee submits that its participation in the take-over bid process was predicated on the understanding that the Fund was able to control the sale of both the Class A Units and the Fund-Related Assets and it is critical about the information made available to the Monitor and the Court relating to the marketing process and the disclosure made available by the Fund. Khanjee suggests that the combination of the take-over bid process and the CCAA process had become a "quagmire for any interested, serious" bidders, and that this justified its last minute application.

6 While the details of the confidentiality and standstill agreements may not have been fully-disclosed in the information before the Court on January 30, 2007, the gist of the contractual

limitations and the negative effect they would have on the auction process was adequately described in the Monitor's reports. Khanjee's application added little by way of relevant information to the process. Participation in a public take-over bid for securities is indeed rife with strategic risk for an interested bidder, but that cannot justify the type of interference with contractual obligations unrelated to the Calpine applicants envisioned by the Khanjee application. These submissions do not justify relief from a costs award against Khanjee.

7 Catalyst's application requested that the January 30, 2007 approval of the bid by HCP Acquisition Inc. be set aside and that Catalyst be permitted to submit a written proposal for the acquisition of the Fund-Related Assets in a form that had been provided to the Monitor dated February 8, 2007. I held that the new proposal was not substantially different from that presented by counsel in oral submissions on January 30, 2007 and that it still suffered from serious contract termination risks. I also held that the application was an attempt to re-argue Catalyst's case. Catalyst submits in this costs application that it had not been able to make adequate representations in the first application about its operational expertise, which, it says, relates to whether it would have been unreasonable for the Fund to refuse its consent to the transfer of the Fund-related contracts. This was always a minor factor, as it was not the Fund's ability to withhold consent but the time it may have taken to resolve the issue through litigation that was of greater relevance to consideration of the competing offers.

8 Catalyst also complains that my reasons of February 8, 2007 were "for some reason" not provided to Catalyst or its counsel. Counsel of record for Catalyst at the time of the January 30, 2007 hearing was advised of the availability of these reasons at the same time as all other counsel. It is unfortunate that Catalyst's change of counsel may have led to a delay in new counsel receiving a copy of the decision.

9 Catalyst also suggests that it brought its application only upon becoming aware that Khanjee was bringing an application in any event. That, unfortunately, did not relieve opposing parties from having to address Catalyst's application separately.

10 Catalyst also suggests that its February 8, 2007 offer was different from what had been presented on January 30, 2007. While there were some differences, I found the new offer not be substantially different, particularly in the key area of contract transfer and termination risks. In short, these submissions do not justify relief from a costs award against Catalyst.

11 Three parties seek costs from Khanjee and Catalyst. There are the Calpine parties (which seek costs, including the full-indemnity costs of any person entitled to indemnity from them with respect to the reconsideration applications), the Independent Trustees of Calpine Commercial Trust and the Directors of Calpine Power L.P. Ltd. (the general partner of Calpine Power L.P.) and HCP Acquisition Inc.

12 With respect to the party and party costs of each of these claimants, I am satisfied that, given the accelerated and intense process necessitated by the reconsideration motions and the nature of the

litigation, Schedule C of the Rules of Court is inappropriate as a guide.

13 I also note that Khanjee and Catalyst did not act jointly, and that therefore joint and several cost awards are not appropriate in this case.

14 I have considered the estimated solicitor and client costs of each of the claimants, and have concluded that HCP Acquisition Inc. and the Trustees and Directors of the Fund and its general partner should receive the same level of reimbursement of costs, roughly commensurate with the principle that a costs award should aim at providing 40% to 50% indemnity: ***LSI Logic Corp. of Canada Inc. v. Logari***, [2001] A.J. No. 1751, 2001 ABQB 968 at para. 8. I therefore award each of these claimants costs in the amount of $6,300 against each of Khanjee and Catalyst, plus one half of their reasonable disbursements.

15 The indemnity costs claimed by the Calpine applicants are considerably higher than those claimed by the other two successful parties, and I note that they impliedly include the costs of other parties who have a right to seek indemnification from the Calpine applicants for the costs of appearing on this application. As pointed out by Catalyst, security instruments that may contain such types of indemnity provisions were not in evidence, but I take note that the costs of the Monitor and the Monitor's counsel are costs that must be borne by the creditors of the estates of the Calpine parties. I therefore award the Calpine applicants parties costs in the amount of $15,000 against each of Khanjee and Catalyst plus one half of their reasonable disbursements.

B.E.C. ROMAINE J.

---- End of Request ----
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