

COURT OF APPEAL FOR ONTARIO

DATE: 20190102  
DOCKET: M49873 (C66166)

Watt J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicants

and

Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondents

Melvyn L. Solmon and Rajiv Joshi, for the moving party Susglobal Energy  
Belleville Ltd.

Miranda Spence and Kyle Plunkett, for the responding party BDO Canada Ltd.  
(the Receiver)

Heard and released orally: December 10, 2018

ENDORSEMENT

[1] Before the motion judge the moving party sought to reopen a previous motion in which SusGlobal sought leave to sue the Receiver BDO for damages. The motion to reopen was so that the moving party could file fresh evidence in support of its motion for leave to sue the receiver.

[2] The motion judge was satisfied that SusGlobal had not met the test to introduce further evidence. Nothing in the reasons reveals any misapprehension

on the part of the motion judge about the test that an applicant must meet to introduce such evidence.

[3] It was not disputed that the core information contained in the report SusGlobal sought to introduce as fresh evidence was available prior to the original hearing. Its availability to and accessibility by SusGlobal is relevant to the due diligence criterion in the fresh evidence analysis.

[4] The motion judge then turned to the question of whether the proposed fresh evidence was such that, if adduced on the motion, it would probably have changed the result. The motion judge was satisfied for several reasons that the proposed fresh evidence would not have done so.

[5] At bottom, a determination whether to admit fresh or further evidence, whether on a motion to reopen at trial or on application or on appeal, is an exercise of judicial discretion. Absent an error of law or principle or a misapprehension of the evidence, the decision of the court of first instance is entitled to deference. This is not an issue that ascends the idiosyncratic facts of this case which would warrant leave to appeal under s. 193(e) of the *Bankruptcy and Insolvency Act*.

[6] The motion is dismissed. Costs on both motions of \$10,000 inclusive of disbursements and all applicable taxes payable by the moving parties to the receiver.

*David Scott N.*