Federal Court of Appeal | Cour d'appel fédérale

Date: 20110516

Dockets: A-472-09
A-473-09

Citation: 2011 FCA 166

CORAM : **LÉTOURNEAU J.A.**
PELLETIER J.A.
TRUDEL J.A.

A-472-09

BETWEEN:

CAISSE POPULAIRE DESJARDINS CHUTES MONTMORENCY

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

A-473-09

BETWEEN:

CAISSE POPULAIRE DESJARDINS DU BAS-RICHELIEU

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Québec, Quebec, on May 9, 2011.

Judgment delivered at Ottawa, Ontario, on May 16, 2011.

REASONS FOR JUDGMENT BY:	LÉTOURNEAU J.A.
CONCURRED IN BY:	PELLETIER J.A. TRUDEL J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal

[1] These are two appeals of a decision of Justice Martineau of the Federal Court (judge) in dockets T-1070-08 and T-1071-08. Although the amounts in dispute in each docket are different, the legal issue is the same. On grounds of prematurity, the appellants were refused the claim for payment they submitted to the Canada Small Business Financing Program (Program) for the losses they sustained when the loans they had granted to small businesses were not paid back at maturity.

[2] Claims for payment are authorized under and governed by the *Canada Small Business Financing Act*, S.C. 1998, c. 36 (Act), while some aspects of their administration are set out in the *Canada Small Business Financing Regulations*, SOR/99-141 (Regulations).

[3] Essentially, as stated by the respondent at paragraph 2 of his Memorandum of Fact and Law, [TRANSLATION] "the Program encourages financial institutions to lend to small businesses by covering some of their residual losses when their loans are not paid back at maturity, on the condition that these institutions minimize those losses by first realizing on any insurance policy under which the they are a beneficiary".

[4] The appellants submit that the judge erred in determining the appropriate standard of review for the Program authorities' decision.

[5] They are also attacking the interpretation given to paragraph 37(3)(*c*) of the Regulations. They state that the judge erred in law as regards the scope of this paragraph when he ruled that the Program authorities were correct in concluding that the paragraph applied to the blanket insurance policy with Desjardins Assurances Générales.

[6] More specifically, they allege that the judge erred in law in finding that the Regulations created a requirement to realize on any insurance policy before approaching the Program for payment of the lender's residual losses.

[7] The appellants also submit that the judge misdirected himself in giving precedence to the Act and the Regulations over one of the conditions of the blanket insurance contract which required that the insurer institute [TRANSLATION] "any other proceedings necessary to realize its guarantees in order to reduce any potential loss covered under this insurance contract": see clause 5.3*c*) of the blanket insurance contract, Appeal Book in docket A-427-09, at page 106 of Tab 13.

[8] Last, the appellants submit that the judge erred in confirming the Program authorities' decision that the claim for payment submitted to them was premature.

Relevant legislation

[9] I reproduce subsection 5(1) of the Act and subsection 38(1) and paragraphs 37(3)(*a*), (*b*) and (*c*) of the Regulations, in that order:

Liability of Minister	**Responsabilité du ministre**
5. (1) Subject to subsection (2), the Minister is liable to pay a lender any eligible loss, calculated in accordance with the regulations, sustained by it as a result of a loan in respect of which the requirements set out in this Act and the regulations have been satisfied.	**5.** (1) Sous réserve du paragraphe (2), le ministre est tenu d'indemniser les prêteurs de toute perte admissible — calculée conformément aux règlements — résultant d'un prêt conforme aux règles énoncées à la présente loi et à ses règlements.
CLAIMS PROCEDURE	PROCÉDURE À SUIVRE EN CAS DE RÉCLAMATION
38. (1) A lender must take all of the measures described in subsection 37(3) that are applicable before submitting a claim to the Minister for loss sustained as a result of a loan.	**38.** (1) Le prêteur doit prendre les mesures applicables prévues au paragraphe 37(3) avant de présenter au ministre une réclamation pour la perte occasionnée par un prêt.
PROCEDURE ON DEFAULT	PROCÉDURE EN CAS DE DÉFAUT
37. … (3) If the outstanding amount of the loan is not repaid within the period specified, the lender must take any of the following measures that will minimize the loss sustained by it in respect of the loan or that will maximize the amount recovered:	**37.** […] (3) Si le solde impayé du prêt n'est pas remboursé dans le délai précisé, le prêteur doit prendre celles des mesures suivantes qui réduiront au minimum la perte résultant du prêt ou permettront de recouvrer le montant maximal :
(*a*) collect the principal and interest outstanding on the loan;	*a*) le recouvrement du principal et des intérêts impayés du prêt;

(*b*) fully realize any security, guarantee or suretyship;	*b*) la réalisation intégrale de toute sûreté ou garantie ou de tout cautionnement;
(*c*) realize on any insurance policy under which the lender is the beneficiary; …	*c*) la réalisation des polices d'assurance dont le prêteur est le bénéficiaire; […]

Analysis of the judge's decision and the parties' submissions

[10] For reasons that will become apparent, there is no need for me to examine each of the grounds for appeal that have been raised. I will begin with the issue of the standard of review.

Standard of review applicable to the Program authorities' decision

[11] I concede that the terms used by the judge, and especially the sequence in which they are used at paragraphs 9 to 13 of his decision, require careful and repeated reading. That being said, he evidently determined that questions of interpretation of the Act and the Regulations are to be reviewed on a correctness standard.

[12] The parties are in agreement on this point. Therefore, they agree that determining whether the Program is a guarantee, as the appellants submit, involves a question of law. They also agree on the question of whether the Regulations do or do not have priority over clause 5.3*c*) of the blanket insurance contract: this is a question of law, also reviewable on a correctness standard.

[13] I note that clause 5.3(*c*) of the blanket insurance contract and paragraph 37(3)(*b*) of the Regulations both require that insureds realize their guarantees before they can submit a claim to the insurer and the Program. In colloquial terms, they are both trying to pass the buck: according to the insurer, insureds must first claim from the Program and, according to the Program, insureds must first submit the claim to their insurer for assessment. These two provisions, that is, clause 5.3(*c*) and subsection 37(3), give rise in this case, just as in *McGeough v. O'Donals Restaurant of Canada Ltd.*, 92 B.C.L.R. (2d) 288 (B.C.C.A.), where the issue was which insurance company had to pay first, to circular reasoning that here results in an impasse: both the Program and Desjardins Assurances Générales were of the opinion that the claim for payment they received was premature because it had to be submitted to the other party first!

[14] In light of my finding on the interpretation of subsection 37(3) and paragraphs 37(3)(*b*) and (*c*) of the Regulations, there is no need to dwell further on the standard of review.

Did the judge err in his interpretation of paragraph 37(3)(*c*) of the Regulations?

[15] Counsel for the appellants submits that the insurance policies benefiting the lender, referred to at paragraph 37(3)(*c*), are limited to either insurance covering the lender's personal liability on account of the loan, such as loan, life or disability insurance, or insurance protecting the hypothecated property, in the event of loss, for example.

[16] I do not believe that the language of paragraph 37(3)(*c*), considering its generality ("realize on any insurance policy") limits the application of the provision to these insurance contracts alone, although these contracts are the most obvious and the most frequent examples.

[17] However, I fully agree with counsel for the appellants that two essential conditions must be met in order for the paragraph to apply. First, the policy must be realizable, that is, that a loss covered by the insurance must have been sustained. Failure to meet either one of these two requirements means that it is not possible to realize on the policy. No one is bound to do the impossible. In addition, the policy must be for the lender's benefit.

[18] In the case at bar, the blanket insurance policy is for the benefit of the appellants in their capacity as lenders. This is a policy that covers the property against theft, embezzlement, fire damage, counterfeiting and forgery, and losses sustained by the insured as hypothecary creditor or creditor for loans granted to a business through instalment or conditional sales contracts or through sales contracts guaranteed by movable hypothec.

[19] It is not disputed that this blanket insurance policy was not entered into as part of the loan. However, I agree with the respondent that it is relevant in this case. As evidence of this, he points to the fact that the insured took steps to obtain this policy's protection and that Desjardins Assurances Générales did not reject the insured's claim, having merely considered it premature, as mentioned above.

[20] With respect, I do not think that the judge can be accused of having misunderstood this aspect of paragraph 37(3)(*c*) of the Regulations.

Is the Program a guarantee of repayment or a surety of the loans granted by the lenders?

[21] It seems to me beyond doubt that the Program is neither a guarantee nor a surety of the loan. This is amply shown by the fact that the Program does not provide for the reimbursement of the loan, but only for the partial compensation of the losses caused by the granting of the loan, with absolute ceilings on liability per part of the aggregate principal: see sections 6 to 9 of the Act.

[22] What is more, once the amount of the losses has been established, the Program requires that the lending financial institution mitigate its losses, which would not be the case if the Program were a guarantee of repayment of the loan. It would then have to assume all of the losses, which is incompatible with the minimization requirement imposed on lenders. To facilitate the fulfillment of this requirement to minimize losses, the provisions state that the Program must repay, in part only and subject to a ceiling, some of the costs incurred by the lending financial institution in collecting or attempting to collect the loan or in realizing on insurance: see subsection 38(7) of the Regulations. The Program's repayment of the collection costs incurred by the lender in proceedings against other guarantors makes no sense if the Program is itself a guarantor liable for the repayment of the loan.

[23] To conceive of the Program as a guarantee of the loan, as the appellants are demanding, would render paragraph 37(3)(*b*) of the Regulations void and nonsensical. In fact, this paragraph provides that the lender must realize any guarantee in its favour to minimize the losses resulting from the loan before it can benefit from the Program. This is a mandatory precondition for the Program to grant a claim for payment.

[24] Yet, if the Program were a guarantee of repayment of the loans, this would mean that although the Act and the Regulations require the lender, who is, after all, responsible for the loan, to minimize its losses, the Program becomes, in that respect, the first agent, even a preferred agent, of that minimization. However, it is clear that this was not the drafter's intention in adopting paragraph 37(3)(*b*).

[25] In short, although attractive at first glance, the appellant's submission does not stand up to an analysis attuned to the basis for, requirements of and purposes of the Act and the Regulations.

Does subsection 37(3) of the Act take precedence over clause 5.3*c*) of the blanket insurance contract?

[26] This question only arises if the Program is a guarantee. Given my finding, there is no need to answer it.

Did the judge err in confirming the Program authorities' conclusion that the appellants' claim submitted to the Program was premature?

[27] When he made his decision, the judge was satisfied on the evidence in the record that Desjardins Assurances Générales had not "formally notified the applicants of its refusal to pay them under the limited warranty clause in the blanket insurance policy": see paragraph 30 of his decision. At the hearing, counsel for the appellants acknowledged that their claim submitted to Desjardins Assurances Générales was still pending. With our decision that the Program is not a guarantor, there is nothing standing in the way of an assessment by Desjardins Assurances Générales on the merits of the appellant's claim. However, the claim submitted to the Program remains pending.

Conclusion

[28] For these reasons, I would dismiss the appeal in this docket and in docket A-473 with costs, limited, however, to a single set for the hearing. A copy of these reasons will be placed in docket A-473 in support of the formal judgment to be rendered.

[29] We thank both parties' counsel for the quality of their arguments.

"Gilles Létourneau"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Trudel J.A."

Certified true translation
Michael Palles

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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REASONS DATED:	May 16, 2011

APPEARANCES:

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