District of: Ontario
Division No.: 09 - Toronto
Court No.: 31-2547832
Estate No.: 31-2547832

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 3070 ELLESMERE DEVELOPMENTS INC.

BOOK OF AUTHORITIES OF 3070 ELLESMERE DEVELOPMENTS INC. (RETURNABLE SEPTEMBER 11, 2019)

September 10, 2019

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Larry Ellis LSO #: 49313K
Tel: 416.869.5406
Fax: 416.262.3543
lellis@casselsbrock.com

Erin Craddock LSO #: 62828J
Tel: 416.860.6480
Fax: 416.644.9324
ecraddock@casselsbrock.com

Lawyers for 3070 Ellesmere Developments Inc.

TABLE OF CONTENTS

Tab 1

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.h Miscellaneous
Headnote
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.
Table of Authorities
Cases considered by *Penny J.*:
Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed
CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered
Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — followed

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

Mustang GP Ltd., Re (2015), 2015 ONSC 6562, 2015 CarswellOnt 16398, 31 C.B.R. (6th) 130 (Ont. S.C.J.) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — followed

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4839, 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Sino-Forest Corp., Re (2012), 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 394, 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List]) — followed

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

W.C. Wood Corp., Re (2009), 2009 CarswellOnt 7113, 61 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 441] — considered

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

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137(2) — considered

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

Background

3 Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

4 Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

5 In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

6 As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

7 Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

8 Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

9 The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

10 On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

11 The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

12 The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

13 The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

14 Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

15 Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

16 Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

17 The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

18 The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

19 Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

20 The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]) at para. 7.

21 The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 22-26.

22 A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

23 In *Brainhunter Inc., Re*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

Brainhunter Inc., Re, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) at paras. 13-17); *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]) at para. 49.

24 While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 24; *Indalex Ltd., Re*, [2013] 1 S.C.R. 271 (S.C.C.) at paras. 50-51.

25 Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Mustang GP Ltd., Re*, 2015 CarswellOnt 16398 (Ont. S.C.J.) at paras. 37-38.

26 These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

27 The SISP is warranted at this time for a number of reasons.

28 First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

29 Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier's filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

30 Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

31 Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

32 There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

33 Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

34 Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

35 In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

36 The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

37 The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

38 The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

39 A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

40 Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

41 Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

42 Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Nortel Networks Corp., Re*, [2009] O.J. No. 4293 (Ont. S.C.J. [Commercial List]) at paras. 12 and 26; *W.C. Wood Corp., Re*, [2009] O.J. No. 4808 (Ont. S.C.J. [Commercial List]) at para. 3, where a 4% break fee was approved.

43 The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

52 Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

53 Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

54 A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

55 In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

56 Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

57 Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Colossus Minerals Inc., Re*, 2014 CarswellOnt 1517 (Ont. S.C.J.) at paras. 11-15.

58 This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

D&O Charge

59 The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

60 Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

61 Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

62 Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

63 The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

64 The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

65 In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

66 I approve the D&O Charge for the following reasons.

67 The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

68 The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

69 The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

70 The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

71 Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

72 Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

73 Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

74 Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

75 Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Nortel Networks Corp., Re supra.*

76 In *Grant Forest Products Inc., Re*, Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Grant Forest Products Inc., Re, [2009] O.J. No. 3344 (Ont. S.C.J. [Commercial List]) at paras. 8-22.

77 While *Grant Forest Products Inc., Re* involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

78 The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

79 There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

80 Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

81 In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 (S.C.C.) at para. 53.

82 In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Stelco Inc., Re*, [2006] O.J. No. 275 (Ont. S.C.J. [Commercial List]) at paras. 2-5; *Nortel Networks Corp., Re*, *supra*.

83 It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

84 The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP.

The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

85 The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

86 As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Order accordingly.

Tab 2

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — General principles
In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors

and officers whose participation in process was critical might not continue their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

Table of Authorities

Cases considered by *H.A. Rady J.*:

Brainhunter Inc., Re (2009), 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) — followed

Colossus Minerals Inc., Re (2014), 2014 ONSC 514, 2014 CarswellOnt 1517, 14 C.B.R. (6th) 261 (Ont. S.C.J.) — considered

Comstock Canada Ltd., Re (2013), 2013 ONSC 4756, 2013 CarswellOnt 9796, 4 C.B.R. (6th) 47, 25 C.L.R. (4th) 175 (Ont. S.C.J.) — considered

Electro Sonic Inc., Re (2014), 2014 ONSC 942, 2014 CarswellOnt 1568, 14 C.B.R. (6th) 256 (Ont. S.C.J. [Commercial List]) — considered

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, *(*sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — considered

Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH (2012), 2012 ONSC 175, 2012 CarswellOnt 2891 (Ont. S.C.J.) — considered

P.J. Wallbank Manufacturing Co., Re (2011), 2011 ONSC 7641, 2011 CarswellOnt 15300, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 13 — considered

s. 14 — considered

s. 15 — considered

s. 16 — considered

s. 17 — considered

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.6 [en. 2005, c. 47, s. 36] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(3) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2005, c. 47, s. 36] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2(1) [en. 2005, c. 47, s. 42] — considered

s. 64.2(2) [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — considered

s. 244(1) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 36 — considered
Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to
Rules considered:
Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

MOTION by debtors for approval of proposal.

***H.A. Rady J.*:**

Introduction

1 This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

2 As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

3 Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

4 The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

5 On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

6 The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

7 Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

8 In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

9 The plant employs twelve part and full time employees.

10 The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

12 The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

13 In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

14 On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. — 2478223 Ontario Limited — purchased and took an assignment of FCC's debt and security at a substantial discount.

15 Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

16 On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

17 On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

18 In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

19 StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

20 The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

21 StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

22 The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

23 Searches of the *PPSA* registry disclosed the following registrations:

(a) *Harvest Ontario Partners:*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

24 There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

25 The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting,

administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List]).

b) the DIP agreement and charge

26 S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

27 S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the debtor's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
>
> (e) the nature and value of the debtor's property
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):
>
> > The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
> >
> > . . .
> >
> > Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
> >
> > [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> > (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
> >
> > (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
> >
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

d) the D & O charge

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

35 I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

> 13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

38 It occurs to me that the Nortel Criteria are of assistance in circumstances such as this — namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

39 In *Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH*, 2012 ONSC 175 (Ont. S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

40 I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships.

The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

41 It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

42 For these reasons, the relief sought is granted.

Motion granted.

Tab 3

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XX Miscellaneous
Headnote
Bankruptcy and insolvency --- Miscellaneous
Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(1) [en. 1992, c. 27, s. 19] — considered

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9) [en. 1992, c. 27, s. 19] — referred to

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

s. 64.1 [en. 2005, c. 47, s. 42] — considered

s. 64.2 [en. 2005, c. 47, s. 42] — considered

s. 65.13 [en. 2005, c. 47, s. 44] — referred to

s. 65.13(1) [en. 2005, c. 47, s. 44] — considered

s. 65.13(4) [en. 2005, c. 47, s. 44] — considered

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

Generally — referred to

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

Tab 4

2005 CarswellOnt 3304
Ontario Superior Court of Justice

Atsana Semiconductor Corp., Re

2005 CarswellOnt 3304, [2005] O.J. No. 3242, 141 A.C.W.S. (3d) 10, 14 C.B.R. (5th) 1

In the Matter of the Proposal of Atsana Semiconductor Corp.

Aitken J.

Judgment: July 27, 2005
Docket: 33-159292

Counsel: Michael S. Hebert for Creditor, 1019883 Ontario Inc.
Leigh Ann Kirby for Atsana Semiconductor Corp.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Interim receiver — Appointment
On July 20, 2005, bankrupt filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act ("BIA") — Bankrupt was attempting to sell its assets, main one of which was its intellectual property — Bankrupt was tenant of commercial premises — Landlord moved under s. 47.1 of BIA for appointment of interim receiver to monitor sale negotiations — Application dismissed — There was no evidence that proposed sale would involve dissipation of bankrupt's assets — Suspicion and speculation were inadequate reasons to justify granting of extraordinary remedy such as appointment of interim receiver — Appointment of receiver would be largely redundant and therefore would entail unnecessary expense — Proposal trustee would maintain close eye on management of bankrupt's assets and on any proposed sale of those assets — Bankruptcy procedure has sufficient safeguards to protect interests of creditors — Efforts of landlord's principals to obtain information about proposed sale from bankrupt's employees, when bankrupt's principals and corporate lawyer had already refused to provide that information, meant that landlord did not come to court with clean hands in seeking equitable relief.
Table of Authorities
Cases considered by *Aitken J.*:
Royal Bank v. Zutphen Brothers Construction Ltd. (1993), 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) — considered
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] — pursuant to

s. 47.1(1) [en. 1992, c. 27, s. 16(1)] — considered

s. 47.1(3) [en. 1992, c. 27, s. 16(1)] — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to
Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
Generally — referred to

APPLICATION by creditor for appointment of interim receiver under. s. 47.1 of *Bankruptcy and Insolvency Act*.

***Aitken J.*:**

Nature of Proceeding

1 On July 20, 2005, Atsana Semiconductor Corp. ("Atsana") filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.-3, as amended ("the BIA"). The Applicant, 1019883 Ontario Inc. is a creditor of Atsana. The Applicant brings a motion under s. 47.1 of the BIA for an order:

1. abridging the time for service of the motion;

2. appointing KPMG Inc. as interim receiver of all of Atsana's property with power to review all contracts, correspondence, memoranda, agreements or any other documentation under the terms of which any of the intellectual property of Atsana is being sold or is contemplated to be sold;

3. requiring the receiver to disclose to the creditors all details of negotiations, marketing, and sale attempts of the said intellectual property including any appraisals or opinions as to the value thereof, as well as any documentation in Atsana's possession with respect to evaluations or appraisals of the said intellectual property;

4. restraining the interim receiver from entering any agreement in respect of the intellectual property of Atsana until full disclosure to the creditor of the information set out in subparagraph 3 above;

5. granting costs on a substantial indemnity basis.

2 There is no dispute that Atsana is in the process of trying to sell its assets and is actively engaged in serious negotiations with a prospective purchaser. The name of the purchaser, the terms of the proposed agreement of purchase and sale, and the concrete steps that Atsana has taken to market its assets and to ensure that the transaction being contemplated is as favourable to Atsana's creditors as can reasonably be expected, considering market conditions, have not been disclosed to the Applicant with any degree of specificity.

3 Atsana opposes the Applicant's motion on the grounds that (1) the appointment of an interim receiver would be redundant in that KMPG has already been identified as the proposal trustee in Atsana's Notice of Intention; (2) there are existing safeguards under the BIA following the filing of a Notice of Intention to Make a Proposal to adequately protect the Applicant and other creditors; (3) the disclosure of more specific information about the potential sale transaction to the Applicant or other creditors at this time could irreparably hurt the integrity of the sale negotiations to the detriment of Atsana and its creditors; and (4) the Applicant is not coming to court with clean hands and should therefore not be granted equitable relief.

Facts

4 Atsana is insolvent. It is attempting to sell its assets, the main one being its intellectual property. A letter of offer has been negotiated by Atsana and a potential purchaser. The terms of the proposed deal are comprehensive. The purchaser is a *bona fide*, arm's length, third party. The purchase would be of Atsana's assets and undertaking as a going concern. It is anticipated that if the sale proceeds as proposed, there might be continued employment of up to 25 employees and the sale proceeds would be used to replace the assets for the sole purpose of funding the proposal to Atsana's creditors. Prior to the letter of offer being negotiated, Atsana, with the assistance of its corporate lawyer, had been exploring various commercial options including mergers, dispositions of various assets and business undertakings as well as additional debt financings and equity investments from both existing and fresh investors.

5 The Applicant is Atsana's landlord, and the creditor with the largest potential claim. As of the date of filing of the materials relating to this motion, all on-going payments under Atsana's lease had been paid. Nevertheless, the filing of the Notice of Intention may be considered a default under the lease, and if that were the case, and the payments under the lease were accelerated, the amount owing to the Applicant could be in the range of $3.5 million. The total outstanding debts of Atsana estimated in its Statement of Affairs under the BIA is $5.6 million.

6 In its motion materials, the Applicant's expressed concern is that, if there is no receiver or trustee appointed to take possession of Atsana's property, Atsana may dispose of or attempt to dispose of its only asset, being its intellectual property, on terms or at a price that would not be the most advantageous for all of the creditors. As well, it is uncontroverted that the Applicant expressed to Atsana its interest in making its own offer to purchase the assets of Atsana, though no such offer has been submitted at this point. I consider this fact important in regard to the potential motivation of the Applicant in bringing this motion.

7 The sale of Atsana's assets to the proposed purchaser will require the support of the proposal trustee and the approval of the court under the BIA. Any assets to be transferred as a result of the proposed transaction would be conveyed by a vesting order of the court. When that approval is sought, creditors will have the opportunity of challenging whether the proposed sale is commercially reasonable.

8 Prior to any litigation commencing, and prior to Atsana filing its Notice of Intention, representatives of the Applicant met with representatives of Atsana, including its corporate lawyer, to discuss Atsana's financial circumstances. The communications that took place at that meeting were intended to be on a without prejudice basis, and therefore privileged. During the course of this meeting, certain information was provided to the Applicant by Atsana concerning the proposed sale in question. The Applicant sought more information from Atsana concerning the proposed sale; Atsana's representatives refused to provide further details, one reason being that the letter of offer imposed a confidentiality obligation on Atsana. Some of the information provided by Atsana to the Applicant at the time of that meeting found its way into the Applicant's motion materials.

9 Following this meeting, representatives of the Applicant went to Atsana's offices and spoke to various employees in the absence of the Atsana officer who had been in attendance at the meeting. The Applicant's representatives lead the Atsana employees to understand that Atsana had offered to sell its assets to the Applicant's principal. The Applicant's representatives then made inquiries to obtain further details regarding the proposed sale of Atsana's assets. The Applicant's representatives did not advise the Atsana employees that they had already been denied access to this information by Atsana's principals. More will be said of this later.

10 On July 19, 2005, the Applicant commenced an action under the *Bulk Sales Act*, R.S. O. 1990, c. B. 14 and under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 setting aside any bulk sale of Atsana's assets and seeking the appointment of a receiver. Within that action, the Applicant scheduled a motion for today's date, seeking virtually the same relief as is being sought today under the BIA. In the affidavit filed in support of the motion are statements attributed to an unnamed "representative of Atsana" in regard to the amount of Atsana's outstanding debts, the nature of Atsana's assets and the amount of money to be received by Atsana were a sale of its assets to occur to the proposed purchaser.

11 In response to this action on behalf of the Applicant, and in consultation with the prospective purchaser, Atsana filed the Notice of Intention to Make a Proposal. Upon this filing, the Applicant's earlier action and motion under the *Bulk Sales Act* were stayed. The Applicant then brought this motion under s. 47.1 of the BIA.

12 Counsel for Atsana has spoken to other stakeholders in this insolvency situation, namely secured creditors, including the Royal Bank of Canada, employees and selected trade creditors and investors. No other creditor has expressed a concern to Atsana about the proposed sale of its assets. No other creditor has joined in the Applicant's motion to seek the appointment of an interim receiver. Those other stakeholders canvassed have agreed with Atsana that the vesting order procedure provides sufficient protection of their respective interests and the appointment of an interim receiver is an unnecessary and costly exercise.

Analysis

Abridged Time for Service

13 No adequate reason was provided as to why the Notice of Motion herein was served only on Monday of this week for a Wednesday hearing. Nor was any adequate reason provided as to why Atsana's lawyers, Fraser Milner Casgrain LLP, were never provided with a copy of the Notice of Motion and were only provided with a copy of the Factum and Book of Authorities on Tuesday afternoon. Atsana's lawyers had previously contacted the Applicant's lawyers to ask when they could expect to receive service of the Applicant's materials. I do not accept the argument of the Applicant's lawyer that, because Atsana's lawyer did not specifically state in the e-mail that Fraser Milner Casgrain had authority to accept service on behalf of Atsana, there was no reason for the Applicant's lawyer to send a copy of the Applicant's materials to that firm. I consider the lack of reasonable response to the e-mail from Fraser Milner Casgrain to be discourteous and unprofessional.

14 That being said, Atsana's lawyers did receive a copy of the motion materials from their own client and a copy of the Factum from the Applicant's lawyers. Atsana's lawyers were able to prepare responding materials overnight and provide a copy to the Applicant's lawyers and to the Court this morning. Atsana's counsel was prepared to argue the motion, and therefore an order is made abridging the time for service of the motion materials by the Applicant, subject to my comments below on costs.

Merits of Motion

15 Section 47.1(1) of the BIA states:

> 47.1(1) **Appointment of interim receiver -** Where a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time thereafter, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property, for such term as the court may determine,
>
> (a) the trustee under the notice of intention or proposal;
>
> (b) another trustee; or
>
> (c) the trustee under the notice of intention or proposal and another trustee jointly.
>
> . . . . .
>
> **(3) When appointment may be made -** An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of
>
> (a) the debtor's estate; or
>
> (b) the interests of one or more creditors, or of the creditors generally.

16 In *Royal Bank v. Zutphen Brothers Construction Ltd.* (1993), 17 C.B.R. (3d) 314 (N.S. S.C.), Registrar Smith stated in regard to an application under s. 47.1 of the BIA, as it then was:

> [Section 47(3)(b) — now s. 47.1(3)(b)] is extremely important and places the onus on the applicant to establish, by a preponderance of evidence, that the appointment of an interim receiver is necessary for the protection of "the interests of the creditor who sent the notice under subsection 244(1)".
>
> It is well established law, that in order to support an application for the appointment of an interim receiver, the danger of dissipation of assets must be actual and immediate and not one based on suspicion and speculation.

17 The Applicant's lawyer argues that the mere fact of the proposed sale of Atsana's assets to a potential purchaser, the details of which proposed transaction have not been shared with the Applicant, creates the danger of an actual and immediate dissipation of assets. I do not agree.

18 The word "dissipate" implies something more than a sale. In regard to money or property, "dissipate" means to squander, fritter away or waste. [1] It implies that after the dissipating event, there will be less available than there was before; in other words, there will not be a transfer of one form of value for another of equal worth — there will be a reduction in value at the end of the day. There is no evidence before me that the proposed sale will involve a dissipation of Atsana's assets.

19 The evidence in the affidavits of Douglas Quinn, to the extent that it speaks to the money that Atsana will receive in the proposed asset sale, is not evidence of dissipation. First, the evidence came from an unidentified third party and it was not stated to be on information and belief. Secondly, the evidence regarding the money to be received was not related to any evidence regarding the value of the assets in question or to any evidence regarding other consideration Atsana may receive in return for the value of the assets. Standing alone, the evidence as to the money Atsana may receive pursuant to the sale of its assets, and its potential liabilities in a bankruptcy, is inadequate evidence to support a finding of an actual and immediate danger of dissipation of assets. At the most what is referred to in the affidavit evidence of Mr. Quinn is his suspicion regarding what may be happening and his speculation as to why the directors of Atsana may want to pursue the transaction in question. As has been noted above, suspicion and speculation are inadequate reasons to justify the granting of an extraordinary remedy such as the appointment of an interim receiver.

20 There are other reasons why the appointment of an interim receiver must fail. First, such an appointment, in the present circumstances, would be largely redundant and therefore would entail an unnecessary expense. There is already a proposal trustee who will be maintaining a close eye on the management of Atsana's assets and on any proposed sale of those assets.

21 No sale shall occur without the support of the proposal trustee and the approval of the court. Creditors will have the opportunity to challenge any proposed sale that would be prejudicial to their interests.

22 It would not be beneficial to Atsana's creditors if money were diverted to fund the appointment of an interim receiver, when one is not necessary to protect the creditors' valid interests.

23 Finally, the appointment of an interim receiver is a form of equitable relief. The Applicant should come to court with clean hands when seeking this relief. The late service of the motion materials, the lack of cooperation to provide a copy of those materials to Atsana's counsel, and most importantly the sneaky efforts of the Applicants' principals to obtain information about the proposed sale from Atsana's employees, when its principals and the corporate lawyer had already refused to provide that information, means that I cannot conclude that the Applicant is coming to court with clean hands. What also concerns me is the undenied fact that the Applicant has indicated to Atsana that it might be interested in making its own offer to purchase Atsana's assets or undertaking. Consequently, the Applicant might be a competitor to the purchaser in the proposed transaction. This naturally brings into question whether there was more than one motive at play when the Applicant brought its motion seeking to get more information as to the nature of the proposed sale transaction. I must keep in mind that the goal of the court should be to fairly protect the rights of all creditors, and not to do anything that places the interests of one creditor ahead of those of the others.

24 For these reasons, the Applicant's motion is denied.

Costs

25 I see no reason why costs should not follow the event, especially in circumstances where there was short service and discourteous conduct by one counsel to another.

26 Atsana shall have its costs on the motion fixed in the amount of $3,500 and payable forthwith.

Non-publication Order

27 In an affidavit of Douglas Quinn filed on this motion, and in submissions made in court, reference was made to a dollar amount that might be payable to Atsana under the proposed sale that was the subject of this motion. At this time Atsana and the prospective purchaser are still in negotiations to conclude an agreement of purchase and sale. Those negotiations are intended

to be confidential. It is important that information that was intended to be kept confidential between the parties negotiating a potential agreement not be publicized because that could lead to the breakdown of negotiations and the withdrawal of any prospective offer. As well, the publication of such confidential information could give other potential purchasers an upper hand in entering negotiations with Atsana or in making their own offers. That would not be in the best interests of the creditors as a whole, nor would it be in the best interest of the other stakeholders.

28 This is an especially important point in the circumstances of this case where the evidence regarding the dollar amount possibly payable to Atsana was offered in a vacuum, without accompanying evidence regarding other relevant facts that would have placed the evidence of a dollar mount in some meaningful context. As well, it was hearsay evidence, without Mr. Quinn identifying the source of the information or his belief that it was accurate.

29 No one, including the media, shall publicize the dollar amount allegedly to be paid to Atsana under the proposed sale, as set out in Mr. Quinn's affidavit filed in these proceedings.

Application dismissed.

Footnotes

1 See Barber, Katherine ed. *The Canadian Oxford Dictionary* (Toronto: Oxford University Press, 1998); *Words and Phrases* Vol 3 (Toronto: Carwsell, 1993) p. 3-450.

Tab 5

2013 NSSC 381
Nova Scotia Supreme Court

Trez Capital Corp. v. UC Investments Inc.

2013 CarswellNS 915, 2013 NSSC 381, 1067 A.P.R. 339, 235
A.C.W.S. (3d) 601, 337 N.S.R. (2d) 339, 7 C.B.R. (6th) 216

Trez Capital Corporation, Trez Capital Limited Partnership, TCC Mortgage Holdings inc., Computershare Trust Company of Canada and WBLI, Inc. Applicants v. UC Investments Inc., Edge Marketing Inc., 3214113 Nova Scotia Limited and PricewaterhouseCoopers Inc. Respondents

Arthur W.D. Pickup J.

Heard: November 20, 2013
Judgment: November 29, 2013
Docket: Hfx. 421567

Counsel: Jeffrey R. Hunt, Joel Henderson for Applicants
Robert G. MacKeigan, Q.C., Sheree L. Conlon for UC Investments Inc., Edge Marketing Inc., 3214113 Nova Scotia Limited
Joshua J. Santimaw for Harbour Edge Mortgage Investment Corporation
Tim Hill for Green-Starlight GP Limited
Josh J.B. McElman, Gavin D.F. MacDonald for BMO
D. Bruce Clarke, Q.C. for PricewaterhouseCoopers Inc.
Adam D. Crane for First National GP Corporation
Diane P. Rowe for Housing Nova Scotia

Subject: Insolvency; Corporate and Commercial; Property

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Between December 7, 2011 and February 6, 2013 respondents agreed to borrow funds totalling $63,788,217 from applicants — As security for loans, respondents, along with guarantors, granted security to applicants including mortgages and general assignment of rents and leases — Respondents defaulted on loans by failing to make necessary interest payments in amount of $570,113.73 — On October 16, 2013, applicants sent Notice of Intention to Enforce Security under Bankruptcy and Insolvency Act; in response, respondents filed Notice of Intention to File Proposal with Superintendent of Bankruptcy — On October 28, 2013, applicants appointed receiver over security and each respondent filed Notice of Intention to File Proposal naming trustee — Applicants brought application for order for appointment of interim receiver over properties of respondents — Application dismissed — Appointment of interim receiver was extraordinary remedy and application judge was satisfied that something more was required than evidence that respondents owed money to contractors and utilities at time of filing — It was necessary for applicants to provide evidence that appointment of receiver was necessary — Applicants did not meet their burden of providing that evidence as there was no evidence that assets would be dissipated — In any event, appointment would be largely redundant because there was already proposal trustee — Appointment of interim receiver would also serve to increase costs of proposal process substantially, which would mean less money for general creditors.

Table of Authorities

Cases considered by *Arthur W.D. Pickup J.*:

Atsana Semiconductor Corp., Re (2005), 2005 CarswellOnt 3304, 14 C.B.R. (5th) 1 (Ont. S.C.J.) — considered
Royal Bank v. Zutphen Brothers Construction Ltd. (1993), 17 C.B.R. (3d) 314, 1993 CarswellNS 22 (N.S. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] — considered

s. 47.1(1)(a) [en. 1992, c. 27, s. 16(1)] — considered

s. 47.1(3) [en. 1992, c. 27, s. 16(1)] — considered

s. 50.4 [en. 1992, c. 27, s. 19] — considered

s. 50.4(7) [en. 1992, c. 27, s. 19] — considered

s. 69(1) — referred to

s. 244 — considered

s. 244(1) — considered

Interpretation Act, R.S.C. 1985, c. I-21
s. 35(1) "holiday" — considered

s. 35(1) "telecommunications" — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 124 — considered

APPLICATION by applicants for order for appointment of interim receiver over properties of respondents.

***Arthur W.D. Pickup J.*, Orally:**

1 This is an application by Trez Capital Corporation, Trez Capital Limited Partnership, TCC Mortgage Holdings Inc., Computershare Trust Company of Canada and WBLI, Inc., seeking the following remedies:

a declaration that the Lender's appointment of the Receiver pursuant to two appointment letters dated October 28, 2013 is not stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*Act*")'

ii. an order for directions requiring the Borrowers to account for and pay to the Receiver all rents received from the Properties after October 28, 2013;

or in the alternative,

iii. an order that PricewaterhouseCoopers Inc. (The "Trustee") be appointed as interim receiver of the Properties pursuant to s. 47.1 of the *Act*; and

iv. an order directing the Trustee to preserve all rents received from the Properties.

2 Submissions were received from the applicants and the respondents, and from Green-Starlight LP, a Second Mortgage Lender. Counsel for PricewaterhouseCoopers Inc. also made submissions. Several other security holders attended by counsel, some of whom had first mortgage security on some of the properties involved in this application. Apparently, they received no formal notice of this proceeding.

3 Counsel for PricewaterhouseCoopers Inc. argues that they should not be named as a respondent in this proceeding. Counsel for the applicants did not take exception to counsel's argument and, as a result, for purposes of my decision when I refer to "respondents" in this decision, this does not include PricewaterhouseCoopers Inc.

Background facts

4 Between December 7, 2011 and February 6, 2013 the respondents agreed to borrow funds totalling $63,788,217 from the applicants.

5 The respondents are the registered owner of property which contains large residential apartment buildings in Nova Scotia and New Brunswick. As security for the loans, the respondents, along with guarantors, granted security to the applicants including mortgages and general assignment of rents and leases.

6 It became apparent at the hearing that there were other secured lenders who had not been notified of the proceeding. For example, BMO, by way of affidavit, sets out its first ranking security interest in certain properties of the respondents. Despite having this first mortgage security, BMO was not notified of the proceeding, although the applicants sought remedies which would affect their security and, in particular, have rents diverted to a receiver.

7 Green-Starlight GP Ltd. is the general partner of Green-Starlight LP (the "Second Mortgage Lender"). The Second Mortgage Lender sold the property to the respondents and, at the time, took back a second mortgage in the original amount of $8,000,000. As of October 17, 2013 the amount due to the Second Mortgage Lender was $7,276,218.74, including principal interest and costs.

8 The terms and conditions of the loans between the applicants and respondents were set out in various commitment letters which are attached as Exhibit 7 through 14 of the affidavit of Paul Bowers.

9 The respondents have defaulted on the loans by failing to make the necessary interest payments for the months of August and September, 2013, due September 7, 2013 and October 7, 2013, respectively, in the amount of $570,113.73.

10 Following the default, the applicants and respondents engaged in discussions which caused the applicants to determine the respondents were not able to meet their obligations under the loans. The applicants lost confidence in the respondents and allege that the respondents may be directing the monthly rents away from their intended purpose of paying the respondents' financial obligations to the applicants.

11 On October 16, 2013 at 6:21 pm (approximately), the applicants sent a Notice of Intention to Enforce Security under the *Bankruptcy and Insolvency Act* by email to the respondents. This notice was also sent to the respondents by courier on October 16, 2013 and was received on October 17, 2013.

12 According to the respondents, they and the applicants entered into negotiations over the potential terms of a Forbearance Agreement that would avoid the need for the respondents to file a Notice of Intention to File a Proposal pursuant to s. 50.4 of the *BIA*. They say these negotiations took place up to and including October 27, 2013. As the parties were unable to reach an agreement on the terms of the Forbearance Agreement, the respondents filed the Notice of Intention to File a Proposal with the Superintendent of Bankruptcy.

13 According to the respondents at no point prior to October 28, 2013 did the applicants or their counsel advise they considered the deadline for the companies to file a Notice of Intention to File a Proposal to have expired on Saturday, October 26, 2013.

14 Despite these negotiations, the applicants maintain the 10 day notice period provided for by s. 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") expired at midnight October 26, 2013. The applicants rely on the email of their Notice of Intention to Enforce Security on October 16, 2013, which was transmitted at approximately 6:21 pm on that date.

15 On Monday, October 28, 2013 the applicants appointed WBLI Inc. as receiver over the security. WBLI Inc. immediately contacted the respondents to obtain their cooperation to proceed with the receivership. WBLI received correspondence from counsel for the respondents advising that notices of intention to file a proposal would be filed by days' end, and that no steps should be taken to enforce security.

16 Subsequently, each respondent filed a "Notice of Intention to File a Proposal" pursuant to s. 50.4 of the *BIA*, naming PricewaterhouseCoopers Inc., ("PwC") as trustee on Monday, October 28, 2013.

17 The Second Mortgage Lender joins in this application to support the applicants' position and indicates by affidavit that the Second Mortgage Lender sent a Notice of Intention to Enforce Security to the respondents on October 17, 2013.

Issues

18 The issues to be determined are as follows:

i. Did the borrowers' Notice of Intention to File a Proposal operate to stay the lenders enforcement of its security and the appointment of WBLI Inc. as receiver?

a) Was the Notice of Intention to Enforce Security served in the appropriate manner?

b) When did the 10 day notice period for the Notice of Intention to Enforce Security expire?

ii. In the alternative, is an interim receiver necessary to protect the interest of the applicants or of creditors generally?

i. Did the borrowers' Notice of Intention to File a Proposal operate to stay the lenders' enforcement of its security and the appointment of WBLI Inc. as receiver?

a) Was the Notice of Intention to Enforce Security served in the appropriate manner?

Applicants' Argument

19 Sub-section 244(1) of the *Bankruptcy and Insolvency Act* is as follows:

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person **shall send to that insolvent person**, in the prescribed form and manner, a notice of that intention.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required **until the expiry of ten days after sending that notice**, unless the insolvent person consents to an earlier enforcement of the security.

[emphasis added]

20 The applicants acknowledge that s. 244 of the *BIA* requires that a Notice of Intention to Enforce Security be sent 10 days prior to enforcing its security in respect of which the notice is required.

21 Notice was provided by the applicants by email and courier.

22 First, dealing with the email notice, Rule 124 of the *Bankruptcy and Insolvency General Rules* (C.R.C., c. 368), states:

> 124. The notice of intention to enforce a security pursuant to subsection 244(1) of the *Act* shall be in prescribed form and shall be served, or sent by registered mail or courier, or, **if agreed to by the parties, by electronic transmission**.
>
> [emphasis added]

23 The applicants argue that, as lenders, they had provided a commitment letter which was signed by the respondents that contained a provision allowing the notice to be sent by email and, as a result, the parties agreed to email service as provided for in Rule 124 of the *Bankruptcy and Insolvency General Rules.* This provision allegedly allowing notice to be sent by email was contained in each loan commitment letter. For example, the Herring Cove Loan commitment letter between Trez Capital Corporation and Edge Marketing December 7, 2011 is attached to the affidavit of Paul Bowers at Tab 7. It states:

> 42 Communication
>
> **All communications provided for hereunder shall be in writing, personally delivered, or sent by prepaid first class mail or telecommunications,** and if to the Lender addressed to the address above noted, to the attention of the President, and if to the Borrower to the addressed [sic] noted above. The date of receipt of any such communication should be deemed to the date of delivery, if delivered as aforesaid, or on the third business day following the date of mailing, as aforesaid.
>
> Any party hereto may change its address for service from time to time by notice in the manner herein provided. In the event of a postal disruption or an anticipated postal disruption, prepaid first class mail will not be an acceptable means of communication.
>
> [emphasis added]

24 The question is whether the email sent by the applicants on October 16, 2013 containing the Notice of Intention to Enforce Security is a "telecommunication" and a form of notice "agreed to by the parties". The applicants argue this provision in the commitment letter evidenced such agreement.

25 The applicants also sent a notice by courier on October 16, 2013 as permitted by Rule 124 of the *Bankruptcy and Insolvency General Rules.* This couriered notice was received by the borrowers on October 17.

Respondents' Position

26 The respondents say that the parties did not agree to electronic communication of the s. 244 notice. They submit that para. 42 of the various commitment letters refers to notice provisions in the commitment letters and cannot be expanded to cover the notice provisions under the *BIA*.

27 For the reasons which follow, I substantially agree with the respondents' position.

Analysis

28 The parties must agree that email delivery is appropriate service under s. 244(1) of the*BIA*. Section 124 of the *Bankruptcy and Insolvency General Rule* states:

> The notice of intention to enforce security pursuant to subsection 244(1) of the *Act* shall be in the prescribed form and shall be served, or sent by registered mail or courier, **or, if agreed to by the parties, by electronic transmission.**
>
> [emphasis added]

29 Therefore, notice under s. 244 can only be served by personal service or by registered mail or courier service, unless the parties agree to email service.

30 Did the parties agree to service of the s. 244 notice by email?

31 The applicants rely on para. 42 of the commitment letters documenting each loan. As quoted earlier, para. 42 reads in part as follows:

> 42. All communications **provided for hereunder** shall be in writing, personally delivered or sent by prepaid first class mail or **telecommunications,**...
>
> [emphasis added]

32 Notice pursuant to the *BIA* is not specifically provided for in the commitment letters. In fact, there is no reference at all to the *BIA* or any other statutory provisions.

33 Paragraph 42 refers to communications "provided for hereunder". I agree with the respondents that reference to "communication provided for hereunder" would be a reference to notice provisions contained in the commitment letter. For example, para. 22 of the commitment letter is as follows:

> All property tax payments, utilities and like amounts due and owing in relation to the Subject Property, or any other taxes charged against the Subject Property, shall be paid prior to or coincide with the Advance (as hereinafter defined). The Borrower shall make arrangements to have the taxes paid by monthly installments to the appropriate taxing authority in order to have them paid in full on their due date. The Borrower is to provide evidence of same to the Lender on a quarterly basis.
>
> In the Event of Default (as hereinafter defined) under the Mortgage Security, the Lender shall have the right to require the establishment of a tax reserve by way of monthly payments representing 1/12 of the estimated taxes payable. The Lender shall not be responsible for the payment of any tax arrears.

34 Under this provision, the borrowers are required to provide evidence of payment of property taxes on a quarterly basis. I am satisfied that notice under para. 22 permits notice by telecommunication, as it is communication "provided for hereunder" as provided for in para. 42. A further example of "communication provided for hereunder" where notice can be given by telecommunication is clause 25. This clause requires five business days notice of funding. Again, this notice could be by telecommunication pursuant to para. 42.

35 A plain common sense reading of para. 42 would suggest that this paragraph provides for nothing more than a telecommunication form of notice pursuant to provisions contained in the commitment letter requiring notice.

36 Consistent with this interpretation is para. 49(f) of the commitment letter which states:

> **Interpretation**
>
> (f) The words "hereto", "herein", "hereunder", "hereby", "Commitment Letter, "this agreement", and similar expressions used in this Commitment Letter, including the schedules attached hereto, mean or refer to this Commitment Letter and not to any particular provision, section or paragraph or other portion of this Commitment Letter and include any instruments supplemental or ancillary hereto.
>
> [emphasis added]

37 Further, at para. 42 after stating "All communications provided for hereunder shall be in writing, personally delivered, or sent by pre-paid first class mail or telecommunications...," goes on to state "...and if to the lender addressed to the address above noted, to the attention of the President, and if to the Borrower to the addressed [sic] noted above..." Both of these addresses are provided for in the commitment letters. There is no reference to an email address which would suggest that email notice was not contemplated under the commitment letter.

38 I am satisfied that the parties did not agree to email service pursuant to the *BIA* and, therefore, the email sent by the applicants on October 16, 2013 was not proper service.

39 As a result, the only effective notice was served by courier on October 17, 2013. The 10 day period began to run after the s. 244 notice was served on October 17, 2013. It is not disputed that the 10 day notice period expired on Sunday, October 27, 2013. Sunday being defined as a holiday under s. 35 of the *Federal Interpretation Act*, R.S.C. 1985, C. I-21, the respondents, therefore, had until Monday, October 28, 2013, to file a Notice of Intention to File a Proposal, which they did on that date.

40 The respondents having filed their Notice of Intention to File a Proposal within the appropriate time, the applicants' motion for a stay of the lender's appointment of the receiver pursuant to two appointment letters dated October 28, 2013 is hereby dismissed.

41 In the event I am wrong and the effect of para. 42 of the commitment letter is to allow service by email pursuant to the *BIA*, the question is whether the word "telecommunication" referred to in para. 42 refers to email. The respondents argue in the alternative that even if email notice is permitted under the *BIA*, the reference to telecommunication in para. 42 of the commitment letter does not refer to email.

42 Is an email a "telecommunication"?

43 The *Federal Interpretation Act* defines "telecommunications" at s. 35 as:

> ...the emission, transmission or reception of signs, signals, writing, images, sounds or intelligence of any nature by any wire, cable, radio, optical or other electromagnetic system, or by any similar technical system;

44 The applicants submit that email is a "telecommunication" and that the parties clearly intended for communications between them with regard to each of the loans to be facilitated by different means, including telecommunications.

45 Despite the applicants' argument, no email addresses were provided for the parties. If email communication was contemplated, then it would seem likely that email addresses would be provided.

46 The respondents' argument is that even if the para. 42 contemplates email service of the s. 244 notice under the *BIA*, the term "telecommunication", is not specific enough to refer to email.

47 Upon reviewing the commitment letters, I note that in a separate clause, dealing with execution of the commitment letter, the parties explicitly contemplated delivery by electronic transmission. In para. 51:

> This agreement may be executed in any number of counterparts and by facsimile, **electronic transmission** or pdf copy, each of which when so executed is deemed to be an original and all of which together shall constitute one and the same agreement.
>
> [emphasis added]

48 I am satisfied that the parties to the commitment letters intended that the execution of the agreements themselves could be done by way of electronic transmission, but must have intended something different when they used the term "telecommunication" in para. 42.

49 I also agree with respondents' submission that the applicants own conduct is consistent with the respondents' interpretation. For example, if the applicants considered service of the s. 244 notice to effected on October 16, 2013 (by email), it is inconsistent that they did not state the 10 day deadline to be October 26, 2013, rather than October 28, 2013.

50 The applicants not having met their burden of proving that "telecommunication" in para. 42 of the commitment letter includes email, I dismiss the application before me for a stay on that basis as well.

51 In summary, I would dismiss the application on the following grounds:

i. That para. 42 of the various commitment letters does not extend to notice under the *BIA*, but rather refers to internal notice under the commitment letter.

ii. In the alternative, even if para. 42 constitutes agreement between the parties as to email service under s. 244 of the *BIA*, I am not satisfied that the term "telecommunication" would include email.

ii. In the alternative, is an interim receiver necessary to protect the interest of the lenders or of creditors generally?

Applicants' Position

52 The applicants argue in the alternative that an interim receiver should be appointed to protect the interests of the applicant lenders and of creditors generally. They initially sought the appointment of PricewaterhouseCoopers Inc., but it is clear from the filed documentation that PricewaterhouseCoopers Inc. do not consent to act. Therefore, during the hearing the applicants proposed that WBLI should be appointed as interim receivers.

53 The applicants submit that it is necessary for the protection of the interests of the applicants and of the respondents' creditors generally that an interim receiver be appointed pursuant to 47.1(1)(a) of the *BIA*. They say the monthly income from the properties is approximately $890,000, yet they have not received the required interest payments from the borrowers in over three months. Moreover, they say the borrowers have permitted other obligations such as utilities, heating oil, property tax and necessary maintenance to be neglected.

54 Despite the applicants' argument that the appointment of a receiver is necessary for the protection of creditors generally, it is apparent from the appearances at the hearing of this matter that some secured creditors were not advised of the hearing.

55 The applicants say there is evidence that the substantial rental income of the respondents is not being applied to even the most elementary of obligations. They say they have lost all confidence in the borrowers to conduct their business affairs. In these circumstances, they say, an interim receiver is necessary to protect the interests of not only the lenders, but of other secured and unsecured creditors as well.

56 Section 47.1 of the *BIA* reads:

> Appointment of interim receiver
>
> 47.1 (1) If a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time after the filing, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property,
>
> (a) the trustee under the notice of intention or proposal;
>
> . . .
>
> When appointment may be made
>
> (3) An appointment of an interim receiver may be made under subsection **(1) only if it is shown to the court to be necessary for the protection of**
>
> (a) the debtor's estate; or
>
> (b) the interests of one or more creditors, or of the creditors generally.
>
> [emphasis added]

57 The burden under s. 47.1(3) of the *BIA* is on the applicants to show that the appointment is necessary to either protect the respondents' estate or to protect the interests of one or more creditors, or of creditors generally.

58 The Second Mortgage Lender joins the applicants in submitting that the appointment of an interim receiver would be in the interests of creditors. They point out that to date $890,000 stands to be collected by the respondents in rent, without the creditors having any idea what is happening to those funds. The amount of $890,000 is collected each month.

59 The Second Mortgage Lender also refers to case law to support its position. They provide at p. 12 of their brief:

> *Royal Bank of Canada v. Zutphen Brothers Construction Ltd.*, [1993] N.S.J. No. 640, 17 C.B.R. (3d) 314 (Registrar) was a very early case dealing with the appointment of an interim receiver following the filing of a Notice of Intention to Make a Proposal. In that case Registrar Smith remarked:
>
> > 20 It is well established law, that in order to support an application for the appointment of an interim receiver, the danger of dissipation of assets must be actual and immediate and not one based on suspicion and speculation.

60 *Royal Bank v. Zutphen Brothers Construction Ltd.* [1993 CarswellNS 22 (N.S. S.C.)], was followed in *Atsana Semiconductor Corp., Re*, 2005 CarswellOnt 3304 (Ont. S.C.J.):

> 3. Atsana opposes the Applicant's motion on the grounds that (1) the appointment of an interim receiver would be redundant in that KMPG [sic] has already been identified as the proposal trustee in Atsana's Notice of Intention; (2) there are existing safeguards under the *BIA* following the filing of a Notice of Intention to Make a Proposal to adequately protect the Applicant and other creditors; (3) the disclosure of more specific information about the potential sale transaction to the Applicant and other creditors at this time could irreparably hurt the integrity of the sale of the negotiations to the detriment of Atsana and its creditors; and (4) the Applicant is not coming to court with clean hands and should therefore not be granted equitable relief.

61 The court applied the test set out in *Zutphen*, *supra*, and commented as follows on the burden the Applicant must meet under s. 47.1:

> 18 The word "dissipate" implies something more than a sale. In regard to money or property, "dissipate" means to squander, fritter away or waste. It implies that after the dissipating event, there will be less available than there was before; in other words, there will not be a transfer of one form of value for another of equal worth - there will be a reduction in value at the end of the day. There is no evidence before me that the proposed sale will involve a dissipation of Atsana's assets.
>
> 19 ...As has been noted above, suspicion and speculation are inadequate reasons to justify the granting of an extraordinary remedy such as the appointment of an interim receiver.
>
> 20 There are other reasons why the appointment of an interim receiver must fail. First, such an appointment, in the present circumstances, would be largely redundant and therefore would entail an unnecessary expense. There is already a proposal trustee who will be maintaining a close eye on the management of Atsana's assets and on any proposed sale of those assets.
>
> 21 No sale shall occur without the support of the proposal trustee and the approval of the court. Creditors will have the opportunity to challenge any proposed sale that would be prejudicial to their interests.
>
> 22 It would not be beneficial to Atsana's creditors if money were diverted to fund the appointment of an interim receiver, when one is not necessary to protect the creditors' valid interests.

62 The court concluded there was no evidence the assets would be dissipated and the applicant had failed to prove an interim receiver was necessary and the motion was dismissed.

63 PricewaterhouseCoopers Inc. has not consented to be an interim receiver and, in fact, considers such an appointment to be redundant given its role as proposed trustee and cites the expense of being so appointed, the practical result of which is that there will be less money for creditors.

64 The applicants support their motion to appoint an interim receiver by affidavit evidence found at paras. 15 - 17 of the Bower affidavit and argue that the companies were behind on their payment to unsecured creditors and some of the properties' maintenance.

Analysis

65 There should be no surprise that in an insolvency case such as this one, the respondent companies owed money to unsecured creditors and missed two interest payments. I agree with the respondents that if this was enough to satisfy the burden on the applicants, virtually every insolvency case would require the appointment of an interim receiver. The appointment of an interim receiver is an extraordinary remedy and I am satisfied that something more is required than evidence that the respondents owe money to contractors and utilities at the time of filing. It is necessary for the applicants to provide evidence that the appointment of a receiver is necessary. I am not satisfied that the applicants have met their burden of providing this evidence.

66 I note that information filed by the respondents indicates that neither property taxes, nor insurance were in arrears at the date of filing.

67 In both the affidavit evidence provided by Mr. Johnston, who is the President of the respondents, and the Trustee's Report dated November 15, 2013, there is evidence that the companies are meeting their operational expenses, including taxes, insurance, utilities, repairs and maintenance, during the proposal process. There is a lack of evidence from the applicants to counter this evidence.

68 As to the second issue raised by the applicants, as to the lack of repairs and maintenance to the property, I am satisfied, by evidence before me, that the applicants approved a five year work plan and the respondents are at the end of year one and have four more years to complete upgrades.

69 PrincewaterhouseCoopers, the trustee, prepared a first report to the court on November 15, 2013 and made a recommendation as follows:

> 32. The Trustee recommends that this Court does NOT issue an Order appointing PwC Inc. as Interim Receiver of the Companies pursuant to Section 47.1(1)(a) of the *BIA*, as such an order is not in the interest of any of the creditors for the following reasons:
>
> (i.) The Companies have acted, and are acting, in good faith and with due diligence;
>
> (ii.) No creditor will be materially prejudiced;
>
> (iii.) The duties being requested of an Interim Receiver are similar to the statutory duties of a Trustee under a NOI;
>
> (vi.) The Companies are required to receive and account to the Court for all income generated by the property under the NOI making an Interim Receiver redundant;
>
> (v.) The Companies are taking commercially reasonable measures to protect and preserve the property, and to operate the Companies during the NOI period.
>
> (vi.) PwC Inc. has not consented to be appointed as Interim Receiver;
>
> (vii.) Additional costs of any Interim Receiver do not outweigh any possible benefit.

70 PricewaterhouseCoopers is already carrying out many of the same duties that a receiver would be mandated to carry out. The duties are set out under s. 54(7) of the *BIA*.

71 This duplication of duties would increase the costs and mean less money for the general creditors.

72 With respect, the test is not whether the respondents were having financial difficulties prior to the filing. The test is one of necessity during the proposal period.

73 I am not satisfied that the applicants have met their burden of proving that the appointment of an interim receiver is necessary for the protection of the debtors estate, or the protection of some or all of the creditors. It is interesting that many of the creditors, some holding first position security on some of the applicant's property, were not even notified of the hearing by the applicants.

74 In any event, to appoint an interim receiver will serve to increase the costs of the proposal process substantially, and I see no necessity to so appoint an interim receiver.

75 The applicants' motion to appoint an interim receiver is dismissed.

76 I will hear the parties as to costs.

Application dismissed.

Tab 6

2013 ONSC 1908
Ontario Superior Court of Justice

Royal Bank of Canada v. OVG Inc.

2013 CarswellOnt 3753, 2013 ONSC 1908, 227 A.C.W.S. (3d) 96

Royal Bank of Canada, Applicant and OVG Inc., Respondent

Kershman J.

Judgment: March 25, 2013
Docket: 33-1718184, 13-57081

Counsel: Counsel — not provided

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
VI Proposal
VI.1 General principles
Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.b Termination of time period
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Bankruptcy and insolvency --- Proposal — General principles
Bankruptcy and insolvency --- Proposal — Time period to file — Termination of time period
Table of Authorities
Cases considered by *Kershman J.*:
Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) — referred to
N.T.W. Management Group Ltd., Re (1993), 1993 CarswellOnt 208, 19 C.B.R. (3d) 162 (Ont. Bktcy.) — referred to
P.J. Wallbank Manufacturing Co., Re (2011), 2011 CarswellOnt 15300, 2011 ONSC 7641, 88 C.B.R. (5th) 281 (Ont. S.C.J.) — followed
1252206 Alberta Ltd. v. Bank of Montreal (2009), 2009 CarswellAlta 900, 2009 ABQB 355 (Alta. Q.B.) — distinguished
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

s. 50.6(1) [en. 2005, c. 47, s. 36] — considered

s. 50.6(5) [en. 2007, c. 36, s. 18] — considered

***Kershman J.*:**

1 There are 2 matters before the Court:

(1) OVG ("Company") has brought a motion to obtain a further advance of DIP fund of 150, 000)

(2) The Royal Bank of Canada ("Bank") has brought an application to terminate the period for OVG to make a [illegible text] and, to appoint a Court Appointed Receiver over the [illegible text] of OVG.

2 At the hearing on March 12, 2013, the Court authorized a primary [illegible text] of DIP [illegible text] of $100, 000. In favour of Waygas Capital Inc. The existing DIP facility allows for a secondary tranche of a further 150,000 [illegible text] to Court approval, which OVG seeks today.

3 OVG say that it has been in talks with several parties either as prospective [illegible text] or strategic partners to restructure the Company and make a viable proposal to the creditors. Two letters of interest have been provided to the Court.

4 The court has reviewed the previous and updated cash-flow statements. The updated statement shows a large account receivable of over 1,000,000 which will be collected by April 1, 2013.

5 The Court confirmed at the hearing that notwithstanding that the cash flow statements seek an additional 500,00, that the Company will not be [illegible text] that amount.

6 The Company says that it requires the $150,000 of DIP financing in order to make payroll and to purchase supplies.

7 The Bank's position is that it is the principal creditor of the Company and that it is in a [illegible text] position with respect to the proposal and that it has lost all confidence in the Company. It argues that the Company will not likely be able to make [illegible text] proposal that would be acceptable to the Bank. As of February 12, 2013, the Bank was owed approximately 3,454,000.00. The Court was advised that the Bank has collected approximately 424,000 in the last few dats from a third partty [illegible text] , thus reducing the amount owing to the Bank.

8 The Company's position is that S.50.6(1) of the BIA allows for the granting of DIP financing. It argues that the case of *P.J. Wallbank Manufacturing Co., Re*, [2011] O.J. No. 5922 (Ont. S.C.J.) at para 13-26 sets out the factors to be considered by the Court. Respondent argues that there is satifactory evidence that all of those factors have been satified, which would allow the DIP financing to be granted to the Company.

Analysis

9 Section 50.6(1) BIA make provision for a DIP facility. Subsection (5) sets out the factors to be [illegible text].

a) Likely duration of the [illegible text] and Proposal Proceedings

10 No evidence has been given as to when the Proposal will be filed. The time to file has been extended to May 8, 2013. The picture is clearer this week than it was last week. The evidence is that there are parties interested either in a purchase, financing or some other type of strategic partnering. The Court is aware that in the evidence, there is no commitment made by any interested person to the transaction.

b) Management of OVG's Affairs

11 The current management will continue to operate the Company. The workforce has been reduced from 60 to approximately 44 employees.

c) Whether this [illegible text] has the Confidence of the Major Creditors

12 The only creditor to voice opposition to the DIP is the Bank. Defendent also opposed the prospect of a viable proposal. The BDC, a [illegible text] creditor, and CRA attended the hearing and did not put forward any positions.

d) Would the DIP load [illegible text] the Prospect of a Viable Proposal

13 Without the DIP loan there would be no proposal because the company will run out of case. With the DIP financing, it will allow the Company to move forward and collect accounts receivable and obtain new work, with the potential of a sale, refinancing or some other form of strategic alliance.

e) Nature and Value of the Debtor's property

14 There is no evidence at this time as to the nature and value of the Company's property. The Company has retained [illegible text] Asset sale, to provide appraisals on a go forward and a liquidated basis. Those appraisals should be available near the beginning of April, 2013.

f) Whether any Creditors would be [illegible text] Prejudiced as a result of the DIP

15 Like any DIP financing, an interim financing charge will impact all the creditors to some degree and will potentially reduce the amount available to the Bank. The current DIP amount is 100,000, with a potential to be increased to 250,000.

g) Report of the Trustee

16 The latest report of the trustee sets out what the company has been doing since the first report, to find a buyer, restructure or find a strategic partner. The latest report says that the company is actively involved in a sale process to keep the business viable as a [illegible text] concern.

17 The trustee says that it has continued to mention the Company's operations. It is of the opinion that no event has been uncovered that may be [illegible text] a material [illegible text] change. It goes on to say that in its opinion there is nothing to [illegible text] OVG's ability to construct a viable proposal to its creditors.

18 The Proposal Trustee states that it has been advised by OVG management & [illegible text] believes that if OVG is not allowed to conduct an Orderly Sales Process to optimize [illegible text] for all stakeholders, that in a forced sale scenerio, there will [illegible text] of funds available for the unsecured creditors.

19 While the Bank will be prejudiced by a further DIP of 150,000, the Court considers the prejudice to be minimal, in light of the fact that there are approximately 6.8 million of unsecured creditors.

20 The court finds that on the balance of probabilities, that the factors favour the granting of the further DIP financing of $150,000. The further DIP of $150,000 is authorized.

Bank's Application

21 The Bank brought an application to terminate the time for OVG to make a proposal and to appoint a Court appointed Receiver over the assets of OVG.

22 The Bank argues that it is the overwhelming principal creditor of the Company and is in a veto position with respect to the Proposal. It also argues that it has lost confidence in OVG and it says that OVG is not likely to make a viable Proposal.

23 The Bank also seeks, to have a Court appointed Receiver appointed in the event that the time period to file the proposal is terminated.

24 It argues that as a secured creditor it would want there to be an orderly sale and liquidation of OVG's assets, if there is a deemed bankruptcy, with the termination of the stay.

25 The Bank relies on the cases of *Cumberland Trading Inc., Re*, [1994] O.J. No. 132 (Ont. Gen. Div. [Commercial List]), and paragraph 5 and 9 inparticular. It also relies on the case of *1252206 Alberta Ltd. v. Bank of Montreal*, [2009] A.J. No. 648 (Alta. Q.B.) paragraphs 17,24,27.

26 The Company argues that the onus to terminate the time period is on the Bank to prove that on a balance of probabilities that the Company has not satisfied all of the [illegible text] conditions in S.50.4(11). It relies on the case of *N.T.W. Management Group Ltd., Re*, [1993] O.J. No. 621 (Ont. Bktcy.), at pp. 4and 6.

Analysis

27 The court has reviewed the 4 factors set out in S. 50.4(11).

a) There is no evidence that the company is not acting in good faith and with due diligence. The evidence is to the contrary, based on the Trustee's Response, which says that the Company is acting in good faith and is doing what is reasonable to find a purchaser, financier or strategic partner to be able to file a viable proposal.

b) The Bank has not provided any evidence that the Company will not be able to make a viable proposal before the expiration of the time period in question;

c) The Bank argues that because it has lost confidence in the Company, that the Company will not be able to make a viable proposal that will be accepted by the creditors. The Court does not agree with this statement because if a proposal is made and the Bank is paid in full or even paid up to [illegible text] % of the debt, the unsecured [illegible text] of the Bank's debt at this level would not be able to overturn the proposal [illegible text] that [illegible text] are unsecured creditors of approximately 6.8 million. The unsecured creditors may well approve of the proposal.

• Therefore Court find that the claim by the Bank in 504.(11)(c) to be incorrect.

d) There is no evidence before the Court that the creditors as a whole would be mutually prejudiced where the application under S.50.4(11) to terminate the proposal is rejected.

28 The Cumberland Trading and the 1252206 Alberta Ltd. cases can be distinguished on their facts.

29 In the Cumberland case the secured creditors held 9.5 % of the secured claims and 67% of all of the claims. That is certainly not the case here.

30 In the 1252206 Alberta case, the secured creditors [illegible text] 100% of teh secured debt and [illegible text] of the unsecured debt.

31 In the case, according to the creditors list filed at the proposal, the Bank holds approximately $135,000 of the unsecured debt of 6.8 million.

32 Furthermore in the 1252206 Alberta case, the DIP financing sought was 1,110,000 to [illegible text] of 2,900,000. The situation here is quite different with 250,000 to be [illegible text] of 3,000,000.

33 Furthermore, when the extension [illegible text] was agreed on March 12, 2013, the Bank didn't approve the extension of time to file the proposal. The Bank cannot come back one week later and argue that the extension time should be terminated on the grounds [illegible text] Application.

34 Accordingly the relief sought to terminate the time [illegible text] is refused.

Application to Appoint Court Appointed Receiver

35 Since the relief to terminate the [illegible text] time period has been refused, it is not appropriate for the Court to appoint the receiver as requested by the Bank.

36 Application refused

37 Order accordingly

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 3070 ELLESMERE DEVELOPMENTS INC.

District of: Ontario
Division No.: 09 - Toronto
Court No.: 31-2547832
Estate No.: 31-2547832

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BRIEF OF AUTHORITIES
(RETURNABLE SEPTEMBER 11, 2019)

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

Larry Ellis LSO #: 49313K
Tel: 416.869.5406
Fax: 416.262.3543
lellis@casselsbrock.com

Erin Craddock LSO #: 62828J
Tel: 416.860.6480
Fax: 416.644.9324
ecraddock@casselsbrock.com

Lawyers for 3070 Ellesmere Developments Inc.