

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
CONFORTI HOLDINGS LIMITED**

NOTICE OF APPEAL

THE Applicant, Conforti Holdings Limited (“**Conforti**”) APPEALS to the Court of Appeal from the order of the Honourable Mr. Justice Cavanagh of the Ontario Superior Court of Justice (Commercial List), dated May 31, 2022, made at Toronto.

THE APPELLANT ASKS that:

1. Leave be granted to Conforti to proceed with this appeal in accordance with section 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”);
2. The order be set aside and an order be made:
 - a. Requesting the aid and assistance of the United States District Court for the District of New Jersey (the “**US Court**”) in determining the value of the claim, if any, of Moroccanoil, Inc. (“**Moroccanoil**”) against Conforti;
 - b. If necessary, lifting the stay of proceedings that may apply under the BIA to Moroccanoil’s claim to allow Moroccanoil to obtain a determination of the claim by the US Court, provided that enforcement of the same shall be stayed and subject to the BIA;
 - c. Awarding Conforti the costs of this appeal and the motion below; and
3. Such further and other relief as this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

Overview

1. The order and the proposed appeal squarely raise the issue as to whether the Superior Court of Justice, sitting in bankruptcy and insolvency, may direct the trial of an issue before a clearly more appropriate forum if that court is not the supervising insolvency court to assist a proposal trustee in valuing a claim under section 135 of the BIA.
2. The order was made in response to a motion for directions by Crowe Soberman Inc., in its capacity as proposal trustee of Conforti (the “**Proposal Trustee**”), regarding valuation of the proof of claim filed by Moroccanoil (the “**Motion**”).
3. Conforti and Moroccanoil have been embroiled in highly contested litigation before the US Court for more than a decade. The litigation now involves, among other things, motions by both Conforti and Moroccanoil to enforce a settlement agreement between the parties that had originally resolved the dispute (the “**US Action**”).
4. Moroccanoil’s motion in the US Action is for order awarding it damages against both Conforti and its principal, Antonio Conforti.
5. Conforti and Mr. Conforti’s motion similarly seeks damages for Moroccanoil’s breach of the settlement agreement (the “**Counterclaim**”).

Motion

6. On its Motion, the Proposal Trustee sought directions that it not determine Moroccanoil’s proof of claim under section 135 of the BIA until after the claim is determined by the US Court along with the Counterclaim and Moroccanoil’s claim against Mr. Conforti.

7. The learned motion judge held that:

- a. the Superior Court of Justice did not have jurisdiction to grant the directions sought; and
- b. if the Court did have such jurisdiction, the Court would not exercise such jurisdiction because directing a trial of Moroccanoil's claim in Ontario would not be materially longer, less efficient, or more costly than the US Action proceeding before the US Court.

Leave to Appeal

8. Leave is sought to appeal the decision to the Court of Appeal as the matter is an issue of importance to the insolvency practice as a whole because it involves the jurisdiction of the Superior Court to request the aid and assistance of another forum in directing a trial of an issue where that forum is clearly the more appropriate forum.
9. The Order is also of significance to this proceeding, because it will effectively permit Moroccanoil to forum shop its claim that has been ongoing in the US Court for over seven years to the Superior Court and require that Conforti's creditors bear increased costs, including those of the Proposal Trustee and its counsel in the Ontario proceedings, which would not be the case in the US Court.
10. The appeal is *prima facie* meritorious.
11. This appeal will not unduly hinder the progress of the proposal proceeding because the Proposal Trustee can establish a reserve out of the funds payable to creditors for Moroccanoil's claim that can subsequently be distributed to Moroccanoil or to Conforti's other creditors depending on whether Moroccanoil is successful or not in its claim.

Appeal

12. The learned motion judge made fundamental errors of law or mixed fact and law in reaching his conclusion that the Court did not have jurisdiction to make the directions sought by the Proposal Trustee.
13. The learned motion judge made a fundamental error of law in determining that the Superior Court of Justice does not have jurisdiction to direct the Proposal Trustee not to value a claim, where the Proposal Trustee was not seeking to avoid its obligations under section 135 of the BIA, but was requesting that the Superior Court request the aid and assistance of the US Court, as the clearly more appropriate forum, to value the claim before fulfilling the Proposal Trustee's obligations under section 135 of the BIA.
14. The learned motion judge further erred in failing to consider how and by whom the Counterclaim will be adjudicated. If Conforti and Mr. Conforti are successful on their Counterclaim, the value of the Counterclaim will exceed the value of Moroccanoil's claim. The learned motion judge did not consider whether the Superior Court has jurisdiction to award damages to both a debtor and a non-creditor of a debtor in a trial of an issue for purposes of valuing a proof of claim in an insolvency proceeding.
15. The learned motion judge also erred in overlooking the fact that Mr. Conforti is a party to the US Action in an individual capacity, and his counterclaim in the US Action must still be determined by the US Court as he is not a party to the insolvency proceedings before the Superior Court.
16. The learned motion judge also erred in finding that a trial to determine Moroccanoil's claim would be appropriate in Ontario by:

- a. incorrectly finding that moving the US Action to the Superior Court would not be more costly than letting the US Action proceed before the US Court, particularly where the settlement agreement at issue is governed by US law;
 - b. failing to consider that the efficiency of the insolvency process is lost if the US Action is moved to the Superior Court because both Moroccanoil and the Proposal Trustee are requesting a trial of Moroccanoil's claim and not a summary adjudication through the typical valuation process.
17. Sections 135, 183(2), and 193(e) of the BIA;
 18. *Rules of Civil Procedure*, including rules 1.04, and 61; and
 19. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. This Court has jurisdiction pursuant to section 193(e) of the BIA.
2. The decision appealed from is a final decision of a judge of the Superior Court of Justice and no appeal lies to the Divisional Court; and

3. Leave to appeal is required.

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Court of Appeal File No.
Superior Court File No. 31-2675583

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Proceeding commenced at Toronto

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