Court File No. CV869/21

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

B E T W E E N:

CAISSE POPULAIRE POINTE-AUX-ROCHES-TECUMSEH INC.

Plaintiff

and

G.I. FARMS INC., VANTEC USA ONTARIO INC., 2287188 ONTARIO INC., 2027512 ONTARIO INC. and 1690169 ONTARIO INC.

Defendants

BRIEF OF AUTHORITIES OF THE COURT APPOINTED RECEIVER
(Distribution and Discharge)
(Returnable July 16, 2021)

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INDEX

Date: 20060717
Docket: CI 06-01-45691
(Winnipeg Centre)
Indexed as: Astra Credit Union Ltd. v.
Protos International Inc.
Cited as: 2006 MBQB 174

COURT OF QUEEN'S BENCH OF MANITOBA

IN THE MATTER OF: THE APPOINTMENT OF AN INTERIM RECEIVER PURSUANT TO SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985 c. B-3 AND THE APPOINTMENT OF A RECEIVER AND MANAGER PURSUANT TO SECTION 55(1) OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M. c. 280, SECTION 95 OF *THE CORPORATIONS ACT*, C.C.S.M. c. C225 AND SECTION 64(7) OF *THE PERSONAL PROPERTY SECURITY ACT*, S.M. 1993 c. 14

B E T W E E N:

ASTRA CREDIT UNION LTD.,	)	Marcel J. Peerson
	)	for Ernst & Young Inc. as
plaintiff,	)	Receiver for Protos
	)	International Inc. and Maple
- and -	)	Leaf Distillers, Inc.
	)	
	)	
	)	David I. Marr and J. Graeme
	)	E. Young
PROTOS INTERNATIONAL INC.,	)	for Costas Ataliotis
	)	
defendant.	)	
	)	David B.N. Ramsay
	)	for Dr. Selvin Passen
	)	and Sylvia Passen
	)	
	)	Judgment Delivered:
	)	July 17, 2006

MONNIN, C.J.Q.B.

[1] Ernst & Young Inc. (the "Receiver"), as Receiver of Protos International Inc. ("Protos"), has brought a motion for an order approving the assignment by the Receiver, pursuant to an agreement between the Receiver and Dr. Selvin Passen and Mrs. Sylvia Passen (the "Passens"), of any interest Protos may have in a condominium in Florida, in a company which owns that condominium, or to claims which are the subject of a court action in Florida relating to that condominium, whereby any interest of Protos would vest in the Passens free of all claims of Protos' creditors. It also seeks an order authorizing the Receiver to execute any documents and take any steps necessary to carry out the terms of the agreement, including terminations of confidentiality agreements which may previously have been entered into between Protos and its employees, consultants, former employees and/or former consultants.

[2] The Passens, represented by Manitoba counsel, support the Receiver's position but took no active part on the argument of the motion.

[3] Counsel for Mr. Ataliotis opposed the granting of the order.

BACKGROUND

[4] Protos was placed in receivership by an order of the Court on January 13, 2006. Ernst & Young was appointed as Receiver. Clause 3(l) of the order authorized the Receiver to sell or assign any property with the approval of the Court where the purchase price exceeded $50,000. This request for approval stems from the fact that the condominium or the shares vesting ownership in the

condominium in Florida are currently owned by Mrs. Suzanne Ataliotis, the wife of Mr. Costas Ataliotis, a shareholder of Protos at the relevant times. The condominium was valued at US$1,400,000 at the time of its sale by the Passens.

RECEIVER'S EVIDENCE

[5] The Receiver's evidence is that the records of Protos and Maple Leaf Distillers Inc. ("Maple Leaf") (a related company also placed into receivership on January 15, 2006) are disorganized and incomplete. The Receiver is therefore unable to have a complete understanding of the events concerning the transfer of the condominium to Mrs. Ataliotis, but believes that the relevant facts are as follows:

(a) For the material time, the controlling shareholders of Protos were Mr. David Wolinsky and Mr. Ataliotis. Collectively they owned 72% of the shares of Protos. An additional 12 shareholders held the remaining 28% of the shares;

(b) Protos was a shareholder in Maple Leaf. There were three other shareholders in Maple Leaf, namely the Crocus Investment Fund, Tribal Council Investment Group and the Passens;

(c) The Passens owned a number of shares in Maple Leaf and wanted to buy more;

(d) The Passens owned Harbourage 902 LLC ("Harbourage"), a Florida corporation which owned a condominium in Florida. Harbourage continues to own the condominium;

(e) In the context of the Passens acquiring more shares in Maple Leaf, the following occurred:

(i) Protos transferred some of its shares in Maple Leaf to Dr. Passen. The agreed upon value of the shares was US$875,000. Given the timing of the transfer of the ownership of Harbourage to Protos, the Receiver believes it is logical to assume that Protos transferred these shares to the Passens in September of 2004;

(ii) In September 2004, the Passens transferred ownership of Harbourage to Protos. The agreed upon value of Harbourage (including the condominium) was US$1,400,000 and to reflect the difference, Protos gave the Passens a promissory note for US$525,000. Some time later (May 2005), the promissory note was paid with further shares in Maple Leaf. These later shares were apparently transferred to the Passens by Mr. Ataliotis and Mr. Wolinsky;

(f) On October 29, 2004, Protos assigned its ownership of Harbourage to Mrs. Ataliotis. This transfer was apparently pursuant to an earlier June 28, 2004 agreement among Protos, Mr. Ataliotis and Mr. Wolinsky whereby upon the transfer of the condominium property to Protos, the latter was to transfer it to Mr. Ataliotis or as he would direct.

[6] According to the Receiver, Protos' available records as of June 20, 2004 show that:

(a) Protos owed about $660,000 to third parties other than its shareholders. Those creditors were still owed about $550,000 when the Protos receivership occurred;

(b) Protos owed over $1,300,000 to shareholders other than Mr. Ataliotis and Mr. Wolinsky. Over $630,000 was still owed to these shareholders when the receivership occurred.

[7] Again, according to the Receiver, as at October 31, 2004 Protos' available records show that:

(a) Protos owed $2,500,000 to third parties other than its shareholders. Over $2,000,000 was owed to these creditors when the receivership occurred;

(b) Protos owed approximately $1,200,000 to shareholders other than Mr. Ataliotis and Mr. Wolinsky. Some of these were also shareholders/creditors as at June 30, 2004 and this amount

included about $315,000 apparently owed to Dr. Passen. In excess of $600,000 was owed to these shareholders/creditors (not including Dr. Passen) when the receivership occurred.

[8] The Receiver believes there is no likelihood of any of Protos' creditors recovering any monies. If there is any recovery, it will be nominal and will go to Astra Credit Union as a secured creditor.

[9] At the commencement of the receivership, Mr. Wolinsky and Mr. Ataliotis were the only directors and officers of Protos. There is no indication that at the times relevant to the application, any other persons were directors or officers of Protos.

EVIDENCE OF MR. ATALIOTIS

[10] Mr. Ataliotis' evidence is that upon the suggestion of Dr. Passen, the latter transferred one of his condominiums in Florida in exchange for additional Maple Leaf shares. The condominium was offered to each of the other Maple Leaf shareholders, namely, Crocus Investment Fund, the Tribal Council Investment Corp, as well as Protos. Mr. Ataliotis further states in his affidavit that, with the approval of all of the Maple Leaf shareholders, Dr. Passen was to transfer title to his condominium to Protos for an additional 3.5% interest in Maple Leaf. He points to the terms of the June 28, 2004 agreement where it states that the shares in Maple Leaf were to be acquired from the shareholdings of Protos with the understanding that the condominium would be purchased by Mr. Ataliotis for

his and his family's use. He suggests that Dr. Passen was aware of this transaction. I note that Dr. Passen was not a party to that agreement.

[11] Mr. Ataliotis further states that it was agreed between Mr. Wolinsky and himself that Protos could transfer the Florida condominium to Mr. Ataliotis or his nominee upon his purchasing Protos' interest therein. Prior to the conclusion of the transaction, Dr. Passen offered to substitute the entire interest in Harbourage for the original condominium. The only asset of Harbourage was and is the condominium which is the subject matter of the proposed assignment between the Receiver and the Passens and the Florida litigation.

[12] The purchase of Harbourage was completed by Mr. Ataliotis forgiving a shareholder's loan to Protos of US$875,000 and Protos providing a promissory note to Dr. Passen for US$525,000. The promissory note was subsequently forgiven by Dr. Passen in exchange for the transfer of additional shares of Protos from Mr. Wolinsky and Mr. Ataliotis. According to Mr. Ataliotis, he has fully paid Protos for the entire interest in Harbourage by his forgiveness of the shareholder's loan to Protos. Moreover, the promissory note owed to Dr. Passen by Protos was retired in exchange for additional shares of Protos. These shares were held personally by Mr. Ataliotis and Mr. Wolinsky.

[13] Mr. Ataliotis notes that when in September 2004 he transferred his interest in the condominium to his spouse, Dr. Passen's Florida solicitor drafted and processed the necessary transfer documents for this transaction, thereby implying knowledge to Dr. Passen.

FLORIDA LITIGATION

[14] In December 2005, the Passens commenced an action in Florida which was amended in February 2006.

[15] A copy of the amended complaint was provided by the Receiver. In the Florida litigation, the Passens, individually and on behalf of Protos, sue Mr. and Mrs. Ataliotis, Mr. Wolinsky, Protos and Harbourage. There are five counts to the document.

[16] In Count No. 1, the Passens allege that they were fraudulently induced by Messrs. Ataliotis and Wolinsky's representations and statements to sell the condominium to Protos.

[17] Count No. 2 is an allegation of fraud and the making of false representations by Messrs. Ataliotis and Wolinsky, inducing the Passens to convert the promissory note they held into shares of Protos.

[18] Count No. 3 is brought by Dr. Passen on behalf of Protos and alleges misappropriation of corporate assets, namely, the transfer by Protos to Mrs. Ataliotis of the interest in Harbourage and the condominium.

[19] Count No. 4 is an allegation of breach of fiduciary duty brought again by Dr. Passen on behalf of Protos against Messrs. Ataliotis and Wolinsky, and includes amongst other things an allegation that as directors and officers of Protos, Messrs. Ataliotis and Wolinsky used the assets of Protos, namely the shares of Maple Leaf, the promissory note and the condominium, in a manner contrary to the interests of the corporation.

[20] Count No. 5 alleges a fraudulent transfer. Dr. Passen, again on behalf of Protos, alleges that the transfer of the condominium to Mrs. Ataliotis was without value or valid consideration to Protos and contrary to its interests and that of its shareholders. On behalf of Protos, Dr. Passen therefore seeks to set aside the conveyance of the condominium to Mrs. Ataliotis.

[21] Therefore, what the litigation in Florida purports to do in relation to Harbourage and the condominium is, firstly, on behalf of Protos, challenge the transaction from Protos to Mrs. Ataliotis and, secondly, seek to have Protos return the Passens' interest in Harbourage back to them.

[22] The Receiver is unwilling to actively participate in the legal proceedings commenced in Florida by the Passens. As explained by its counsel, there is no material benefit to the receivership to become involved in an action which, at the end of the day, may simply lead to the property being turned over to third parties, the Passens, with little or no benefit to the creditors. For that reason, the Receiver agreed to assign to the Passens any interest that Protos may have in the litigation in return for 20% of the net value of the condominium, less any charges on the property and the legal costs if the condominium or the shares in Harbourage are returned to the Passens.

MAPLE LEAF RECEIVERSHIP

[23] The Receiver also seeks a parallel order in the Maple Leaf receivership whereby the Maple Leaf Receiver (also Ernst & Young) would transfer its Florida-related claims to the Passens. When Harbourage transferred from Protos to Mrs.

Ataliotis, the transfer was apparently paid for through a reduction of Mr. Ataliotis' shareholder account in Protos, which account was apparently created on the books of Protos by that shareholder account being transferred from Maple Leaf to Protos. The parallel order is sought in the Maple Leaf proceedings so that there is a complete assignment of the condominium-related claims.

STANDING

[24] The Receiver challenged the standing of Mr. Ataliotis to intervene in a motion for court approval by the Receiver in the interests of the creditors. It argues that the order sought would not determine the merits of the Florida action nor affect any rights or defences which the Ataliotises may have had in Florida.

[25] It relied on the case of ***Nesi Energy Marketing Canada Inc., (Re)***, 1998 ABQB 912, (1998), 8 C.B.R. (4th) 76. That case dealt with s. 38 of the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3, whereby a creditor could seek leave to bring action in lieu of the trustee where the trustee declined to bring action itself. The Court held that the proposed defendants in that case, the Bankrupt's directors, did not have the standing to challenge the application, although they would have the standing to contest the order once granted.

[26] Counsel for Mr. Ataliotis referred the Court to Queen's Bench Rule 13.01(1) and argued that his client had an interest in the subject matter of the proceeding or, alternatively, that he would be adversely affected by the judgment in the proceeding.

[27] I indicated at the hearing of the motion, after counsel's submissions, that I would grant an application for standing as I was of the view that Mr. Ataliotis had an interest in whether approval was granted, given that it would affect a potential defence that he would have in the proceedings in Florida. I accordingly allowed him standing to argue the motion.

ATALIOTIS POSITION

[28] Mr. Ataliotis' position is that the Court should not grant its approval to the assignment unless the Receiver can demonstrate that the claim is *prima facie* meritorious. Only then would the Receiver have an interest which it could assign.

[29] Relying by analogy upon case law under s. 38 of the ***Bankruptcy and Insolvency Act***, Mr. Ataliotis argues that it is incumbent upon the Court to assess the Receiver's evidence to determine whether the latter has an interest in the claim concerning Harbourage that is not too speculative or remote to assign.

[30] Referring to ***Jolub Construction Ltd. (Re)*** (1993), 21 C.B.R. (3d) 313, [1993] O.J. No. 2339, a decision of Blair, J. of the Ontario Court of Justice, Mr. Ataliotis' counsel argues that this application is not a mere rubber stamp, but that the Court must perform a screening function. To succeed the Receiver must demonstrate a *prima facie* case, which he argues it has not, as the only evidentiary foundation for the application to assign are the unproven allegations in the Florida complaint.

[31] Mr. Ataliotis' affidavit has not been challenged and it is undisputed that Mrs. Ataliotis has title to the Florida condominium. In addition, the Receiver's unwillingness to participate in the Florida litigation suggests, according to Mr. Ataliotis, that the Receiver does not view the condominium or the Harbourage interest as a current or future asset of the receivership, or that it would have a meritorious claim in Florida.

POSITION OF THE RECEIVER

[32] The Receiver argues that the limited evidence to date raises an issue as to the potential breach by Mr. Ataliotis and Mr. Wolinsky of their duties of loyalty to Protos as directors and officers pursuant to the provisions of the ***Canada Business Corporations Act***, R.S.C. 1985, c. B-3. As sole directors and officers of Protos, they had a duty to the company and its shareholders to act honestly and in good faith with a view to the best interests of the corporation, as well as a duty of care towards its creditors. The Receiver relies upon s. 122 of the ***Canada Business Corporations Act*** and the Supreme Court of Canada's decision in ***Peoples Department Stores Inc. (Trustee of) v. Wise***, 2004 SCC 68, [2004] 3 S.C.R. 461.

[33] In the Receiver's submission, the disposition of Harbourage to Mr. Ataliotis by Protos was a transaction in which he and Mr. Wolinsky had a material interest. Accordingly, the reasonableness and fairness of the transaction must be viewed in light of the fact that:

(a) There was a substantial minority shareholding held by shareholders other than Ataliotis and Wolinsky;

(b) Third parties and shareholders were owed substantial amounts as discussed in paragraphs 6 and 7 of these reasons;

(c) Harbourage (more particularly, its condominium) was one of the few, if not the only, real tangible asset of Protos and, accordingly, the disposition of it in a manner which benefited the two major shareholders may not have been reasonable in the circumstances. Protos therefore may have grounds to complain of the conduct of Mr. Ataliotis and argue a breach of his duty towards the corporation.

CHOICE OF LAW

[34] Neither party addressed the issue of choice of law in their briefs, but at the hearing of the motion I was advised that both parties were of the view that with respect to the June 28th agreement and the transfer from the Passens to Protos and to Mrs. Ataliotis, Florida law would most likely apply given that it was a real estate transaction occurring in that state.

[35] As to the portion of the Florida complaint alleging a fraudulent transfer from Protos to Mrs. Ataliotis of the interest in Harbourage and the condominium and seeking to set it aside, the Receiver alleges there was no valid consideration to the corporation for the transaction, and that the actions of Mr. Ataliotis and Mr. Wolinsky were motivated by self-interest and self-dealing, contrary to the

interests of Protos and its shareholders. Given that the condominium is located in Florida and the documentation evidencing the transfer from the corporation to Mrs. Ataliotis was prepared and executed in Florida, I conclude that there is a substantial connection to that jurisdiction with respect to that part of the litigation.

[36] While not specifically set out in Mr. Ataliotis' argument, Mr. Ataliotis acknowledges that the assignment of Protos' interest to the Passens will materially affect his defences in the Florida litigation.

ANALYSIS

[37] I am not satisfied that this matter should be resolved by analogy to the provisions of s. 38 of the ***Bankruptcy and Insolvency Act***. The statutory scheme provided by that act is not what is at issue in this case. Rather, I believe this case falls to be decided by reference to the principles governing the duties, responsibilities and powers of court-appointed receivers.

[38] It is trite law that a receiver appointed by the Court is a court officer and has a general duty to deal with the property of the debtor in accordance with the powers provided by the Court in its order. He also has a fiduciary relationship to the debtor and the creditors with a duty to exercise such reasonable care, supervision and control of the property as an ordinary man would give to his own. (See *Bennett on Receiverships*, The Carswell Company Limited 1985 at p. 16.)

[39] As provided in the court order and also at common law, a receiver must diligently exercise his power to defend, institute or continue proceedings for the benefit of all creditors and debtors. While he does not need to expend amounts in excess of what is likely collectible, he has a duty to enforce a claim that is an asset of the debtor which may produce some proceeds. (See *Bennett* at p. 132.) Furthermore, again by the terms of the court order and common law, the receiver has the power to settle or compromise any indebtedness to the debtor. In that aspect he has a discretion and must act in a commercially reasonable manner in doing so.

[40] As I understand the approval sought by the Receiver in this case, it is to assign the right of action of Protos against Mrs. Ataliotis to seek the reconveyance of the condominium to Protos. The assignment would allow for the ultimate reconveyance of the condominium to the Passens rather than to Protos. In exchange, the Receiver stands to receive 20% of the net value of the condominium, which amount would stand to the benefit of the creditors.

[41] I agree with the Receiver's rationale that it would not be in the interests of the receivership to pursue a court review of the transaction with respect to the Florida condominium if, at the end of the day, a successful review would only lead to the condominium being transferred to the Passens with no benefit to the creditors of Protos. While it is conceivable that the Florida court could order reconveyance of the property to Protos and yet not find that the Passens had a right to the property, this is a matter in which I believe the Court should rely

upon the Receiver's discretion at this stage. Having decided that it is reasonable not to participate in the Florida litigation, it is also reasonable for the Receiver to seek whatever benefit for the receivership it can for the contingent interest in the condominium. Otherwise, any interest of the creditors in the review of the transaction may well be lost.

[42] In the circumstances, while not necessary to do so, I am of the view that the Receiver has shown a *prima facie* case for the review of the transaction. Whether or not the Passens were aware of the fact that the condominium would eventually be transferred to Mr. and Mrs. Ataliotis, the issue in the review would be the reasonableness of the transaction vis-à-vis all shareholders of Protos. I agree with the Receiver in his contention that the reasonableness and fairness of the transaction must be reviewed in light of the substantial minority shareholding of others than Mr. Ataliotis and the fact that the condominium was a substantial real tangible asset of Protos. On that basis, I believe there is a *prima facie* case for the review of the transaction.

[43] Even if I am incorrect in that respect, I believe the Receiver does not need to make out a *prima facie* case as long as it can show that the assignment is in the interests of the receivership. The potential benefit from the assignment, demonstrated from the evidence, satisfies me on that score.

ASSIGNABILITY

[44] The question was raised whether a claim in fraud, being a cause of action in tort, was assignable. This raises the concerns of the common law with respect to maintenance and champerty.

[45] In ***Frederickson v. Insurance Corporation of British Columbia***, [1986] 4 W.W.R. 504 (B.C.C.A.), Madam Justice McLachlin, as she then was, for the Court, stated:

> 23. On the assumption that, as a general rule, causes of action in tort are not assignable, it is clear that that rule is subject to a number of exceptions. In dealing with those exceptions it must be borne in mind that the categories of exceptions are not closed. In each case the court must ask itself whether the assignment can fairly be seen as prompted by a desire to advance the cause of justice rather than as intermeddling for some collateral reason: Fleming, The Law of Torts, 6th ed., p. 593.
>
> . . .
>
> 26. A second exception concerns cases where the assignee has either a pre-existing property interest or a legitimate commercial interest in the enforcement of the claim. An assignment where the assignee possesses such an interest will be valid, provided the action in tort is not based on a personal wrong, such as assault, libel or personal injury. The reason for the latter stricture appears to be that in cases of personal torts, the assignee can have no legitimate property or commercial interest in recovery: *Trendtex Trading Corp. v. Credit Suisse*, [1980] 1 Q.B. 629 at pp. 656-657 per Denning M.R., affirmed [1981] 3 All E.R. 520 at p. 530.

[46] In this case, it is not just the results of litigation which purport to be assigned, but the right to prosecute itself. However, fraud or deceit is not a cause of action in tort based upon a personal wrong.

[47] In ***Frederickson***, McLachlin J.A. went on to say:

> 37. ... An assignment of a cause of action for non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any taint of champerty or maintenance. In

> determining if this test is met, the court should look at the totality of the transaction: *Trendtex*, supra, per Lord Roskill at p. 531.

[48] On the facts of this case, Dr. Passen has a pre-existing financial interest as a shareholder in Protos and as an individual with a potential claim to the reconveyance of the condominium to him. He has a pre-existing financial interest in the litigation sufficient to overcome any concern of champerty or maintenance.

CONCLUSION

[49] In summary, I agree that the Receiver has valid reasons not to participate in the Florida litigation and that it has a cause of action which is assignable in law. The terms of the assignment are reasonable in the circumstances given the potential for the Receiver not to receive any benefit from its interest in the litigation. The terms of the assignment provide a contingent benefit which may stand to the credit of the receivership. The creditors have a possibility of receiving a percentage of the value of the remaining equity in the condominium if a court of competent jurisdiction determines that there was inappropriate conduct on the part of Mr. Ataliotis.

[50] As to the request to authorize the Receiver to execute documents including terminations of confidentiality agreements between Protos and its employees, consultants and former employees, it flows naturally from the granting of an order approving the assignment. In any event, I fail to see that Mr. Ataliotis has any interest in precluding the Receiver from agreeing to such

terminations, which it could do in the normal course as part of the authority given under its appointment by the Court.

ORDER

[51] I therefore approve of an assignment by the Receiver pursuant to the April 18, 2006 agreement, or any agreement extending the terms of that agreement, of any interest Protos may have in Harbourage and to the claims which are the subject of court action in Florida related to Harbourage and a condominium which it owns. I also authorize the Receiver to vest such interest in the Passens free of all claims of Protos' creditors and to execute documents and take the steps to carry out the terms of the agreement, including terminations of confidentiality agreements between Protos and its employees, consultants, former employees and former consultants.

[52] I direct that any proceeds from the sale will stand in place of the sold interest subject to the same charges as the interest itself. I also grant a parallel order to Ernest & Young as Receiver of Maple Leaf Distillers Inc.

[53] I order costs on a party and party basis in favour of the Receiver and against Mr. Ataliotis.

Monnin, C.J.Q.B.

COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nova Scotia v. Diemer, 2014 ONCA 851
DATE: 20141201
DOCKET: C58381

Hoy A.C.J.O., Cronk and Pepall JJ.A.

BETWEEN

The Bank of Nova Scotia

Plaintiff (Respondent)

and

Daniel A. Diemer o/a Cornacre Cattle Co.

Defendant (Respondent)

Peter H. Griffin, for the appellant PricewaterhouseCoopers Inc.

James H. Cooke, for the respondent Daniel A. Diemer

No one appearing for the respondent The Bank of Nova Scotia

Heard: June 10, 2014

On appeal from the order of Justice Andrew J. Goodman of the Superior Court of Justice, dated January 22, 2014, with reasons reported at 2014 ONSC 365.

Pepall J.A.:

[1] The public nature of an insolvency which juxtaposes a debtor's financial hardship with a claim for significant legal compensation focuses attention on the cost of legal services.

[2] This appeal involves a motion judge's refusal to approve legal fees of $255,955 that were requested by a court appointed receiver on behalf of its counsel in a cattle farm receivership that spanned approximately two months.

[3] For the reasons that follow, I would dismiss the appeal.

Facts

(a) Appointment of Receiver

[4] The respondent, Daniel A. Diemer o/a Cornacre Cattle Co. (the "debtor"), is a cattle farmer. The Bank of Nova Scotia ("BNS") held security over his farm operations which were located near London, Ontario. BNS and Maxium Financial Services Inc. were owed approximately $4.9 million (approximately $2 million and $2.85 million respectively). BNS applied for the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. 43. The debtor was represented by counsel and consented to the appointment.

[5] On August 20, 2013, Carey J. granted the request and appointed PricewaterhouseCoopers Inc. ("PWC" or the "Receiver") as receiver of the debtor. The initial appointment order addressed various aspects of the receivership. This included the duty of the debtor to cooperate with the Receiver and the approval of a sales process for the farm operations described in

materials filed in court by BNS. The order also contained a come-back provision allowing any interested party to apply to vary the order on seven days' notice.

[6] Paragraphs 17 and 18 of the appointment order, which dealt with the accounts of the Receiver and its counsel, stated:

> 17. THIS COURT ORDERS that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "Receiver's Charge") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.
>
> 18. THIS COURT ORDERS that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Ontario Superior Court of Justice.

There is no suggestion that the materials filed in support of the request for the appointment of the Receiver provided specifics on the standard rates and charges referred to in para. 17 of the initial appointment order.

[7] Counsel to the Receiver was Borden Ladner Gervais LLP ("BLG") and the lead lawyer was Roger Jaipargas. Mr. Jaipargas was called to the Ontario bar in 2000, practises out of BLG's Toronto office, and is an experienced and capable

insolvency practitioner. Among other things, at the time of the receivership, he was the Chair of the Insolvency Section of the Ontario Bar Association.

(b) Receiver's Activities

[8] The activities of the Receiver and, to a certain extent, those of its counsel, were described in reports dated September 11 and October 15, 2013 filed in court by the Receiver. Both reports were subsequently approved by the court.

[9] The reports revealed that:

- Following the granting of the initial appointment order, the Receiver entered into an agreement with the debtor pursuant to which the latter was to manage the day-to-day operations of the farm and the Receiver would provide oversight.
- After the Receiver was appointed, the debtor advised the Receiver of an August 13, 2013 offer he had received. It had resulted from a robust sales process conducted by the debtor. On learning of this offer, the Receiver negotiated an agreement of purchase and sale with the offeror for the purchase of the farm for the sum of $8.3 million. The purchase price included 170 milking cows.
- On September 17, 2013, the Receiver obtained, without objection from the debtor, a court order setting aside the sales process approved in the initial appointment order, approving the agreement of purchase and

sale it had negotiated, and approving the Receiver's September 11, 2013 report outlining its activities to date.

- The agreement of purchase and sale required that over 150 cows be removed from the farm (not including the 170 milking cows that were the subject of the agreement of purchase and sale). Complications relating to these cows and an additional 60 cows which the debtor wanted to rent to increase his milking quota arose to which the Receiver and its counsel were required to attend.
- The Receiver and BLG also negotiated an access agreement to permit certain property to remain on the farm after the closing date of the agreement of purchase and sale at no cost to the debtor. Unbeknownst to the Receiver, the debtor then removed some of that property.
- The Receiver and its counsel also had to consider numerous claims to the proceeds of the receivership by other interested creditors and an abandoned request by the debtor to change the venue of the receivership from London to Windsor.

[10] After approximately two months, the debtor asked that the Receiver be replaced. Accordingly, PWC brought a motion to substitute BDO Canada Ltd. as receiver and to approve its second report dated October 15, 2013.

(c) Application to Approve Fees

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to $138,297 plus $9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of $338.38. The highest hourly rate charged by the Receiver was $525 per hour. Fees estimated to complete were $20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to $255,955, plus $4,434.92 in disbursements and $33,821.69 in taxes for a total account of $294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of $643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of $750.00. The rates of the other 10 people on the account ranged from $950 per hour for a senior lawyer to $195 for a student and $330 for a law clerk.

[14] Fees estimated to complete were $20,000.

[15] In support of the request for approval of both sets of accounts, the Receiver filed an affidavit of its own representative and one from its counsel, Mr. Jaipargas.

[16] As is customary in receiver fee approval requests, the Receiver's representative stated that, to the best of his knowledge, the rates charged by its counsel were comparable to the rates charged by other law firms for the provision of similar services and that the fees and disbursements were fair and reasonable in the circumstances.

[17] In his affidavit, Mr. Jaipargas attached copies of BLG's accounts and a summary of the hourly rates and time spent by the eleven BLG timekeepers who worked on the receivership. The attached accounts included detailed block descriptions of the activities undertaken by the BLG timekeepers with total daily aggregate hours recorded. Usually the entries included multiple tasks such as e-mails and telephone calls. Time was recorded in six minute increments. Of the over 160 docket entries, a total of 11 entries reflected time of .1 (6 minutes) and .2 (12 minutes).

[18] On October 23, 2013, the motion judge granted a preliminary order. He ordered that:

- BDO Canada Ltd. be substituted as receiver;
- PWC's fees and disbursements be approved;
- the Receiver's October 15, 2013 report and the activities of the Receiver set out therein be approved;
- $100,000 of BLG's fees be approved; and

- the determination of the approval of the balance of BLG's fees and disbursements be adjourned to January 3, 2014.

[19] Prior to the January return date, the debtor filed an affidavit of a representative from his law firm. The affiant described the billing rates of legal professionals located in the cities of London and Windsor, Ontario. These rates tended to be significantly lower than those of BLG. For example, the highest billing rate was $500 for the services of a partner called to the bar in 1988. Mr. Jaipargas replied with an affidavit that addressed Toronto rates in insolvency proceedings in Toronto with which BLG's rates compared favourably. He also revised BLG's estimate to complete to $30,000.

Motion Judge's Decision

[20] On January 3, 2014, the motion judge heard the motion relating to approval of the balance of BLG's fees and disbursements. He refused to grant the requested fee approval and provided detailed reasons for his decision dated January 22, 2014.

[21] In his reasons, the motion judge considered and applied the principles set out in *Re Bakemates International Inc.* (2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460 (also referred to as *Confectionately Yours Inc., Re*); *BT-PR Realty Holdings Inc. v. Coopers & Lybrand* (1997), 29 O.T.C. 354 (S.C.); and *Federal Business Development Bank v. Belyea* (1983), 44 N.B.R. (2d) 248 (C.A.). The motion judge considered the nature, extent and

value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the debtor, and the cost of comparable services.

[22] The motion judge took into account the challenges identified by the Receiver in dealing with the debtor. However, he found that the debtor had co-operated and that there was little involvement by the Receiver and counsel that required either day-to-day management or identification of a potential purchaser.

[23] He noted, at para. 17 of his reasons, that although counsel for the debtor took specific issue with BLG counsel's rates: "I glean from submissions that the thrust of his argument evolved from a complaint about the rates being charged to an overall dispute of the unreasonableness of the entirety of the fees (and by extension – the hours) submitted for reimbursement."

[24] The motion judge considered the hourly rates, time spent and work done. He noted that the asset was a family farm worth approximately $8.3 million and that the scope of the receivership was modest. In his view, the size of the receivership estate should have some bearing on the hourly rates. He determined that the amount of counsel's efforts and the work involved was disproportionate to the size of the receivership. After the size of the estate became known, the usual or standard rates were too high. He expressly referred to paras. 17 and 18 of the initial appointment order.

[25] The motion judge also took issue with the need for, and excessive work done by, senior counsel on routine matters. He rejected the Receiver's opinion endorsing its counsel's fees, found that the number of hours reflected a significant degree of inefficiency, and that some of the work could have been performed at a lower hourly rate. He concluded: "I have concerns about the fees claimed that involve the scope of work over the course of just over two months in what appears to be a relatively straightforward receivership. Frankly, the rates greatly exceed what I view as fair and reasonable."

[26] He acknowledged that there were several methods to achieve what he believed to be a just and reasonable amount including simply cutting the overall number of hours billed. Instead, so as to reduce the amount claimed, he adopted the average London rate of $475 for lawyers of similar experience and expertise as shown in the affidavit filed by the debtor. He also expressly limited his case to the facts at hand, noting that his reasons should not be construed as saying that Toronto rates have no application in matters in the Southwest Region.

[27] The motion judge concluded that BLG's fees were "nothing short of excessive." He assessed them at $157,500 from which the $100,000 allowed in his October 23, 2013 order was to be deducted. He also allowed disbursements of $4,434.92 and applicable HST.

Grounds of Appeal

[28] The appellant advances three grounds of appeal. It submits that the motion judge erred: (1) by failing to apply the clear provisions of the appointment order which entitled BLG to charge fees at its standard rates; (2) by reducing BLG's fees in the absence of evidence that the fees were not fair and reasonable; and (3) by making unfair and unsupported criticisms of counsel.

Burden of Proof

[29] The receiver bears the burden of proving that its fees are fair and reasonable: *HSBC Bank Canada v. Lechier-Kimel*, 2014 ONCA 721, at para. 16 and *Bakemates*, at para. 31.

Analysis

(a) Appointment of a Receiver

[30] Under s. 243(1) of the *BIA,* the court may appoint a receiver and under s. 243(6), may make any order respecting the fees and disbursements of the receiver that the court considers proper. Similarly, s.101 of the *Courts of Justice Act* provides for the appointment of a receiver and that the appointment order may include such terms as are considered just. As in the case under appeal, the initial appointment order may provide for a judicial passing of accounts. Section 248(2) of the *BIA* also permits the Superintendent of Bankruptcy, the debtor, the trustee in bankruptcy or a creditor to apply to court to have the receiver's

accounts reviewed. The court also relies on its supervisory role and inherent jurisdiction to review a receiver's requests for payment: *Bakemates*, at para. 36 and Kevin P. McElcheran, *Commercial Insolvency in Canada*, 2d ed. (Markham: LexisNexis, 2011), at pp. 185-186.

[31] The receiver is an officer of the court: *Bakemates*, at para. 34. As stated by McElcheran, at p.186:

> The receiver, once appointed, is said to be a "fiduciary" for all creditors of the debtor. The term "fiduciary" to describe the receiver's duties to creditors reflects the representative nature of its role in the performance of its duties. The receiver does not have a financial stake in the outcome. It is not an advocate of any affected party and it has no client. As a court officer and appointee, the receiver has a duty of even-handedness that mirrors the court's own duty of fairness in the administration of justice. [Footnotes omitted.]

(b) Passing of a Receiver's Accounts

[32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:

> The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

[33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea*: *Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

[34] In Canada, very little has been written on professional fees in insolvency proceedings: see Stephanie Ben-Ishai and Virginia Torrie, "A 'Cost' Benefit

Analysis: Examining Professional Fees in *CCAA* Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law* (Toronto: Carswell, 2010) 141, at p.151.

[35] Having said that, it is evident that the fairness and reasonableness of the fees of a receiver and its counsel are the stated lynchpins in the *Bakemates* analysis. However, in actual practice, time spent, that is, hours spent times hourly rate, has tended to be the predominant factor in determining the quantum of legal fees.

[36] There is a certain irony associated with this dichotomy. A person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer's financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both of these undesirable features.

(c) The Rise and Dominance of the Billable Hour

[37] For many decades now, the cornerstone of legal accounts and law firms has been the billable hour. It ostensibly provides an objective measure for both clients and law firms. For the most part, it determines the quantum of fees. From an internal law firm perspective, the billable hour also measures productivity and is an important tool in assessing the performance of associates and partners alike.

[38] The billable hour traces its roots to the mid-20th century. In 1958, the American Bar Association ("ABA")'s Special Commission on the Economics of Law Practice published a study entitled "The 1958 Lawyer and his 1938 Dollar". The study noted that lawyers' incomes had not kept pace with those of other professionals and recommended improved recording of time spent and a target of 1,300 billable hours per year to boost lawyers' profits: see Stuart L. Pardau, "*Bill, Baby, Bill: How the Billable Hour Emerged as the Primary Method of Attorney Fee Generation and Why Early Reports of its Demise May be Greatly Exaggerated*" (2013) 50 Idaho L. Rev. 1, at pp. 4-5. By 2002, in its Commission on Billable Hours, the ABA revised its proposed expectation to 2,300 hours docketed annually of which 1,900 would represent billable work: see Pardau, at p. 2. And that was in 2002.

[39] Typically, a lawyer's record of billable hours is accompanied by dockets that record and detail the time spent on a matter. In theory, this allows for considerable transparency. However, docketing may become more of an art than a science, and the objective of transparency is sometimes elusive.

[40] This case illustrates the problem. Here, the lawyers provided dockets in blocks of time that provide little, if any, insight into the value provided by the time recorded. Moreover, each hour is divided into 10 six-minute segments, with six minutes being the minimum docket. So, for example, reading a one line e-mail could engender a 6 minute docket and associated fee. This segmenting of the

hour to be docketed does not necessarily encourage accuracy or docketing parsimony.

(d) Fees in Context of Court Appointed Receiver

[41] The cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. In contrast, the cost of putting together many of the transactions that then become unravelled in court insolvency proceedings rarely attract the public scrutiny that professional fees in insolvencies do. While many of the principles described in these reasons may also be applicable to other areas of legal practice, the focus of this appeal is on legal fees in an insolvency.

[42] Bilateral relationships are not the norm in an insolvency. In a traditional solicitor/client relationship, there are built-in checks and balances, incentives, and, frequently, prior agreements on fees. These sorts of arrangements are less common in an insolvency. For example, a receiver may not have the ability or incentive to reap the benefit of any pre-agreed client percentage fee discount of the sort that is incorporated from time to time into fee arrangements in bilateral relationships.

[43] In a court-supervised insolvency, stakeholders with little or no influence on the fees may ultimately bear the burden of the largesse of legal expenditures. In the case under appeal, the recoveries were sufficient to discharge the debt owed

to BNS. As such, it did not bear the cost of the receivership. In contrast, had the receivership costs far exceeded BNS's debt recovery such that in essence it was funding the professional fees, BNS would hold the economic interest and other stakeholders would be unaffected.

[44] In a receivership, the duty to monitor legal fees and services in the first instance is on the receiver. Choice of counsel is also entirely within the purview of the receiver. In selecting its counsel, the receiver must consider expertise, complexity, location, and anticipated costs. The responsibility is on the receiver to choose counsel who best suits the circumstances of the receivership. However, subsequently, the court must pass on the fairness and reasonableness of the fees of the receiver and its counsel.

[45] In my view, it is not for the court to tell lawyers and law firms how to bill. That said, in proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to the legal fees requested for counsel by its court officer, the court must ensure that the compensation sought is indeed fair and reasonable. In making this assessment, all the *Belyea* factors, including time spent, should be considered. However, value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption. Thus, the factors identified in *Belyea* require a consideration of the overall value contributed by the receiver's counsel. The focus of the fair

and reasonable assessment should be on what was accomplished, not on how much time it took. Of course, the measurement of accomplishment may include consideration of complications and difficulties encountered in the receivership.

[46] It is not my intention to introduce additional complexity and cost to the assessment of legal fees in insolvency proceedings. All participants must be mindful of costs and seek to minimize court appearances recognizing that the risk of failing to do so may be borne on their own shoulders.

(e) Application to This Case

[47] Applying these principles to the grounds raised, I am not persuaded that the motion judge erred in disallowing counsel's fees.

[48] The initial appointment order stating that the compensation of counsel was to be paid at standard rates and the subsequent approval of the Receiver's reports do not oust the need for the court to consider whether the fees claimed are fair and reasonable.

[49] As stated in *Bakemates*, at para. 53, there may be cases in which the fees generated by the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors so requires. Furthermore, although they would not have been determinative in any event, there is no evidence before this court that the standard rates were ever disclosed prior to the appointment of the receiver. In addition, as stated, while the receiver and its

counsel may be entitled to charge their standard rates, the ultimate assessment of what is fair and reasonable should dominate the analysis. I would therefore reject the appellant's argument that the motion judge erred in disallowing BLG's fees at its standard rates.

[50] I also reject the appellant's argument that the motion judge erred in fact in concluding that counsel's fees were not fair and reasonable.

[51] In this regard, the appellant makes numerous complaints.

[52] The appellant submits that the motion judge made a palpable and overriding error of fact in finding that the debtor was cooperative. The appellant relies on the contents of the Receiver's two reports in support of this contention. The first report states that on the date of the initial appointment order, August 20, 2013, the Receiver became aware of an offer to purchase the farm dated August 13, 2013 and reviewed the offer with the debtor's counsel. The report goes on to state that the debtor was not opposed to the Receiver completing that transaction and seeking the court's approval of it. The second report does detail some issues with the debtor such as the movement of certain property and cows to two farms for storage, even though the Receiver had arranged for storage with the purchaser at no cost to the Receiver or the debtor, and the leasing by the debtor of 60 additional cows to increase milk production.

[53] While there are certain aspects of the second report indicating that some negotiation with the debtor was required, based on the facts before him, it was open to the motion judge to conclude, overall, that the debtor cooperated. The Receiver and its counsel never said otherwise. Furthermore, this finding was made in the context of the debtor having agreed to continue to operate the farm pursuant to an August 30, 2013 agreement and in the face of little involvement of the Receiver and its counsel in the day-to-day management of the farm. Indeed, in the first report, the Receiver notes the debtor's willingness to carry on the farming operations on a day-to-day basis.

[54] In my view, it was also appropriate for the motion judge to question why a senior Toronto partner had to attend court in London to address unopposed motions and, further, to find that the scope of the receivership was modest. Indeed, in his reasons at para. 40, the motion judge wrote that, in the proceedings before him, counsel for the Receiver acknowledged that the receivership was not complex. Based on the record, it was open to him to conclude that the receivership involved "the divestment of the farm and assets with some modest ancillary work."

[55] As the motion judge noted at para. 20, the fixing of costs is not an unusual task for the court. Moreover, he was fully familiar with the receivership and was well-placed to assess the value generated by the legal services rendered. He properly considered the *Belyea* factors. While a different judge might have

viewed the facts, including the debtor's conduct, differently, the motion judge made findings of fact based on the record and is owed deference. In my view, the appellant failed to establish any palpable and overriding error.

[56] Nor did the motion judge focus his decision on what remained to the debtor after the creditors, the Receiver and Receiver's counsel had been paid, as alleged by the appellant. In para. 34 of his reasons, which is the focus of the appellant's complaint on this point, the motion judge correctly considered the size of the estate. He stated that he was persuaded that "the amount of counsel's efforts and work involved may be disproportionate to the size of the receivership." After the size of the estate became known, he concluded that the "standard" rates of counsel were too high relative to the size. As observed in *Belyea*, at para. 9, the "nature, extent and value" of an estate is a factor to be considered in assessing whether fees are fair and reasonable. As such, along with counsel's knowledge, experience and skill and the other *Belyea* factors, it is a relevant consideration.

[57] In addition, the motion judge was not bound to accept the affidavit evidence filed by BLG or the two Receiver reports as determinative of the fairness and reasonableness of the fees requested. It is incumbent on the court to look to the record to assess the accounts of its court officer, but it is open to a motion judge to draw inferences from that record. This is just what the motion judge did.

[58] Having said that, I do agree with the appellant that there were some unfair criticisms made of counsel. There was no basis to state that counsel had attempted to exaggerate or had conducted himself in a disingenuous manner. I also agree with the appellant that the Receiver and its counsel cannot be faulted for failing to bring the accounts forward for approval at an earlier stage. Costly court appearances should be discouraged not encouraged.

[59] I also agree with the appellant that it was inappropriate for the motion judge to adopt a mathematical approach and simply apply the rates of London counsel. However, this was not fatal: the motion judge's decision was informed by the factors in *Belyea*. As he noted, he would have arrived at the same result in any event. He was informed by the correct principles, which led him to conclude that the fees lacked proportionality and reasonableness. This is buttressed by the motion judge's concluding comments, in para. 47 of his reasons, where he made it clear that the driving concern in his analysis was the "overall reasonableness of the fees" and that his decision should not be read as saying that Toronto rates have no application in matters in London or its surrounding areas.

[60] While certain of the motion judge's comments were unjustified, I am not persuaded that a different result should ensue.

Disposition

[61] For the foregoing reasons, I would dismiss the appeal. As agreed, the appellant shall pay the respondent's costs of the appeal, fixed in the amount of $5,500, together with disbursements and all applicable taxes.

Released:

"DEC -1 2014"
"EAC"

"Sarah E. Pepall J.A."
"I agree Alexandra Hoy A.C.J.O."
"I agree E.A. Cronk J.A."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Berry v. Cypost et al (No. 5)***
2004 BCSC 189

Date: 20040212
Docket: S006790
Registry: Vancouver

Between:

STEVEN BERRY and TIA BERRY

PLAINTIFFS

And

CYPOST CORPORATION, EPOST INNOVATIONS INC., KELLY SHANE MONTALBAN, TOM JOHNSTON, CARL WHITEHEAD and ROBERT SENDOH

DEFENDANTS

Before: The Honourable Mr. Justice Burnyeat

RULING NUMBER FIVE

Counsel for Steven Berry and Tia Berry	R.S. Anderson T.M. Tomchak
Counsel for Tom Johnston	J.E. Wittmann K. Wiebe
Counsel for Roundtable Strategies Ltd.	P. Spencer
Kelly Shane Montalban, Carl Whitehead and Robert Sendoh	Appeared on their own behalf
Date and Place of Hearing:	January 6, 2004 Vancouver, B.C.

[1] Cypost Corporation (“Cypost”) is now a bankrupt under *United States Bankruptcy Legislation*. By a December 8, 2003 Assignment Agreement (“Assignment”), the United States Trustee in Bankruptcy of Cypost (“Trustee”) assigned to Roundtable Strategies Ltd. (“Roundtable”):

> All right, title and interest in and to the action [S06790] on the terms and conditions set out in this Agreement.

[2] As a result of the Assignment, Roundtable now seeks an order deleting Cypost as a Defendant and substituting “Roundtable Strategies Ltd., assignee of Cypost Corporation” as a Defendant. That application is opposed by the Plaintiffs on a number of bases including the basis that the Assignment is champertous.

BACKGROUND

[3] The principal of Roundtable is the Defendant Tom Johnston. In 2001, Mr. Johnston became an officer and director of Cypost. On November 1, 2001, Roundtable executed a contract with Cypost to provide consulting services. As of April 3, 2003, Cypost owed Roundtable $110,400 in unpaid fees pursuant to that contract.

[4] In the United States bankruptcy proceedings, Roundtable filed a proof of claim and is listed as a creditor of the estate of Cypost. After the Trustee indicated that he was not

prepared to fund the defence and the Counterclaim of Cypost in this Action, Roundtable took the Assignment. Under the Assignment, Roundtable will receive 75% of any award made to Cypost as Plaintiff by Counterclaim.

DISCUSSION AND CASE AUTHORITIES

[5] Champerty is defined in *Black's Law Dictionary*, 7th ed., (West Group, St. Paul Minn.) (1999) as an agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds.

[6] However, an assignment of cause of action will not be champertous if the assignee has a legitimate commercial interest or pre-existing relationship with the assignor. Roundtable submits that the commercial interest of Roundtable is established by the pre-existing contract for consulting services between Roundtable and Cypost and by virtue of the fact that Mr. Johnston as the principal of Roundtable was named as a co-defendant in this Action two years ago so that he has a legitimate, pre-existing interest in the litigation.

[7] McLaughlin, J.A., as she then was, stated on behalf of the Court in ***Fredrickson v. Insurance Corporation of British***

Columbia, (1986) 28 D.L.R. (4th) 414 (B.C.C.A.), aff'd [1988] 1 S.C.R. 1089:

> An assignment of a cause of action for non-personal tort is generally valid if the assignee has a sufficient pre-existing interest in the litigation to negate any taint of champerty or maintenance. In determining if this test is met, the court should look at the totality of the transaction: A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest" is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense. Assignment of a cause of action to a stranger will not be permitted, nor will the court uphold an assignment made for the purpose of obtaining more than what the assignee is legally entitled to. (at pp. 423-4).

[8] The commercial interest or relationship must exist prior to the execution of the Assignment: ***Interclaim Holdings Ltd. v. Down*** (1999) 178 D.L.R. (4th) 294 (B.C.S.C.) at p. 312. In the case at bar, the commercial interest of Roundtable has existed since November 1, 2001 when Roundtable agreed to provide consulting services to Cypost and since Mr. Johnston was named as a Defendant in this Action.

[9] For the same reasons, I can be satisfied that the pre-existing commercial interest is "genuine". There is no suggestion that the consulting contract was not *bona fide*. As well, it cannot be said that Roundtable is a "stranger" to the commercial dealings of Cypost.

[10] On the question of whether the Assignment should not be upheld because Roundtable may obtain more in the Action than what would be obtained by Roundtable as a creditor of Cypost if any monies available to Cypost in the Action were paid to the Trustee of Cypost to be distributed to the creditors of Cypost, I am satisfied that the potential windfall available to Roundtable can be justified and that the Assignment should be permitted.

[11] In Canada, s. 38 of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 (“***B.I.A.***”) allows a creditor to obtain a court order authorizing the creditor to take the proceeding in his or her own name and at his or her own expense and risk if the trustee refuses or neglects to take the proceeding. Although it has not been shown that there is a similar provision under the *United States Bankruptcy Code*, the fact that the ***B.I.A.*** contemplates the ability of a creditor to obtain a “windfall” allows me to conclude that the argument advanced by the Plaintiffs that this Assignment was champertous would not succeed in the context of a Canadian bankruptcy whether or not the procedures afforded by s. 38 of the ***B.I.A.*** were followed.

[12] Where the procedures set out under s. 38 of the ***B.I.A.*** are followed, it is clear that the doctrine of champerty does

not apply: ***Caisse Populaire Vanier Ltee v.*** Bales (1991) 2 O.R. (3d) 456 (Ont. G.D.).

[13] Even if the procedure set out in s. 38 of the ***B.I.A.*** was not followed, an assignment of a cause of action to a third party who had no pre-existing relationship with either the plaintiff bankrupt company or the defendant will not lead to a conclusion that such an assignment is champterous. In ***N.R.S. Block Bros. Realty v. Minerva Technology Inc.*** (1997), 145 D.L.R. (4th) 448 (B.C.S.C.), Warren, J. concluded that such an assignment was part of the legitimate commercial transaction arising out of the winding up of the commercial affairs of the bankrupt company so that the assignment was not a champertous arrangement.

[14] In the context of this Assignment from the United States Trustee, I conclude that the Assignment was also part of a legitimate commercial transaction arising out of the winding up of the commercial affairs of Cypost. I cannot conclude that the Assignment is champertous even though Roundtable having a very small percentage claim to monies available in the bankruptcy now has the potential to receive 75% of any award made to Cypost. If the Assignment was not available to the Trustee, the estate of Cypost would gain nothing as there

are insufficient funds available to the Trustee to prosecute the defence and Counterclaim.

[15] I am satisfied that this is not a case where Roundtable merely desires to become involved in litigation to earn a profit. In the circumstances, the following statement of Brenner, J., as he then was, in ***Re Down*** (1999), 178 D.L.R. (4th) 294 (B.C.S.C.) does not apply:

> ... the state of the current law does not countenance a stranger involving itself in litigation for a share of the profits because this contravenes the public policy core of champerty: a prohibition in trafficking in litigation. Simply put, a desire to become involved in litigation in order to earn a profit cannot be a "valid commercial interest" .... (at p. 319).

[16] I find that the Assignment is not champertous so that Roundtable Strategies Ltd. is in a position to pursue any rights that it obtained as a result of the Assignment.

"G.D. Burnyeat, J."
The Honourable Mr. Justice G.D. Burnyeat

Caisse Populaire Vanier Ltee v. Bales; Caisse Populaire Vanier Ltee v. D. & A. McLeod Co., trustee in bankruptcy

Indexed as: Caisse Populaire Vanier Ltee v. Bales (Gen. Div.)

2 O.R. (3d) 456
[1991] O.J. No. 308
Action Nos. 15769/90 and 041342/90 (Bankruptcy)

ONTARIO
Ontario Court (General Division)
Chadwick J.
February 19, 1991

Courts -- Abuse of process -- Maintenance and champerty -- Default judgment against debtor for failing to pay promissory note -- Debtor making assignment in bankruptcy -- Creditor moving for order assigning to it debtor's action against solicitor for negligence in advising about note -- Test for determining whether assignment of cause of action amounting to champerty or maintenance -- Pre-existing financial interest -- Cause of action assignable.

Debtor and creditor -- Assignments -- Cause of action -- Order that trustee in bankruptcy assign to creditor bankrupt's cause of action for solicitor's negligence -- Test for determining whether assignment of cause of action amounting to champerty or maintenance -- Pre-existing financial interest -- Cause of action assignable under Bankruptcy Act definition of "property" -- Bankruptcy Act, R.S.C. 1985, c. B-3, ss. 2, 38.

O along with his lawyer B were involved in a construction project. The plaintiff loaned $55,000 to each of O and B for the project. The loans were secured by promissory notes. O defaulted on his note and the plaintiff obtained default

judgment against him. O made an assignment into bankruptcy. It was alleged that O had a cause of action for negligence against B in respect of advice given about the promissory note. The plaintiff moved before the Registrar in Bankruptcy for an order that O's trustee in bankruptcy assign to it the cause of action that O had against B. The Registrar granted the order. B brought a motion under rule 21.01(1) of the Rules of Civil Procedure for a determination before trial of the question of law of whether the cause of action against B could be assigned.

Held, the cause of action could be assigned.

B challenged the assignment of the cause of action on the grounds that the assignment would amount to champerty and maintenance. In determining whether an assignment amounted to champerty and maintenance, the entire transaction must be looked at and the essential question is whether the assignee possessed a pre-existing commercial interest at the time of the assignment. In this case, the interest of the plaintiff was sufficient to take it out of the area of champerty and maintenance. The cause of action was a "thing in action" within the Bankruptcy Act definition of "property" and as such was assignable under the provisions of the Bankruptcy Act.

Fredrikson v. Insurance Corp. of British Columbia (1986), 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, 28 D.L.R. (4th) 414, [1986] I.L.R. Paragraph1-2100, [1986] 4 W.W.R. 504 (C.A.), affd [1988] 1 S.C.R. 1089, 49 D.L.R. (4th) 160, [1988] I.L.R. Paragraph1-2371, 86 N.R. 48, [1988] 6 W.W.R. 633, consd

Other cases referred to

Cherry v. Ivey (1982), 37 O.R. (2d) 361, 43 C.B.R. (N.S.) 174, 136 D.L.R. (3d) 381 (H.C.J.); McCormack v. Toronto Railway Co. (1907), 13 O.L.R. 656 (Div. Ct.); Pehlke (Re) (1940), 21 C.B.R. 159, [1940] 1 D.L.R. 657 (Ont. C.A.); R. v. Wilson, [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 26 Man. R. (2d) 194, 51 N.R. 321, [1984] 1 W.W.R. 481; Swerdlow (Re) (1985), 57 C.B.R. (N.S.) 180 (Ont. S.C.); Taylor (Re) (1977), 30 C.B.R. (N.S.) 110 (Ont. S.C.);

Trendtex Trading Corp. v. Credit Suisse, [1982] A.C. 679, [1981] 3 All E.R. 520, [1981] 3 W.L.R. 766 (H.L.); Union Gas Co. v. Brown, [1968] 1 O.R. 524, 67 D.L.R. (2d) 44 (H.C.J.), revd on other grounds [1970] 1 O.R. 715, 9 D.L.R. (3d) 337 (C.A.); Wilson v. United Counties Bank Ltd., [1920] A.C. 102, [1918-19] All E.R. Rep. 1035, 88 L.J.K.B. 1033 (H.L.); 453416 Ontario Inc. v. White (1984), 42 C.P.C. 209 (Ont. H.C.J.) [leave to appeal to Div. Ct. granted (1984), 42 C.P.C. 209 at 215]; 478110 Ontario Inc. (Re) (1984), 50 C.B.R. (N.S.) 245 (Ont. S.C.)

Statutes referred to

Bankruptcy Act, R.S.C. 1985, c. B-3, ss. 2 "property", 38, 38(1), 187, 187(5), (9)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 21.01(1), 37.14 [am. O. Reg. 711/89, s. 30]

MOTION for determination before trial of a question of law pursuant to rule 21.01(1) of the Rules of Civil Procedure.

Peter K. Doody, for plaintiff.

Denis J.R. Power, Q.C., for defendant.

CHADWICK J.:-- This is a motion brought by the defendant, Robert Bales, pursuant to rule 21.01(1) of the Rules of Civil Procedure, O. Reg. 560/84. The motion is for a determination before trial of a question of law raised by a pleading in an action, where the determination may dispose of all or part of the action.

The defendant Bales is a lawyer and a businessman who was involved in a construction project with his client, Swee Hin Henry Ooi.

In the course of their business venture, Mr. Ooi and Mr. Bales each borrowed the sum of $55,000 from the Caisse Populaire Vanier Limitee on December 1, 1986. The loan was secured by way of a promissory note which was subsequently replaced by a second promissory note on July 3, 1987.

When Mr. Ooi defaulted on his promissory note, the Caisse Populaire successfully obtained judgment against him in the amount of $58,263.84 plus $240 in costs and interest at 10 per cent per year from the date of the judgment.

Subsequent to the judgment on August 30, 1988, Mr. Ooi filed an assignment in bankruptcy appointing the respondent D. & A. MacLeod Company Ltd. as his trustee in bankruptcy.

On September 15, the Caisse Populaire filed a proof of claim with Mr. Ooi's trustee in bankruptcy in respect of the debt evidenced by the judgment referred to herein.

On July 7, 1989 the Caisse Populaire brought a motion before the Registrar in Bankruptcy, without notice to Mr. Bales, for an order pursuant to the Bankruptcy Act, R.S.C. 1985, c. B-3, s. 38. In it, the Caisse asked that the trustee assign to it all rights, title and interest in the chose in action which Mr. Ooi may have in respect of allegedly negligent advice given to him by Robert Bales. On July 18, 1989 the Registrar issued the above and further ordered that the Caisse Populaire be authorized to commence and prosecute the proceedings contemplated therein in its own name and at its own expense and risk.

In its pleadings, which are accepted as being true for the purpose of this motion, the plaintiff Caisse Populaire alleges that the defendant Bales was in fact acting as a solicitor for Mr. Ooi at all relevant times. Further, at the time of the execution of the promissory note by Mr. Ooi, Mr. Bales improperly advised Mr. Ooi that he would not be personally liable on the promissory note.

The issues

The defendant raises the following issues to be determined as questions of law.

1(i) Can a right of action of a bankrupt, arising out of allegations of the negligent provisions of legal services, be:

(a) assigned at common law to a creditor of the bankrupt, and/or;

(b) assigned pursuant to s. 38 of the Bankruptcy Act, supra?

1(ii) Is an order made by the Deputy Registrar, without notice to the defendant, allowing the trustee in bankruptcy to assign and transfer the aforementioned right of action to a creditor of the bankrupt, a valid and binding order?

In addition to these issues, the plaintiff in response raises the following issues:

(1) Does this court have the jurisdiction to determine the propriety or validity of the order of the Deputy Registrar dated July 7, 1989?

(2) If such jurisdiction does exist, is the applicant defendant precluded from having the order of the Deputy Registrar of July 7, 1989 set aside due to his delay in bringing this motion?

Jurisdiction

First I will deal with the issue of jurisdiction as raised by the respondent in his material.

The plaintiff brought an application before the Deputy Registrar for an order under s. 38 of the Bankruptcy Act, supra. The order sought was for an assignment of the trustee's right of action against the bankrupt's solicitor. The application was brought without notice to the defendant solicitor and was based on supporting affidavit material.

Section 38 reads as follows:

38.(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the Court may direct.

(2) On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

The first question which arises is whether the proposed defendant Bales ought to have been given notice of the original application before the Registrar. Section 38 does not require that notice be given to the proposed defendant. It only requires in subs. (1) that notice be given to the other creditors of the bankrupt estate. However, the court, upon hearing such an application, can impose whatever terms and conditions it feels is appropriate under the circumstances.

Trainor J., in Re Swerdlow (1985), 57 C.B.R. (N.S.) 180 (Ont. S.C.), considered whether it would be appropriate to require a proposed defendant be given notice in applications such as the one before me. He reviewed a number of conflicting authorities when considering the effect of s. 20 of the Bankruptcy Act, R.S.C. 1970, c. B-3 (now s. 38) in conjunction with Rule 13 of the Bankruptcy Rules, C.R.C. 1978, c. 368. This rule requires that notice be given to all interested parties. At p. 184 C.B.R. he stated:

In the present circumstances, where the trustee has not

been discharged, but where he has decided against prosecuting the action, I can find no requirement or necessity to serve the proposed defendants with notice. Section 20 contemplates two parties, the moving creditor and the trustee. Rule 13 mandates service on parties affected by the motion. The proposed defendants are not parties. The creditor or creditors, upon an order being granted, stand in the shoes of the trustee. In the facts of this case, I can see no cogent reason to require the creditors to give notice to the defendants, any more than I could find reason to require the trustee to serve notice if he brought the action. The trustee must be served because, by the bankruptcy, any property of the bankrupt is vested in him as is the cause of action against the bankrupt.

I am in agreement with Mr. Justice Trainor's position in this regard.

The second question which arises is whether this motion can properly be brought before me.

The Caisse Populaire submits that the applicant is in fact seeking to review the order of the Deputy Registrar. Given that a procedure is provided for in the Bankruptcy Act for reviewing and appealing orders issued pursuant to it, that is the proper procedure to use in this instance.

While as a general principle form ought not to be elevated over substance, in bankruptcy matters, the legislature has provided parties with an expeditious and efficient way of resolving issues of this nature. Requiring litigants to adhere to this intention is in society's best interests as confusion and duplicity of proceedings would surely result otherwise.

I find that if the applicant sought to challenge the validity of the order, the appropriate practice to follow would be to bring an application for review under s. 187(5).

As argued by the respondents, bringing a motion pursuant to the Rules of Civil Procedure amounts to a collateral attack upon the order of the Deputy Registrar. Mr. Justice McIntyre,

in R. v. Wilson, [1983] 2 S.C.R. 594, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 4 D.L.R. (4th) 577, 26 Man. R. (2d) 194, 51 N.R. 321, [1984] 1 W.W.R. 481, at p. 599 S.C.R., p. 117 C.C.C., describes a collateral attack as "an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment".

The applicant has brought this application under the provision of rule 21.01(1) of the Rules of Civil Procedure.

The application should have been brought pursuant to s. 187 of the Bankruptcy Act.

Section 187(9) provides:

> (9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

As all parties are before the court and the application was fully argued on the merits, I am going to dispose of this application as if it was brought in Bankruptcy Court, which I have the jurisdiction to do.

Merits

Section 187(5) of the Bankruptcy Act is as follows:

> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

In my view the definition of "court" as set out above would include both a Deputy Registrar in Bankruptcy and any judge of the superior court. Although the authorities are conflicting, I am bound by and agree with the decision of our Court of Appeal: Re Pehlke (1940), 21 C.B.R. 159, [1940] 1 D.L.R. 657. This case stands for the proposition that one judge may review and rescind another's order.

I would have heard the application in light of the new materials and new issues which were obviously not before the Deputy Registrar at the original ex parte motion. Under these circumstances, in my view, a judge has the necessary jurisdiction to vary or rescind the original without notice order.

Delay

The respondent Caisse Populaire submits that the applicant has not brought this application in a timely fashion, waiting some ten months after the original order. This amounts to delay and would violate rule 37.14 [am. O. Reg. 711/89, s. 30] of the Rules of Civil Procedure (if they applied) which requires a person affected by an order obtained on motion without notice to move forthwith to vary or set aside the motion.

Since there is no similar provision provided in s. 187(5) of the Bankruptcy Act the respondent argues that laches would apply. He relies upon Re Taylor (1977), 30 C.B.R. (N.S.) 110 (Ont. S.C.).

On the facts of this case I do not feel that the defendant's counsel has been guilty of laches. There were insurance matters which had to be determined before any action could be taken. I am satisfied that under the circumstances, although counsel could have probably moved faster, they were not guilty of laches.

Assignability of the cause of action in tort

The defendant Bales challenges the right of the Deputy Registrar in Bankruptcy to assign Mr. Ooi's right of action for his solicitor's negligence. He argues that the assignment of a personal action in tort is prohibited at common law. This is based primarily on the proposition that such assignments amount to champerty and maintenance in the regular form.

In support of this proposition Mr. Power on behalf of the defendant cited a number of authorities where the court in the

past refused to allow such an assignment:

1. McCormack v. Toronto Railway Co. (1907), 13 O.L.R. 656 (Div. Ct.)

2. Union Gas Co. v. Brown, [1968] 1 O.R. 524, 67 D.L.R. (2d) 44 (H.C.J.), reversed on other grounds [1970] 1 O.R. 715, 9 D.L.R. (3d) 337 (C.A.)

3. Wilson v. United Counties Bank Ltd., [1920] A.C. 102, [1918-19] All E.R. Rep. 1035, 88 L.J.K.B. 1033 (H.L.)

4. Cherry v. Ivey (1982), 37 O.R. (2d) 361, 43 C.B.R. (N.S.) 174, 136 D.L.R. (3d) 381 (H.C.J.)

5. Re 478110 Ontario Inc. (1984), 50 C.B.R. (N.S.) 245 (Ont. S.C.)

6. 453416 Ontario Inc. v. White (1984), 42 C.P.C. 209 (Ont. H.C.J.) [leave to appeal to Div. Ct. granted (1984), 42 C.P.C. 209 at 215]

7. Trendtex Trading Corp. v. Credit Suisse, [1982] A.C. 679, [1981] 3 All E.R. 520, [1981] 3 W.L.R. 766 (H.L.)

A more recent case, Fredrikson v. Insurance Corp. of British Columbia (1986), 3 B.C.L.R. (2d) 145, 17 C.C.L.I. 194, 28 D.L.R. (4th) 414, [1986] I.L.R. Paragraph1-2100, [1986] 4 W.W.R. 504 (C.A.), affd [1988] 1 S.C.R. 1089, 49 D.L.R. (4th) 160, [1988] I.L.R. Paragraph1-2371, 86 N.R. 48, [1988] 6 W.W.R. 633, reviewed the question of the assignment of causes of action both in tort and in contract at common law. While this case did not deal with a bankrupt's estate, the common law principles of assignment are the same.

Fredrikson was an appeal from an order of a Chambers judge which allowed the insured plaintiff to assign its cause of action against the insurer both in tort and contract. The plaintiff insured lent his motor vehicle to an impaired person

who was seriously injured in a motor vehicle accident. The insured was found 80 per cent at fault for lending her the vehicle. Following the trial which established liability, the insured notified his insurer that if it chose not to settle the claim within the $500,000 policy limit, he would expect the insurer to indemnify him in full. The insurer settled the action for $1.2 million. The insured framed its action in both contract and tort alleging in the latter case that the insurer was negligent in adjusting and defending his claim. As the insured had no assets, the injured woman agreed to take an assignment of the insured's action against his insurer in consideration of her promising not to enforce the judgment against the insured.

McLachlin J.A. reviewed a number of cases, some of which have been cited by Mr. Power, dealing with the assignability of tortious claims.

The Fredrikson case dealt with the assignability of a personal cause of action for damages. McLachlin J.A. at p. 8118 I.L.R. recognizes that one exception to the general rule prohibiting the assignment of a bare cause of action is the existence of a pre-existing commercial interest. She stated as follows:

> In determining if the test is met, the court should look at the totality of the transaction: Trendtex, supra, per Lord Roskill at p. 531. A property interest ancillary to the cause of action assigned is sufficient to support an assignment, but not essential. A genuine pre-existing commercial interest will suffice. The term "commercial interest'' is used in the sense of financial interest; it need not arise from commercial dealings in the narrow sense.

She goes on to say that:

> While the entire transaction must be looked to, the essential question to be considered in determining whether the assignment smacks of maintenance or champerty is whether the assignee possessed the requisite financial interest at the time of the assignment.

The court found the requisite degree of commercial interest and allowed the assignment.

In the case at bar, the parties Ooi and Bales were business partners. The applicant Caisse Populaire loaned each of them $55,000 personally in order that they may commence the project in which they were involved.

When Ooi filed in bankruptcy, the applicant suffered a financial loss. It is this loss the Caisse hopes to recoup by proceeding with the cause of action against Bales. The Caisse does not stand to profit from this action. I find that the assignment has sufficient related commercial significance to take it out of the area of champerty and maintenance and, as such, is assignable at common law.

Assignability pursuant to the provisions of the Bankruptcy Act

Section 2 of the Bankruptcy Act defines "property" in the following way;

> "property" includes any money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property ...

(Emphasis added)

I find that the phrase "things in action" is sufficiently broad to include chose in action arising in tort or contract, and, as such, would also be assignable by statute.

In reaching the conclusion that the action against Bales is assignable at common law, I have not considered the merits of the proposed action against Bales.

Therefore the motion is dismissed. Counsel may speak to me

with respect to the question of costs.

Order accordingly.
CIVT INVT COMT

CITATION: West Face Capital Inc. v. Chieftain Metals Inc., 2020 ONSC 5161
COURT FILE NO.: CV-16-11511-00CL
DATE: 2020-10-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WEST FACE CAPITAL INC., AS AGENT

AND:

CHIEFTAIN METALS INC. AND CHIEFTAIN METALS CORP.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Mark Laugesen* and *Danish Afroz*, for the Receiver Grant Thornton Limited

Roger Jaipargas, for West Face Capital Inc., as Agent

Colby Linthwaite and *Aaron Welch*, for the Her Majesty the Queen in right of the Province of British Columbia

Robin Dean and *Robert Janes*, for Taku River Tlingit First Nation

Erin Gray, for Rivers Without Borders

HEARD by ZOOM CONFERENCE: August 11, 2020

ENDORSEMENT

[1] Grant Thornton Limited ("GTL") as court-appointed receiver and manager (the "Receiver"), of the assets, undertakings and property (the "Property") of Chieftain Metals Inc. ("CMI") and Chieftain Metals Corp. ("CMC" and, together with CMI, the "Companies" or "Chieftain") brings this motion for an order (the "Discharge Order"):

(a) approving the Third Report of the Receiver dated June 17, 2019 (the "Third Report"), including the actions and activities of the Receiver referred to therein;

(b) approving the Receiver's final Statement of Receipts and Disbursements;

(c) approving the fees and disbursements of the Receiver and its legal counsel, Bennett Jones;

(d) approving the anticipated further fees and disbursements of the Receiver and Bennett Jones, estimated not to exceed $25,000 to complete the

administration of the receivership (the "Receivership") in the context of these proceedings (the "Receivership Proceedings");

(e) approving the repayment to the ranking secured creditor West Face Capital Inc. as Agent ("West Face") of any monies remaining in the hands of the Receiver after payment of the fees and disbursements;

(f) sealing Confidential Appendix 1 to the Third Report;

(g) subject to the possible revival of the Receivership and re-appointment of the Receiver in the Receivership Proceedings as set forth in (i) immediately below, terminating the Receivership and discharging GTL as Receiver;

(h) releasing GTL while acting in its capacity as Receiver, save and except for gross negligence or wilful misconduct;

(i) providing for the possible revival of the Receivership and the re-appointment of GTL as Receiver of the Companies in the Receivership Proceedings on the same terms as provided for in the Appointment Order, with any such revival and re-appointment to become effective on the date and time of the filing by GTL of a certificate with the Court (the "Re-appointment Certificate"), for the general purpose of implementing a transaction in connection with the Property; and

(j) providing that, if the Re-appointment Certificate is not filed with the Court within two years from the date of the Discharge Order, the Receivership Proceedings shall be terminated.

[2] Since the date of the Third Report there have been extensive discussions among the Receiver, West Face, and various departments of the Government of British Columbia, including the Ministry of Energy and Mines and Petroleum Services, the Ministry of the Environment, the Ministry of Forests, Land and Natural Resources, the Ministry of Indigenous Relations and Reconciliation and Ministry of the Attorney General (collectively, the "Province").

[3] The Receiver subsequently filed a Supplement to the Third Report (the "Supplementary Report") to support the Receiver's request for a revised form of discharge order (the "Revised Discharge Order", substantially in the form attached to the Supplementary Report.

[4] Subject to certain exceptions noted below, the relief sought in the Revised Discharge Order mirrors that in the Discharge Order.

[5] The requested Revised Discharge Order provides at paragraph 14:

> [14] THIS COURT ORDERS that this Order, including the discharge of the Receiver as Receiver of the Property of Chieftain granted hereunder, shall be without prejudice to West Face's right to bring a motion before this Honourable Court to seek the appointment of a receiver and/or manager of the Companies and the Property pursuant to section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B – 3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, in the within receivership proceedings, bearing Court File Number CV–16–11511–00CL, and any such motion shall be served on Her Majesty the Queen in right of the Province of British Columbia.

[6] The Receiver reports that by late January 2020, there were no credible and interested parties willing to submit any bid or proposal on the Tulsequah Mine Project (the "Project") on terms which would be acceptable to the Receiver and West Face.

[7] The Receiver also reported that a draft Closure and Reclamation Plan for the Project was finalized on April 24, 2020.

[8] During the first months of 2020, the Receiver determined that the most prudent course of action was to amend the relief sought in the Discharge Order in an effort to eliminate or reduce the issues of concern to the Province.

[9] In the Supplementary Report, the Receiver reports that, with one remaining exception, all issues in the proposed form of Revised Discharge Order have been settled among the Receiver, West Face and the Province.

[10] The unresolved issue concerns the proposed paragraph 14 of the Revised Discharge Order.

[11] Having reviewed the record and, in particular, the Third Report and the Supplementary Report, I am satisfied that with the exception of the sole issue in dispute, the relief requested by the Receiver is appropriate in the circumstances and is granted. In arriving at this conclusion, I have taken into account that no party is opposed to the requested relief. The requested fees and disbursements appear to be reasonable in the circumstances. In addition, I am satisfied that the requested sealing order provision is appropriate as the disclosure of the information in Confidential Appendix I to the Third Report could be harmful to stakeholders. The *Sierra Club* principles have been taken into account.

Issue for Determination

[12] The Receiver takes the position that it should be discharged at this time. The Receiver has concluded that incurring the cost necessary for the continuation of the receivership is no longer beneficial to the stakeholders of the Companies, including the secured creditor West Face. With no credible and interested parties willing to pursue a transaction to acquire the Project, the

further costs of administering the Receivership cannot be justified at this time. West Face intends to continue in its efforts to find or develop a private-sector solution.

[13] West Face wants the Receiver to be discharged at this time and accepts the terms set forth at paragraph 14 of the Revised Discharge Order.

[14] The Province wants the language in paragraph 14 of the Revised Discharge Order augmented to provide that, "should West Face fail to bring the said motion to seek the appointment of a receiver and/or manager not later than two years from the date of this order, it may not do so thereafter without first obtaining the express written consent of Her Majesty the Queen in Right of the Province of British Columbia".

[15] The Taku River Tlingit First Nation ("TRTFN") does not oppose the discharge of the Receiver but submits that the Receiver should be discharged without the benefit of the proposed "without prejudice" provision and that the court should not exercise its discretion so as to give the secured creditor rights that it would not normally have under the BIA, particularly given the prejudiced innocent third parties like the TRTFN. Nor does the TRTFN agree with the additional wording proposed by the Province.

[16] The original version (paragraphs 12 – 14 of the Discharge Order) provided that the Receivership shall be revived and the Receiver re-appointed in the within Receivership Proceedings, in both cases effective on the filing of the Re-appointment Certificate. If the Re-appointment Certificate was not filed within two years, the Receivership Proceedings were to be terminated. No court order would be required to revive the Receivership Proceedings.

[17] The proposed Revised Discharge Order provides for a different path to revive the Receivership Proceedings. It requires West Face to bring a motion for the appointment of a receiver in the Receivership Proceedings on Notice to the Province. The two-year period within which to revive the Receivership Proceedings as set out in the Discharge Order is no longer referenced.

Analysis

[18] In its factum, counsel for West Face submits that the Province is requesting that the court take the extraordinary step of restricting the ability of West Face to move for the appointment of receiver over the Property to a two-year period and that it is the Province that is requesting that the court grant relief that is of an injunctive nature for which there is no authority to support such request.

[19] In my view, such a submission is misguided.

[20] In the vast majority of receivership proceedings, the discharge of the receiver is intended to bring finality to the receivership proceedings. There may be, in certain circumstances, ancillary work that remains to be completed and in such cases, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver. That is not the situation in these Receivership

Proceedings. This is not a case of ancillary work that remains to be completed. A court supervised sale transaction involving the Project is the fundamental purpose of the Receivership Proceedings.

[21] West Face is the party that initiated the Receivership Proceedings in 2016. The Receiver has been attempting to find a commercial resolution, satisfactory to West Face and other stakeholders since that time but has been unable to do so. It is understandable that West Face does not wish to continue to fund the Receivership Proceedings without any commercial resolution being implemented. West Face now proposes that its exposure in continuing to fund the Receiver should come at an end while the same time, it can continue to pursue, outside of the Receivership Proceedings, potential commercial transactions and, if a suitable transaction can be agreed upon, the Receivership Proceedings can be revived to provide a vehicle to complete the transaction.

[22] In seeking to preserve a route to revive the Receivership Proceedings, it is West Face and not the Province that is requesting extraordinary relief. In my view, the onus is on West Face to justify whether such relief is appropriate in the circumstances.

[23] West Face references that a re-appointment of a trustee in bankruptcy, is expressly contemplated in S. 41(11) of the BIA, which provides:

> 41(11) The court, on being satisfied that there are assets that have not been realized or distributed, may, on the application of any interested person, appointed a trustee to complete the administration of the estate of the bankrupt, and the trustee shall be governed by the provisions of this Act, in so far as they are applicable.

[24] Counsel to West Face submits that courts have interpreted this this provision to mean that the "door is not closed on the administration of an estate by the simple fact of a trustee's discharge", as the trustee may be reappointed to deal with assets which have not been realized or distributed. As such, courts have recognized that "it cannot be said that the trustee's powers end permanently and unequivocally following discharge or that the bankrupt's assets are unavailable."

[25] In considering this submission, it is necessary to take into account two points. First, bankruptcy proceedings differ from receivership proceedings. In a bankruptcy scenario, the assets of the bankrupt vest in the trustee in bankruptcy (s. 71 of the BIA). This is to be contrasted with a receivership scenario where there is no statutory vesting of assets in the receiver. Second, the re-appointment of a trustee is specifically provided for in the BIA.

[26] Section 41(11) of the BIA should not be read in isolation. Section 40 and 41 address issues relating to the discharge of the trustee and the treatment of remaining assets. In particular, section 40 deals with disposal of property and s. 41(10) provides that notwithstanding the discharge, the trustee remains trustee of the estate for the performance of such duties as may be incidental to the full administration of the estate.

[27] There are no corresponding provisions to sections 40 and 41 in Part XI of the BIA which deals with secured creditors and receivers, other than perhaps, s. 247(b) which requires the receiver to deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

[28] In my view, the authorities referenced by counsel to West Face which reference s. 41(11) of the BIA and the realization and distribution of assets are of limited assistance.

[29] However, I am satisfied that it is open to the court to consider provisions in a discharge order that would provide for the re-appointment of a receiver in certain circumstances. I arrive at this conclusion for two reasons. First, *Re Grand River Railway Co. Limited* [1933] O.J. 151, at para. 19 a decision of the Court of Appeal for Ontario, provided for the re-appointment of a receiver. Second, there is no express prohibition in the BIA that would prevent the court from re-appointing a receiver.

[30] In my view, the court does have the jurisdiction to reappoint a receiver in appropriate circumstances. The question is whether I should exercise my discretion to include a provision in the Revised Discharge Order that could result, at some future date, in a motion for the appointment or re-appointment of the receiver.

[31] The Province submits that if West Face is granted an unlimited time within which to move for the re-appointment of a receiver for the purpose of selling the Project, the Province will be required to run an unlimited risk that any costs it incurs and resources it expends with respect to the remediation of the Project will (i) be made redundant, or (ii) be for the benefit of West Face. The Province contends that West Face is content for the Province to solve the problem, while it retains its rights forever. In such circumstances, the re-appointment of a receiver, at some future time for the purpose of completing a sale of the Project would be convenient for West Face, but it would certainly not be just.

[32] Counsel to the Province references *Bank of Nova Scotia* v. *Freure Village on Clair Creek*, [1996] 40 C.B.R. [3rd] 274 [Ont. Commercial List] for the proposition that the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This involved an examination of all the circumstances, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[33] The Province submits that in this case, the "potential cost" to the Province is the time, effort and money expended upon work towards the development and implementation of a final remediation and closure plan that is ultimately for the benefit of West Face and its buyer.

[34] The Province contends that there should be some time limit imposed on West Face's ability to bring a motion to request the re-appointment of the Receiver and that the issue to be determined is what time limit should be imposed. The Province contends that it should be no

longer than two years and that the consent of the Province should be a precondition to bring such a motion.

[35] Counsel to the TRTFN detailed that since the 1990s, the TFTFN has taken considerable steps to protect its lands and that the protection and stewardship of the TRTFN territory is fundamental to the TRTFN way of life. The TRTFN is opposed to the project as it views the Project as a threat to their lands and waters as well as to their way of life.

[36] With respect to the issue of the discharge of a Receiver, counsel to TRTFN submits that the BIA makes no provision for without prejudice discharge of a receiver and if there is any authority to make an order granting an unlimited period of time to move for the re-appointment of a receiver in this proceeding, it lies in the discretionary power of the court in managing insolvency proceedings. I agree.

[37] Accordingly, in the exercise of its discretion, counsel submits that the court should take into account all interests of innocent third party such as the TRTFN. The TRTFN submits that permitting West Face to move for the re-appointment of a receiver will have a chilling effect on the remediation plan and the Province will be reluctant to engage in an expensive environmental cleanup to benefit West Face and future purchasers.

[38] It is clear that West Face is not satisfied with the status quo. It does not wish to maintain the receivership and accept the costs and responsibilities associated with the Receivership Proceedings, including the ongoing supervision by the court. West Face desires an outcome which limits their ongoing financial exposure, but at the same time, preserves their ability to seek a satisfactory commercial resolution which may include the use of Receivership Proceedings to consummate a future transaction. West Face does not want a termination of the Receivership Proceedings. It is conceivable that there may be limitation period consequences to West Face if this course of action is implemented and West Face wanted to initiate a second receivership proceeding. While I acknowledge the practical concerns of West Face, the solution proposed by West Face results, in my view, in an unwarranted transference of risk and uncertainty to other parties.

[39] The Province raises legitimate concerns. In my view, the Province should not be faced with an unlimited period of time of uncertainty. There are environmental concerns with the Project which will have to be addressed. It has proposed a two-year period during which West Face can explore the possibilities of a commercial transaction. However, beyond that period, the Province quite properly put forward the position that it should have some certainty in the outcome.

[40] The TRTFN has also raised legitimate concerns and want these Receivership Proceedings to be dealt with in a definitive manner.

[41] In my view, the Province and the TRTFN are entitled to certainty of outcome. The only question to be addressed is whether West Face should have a defined period of time to bring a motion to revive the receivership proceedings, and if so, whether that time period shall be extended only with the consent of the Province.

Disposition

[42] In balancing the interests of the Receiver, the secured creditor West Face, the Province and TRTFN, I have concluded that the Receiver is to be discharged at this time, without prejudice to the right of West Face to bring a motion to seek the appointment of a receiver in these proceedings no later than August 11, 2022, this date being two years from the date of this hearing. This gives West Face adequate time to assess its options.

[43] I have also concluded that it is not appropriate, in the circumstances to include a provision that would potentially extend the timeline beyond August 11, 2022. To do so would just prolong a period of uncertainty that could be detrimental to the TRTFN and the Province. If circumstances are such that require this issue to be revisited on or before August 11, 2022, it is open to West Face to bring its motion in the Receivership Proceedings and, if reappointed, the Receiver can seek further direction from the court.

[44] An order shall issue to give effect to the foregoing.

Chief Justice Geoffrey B. Morawetz

Date: October 8, 2020

CAISSE POPULAIRE POINTE-AUX-ROCHES-TECUMSEH INC. Plaintiff	and	G.I. FARMS INC., VANTEC USA ONTARIO INC., 2287188 ONTARIO INC., 2027512 ONTARIO INC. and 1690169 ONTARIO INC. Defendants	Court File No. CV-869/21

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at **LONDON**

Brief of Authorities of the Receiver
(Distribution and Discharge Order)
(returnable July 16, 2021)

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