

CITATION: Business Development Bank of Canada v. Astoria Organic Matters Ltd. and
Astoria Organic Matters Canada LP, 2018 ONSC 2850
COURT FILE NO.: CV-17-11760-00CL
DATE: 20180517

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
BUSINESS DEVELOPMENT BANK OF) *Kyle Kuepfer*, counsel for Business
CANADA) Development Bank of Canada
)
Applicants) *Kyle Plunkett* and *Steve Graff*, counsel for
) BDO Canada Ltd., the Receiver
- and -)
) *Melvyn L. Solomon* and *Andrew T. R.*
) *Chachula*, counsel for SusGlobal Energy
) Belleville Ltd.
)
)
ASTORIA ORGANIC MATTERS LTD.)
and ASTORIA ORGANIC MATTERS)
CANADA LP)
)
Respondents)
) **HEARD:** February 21 and 27, 2018 and
) March 5, 2018

REASONS FOR DECISION

MCEWEN J.

[1] The issue to be determined on this motion is whether I should grant leave to allow SusGlobal Energy Belleville Ltd. (“SusGlobal”) to commence a claim against BDO Canada Inc. (“BDO”) in its capacity as Court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP (“Astoria”) for damages for gross negligence, or in the alternative, willful misconduct, and breaching the Asset Purchase Agreement and the order of Justice Hainey dated April 13, 2017.

OVERVIEW

[2] Astoria was located in Belleville (the “facility”). It operated a business that made Category A compost. It created Category A compost by processing a mixture of leaf and yard

waste (“leaf/yard waste”) and bio-solids, food, liquid organics, manure, and paper sludge (“organic waste”). The initial blending of the leaf/yard waste and organic waste was carried out in a structure called the Tipping Building. The leaf/yard waste was stored outside, while the organic waste was stored in the Tipping Building. Afterwards, the mixture would be transferred to a Compost Building where it would be formed into long rows (“windrows”) which weighed between 450 – 500 metric tonnes (“MT”) and undergo a treatment process. After processing, the resulting Category A compost could be sold to the public for consumer use.

[3] Astoria was owned by a German company that fell into insolvency proceedings in Germany. Ultimately, Astoria was not able to satisfy the loan it had with Business Development Bank of Canada (“BDC”).

[4] On application of the BDC, Astoria’s largest secured creditor, BDO was appointed as the receiver pursuant to the order of Justice Hainey dated April 13, 2017 (the “Appointment Order”). Pursuant to the terms of the Appointment Order, BDO was empowered and authorized to, amongst other things, market any and all of Astoria’s assets, undertakings and property (the “Property”). This included developing a formal sales process, advertising and soliciting offers in respect of the Property, including the facility, and negotiating the terms and conditions of any sale.

[5] Subsequent to the order of Justice Hainey, BDO took possession of the facility and began to operate the business pending a sale.

[6] After conducting a competitive sales process, BDO entered into an asset purchase agreement (the “APA”) with SusGlobal. The sales transaction was approved by Justice Myers on August 30, 2017. It closed on September 15, 2017.

[7] SusGlobal alleges that BDO, during the 23 week Receiver period, operated the business in a grossly negligent manner and engaged in willful misconduct. As a result, it claims BDO breached the terms of the APA and the Appointment Order. Accordingly, SusGlobal submits that it should be granted leave to commence an action against BDO.

[8] Of note is the fact that the Appointment Order contained the following paragraphs concerning actions against BDO:

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a “Proceeding”), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court. [Emphasis Added]

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and

suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, (iv) prevent the registration of a claim for lien, or (v) prevent the registration and perfection of the claim for lien of Ken Tulloch Construction Ltd., but for greater certainty, no further steps or proceedings shall be taken in the context of any such claim. [Emphasis Added]

LIMITATION ON ENVIRONMENT LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession. [Emphasis Added]

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. [Emphasis Added]

[9] As can be seen SusGlobal requires leave of this court to commence the action. Further, BDO shall incur no liability unless SusGlobal can establish that it was grossly negligent or engaged in willful misconduct.

[10] SusGlobal's claim of gross negligence and willful misconduct stem from one allegation. That allegation is that as of the date of closing, September 15, 2017, there was between approximately 1,300 MT and 2,100 MT of organic waste in the Tipping Building.

[11] SusGlobal alleges that this amount of organic waste far exceeded the amount allowed. It relies upon the Amended Environmental Compliance Approval Number 0031-7UTRSS (the "ECA"), which was issued to Astoria in August 2015. The ECA stipulates that there was to be no more than 150 MT of organic waste stored in the Tipping Building.

[12] As a result, SusGlobal alleges that BDO failed to comply with the conditions of the ECA as per section 186(3) of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 and paragraphs 10 and 16 of the Appointment Order which generally provide that nothing exempts BDO from compliance with regulatory provisions concerning health, safety, or the environment or from complying with the provisions of the *Environmental Protection Act*. It claims that this failure amounts to gross negligence or willful misconduct.

[13] SusGlobal further alleges that it sustained damages in the amount of \$755,400. It attributes \$300,000 of this amount to additional processing costs that SusGlobal incurred to rid itself of the extra organic waste. The remaining alleged damages are economic losses involving subsequent loss of contracts, reduced profits, loss of opportunity cost, and refund of a penalty consideration it paid to BDO to extend the closing date.

THE LAW

[14] The test for granting leave was recently set out by the Court of Appeal in *Canadian National Railway Co. v. Holms*, 2016 ONCA 148 ("CNR").

[15] In *CNR*, Weiler J.A. set out the test as follows:

29 Both parties agree that the threshold for leave in this context is not a high one. It is designed to protect the receiver against frivolous or vexatious actions or actions without basis in fact. The party seeking leave must only show a reasonable cause of action with some evidentiary basis, or in other words, "the evidence must disclose a *prima facie* case": see *GMAC Commercial Credit Corp. – Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, at para. 59.

[...]

31 The liability of the Monitor and Receiver in this case was limited by the various orders to gross negligence or willful misconduct. Accordingly, the analysis as to whether there is a factual foundation for a claim does not relate to mere negligence. In such circumstances, the test is whether the Receiver "demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct": *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB

350, 590 A.R. 156, at para. 39. The motions judge applied this test, and I agree that this is the proper test.

[16] In a case such as this, where BDO's liability has been limited to gross negligence or willful misconduct, I must therefore determine whether the evidence discloses a *prima facie* case that BDO demonstrated a very marked departure from the standards by which reasonable and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent to its conduct. In conducting the analysis I am not engaging in an investigation on the merits but rather simply assessing whether there is a sufficient evidentiary basis to satisfy the test.

[17] For the reasons below I am of the view that the evidence does not disclose a *prima facie* case of gross negligence or willful misconduct against BDO and that leave ought not to be granted to pursue an action.

ANALYSIS

Introduction

[18] This motion was lengthy and hard fought. The parties filed numerous briefs and provided me with a number of charts, photos, and chronologies during the hearing of the motion. I do not propose to deal with each and every dispute raised by the parties. These reasons will focus on the three submissions made by SusGlobal at the motion in support of its motion and the provisions of the APA.

[19] Before I commence my review of SusGlobal's primary three submissions I wish to note that, overall, SusGlobal's motion fails due to its inability to produce credible and reliable evidence to support its claim of excess organic waste in the Tipping Building. For example, it failed to produce any eye-witness evidence from its own employees notwithstanding it had ample access to the facility, including the Tipping Building, prior to closing and as of September 15, 2017 when it alleges the excess organic materials were contained in the Tipping Building. It also failed to provide any credible and reliable evidence from other sources who attended at the site before and after closing, including personnel from the Ministry of the Environment and Climate Change (the "MOECC"), Mr. Ben Hamilton ("Ben Hamilton"), the former operations manager of Astoria, who was retained by SusGlobal post-closing as a site supervisor, and its other employees, operators or consultants.

[20] Instead, in an attempt to establish a *prima facie* case of willful misconduct and/or gross negligence, SusGlobal relies upon a convoluted mixture of document review, photograph analysis, and self-proclaimed expert evidence. SusGlobal's case is not helped by the fact that at various times in these proceedings it has alleged that the excess organic waste weighed approximately 1,300 MT or 1,500 MT or 2,100 MT.

[21] It is also important to note from the outset that, notwithstanding the fact that SusGlobal relies upon the provisions of the ECA which stipulates that no more than 150 MT of organic waste can be stored in the Tipping Building, SusGlobal conceded in oral argument that it was not

unusual and, in fact, acceptable to have amounts in excess of 150 MT, and up to 500 MT of organic waste in the Tipping Building at one time so that the organic waste and the leaf/yard waste can be mixed to create Category A compost.

[22] Further, I accept the evidence of BDO that the 150 MT standard only related to storage of organic waste in the Tipping Building. During the blending process it is obvious that, at any time, in excess of 500 MT could be present so that the proper amount of organic waste could be blended with the leaf/yard waste.

[23] The simple fact that there was an amount of organic waste in excess of 150 MT could not, in-and of itself, constitute to gross negligence or willful misconduct. I accept, however, that at some level, excess storage of organic waste could arguably establish a *prima facie* case of gross negligence or willful misconduct but that was not the case here. In my view this position is supported by the fact, as will be discussed further below, that when the MOECC officials were provided with information that the Tipping Building may contain approximately 1300 MT of organic waste they took no steps to investigate. Nor were any type of charges or sanctions contemplated or leveled against BDO during the time it was operating the facility.

SusGlobal's Position

[24] I will now turn to SusGlobal's three submissions that it makes in support of its contention that there was between 1300 MT and 2100 MT of organic waste in the Tipping Building on the date of closing:

1. The review of photographs undertaken by SusGlobal's chief executive officer Gerald Hamaliuk ("Mr. Hamaliuk") and Nick Pora ("Mr. Pora").
2. Report of Pinchin Ltd. dated October 5, 2017 (the "Pinchin Report").
3. Calculations performed by Mr. Hamaliuk and Mr. Pora based on various documents that were contemporaneously prepared during the 23 week receivership.

[25] I will deal with each in turn.

1. Photograph Review by Mr. Hamaliuk and Mr. Pora

[26] I will first deal with the evidence of Mr. Pora.

[27] SusGlobal has provided what it describes as an expert report from Mr. Pora, unattached to an affidavit. Mr. Pora has executed an Acknowledgment of Expert's Duty as per Rule 53 of the *Rules of Civil Procedure*, R.S.O. 1990 c. C.43.

[28] Mr. Pora conducted a review of photographs taken inside the Tipping Building by BDO in September 2017. Based on the size of the building and the amount of organic waste displayed in the photographs he concluded that there was 2,092.54 MT of organic waste in the Tipping Building as of the September 15, 2017 date of closing. I am not, however, prepared to give Mr. Pora's evidence, based on the photographs, any weight given the following significant problems:

- The report is not attached to an affidavit which insulated Mr. Pora from cross-examination.
- In December 2017 Mr. Pora was employed by SusGlobal. It was at that time he was asked by Mr. Hamaliuk, SusGlobal's CEO, to review the photographs and prepare a report.
- Mr. Pora notes in his report that he was hired as an operations consultant at SusGlobal. He fails, however, to establish that he has any special or peculiar knowledge through study or experience which would qualify him to prepare an expert report based on a review of the photographs.
- Having been hired in November 2017 by SusGlobal, Mr. Pora was not present during the relevant time period when BDO was operating the facility. His report is restricted to a review of series of photographs to determine inventory levels of organic waste as of September 2017. He has no firsthand knowledge of the amount of organic waste that was in the Tipping Building prior to his being hired at SusGlobal.

[29] In my view, based on all the above, no weight can be placed on Mr. Pora's report. He lacks the objectivity required of an expert, has not established any particular expertise to conduct a review of the photographs and has no firsthand knowledge of the issue in question. Any one of these issues would, in and of itself, be of concern but taken cumulatively I am unable to place any confidence in Mr. Pora's analysis of the photographs.

[30] Further, both Mr. Pora's and Mr. Hamaliuk's photograph analyses, are fatally flawed. Mr. Hamaliuk, like Mr. Pora, relied upon the BDO photographs taken in September 2017.

[31] Their analyses simply involved them looking at the photographs and then, by estimating the size of the building and assuming the organic waste had a uniform height of two meters, estimating the amount of organic waste.

[32] In my view, this is a highly unscientific and inaccurate way to try to conduct such a review for two primary reasons:

- a) A review of these photographs clearly shows that the organic waste was not piled at a uniform height of two meters; and
- b) the photographs show that, notwithstanding the assumptions of Messrs. Hamaliuk and Pora that organic waste could be stored throughout the building, large machinery was stored at the rear of the building. Messrs. Hamaliuk and Pora prepared their estimates on the assumption that the entire Tipping Building would have been filled with organic waste. This simply could not be the case since the machinery takes up a considerable amount of space in the Tipping Building.

[33] It is for these reasons that I find the analysis based on the photographs is unreliable and of no real probative value. I therefore cannot rely upon the evidence of Mr. Hamaliuk or Mr. Pora with respect to their review of the photographs.

2. The Pinchin Report

[34] SusGlobal relies upon the Pinchin Report, and to a lesser extent, the report of Stantec Consulting Ltd. (the "Stantec Report"). Both companies conducted yearly odour sampling testing at the facility to ensure that Astoria was in compliance with the ECA conditions concerning the odour emissions proscribed by the Ministry of the Environment. Both companies were on-site during the time BDO was operating the facility and later prepared reports.

[35] The Pinchin Report and the Stantec Report indicated that there was 1,312.5 MT of organic waste in the Tipping Building. Both the Pinchin and Stantec reports also identified odour problems. SusGlobal submits that this should have, or did, lead BDO to the conclusion that there was too much organic waste in the Tipping Building.

[36] SusGlobal submits that BDO failed to undertake a reasonable investigation to determine the cause of the odour issue and the amount of excess organic waste in the Tipping Building. SusGlobal further submits that, thereafter, BDO failed to advise SusGlobal of these problems. As a result, SusGlobal submits that it was commercially unreasonable for BDO to keep it in the dark and close the transaction in which SusGlobal paid approximately \$7.7 million dollars for the Property.

[37] For the following reasons, I do not place any weight on Pinchin's notation that there was 1,312.5 MT of organic waste in the Tipping Building. SusGlobal conceded that neither Pinchin nor Stantec conducted any independent measurements in this regard. The estimate of 1,312.5 MT of organic waste contained in the report was obtained by Pinchin from Mr. Allan Hamilton ("Allan Hamilton") who was Astoria's president and chief executive officer. Allan Hamilton remained working at the facility during the receivership period. I will say more about Allan Hamilton and his calculations later in these reasons but, briefly, the aforementioned estimate made by Allan Hamilton was later corrected by him. He lowered it to 184 MT as of the date of closing, September 15, 2017 and 403 MT as of September 26, 2017.

[38] Ultimately, therefore, there is nothing in the Pinchin Report or the Stantec Report to credibly suggest that there was excess organic waste in the Tipping Building as of the date of closing. They provided no first-hand knowledge in this regard.

[39] SusGlobal also complains that BDO hired Pinchin and Stantec and failed to advise SusGlobal of the results of the odour testing prior to closing. First, it is somewhat inaccurate to submit that BDO hired these two companies. They attended at the site in July 2017, as they did in the past, to carry their yearly testing. Second, I find that SusGlobal's second complaint that BDO failed to advise of the findings of excessive odour are unwarranted.

[40] While it is true that Pinchin did detect odour emissions in the Tipping Building that were considerably higher than expected, the proposed solution was simply to place a layer of woodchips on top of the bio-solids to reduce exposure of the bio-solids to ambient air.

[41] Furthermore, the record demonstrates that the MOECC, who reviewed the reports, determined that there had been an error in how the source testing was completed in the Compost Buildings and therefore any excessive odours from those buildings were of little importance. Subsequently, the MOECC also attended in August 2017 to investigate an odour complaint and actually toured the Tipping Building that time. It was determined that the odour was not being generated from the Tipping Building but was a result of an off-site odour which was agricultural based.

[42] Ultimately, the MOECC agreed that any source testing could be delayed and could be redone in spring/summer of 2018. It was apparent that the MOECC was largely unconcerned with the contents of the Pinchin and Stantec reports.

[43] Of further importance is the fact that Ms. Katy Potter, an employee of the MOECC who attended at the site, agreed via an email exchange with BDO on December 6, 2017 that the MOECC found no reason to assess the Tipping Building. It was determined that the on-site odour was not being generated from the Tipping Building but that it was off-site and it was agriculturally based.

[44] Perhaps of the greatest significance is another email that Ms. Potter sent to BDO on November 8, 2017 wherein she confirmed that she did a site visit with "an outside operator/consultant" of SusGlobal on September 26, 2017. That operator/consultant provided Ms. Potter with an estimate of 400 MT of organic waste in the Tipping Building. This is within the acknowledged acceptable range and is in keeping with the estimates, referred to above, provided by Allan Hamilton.

[45] I have not noted each and every document that was provided to me by SusGlobal (or for that matter BDO) in my review of the Pinchin/Stantec Reports. Suffice to say, however, that the aforementioned documentation, which in my view is the most significant, does not support an allegation that there was excess organic waste in the Tipping Building during the time BDO was in possession. The exercise that I was put to by SusGlobal amounts to a review of e-mails and other documents prepared by persons who did not provide direct evidence on this point, often lacking context and leading to no real reliable conclusions. If anything the e-mails and documents suggest that Pinchin itself had no knowledge of the amount of organic waste in the Tipping Building, nor was the MOECC concerned of either the amount of organic waste in the Tipping Building or the odour sampling.

[46] In my view, therefore, there is no credible evidence in the Pinchin or Stantec Reports to suggest excess organic waste. Further, given the above, there was no reason for BDO to advise SusGlobal of any alleged difficulties.

3. Calculations performed by Mr. Hamaliuk and Mr. Pora

[47] In addition to the photographic evidence and the Pinchin Report, dealt with above, SusGlobal relies, perhaps most heavily, on the calculations performed by Mr. Hamaliuk in his supplementary affidavit (particularly at paragraphs 22-32) and by Mr. Pora in his report. Their calculations conclude that there was approximately 2,100 MT of organic waste in the Tipping Building at the time of closing.

[48] Both Mr. Hamaliuk and Mr. Pora base their calculations on the amount of actual organic waste that was delivered to the facility, via truck, during the time frame in which BDO operated the facility. These deliveries were recorded in "Material Reports" which appear to have accumulatively recorded deliveries of organic waste.

[49] Of importance in analyzing these calculations is the fact that Grade A compost is created by blending leaf/yard waste and organic waste at a 75:25 ratio. On average, approximately one windrow will be created each week and the windrow would weigh between 450 and 500 MT.

[50] Messrs. Hamaliuk and Pora engaged in analyses where they determined, in their view, how much organic waste would have been used during the 23 week receivership period to make the compost. They concluded that there would have been approximately 2,100 MT of organic waste left in the Tipping Building at the date of closing, September 15, 2017.

[51] SusGlobal submits, therefore, that even if it was acceptable to have up to 500 MT of organic waste in the Tipping Building this amount is far in excess of what is allowable and significantly out of compliance with the MOECC guidelines.

[52] BDO hotly contests the calculations prepared by Messrs. Hamaliuk and Pora. While I agree that using actual deliveries is a useful way to determine the amount of organic waste at the site, I agree with BDO that the calculations prepared by Messrs. Hamaliuk and Pora are of no real probative value and I accept the calculations performed by BDO.

[53] In my view, the flaw in SusGlobal's calculations is set out in paragraph 22 of Mr. Hamaliuk's supplementary affidavit wherein he deposed as follows:

22. To produce Category A Compost at the Process Rate During the Receivership and Ratio using a Full Windrow per week, BDO would have been required to process (25% of 500 MT) 125 MT of Biosolid Content (per week) and (75% of 500 MT) 375 MT of Leaf/Yard Content (per week), to a total Compost Mixture amount of 500 MT. (See Calculation at Exhibit "5" – Category A Compost Calculation, Full Windrow)

[54] As can be seen, in conducting his analysis Mr. Hamaliuk, as did Mr. Pora, assumed that in creating a full 500 MT windrow of Category A compost it would consist of 125 MT of organic waste and 375 MT of leaf/yard content.

[55] The analysis that was performed by BDO in its Supplement to the Fourth Report to the Court demonstrates why this is an error. In that report BDO analyzed Mr. Hamaliuk's calculations and identified what I accept to be the flaw. Mr. Hamaliuk, based on the fact that Grade A compost is comprised of 25% organic waste on a dry weight basis and 75% leaf/yard waste (therefore 1 part organic waste per 3 parts leaf/yard waste) that this would result in windrows that consist of 125 MT of organic waste and 375 MT leaf/yard waste.

[56] The flaw is that, by volume, however the 1:3 part ratio equals approximately 1:1 by actual weight. This stems from the fact that organic waste is naturally heavier. This would result in the windrows not consisting of 125 MT of organic waste (assuming a windrow is 500 MT in total weight) but rather 250 MT. A 500 MT windrow would consist of 250 MT of organic waste as opposed to the 125 MT advanced by Mr. Hamaliuk. BDO's argument demonstrates that Mr. Hamaliuk's assumption in his calculations that one part organic waste would weigh the same as one part leaf/yard waste is incorrect. That this renders Mr. Hamaliuk's and Mr. Pora's calculations meaningless.

[57] For ease of reference, I set out below the BDO¹ analysis as set out in the Supplement to the Fourth Report:

2.0 Incorrect Statements/Facts in the Supplemental Hamaliuk Affidavit

2.0.1 The Supplemental Hamaliuk Affidavit outlines Mr. Hamaliuk's understanding of the Environmental Compliance Approval ("ECA") and applicable guidelines to perform a series of calculations relating to the mix of Wind rows and the quantum of bio-solids inventory in the Tipping Building. Based upon his calculations, Mr. Hamaliuk asserts that the Receiver could not have processed the quantum of bio-solids that were received during the receivership period. As outlined further below, the Receiver disagrees with this assertion.

2.0.2 We have reviewed the Supplemental Hamaliuk Affidavit in support of the SusGlobal Claim and the Receiver is of the view that the information contained therein is misleading. The Receiver continues to rely on the previous statements provided in the Fourth Report to the Court and prior reports. The Ontario Compost Quality Standards (the "Compost Standards") provided at Tab 1 of the Supplemental Hamaliuk Affidavit provide several requirements in respect of compost and composting facilities. **All weights for the materials processed at Astoria provided at Tab 2E of the Hamaliuk Affidavit included in the SusGlobal Motion is natural or "wet" weight of the materials. However, the information in the Compost Standards is premised on "dry weight" which Mr. Hamaliuk noted, but omitted from the calculations included in the Supplemental Hamaliuk Affidavit. Such an omission renders these comments and submissions meaningless.**

¹ The analysis refers to "bio-solids", which I describe in these reasons as organic waste.

2.0.3 As noted previously in the Fourth Report at paragraph 2.1 .3(2), and referenced in the Supplemental Hamaliuk Affidavit at paragraph 15, the blended materials in the Tipping Building would contain approximately 60% moisture (well more than half the weight) immediately prior to placement in the Windrow. The moisture content of other materials varies significantly.

2.0.4 As such, using "wet weight" to draw conclusions, as SusGlobal Belleville has done, and comparing them to metrics based upon "dry weight" is wholly inappropriate and incorrect.

2.0.5 Based on a review of the Supplemental Hamaliuk Affidavit by the Receiver and Mr. Al Hamilton, the latter of whom operated the Site prior to and during the receivership without any significant concerns identified by the MOECC, it is the Receiver's view that Mr. Hamaliuk has miscalculated the figures in the Supplemental Hamaliuk Affidavit relating to the use of bio-solids in the production of Astoria Wind rows as follows:

- 1) Grade A compost is comprised of 25% or less bio-solids on a "dry weight" basis. To achieve this, Astoria used a Carbon: Nitrogen ratio that is 3:1 by volume and which equates to approximately 1:1 by weight. Meaning three buckets of leaf and yard (Carbon) to 1 bucket of bio-solids (Nitrogen). Mr. Hamaliuk's calculations assumes that one bucket of bio-solids weighs the same as a bucket of dry leaf and yard waste, which is incorrect, and which renders the calculations dependent upon those facts meaningless and misleading. [Underline in original]
- 2) In contrast to the calculations contained in the Supplementary Hamaliuk Affidavit (i.e. that each Windrow consisted of 112.5 to 125 tonnes of bio-solids and 337.5 to 350 tonnes of Leaf & Yard), the Gore Windrows built by Astoria are estimated to contain approximately 225 - 250 tonnes of bio-solids and 225 - 250 tonnes of Leaf & Yard waste for each Windrow. Mr. Hamaliuk points out that he believes 4,952 of tonnes (or a weekly average of 215 tonnes) of bio-solids were received during the receivership period. The Receiver notes the period is 22 weeks and 1 day and believes that approximately 5,200 tonnes were received during this period, being an average of 235 tonnes per week.
- 3) Based on either of Mr. Hamaliuk 's or the Receiver 's estimates of between 215 to 235 tonnes of bio-solids received per week, the quantum received is in line with the quantum required to process the Windrows built during the receivership period (i.e. an average of 1 per week). [Emphasis Added]

[58] I accept the calculations prepared in "Chart 1" provided to me at the hearing by BDO, without objection. As per those calculation, using a weight ratio of 1:1 on a wet weight basis, I agree that, ultimately, the amount of organic waste in the Tipping Building would have been at or near the 150 MT as per the regulation and certainly below the 500 MT that SusGlobal concedes is acceptable.

[59] This estimate is also close to the aforementioned calculations prepared by Allan Hamilton (403 MT as of September 26) and the estimate provided by the SusGlobal operator/consultant (400 MT of organic waste) as quoted by Ms. Potter in her aforementioned e-mail.

[60] I should note, that in addition to SusGlobal taking issue with Allan Hamilton's calculation, they also alleged he knowingly misrepresented the amount of organic waste in the Tipping Building.

[61] First, I do accept that there were problems with Allan Hamilton's calculations – he had to correct them once and ultimately explain another error/misstatement. I do however accept the final calculations as being generally accurate since, as noted, they generally correspond with the BDO calculations and the estimate provided by the SusGlobal operator/consultant.

[62] Further, Allan Hamilton was one of the best people to comment on the amount of organic waste in the Tipping Building. He also provided a diagram to illustrate the design, layout, and raw materials stored in the Tipping Building which support his estimate of approximately 400 MT. SusGlobal took no steps to try to elicit evidence from Allan Hamilton or examine him with respect to his conclusions for the purposes of this motion. There is no credible or reliable evidence in this motion to support the bald allegation that Allan Hamilton was dishonest or manipulated the numbers.

[63] Of interest, however, is the fact that emails passed between Allan Hamilton and Mr. Hamaliuk in September 2017. In those emails Mr. Hamaliuk indicated that the facility would be closing and processing would be limited. Mr. Hamilton expressed concern that this would stagnate the process to create Grade A compost and it would take weeks to recover. This affords some insight as to operations post-closing which may have led to a buildup of organic waste.

[64] SusGlobal also takes great issue with much, if not all of Allan Hamilton's evidence, including, but not limited to his observation that on average 1-1.5 windrows were created per week. I have reviewed all of this evidence and find that while his use of words, may at times, have been imprecise, I do not have any qualms concerning credibility. Once again, SusGlobal, had it seen fit, could have had Allan Hamilton testify to put evidence squarely before this court. It did not. It is also interesting to note that while SusGlobal takes aim at Allan Hamilton's credibility, Mr. Hamaliuk also provided inaccurate information in his November 4, 2017 email to BDO where he claimed to have pictures and MOECC estimates of inventory over 1,500 MT when this was not the case. This is incorrect and was either a mistake or an exaggeration. In my view, all this underscores the fact that both sides attempted to raise credibility issues that were of little assistance.

[65] Other than Mr. Hamaliuk's photograph review and calculations, I should note that he also provided affidavit evidence containing a number of assumptions on his part. In my view, this affidavit evidence as to the amount of organic waste in the Tipping Building is of no probative value. I do not propose to repeat each and every instance of the evidence but examples of recitation of bald, substantiated statements are contained in paragraphs 48, 49, and 61 of his November 29, 2017 affidavit. It was in this affidavit that Mr. Hamaliuk came up with the estimate of 1,500 MT.

[66] Last, it also worth noting that in the event that there was an accumulation of organic waste after SusGlobal took possession of the facility there are notations from both Ben and Allan Hamilton that SusGlobal failed to purchase equipment at the facility to maintain the level of

operations required to remain within a compliance of ECA requirements and that SusGlobal decreased its processing so that less organic waste was being used to create Grade A compost. Admittedly, the evidence is confused in this regard since there are also product reports of regular production of windrows, but post-closing they identified clear problems with production that may explain the buildup of organic waste.

The Asset Purchase Agreement (APA)

[67] In any event, the sale of the Property is governed by the APA dated July 27, 2017.

[68] Of importance are the following provisions:

2.8 Assumption of Liabilities

(1) **At the Time of Closing, the Purchaser will assume and thereafter fulfil, perform and discharge when due the following Liabilities of Astoria outstanding as at the Closing Date (collectively, the "Assumed Liabilities"):**

- (a) **all Liabilities relating to or arising from the Purchased Assets under Environmental Laws from and after the Closing Date including, without limitation, any costs and expenses associated with any ongoing work in process from and after the Time of Closing required to be carried out in order to comply with any Environmental Laws provided that it is agreed by the parties hereto that such ongoing work shall not include the work described in Section 4.02(9) below. [Emphasis Added]**

...

3.03 "As Is, Where Is"

(1) **The Purchaser acknowledges and agrees that it is purchasing the Purchased Assets on an "as is, where is" basis and on the basis that the Purchaser has conducted to its satisfaction an independent inspection, investigation and verification of the Purchased Assets (including a review of title), Assumed Liabilities and all other relevant matters and has determined to proceed with the transaction contemplated herein and will accept the same at the Time of Closing in their then current state, condition, location, and amounts, subject to all Permitted Encumbrances. [Emphasis Added]**

...

[69] The transaction involved two sophisticated parties. There was a competitive sales process in which SusGlobal was the successful purchaser. SusGlobal knew, as per s. 2.8, that it was assuming any outstanding liabilities arising from any environmental laws. Most significantly, as per s. 3.03, it acknowledged it had conducted to its satisfaction an independent inspection, investigation and verification of the purchased assets and was purchasing the Purchased Assets on an "as is, where is", basis.

[70] Even if SusGlobal's evidence, taken at its highest, is true, the amount of excess organic waste that they now complain of was in plain view. BDO made the facility available to SusGlobal and representatives of SusGlobal did tour the facility on numerous occasions. They also had full access to, and did review, relevant data. This is not a case of any form of hidden or latent defect. There is also no credible or reliable evidence that BDO knowingly concealed information.

[71] As a result, in my view, s. 3.03 absolves BDO of any liability.

[72] In this regard, I rely upon the decision of Justice Lax in *Antorisa Investments Ltd. v. 172965 Canada Ltd.* (2006), 82 O.R. (3d) 437 (Ont. S.C.J.), wherein she held:

77 A plaintiff cannot rely on its own lack of diligence to fix responsibility upon the defendant. Nor do I see why the law should come to the assistance of a purchaser in these circumstances. As Master Funduk stated in *Toffoli v. Rozenhart*:

. . . It cannot seriously be argued that the essential terms of an agreement for the sale of land disappear because title is transferred to the purchaser.

That submission, if indeed that is what is submitted, would mean that a purchase "as is" is a purchase "as is" until title is transferred and stops being a purchase "as is" the moment title is transferred. That is just not sensible, intellectually or legally.

78 The law already provides some protection for a purchaser to ameliorate the consequences of the caveat emptor doctrine. Fraud, mistake and negligent misrepresentation can be the basis for an action for rescission or damages. A vendor may also be liable to a purchaser for hazards on a property, if a cause of action for latent defect is made out. Antorisa concedes that no cause of action lies against the defendants, presumably because the decision of the Ontario Court of Appeal in *Tony's Broadloom* would appear to foreclose such a claim in circumstances where the purchaser has had the opportunity to conduct its own diligence.

[73] This conclusion is consistent with the decision of Justice Wilton-Siegel in *Crate Marine Sales Ltd., Re*, 2017 ONSC 178, where he also dealt with the issue of purchased assets on an "as is, where is" basis (see paras. 28, 29, and 45). In that case, as in this case, there were no representations or warranties negatively affecting BDO.

[74] Based on the circumstances surrounding the purchase and the aforementioned provisions of the APA, it can now not complain of gross negligence or willful misconduct.

[75] Alternatively, even in the absence of the aforementioned provisions in the APA if I were to conclude that there was somewhere in the neighbourhood of 1,300 – 2,100 MT of organic waste in the Tipping Building as initially alleged by SusGlobal I do not accept that this would constitute *prima facie* evidence of willful misconduct or, alternatively, gross negligence. While violation of the ECA could, in some circumstances, lead to liability, I do not accept that any amount in excess of 150 MT would automatically form a cause of action. First, SusGlobal concedes that up to 500 MT of organic waste could be stored in the Tipping Building at any time. As noted, in my view, this amount could even be higher depending on the processing that was taking place. Further, it is uncertain as to how much organic waste was being “stored” as opposed to “processed” at any given time. Presumably, this is what led to the MOECC’s lack of interest when it was told that approximately 1,300 MT of organic waste could be in the Tipping Building. Based upon this lack of real concern, or any following investigation, I do not accept SusGlobal’s contention that BDO operated the business “illegally”. It certainly appears from the record placed in front of me that the MOECC obviously allowed some “given and take” with respect to the amount of organic waste contained in the Tipping Building.

Disposition

[76] In all of these circumstances I cannot conclude that the evidence discloses a *prima facie* case that BDO’s conduct, during the 23 week period it operated the facility, demonstrated a marked departure from the standards which reasonable and competent people in such circumstances would have acted or conducted themselves. There is certainly nothing to suggest that BDO was doing anything it knew to be wrong or engaged in recklessly indifferent conduct. I also, therefore, do not find that BDO breached the APA or the Appointment Order.

[77] Based on the foregoing reasons, SusGlobal’s motion is dismissed with costs.

[78] If the parties cannot agree on costs, they can provide written submissions, not to exceed three pages plus a bill of cost. BDO should provide its submissions within three weeks with SusGlobal to follow 14 days thereafter.



McEwen J.

CITATION: Business Development Bank of Canada v. Astoria Organic Matters Ltd. and
Astoria Organic Matters Canada LP, 2018 ONSC 2850
COURT FILE NO.: CV-17-11760-00CL
DATE: 20180517

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicants

– and –

**ASTORIA ORGANIC MATTERS LTD. and
ASTORIA ORGANIC MATTERS CANADA LP**

Respondents

REASONS FOR DECISION

McEwen J.

Released: May 17, 2018