CITATION: Tucker v. Seaquest Capital Corporation et al, 2011 ONSC 6558
COURT FILE NO.: CV-119430-00CL; 31 1553272; 31 553274
DATE: 20111103

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

Court File No. CV-119430-00CL

RE: BRIAN JOSEPH TUCKER, SANDRA TUCKER and THE BRIAN JOSPEH TUCKER FAMILY TRUST (TRUSTEE OF)

Plaintiffs

- **and** -

SEAQUEST CAPITAL CORPORATION, SEAQUEST CORPORATION, DAVID BURNS HOLDEN, ROSA HOLDEN, VINCE JAMES BULBROOK, ANTONIO MARIO COSENTINO, EDMOND CHIN-HO SO (aka EDMOND SO), JEFFREY ALAN PHIPPS, SEAQUEST GLOBAL CORPORATION (#1), SEAQUEST GLOBAL CORPORATION (#2), TONYCOS INVESTMENTS LTD., HARRIS BROWN CORPORATION and HARRIS BROWN AND PARTNERS LIMITED

Defendants

AND BETWEEN:

Court File No. 31 1553272

IN THE MATTER OF THE PROPOSAL OF SEAQUEST CORPORATION

AND BETWEEN:

Court File No. 31 553274

IN THE MATTER OF THE PROPOSAL OF SEAQUEST CAPITAL CORPORATION

BEFORE: Justice Newbould

COUNSEL: Michael Nowina, for the plaintiffs
David P. Preger and Lisa S. Corne, for Seaquest Corporation and Seaquest Capital Corporation
Neil S. Rabinovitch, for BDO Canada Ltd.
Fiona Campbell, for Watts Inc., a creditor

DATE HEARD: November 2, 2011

E N D O R S E M E N T

[1] The plaintiffs ("Tucker") move for the appointment of A. Farber & Partners Inc. ("Farber") as receiver and manager of Seaquest Capital Corporation and Seaquest Corporation (together "Seaquest") pursuant to a security agreement from Seaquest. Their motion was served on October 24, 2011. On the same day Seaquest filed notices of intention to make a proposal under the BIA, naming BDO Canada Ltd. ("BDO") as proposal trustee. On November 1, 2011 Seaquest served a cross-motion for an order appointing BDO as interim receiver of all of the assets of Seaquest. The primary issues are (i) whether there should be a full receivership of Seaquest with the receiver being granted the right to sell the property, or only an interim receivership without the power to sell and (ii) whether Farber or BDO should be appointed as receiver.

Tucker security

[2] David Holden has been the president, and together with his wife, the controlling shareholder, of Seaquest. Based on advice from Holden, Tucker invested $6.2 million with Seaquest. These investments were supposed to have been placed by Seaquest in specific, short-term, secured and interest generating loans made to small and midsize companies.[1] An investigation later made revealed that a number of the companies in which the investments were to have been made by Seaquest did not appear to exist, nor did the required general security agreements for individual investments. Holden had been sentenced to 90 days in prison in 1995 for violations of the *Ontario Securities Act* and to a further six years imprisonment in 2000 concerning an investment fraud. Contrary to his representation, neither Holden nor Seaquest were registered with the OSC.

[3] Tucker commenced an action to recover its investment on the grounds of fraud and other grounds and moved for a Mareva injunction. Prior to the hearing of the motion, a settlement was made on July 4, 2011 pursuant to which Seaquest agreed to repay Tucker the $6.2 million with interest in a series of repayments. It was agreed that the action would be dismissed without

prejudice to Tucker's ability to reinstitute the action if default were made under the settlement. Consents to judgment were signed and as collateral security for the indebtedness, Seaquest granted a general security agreement in favour of Tucker which included the usual terms, including the right to apply to court to have a receiver appointed.

[4] Seaquest defaulted on the repayment terms. On October 21, 2011 Tucker recommenced this action for fraud and other claims.

Seaquest response

[5] On October 14, 2011 a Mr. Vince Bulbrook wrote to the solicitors for Tucker. He stated that that Seaquest was commencing a restructuring process, that he had been retained as the chief restructuring officer of Seaquest, Dickinson Wright LLP had been retained as legal restructuring counsel and that BDO had been retained as restructuring advisers to assist in preparing a proposal under the BIA. On October 26, 2011, after the filing of the proposal on October 24, 2011, Mr. Preger wrote to Mr. Nowina seeking information as to Tucker's position with respect to Mr. Bulbrook acting as the chief restructuring officer of Seaquest. Tucker was not agreeable to Mr. Bulbrook being involved.

[6] While there is no affidavit material dealing with this, I have been advised by Mr. Preger and by counsel to BDO that Mr. Holden has resigned as an officer and director of the Seaquest companies involved in the proposals filed by Seaquest.

[7] The cross-motion record of Seaquest was served on November 1, 2011. It contained an affidavit of Mr. Greg MacLeod sworn October 28, 2011 in which Mr. MacLeod said that he had just been engaged as the chief restructuring officer of Seaquest and that he had no prior relationship or interest whatsoever in the Seaquest companies or any entity related directly or indirectly to them or to Mr. Holden or Mr. Bulbrook. Mr. MacLeod has extensive experience in financial restructuring advisory services and until 2003 was a partner in that area of practice at

[1] The factual history regarding the Tucker investment and related matters are taken from affidavit material filed on behalf of Tucker. No responding material contesting these facts has been filed on these motions. I make no findings of fact but merely recite the facts to give context to the dispute.

Deloitte LLP. He has had his own firm since 2004. I am satisfied that he is independent of Seaquest and of Mr. Holden and Mr. Bulbrook.

[8] Mr. MacLeod's affidavit attached an organizational chart of the Seaquest companies and related entities which was prepared by Seaquest's solicitors "in connection with its review of the Seaquest companies' records and discussions with its employees". Tucker filed responding affidavit material which included advertisements published in the Toronto newspapers as late as October 29, 2011 in which www.seaquestglobal.com said they were a private investment group seeking to invest in companies. The website for www.seaquestglobal.com lists Mr. Bulbrook as the contact person for inquiries and Mr. Holden as the managing director. A business chart provided to Tucker during settlement negotiations in July listed Seaquest Global Corporation (Canada) as the 100% owner of Seaquest Capital Corporation and listed Seaquest Global Corporation (Bahamas) as a sister Corporation. There is no evidence as to why these corporations were not disclosed to Seaquest's solicitors who prepared the chart attached to Mr. MacLeod's affidavit or why they have not been included in the proposal that has been filed.

[9] I raise this because the role being played by Mr. Holden and Mr. Bulbrook is, to say the least, murky. There is no affidavit evidence whatsoever about these people filed on behalf of those opposing the position of Tucker and no explanation in any affidavit as to what Mr. Holden and Mr. Bulbrook's continuing role is or what influence they will be able to exercise over the remaining executives in the business. In the cross-motion record filed by Seaquest, apart from the affidavit of Mr. MacLeod, there were four affidavits filed by persons said to be creditors of Seaquest in support of the position being taken by Seaquest. It turns out that all four are non-arm's-length parties to Seaquest in that they are directors or shareholders of the Seaquest companies or their subsidiaries. No mention of this was made in any of their affidavits.

[10] All of this gives little comfort that Seaquest is being candid with the court.

Analysis

[11] Both sides agree that a receiver is required and that an investigation of the business and affairs of Seaquest is required in order to determine what assets are available. With allegations of fraud, that is of course understandable. I also understand that one of the matters that will need to

be investigated are intercompany loans and the prospect of their being repaid. There are apparently a number of creditors who are likely to claim to have been defrauded by Mr. Holden.

[12] With respect to whether the receiver should be given full powers to sell the business or be restricted at this stage to taking control of the company and undertaking an investigation of the business, it seems to me that the latter is the case. In light of the fact that a notice of proposal has been filed, it would work against the purposes of a stay that is provided for once the proposal has been filed to permit the assets to be sold at this stage. In my view the receiver should be appointed under section 47(1) on an interim basis and the power to sell assets should be limited to disposing of property that is perishable or likely to rapidly depreciate in value. The parties can no doubt work out the appropriate language without the necessity of further court intervention in that regard.

[13] Tucker's position is that BDO is the proposal trustee and in that capacity is required to work with Seaquest in an effort to devise a proposal to be made to the creditors. As a receiver, BDO would be required to take into account the interests of all creditors and in a case such as this, where there are serious allegations of fraud, it is said that there is an inherent conflict between the position of BDO as proposal trustee and the position of BDO as a receiver. Tucker is uncomfortable because of the circumstances of this case in having a receiver appointed that of necessity has to have ties to Seaquest in order to assist with a proposal to be made on behalf of Seaquest.

[14] Section 47.1(1) of the BIA permits the appointment of an interim receiver after a notice of intention to make a proposal has been filed and it expressly provides that the interim receiver may be the trustee under the notice of intention. Thus the fact that the interim receiver would also be the trustee under the proposal is not, *ipso facto*, impermissible. It is a matter of discretion.

[15] Seaquest and BDO take the position that for the sake of efficiency, it would be preferable for BDO to be the receiver. While BDO has been involved in this matter for only a short time, without a great deal of work, Mr. Rabinovich points out that under section 50(5) of the BIA, BDO as proposal trustee has an obligation to investigate Seaquest’s affairs and that if Farber were to be appointed a receiver of Seaquest, it would amount to both Farber and BDO carrying

out an investigation of what appears to be a very complex business. The concern with that situation is that there would be two sets of professional fees, both accounting and legal, which would be burdensome to the creditors who are likely to take a significant haircut.

[16] Section 50(5) of the BIA provides:

> The trustee shall make or cause to be made such an appraisal and investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency and report the result thereof to the meeting of the creditors.

[17] Mr. Nowina points to the language in this provision that the trustee shall make "or cause to be made" an investigation and asserts that BDO would not need to do the investigation but rather could leave it to Farber. Once Farber had concluded its investigation, it could provide the results of that to BDO who could then use it in its position as the proposal trustee.

[18] Mr. Rabinovich responds, I think fairly, that BDO cannot sit back and simply say to Farber to tell BDO when their investigation is complete. There will have to be cooperation between the two and inevitably there would be duplication of work. BDO would no doubt have questions that would have to be dealt with which would involve both professionals' time and effort. While the language of section 50(5) of the BIA may be broad enough to permit BDO to have the investigation carried out by Farber, I would be reluctant to the stage to cause that to happen.

[19] I am persuaded that the potential, if not certainty, of the extra costs involved in having Farber appointed interim receiver should not be caused if it is not necessary, and BDO is appointed interim receiver. I am sure that BDO will recognize its role as interim receiver to be neutral and to act in the best interests of all concerned.

[20] Whether the notice of intention to file a proposal is going anywhere remains to be seen, and whether there is any need for a chief restructuring officer is really not yet known. I take some comfort, however, from the fact that an independent chief restructuring officer has been appointed. Mr. Preger in argument said that Seaquest would not be opposed to having some provision in the order giving Mr. MacLeod the power to negotiate or deal with creditors. In my

view some such provision is warranted and the parties should attempt to settle on appropriate language. I also think it essential that if Mr. MacLeod seeks any legal advice, he should obtain it from a solicitor independent of Seaquest, and the order should so provide. If Mr. McCrea resigns or is terminated, reconsideration to the appointment of BDO as interim receiver should be given.

[21] During the interim receivership, BDO and Mr. MacLeod should make every effort to deal reasonably with Tucker and its advisers. This should go a long way to assuage Tuckers concerns.

[22] With respect to the duration of the interim receivership, I have some concerns that it not become a long-term project. If it is evident that the business is not going to survive, but is to be sold in whole or in pieces, to do so under a notice of intention to file a proposal is not a satisfactory way of proceeding. I recognize that at this stage what is in the Pandora's box is unknown to BDO, but I think there should be a comeback clause for BDO as receiver to report to the court on its activities in 30 days, at which time the parties can make whatever submissions they wish. Further, if at any time BDO considers that there has been any material adverse change to the business in any way, it should immediately report that to Tucker’s solicitors and other interested parties and the matter brought back to the Court.

[23] If there is any difficulty in settling the language of the order, it can be dealt with at a 9:30 a.m. appointment. I will remain seized of this matter.

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Newbould J.

DATE: November 3, 2011