COURT OF APPEAL FOR ONTARIO

DATE: 20150402
DOCKET: M44532
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Feldman J.A. (Chambers)

APPLICATION UNDER Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3, and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

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BETWEEN

8527504 Canada Inc.

Responding Party (Applicant)

and

Sun Pac Foods Limited

Respondent

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AND BETWEEN

8527504 Canada Inc.

Responding Party (Applicant)

and

Liquibrands Inc.

Moving Party (Respondent)

David E. Wires and Krista Bulmer, for the moving party, Liquibrands Inc.

Harvey Chaiton and Sam Rappos, for the responding party, 8527504 Canada Inc.

Anthony O'Brien, for the responding party, BDO Canada Limited, Court-Appointed Receiver

Heard: March 31, 2015

On appeal from the order of Justice Newbould of the Superior Court of Justice, dated December 4, 2014, with reasons reported at 2014 ONSC 7015.

ENDORSEMENT

[1] This is a motion by Liquibrands Inc. ("Liquibrands") for leave to appeal the decision of Newbould J., dated December 4, 2014, wherein he made three orders on motions brought by Liquibrands, 8527504 Canada Inc. ("852") and BDO Canada Limited ("BDO"), the receiver for Sun Pac Foods Limited ("Sun Pac") appointed by the court under s. 243 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3.

[2] For the reasons that follow, leave to appeal is denied.

Background

[3] The factual background was succinctly explained by the motion judge, at paras. 3-17 of his reasons:

> [3] Sun Pac was a Canadian manufacturer of private label and branded beverage products, and a

manufacturer of croutons and bread crumbs and other private label brands (the "Breadcrumbs Division").

[4] Sun Pac was acquired by Liquibrands in November 2011. Liquibrands is the sole shareholder of Sun Pac. Mr. Csaba Reider is the sole shareholder, officer and director of Liquibrands. He was also the sole officer and director of Sun Pac.

[5] [Bridging Canada Inc. ("Bridging")] provides middle-market commercial customers with alternative financing solutions to borrowers who are unable to obtain financing from traditional lenders. 852 is a company related to Bridging and took an assignment of the loans and security for loans made by Bridging to Sun Pac.

[6] On October 1, 2012, Bridging advanced a revolving loan of up to $5 million based on a lending formula under Facility A, $500,000.00 (before facility fees) on January 18, 2013 under a Facility B term loan on equipment, and the balance of the facility B loan, $1,182,524.00 (before facility fees), was advanced on January 31, 2013. The loans were secured on the assets of Sun Pac. Liquibrands guaranteed $1 million of the Sun Pac Facility A loan and provided security over all of its assets to support the guarantee.

[7] Mr. Reider was in discussion with Loblaws to produce private label drinks for Loblaws. However Sun Pac was running short of working capital and in August 2013 was in default of its loan obligations to 852. He decided to sell the Breadcrumbs Division for $3.1 million and he requested additional funding to continue operating.

[8] On September 11, 2013 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement dated September 11, 2013. The Forbearance Agreement was entered into to provide Sun Pac with a temporary bridge loan in the hopes of obtaining equity and debt financing for the anticipated Loblaws contract and to complete a sale of the Breadcrumbs Division to repay the bridge loan. In the

Forbearance Agreement, Sun Pac acknowledged that it was in default of the terms of its loans.

[9] Notwithstanding the default, 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.

[10] In the Forbearance Agreement, 852 agreed to extend a temporary bridge loan to Sun Pac in two tranches. Facility C was a demand non-revolving loan in the amount of $500,000 less fees. Facility C was advanced to Sun Pac in the amount of $475,000 on or about September 13, 2013.

[11] Facility D was a demand non-revolving loan in the maximum amount of 2 times EBITDA of the Breadcrumbs Division as determined by a report from BDO Canada Limited, less the amount advanced under Facility C. Paragraph 13 of the Forbearance Agreement provided:

> Provided that 852 has received and is satisfied with the report to be prepared by BDO at the expense of Sun Pac, 852 shall, promptly following the execution of this Agreement, advance to Sun Pac as a Facility D Loan advance a single advance in an amount equal to 2 times EBITDA of the Breadcrumbs Division (as defined below) (as determined by BDO in its report to Sun Pac and 852 in its sole discretion), less the Facility C Principal Amount ... Each advance shall be conditional on there being no Event of Default under this Agreement and the Loan Agreement.

[12] One event of default contained in the Forbearance Agreement was if Sun Pac failed to have a binding agreement for the sale of the Breadcrumbs Division by November 6, 2013 that was acceptable to 852 in its sole and absolute discretion and failed to close it by December 6, 2013.

[13] BDO prepared a report dated September 25, 2013, which it delivered to Sun Pac and 852 on September 30, 2013. Based on the report, the Facility D loan was to be approximately $1.15 million. 852 took no issue with the amount of the EBITDA as reported by BDO.

[14] 852 did not advance the Facility D loan. There is a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan. I do not intend to get into that issue, although was invited to do so.

[15] On October 4, 2013, 852 informed Mr. Reider that it was not prepared to advance Facility D without certain matters being addressed. According to 852, they were not addressed.

[16] On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced an urgent receivership application heard on November 12, 2013. Sun Pac and Liquibrands had counsel attend the hearing but did not oppose the receivership application. BDO was appointed as receiver of Sun Pac on November 12, 2013.

[17] On the morning of November 12, 2013, Liquibrands and Sun Pac commenced an action against 852 and Bridging seeking, *inter alia*, general damages of $100 million for breach of the Forbearance Agreement by not advancing Facility D in the amount of approximately $1.15 million. Sun Pac had signed an agreement with Loblaws made as of September 18, 2013 containing terms regarding the sale of drink products by Sun Pac to Loblaws, and the damage claim is for alleged lost profits that would have been earned under that agreement.

Decision Below

[4] The first motion before Newbould J. was a request by the receiver, BDO, for an order approving its reports and permitting it to pay the amount realized on the assets of Sun Pac to 852. Liquibrands, as second secured creditor, asked that those funds be paid into court pending the determination by a trial of the issues raised in the lawsuit brought by Sun Pac and Liquibrands against 852 for alleged wrongdoing that caused Sun Pac to fail. Pursuant to rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Liquibrands framed its claim as a right to a specified fund.

[5] The motion judge granted the receiver's motion. He held that rule 45.02 did not assist Liquibrands. As 852 had valid security that ranked ahead of Liquibrands' security, Liquibrands was essentially attempting to secure judgment on its claim for damages against 852. Furthermore, Liquibrands' action against 852 was commenced hours before the Sun Pac receivership order was made. Both Sun Pac and Liquibrands were represented at the receivership proceeding by experienced insolvency counsel who did not object to the receivership order being made. The motion judge concluded that the debtors could not now contend that the money was not owing to 852, as that would amount to a collateral attack on the receivership order.

[6] It followed that there was no serious issue to be tried regarding 852's entitlement to the funds. The fact that there may be a serious issue to be tried in the lawsuit against 852 did not affect its entitlement, over any alleged entitlement of Liquibrands, to the realized assets of Sun Pac.

[7] The second motion was brought by 852 for an order appointing BDO as receiver of Liquibrands. Demand was made under Liquibrands' guarantee in April 2014 and no payment was received. There was therefore an event of default in respect of valid security.

[8] Liquibrands submitted that no receiver should be appointed pending the outcome of its action against 852. It argued that, following the decision in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, it might be relieved of liability under its guarantee if the lawsuit were successful based on wrongdoing by the lender.

[9] The motion judge rejected that argument. He found that Liquibrands had contracted out of its equitable rights by the wording of paragraph 2 of the guarantee: *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102. Moreover, in the Subordination, Assignment, Postponement and Standstill Agreement, Liquibrands had agreed to not to take steps to challenge or impede 852's enforcement of its security.

[10] As Liquibrands was therefore precluded from asserting priority over 852, the motion judge found it just and equitable to appoint BDO as receiver of Liquibrands.

[11] The third issue involved the procedure for dealing with the lawsuit against 852, which was considered by the receiver as an asset of the Sun Pac receivership (and of the Liquibrands receivership once ordered). Liquibrands requested the appointment of a separate receiver to pursue the litigation on the grounds that the current receiver, BDO, did not intend to spend money on the litigation. The motion judge, following the procedure endorsed in *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893, directed the receiver to conduct a marketing process for the sale of the action, the terms of which were contained in the ultimate order.

Analysis

[12] The exercise of granting leave to appeal under s. 193 of the *Bankruptcy and Insolvency Act* is discretionary, flexible and contextual. In the recent case *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, this court stated that the three "prevailing considerations" are whether the proposed appeal (1) raises an issue of general importance to bankruptcy law or the administration of justice that this court

should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the proceedings.

[13] Liquibrands asserts that the issue of importance for this appeal is whether the lender should be entitled to profit from its breach of the Forebearance Agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it. The motion judge determined that he did not need to address the merits of the proposed litigation in order to determine the three issues before him. That is disputed by Liquibrands. It wants to see the litigation continued and concluded before the rights of the debtors and the lender to the proceeds of the receivership are finally determined.

[14] Mr. Wires, on behalf of Liquibrands, has presented this issue in a very interesting and compelling way. However, to proceed as he suggests would essentially turn the process inside out. It would effectively allow the debtors, through a funded receiver, to use the funds realized in the receivership to fund their litigation, rather than to pay the lender, 852. That is not to say that the motion judge could not have made the orders sought by Liquibrands had he determined that such orders were warranted in the circumstances. However, his decisions not to do so and to make the orders he did were grounded in law and reason and were based on the facts and the documents presented. They are owed deference by this court.

[15] Before concluding these reasons, I add the following. On the motion as argued, I did not understand Liquibrands to be objecting to the procedure for the marketing of the lawsuit, in the event that its request that a separate receiver be appointed to pursue the lawsuit was rejected. I raised some issues in oral argument regarding the propriety of that procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

Conclusion

[16] In my view, leave to appeal should not be granted, particularly on the ground that the appeal is not *prima facie* meritorious. The motion for leave to appeal is therefore dismissed with costs to 852 fixed at $15,000 inclusive of disbursements and HST.

K. Feldman J.A.