

CITATION: Sirius Concrete Inc. (Bankruptcy), 2020 ONSC 7733
COURT FILE NO.: 35-2481393
DATE: 2020/12/14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE BANKRUPTCY OF SIRIUS CONCRETE INC.

BEFORE: George J.

COUNSEL: Melinda Vine, for BDO Canada Limited

Scott Turton, for Ayerswood Development Corp.

HEARD: November 18, 2020

DATE: December 14, 2020

ENDORSEMENT

- [1] Three facts set the stage for the issues raised on this motion. First, On March 1, 2019 Ayerswood paid Sirius \$381,578.40 (“March Payment”) for services rendered and invoiced earlier that year in January. Second, on March 4, 2019 Sirius made a voluntary assignment in bankruptcy. Third, BDO Canada Ltd. (“BDO”) was appointed trustee.
- [2] Sirius specializes in what was described as “modern super-structures” providing, along with other services and products, insulated concrete forms, cast-in-place concrete, and pre-cast panelling. At the time of its assignment Sirius was involved in several projects including one for Ayerswood in Guelph (“Guelph Project”).
- [3] BDO has previously filed, and had approved, its First, Second, and Third reports. It now seeks an order approving the Fourth Report dated March 3, 2020, as well as court direction in respect of the March Payment. It has also prepared and submitted a supplement to its Fourth Report, dated October 16, 2020.
- [4] BDO takes the position that the March Payment constitutes a pre-bankruptcy collection of a receivable, and is not recoverable by Ayerswood. It argues that any alleged deficiencies in the work performed by Sirius, even if established, would only entitle Ayerswood to an unsecured claim in this bankruptcy proceeding.
- [5] Ayerswood’s argument is that it made the March payment – which, again, was for work described in a January 2019 invoice – only after being deceived by Sirius. The circumstances surrounding this alleged deception are set out in the affidavit of Ayerswood construction manager John Camara, sworn October 9, 2020. I have carefully reviewed this affidavit and reproduce these notable passages:

8. [Exhibit D] to this affidavit is my email exchange with Sirius on the first of March 2019. In my email of 10:51 a.m. on March first I write that I was at the job site in Guelph and was disappointed that no one from Sirius showed up. A meeting on site had been set up for that morning at which [point] Sirius was to present a detailed plan that would address the problems with their delays and deficiencies. While still on site I received a call from Tomas Waite, the project manager at Sirius, apologizing for their failure to come to the meeting and asking that the meeting be put back to the following Tuesday, March fifth. I was told that they were discussing their plan to get back on track with their work at the Building and needed a bit more time hence the need to delay the meeting until the following Tuesday. At that time Tomas asked me if I could help out by giving them the cheque for the January invoice (this is the \$381,578.40). I expressed my reluctance to do that until I received a satisfactory plan from them some confidence it would be adhered to. Tomas assured me that Sirius was committed to providing me with an effective plan and sticking to it so that their work would be back on track and get completed. He told me that if I provided the cheque now that would ensure that Sirius would push things along to get their work done. The assurance of Sirius committing to finishing up the work on an efficient schedule was of huge importance to me as the project was significantly behind schedule, so in reliance on these assurances from Sirius, and believing them, I relented and agreed to release the cheque that day. Sirius sent Tom Waites girlfriend on that Friday, 1 March, to pick up the cheque and in good faith I gave it to her. I did not suspect any foul play.

9. What I did not know on March first was that Sirius had already been working with its licenced insolvency trustee prior to March first and the documents were prepared, and signed, on March first 2019, to put Sirius into bankruptcy. In short, when Sirius dealt with me on March first, and persuaded me to release the cheque to them, Sirius knew it was not going to be doing any further work on the building. So when Sirius wrote to me on March 1, 2019 – “Tobin and myself will be making more site appearances to get things on track. Please be patient with us as we work through the issues.” – Ayerswood was being lied to. Exhibit E to this affidavit is a copy of the Statement of Affairs of Sirius. While it shows a date of March 1, 2019 the amount of information in that form was self-evidently not compiled only after 12:44 p.m. that day [the time of the above quoted email]. Sirius knew they would not be returning to site and deceived me.

10. I, and hence Ayerswood, was assured by Sirius that if the payment of their January invoice was given to them they would come to the meeting on 5 March 2019 with a concrete plan to solve the problems and would move their work ahead promptly ...

11. If Sirius had told me the truth on March first 2019 that they had already been working with BDO Canada Limited (“the Trustee”) and were going to assign Sirius into bankruptcy and abandon their contract for the building I never would have released the \$381,578.40 cheque to them; Ayerswood would not have made that payment. The value of the work by Sirius, coupled with the deficiencies in it, and the delay of the completion of the Building that they caused, meant that they had been over-paid for the work they had done. Sirius was not owed

\$381,578.40, or any part of that money, and it only received that cheque due to their deceit as I have outlined above.

- [6] The affidavit goes on to discuss the assessment of Truest Quantity Surveyors, which was commissioned by Ayerswood to investigate and report on the value of the work completed by Sirius. The report speaks for itself and is attached as Exhibit F to Mr. Camara's affidavit. Mr. Camara deposes that "I accept as correct, and agree with, the conclusion of this report that Sirius was overpaid by \$702,551.61" concluding that "if the funds behind held by the trustee, namely the \$381,578.40, plus the 10% holdback attributable to that amount, are not returned to Ayerswood then Ayerswood would have paid for work that was not done and the creditors of Sirius will receive funds that were not earned by Sirius and were obtained through deceit".
- [7] What is described above should, according to Ayerswood, result in the imposition of a remedial constructive trust. The court can, it argues, grant this equitable remedy when funds have been obtained by misrepresentation or deceit, or in a situation of unjust enrichment. While BDO does not agree these funds are held in trust, it does agree that if the court so finds, then said funds are not Sirius property, not now a part of its estate, and as such never vested in it as trustee.
- [8] Ayerswood is not asking that I, today, declare a trust. It simply takes the position that the issue of whether one exists or not cannot be determined on the record before me. In other words, it can only be properly considered on a full evidentiary record, created in one of three ways:
- i) After a trial of an issue in the context of this bankruptcy proceeding;
 - ii) after a hearing on a fresh application that specifically seeks the imposition of a trust and return of March Payment; or
 - iii) in the construction lien matter that remains outstanding in Guelph, in which it filed a counterclaim seeking the return of the March Payment.
- [9] It takes the position that the first two options noted above are preferable and to that end attaches to its materials on this motion a not yet issued Notice of Application which sets out the relief it wants (i.e. the declaration of a trust, and return of the March Payment).
- [10] BDO takes the position that the March Payment is a pre-bankruptcy collection of a receivable, paid in the normal course, and not recoverable by Ayerswood. It argues that any alleged deficiencies in Sirius' work, and any damages that might flow therefrom (if established), amount only to an unsecured claim in this bankruptcy matter. As indicated, BDO agrees that if the March Payment is being held in trust for Ayerswood then said funds would not have vested with it, as trustee, on Sirius' assignment – and would therefore not be governed by s. 136 of the *Bankruptcy and Insolvency Act* ("BIA"). It submits, however, that there is no evidence to support that position.

[11] While no evidence was filed in direct response to Mr. Camara's affidavit, counsel for BDO points to these factors in support of its position that any claim Sirius' work was deficient is doomed to fail, and that a trust does not exist:

- i) Before payment, Ayerswood had ample opportunity to satisfy itself as to the quality of the work Sirius had completed and invoiced in January. In other words, irrespective of what Mr. Camara deposes, if it had concerns about the work or issues with the invoice it would not have made the payment.
- ii) By making the March Payment Ayerswood expressed its satisfaction with Sirius' work.
- iii) Ayerswood paid this particular invoice as it had for Sirius' previous nine invoices, and in the same manner.
- iv) Despite any alleged deficiencies – which would, if proven, in its effect lower the amount of the invoice – there can be no dispute that on the assignment of a person into bankruptcy all of their property vests in the trustee, unless it can be established that the funds are held in trust.
- v) Mr. Camara's affidavit discloses no basis upon which a trust could be imposed.
- vi) Ayerswood has pled no facts to support the notion that, as against Sirius, it is a secured creditor.
- vii) At the time of the March Payment Ayerswood and Sirius had an existing contractual relationship with Sirius routinely providing a service(s) with Ayerswood promptly paying for said services. That is, this was not a one-off transaction immediately preceding a bankruptcy, but rather a payment, made in the normal course, and in the context of an habitual relationship.
- viii) Ayerswood' counterclaim in the Guelph Matter is not properly before the court as it did not seek leave as required by the BIA.
- ix) Lastly, and perhaps most importantly, to accede to Ayerswood's request would be to improperly elevate its status beyond other unsecured creditors. Such a result would carry serious implications for the BIA as it would invariably give rise to confusion about when certain claims could be commenced and would needlessly raise questions about the nature of the BIA's priority scheme.

[12] All creditors – at least those who made their position known – support BDO's position that the funds in question form part of the bankrupt's estate and ought to be distributed to

the creditors pursuant to the Claims Administration Procedure and or the BIA's distribution scheme.

- [13] I accept that there is a live question as to whether Ayerswood was manipulated and duped into making the March Payment. Meaning, it might very well have a claim for damages against the principal of Sirius based on what it styles a fraudulent misrepresentation. This is not, however, an issue for BDO to concern itself with, as the bankruptcy scheme is to provide for the orderly distribution of a bankrupt's estate among its creditors (with proven claims), which is precisely what it is attempting to do in this case.
- [14] The reality is there is absolutely nothing to distinguish the character of the March Payment from those made in respect of the prior nine invoices issued by Sirius (and paid by Ayerswood). It is true that after this one payment bankruptcy followed, but this is immaterial to BDO's motion nor does it, standing alone, transform these funds into an amount held in trust pending "the contract getting back on track as promised", which Mr. Camara asserts.
- [15] More than anything else, I am concerned with the public policy issue raised by BDO. I truly believe that to find a trust exists in circumstances like these, would lead to chaos. It would, in its effect, open the door for every payment made pursuant to an invoice rendered (for work completed) prior to the date of bankruptcy to be impressed with a trust. A decision like that runs the risk of upending the purpose of the BIA and undermining its rationale. Were we talking about an anticipatory payment, made for work not yet completed, then this concern would not be as acute; but that is not the nature of this payment, even on Mr. Camara's account.
- [16] The fact is, Ayerswood has its remedy. It can file a proof of claim with BDO for the deficiencies it says exist and attempt to establish that Sirius breached its contractual obligations (by failing to complete the project as agreed). Ayerswood's allegations of work deficiencies will surely meet resistance but it can at least make that claim. In any case, as I understand it, if deficiencies can be proven and if it is entitled to damages then Ayerswood would simply share it proportionately with other unsecured creditors. That is how this is supposed to work.
- [17] Even if I am wrong and have overstated what options are available to Ayerswood, it remains that a trust has not and cannot be established. Ayerswood's counsel made much of the fact that, first, there was no summary judgment motion (or like proceeding) before the court and, second, that there was no evidence to contradict Mr. Camara's. Neither is of any consequence. On the face of it, and accepting all of it as true, none of what Mr. Camara deposes could possibly lead to the imposition of a trust. Which means, apart from any deficiencies in Sirius' work (which is irrelevant for our purposes), what we are talking about here is payment on an outstanding debt. Sirius completed work; invoiced for it; and, consistent with its typical practice and after the passage of a significant period of time, Ayerswood paid it. There is not much else to say about this other than: a debt was owed, which was paid, and any deficiency claim by Ayerswood would simply be

addressed as an unsecured claim in the bankruptcy. What Ayerswood is really asking me to do is elevate it above and give it priority to the remaining unsecured creditors of Sirius, including some which are unpaid subtrades of Sirius for whom the March Payment represents a source of recovery.

- [18] For these reasons, BDO's motion is granted. An order to issue approving the Fourth Report to the Court dated March 3, 2020 and Supplement to the Fourth Report dated October 16, 2020. Furthermore, I find that the March Payment forms part of the estate of Sirius and direct that it be distributed to the creditors thereof pursuant to the Claims Administration Procedure and/or scheme of distribution in the BIA.



Justice Jonathon C. George

Date: December 14, 2020