Court of Appeal File No.: C66871
Court File No.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

RESPONDENT'S BRIEF OF AUTHORITIES

September 9, 2019

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2019 ONSC 716
Ontario Superior Court of Justice

1787930 Ontario Inc. v. Transit Petroleum

2019 CarswellOnt 1120, 2019 ONSC 716, 301 A.C.W.S. (3d) 697

IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 178930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

R. Raikes J.

Heard: December 19, 2018
Judgment: January 28, 2019
Docket: 35-2395487, 35-2395481

Counsel: Sherry Kettle, for Transit Petroleum
Bruce Simpson, Mr. Ly, for 1787930 Ontario Inc.

Subject: Insolvency

APPLICATION by debtor for order requiring creditor to return payment obtained subsequent to filing of Notice of Intent to File Proposal.

***R. Raikes J.*:**

1 1787930 Ontario Inc. is a logistics company carrying on business as Messenger Freight Systems (hereafter "Messenger"). It operates a fleet of trucks for delivery of goods to customers.

2 Transit Petroleum (hereafter "Transit") was a supplier of fuel for Messenger's trucks. It supplied approximately $200,000 of fuel to Messenger each month.

3 Messenger paid for the fuel by pre-authorised debits ("PADs") from its account with the Bank of Nova Scotia. By June 2018, Messenger was in arrears for fuel already supplied by Transit. Some of the PADs did not go through because Messenger lacked sufficient funds to cover the payment (NSF). In addition, Messenger stopped payment on some payments due.

4 In mid-June 2018, the Canada Revenue Agency ("CRA") issued a Requirement to Pay ("RTP") and froze Messenger's account at the Bank of Nova Scotia from which the PADs were drawn to pay Transit. Unbeknownst to Transit, the Bank of Nova Scotia then served Messenger with a Notice to Enforce Security pursuant to s. 144 of the *Bankruptcy and Insolvency Act* ("*BIA*") seeking repayment of monies owing to the Bank, and informed Messenger that they were preparing materials to appoint a receiver.

5 The PAD payment due on June 18, 2018 did not go through. Transit received the PAD back with a notification from the Bank: "Account Frozen".

6 On June 22, 2018, Nathan McDaniel ("McDaniel"), the Financial Controller at Messenger, spoke by telephone with Monique Paul ("Paul"), a Credit Analyst at Transit, concerning the overdue account; specifically, how Messenger was going to pay the arrears and ongoing fuel supplies. According to Paul, she was informed by McDaniel that Messenger's account was frozen because of fraudulent activity.

7 By email dated June 22, 2018 to McDaniel, Paul confirmed Messenger's proposal to pay the arrears by four PAD's with the first on Monday, July 2 and the last on July 23, 2018. The proposal by McDaniel contemplated the following payments:

> Monday, July 2, 2018 - $83,734.05
>
> Monday, July 9, 2018 — regular amount owing plus $27,911.35 for arrears
>
> Monday, July 16, 2018 — same as July 9
>
> Monday, July 23, 2018 — same as July 9
>
> Paul asked McDaniel to confirm the proposal before she spoke to the fuel manager to get his approval. With the account at the Bank of Nova Scotia frozen, McDaniel needed to provide new banking details in order for the PAD's to be processed. She attached a new PAD for him to fill out.

8 On June 25, 2018, McDaniel emailed Paul to request that the first payment be changed from Monday, July 2 to Friday, July 6.

9 On June 26, 2018, Paul and Tina Thorne ("Thorne") spoke with McDaniel by telephone with respect to the requested change. They advised McDaniel that if the change was made to Thursday, the terms of payment would have to change from Net 14 to Net 7. Paul and Thorne aver that McDaniel agreed to that change during the telephone call; McDaniel does not recall what was discussed in that call.

10 After the telephone call, Paul emailed McDaniel on June 26, 2018. Paul indicated that Transit was prepared to change the PAD's from Mondays to Thursdays "with the below proposal on getting the account current". The proposal is materially different from that outlined in the June 22 email above. It contemplates three, not four payments. The first payment is $111,645.40, the second $83,004.86 and the last is the regular fuel payment plus $27,911.35. The email is silent with respect to change of credit terms from Net 14 to Net 7.

11 McDaniel emailed Paul on June 27 at 5:40 PM. He wrote:

> Much thanks for the patience and support that both you and Tina have demonstrated; it means a lot to me. Attached is a scan of a voided check [sic] from our new checking [sic] account; please use this banking information for future billings. With regards to the below — mentioned proposal, I would ask that we adjust is [sic] slightly to be more in line with our original conversation. Would you let me know if my proposal is acceptable?
>
> July 5 $83,734.05 (50% of the arrears amount)
>
> July 12 regular amount plus $27,911.35 (16.67% of the arrears amount)
>
> July 19 regular amount plus $27,911.35 (16.67% of the arrears amount)
>
> July 26 regular amount plus $27,911.35 (16.67% of the arrears amount)
>
> With this payment plan, we would effectively have the arrears amount paid up by EOM July.

12 Paul responded by email dated June 28, 2018 at 8:55 AM. She indicated that his proposal had been discussed at length with Thorne and Trevor Chambers, the fuel manager. She wrote: " . . . we will accept this proposal, with below stipulations." After setting out the same payment schedule and amounts proposed by McDaniel in his June 27 email, she wrote:

> Currently terms are Net 14 with Monday PAD making invoices 15 days old, if we agree to move your PAD to Thursday we will need to change your terms to Net 7 making your invoices 11 days old, we cannot keep your terms at Net 14 and Paul on Thursday as that makes the invoices 19 days old.
>
> We have continuously gone above and beyond to work with Messenger on their financial issues, but going forward we need to be reassured that we will no longer have any problems going forward which is why we are agreeing to the Thursday PAD.
>
> We have already had to pay the fuel purchased and used by Messenger, as out [sic] terms are Net 7 with our supplier.
>
> We need to be clear that this will be the last time we can split payments due to the inability to pay your fuel purchases on the agreed-upon pull date.
>
> *We need the above approved no later than 3pm on Friday June 29, 2018*, in order to pull the first payment on Thursday, July 5 th, , 2018. [Italics added]

13 McDaniel emailed Paul on June 29, 2018 at 4:05 PM. He apologized for his delay and advised that he was being pulled in several directions. He asked her to call him on Tuesday when she was back in the office and indicated: "I just have a few questions regarding the terms . . . I want to make sure I am on the same page with you." No further communications took place between McDaniel and Paul until July 3, 2018 when Paul emailed McDaniel to ask him to call as soon as possible.

14 Transit takes the position that the June 28, 2018 email by Paul merely confirms the terms that had previously been agreed upon and accepts McDaniel's proposal as to the amounts and timing of payment. In other words, the change from Net 14 to Net 7 was already agreed upon and implicit in McDaniel's proposal of June 27 which Transit was accepting.

15 Messenger takes the position that the change to Net 7 was not previously agreed to, did not form part of McDaniel's proposal and represents a counter-offer to his June 27, 2018 proposal. In short, Paul asked for confirmation of acceptance/approval because it represented a change in the terms previously discussed. Thus, there was no agreement on June 28, 2018, nor was there any communication of acceptance of Transit's proposed terms at any point before July 5, 2018.

16 On June 28, 2018, the Bank of Nova Scotia informed Messenger that it required Messenger to proceed by way of Notice of Intention to File a Proposal ("NOI") failing which the Bank would not forbear from enforcement procedures. No further discussions took place with Transit between June 28 and July 2 when, Messenger issued a NOI.

17 Thus, by the time Paul left a voicemail message and emailed McDaniel on July 3, the NOI had already been issued. In her voicemail message, she indicated that she needed to hear back from him by 10 AM that day to confirm that he would have no issues with the PAD on July 5. She testified that she simply wanted to make sure that funds would be available given the past history of NSF's and stop payments.

18 When she did not hear back from McDaniel, Paul sent a further email at 11:17 AM on July 3 in which she informed him that she had put the PAD through for withdrawal for July 5, 2018. She deposed that McDaniel did not respond and the PAD was submitted to Libro on July 3, 2018 at 11:45 AM for withdrawal from Messenger's account on July 5.

19 Messenger did not stop payment on the PAD and, according to Transit's witnesses, it did not advise Transit of the N0I before the PAD was processed and funds were transferred from the account to Transit on July 5.

20 On July 4, 2018, McDaniel sent an internal email at 2:37 PM in which he confirmed that he had asked Chambers, fuel manager at Transit, to put a hold or stay on the PAD for July 5. McDaniel deposes that there was no agreement to pay the $83,734.05 on July 5 because he never accepted the changed terms. He also disputes that Transit was not informed that the PAD should not go through.

21 Transit asserts that it was unaware of the NOI until a meeting on July 5 at approximately 1 PM. The owner of Messenger, Louise Vonk (hereafter "Vonk"), and general manager, Blaine Skirtschak (hereafter "Skirtschak"), met with Paul and Trevor Chambers of Transit. During that meeting, Vonk informed Paul and Chambers that Messenger had filed a NOI on July 2, 2018 to restrict further action by CRA and to give Messenger some time to reorganize financially to carry on business.

22 During the July 5 meeting, Vonk indicated that Messenger needed Transit's support to keep operating and she was willing to do whatever was necessary to keep Transit as its fuel supplier. She did not request return of the monies received by Transit from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a "vital vendor" necessary for Messenger to remain in business.

23 Neither Vonk nor Chambers filed responding affidavits to dispute the evidence of the discussion at the meeting on July 5, 2018.

24 On July 6, 2018, Paul called McDaniel twice and left voice messages to discuss the following week's PAD for post-NOI purchases of fuel. McDaniel emailed Paul at 5:50 PM on July 6 to apologize for not reaching out and advised that he would contact her on Monday, July 9, 2018.

25 On July 9, 2018, McDaniel spoke by telephone with Paul, Chambers and Don Poort, CFO for Transit. According to affidavits by Paul and Poort, McDaniel did not request return of the monies received by Transit on July 5 from the PAD. McDaniel advised in that telephone call that he had allowed the PAD to be processed because he had agreed to that payment on June 28, the payment had been processed and received by Transit before they knew of the NOI, and Messenger needed Transit to continue as a supplier to stay in business.

26 In his supplementary affidavit sworn October 15, 2018, McDaniel deposed, *inter alia*, that:

a. he asked Paul on July 3 not to proceed with the July 5 PAD;

b. he tried unsuccessfully to stop the July 5 payment;

c. he did not retroactively authorize the July 5 PAD, nor did he offer the reasons proffered by Transit's witnesses for allowing the PAD to go through; and

d. he did not ask Poort for return of the July 5 PAD monies, but he did ask Paul for same.

27 As is evident, there are facts in dispute. Counsel for Transit asks me to find that McDaniel's evidence is not credible or reliable. She points to inconsistencies which she asserts undermine his evidence. The facts in dispute are material to whether there was an agreement to pay the arrears by four PAD's including the first on July 5, whether Messenger asked Transit not to proceed with that payment before July 5, and whether Messenger approved of that payment after the NOI was issued as part of an arrangement to ensure ongoing fuel supply from Transit.

28 Despite these factual issues, the following facts are not disputed:

a. Messenger issued its NOI on July 2, 2018;

b. The PAD for $83,734.05 was submitted to Libro on July 3 and processed on July 5, 2018, three days after the NOI was issued;

c. That payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;

d. After the NOI was issued, Transit supplied additional fuel to Messenger in the amount of $48,434.30;

e. On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks;

f. Messenger severed its fuel supply relationship with Transit on that date;

g. Transit filed a Proof of Claim in Messenger's Proposal in the amount of $202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5 through the PAD.

Position of Parties

a. Messenger

29 Messenger takes the following positions on this application:

a. the payment received by Transit on July 5, 2018 by PAD is barred by s. 69(1)(a) of the *BIA*;

b. allowing Transit to retain those monies on account of pre-NOI debt is contrary to the objectives of the *BIA*;

c. there was no agreement to pay those monies by PAD on July 5 — at most, the parties had discussions but no agreement was reached;

d. the payment amounts to a fraudulent preference vis-à-vis other creditors of Messenger; and

e. at most, Transit should retain only the amount payable for post-NOI fuel supplied to Messenger which amounts to $48,434.30. The balance should be repaid.

b. *Transit*

30 Transit takes the following positions:

a. the July 5 PAD payment does not constitute the exercise of a remedy and, accordingly, is not barred by s.69 of the *BIA*;

b. the PAD was made to Transit pursuant to an agreement made on June 28, 2018. That agreement was subsequently confirmed by Messenger's representatives;

c. the payment received by Transit on July 5, 2018 is consistent with the objectives of the *BIA* which promote arrangements to give debtors time and means to restructure financially to continue in business;

d. Messenger has no standing to assert a claim of fraudulent preference; and

e. In any event, the payment in question was not a fraudulent preference.

Analysis

31 Section 69(1) of the *BIA* immediately stays any remedies against a debtor upon issuance of a NOI. Section s.69(1) states:

(1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

32 In cross-examination, Paul confirmed that the full amount outstanding as at July 2, 2018 was a claim provable in bankruptcy. The amount then outstanding included the amount later received on July 5, 2018 when the PAD was processed. The Proof of Claim filed included the $83,734.05 received on July 5, 2018.

33 Section 69.4 of the *BIA* permits a creditor affected by the operation of section 69 to apply to the court for a declaration that that section does not operate for that creditor. The court may make such declaration if it is satisfied that the creditor is likely to be materially prejudiced by the continued operation of that section or it is equitable on other grounds to make that declaration: s. 69.4

34 Transit has never sought relief under section 69.4.

35 In *The Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) by Lloyd W. Houlden and Geoffrey B. Morawetz, the authors explain the intent and purpose of s. 69 and stay of proceedings in the following terms:

> One of the objects of the *Bankruptcy and Insolvency Act* is to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis . . . : *R. v. Fitzgibbon* (1990), 78 C.B.R. (N.S.) 193, 1990 CarswellOnt 172 (S.C.C.). Sections 69, 69.1, 69.2 and 69.3 are designed to prevent proceedings by a creditor that might give the creditor an advantage over other creditors.
>
> Sections 69, 69.1, 69.2 and 69.3 do not give the court power to order a stay; rather they create a stay *ipso facto* on the filing of a notice of intention or of a proposal or consumer proposal or on bankruptcy by prohibiting a creditor from instituting or continuing the proceedings mentioned in the sections without leave of the Bankruptcy Court: *Re Cohen* (1948), 29 C.B.R. 111, aff'd 29 C.B.R. 163 (Ont. C.A.); *3031085 Nova Scotia Ltd. v. Classic Freight Systems Ltd.* (2002), 34 C.B.R. (4th) 313, 2002 CarswellNS 245, 2002 NSSC 151 (N.S. S.C. [In Chambers]). . . .
>
> Knowledge that a notice of intention or proposal has been filed or that the debtor has gone into bankruptcy is unnecessary for a stay to be effective. If a creditor cashes a cheque that it has received from the debtor after the debtor has filed a notice of intention, the money must be repaid. The cashing of the cheque is a remedy within s. 69(1)(a): *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* (2000), 20 C.B.R. (4th) 166, 2000 CarswellBC 1802, 2000 BCSC 1316 (S.C. [In Chambers]).

36 The word "remedy" in s. 69(1)(a) is to be given a broad interpretation: *Gene Moses Construction Ltd., Re*, 1999 CarswellBC 149 (B.C. S.C.) at paras. 9 and 10. Remedies are not restricted to proceedings of a judicial nature: *Gene Moses*, para. 11.

37 In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CarswellOnt 9935 (Ont. S.C.J.), Lederman J. considered the scope of the meaning of "remedy" in the context of s. 69. He wrote at paras. 11 and 12:

> 11. While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of E.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 — Stays of Proceedings, under the *Bankruptch and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."
>
> 12. A purposive definition of the word 'remedy' in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which

should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.

38 In *Gene Moses*, the debtor construction company leased logging equipment with financial assistance from GE Capital Leasing. Monthly lease payments were payable. The lease payments were restructured at some point but were payable monthly by way of preauthorized debits (PAD's). The construction company executed a NOI under the *BIA* which was filed with the official receiver on December 17, 1998. Five days later, GE presented three debit memos to the company's bank totaling $29,149. The bank honoured the debit memos and paid the money to GE.

39 The construction company sought return of the monies paid to GE after the NOI was issued. At para. 14, Master Powers held:

I conclude that "remedy" in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debit memos.

40 In *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* [2000 CarswellBC 1802 (B.C. S.C. [In Chambers])], Startek purchased computer equipment from Samtack. Startek paid for the goods by a cheque that was returned NSF. Startek then issued a second cheque to pay for the goods. Startek filed a NOI. Four days later, Samtack presented the first cheque to the bank again and this time it was honoured. Startek sought return of the funds received.

41 Harvey J. of the British Columbia Supreme Court held at para. 11 that by renegotiating the first cheque without the knowledge or consent of Startek or the trustee, the creditor (Samtack) "exercised a remedy and violated the existing state of proceedings".

42 Transit distinguishes the result in *Startek* on the basis that Messenger expressly consented to the PAD being exercised on July 5, 2018, and subsequently confirmed that consent by word and conduct.

43 Transit argues that fuel is an essential requirement for a trucking business. Messenger needed time to restructure its debts while continuing to operate. It could not operate without fuel. As Ms. Vonk indicated at the July 9 meeting, Transit was a vital supplier. Allowing Transit to negotiate and retain the monies from the July 5 PAD is entirely consistent with the objectives of the *BIA*. Accordingly, the negotiation of that PAD on July 5 did not constitute the exercise of a "remedy".

44 I disagree for the following reasons:

a. The July 5, 2018 PAD was for fuel already delivered and consumed before July 2;

b. While Transit was aware that Messenger was having financial difficulties as evidenced by the frozen bank account and NSF payments, Transit was not aware of the full extent of Messenger's difficulties or its plan to restructure its debt going forward. This is not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid;

c. Messenger was able to replace Transit as a supplier within a day or two of the July 9 meeting;

d. Like the PAD's in *Gene Moses* and the cheque in question in *Startek*, the July 5 PAD was simply to catch up payments missed or dishonoured before the NOI;

e. The July 5 PAD was part of an alleged "agreement" that contemplated four payments. Transit does not assert nor did it move under s. 69.4 to assert that the other three payments are other than debts provable in bankruptcy that are captured by the proposal made. There is no reason to treat the July 5 PAD different from the other PAD's contemplated by the "agreement"; and

f. It was not open to Messenger to determine which creditors should be paid for monies already owing and to give its consent to payments to some creditors in preference to others.

45 I find that the July 5 PAD constitutes a remedy that is captured by the stay in s. 69(1)(a) of the *BIA*. It is contrary to the objective of the *BIA* to treat all creditors fairly to permit Transit to retain the monies received.

46 As mentioned, Transit did supply fuel in July 2018 after the NOI was issued and before Messenger switched to Petro Canada. It is entitled to set off the debt owing for that fuel against the monies payable to Messenger for the July 5 PAD. In the result, Transit shall pay to Messenger the sum of $35,299.75.

47 It is unnecessary for me to determine whether the parties reached an agreement on June 28 or at any point before July 2, 2018. The fact of such agreement would not change the analysis or result above. I note, however, that that issue did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. Were it necessary to determine that issue, I would direct a trial of an issue.

48 It is likewise unnecessary to determine whether the July 5 payment amounts to a fraudulent preference. I have grave misgivings with respect to Messenger's standing to assert that claim. It strikes me as passing odd that the party who preferred one creditor over others should make the application.

49 If the parties cannot agree on costs, they may make submissions not exceeding 3 pages within 21 days.

Application granted in part.

End of Document

Ontario Superior Court of Justice

Citation: Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.
Court File No. 05-CV-297282 PD3
Date: 2005-11-23

Lederman J.

Counsel:
Brian Bellmore and *Karen Mitchell,* for plaintiff, Golden Griddle Corp.
D.J. Miller, for defendants, Fort Erie Truck and Travel Plaza Inc. and 1515578 Ontario Ltd.
Brandon Jaffe, for trustee, Grant Thornton Ltd.
Douglas Harrison, for Ultramar Inc.

LEDERMAN J.: —

ENDORSEMENT

[1] The plaintiffs, Golden Griddle and Nicholby's (in a companion proceeding) commenced actions for damages and injunctive relief and brought a motion for an interlocutory injunction seeking to restrain the defendants, Fort Erie and 1515578 Ontario Ltd., from breaching negative covenants in the lease and franchise agreements and seeking an order that they not operate a restaurant other than a Golden Griddle restaurant and not operate a convenience store, other than a Nicholby's in the plaza. They have also sought an interlocutory injunction preventing the defendants from terminating the lease agreements between the parties.

[2] Just before the return date of the motion, Fort Erie and 151 each filed a Notice of Intention to make a proposal under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("BIA"). The defendants take the position that pursuant to section 69 of the BIA, the actions and the motion for an interlocutory injunctions are stayed.

[3] The plaintiffs have brought this motion for a declaration that the injunctive relief that they seek is not subject to the stay imposed by section 69. Alternatively, if there is a stay, they seek an order under section 69.4, lifting the stay.

Whether Section 69 Stays a Claim For Inactive and Declaratory Relief

[4] The plaintiffs rely on the case of *Ryder* v. *Lightfoot & Burns* (1965), 51 D.L.R. (2d) 83 (N.S.S.C.), for the proposition that an interim injunction to enforce a restrictive covenant is not subject to a statutory stay of proceedings following a filing of a Notice of Intention to make a proposal. The *Ryder* case was referred to subsequently in *3031085 Nova Scotia Limited v. Classic Freight Systems Limited,* 2002 NSSC 151, 114 A.C.W.S. (3d) 592. It has also been cited by Houlden and Morawetz, *Bankruptcy and Insolvency Law of Canada,* 3rd edition, in its 2005 release, to the effect that a claim for an injunction against the bankrupt for breach of a non-competition clause is a circumstance where leave is not required to proceed.

[5] Ms. Miller, for the defendants, submits that the *Ryder* case is not authoritative and that

any reference to it subsequently has been to solely accept it without considered analysis. More importantly, she points out that the BIA provision, section 40(1) [*Bankruptcy Act,* R.S.C. 1952, c. 14], which was in force at the time of the *Ryder* decision, has since been amended in 1992. That amendment has resulted in a change in the wording of the relevant provisions. Whereas section 40(1) had read in part, ... "no creditor with a claim provable in bankruptcy shall have any remedy against the debtor...," the present section 69(1)(a) which deals with stay of proceedings in respect of a filing of a Notice of Intention states in part, ... "no creditor has any remedy against the insolvent person or the insolvent person's property..."

[6] Ms. Miller submits that the intention of Parliament in these 1992 amendments was to expand the scope of the stay provisions to include any remedy against the insolvent person upon the filing of a Notice of Intention under section 50.4 of the BIA.

[7] In *Vachon* v. *Canada* (*Employment and Immigration Commission*), [1985] 2 S.C.R. 417, 23 D.L.R. (4th) 641, the Supreme Court of Canada commented on the general nature of the stay proceedings imposed by then section 49(1) of the BIA [*Bankruptcy Act,* R.S.C. 1970, c. B-3] (which had the exact language as section 40(1) in the *Ryder* case). Beetz J. said the word "remedy" has a very broad meaning and has been defined to mean "the means by which a right is enforced or the violation of a right is prevented ..." [p. 645]. He went on to say that courts have interpreted the stay of proceedings imposed by then section 49(1) very broadly.

[8] Ms. Miller further submits that sections 69(2) and 69.42 of the BIA which exclude specific circumstances from the operation of the stay provisions make no mention of injunctive relief and if Parliament wanted to exclude it from the effect of the stay, it would have expressly said so.

[9] In reply, Mr. Bellmore, for the plaintiffs, said that the amendments were merely to streamline the existing language and the position of the comma in section 69(1)(a) makes it clear that both the remedy against an insolvent person and the right to commence or continue proceedings are modified by the words "for the recovery of claim provable in bankruptcy". He submits, therefore, that as the injunctive relief sought is not for payment of money or collection of a debt or a liability provable in bankruptcy, there is no automatic stay precluding it.

[10] He also contended that any interpretation of the word "remedy" that is open-ended could lead to ludicrous results and he gave the extreme example of a person seeking a remedy for child access or custody in a matrimonial proceeding against an insolvent spouse, and being prevented from doing so by the automatic stay.

[11] While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act,* June 1, 1995 – Stays of Proceedings, under the *Bankruptcy and Insolvency Act"* (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."

[12] A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.

[13] The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's. To operate as a Golden Griddle restaurant requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.

[14] To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.

[15] I, therefore find that the nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed.

Lifting the Stay

[16] I turn now to whether the stay should be lifted.

[17] Under section 69.4, a creditor has the onus of satisfying the court that:

a) the creditor is likely to be materially prejudiced by the continued operation of stay, or

b) it is equitable on other grounds to lift the stay.

[18] As to subsection (a), what amounts to material prejudice depends on the circumstances in each case. By its nature, a stay creates prejudice for all secured creditors while a reorganization is being contemplated.

[19] What Golden Griddle and Nicholby's must establish is material prejudice to them in the sense that they will be treated differently or some way unfairly, or they would suffer worse harm than other creditors.

[20] The plaintiffs assert in their affidavit material that they have been materially prejudiced in that the defendants continue to operate the restaurant using the same furniture, fixtures and

decor and similar menus as it did prior to the purported termination of the lease without compliance with the provisions of the franchise agreement to the prejudice of the names and reputations of the plaintiffs. The plaintiffs submit that without an injunction the defendants will continue to breach their covenants and further financial losses, which are difficult if not impossible to measure, will be incurred.

[21] Nothing is put forth by the plaintiffs to suggest what the magnitude of that loss may be or how it differs qualitatively from the harm suffered by other creditors.

[22] As stated by Farley J. in *Re Cumberland Trading Inc.* (1994), 23 C.B.R. (3d) 225 (Ont. Ct. (Gen. Div.)):

> [There is an obligation to provide some] quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of the materiality. [para. 11]

[23] I do not have before me sufficient evidence to suggest that the losses that the plaintiffs may suffer differ materially from the losses incurred by other secured creditors. With the exception that I will mention shortly, the plaintiffs have not demonstrated material prejudice.

[24] As to whether there are other equitable grounds for lifting the stay, Mr. Bellmore submits that the corporate defendants are related entities carrying on business under common direction, and that Fort Erie became the sole shareholder of 151 and has directly managed the operations of 151 since that time. He submits that their filing of a Notice of Intention just prior to the return of the plaintiffs' interlocutory injunction motion was an improper attempt to use the BIA to frustrate the plaintiffs' rightful claims. He submits that Fort Erie's termination of the leases has allowed the defendants to indirectly use monies that should have been paid for royalties to fund their operations. Thus, he submits equity requires a lifting of the stay.

[25] The commercial realty of the situation, however, is that 151 has not been able to earn sufficient income to meet its liabilities in operating a Golden Griddle franchise. It has been running significant deficits.

[26] The restaurant has never made profit during the entire time that it has operated as a Golden Griddle franchise. It has depended on funding provided by its parent company, Fort Erie and on others. 151 has not met its obligations to Fort Erie to pay rent.

[27] 151 has paid all royalty payments and franchise fees due or owing to Golden Griddle under the franchise agreement and no such amounts are outstanding to date. These payments have been funded in large part, by loans and advances made by Fort Erie to 151, without any legal obligation on the part of Fort Erie to do so. Fort Erie is not prepared to continue to finance the operation and incur the risk of further losses with the operation of a Golden Griddle franchise in the plaza.

[28] Nor have the plaintiffs elected to cure 151's default within the curative period provided in the lease.

[29] So neither Fort Erie nor Golden Griddle is prepared to finance the franchise and the

lease. Fort Erie is under no obligation to provide further funding. In these circumstances, with losses continuing to mount, it cannot be said that the Notice of Intention was filed in bad faith to frustrate the rights of the plaintiffs. Rather, it was done as a serious attempt to resolve its financial difficulties.

[30] In terms of equitable considerations, it should be noted that Golden Griddle seeks to prevent the defendants from operating any form of restaurant at the plaza other than a Golden Griddle, while at the same time declining to assume 151's obligations under the lease pursuant to the default agreement or funding the operations of the franchise itself.

[31] More importantly, a lifting of the stay and the potential granting of an interlocutory injunction will result in the restaurant closing and an inability by the debtors to offer any viable proposal. The defendants have stated that if the stay is lifted they would make an assignment in bankruptcy.

[32] If the plaza had to operate without a restaurant, Fort Erie would be in immediate default of its agreement with Ultramar, its fuel supplier and secured creditor, and transport drivers would no longer frequent the plaza. Without a restaurant on the premises it would be impossible for the plaza to attract customers, thereby eliminating the ability of the defendants to successfully restructure their affairs. The ability of Ultramar and Meridian to recover payment of their secured indebtedness would be materially prejudiced. The value of the plaza with no ongoing operations would be significantly less than its value when businesses are operated by tenants and customers. If the restaurant is closed, the plaza will shut down and the defendants' employees would be terminated.

[33] The impact of lifting the stay on these parties would outweigh any prejudice to the plaintiffs in having their motion for injunctive relief stayed.

[34] As stated in Honsberger and DaRe, *Debt Restructuring* at 8:2109, a stay should not be lifted where it is a virtual certainty that if the stay is lifted, the proposal will fail and cause a real and substantial prejudice to the creditors and employees of the debtor.

[35] Mr. Bellmore says that the threat of closing the restaurant is at the option of the defendants and the court should not be receptive to an *in terrorem* argument. However, the commercial reality is such that any viable proposal depends upon the continuation of a restaurant at the plaza and it is clear that if the defendants are required to run it as a Golden Griddle franchise, even on a temporary basis, they cannot make a go of it and no possibility of a proposal would be forthcoming.

[36] The plaintiffs have not demonstrated that they will suffer any material prejudice, nor have they raised any equitable grounds for lifting the stay of proceedings. Any harm that they allege that they are incurring by the restaurant and convenience store not being operated as franchises can be adequately compensated for in damages.

[37] Accordingly, I am not satisfied that the grounds under section 69.4 have been met to justify lifting the stay for the nature of the injunctive relief sought in the notice of motion requiring the defendants to continue to operate the Golden Griddle and Nicholby's franchises.

[38] That being said, however, the plaintiffs did assert an argument that there has been a derogation of their trademarks and names and that there remains signage on the Q.E.W. approaching the plaza and potentially obstructed plaza signs and other markings to the effect that the restaurant continues to operate as a Golden Griddle and the convenience store as a Nicholby's. The travelling public and the truckers could well interpret these markings that the restaurant continues to be operated as a Golden Griddle and the convenience store as a Nicholby's when such is not presently the case and that would materially prejudice the plaintiffs in a way that is qualitatively different than the prejudice suffered by other creditors. It would have a unique detrimental effect on their goodwill and reputation. In such circumstances, the stay should be lifted to permit the plaintiffs to bring an interlocutory motion requiring the defendants, to the extent that it is within their control, to remove all signage, labels and markings which could identify the retail outlets as being a Golden Griddle and a Nicholby's. Ms. Miller indicated in argument that that aspect of the relief is not contentious.

[39] So with that exception, the motion to lift the stay is dismissed.

[40] Motion dismissed in part.

CITATION: Re Emergency Door Service Inc., 2016 ONSC 5284
COURT FILE NO.: 32-2131211
DATE: 20160822

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF: EMERGENCY DOOR SERVICE INC. PURSUANT TO THE *BANKRUPTCY AND INSOLVENCY ACT*

EMERGENCY DOOR SERVICE INC.

Applicant

BEFORE: Newbould J.

COUNSEL: *Jordan Schultz,* for Rytec Corporation

David Ullman, for the debtor Emergency Door Service Inc.

Robert A. Klotz, for the Proposal Trustee

HEARD: August 3, 2016

ENDORSEMENT

[1] On June 3, 2016 Emergency Door Service ("EDS") filed a notice of intention to make a proposal under the BIA. On August 2, 2016 EDS filed its proposal with the Proposal Trustee and the Superintendent.

[2] Rytec Corporation ("Rytec") has commenced an action against EDS in the Federal Court and in the Court of Queen's Bench in Alberta in which it seeks in both actions an injunction against EDS. Rytec now moves for an order that the statutory stay of proceedings under section

69.3(1) of the BIA does not apply to a motion which it says it intends to bring in the Federal Court to prevent post-filing conduct on the part of EDS.[1]

[3] For the reasons that follow, the motion by Rytec is dismissed.

Relevant facts

[4] EDS is in the business of installing, selling and servicing industrial doors on commercial properties. It is a relatively small company, employing 17 people in its sole office in Mississauga Ontario. It has been in business for 23 years. It conducts its business mainly in Ontario.

[5] Among the products that are sold and installed by EDS are products sold to EDS by an entity known as Efaflex (Efaflex Tor-Und Sicherhaltssysteme GmbH & CO. KG) ("Efaflex"). Mr. Cornelius of EDS states in his affidavit that the doors which are sold and installed by EDS which it acquires from Efaflex are, to the best of EDS's knowledge, based on intellectual property owned by Efaflex. EDS has entered into a licence agreement with Efaflex for the sale of these doors.

[6] Rytec is a manufacturer of doors for industrial, commercial and cold-storage environments in North America. Rytec has been marketing high-speed doors bearing the mark Spiral® in Canada since at least 1996.

[7] Rytec claims under a series of agreements with Efaflex that it has the exclusive patent and trademark rights in respect of Spirals. It claims under several agreements as follows:

(a) On March 9, 2004, Rytec and Efaflex entered a new, non-cancellable "Technology License Agreement" in which Rytec agreed to assign the Rytec

[1] In its motion material, Rytec took the position that the applicability of the statutory stay under the BIA was to be determined in the Federal Court. This position was abandoned at the hearing of the motion.

Patents and Applications to Efaflex in exchange for the exclusive license to make, have made, use, sell and offer to sell, install, maintain and service Spirals in North America, including Canada.

(b) On April 15, 2004, Rytec assigned the Rytec Patents and Applications to Efaflex.

(c) In conjunction with the Technology License Agreement, Rytec and Efaflex entered into a purchase agreement that provided, among other things, that Efaflex would sell Spirals only and exclusively to Rytec for distribution in North America.

[8] EDS had a prior existing business relationship with Rytec, which included the sale of Rytec doors. The business relationship between Rytec and EDS ceased in 2014. Since November 2014, EDS has been in business in direct competition with Rytec in Canada.

[9] EDS claims under certain agreements with Efaflex as follows:

(i) On or about November 19, 2014, EDS and Efaflex entered into an agreement to co-operate in the sale and distribution of Efaflex products in North America. This agreement also granted EDS a licence to use Efaflex's intellectual property as necessary for the sale of Efaflex's products.

(ii) As part of this agreement, EDS was not entitled to purchase Efaflex products that were subject to Efaflex's agreements with Rytec until May 2015 at which time certain rights under Rytec's agreements with Efaflex terminated. EDS says it abided by this restriction in good faith and to the best of its knowledge, in accordance with instructions it received from Efaflex as to the scope of the agreements between Efaflex and Rytec.

[10] EDS began distributing Efaflex products on July 1, 2015. It says that it no longer sells or installs any doors bearing the Spiral trademark and has not done so since its relationship with Rytec ended in 2014. The doors it sells are Efaflex branded doors.

[11] Rytec and Efaflex are much larger companies than EDS. According to the Rytec website: "…there are over 100,000 Rytec doors in operation today. Rytec corporate offices and manufacturing operations are headquartered in Jackson, Wisconsin. Customer support is provided through a national network of local dealers and installers throughout North America." Efaflex's website advises that there are over 1,000,000 Efaflex doors sold through dealer network, which extends over all five continents, in addition to subsidiaries in Germany, Austria, Switzerland, Great Britain, Slovenia, Czech Republic, Poland, Netherlands, Belgium and Russia.

[12] Mr. Cornelius states that EDS is very much caught in a tug of war between these two giant competitors. I accept that, which is clear from the litigation that is taking place.

[13] On January 25, 2016 Rytec commenced an action in the Federal Court against EDS and Efaflex claiming that both defendants had breached the *Trade-marks Act* and the *Copyright Act*. The claim for relief includes interim, interlocutory and/or permanent injunctions against both defendants prohibiting the selling of Efaflex doors and damages of $325,000. On the same day Rytec commenced an action in the Alberta Court of Queen's Bench against EDS based on the same agreements pleaded in the Federal Court claiming various torts including a claim that EDS has induced Efaflex to breach its agreements with Rytec. Damages of $325,000 are claimed.

[14] Although issued on January 25, 2016, the statement of claim in the Federal Court was not served until the end of March, 2016. On May 9, 2016, Rytec served a notice of motion in the Federal Court proceedings to seek an interlocutory injunction against EDS to prohibit its sale and installation of Efaflex products and to require the destruction of such doors as are in its inventory. Rytec initially made that motion returnable on June 13, 2016. Later it amended the motion to make it returnable on a date to be appointed by the Judicial Administrator. No affidavits or supporting evidence have been served in that injunction proceeding. Efaflex was not

named in the injunction motion although its interests would clearly be affected if Rytec were successful in obtaining the injunctive relief it seeks.

Does the stay of proceedings in the BIA apply?

[15] Section 69 (1)(a) of the BIA provides for an automatic stay of proceedings once a notice of intention to file a proposal has been filed, as follows:

> **69(1) Stay of proceedings — notice of intention**
>
> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,…

[16] Rytec takes the position that injunctive relief for post-filing conduct of EDS is not caught by the stay as relief sought in the injunction motion is not aimed at recovery of any monetary claims against EDS but rather seeks to enjoin EDS from further behaviour that harms Rytec. It says that the injunction is not in relation to collection or enforcement of a debt, liability, or obligation, nor is it possible to attach a monetary value to the injunction. It further says that the relief sought in the injunction motion is relief in respect of the ongoing conduct of EDS and therefore necessarily relates to conduct that continues to occur after the filing of the NOI. The behaviour that the injunction motion seeks to curtail would, absent an injunction, not result in a claim provable in bankruptcy as any claim would be a post-filing matter, the enforcement of which is not stayed.

[17] EDS takes the position that the stay in section 69 (1)(a) is intended to prohibit all remedies against an insolvent person, or an insolvent person's property, including an injunction. It says that the purpose of a proposal is to try to achieve a restructuring of the business and that if an injunction proceeding would detrimentally affect its ability to proceed with its proposal, the purpose of the proposal provisions in the BIA would be frustrated. It says further that under a CCAA stay an injunction motion would ordinarily be stayed and that the two statutes should be read harmoniously to reach similar results.

[18] The issue involves the interpretation of 69.(1)(a) of the BIA. In interpreting statutes, there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. See *Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27 at para 21.

[19] Rytec contends that a grammatical and ordinary reading of section 69(1)(a) indicates that the phrase "for the recovery of a claim provable in bankruptcy" modifies the entirety of "any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings".

[20] Rytec relies on a decision in *Canadian Petcetera Ltd Partnership v 2876 R Holdings Ltd.* (2010), 10 B.C.L.R. (5th) 235 (B.C.C.A.). In that case, a landlord sought to terminate a lease after the debtor filed a notice of intention to file a proposal for failure of the debtor to pay rent when due and failure to pay post-filing rent. It was held that section 65.1 of the BIA, which deals specifically with a landlord's rights after a tenant has filed a notice of intention to file a proposal, applied and that the landlord had the right to terminate the lease. It was argued by the trustee of the debtor who had gone bankrupt by the time of the appeal that the stay provided for in section 69.1(a) of the BIA prevented the landlord from terminating the lease. Justice Tysoe in the Court of Appeal held that section 69.1 did not apply to the situation as leases were expressly dealt with in section 65.1. He held however that section 69.1 could not prevent termination of the lease as

the termination was not the exercise of a remedy for the recovery of a claim provable in bankruptcy. Tysoe J.A. stated:

> **29** In my opinion, s. 69(1) does not stay the termination of leases because the phrase "for the recovery of a claim provable in bankruptcy" at the end of clause (a) modifies each of the earlier phrases in clause (a). I agree with counsel for the Landlord that this is confirmed by the placement of a comma after the word "proceedings" because there would be no comma if it was intended that the last phrase was to modify only the immediately preceding phrase. Thus, while the termination of a lease is an exercise of a remedy, it is not the exercise of a remedy for the recovery of a claim provable in bankruptcy.
>
> **30** The wording of s. 69(1), which came into effect in 1992, was taken from the stay provision applicable when a debtor becomes bankrupt, which is now contained in s. 69.3. The general purpose of s. 69.3 was discussed by the Supreme Court of Canada in *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at 1015-16, 78 C.B.R. (N.S.) 193, (when the provision was s. 49(1) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3):
>
> > The aim of the section is to provide a means of maintaining control over the distribution of the assets and property of the bankrupt. In doing so, it reflects one of the primary purposes of the *Bankruptcy Act*, namely to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis. See Duncan and Honsberger, *Bankruptcy in Canada* (3rd ed. 1961), at p. 4. The object of the section is to avoid a multiplicity of proceedings and to prevent any single unsecured creditor from obtaining a priority over any other unsecured creditors by bringing an action and executing a judgment against the debtor. This is accomplished by providing that no remedy or action may be taken against a bankrupt without leave of the court in bankruptcy, and then only upon such terms as that court may impose.
>
> It was held in *Fitzgibbon* that the stay provision did not apply to the making of a compensation order under the Criminal Code. Similarly, it has been held the stay provision does not apply to proceedings for contempt of court because, although contempt is a remedy against a debtor, it does not result in the recovery of a claim provable in bankruptcy (see *Neufeld v. Wilson* (1997), 86 B.C.A.C. 109, 45 C.B.R. (3d) 180, and *Long Shong Pictures (H.K.) Ltd. v. NTC Entertainment Ltd*. (2000), 18 C.B.R. (4th) 223, 190 F.T.R. 257).

[21] As stated by Tysoe J.A., the wording of s. 69(1), which came into effect in 1992, appears to have been taken from the stay provision then in effect applicable when a debtor becomes bankrupt, which is now contained in s. 69.3, which provides:

> **69.3(1) Stays of proceedings — bankruptcies**
>
> Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[22] Tysoe J.A. referred to and relied on a statement of Justice Cory in *R. v. Fitzgibbon* that the aim of section 69.3 (1) is to provide a means of maintaining control over the distribution of the assets and property of the bankrupt and reflects one of the primary purposes of the BIA, namely to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis.

[23] I have difficulty, however, in applying that reasoning in a case of bankruptcy to a case dealing with a notice of intention to file a proposal. The purpose of a proposal is to give a debtor some breathing space to negotiate a compromise with the debtor’s creditors in the hopes of saving the debtor. Such a purpose does not exist in the case of a bankruptcy.

[24] Thus, while section 69(1)(a) dealing with a stay after a notice of intention to file a proposal has been made contains the same language as section 69.3 it is necessary in my view to construe it purposively taking into account the intent of proposal proceedings.

[25] Tysoe J.A. relied on the second comma in the section after the word “proceedings” to conclude that an injunction for post-filing conduct was not stayed as it was not for the recovery of a claim provable in bankruptcy. When one looks at the French version of the section, there is no such comma. The reasoning of Tysoe J.A. does not apply to it. It states:

> **Suspension des procédures en cas d’avis d’intention**

> **69 (1)** Sous réserve des paragraphes (2) et (3) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt par une personne insolvable d'un avis d'intention aux termes de l'article 50.4 et la date du dépôt, aux termes du paragraphe 62(1), d'une proposition relative à cette personne ou la date à laquelle celle-ci devient un failli :
>
> **a)** les créanciers n'ont aucun recours contre la personne insolvable ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite;

[26] Both the English and French versions are official and authoritative. Neither version enjoys priority or paramountcy over the other. This is known as the equal authenticity rule. When the two versions of a bilingual enactment appear to say different things, the courts are obliged by the equal authenticity rule to read and rely on both versions. If an acceptable meaning common to both versions cannot be found, some way of dealing with the discrepancy must be found by some means other than a preference for a particular language. Reliance on a single version is totally unacceptable for any official interpretation. Any discrepancy between the two versions must be reconciled. See Sullivan *on the Construction of Statutes*, 6th ed. 2014 LexisNexis at §§5.7, 5.12, 5.17 and 5.19.

[27] In my view, the discrepancy between the two versions can be reconciled by interpreting the sections taking into account the purpose of the BIA involved in proposals made by a debtor.

[28] Taking into account the purposes of insolvency legislation was discussed by Justice Deschamps in *Century Services Inc. v. Canada (Attorney General),* [2010] 3 S.C.R. 379 in considering the CCAA. At para. 70 she stated:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company.

[29] The direction to consider the remedial purpose of legislation is equally applicable to the BIA. The remedial purpose in proposal proceedings is to save a debtor form the social and economic losses resulting from a bankruptcy. Interpreting the word "remedy" in section 69(1)(a) to include injunctive relief sought against a debtor that has made a proposal would be a purposive interpretation that fulfills the aim of the legislation.

[30] In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc*. (2005), 29 C.B.R. (5th) 62, the same arguments made in this case by Rytec were made to Justice Lederman in a case in which a franchisor sought an injunction to prevent a franchisee who had filed a notice of intention to make a proposal from post-filing breaches of provisions of the franchise agreement and a lease. The same argument was made that because of the second comma in section 69(1)(a) of the BIA, as the injunctive relief sought was not for payment of money or collection of a debt or a liability provable in bankruptcy there was no automatic stay precluding it. Lederman J. did not accept that argument and stated:

> 11 While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of L.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 - Stays of proceedings, under the *Bankruptcy and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some "breathing room" during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."
>
> 12 A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent persons to put forth a proposal it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on the ability, it should not be stayed.

[31] There is much to say in favour of this principle enunciated by Lederman J. in *Golden Griddle.* It gives effect to the aim of the proposal provisions of the BIA to permit a debtor who had filed a notice of intention to file a proposal some space if needed to achieve a successful proposal.

[32] One of the exceptions in the stay provision in section 69(1)(a) of the BIA is section 69.6, which excepts regulatory proceedings. It provides:

> **69.6 (1) Meaning of "regulatory body" —** In this section, *regulatory body* means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.
>
> **(2) Regulatory bodies — sections 69 and 69.1 —** Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.
>
> **(3) Exception —** On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.

[33] One may ask why an exception from the stay provisions in these broad terms was required for regulatory proceedings if not covered in sections 69 and 69(1). As an example, under provincial securities legislation, it is common for proceedings to be taken against a bankrupt who has contravened securities legislation for non-monetary claims such as orders preventing future access to the capital markets. If it is right that the stay in section 69(1) does not apply to such proceedings because they are not for the recovery of a claim provable in bankruptcy, the broad exception in section 69.6 would not be necessary. Moreover, one of the

exceptions in section 69.6(3) preventing regulatory proceedings from continuing if it can be established to the satisfaction of a court that a viable proposal could not be made in respect of the insolvent person, confirms the legislation's intent that non-monetary claims should not be permitted if they affect the chances of a successful proposal.

[34] Under section 11.02 (b) and (c) of the CCAA, a court may stay proceedings in any action, suit or proceeding against the company and may prohibit the commencement of any action, suit or proceeding against the company. This is the normal provision in initial orders under the CCAA.[2] There is a thrust under modern Canadian insolvency law to harmonize the statutory schemes contained in the CCAA and the BIA.

[35] In *Century Services Inc. v. Canada (Attorney General)* Justice Deschamps stated:

> **24** With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation…

[36] There is no reason in principle why a larger corporation with debts of $5 million or more would be entitled to a stay of proceedings against an injunction proceeding for post-filing activity under the CCAA while a smaller corporation with debts less than $5 million that would not able to file under the CCAA would not be entitled to a stay in an appropriate case under the proposal provisions of the BIA.

[37] In my view every attempt should be made to interpret the provisions of section 69(1)(a) in a harmonious way with section 11.02 of the CCAA, thus giving effect to the *Century City* principles. This can be done by interpreting the word "remedy" to include injunctive proceedings

[2] It is contained in the model order adopted in Ontario.

to prevent post-filing conduct of a debtor that has filed a proposal. If a debtor were to misuse this protection from a stay, an application could be made to lift the stay.

[38] I do not see the interpretation of section 69(1)(a) resting on the placement of the second comma in the English version as being a purposive interpretation of the section, particularly as the French version does not contain such a comma.

[39] The way to avoid that and to make a purposive interpretation of section 69(1)(a) is to interpret the word “remedy”, or in French le mot “recours”, to include injunctive proceedings to prevent post-filing conduct of a debtor. I thus interpret section 69(1)(a) of the BIA to stay an injunction proceeding taken to stop post-filing conduct of a debtor who has filed a notice of intention to file a proposal.

Should the stay be lifted?

[40] If the stay applies, the bankruptcy court has jurisdiction to lift the stay under section 69.4 which provides:

> **69.4 Court may declare that stays, etc., cease**
>
> A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[41] Thus Rytec must establish to the satisfaction of the court that it is likely to be materially prejudiced by the stay or that it is equitable on other grounds to lift the stay. If it does, it is still a

matter of discretion for the court as the section provides that the court may lift the stay if so satisfied.

[42] In *Re Ma* (2001), 24 C.B.R. (4th) 68 (Ont. C.A.) the Court of Appeal set out the test for lifting the stay in the following:

> **2** The approach to be taken on s. 69.4 application was considered by Adams J. in *Re Francisco* (1995), 32 C.B.R. (3d) 29 at 29-30 (Ont. Gen. Div.), a decision affirmed by this court (1996), 40 C.B.R. (3d) 77 (Ont. C.A.):
>
> > In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, exist for relieving against the otherwise automatic stay of proceedings.
>
> **3** As this passage makes clear, lifting the automatic stay is far from a routine matter. There is an onus on the applicant to establish a basis for the order within the meaning of s. 69.4. As stated in *Re Francisco*, the role of the court is to ensure that there are "sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*" to relieve against the automatic stay. While the test is not whether there is a prima facie case, that does not, in our view, preclude any consideration of the merits of the proposed action where relevant to the issue of whether there are "sound reasons" for lifting the stay. For example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

[43] Mr. Grasso of Rytec says that Rytec is suffering from the actions of EDS and Efaflex in that "Efaflex and EDS continue to act together to sell Spirals in Canada" at below cost. What he means by "Spirals" in his affidavit are doors that contain the Spiral® trademark. Yet the evidence on the record is that EDS has not sold or installed any doors bearing the Spiral trademark since its relationship with Rytec ended in 2014.

[44] Mr. Grosso also states that Rytec has suffered and continues to suffer through loss of market share, loss of distinctiveness of Spirals, loss of customer goodwill, loss of profits and loss of Rytec's investment in building the market and brand for Spiral doors in Canada. This results

in significant prejudice to Rytec's business in Canada and the U.S. He says that since EDS began competing with Rytec, the sales of Rytec Spirals has plummeted. There is little to support the assertions.

[45] The argument that Rytec will be materially prejudiced if it may not proceed with its injunction proceedings suffers from the absence of alacrity with which it has taken injunction proceedings. Its claims relate to actions taken by EDS and Efaflex since 2014. Rytec only commenced its claims in the Federal and Alberta courts on January 26, 2016 and did not serve them until late March. No injunction application was brought until May 9 and when served did not contain any sworn materials. Rytec then on its own adjourned its motion sine die on May 19. I accept that if Rytec were truly suffering material prejudice, it would have moved with far more haste.

[46] The claim by Rytec is essentially for lost market share and damages, which it has quantified in its claim against EDS and Efaflex in the Federal Court action at $325,000. This kind of claim usually does not attract injunctive relief. In this case, there is no issue of Efaflex being able to fund any such award if made.

[47] Mr. Cornelius of EDS states the difficulty caused to a restructuring if it is required to become immersed in injunction proceedings. He states that the business of EDS continues to operate and is generally on track for the projections set out in its cash flow in the NOI proceedings. He says that the restructuring plans of EDS are still being developed and that EDS is still in the process of considering its restructuring options and discussing them with counsel, the proposal trustee, and key stakeholders. It would be extremely distracting to those restructuring efforts for EDS to have to turn all its energy now to address this injunction. To be denied access to the products which are the subject of the injunction would have a material impact on EDS' business. Without access to these products, the restructuring would likely fail and the company would become bankrupt.

[48] Mr. Cornelius further states that EDS is continuing to take delivery of Efaflex doors which are the subject of the injunction, and it continues to market and sell those doors. The completion of the orders to which these doors relate are an essential part of the cash flow which the company filed with the Superintendent. In general, the business of selling and installing Efaflex doors represents approximately one half of the business of EDS. Without the Efaflex business, and certainly in the event of an abrupt and unplanned stop to that business, it is likely that the company would not be able to continue with its restructuring process.

[49] The Proposal Trustee states in its report to the Court that it is concerned that continuation of the injunction proceedings, even if the injunction is ultimately refused, will adversely affect EDS's ability to successfully restructure via this process. The EDS's cash flow will be needed to fund legal fees in that proceeding. Injunction proceedings normally require considerable time and resources. The Proposal Trustee states that it has reviewed the potential return to unsecured creditors in a bankruptcy scenario and based on its preliminary analysis, it would appear that the proposal that EDS filed on August 2, 2016 offers a larger return to the Company's unsecured creditors if accepted.

[50] I accept that the injunction proceedings would be a large negative at this time to a successful restructuring. EDS is a small company and without a stay, the cost and time involved in injunction proceedings would be very disrupting of its attempts to negotiate a successful restructuring of the business. It has not gone unnoticed that Rytec has chosen not to seek an injunction against Efaflex, the effect of which is that the cost of defending the injunction would be entirely at EDS' expense.

[51] There is evidence that Rytec is taking advantage of the proposal proceedings on EDS. Mr. Cornelius in his affidavit states on information and belief that he was told by Mr. Jakob Hess, a senior executive at Efaflex that on June 16, 2016, Mr. Grasso sent an email to the owners of Efaflex and advised that EDS was bankrupt and unable to continue to conduct business in Canada. As a result of these statements Efaflex threatened to place EDS on credit hold and stop the supply of doors which had been ordered prior to the commencement of the NOI process.

There is no affidavit from Mr. Grasso denying this evidence. I have little doubt that Rytec is quite prepared to see the failure of EDS if the injunction proceedings mean the end of the line for EDS.

[52] In the result and considering all of the evidence, I am not prepared to lift the automatic stay provided under section 69(1)(a) of the BIA.

Costs

[53] EDS is entitled to its costs. It claims costs on a partial indemnity scale totalling $19,058.85 all in. Rytec's cost outline claims costs on a partial indemnity scale totalling $10,140.33 all in. I note that EDS's rates for its partial indemnity cost claim are calculated at 70% of their actual rates. This is too high, the norm being 60% of reasonable actual costs. The actual rates charged to EDS appear reasonable. Reducing the partial indemnity rates to 60% of actual rates would reduce the cost claim by about $2500. I allow costs for EDS of $16,500 all in, to be paid by Rytec within 30 days..

[54] EDS is responsible for the costs of the Proposal Trustee. The Trustee prepared a report specifically in connection with the motion and its counsel attended court three times. EDS is entitled to be paid these costs of the Trustee. These should be agreed, but if not, brief submissions in writing by the parties may be made within 10 days.

Newbould J.

Date: August 22, 2016

Date: 19990113
Docket: 22283
Bankruptcy No. 188154
Registry: Vernon

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY

IN THE MATTER OF THE NOTICE OF INTENTION TO FILE A PROPOSAL OF

GENE MOSES CONSTRUCTION LTD.

DECISION

OF

MASTER POWERS

(IN CHAMBERS)

Counsel for Gene Moses Construction Ltd.: F.J. Quinn

Counsel for GE Capital Corporation: R.C. Hunter, Q.C.

Place and Date of Hearing: Kamloops, B.C.
January 11, 1999

THE APPLICATION

[1] Gene Moses Construction Ltd. (the company) seeks the declaration that GE Capital Leasing Services Inc. (GE Capital) unlawfully removed $29,149.13 from the bank account of the company and for an order that those funds be returned to the company account.

BACKGROUND

[2] The company leased a piece of logging equipment with the assistance of GE Capital Leasing Services Inc. The cost of this equipment called a forwarder was $454,351. The monthly lease payments were $12,198.06 payable on the 1st day of each and every month excluding April and May. The payments were made by way of pre-authorization to debit an account. The lease was originally entered into on July 30, 1997. Problems arose in March of 1998 when payments were not made. GE Capital agreed to restructure the lease to allow for some skipped payments for 1998 and the payments were to be $12,342.54 per month commencing July 1, 1998.

[3] The company says that the method of payment was changed after the lease was restructured and this has not been denied by GE Capital. The company says that payments were not always processed on the 1st of the month but only after specific authorization by Mr. and Ms. Moses. GE Capital says that their position was that they had worked with the company but they advised the company it was imperative that the payments be

made. $10,000 was paid towards the October payment on November 3, 1998 but no payments were made on the November or December accounts up to December 17, 1998.

[4] The company executed a Notice of Intention to File a Proposal under the *Bankruptcy and Insolvency Act*. The notice was filed with the official receiver on December 17, 1998. Ms. Louise Moses states that she spoke to Mr. Sutherland, a representative of GE Capital, some time after December 17, 1998 and before December 22, 1998 and advised him that the notice had been filed. Mr. Sutherland does acknowledge speaking with Ms. Moses on December 15, 1998 and December 17, 1998, but says he did not have any knowledge of the proposal until he was advised by telephone by the trustee on December 23, 1998.

[5] On December 22, 1998 GE Capital presented three debit memos to the company's bank in the amount of $4,464.05, $12,342.54 and $12,342.54, for a total of $29,149.13. The bank honoured those debit memos and paid $29,149.13 to GE Capital.

[6] The company says that the withdrawal of this money prevents the company from meeting its payroll and its payments to the Bank of Montreal. They also say the insurance on the forwarder has been cancelled for non payment of premiums. They also say that it may be detrimental to their efforts at reorganizing their affairs pursuant to the *Bankruptcy Act*.

[7] GE Capital takes the position that they were unaware of the proposal and after attempting to deal with the company, simply processed the debit memos as they were entitled to do in order to collect the arrears of lease payments.

BANKRUPTCY AND INSOLVENCY ACT

[8] The company relies on Part III, Division I of the *Bankruptcy and Insolvency Act* and Section 69 which they say operates as a stay of proceedings upon the filing of the proposal or a notice of intention to file a proposal whether or not a creditor has knowledge of the notice or the proposal. The section relied on is as follows:

> 69(1) Subject to subsections (2) and (3) and section 69.4 and 69.5 on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

[9] The issue is whether the presentation of the debit memos to collect the arrears of lease payments was the exercise of a "remedy" and prohibited pursuant to section 69(1) of the Act.

[10] The company refers to a number of decisions in support of its position including:

Vachon v. Canada Employment and Immigration Commission and Attorney General of Canada (1985), 56 C.B.R. 113 (S.C.C.). This deal with a stay under s. 49(1) of the *Bankruptcy Act* at the time. Revenue Canada had made an overpayment to an individual who subsequently became bankrupt. The individual subsequently became entitled to Unemployment Insurance benefits but Revenue Canada exercised its statutory authority to set off the overpayment against the new benefits. Subsequent to a discharge from bankruptcy the bankrupt applied to the court for a declaration that such set off was contrary to section 49(1) of the *Bankruptcy and Insolvency Act*. Section 49(1) of the *Bankruptcy and Insolvency Act* provided:

> Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceeding for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until a proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

[11] The court decided that the *Bankruptcy Act* should be broadly interpreted and that the remedy included the statutory retention of subsequent benefits. The court said at page 121:

> This broad meaning is confirmed by the fact that the legislature took the trouble to exclude actions against either the creditor or his property.

[12] This broad meaning was consistent with the general scheme of the *Bankruptcy and Insolvency Act* (page 125). Remedies were not restricted to proceedings of a judicial nature.

[13] It was also referred to ***National Bank of Canada v. Dutch Industries Ltd.*** (1996), 45 C.B.R. (3d) 103 (Sask. Q.B.). In this case the court dealt with a bank's right to impose margining requirements which allowed the bank to take the debtor's cash deposits made to its account. The bank applied to lift the stay but the court found if the stay were lifted it would prevent the debtor from making a viable proposal. The stay was not lifted but terms were imposed on the monies deposited into the accounts. The court treated the contractual margining rights as a remedy covered by section 69(1) of the Act.

[14] I conclude that "remedy" in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debits memos.

[15] It is not necessary for me to decide whether Ms. Moses actually told Mr. Sutherland about the notice of intention to

file a proposal because knowledge of the filing of the notice is not necessary for the stay to be effective.

[16] I grant the declaration that the sum of $29,149.13 was removed from the account of the company at the Bank of Montreal contrary to the provisions of section 69(1) of the *Bankruptcy and Insolvency Act* and direct that those funds be repaid to the company's account at the Bank of Montreal.

[17] The fact that the insurance on the forwarder has been cancelled does raise a concern. GE Capital is at liberty to apply to lift the stay under section 69 of the *Bankruptcy and Insolvency Act* and may wish to do so if satisfactory arrangements cannot be made for the placement of insurance on the forwarder. Neither party had an opportunity to address that issue at the hearing before me.

[18] The point argued by the parties was a novel one with limited case authority to support either position and I find it is appropriate that each party bear their own costs.

"R. E. Powers"

R. E. POWERS
MASTER OF THE SUPREME COURT

Citation: Campbell, Saunders v. Samtack 2000 BCSC 1316

Date: 20000901
Docket: S001120
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CAMPBELL, SAUNDERS LTD., TRUSTEE IN BANKRUPTCY OF THE ESTATE OF STARTEK COMPUTER INC.

PLAINTIFF

AND:

SAMTACK COMPUTER INC.

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE HARVEY

(IN CHAMBERS)

Counsel for the Plaintiff: C.L. Shaley

Counsel for Defendant: C. Tong

Date and Place of Hearing: August 30, 2000
Vancouver, B.C.

[1] The plaintiff applies for judgment pursuant to Rule 18A against the defendant Samtack Computer Inc. ("Samtack") in the amount of $20,098.88 plus interest and costs.

[2] Startek Computer Inc. ("Startek") paid the defendant for certain goods, computer equipment, sold by it to Startek with a cheque. That cheque was returned to the defendant for non-sufficient funds.

[3] Startek provided the defendant with a replacement cheque for the goods. The defendant negotiated the replacement cheque.

[4] On June 17 two events occurred. Startek filed a Notice of Intention to Make a Proposal pursuant to the ***Bankruptcy and Insolvency Act***, R.S.C. 1985, c. B-3 and pursuant to s. 69(2) of the said statute a stay of proceedings was in effect as of June 17, 1999.

[5] On or about June 21, 1999 without the knowledge or consent of Startek or the trustee, the defendant renegotiated the original cheque which was cleared by Startek's bank.

[6] The matter has a history.

[7] On July 6, 2000 the matter came on for hearing before Pitfield J. At that time Samtack claimed that the first

cheque and the replacement cheque were not issued to pay for the same three invoices. Samtack claimed it had evidence that supported its position but that evidence was not before the court. As a result, Pitfield J. ordered Samtack to produce this evidence and the application was adjourned accordingly.

[8] In due course Samtack forwarded copies of the invoices it claims were paid by the first cheque and the replacement cheque.

[9] The issue is framed in counsel for the plaintiff's outline of argument as follows:

> Is Samtack liable to the trustee in the amount of $20,098.88 for cashing both the first cheque and the replacement cheque on the basis that renegotiating the first cheque was a remedy prohibited as a result of the stay of proceedings imposed by section 69(1) of the BIA.

[10] The answer to this question is yes.

[11] The short answer to this application is that Samtack by renegotiating what has been referred to as the First Cheque on or about June 21, 1999, without the knowledge or consent of Startek or the trustee, exercised a remedy and violated the existing stay of proceedings. Further, upon a comparison of the invoices and particularly the further material ordered to be produced by Pitfield J. it is apparent the cheques were

issued to pay for the same three invoices and not as alleged by Samtack invoices in relation to additional goods sold to Startek. In this perspective Samtack was paid twice for the same goods and the same invoices.

[12] I do not accept Samtack's assertion that it has some form of defence based upon the fact it was not aware of the filing and the stay of proceedings referred to *supra*. In this regard in ***Gene Moses Construction Ltd.*** (1999), B.C.J. No. 141 the Court of Appeal confirms that knowledge of the filing of the Notice of Intention to make a proposal is not necessary for the stay to be effective. It follows that in this case pursuant to the relevant provision of the BIA a stay of proceedings was in effect as of June 17, 1999 and no creditor, including Samtack, had any remedy against it for a claim provable in bankruptcy.

[13] I grant the application for summary judgment in the amount as claimed together with interest and costs on Scale 3.

"R.B. Harvey, J."
The Honourable Mr. Justice R.B. Harvey

CITATION: Loat v. Howarth, 2011 ONCA 509
DATE: 20110712
DOCKET: C53325

COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Cronk and Rouleau JJ.A.

BETWEEN

David Loat

Appellant (Respondent by Cross-appeal)

and

Andrew Howarth, Storetech Solutions Inc.
and Storetech Limited

Respondents (Appellants by Cross-appeal)

Elliot S. Birnboim and Alastair J. McNish, for the appellant

Owen Rees and Justin Safayeni, for the respondents

Heard: July 5, 2011

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated January 25, 2011, with reasons reported at 2011 ONSC 460, and on cross-appeal from the costs order of Justice Campbell, dated March 11, 2011, with reasons reported at 2011 ONSC 1558.

BY THE COURT:

I. Background

[1] David Loat (the "plaintiff") is a former director, officer and employee of Storetech Solutions Inc. ("Storetech Ontario") and a minority shareholder of Storetech Limited ("Storetech UK"), the parent company of Storetech Ontario. The Storetech companies

were founded by the respondent, Andrew Howarth. They provide software application services to retailers, both in Ontario and abroad.

[2] Commencing in 2006, the plaintiff and Mr. Howarth entered into negotiations concerning a business arrangement to facilitate Storetech UK's expansion into the North American market. In November 2006, Storetech Ontario was incorporated for this purpose and the plaintiff became its Chief Operating Officer.

[3] About one year later, on November 29, 2007, the plaintiff entered into a formal written service agreement with Storetech Ontario (the "Service Agreement"), which confirmed his executive position with the company, effective November 1, 2006, at an annual salary of $225,000. The Service Agreement provided that the plaintiff's employment could be terminated by either party on "not less than" three months' written notice.

[4] The Service Agreement also contained "entire agreement" or "integration" clauses. They read as follows:

> 22.1 This Agreement is in substitution for any previous agreements or contracts of service entered into between the Company or any predecessor undertaking in relation to the employment of the Executive and all prior agreements are deemed to have terminated by mutual agreement on the date of this Agreement.
>
> ….

> 24.1 The Agreement constitutes the entire agreement between the parties with respect to all matters referred to in it.

[5] Further, clause 24.2 of the Service Agreement provided that any variations to the contract would be ineffective "unless made in writing and signed by both of the parties".

[6] The Service Agreement also contained a combined forum selection and governing law clause. Section 26.1 stipulated:

> Except as expressly set forth herein this Agreement is governed by and construed in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein. *The parties agree to submit to the non-exclusive jurisdiction of the courts of the Province of Ontario in relation to any claim or matter arising under this Agreement.* [Emphasis added.]

[7] On November 27, 2007, two days prior to the date of the Service Agreement, the plaintiff, his family trust, Mr. Howarth and Storetech UK had entered into a shareholders' agreement (the "Shareholders' Agreement"), whereby the plaintiff acquired, through his family holding company, a minority equity position in Storetech UK and the right to nominate a minority of directors to Storetech UK's board of directors in exchange for loaning $400,000 of start-up capital to Storetech Ontario. The Shareholders' Agreement provided that the plaintiff would furnish the agreed start-up funds: (1) by "irrevocably" deferring the first year of his salary with Storetech Ontario ($225,000) until certain conditions were met; and (2) by paying the remaining $175,000 in cash to Storetech Ontario.

[8] The Shareholders' Agreement, like the Service Agreement, contained governing law and forum selection clauses. However, while the forum selection clause in the Service Agreement applied to "any claim or matter arising under this Agreement", the Shareholders' Agreement provided that any disputes "arising out of or in connection with this Agreement" were to be resolved exclusively in England under English law:

> 13.1 This Agreement and any disputes or claims arising out of or in connection with its subject matter are governed by and construed in accordance with the law of England.
>
> 13.2 *The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement*. [Emphasis added.]

[9] No entire agreement or integration clause appears in the Shareholders' Agreement.

[10] On December 8, 2009, Storetech Ontario terminated the plaintiff's employment without notice and allegedly for cause. The plaintiff promptly commenced an action in Ontario against Mr. Howarth, Storetech Ontario and Storetech UK (the "defendants"), claiming: (1) various oppression remedy-related declaratory relief against all the defendants, pursuant to s. 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c. B. 16; (2) repayment of director's loans allegedly made by him to Storetech Ontario; (3) payment of "unpaid salary" in an amount equivalent to US $545,617.87; (4) damages for oppression in the amount of $1 million and punitive damages in the amount of $1 million; (5) a declaration that his employment had been wrongfully terminated; and (6)

payment of three months' termination pay under the Service Agreement (pay in lieu of notice), in the amount of US $56,250, amongst other relief (the "Ontario Action").

[11] The defendants defended the Ontario Action and counterclaimed against the plaintiff for damages on various grounds. In their pleading, the defendants denied the plaintiff's allegations but did not contest his right to advance his claims in Ontario. In particular, they did not invoke the forum selection clause in the Shareholders' Agreement as a bar to the plaintiff's right to sue in Ontario, nor did they plead any reservation against their attornment to Ontario's jurisdiction over the plaintiff's claims.

[12] In October 2010, the plaintiff moved for partial summary judgment in relation to his claimed unpaid wages and termination pay. By that time, the parties had exchanged pleadings and, on the defendants' demand, the plaintiff had furnished particulars in respect of his claims in the Ontario Action.

[13] The defendants resisted the plaintiff's summary judgment motion and brought their own cross-motion seeking orders granting them leave to amend their pleading to invoke the forum selection clause in the Shareholders' Agreement and dismissing or staying the Ontario Action by reason of that clause.

[14] The parties' duelling motions were heard together on December 17, 2010 by C. Campbell J. of the Superior Court of Justice. By order dated January 25, 2011, he dismissed the plaintiff's motion on the basis that there existed a genuine issue requiring a

trial. He granted the defendants' stay motion in part, on jurisdictional grounds, directing that the Ontario Action be stayed "to permit the [p]laintiff to pursue all relief claimed if so advised in the Courts of England". He further directed that, "[i]f for any reason the [p]laintiff is not permitted to pursue the employment part of his entire claim and the claim for wages pursuant to the Ontario *Employment Standards Act, 2000*, a motion may be made to set aside the stay". Although the motions judge did not refer expressly to the defendants' request to amend their pleading, it is implicit in his reasons that he also granted this relief.

[15] Subsequently, by order dated March 11, 2011, the motions judge declined to award any costs in respect of either motion. In his costs reasons, he expressed his view that it was a reasonable exercise of his discretion in the circumstances to decline to award any costs.

[16] The plaintiff appeals the motions judge's stay order and the denial of partial summary judgment on his unpaid wages claim. He does not challenge the motions judge's ruling that a trial is required on his claim for three months' termination pay. The defendants cross-appeal from the motions judge's refusal to award them their costs of both motions.

II. The Appeal

[17] There are two aspects to the plaintiff's appeal. First, he argues that, contrary to the motions judge's holding, there is no genuine factual issue requiring a trial in respect of

his claim for payment of unpaid wages. Second, he submits that the motions judge erred in granting a stay of the Ontario Action: (i) by failing to recognize that he is entitled under the Service Agreement to sue Storetech Ontario in Ontario for unpaid wages; (ii) by, in effect, staying his "primary" claim for payment of unpaid wages on the basis of the defendants' defences to the plaintiff's discrete – and narrower – claim for three months' termination pay; (iii) by failing to recognize that the defendants attorned to Ontario's jurisdiction, thereby waiving their entitlement to rely on the forum selection clause contained in the Shareholders' Agreement; and (iv) by misapprehending and misapplying the "strong cause" test applicable to displacement of the exclusive jurisdiction conferred on the courts of England by the forum selection clause in the Shareholders' Agreement.

(1) Denial of Partial Summary Judgment

[18] In our view, the plaintiff's challenge to the dismissal of his partial summary judgment motion cannot succeed.

[19] The motions judge's reasons indicate that he properly identified the applicable test for summary judgment under the *Rules of Civil Procedure*, as recently amended, and that he applied that test correctly to the facts of this case.

[20] The motions judge concluded that, "There is little doubt that there are disputed facts". We agree. In particular, in response to the claim for payment of unpaid wages, the defendants assert that the plaintiff agreed under the Shareholders' Agreement to defer payment of his wages for 2007 until certain conditions were met and that these conditions

were never fulfilled. They also allege that the plaintiff thereafter agreed to defer his 2008 salary to keep Storetech Ontario "afloat" and to unconditionally waive his 2009 salary in exchange for continued employment. The plaintiff denies all these assertions.

[21] On the issues joined by the parties, therefore, the key question of the plaintiff's entitlement to unpaid wages raises a genuine issue requiring a trial. Contrary to the plaintiff's submissions, the record before the motions judge established that many of the material facts concerning this question are disputed. The resolution of this core issue will require credibility-based findings based on *viva voce* evidence.

[22] The plaintiff submits, correctly, that it was open to the motions judge to order or conduct the trial of an issue to resolve the unpaid wages claim. He asserts that the motions judge's failure to do so constitutes reversible error.

[23] We reject this assertion. First, the parties are divided on whether the plaintiff requested this relief before the motions judge and the record does not permit us to resolve this question with any certainty. Second, and more importantly, the decision of whether to order or conduct the trial of an issue is a discretionary one. In his pleading, the plaintiff seeks payment of the claimed unpaid wages from all the defendants. The defences raised to that claim involve wide-ranging factual issues implicating both the Shareholders' Agreement and the Service Agreement, in the context of the entirety of the parties' commercial business relationship. In these circumstances, it was well within the

motions judge's discretion to decline to direct or conduct the trial of an issue on the unpaid wages claim. His decision in that regard attracts deference from this court.

[24] Accordingly, that part of the appeal pertaining to the motions judge's refusal to grant partial summary judgment fails.

(2) Stay of the Ontario Action

[25] We reach a different conclusion, however, concerning the plaintiff's challenge to the stay order granted by the motions judge. In our opinion, for the reasons that follow, the stay order cannot stand.

[26] It is necessary for the determination of this part of the appeal to address only two grounds of appeal raised by the plaintiff in relation to the impugned stay order. We begin by considering the import of the forum selection clause in the Service Agreement.

[27] In the Service Agreement, the parties agreed that the Ontario courts have "non-exclusive" jurisdiction "in relation to any claim or matter arising under [the Service Agreement]". The plaintiff's action is rooted in his employment relationship with Storetech Ontario. This is a matter falling squarely within the four corners of the Service Agreement, thereby implicating the forum selection clause of that contract.

[28] Further, on the plain language of the forum selection clause in the Service Agreement, the plaintiff and Storetech Ontario expressly attorned to Ontario's

jurisdiction in respect of any disputes arising with respect to his employment. Under the clause, Ontario has jurisdiction *simpliciter* regarding such disputes.

[29] While the non-exclusive jurisdiction conferred under the forum selection clause in the Service Agreement did not preclude the plaintiff from commencing an action in England in respect of disputes arising under the Service Agreement, it did not oblige him to do so. The effect of the clause was to foreclose objection by the defendants to an action commenced in Ontario regarding claims contemplated by the Service Agreement: see *Gary Sugar v. Megawheels Technologies Inc.*, 2006 CanLII 37880 (S.C.J.); *Blue Note Mining Inc. v. CanZinco Ltd.* (2008), 297 D.L.R. (4th) 640 (S.C.J.). As a result, on the termination of his employment, the plaintiff was entitled to sue in Ontario for the recovery of any owed and unpaid wages.

[30] The motions judge failed to address the implications of the forum selection clause in the Service Agreement and the resultant contractual attornment to Ontario's non-exclusive jurisdiction over disputes arising from the plaintiff's employment relationship with Storetech Ontario. Indeed, based on his reasons, it appears that the motions judge accorded no weight at all to this clause or to the attornment confirmed under it. Instead, he treated this aspect of the parties' negotiated bargain as completely overridden by the forum selection clause in the Shareholders' Agreement.

[31] The failure to consider the import of the forum selection clause in the Service Agreement was an error. Canadian law favours the enforcement of forum selection

clauses negotiated, as here, by sophisticated business people. This court, for example, has affirmed that "[a] forum selection clause in a commercial contract should be given effect" and that the factors "that may justify departure from that general principle are few": *Expedition Helicopters Inc. v. Honeywell Inc.* (2010), 100 O.R. (3d) 241 (C.A.), at para. 24; see also *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.* (2010), 103 O.R. (3d) 467 (C.A.), at para. 39; *Stubbs v. ATS International BV* (2010), 272 O.A.C. 386 (C.A.), at para. 43.

[32] In a case like this one, therefore, where forum selection clauses in the Service and Shareholders' Agreements are at issue, to the extent possible effect must be given to the intentions of the parties as reflected in both clauses. That the parties intended the Service Agreement to govern any disputes arising from the plaintiff's employment is confirmed both by the language of the forum selection clause and by the entire agreement or integration clauses contained in the Service Agreement. This was not a case, therefore, where the plaintiff was required to show strong cause why the forum selection clause in the Shareholders' Agreement should not prevail. What he was required to do, and what he did do, was to establish that the forum selection clause in the Service Agreement was triggered.

[33] But that does not end the matter. The motions judge was confronted with two different forum selection clauses, each involving different parties and assigning jurisdiction over identified disputes to different legal regimes. What, then, are the

implications of the forum selection clause in the Shareholders' Agreement in the circumstances of this case?

[34] We offer several responses to this question.

[35] First, the starting point for the determination of whether a forum selection clause should be given effect is that, "the parties should be held to their bargain": see *Expedition Helicopters*, at para. 9; *Momentous.ca*, at para. 39. This requires examination of the scope of the clause and of the nature of the matter or matters in dispute to determine whether the claims or the circumstances that have arisen "are outside of what was reasonably contemplated by the parties when they agreed to the clause": *Expedition Helicopters*, at para. 24.

[36] In this case, each clause describes the disputes in respect of which it applies. The relevant clause in the Shareholders' Agreement concerns "any dispute or claim that arises out of or in connection with this Agreement", while the companion clause in the Service Agreement applies "to any claim or matter arising under this Agreement". The plaintiff's claims, read as a whole, are focused primarily on the incidents of his employment with Storetech Ontario and the termination of his relationship with the Storetech companies. In our view, these are matters that clearly engage the Service Agreement, even if the Shareholders' Agreement is also implicated in connection with some issues and some of the parties.

[37] Second, the conduct of the parties is a critical factor in this case. In addition to Storetech Ontario's express contractual attornment to the jurisdiction of Ontario under the Service Agreement, the defendants as a group attorned to Ontario's jurisdiction over *all* the plaintiffs' claims as pleaded in his statement of claim, without exception, by defending the Ontario Action on the merits without invoking the forum selection clause in the Shareholders' Agreement. This factor distinguishes this case from those cases cited by the parties in which the defendant responded on the merits to a plaintiff's claims while also raising a jurisdictional challenge based on a contractual choice of forum clause: see for example, *Momentous.ca*.

[38] Moreover, the defendants advanced their own claims in the Ontario Action, by initiating a counterclaim for damages. They also furthered the progress of the Ontario Action by demanding and obtaining particulars from the plaintiff concerning most, if not all, the claims advanced in his pleading. Affidavits of documents have also apparently been exchanged by the parties. Finally, the defendants delayed for almost one year after the commencement of the Ontario Action before moving to amend their pleading to rely on the forum selection clause in the Shareholders' Agreement. And this step came in response to the plaintiff's motion for partial summary judgment. No cogent explanation for this delay, or for the defendants' failure to advance a jurisdictional argument in their pleading, is evident in the record.

[39] In assessing whether a stay order should be granted based on the forum selection clause in the Shareholders' Agreement, the motions judge failed to consider the import of the defendants' attornment to Ontario's jurisdiction and the relevance of their conduct in relation to the Ontario Action. With respect, this, too, was an error. These factors were relevant to whether the Ontario courts have jurisdiction in respect of the plaintiff's claims. The defendants' delay in invoking the forum selection clause in the Shareholders' Agreement was also a proper consideration in determining whether to enforce that clause: *Momentous.ca*, at paras. 42-44.

[40] We also agree with the plaintiff's submission that, in the circumstances above-described, fairness dictates that he not be put to the significant delay and expense that inevitably would be occasioned by recommencing proceedings in England, particularly where his own alleged unpaid wages are at issue and the Ontario Action was underway for almost one year before the defendants sought to rely on the forum selection clause in the Shareholders' Agreement.

[41] In our opinion, this result does not produce unfairness to the defendants. They will be free to raise any applicable defences arising from the parties' overall business dealings in the Ontario Action or in their counterclaim proceeding. We also note that the adjudication in Ontario of the issues in controversy between the parties will avoid duplication of proceedings and attendant incremental costs and delay, thus promoting the convenient administration of justice.

[42] We therefore conclude, on the particular facts of this case, that the Ontario courts have jurisdiction to entertain the Ontario Action and that this jurisdiction should be exercised, having properly been invoked. It follows that the forum selection clause in the Shareholders' Agreement does not operate to preclude the Ontario Action and the stay order, which is based on that clause, must be set aside.

III. The Cross-appeal

[43] The defendants advance several arguments in support of their cross-appeal from the motions judge's decision not to award any costs of the summary judgment and stay motions. In brief, they contend that the motions judge erred by failing to adhere to the traditional rule that costs follow the event, by failing to distinguish between the two motions before him when assessing costs, and by basing his costs decision on irrelevant and improper considerations.

[44] In light of our disposition of the appeal, it is unnecessary to address the issues raised on the cross-appeal. If the stay motion had been dismissed, as in our view should have occurred, success before the motions judge would have been divided. This may have led to a decision by the motions judge that each party should bear their own costs. However, the defendants maintain that the majority of their relevant costs were incurred in resisting the summary judgment motion and that they are entitled to those costs notwithstanding that, on proper disposition of the motions, the plaintiff would have been entitled to his costs of the unsuccessful stay motion.

[45] Given the disposition of the appeal, the Ontario Action will now proceed to trial. In our view, it is appropriate in these circumstances that the costs of the motions before the motions judge be addressed by the judge presiding at the trial in the light of these reasons and we so order.

IV. Disposition

[46] The appeal is allowed in part in accordance with these reasons, the stay order is set aside, and the cross-appeal is dismissed. As success before this court has been divided, we award no costs of the appeal and cross-appeal.

RELEASED:

"JUL 12 2011"
"DOC"

"Dennis O'Connor A.C.J.O."
"E.A. Cronk J.A."
"Paul Rouleau J.A."

IN THE MATTER OF NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

Court of Appeal File No.: C66871
Court File Nos.: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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