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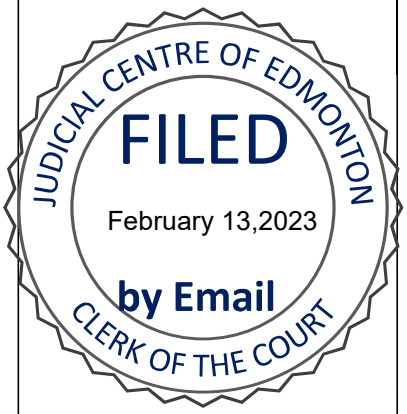

PLAINTIFFS	MIKE PRIESTNER REAL ESTATE INC. and MPRE GP DEV INC.
DEFENDANTS	2399430 ALBERTA LTD., 2399449 ALBERTA LTD., TURNIP HOMES INC., and HENOK KASSAYE
DOCUMENT	**BENCH BRIEF OF THE RECEIVER, MNP LTD.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McLennan Ross LLP #600 McLennan Ross Building 12220 Stony Plain Road Edmonton, AB T5N 3Y4	Lawyer: Ryan Trainer Telephone: 780.482.9153 Fax: 780.733.9716 Email: ryan.trainer@mross.com File No.: 20225092

1. This Bench Brief is submitted on behalf of MNP Ltd. (the "**Receiver**"), in its capacity as the Court-Appointed Receiver of 2399430 Alberta Ltd. ("**430 Alberta**") and 2399449 Alberta Ltd. ("**449 Alberta**") (collectively referred to herein as the "**Companies**"), in support of an application by the Receiver for:

   (a) An Order abridging the time for service of notice of the Application, if necessary;

   (b) An Order substantially in the form attached as Schedule "B" to the Application approving the activities, conduct and actions of the Receiver as outlined in the Receiver's First Report to the Court dated February 10, 2023 (the "**First Report**");

   (c) An Order authorizing the Receiver to assign the Companies into bankruptcy pursuant to s. 49 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**");

   (d) An Order compelling Henok Kassaye ("**Kassaye**"), the sole director of the Companies to provide the Receiver with the requested outstanding information (the "**Outstanding Information**"); and

   (e) Such further and other relief as counsel for the Receiver may advise and this Honourable Court may permit.

2. For the purposes of this Bench Brief, only the request for the Court to authorize the Receiver to assign the Companies into bankruptcy is addressed.

3. A detailed background of the Companies and the Receiver's activities leading up to this application are more fulsomely described in the First Report, filed concurrently.

4. As a receiver is not a creditor and is not owed money by a debtor, it is not able to bring a bankruptcy application pursuant to Section 43 of the *BIA*.[1]

5. However, section 49 of the BIA provides that "an insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may

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[1] *Bankruptcy and Insolvency Act* ("*BIA*") s. 43 [**TAB 1**].

make an assignment of all insolvent person's property for the general benefit of the insolvent person's creditors".[2]

6. The Receiver has been given the express power to assign the Companies into bankruptcy pursuant to paragraph 3(s) of the Receivership Order. [3]

7. The Honourable Mr. Justice R.A. Graesser of the Alberta Court of King's Bench in *Bank of Montreal v Ladacor AMS Ltd*., 2019 ABQB 985, approved an application of a receiver requesting permission to assign a debtor corporation into bankruptcy.[4] The relief was opposed by one debtor who argued that assigning any of the debtors into bankruptcy should only be done after the Receiver completed a proper investigation and analysis of the assets and debts of the debtor corporations, and should only occur when it is commercially reasonable to do so. [5]

8. The Court ruled against the Debtor and found that one of the debtor companies, Ladacor, was insolvent under any interpretation of insolvency.[6] It was further acknowledged that while there were ways of dealing with claims in a receivership, the only effective way of dealing with the numerous claims was through a statutory process such as bankruptcy and therefore approved the Receiver's application.[7]

9. The Ontario Superior Court in *RBC v Gustin*, 2019 ONSC 5370, likewise affirmed that there is ample authority for the Court to empower a receiver to file an assignment into bankruptcy companies subject to a receivership.[8]

10. There are powers contained in the *BIA* not available in a Receivership. For example, section 163 of the *BIA* permits a trustee in bankruptcy to examine any person reasonably thought to have

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[2] *BIA* s. 49 [**TAB 2**].

[3] First Report, Appendix B.

[4] *Bank of Montreal v Ladacor AMS Ltd*., 2019 ABQB 985 ("*Ladacor*") [**TAB 3**].

[5] *Ladacor* at para 92 [**TAB 3**].

[6] *Ladacor* at para 56 [**TAB 3**].

[7] *Ladacor* at paras 144-145 [**TAB 3**].

[8] *RBC v Gustin,* 2019 ONSC 5370 ("*Gustin*") at para 15 [**TAB 4**].

knowledge of the affairs of a bankrupt, or any officer or director of a bankrupt respecting the bankrupt or the bankrupt's dealings with its property.[9]

11. In this case, after reviewing the Companies' books and records, the Receiver identified over 75 separate unknown transactions in the Companies' ATB Financial ("**ATB**") bank accounts, totaling over $600,000 for the period February 23, 2022, to December 13, 2022 (the "**ATB Transfers**").[10] The Receiver has requested additional information regarding the nature of the ATB Transfers from both Kassaye and ATB. ATB indicated they are working to answer the Receiver's requests.[11]

12. Sections 95 and 96 of the BIA provide a framework and timeline for trustees to challenge transactions that can diminish the value of a debtor's estate, and by extension, the assets available for distribution to creditors. Section 95 and 96 are designed to ensure commercial fairness and predictability when dealing with transactions made by an insolvent debtor during the applicable reviewable period. [12]

13. Although the Receiver has not made a determination as to whether the ATB Transfers are at an undervalue, or constitute preference payments, the Receiver submits it is reasonable and appropriate to assign the Companies into bankruptcy at this time to preserve the applicable limitation dates and to take advantage of the investigatory powers of the BIA.

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9 *BIA,* s 163 [**TAB 5**].

10 *First Report* at para 27.

11 *First Report* at para 27.

12 *BIA,* s 95 and s.96 [**TAB 6**].

14. The Receiver respectfully requests that this Honourable Court exercise its authority and authorize the Receiver to assign the Companies into bankruptcy pursuant to s. 49 of the BIA, and such other relief as outlined in the First Report and the proposed form of Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 13th day of February, 2023

MCLENNAN ROSS LLP

Per: _____

Ryan Trainer, Solicitors for MNP Ltd., the Court-Appointed Receiver of 2399430 Alberta Ltd. and 2399449 Alberta Ltd.

TABLE OF AUTHORITIES

TAB 1

(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

(j) if he ceases to meet his liabilities generally as they become due.

f) si, à une assemblée de ses créanciers, il produit un bilan démontrant qu'il est insolvable, ou présente ou fait présenter à cette assemblée un aveu par écrit de son incapacité de payer ses dettes;

g) s'il cède, enlève ou cache, ou essaie ou est sur le point de céder, d'enlever ou de cacher une partie de ses biens, ou en dispose ou essaie ou est sur le point d'en disposer, avec l'intention de frauder, frustrer ou retarder ses créanciers ou l'un d'entre eux;

h) s'il donne avis à l'un de ses créanciers qu'il a suspendu ou qu'il est sur le point de suspendre le paiement de ses dettes;

i) s'il fait défaut à toute proposition concordataire faite sous le régime de la présente loi;

j) s'il cesse de faire honneur à ses obligations en général au fur et à mesure qu'elles sont échues.

Unauthorized assignments are void or null

(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.

R.S., 1985, c. B-3, s. 42; 1997, c. 12, s. 26; 2004, c. 25, s. 27.

Les cessions non autorisées sont nulles

(2) Toute cession de ses biens, autre qu'une cession consentie conformément à la présente loi, faite par un débiteur insolvable au profit de ses créanciers en général, est nulle.

L.R. (1985), ch. B-3, art. 42; 1997, ch. 12, art. 26; 2004, ch. 25, art. 27.

Application for Bankruptcy Order

Requête en faillite

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

Requête en faillite

43 (1) Sous réserve des autres dispositions du présent article, un ou plusieurs créanciers peuvent déposer au tribunal une requête en faillite contre un débiteur :

a) d'une part, si la ou les dettes envers le ou les créanciers requérants s'élèvent à mille dollars et si la requête en fait mention;

b) d'autre part, si le débiteur a commis un acte de faillite dans les six mois qui précèdent le dépôt de la requête et si celle-ci en fait mention.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

Cas où le créancier requérant est un créancier garanti

(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

Affidavit

(3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.

Consolidation of applications

(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

Place of filing

(5) The application shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor.

Proof of facts, etc.

(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

Dismissal of application

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Dismissal with respect to some respondents only

(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

Appointment of trustee

(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

Stay of proceedings if facts denied

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's

Affidavit

(3) La requête doit être attestée par un affidavit du requérant, ou d'une personne dûment autorisée en son nom, qui a une connaissance personnelle des faits qui y sont allégués.

Jonction des requêtes

(4) Lorsque plusieurs requêtes sont déposées contre le même débiteur ou contre des codébiteurs, le tribunal peut joindre les procédures, ou quelques-unes d'entre elles, aux conditions qu'il juge convenables.

Lieu du dépôt

(5) La requête est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Preuve des faits et de la signification

(6) À l'audition, le tribunal exige la preuve des faits allégués dans la requête et de la signification de celle-ci; il peut, s'il juge la preuve satisfaisante, rendre une ordonnance de faillite.

Rejet de la requête

(7) Lorsque le tribunal n'estime pas satisfaisante la preuve des faits allégués dans la requête, ou de la signification de celle-ci, ou si le débiteur lui a démontré à sa satisfaction qu'il est en état de payer ses dettes, ou si le tribunal juge que, pour toute autre cause suffisante, aucune ordonnance ne devrait être rendue, il doit rejeter la requête.

Rejet de la requête à l'égard de certains défendeurs seulement

(8) Lorsqu'il y a plus d'un défendeur dans une requête, le tribunal peut rejeter la requête relativement à l'un ou à plusieurs d'entre eux, sans préjudice de l'effet de la requête à l'encontre de l'autre ou des autres défendeurs.

Nomination de syndics

(9) Lorsqu'une ordonnance de faillite est rendue, le tribunal nomme un syndic autorisé à titre de syndic des biens du failli en tenant compte, dans la mesure où le tribunal le juge équitable, de la volonté des créanciers.

Sursis des procédures

(10) Lorsque le débiteur comparaît relativement à la requête et nie la véracité des faits qui y sont allégués, le tribunal peut, au lieu de rejeter la requête, surseoir aux procédures relatives à la requête aux conditions qu'il juge convenable d'imposer au requérant quant aux frais ou au

property and for any period of time that may be required for trial of the issue relating to the disputed facts.

Stay of proceedings for other reasons

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Security for costs

(12) Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

Bankruptcy order on another application

(13) If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Withdrawing application

(14) An application shall not be withdrawn without the leave of the court.

Application against one partner

(15) Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

Court may consolidate proceedings

(16) If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

débiteur afin d'empêcher l'aliénation de ses biens, et pendant le temps nécessaire à l'instruction de la contestation.

Suspension des procédures pour autres raisons

(11) Le tribunal peut, pour d'autres raisons suffisantes, rendre une ordonnance suspendant les procédures intentées dans le cadre d'une requête, soit absolument, soit pour un temps limité, aux conditions qu'il juge équitables.

Cautionnement pour frais

(12) Le requérant qui réside à l'étranger peut être contraint de fournir au débiteur un cautionnement pour les frais, et les procédures découlant de la requête peuvent être suspendues jusqu'à ce que le cautionnement soit fourni.

Ordonnance de faillite sur autre requête

(13) Lorsque des procédures relatives à une requête ont été suspendues ou n'ont pas été poursuivies avec la diligence et l'effet voulus, le tribunal peut, s'il croit juste de le faire en raison du retard ou pour toute autre cause, substituer au requérant ou lui adjoindre tout autre créancier envers qui le débiteur peut être endetté de la somme prévue par la présente loi; il peut rendre une ordonnance de faillite sur la requête d'un tel autre créancier, et doit dès lors rejeter, aux conditions qu'il croit justes, la requête dont les procédures ont été suspendues ou n'ont pas été poursuivies.

Retrait d'une requête

(14) Une requête ne peut être retirée sans l'autorisation du tribunal.

Requête contre un associé

(15) Tout créancier dont la réclamation contre une société de personnes est suffisante pour l'autoriser à présenter une requête en faillite peut présenter une requête contre un ou plusieurs membres de cette société, sans y inclure les autres.

Jonction des procédures par le tribunal

(16) Lorsqu'une ordonnance de faillite a été rendue contre un membre d'une société de personnes, toute autre requête contre un membre de la même société est déposée ou renvoyée au même tribunal, et ce dernier peut donner les instructions qui lui semblent justes pour joindre les procédures intentées dans le cadre des requêtes.

Continuance of proceedings on death of debtor

(17) If a debtor against whom an application has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if the debtor were alive.

R.S., 1985, c. B-3, s. 43; 1992, c. 27, s. 15; 2004, c. 25, s. 28.

Continuation des procédures advenant le décès d'un débiteur

(17) Advenant le décès d'un débiteur contre qui une requête a été déposée, les procédures sont continuées, à moins que le tribunal n'en ordonne autrement, comme s'il était vivant.

L.R. (1985), ch. B-3, art. 43; 1992, ch. 27, art. 15; 2004, ch. 25, art. 28.

Application against estate or succession

44 (1) Subject to section 43, an application for a bankruptcy order may be filed against the estate or succession of a deceased debtor.

Requête contre la succession d'un débiteur décédé

44 (1) Sous réserve de l'article 43, une requête en faillite peut être produite contre la succession d'un débiteur décédé.

Personal liability

(2) After service of an application for a bankruptcy order on the executor or administrator of the estate of a deceased debtor, or liquidator of the succession of a deceased debtor, the person on whom the order was served shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the application is disposed of; otherwise, in addition to any penalties to which the person may be subject, the person is personally liable for the payment or transfer.

Responsabilité personnelle

(2) Le liquidateur de la succession d'un débiteur décédé, l'exécuteur testamentaire de celui-ci ou l'administrateur de sa succession, après qu'une requête en faillite lui a été signifiée, ne peut payer aucune somme d'argent ni transférer aucun bien du débiteur décédé, sauf ce qui est requis pour acquitter les frais funéraires et testamentaires convenables, avant qu'il ait été décidé de la requête; sinon, en sus des peines qu'il peut encourir, il en est tenu responsable personnellement.

Act done in good faith

(3) Nothing in this section invalidates any payment or transfer of property made or any act or thing done, in good faith, by the executor, administrator of the estate or liquidator of the succession before the service of an application referred to in subsection (2).

R.S., 1985, c. B-3, s. 44; 2004, c. 25, s. 28.

Actes faits de bonne foi

(3) Le présent article n'a toutefois pas pour effet d'invalider un paiement ou un transfert de biens fait ou tout acte ou chose accompli de bonne foi par le liquidateur, l'exécuteur testamentaire ou l'administrateur avant la signification de la requête.

L.R. (1985), ch. B-3, art. 44; 2004, ch. 25, art. 28.

Costs of application

45 (1) If a bankruptcy order is made, the costs of the applicant shall be taxed and be payable out of the estate, unless the court otherwise orders.

Frais de requête

45 (1) Lorsqu'une ordonnance de faillite est rendue, les frais du requérant sont taxés et payables sur l'actif à moins que le tribunal n'en ordonne autrement.

Insufficient proceeds

(2) If the proceeds of the estate are not sufficient for the payment of any costs incurred by the trustee, the court may order the costs to be paid by the applicant.

R.S., 1985, c. B-3, s. 45; 1992, c. 1, s. 14; 2004, c. 25, s. 28.

Insuffisance de l'actif

(2) Lorsque le produit de l'actif ne suffit pas à payer les frais subis par le syndic, le tribunal peut ordonner au requérant de payer ces frais.

L.R. (1985), ch. B-3, art. 45; 1992, ch. 1, art. 14; 2004, ch. 25, art. 28.

Interim Receiver

Appointment of interim receiver

46 (1) The court may, if it is shown to be necessary for the protection of the estate of a debtor, at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made, appoint a licensed trustee as interim receiver of the property or any part of

Séquestre intérimaire

Nomination d'un séquestre intérimaire

46 (1) S'il est démontré que la mesure est nécessaire pour la protection de l'actif du débiteur, le tribunal peut, après la production d'une requête en faillite et avant qu'une ordonnance de faillite ait été rendue, nommer un syndic autorisé comme séquestre intérimaire de tout ou

TAB 2

Meaning of disbursements

(2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

Accounts, discharge of interim receivers

(3) With respect to interim receivers appointed under section 46, 47 or 47.1,

(a) the form and content of their accounts, including their final statement of receipts and disbursements,

(b) the procedure for the preparation and taxation of those accounts, and

(c) the procedure for the discharge of the interim receiver

shall be as prescribed.

1992, c. 27, s. 16; 2004, c. 25, s. 30; 2005, c. 47, s. 32; 2015, c. 3, s. 7(F).

Application of sections 43 to 46

48 Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

R.S., 1985, c. B-3, s. 48; 1997, c. 12, s. 28.

Assignments

Assignment for general benefit of creditors

49 (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

Sworn statement

(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

Filing of assignment

(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

Sens de débours

(2) Pour l'application du paragraphe (1), ne sont pas compris parmi les débours les paiements effectués dans le cadre des opérations propres aux affaires du débiteur.

Comptes et libération du séquestre intérimaire

(3) La forme et le contenu des comptes — y compris l'état définitif des recettes et des débours — du séquestre intérimaire nommé aux termes des articles 46, 47 ou 47.1 et la procédure à suivre pour leur préparation et leur taxation, ainsi que pour la libération du séquestre intérimaire sont déterminés par les Règles générales.

1992, ch. 27, art. 16; 2004, ch. 25, art. 30; 2005, ch. 47, art. 32; 2015, ch. 3, art. 7(F).

Application des art. 43 à 46

48 Les articles 43 à 46 ne s'appliquent pas au particulier dont la principale activité — et la principale source de revenu — est la pêche, l'agriculture ou la culture du sol, ni au particulier qui travaille pour un salaire, un traitement, une commission ou des gages ne dépassant pas deux mille cinq cents dollars par année et qui n'exerce pas un commerce pour son propre compte.

L.R. (1985), ch. B-3, art. 48; 1997, ch. 12, art. 28.

Cessions

Cession au profit des créanciers en général

49 (1) Une personne insolvable ou, si elle est décédée, l'exécuteur testamentaire, le liquidateur de la succession ou l'administrateur à la succession, avec la permission du tribunal, peut faire une cession de tous ses biens au profit de ses créanciers en général.

Déclaration sous serment

(2) La cession est accompagnée d'une déclaration sous serment dans la forme prescrite, indiquant les biens du débiteur susceptibles d'être partagés entre ses créanciers, les noms et adresses de tous ses créanciers et les montants de leurs réclamations respectives.

Production de la cession

(3) La cession est présentée au séquestre officiel dans la localité du débiteur, et elle est inopérante tant qu'elle n'a pas été déposée auprès de ce séquestre officiel qui en refuse la production, à moins qu'elle ne soit en la forme

Appointment of trustee

(4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee.

Cancellation of assignment

(5) Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment.

Procedure in small estates

(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

Future property not to be considered

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

Where subsection (6) ceases to apply

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

R.S., 1985, c. B-3, s. 49; 1992, c. 1, s. 15, c. 27, s. 17; 1997, c. 12, s. 29; 2004, c. 25, s. 31(E); 2005, c. 47, s. 33.

prescrite ou en des termes ayant le même effet, et accompagnée de la déclaration sous serment requise au paragraphe (2).

Nomination de syndic

(4) Lorsque le séquestre officiel accepte la production de la cession, il nomme comme syndic un syndic autorisé qu'il choisira, autant que faire se peut, en tenant compte des désirs des créanciers les plus intéressés, s'il est possible de s'en rendre compte à ce moment. Le séquestre officiel complète la cession en y insérant comme cessionnaire le nom du syndic.

Annulation de cession

(5) Le séquestre officiel annule la cession, sur préavis de cinq jours au failli, lorsqu'il ne peut trouver un syndic autorisé qui consente à agir.

Procédures à l'égard d'actifs peu considérables

(6) Lorsque le failli n'est pas une personne morale et que, de l'avis du séquestre officiel, ses avoirs réalisables, déduction faite des réclamations des créanciers garantis, ne dépassent pas cinq mille dollars ou tout autre montant prescrit, les dispositions de la présente loi concernant l'administration sommaire des actifs s'appliquent.

Exclusion des biens futurs

(7) Il n'est pas tenu compte pour la détermination des avoirs réalisables du failli des biens que celui-ci peut acquérir ou qui peuvent lui être dévolus avant sa libération.

Cessation d'effet du paragraphe (6)

(8) Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que les coûts de réalisation de ces avoirs représentent une partie importante de leur valeur réalisable, et s'il estime pareille mesure indiquée.

L.R. (1985), ch. B-3, art. 49; 1992, ch. 1, art. 15, ch. 27, art. 17; 1997, ch. 12, art. 29; 2004, ch. 25, art. 31(A); 2005, ch. 47, art. 33.

TAB 3

Court of Queen's Bench of Alberta

Citation: Bank of Montreal v Ladacor AMS Ltd, 2019 ABQB 985

Date: 20191219
Docket: 1803 09581
Registry: Edmonton

2019 ABQB 985 (CanLII)

Between:

Bank of Montreal

Plaintiff

- and -

Ladacor AMS Ltd, Nomads Pipeline Consulting Ltd, 2367147 Ontario Inc, and Donald Klisowsky

Defendants

Corrected judgment: A corrigendum was issued on January 13, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Alvarez & Marsal Canada Inc. LIT (the "Receiver") is the Receiver and Manager of Ladacor AMS Ltd. ("Ladacor"), Nomads Pipeline Consulting Ltd. ("Nomads") and 2367147

Ontario Inc. ("236"). It was appointed receiver and manager of these entities by Court order dated May 18, 2018 (the "Receivership Order"). It now applies for a number of orders:

1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver's Fourth Report to the Court dated September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings;
2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report;
3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application;
4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report;
5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order;
6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors;
7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver;
8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise; and
9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.

[2] The application was initially heard by Topolniski J on September 13. She approved the Receiver's accounts as set out in the Fourth Report and the Affidavit of Fees, a well as the accounts of the Receiver's counsel, Blake, Cassels & Graydon LLP.

[3] Mr. Klisowsky was directed to provide the Receiver's counsel with a list of issues or questions pertaining to the Receiver's findings as reported in the Fourth Report and the Supplemental Report dated September 12, 2019.

[4] An application by Hythe & District Pioneer Homes (Advisory Committee) ("Hythe") seeking to lift the stay of proceedings against Ladacor was adjourned to a later date. Hythe was attempting to file an amended statement of defence and counterclaim. It alleges that the work by Nomads was so deficient and defective that the entire project has to be demolished and Hythe will have to start again with a new contractor.

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[5] Mr. Klisowsky's application in relation to Nomad's potential liability on performance bonds with Liberty Mutual Insurance Company, and Mr. Klisowsky's concerns about Nomad's potential liability to the Government of Canada under the Employment and Social Development Canada Wage Earner Protection Program ("WEPP"), were also adjourned to a later date. The Receiver's discharge application was adjourned as well.

[6] The adjourned applications were set down before me on November 27. The Hythe matter had been resolved directly between its counsel and counsel for the Receiver. That still left a number of issues that required resolution. Following submissions and argument, I reserved on all of the issues left to me to decide.

[7] I received written submissions from counsel for the Receiver (3 in total), from counsel for Mr. Klisowsky, and from counsel for J. Steenhof & Associates Ltd and 1459428 Ontario Inc. I heard submissions from those counsel as well as from counsel for Liberty Mutual Insurance Company ("Liberty Mutual").

[8] There was a significant volume of material put before me. The Receiver had prepared four reports over the course of the receivership, and added a supplement to the Fourth Report and provided a Fifth Report filed October 25, 2019 for the purposes of this application. The Supplement and Fifth Report mainly responded to the issues raised by Mr. Klisowsky.

[9] There was an affidavit of fees from Orest Konowalchuk, a senior vice president of the Receiver. There were also were affidavits from John Hermann, from the Bank of Montreal ("BMO"), sworn May 18, 2018, from Mr. Klisowsky sworn September 7, 2019, September 11, 2019, and October 5, 2019, from Larry Slywka, a former employee of Ladacor, sworn October 13, 2019, from Bonnie Erin Richard, another former employee of Ladacor, filed October 25, 2019, and a "secretarial affidavit" from Lindsay Farr, sworn November 20, 2019. There was also an affidavit from Jacob Steenhof, from J. Steenhof & Associates Ltd ("J. Steenhof") and 1459428 Ontario Inc ("145"), sworn October 25, 2019.

[10] Each of Mr. Klisowsky, Mr. Slywka, Ms. Richard and Mr. Steenhof were cross-examined on their affidavits and I have the transcripts from their cross-examinations.

Background

[11] Most of the background facts are not in dispute. Mr. Klisowsky is the majority shareholder in Nomads (97.28%). His son owns the remaining 2.72% of the shares. Nomads was a Calgary based company whose principal business was the manufacture and production of advanced modular buildings and structures. These structures were generally constructed of sea cans. Part of Nomads' business was investing in other assets. One of those investments is its 90% interest in 236. 236 is an Ontario corporation whose business was the ownership and operation of a Days Inn hotel in Sioux Lookout, Ontario. The remaining 10% of the shares in 236 are owned by J. Steenhof, an Ontario corporation.

[12] Ladacor is a wholly owned subsidiary of Nomads. Ladacor came into existence in 2017 and carried on the same advanced modular home business as did Nomads. It appears that the incorporation of Ladacor coincided with a banking change by Nomads.

[13] In the latter part of 2017, Nomads began a banking relationship with BMO. Mr. Klisowsky injected some $4,000,000 of capital into Nomads/Ladacor. BMO loaned approximately $4,000,000 to Nomads/Ladacor. Ladacor was the principal debtor. BMO took

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typical security from Ladacor. Guarantees of the Ladacor debt to BMO were provided by Nomads, 236 and Mr. Klisowsky.

[14] After Ladacor was incorporated, all new work was directed to it, while Nomads completed the work it already had under contract. The work contracted by Nomads was, however, performed for it by Ladacor. Payments, whether from Nomads customers or Ladacor customers, were deposited into Ladacor's bank account with BMO

[15] The accounting records and the evidence of Mr. Klisowsky, Mr. Slywka and Ms. Richard show that Nomads and Ladacor essentially operated as one entity. All bills were paid from the Ladacor bank account with BMO, and all of the enterprise employees (but for Mr. Klisowsky, his wife, and his son, were paid by Ladacor.

[16] Ladacor entered into a bonding relationship with Liberty Mutual. Ladacor's indemnification obligations to Liberty Mutual were guaranteed by Nomads, 236, and by Mr. Klisowsky.

[17] The months following the incorporation of Ladacor were not financially successful. Nomads had a major contract with Hythe that was ongoing and far from completion. Nomads had a large receivable ($2,700,000) owed to it by 1507811 Alberta Ltd on a project in Edmonton known as "Westgate". That project had been completed, but there were ongoing discussions about the outstanding payment.

[18] Ladacor was performing the work on ongoing projects that were in various stages of completion, including a project in Banff. The Receiver completed these obligations over the course of the receivership.

[19] In May 2018, shortly before the Receivership Order, Ladacor was awarded a sub-contract for work on the new court house in Chateh, Alberta. From the information before me, it is likely that Liberty Mutual had previously provided a bid bond, and subsequently provided a surety bond in favour of the general contractor, Kor Alta Construction Ltd ("Kor Alta"). Physical work on the project had not begun at the time of the Receivership Order, and the Receiver disclaimed the contract. That led to a bond claim by Kor Alta against Liberty Mutual. The claim in favour of Kor Alta is tentatively valued at over $1,000,000. Liberty Mutual seeks indemnification for that amount from each of Ladacor, Nomads, 236, and Mr. Klisowsky.

[20] Following the Receivership Order, Hawke Electric, a subcontractor to Nomads, made a bond claim on a labour and material payment bond on the Westgate project against Liberty Mutual. Kor-Alta, the general contractor on the Chateh courthouse project, claimed in excess of $1,000,000 as a result of the termination of the subcontract by the Receiver. Liberty Mutual seeks indemnification for those amounts from each of Ladacor, Nomads, 236 and Mr. Klisowsky.

[21] Liberty Mutual values these claims at a total of approximately $1,100,000.

[22] The Receiver has reported throughout the receivership on its activities and realizations. A sale of the physical assets of Nomads and Ladacor was conducted in the late fall of 2018. The auction sale netted $606,000. Further physical assets (miscellaneous inventory) netted a further $76,000.

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[23] The Receiver was successful in collecting most if not all of the $2,700,000 receivable owed to Nomads on the Westgate project. The Receiver collected $1,568,609 owed to Ladacor on the Banff project.

[24] Since 236 was also put into receivership, the Receiver took steps to sell 236's main asset, the Days Inn Hotel in Sioux Lookout. Of the roughly $5,000,000 sale proceeds, $4,000,000 were paid by the Receiver to BMO.

[25] Ultimately, the time of the Fourth Report, the Receiver had paid off the secured debt to BMO, the Receiver's borrowings from BMO to enable it to carry on the Receivership, the WEPP claims, CRA and Service Canada trust/priority claims, along with its and its lawyer's fees and disbursements.

[26] The supplemental report and Fifth Report update the figures. As at the time of that report, October 25, the Receiver was holding $10,398 for Nomads, $722,661 for Ladacor, and $637,241 for 236. The Receiver proposes to allocate all of the available proceeds currently in Ladacor's and Nomads' accounts to 236.

[27] All three corporations would then be placed in bankruptcy.

[28] Because Nomads and Ladacor had intermingled their physical assets, it was not possible for the Receiver to determine with any degree of certainty what assets belonged to Nomads and what assets belonged to Ladacor. For BMO, the secured creditor, it did not matter. It had reportedly good security against all of the assets regardless of which corporation owned them. For the purposes of the Fourth Report, which was from the date of the Receivership Order to August 31, 2019, the Receiver apportioned the auction proceeds $451,450 to Nomads and $154,407 to Ladacor. Ongoing expenses were apportioned between the two corporations based on the contracting party for the contract being worked on. Employee withholding claims by CRA and WEPP claims were broken down between the two corporations as well.

[29] Following receipt of Mr. Klisowsky's cross application and the concerns he expressed over the apportionments in the Fourth Report, the Receiver retained Erin Richard to explain the financial situation and accounting of Nomads and Ladacor while she was comptroller for the final year of their operations. She had worked with the Receiver during the course of the receivership. Ms. Richard outlined in her affidavit how employees and assets had been apportioned between the two entities. She attempted to determine from the available records what assets had been owned before Ladacor was incorporated. Those would have been Nomads. Because Ladacor had become the main operating entity after the fall of 2017, anything acquired since then was attributed to Ladacor.

[30] The same analysis was performed with respect to employees. For the purposes of payroll, withholdings and other employment related issues, the Receiver treated employees who had been employed with Nomads and who stayed on after Ladacor began operating as Nomads employees. Employees hired after Ladacor began operating were treated as Ladacor employees, even though they may have been working on Nomads projects.

[31] For accounts payable and monies owed to trade creditors, the Receiver looked at which entity an invoice was addressed to, or which project it related to. If it was addressed to Nomads, or was in relation to a Nomads project, it was attributed to Nomads. And vice versa for Ladacor.

[32] There does not appear to be any dispute that the Nomads/Ladacor records did not provide the Receiver with much guidance. There was no written agreement between Nomads and

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Ladacor when Ladacor assumed all of the operations of the two corporations. There was no asset transfer agreement. There was no agreement transferring Nomads' rights under any of its ongoing contracts to Ladacor. There was no agreement relating to employees.

[33] According to Mr. Slywka, when Ladacor assumed the operations, employees at the time were simply told they were now working for Ladacor. It is unclear whether any of the parties Nomads had contracted with were ever told that Ladacor had taken over Nomads' operations, or that Nomads had assigned any rights to Ladacor.

[34] Mr. Klisowsky takes issue with the amount of the asset sale proceeds attributed to Ladacor versus Nomads. He challenges Ms. Richard's assessment, noting that she was a relatively new employee at Ladacor. He also takes issue with the allocation of employees between the companies, and says that only his wife and son were Nomads employees, as all other workers worked for Ladacor. That impacts wages paid to the employees (their WEPP claims) as well as claims by the government for employee deductions and other trust claims made by the Government of Canada.

[35] Mr. Klisowsky's view is that as at the beginning of 2018, Nomads was essentially a holding company. All of its projects, employees and assets had been transferred to Ladacor. Ladacor performed all of the work on all of the projects contracted to either Nomads or Ladacor. Ladacor paid all of the employee wages, regardless of what project they were working on. Ladacor paid all of the bills whether they were invoiced to Ladacor or to Nomads, as Ladacor had taken over all of the work on all of the ongoing projects.

[36] Whatever the arrangement between Nomads and Ladacor was, it was not reduced to writing. There is some suggestion that the merging of operations and the creation of Ladacor was linked to collection activities undertaken against Nomads by Alberta Treasury Board and Finance in relation to a reassessment of tax credits Nomads had been given under a government tax incentive program. A review by the Tax and Revenue Administration revisited the credits given to Nomads for 2012, 2013 and 2014 and assessed Nomads some $769,000. The Provincial government had apparently garnisheed Nomads' former bank, leading to Nomads setting up a new banking relationship with BMO.

[37] The best that can be said of the operations of Nomads and Ladacor once Ladacor came into existence is that they operated under Mr. Klisowsky's control as "owner" of both entities. Daryl Nimchuk was the chief operating officer for some time. Ms. Richard was comptroller, and Larry Slywka was Ladacor's production manager. The operations of both Nomads and Ladacor were merged so that all receipts went into the Ladacor bank account and all bills were paid out of that account. There was no internal attempt to separate assets, projects, employee functions, bills or receivables. The reporting to BMO and any financial statements produced were "consolidated", although the two corporations were never consolidated under the *Business Corporations Act*. The joint operation is frequently described internally and on contracts as "Nomads Pipelines Consulting Ltd o/a Ladacor". The internal treatment of the two entities' operations does not reflect either entity's legal rights or obligations.

[38] According to the brief filed on behalf of Mr. Klisowsky, and his affidavit evidence, he believes that despite all of the various claims being advanced against it, Nomads remains a solvent entity and that Nomads should not be put into bankruptcy. He points to the large receivable of $2,800,000 secured by a builder's lien against the Hythe project. He claims that

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there is a good defence to Liberty Mutual's claim against Nomads on the indemnity and guarantee agreement on the bond issued in favour of Kor Alta.

[39] Mr. Klisowsky points to the wording of the indemnity agreement and argues that the agreement gave Nomads (or the Receiver when it took over control of Nomads following the Receivership Order) their right to cancel the bond in favour of Kor Alta. The Receiver failed to do so. The Receiver's failure should not be visited on Nomads, such that Nomads should not ultimately have to pay anything to the bonding company.

[40] He refers to paragraph 45 of the Indemnity agreement that provides:

> 45. *Termination of the present agreement and its effect upon outstanding Bonds* – The present agreement shall only be terminated by any Indemnitor, upon prior written notice to the Surety by registered mail and at its head office, at least thirty days prior to its effective date; however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date, the present agreement will remain in full force and effect as regards the other Indemnitors without any obligation on the part of the Surety to advise such other Indemnitors of such termination.

[41] This argument affects Ladacor as well, as it is the primary obligee on the bond and it is required to indemnify Liberty Mutual. The Indemnity Agreement in favour of Liberty Mutual executed by Ladacor, Nomads and 236 by Mr. Klisowsky signing the same. Mr. Klisowsky signed a personal indemnification in favour of Liberty Mutual and there is a *Guarantees Acknowledgement Act* certificate dated January 4, 2018.

Issues

[42] The Receiver raises a number of issues and seeks the Court's direction on the following:

1. Should the Receiver's apportionment of funds be approved, including its treatment of the contribution and subrogation obligations and rights of the guarantors?
2. Is there a valid defence on Liberty Mutual's indemnification claims on the bond claims against it?
3. Has the Receiver erred in apportioning employees, assets and debts?
4. Should all or any of the entities be put into bankruptcy? and
5. Should the Receiver's actions be approved?

[43] Mr. Klisowky's application challenges a number of the Receiver's recommendations and conclusions and raises a number of issues:

1. The validity of the Liberty Mutual claims under the Indemnity Agreement;
2. The identification and allocation of unsecured debt as between Ladacor and Nomads;

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3. The identification and allocation of the auction proceeds between Ladacor and Nomads;
4. The identification of employees of Nomads and any claims (CRA and WEPP);
5. The validity of the Alberta Treasury Board and Finance claim against Nomads;
6. The proposed subrogation from Nomads and Ladacor to 236;
7. The claim of J. Steenhof against 236; and
8. The conduct of the Receiver.

[44] I will deal with subrogation first as my decision on it will impact a number of the other issues. I will then deal with Mr. Klisowsky's concerns and claims, before dealing with the relief sought by the Receiver.

Subrogation

[45] BMO has been paid in full. It received $5,834,882. That included repayment of amounts loaned by BMO to fund the receivership. Most if not all of the funds that were paid to BMO resulted from the sale of 236's hotel in Sioux Lookout and the collection of the $2,600,000 receivable on the Westgate contract owed to Nomads. The principal debtor to BMO was Ladacor. It was the entity that borrowed and received the funds from BMO. The funds that resulted from collections on other Nomads and Ladacor projects and the sale of Nomads' and Ladacor's physical assets were mainly used to pay the ongoing costs of the receivership, including completion of some of the project work, and the Receiver's fees and disbursements.

[46] BMO was a secured creditor, subject only to the superior WEPP claims and CRA source deduction claims, and the costs of the receivership. The Receiver argues on this application that guarantors (such as Nomads and 236) are entitled to be subrogated to the claims they have paid out on behalf of the principal debtor, Ladacor.

[47] In this case, Nomads and 236 have paid off BMO's claims against Ladacor. Nomads and 236 are entitled to be subrogated to BMO's claim, and to stand in BMO's shoes with respect to any security BMO held against Ladacor. That means, according to the Receiver, that Nomads and 236 are now the primary secured creditors on any of Ladacor's remaining assets.

[48] Additionally, as between guarantors who have paid out on their guarantees, Nomads and 236 are entitled to be treated proportionately, so the debt paid off should be apportioned between them. Where guarantors are equally liable to the obligee, the guarantors are considered to be responsible for equal shares of the debt.

[49] Here, that would mean that each of Nomads and 236 should have paid off half of the debt owed to BMO. Since 236 paid more than half of the BMO debt, there should be an adjustment as between Nomads and 236, in 236's favor.

[50] The way the Receiver has accounted for this is that the excess of collections over required payments has left a surplus, some of which now stands to the credit of Ladacor. Because 236 paid more than its half of the obligation, 236 is entitled to recover that excess from Ladacor.

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[51] Of the $5,834,882 paid to satisfy BMO's claims, $4,000,000 came from 236. The remainder came from Nomads. Because of contribution principles between guarantors, each of the guarantors should have paid $2,917,441. 266 overcontributed by $1,082,559. That amount is owed to it by Nomads.

[52] The Receiver proposes to pay the funds remaining in the Nomads account and the Ladacor account (after holdbacks for further administration costs) in the approximate amount of $465,000 (Receiver's Fifth Report). 236 is expected to have approximately $517,000 in its account, so it will recover $982,001. It will be short by approximately $100,559. Because of it standing into BMO's security, it will be Nomads' only secured creditor to that extent.

[53] This analysis and position is well supported by the Receiver's first brief for this application. The Receiver cites:

> ***Gerrow v Dorais***, 2010 ABQB 560;
>
> *Mercantile Law Amendment Act 1856*, 19 & 20 Vict, c 97;
>
> ***Karen Matticks v B & M Construction Inc (Trustee of)***, 1992 CarswellOnt 193 (ONCJGD);
>
> Andrews & Millett, *Law of Guarantees*, 7th Ed (London: Sweet & Maxwell, 2015) at para 11-017;
>
> ***Re Windham Sales Ltd***, 1979 CarswellOnt 227 (ONSC in bankruptcy);
>
> ***Wong v Field***, 2012 BCSC 1141;
>
> ***EC&M Electric Ltd v Medicine Hat General & Auxiliary Hospital & Nursing Home District N 69***, 1987 CarswellAlta 25 (ABQB); and
>
> ***Abaklhan v Halpen***, 2006 BCSC 1979, aff'd 2008 BCCA 29.

[54] J. Steenhof, as an unsecured creditor of 236, and 145 as an unsecured creditor of Nomads on the Hythe project, agree with this analysis, as does Liberty Mutual. Mr. Klisowsky raises no specific objection to this proposal on the part of the Receiver, but suggests that it is premature. He says that the proper contribution between Nomads and 236 can only be calculated once the assets and liabilities of Nomads and Ladacor (as between those entities) have been properly allocated.

[55] I am satisfied that for the purposes of finalizing the Receivership accounts, the monies the Receiver holds to the account of Ladacor and Nomads should be transferred to 236's account as a function of a guarantor's right to subrogation and to contribution rights and obligations as between co-guarantors.

Assets and Liabilities of the Debtors

Ladacor

[56] There is no doubt that Ladacor is insolvent under any interpretation of "insolvency". It has no remaining assets, other than a contingent interest in the funds proposed to be held back by the Receiver to deal with CRA's post-receivership withholdings claims (discussed below), and a $57,000 GST refund apparently owed to it by CRA. All physical assets have been disposed of. All of Ladacor's projects have been abandoned, completed or wound down. Its receivables have

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been collected. There are still claims by CRA relating to pre-receivership GST. These claims total $33,446. While these claims presently enjoy priority status, they will drop down to unsecured status in the event of Ladacor's bankruptcy.

[57] There is a post-receivership claim relating to source deductions assessed against the Receiver's independent contractors used to complete project work and for other receivership purposes. CRA's position is that these contractors should be treated as employees subject to employment insurance and Canada Pension Plan deductions. While the presently-advanced claim is approximately $10,000, the Receiver anticipates that there are a number of other claims that CRA will advance, depending on its success on the claims already made. The Receiver proposes to withhold $125,000 as a contingency to deal with those funds. It is possible that not all of those funds will be required, and some might ultimately be released back to Ladacor. Conversely, it is possible that the claims and costs of defending Ladacor against them will use up most or all of the contingency amount.

[58] The Receiver's records list Ladacor's unsecured creditors. The present list totals approximately $3,500,000 in unsecured claims. That does not include over $1,100,000 from Liberty Mutual under the Indemnity Agreement in favour of Liberty Mutual.

[59] The priority claims of CRA have been accounted for in the holdback of $125,000 discussed above. Ladacor's only remaining secured creditors are 236 and Nomads, because they are able to step into BMO's secured position because of their subrogation rights. Since 236's and Nomads' assets were used to pay off BMO, 236 and Nomads have a secured claim against Ladacor for up to $5,834,882, less the approximately $465,000 that will be paid to 236 as a result of this application.

[60] It appears from this analysis that Ladacor's unsecured creditors are unlikely to make any recovery at all, as any remaining funds will go to or be attributed to 236 and Nomads, with 236 being able to recover all of any anticipated or hoped-for funds because of its contribution rights against Nomads.

[61] It is obvious that Ladacor should be placed into bankruptcy, although it is difficult to see any advantage to that for Ladacor's unsecured creditors. The bankruptcy would appear to benefit only the creditors of 236, as discussed below.

[62] In any event, there needs to be an orderly resolution to the massive amount of unsecured debt owed to Ladacor's creditors and the only way of achieving that is through bankruptcy

236

[63] 236 has no remaining assets, other than its subrogated claim against Ladacor and its claim against Nomads for contribution so that its and Nomads' contributions to BMO will be equalized. 236's creditors are all unsecured. The major claims are Liberty Mutual's claim for indemnity for bond claims against Ladacor ($1,100,000) and a claim from J. Steenhof for approximately $444,000. It too has a GST claim by CRA ($33,000), which is presently a priority claim but which will become unsecured on bankruptcy. There are only a few other unsecured claims totaling about $40,000.

[64] Through its subrogation rights and contribution rights arising out of 236's payments to BMO, 236 will receive all of the remaining cash in the three debtor accounts. There is the possibility that some further funds might come to 236 from Ladacor (any surplus from the CRA

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holdback discussed above and the GST refund). Any such funds may be available for 236's creditors.

[65] It is unlikely that 236 will receive any more than the amount presently suggested by the Receiver. That will not satisfy Liberty Mutual's claim, if the claim is valid and anywhere close to the current amount claimed. If J. Steenhof's claim has any validity, it and Liberty Mutual will recover only a fraction of their claims.

Nomads

[66] In his submissions, Mr. Klisowsky emphasizes the $2,800,000 receivable and builder's lien claim Nomads has against Hythe. As discussed below, that claim is hotly disputed by Hythe. Hythe is attempting to amend its statement of defence and counterclaim to advance a claim against Nomads for damages significantly higher than the Nomads claim against Hythe.

[67] There are two investments owned by Nomads. The first is 27.5% of the common shares in a private corporation, Testalta Corporation Ltd. Nomads is also owed a shareholder's loan of $220,500. The Receiver has no information on the value of this investment. It says that Mr. Klisowsky has not provided any relevant information that would assist it in valuing this asset. As a result, the Receiver places no value on Nomads' investment in Testalta and the Receiver has no information as to whether the shareholders' loan is recoverable.

[68] The second of these investments is a 50% interest in 1878826 Alberta Ltd. This private corporation owns a Studio 6 Hotel in Bruderheim, Alberta. The Receiver's information is that the hotel is presently producing "minimal positive cash flow" and is subject to a mortgage of approximately $3,000,000. Because of the lack of information, the Receiver is unable to place any value on this investment.

[69] Nomads has a contingent claim to the $54,236 the Receiver paid into Court to discharge a builder's lien in favour of Hawk Electric, filed against the Westgate project. Those funds are in Court as security for the lien and will remain there until further Court order. It is possible that some of those funds might come back to Nomads.

[70] Nomads owns 23 modular storage units which were earmarked for the Hythe project. They remain in storage. Unless the Hythe project can use them, they have little residual value. No information was put before me as to the potential value of these storage units. The main value appears to be the ability to use them for completion of the Hythe project. It seems highly unlikely Nomads or the Receiver will have any further involvement with Hythe, other than in the litigation that has ensued.

[71] Nomads is entitled to be indemnified for its payments to BMO by Ladacor and in that regard is a secured creditor, being entitled to step into BMO's security position. There is a possibility that Ladacor may not need all of the CRA contingency it has set up, and that it might recover a pre-receivership GST refund. However, since 236 is entitled to contribution from Nomads to equalize their payments to BMO to pay off Ladacor's debts to BMO, 236 will be entitled to recover any of the required contribution from Nomads as a secured creditor.

[72] Having regard to the roughly $100,000 contribution owed to 236 and 236's security position, it appears highly unlikely that any funds will remain for the benefit of any of Nomads' unsecured creditors.

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[73] By way of liabilities, CRA is a priority creditor in the amount of $152,742 in pre-receivership GST. As with Ladacor, this claim will drop down to unsecured status in the event of Nomads' bankruptcy.

[74] Nomads is liable to indemnify Liberty Mutual for both of the bond claims Liberty Mutual is liable for. Those claims total approximately $1,100,000.

[75] Alberta Treasury Board and Finance Tax and Revenue Administration has a claim (presumably unsecured) against Nomads following a reassessment of tax credits for 2012, 2013 and 2014 totaling $769,245.68. This claim has been outstanding since some time in 2017. Mr. Klisowsky professes to know nothing about this claim.

[76] 236 has a claim against Nomads to equalize what the two entities paid out to satisfy Ladacor's debts to BMO in the approximate amount of $100,000, assuming all available funds from Ladacor and Nomads are paid over to 236 as a result of this application.

[77] Hythe has recently provided information to the Receiver that the work done by Nomads should be demolished because of defects and mold infestation. The expert report provided states that the cost of repairing the existing work and completing it is likely to be significantly more expensive than demolishing the existing work and starting over again. The intended counterclaim will greatly exceed the amount of Nomads' builder's lien and claim for the value of work it claims to have done. While the relative merits of the positions of Nomads and Hythe are unknown, it seems clear that it will be a long and difficult fight for Nomads to collect anything from Hythe. It is not known what was agreed between the Receiver and Hythe with respect to this application such that Hythe's application to lift the stay of proceedings to allow it to file an amended statement of defence and counterclaim. However, the information presented by the Receiver casts doubt on the recoverability of the claimed receivable.

[78] Nomads also has approximately $1,900,000 in debts to creditors, after deducting the Liberty Mutual and Alberta Treasury Board claims. One of the J. Steenhof companies, 145, has a claim against Nomads for work done on the Hythe project, but its hopes of collection are likely tied to its builder's lien.

[79] It appears, following this analysis, that anything that Nomads may be able to recover from its few debtors will ultimately go to 236 until its and 236's payments to BMO have been equalized. The absence of information as to the potential value of Nomads' investments in Testalta and 1878826 Alberta Ltd makes it impossible to determine if there is any chance of recovery on either of those investments, or in what amount. The first $100,000 is likely to go to 236 and there are $4,700,000 in other creditors, so even if Nomads' present claim against Hythe were given full value (ignoring Hythe's counterclaim), Nomads would be unable to pay off its unsecured creditors. In my view, the suggestion that Nomads is solvent and should be able to resolve outstanding issues with its creditors is fanciful.

[80] Any remaining assets of Ladacor and Nomads will likely end up with 236 and be distributed to its creditors and not to any other creditors of Nomads or Ladacor. The resulting beneficiaries of that scenario are Liberty Mutual and J. Steenhof.

[81] 236 has no remaining assets other than its subrogated claim against Ladacor and the contribution claim against Nomads. The Receiver proposes to pay Ladacor's remaining funds in the amount of $799,000 less holdbacks and estimated administration costs to 236. Its claim

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against Ladacor is secured because of its rights to subrogation. However, claims will not satisfy the $4,000,000 236 paid to BMO.

Positions of Liberty Mutual, J. Steenhof and 145

[82] Both Liberty Mutual and the Steenhof parties support the Receiver's application. They support the proposal to put all three of the debtor corporations into bankruptcy. They do not oppose any of the other relief sought by the Receiver.

Position of Mr. Klisowsky

[83] The foundation of Mr. Klisowsky's disputes with the Receiver's reports and recommendations is that Mr. Klisowsky believes that Nomads remains solvent. Because of its assets, and in particular the Hythe receivable and builder's lien claim, the mis-allocation of debt between Nomads and Ladacor, the invalidity of the Alberta Treasury Board claim and the invalidity of the Liberty Mutual indemnification claims, there is no need to put Nomads into bankruptcy. He argues that Nomads essentially shut down and transferred all of its business to Ladacor. After late 2017, when the transfer took place, all rights and all obligations under existing contracts were assumed by Ladacor. As a result, almost all of the claims against Nomads and Ladacor should be Ladacor's responsibility. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to attribute a significant portion of the creditors to Nomads.

[84] Mr. Klisowsky makes the same argument with respect to the physical assets of the enterprise. Effective late 2017, the assets that were eventually auctioned off by the Receiver were mainly assets of Ladacor and not Nomads. Mr. Klisowsky claims that the Receiver did not accurately identify equipment owned by Nomads such that it should be given credit for more of the proceeds of the physical asset sale than it was. The total proceeds of sale were $605,858, of which $451,450 was allocated to Nomads and $154,407 was allocated to Ladacor. Mr. Klisowsky says that most of this should have been allocated to Ladacor.

[85] The same holds true for employee claims and the Receiver's treatment of WEPP claims and CRA withholding claims. After the assignment of the business to Ladacor, all employees (but for Mr. Klisowsky's wife and son) became Ladacor employees. Thus none, or almost none, of Nomads' real assets should have been used to pay off the BMO claims. Any remaining claims should be to Ladacor's account. and all the allocation of debt as between Nomads and Ladacor should be attributed to Ladacor.

[86] According to Mr. Klisowsky, the Receiver overpaid the WEPP claims and CRA preferred/secured claims because of failing to properly identify what employees worked for Nomads and for Ladacor. From the Receiver's accounting, CRA source deductions for Nomads and Ladacor totaled $322,652. These do not appear to have been broken down between Nomads and Ladacor by the Receiver. The WEPP claims totaled $25,005 (attributed $18,056 to Nomads and $8949 to Ladacor.

[87] Mr. Klisowsky says the manner of apportionment of employees was not commercially reasonable.

[88] Ultimately, Mr. Klisowsky says that more work needs to be done by the Receiver to properly analyzed and the results amended.

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[89] Mr. Klisowsky's position with respect to the Liberty Mutual indemnification claims is that if Ladacor had any outstanding bonds, and if there are any valid bond claims, the indemnity agreement should have been terminated by the Receiver immediately on their appointment thus avoiding liability on the bonds. Mr. Klisowsky also takes the position that the Receiver should not have terminated the subcontract with Kor-Alta because that triggered the performance bond claims. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to cancel the contract.

[90] Mr. Klisowsky argues that the work done by the Receiver to analyze and quantify the Alberta Finance claim relating to the reversed tax credits is deficient and needs further investigation as to whether the amount claimed is legitimate, whether it can be negotiated, and whether there is a process to appeal the reassessment. Mr. Klisowsky notes that the Alberta Finance claim is the most significant claim against Nomads other than the Liberty Mutual claim and suggests that the Receiver has not yet reached the point of commercial reasonableness in its work on this claim.

[91] Mr. Klisowsky also argues that the 145 claim against Nomads on the Hythe project is not valid. It is a claim for $603,000. Additionally, he disputes J. Steenhof's claim for $444,000 against 236. He says there is an issue for trial regarding that claim, as he says that amount represents part of J. Steenhof's investment in 236 and not a debt owed by 236 to J. Steenhof.

[92] Mr. Klisowsky argues that assigning any of the debtors into bankruptcy should only be done after the Receiver has completed a proper investigation and analysis of the assets and debts of the debtor corporations. Such a step should only occur when it is commercially reasonable to do so and that point has not been reached.

[93] Other issues raised include the reasonableness of the Receiver's actions when heavy rains damaged the roof and other parts of the under-construction Hythe project and its response to the theft of some property from that site.

[94] Mr. Klisowsky cites ***Royal Bank of Canada v Melvax Properties Inc***, 2011 ABQB 167 in support of his submissions. At the hearing, his counsel also referred to section 66(1) of the *Personal Property Security Act*, RSA 2000 c P-7, and ***Bank of Montreal v Tolo-Pacific Consolidated Industries Corp***, 2012 BCSC 1785.

Analysis

1. The validity of the Liberty Mutual claims under the Indemnity Agreement

[95] I cannot make any determination as to the validity of the Liberty Mutual claims as I have no documentation supporting the claims against the various bonds. In particular, none of the underlying contracts or subcontracts by Ladacor are in evidence. Mr. Klisowsky suggests that there was no signed contract between Ladacor and Kor-Alta. That may be so. However, that does not answer the matter, as there may well have been a bid bond issued in favour of Kor-Alta during the tendering process. A bid bond secures the successful tenderer's obligation to enter into a contract to perform the work and to provide a performance bond.

[96] Mr. Klisowsky's brief seems to suggest that a performance bond and labour and material payment bond were issued, which suggest that there were underlying contracts in existence. But it is premature to try to assess these issues. Liberty Mutual has indemnification agreements from

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each of Ladacor, Nomads, 236 and Mr. Klisowsky. It does not appear that any of the bond claims have been finalized.

[97] Liberty Mutual claims that it is or will be owed approximately $1,100,000 on account of the labour and material payment bond claim by Hawke Electric and the performance bond claim by Kor-Alta. Those claims may be valid and if they are valid, the indemnification agreements appear valid on their face.

[98] The defence raised by Mr. Klisowsky: that the Receiver should have terminated the indemnity agreements thereby avoiding liability for the indemnitors, is entirely without merit. His reference to paragraph 45 of the Indemnity Agreement might provide an argument in his favour, it the paragraph ended after the first part of the first sentence. The sentence continues:

> …however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date…

[99] It would make no sense at all for the indemnitors to be able to avoid their liability to indemnify the bonding company for bonds issued before the termination becomes effective. The essence of paragraph 45 is that the indemnitors can avoid liability for future bonds or bonding obligations by giving a 30-day notice. Existing arrangements are not affected.

[100] Standard form performance bonds, labour and material payment bonds and bid bonds do not have unilateral termination provisions or cancellation provisions on the part of either party. Once the bonding company is on the hook for a bonded obligation, the indemnitors are likewise on the same risk.

[101] This is so elementary in the bonding world that no authorities need be cited. Mr. Klisowsky's argument here is without merit. If Liberty Mutual is liable on any of the bonds it issued for Ladacor, the indemnitors are almost certainly liable to indemnify Liberty Mutual (subject to the usual types of defences available to guarantors.

[102] There is no basis to reject the Liberty Mutual claims from consideration of the merits of putting the debtor corporations into bankruptcy. Undoubtedly there may be litigation as to whether Liberty Mutual has properly paid out any of the claims against it and whether they have acted reasonably. But someone will have to carefully monitor the claims and Liberty Mutual's responses, and in doing so will be a costly venture for whomever is tasked with that.

2. The identification and allocation of unsecured debt as between Ladacor and Nomads

[103] This is another area where Mr. Klisowsky's arguments are without merit. A debtor cannot unilaterally pass its debts on to someone else and avoid further liability. Subject to the terms of the contract between the creditor and the debtor, a creditor can assign its rights (like its receivables or benefits accruing under a contract) to a third party. Sometimes that requires the consent or agreement of the debtor or other contracting party, and sometimes not. Nomads might have been able to assign its rights under the contract with Hythe and others to Ladacor, and it might not have been.

[104] While Nomads could by contract require another party to satisfy its obligations (such as Ladacor) that is not binding on the creditor. Someone cannot simply go to a creditor and say "I

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don't owe that to you any more, I assigned my obligations to someone else". If that were possible, every debtor would rush to assign its obligations to a shell company or insolvent entity. Creditors are entitled to look to their debtor for payment or performance and they do not have to try to collect from someone else, unless they have specifically agreed to do that through some valid contractual mechanism.

[105] There is no evidence here that any of the Nomads creditors ever agreed to release Nomads and substitute Ladacor is its debtor. As a result, the method used by the Receiver with the assistance of Ms. Richard and others, was commercially reasonable. There were no written agreements between Nomads and Ladacor. Claims on contracts Nomads entered into are likely still Nomads' responsibility. Suppliers who supplied things on Nomads projects are likely still Nomads' creditors.

[106] I see no error in principle as to how the Receiver characterized the creditors. The Receiver has made no binding determinations; that would result from a claims process in the receivership, or the normal claims processes in bankruptcy. No one has suggested that it would be more efficient or effective to have a claims process within the existing Receivership.

[107] I do not see that the Receiver's actions in this area have been unreasonable in any way. It was faced with an undocumented mess and the Receiver has done its best to make sense of the disorganization created by the do-it-yourself creation of Ladacor by Mr. Klisowsky.

3. The identification and allocation of the auction proceeds between Ladacor and Nomads

[108] There were no transfer documents in evidence as to any transfers of assets between Nomads and Ladacor. No purchase documents were in evidence showing which entity actually purchased an asset in the first place. In the absence of documentation, the approach taken by the Receiver appears to be reasonable. Where an asset appears to have been in Nomads' possession at the time Ladacor came into existence, it remained Nomads'. Anything acquired after Ladacor began operations was attributed to Ladacor.

[109] I see nothing in this approach that is unreasonable. Again, any potential errors on the part of the Receiver were caused by the absence of appropriate documentation at the commencement of the receivership.

[110] In any event, arguments of this nature do not get Nomads anywhere. The fewer assets Nomads had, the less it contributed to paying off the BMO debt, and the more it would owe to 236's contribution claim.

4. The identification of employees of Nomads and any claims (CRA and WEPP)

[111] It does not appear that existing Nomads employees were properly transferred over to Ladacor's employment. Ladacor may well have been making all of the payroll payments once it took over as the operating company. For employment insurance, Canada Pension purposes, and employment standards purposes, the existing employees should have been terminated from Nomads and hired by Ladacor. Records of Employment should have been prepared and filed; accrued vacation pay should have been paid out.

[112] The failure to take those steps, however, does not invalidate a successor employer's employment or liability to the workers it has taken on. It creates liabilities for the former employer (in this case Nomads).

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[113] This is one area where the Receiver may have been incorrect in its treatment of employees and liability for wages and withholdings. I only say "may", as in the circumstances the Receiver faced, it is possible that any unpaid employee (and CRA) could have chosen which entity to pursue. It would have been possible for Ladacor employees to work on Nomads projects. Nomads could have subcontracted its obligations to Ladacor such that as between Nomads and Ladacor, Ladacor would have all future responsibilities.

[114] The absence of any agreement between Nomads and Ladacor makes it virtually impossible to determine what enforceable arrangements between Nomads and Ladacor were made. Consolidated financial statements were prepared. There is no evidence that Nomads and Ladacor had their own financial statements or books once Ladacor came into the picture.

[115] There is no evidence that Nomads was ever paid anything by Ladacor for Nomads assets or its ongoing contracts. There is no evidence that Ladacor ever indemnified Nomads against claims from any of Nomads' creditors or contracting parties. Nevertheless, it is possible that most of the employee claims were Ladacor obligations.

[116] That being said, the amounts of the claims really makes this a *de minimus* area of concern. Mr. Klisowsky complains of $18,056 of WEPP claims already paid out by the Receiver from Nomads, and disputes the estimated $84,300 in unsecured WEPP claims remaining against Nomads. Charging $18,056 to Ladacor instead of Nomads changes nothing of significance with respect to the results of the receivership and indeed would increase the amount of contribution Nomads would owe to 236. The less attributed to Nomads means the more attributed to 236 such that 236 would itself be a larger creditor of Nomads. That takes on even more significance when 236's status as a secured creditor is factored in, along with the unlikelihood of recovery for any of Nomads' unsecured creditors.

[117] While Mr. Klisowsky makes a valid theoretical point, there is no merit to it in substance, as the amounts are too small to make any difference in the overall results.

5. The validity of the Alberta Treasury Board and Finance claim against Nomads

[118] The Alberta Finance claim will have to be dealt with whether in the receivership or in a bankruptcy. This is not a claim that was made after the receivership began; it was made against Nomads sometime in 2017. If an appeal period with respect to the reassessment of taxes was missed, it was likely missed long before the Receivership. The Receiver can hardly be faulted for not spending a lot of time investigating an unsecured claim that Nomads appeared to be ignoring and restructuring its affairs to avoid paying.

[119] There is nothing unreasonable in the Receiver's approach to this claim. The Receiver did nothing with respect to investigating the validity of any of the unsecured claims, let alone trying to negotiate settlements on them. The main task of the Receiver was to identify secured and preferred claims, and pay out BMO, CRA, Service Canada, and WEPP, so that anything remaining could be properly divided amongst the unsecured creditors.

[120] The latter process has yet to occur, and is one of the reasons bankruptcy is a necessary process.

[121] I find no fault on the part of the Receiver in this area, and certainly no lack of commercial reasonableness.

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6. The claim of J. Steenhof against 236

[122] There is little information about the validity of J. Steenhof's claims against 236. Mr. Klisowsky acknowledges that there is a triable issue between 236 and J. Steenhof as to whether the claim is a debt owed to a shareholder or whether the claim relates to the shareholder's investment in the corporation for the purchase of its shares. That needs to be decided in some binding manner. Absent a claims process, the Receiver is not in a position to make any determination. At the end of the day, however, that is really a question for the unsecured creditors of 236. Mr. Klisowsky does not claim to be a creditor of 236, let alone a secured creditor. He claims to be a shareholder. The information suggests that the shareholders of 236 are likely to receive nothing for any shareholders' loans, let alone any equity they may have in that corporation.

[123] It is certainly not an issue that can be decided summarily and will likely be a time consuming and expensive exercise.

[124] The Receiver cannot be criticized for its approach to this claim and there is nothing commercially unreasonable about maintaining the J. Steenhof claims in the list of unsecured creditors.

Relief sought by Receiver

[125] This takes us to the Receiver's requested relief, which I can now deal with having regard to the facts as I have found them.

1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver's Fourth Report to the Court dated September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings

[126] Whether the Receiver should have taken different action after the rain damage to the Hythe project, and whether the Receiver should have taken different action after thefts of equipment or tools from that project, are arguable issues.

[127] However, Mr. Klisowsky has not raised any issues or arguments that require further evidence or a trial.

[128] In response to Mr. Klisowsky's criticisms of the Receiver, counsel says that it is too late for Mr. Klisowsky to raise these arguments. The Receiver has been transparent throughout; Mr. Klisowsky has been represented throughout and has been present at most if not all of the court appearances. The allocations of assets and employees and payment of secured and preferred claims have been dealt with in the Receiver's various reports and on the court applications approving payments and transactions. Mr. Klisowsky has been silent throughout the proceedings and took no appeals from any of the orders made. Counsel argues that any suggestion that the Receiver has not acted in a commercially reasonable manner is without foundation.

[129] Additionally, counsel for the Receiver points out that no expert evidence has been put forward as to what should have been done regarding any of these issues to achieve commercial reasonableness.

[130] The Receiver cites ***Jaycap Financial Ltd v Snowdon Block Inc***, 2019 ABCA 47 on the subject of commercial reasonableness and a receiver's obligation to:

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> … exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking (at paragraph 28).

[131] The Receiver says that here, it satisfied those obligations and acted in a fully transparent manner having regard to its various reports and court applications.

[132] The Receiver cites ***Western Union Petro International Co Ltd v Anterra Energy Inc***, 2019 ABQB 165 and argues that the record before me is sufficient to enable me to make a fair and just determination of the issues without requiring more evidence, or a trial.

[133] Counsel also refers to the decision in ***Royal Bank of Canada v Melvax Properties Inc***, 2011 ABQB 167 where Veit J referred to the weight to be given to the business judgments of others involved in the matter. Here, counsel points to the support the receiver has from Nomads', Ladacor's and 236's largest creditors, Liberty Mutual and the Steenhof parties. The other large creditor, Alberta Finance, has taken no position.

[134] The value of the theft was not significant in the overall scheme of things, and the Receiver's actions following the rain damage were aimed towards having Hythe continue on with some aspects of the construction contract. The objective there was to recover the amounts owed to date, and be able to make valuable use of the containers that still remain in storage. While those efforts ultimately proved unsuccessful, and the benefit of hindsight gives rise to the efficacy of those actions, the Receiver's actions do not appear to be outside the scope of commercial reasonableness. Nor do they approach the gross negligence or willful misconduct level required to have the Receiver liable for any loss resulting from those actions.

[135] To the extent that the Receiver's actions have not otherwise been approved in previous orders, I am satisfied that relief should be granted to the Receiver

2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report

[136] With the exception of Mr. Klisowsky's concerns addressed above, no one challenged the appropriateness of the Receiver's final statement of receipts and disbursements for this period. Mr. Klisowsky took no objection to the time spent or the hourly rates, but objected to the completeness of the Receiver's work.

[137] I am satisfied that it is appropriate to approve these accounts, and do so (to the extent not already covered by Topolniski J's Order of September 13).

3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application

[138] While I do not see any problem with the anticipated accounts, fees and disbursements in connection with the completion of the receivership proceedings, I think it is more appropriate to approve these accounts, fees and disbursements when they have been incurred. Hopefully they can be completed within the budgeted amounts.

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4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report

[139] I acknowledge that the Receiver's work in allocating assets and employees between Ladacor and Nomads may not have resulted in a perfect allocation. That is not because the Receiver's work was deficient or flawed. Rather, it was because of the corporate mess that existed at the time of the Receivership Order. The Receiver had to try to make sense of an undocumented and ill-conceived "takeover" of Nomads by Ladacor. The proposed method of allocation by Mr. Klisowsky is unworkable, especially as it is founded on the incorrect assumption that Nomads could assign its obligations to Ladacor in a manner that would be binding on its creditors.

[140] The reality is that any reallocation of assets would be moot. Putting more assets and liabilities into Ladacor would result in Nomads making a smaller contribution to paying off the BMO debt. That would simply increase the amount of 236's secured claim for contribution from Nomads. While it might leave fewer unsecured creditors for Nomads to have to deal with, the above analysis indicates that Nomads' unsecured creditors are unlikely to make any recovery at all.

[141] As such, my conclusion is that no creditor is prejudiced by the allocations that were made by the Receiver between Nomads and Ladacor.

[142] The Receiver has, in my view, correctly applied the applicable principles of subrogation and contribution, such that it is appropriate to allocate all of the remaining cash of Ladacor and Nomads to 236.

5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order

[143] What is left with the three debtor corporations is a paucity of assets and a mountain of claims against them. Only the Liberty Mutual claim involves all three corporations. Total claims (counting Liberty Mutual only once) exceed $7,000,000. None of the claims have been proven. There may be defences to some or many of the claims, and some of the claims may be excessive in amount.

[144] Getting to the bottom of all of this will be time consuming and very expensive. Litigation with Hythe has already commenced. Its result is uncertain. Success on that litigation would appear to be the only real chance of any collection for Nomads' unsecured creditors. The only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy. While there are possible ways of dealing with claims in a receivership, no one other than Mr. Klisowsky is recommending that the receivership continue. The Receiver's recommendation is to use the bankruptcy process to deal with the few remaining assets and myriad of claims.

[145] I agree with the Receiver's recommendation and accordingly approve its proposal to assign the three debtor corporations into bankruptcy.

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6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors

[146] Having approved the assignments into bankruptcy, it flows that any funds and property remaining after the administration of the receivership has been completed should be transferred into the respective bankruptcy proceedings.

7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver

[147] There is no valid objection to this relief being granted, to the date of this decision and insofar is the Receiver carries out the orders herein.

8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise

[148] This order appears to be premature, as there is still work to be done to carry out the terms of this order. To date, this relief appears appropriate but this relief should be applied for after the Receiver has completed its work and not in advance.

9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.

[149] Having approved the assignments into bankruptcy, this relief flows from that order and is granted.

Heard on the 26th day of November, 2019.
Dated at the City of Edmonton, Alberta this 19th day of December, 2019.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

Andrew Wilkinson
Rose LLP
for Liberty Mutual Insurance Company

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James Reid and Keith D. Marlowe
Blake, Cassels & Graydon LLP
for the Receiver

Shaun D. Wetmore
McCuaig Desrochers LLP
for the Steenhof entities

Norman D. Anderson
Anderson James McCall Barristers
for Donald Klisowsky

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Corrigendum of the Reasons for Decision
of
The Honourable Mr. Justice Robert A. Graesser

Under Appearances, Dean Hitesman was removed and Andrew Wilkinson was added.

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TAB 4

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

2019 ONSC 5370 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

B E T W E E N:	)	
	)	
MNP Limited	)	
	)	J. Ross MacFarlane, for MNP Limited, the Receiver
Receiver	)	
	)	
Royal Bank of Canada	)	
	)	
	)	Timothy C. Hogan, for the applicant, Royal Bank of Canada
Applicant	)	
	)	
- and -	)	
	)	
Grant Gustin	)	Benjamin Blay, for the respondent
	)	
Respondent	)	
	)	
	)	**HEARD:** September 13, 2019

RADY J.

Introduction

[1] MNP, the Court appointed Receiver, seeks the Approval of its first report dated August 30, 2019 and various related relief. The only controversy is whether the Court can and should order the relief sought in para. 8 of the proposed draft order. It authorizes the Receiver to file an assignment in bankruptcy on behalf of the debtor. Royal Bank of Canada supports the relief and Mr. Gustin opposes.

[2] I pause here to note that the receiver was also seeking relief against 1886890 Ontario Limited and Frank Gustin, who is Grant Gustin's father. He and the numbered company filed a responding motion record opposing some of the relief the Receiver's being requested. I am advised that the Receiver and Mr. Gustin Sr. have reached an accommodation and as a result, he did not participate in the motion.

Facts

[3] Grant Gustin has been a farmer operating a hog and cash crop farm in Petrolia on land he owned at 4715 Lasalle Line and also rented elsewhere.

[4] Royal Bank of Canada holds a mortgage on the property and a first ranking general security agreement. Mr. Gustin is in default, which led to the appointment of the Receiver. Mr. Gustin has not been cooperative, and there is evidence in the record that he has withheld relevant information and has or has threatened to remove assets from the Receiver's reach.

[5] The Receiver and Royal Bank of Canada say that he misrepresented that he was the owner of 931 hogs. The hogs may be owned by J. A. Cryderman Farms Inc. They are being managed by Scott Leystra, a business associate of Mr. Gustin.

[6] Mr. Gustin also has made eight payments totaling $242,047 to Mr. Leystra between March and May 2019. There is also an issue respecting the ownership of certain equipment and stored grain (which was the subject of Mr. Gustin Senior's response to the motion). Mr. Gustin has said some of the equipment and crops are jointly owned with or owned outright by his father.

The Law

[7] As already noted, the Receiver seeks authority from the Court to make an assignment in bankruptcy of the debtor. Obviously, it is not a creditor.

[8] It wishes to avail itself of the enhanced powers available to a trustee in bankruptcy under ss. 158 and 161-167 of the *Bankruptcy & Insolvency Act*. This is necessary given Mr. Gustin's lack of cooperation and misrepresentations.

[9] In support of the relief sought, Royal Bank of Canada submits that Mr. Gustin has committed acts of bankruptcy as defined in s. 42(1) of the *BIA* and in particular subsections (f), (g), (h) and (j). He availed himself of the provisions of the *Farm Debt Mediation Act*, thereby acknowledging his insolvency.

[10] As a preliminary matter, ss. 43-48 of the *BIA* protects farmers from creditor applications for bankruptcy orders. Section 48 provides:

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> Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

[11] The Receiver and Royal Bank of Canada submit that Mr. Gustin is no longer entitled to the protection afforded by the *BIA* because he ceased being a farmer when the Receiver was appointed.

[12] There is authority supporting the Court's power to grant this form of relief in *Royal Bank of Canada v. Sun Squeeze Juices Inc.,* [1994] O.J. No. 567 (Gen. Div.) aff'd 1994 Carswell Ont. 310 (C.A.); and *Bank of Montreal Owen Sound Golf and Country Club Ltd.*, 2012 ONSC 557.

[13] On behalf of Mr. Gustin, Mr. Blay opposes the relief for the following reasons:

1) an assignment is premature because there is no evidence of what the creditor's position will be on liquidation;

2) Royal Bank of Canada is a single, secured creditor and as a result, must show special circumstances;

3) the cases relied upon both involved corporations rather than individuals; and

4) there are remedies available under provincial legislation for improper conveyances etc. and resort to the *BIA* is unnecessary.

Analysis

[14] I agree with the Receiver and Bank that Mr. Gustin ceased to fall within the ambit and protection of s. 48 of the *BIA* upon the appointment of the Receiver. His principal occupation and means of livelihood can no longer be said to be from active farming.

[15] Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions. There is no sound basis to distinguish the cases because the debtors were corporations. There is no legal distinction between a person and a corporation.

[16] Nor is Royal Bank of Canada a sole creditor. A list of Mr. Gustin's unsecure Creditors is found in the material filed.

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[17] Finally, while there may well be remedies available under provincial statues, it is needlessly inefficient and expensive to be required to resort to them. And more importantly, it would serve to delay the orderly execution of the Receiver's undertaking.

[18] I am satisfied that the relief sought should be granted as requested and I have signed the order provided.

Justice H. A. Rady

Released: September 16, 2019

2019 ONSC 5370 (CanLII)

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

2019 ONSC 5370 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N :

MNP Limited

Receiver

Royal Bank of Canada

Applicant

- and -

Grant Gustin

Respondent

REASONS FOR JUDGMENT

J.

Released: September 16, 2019

TAB 5

any inquiry or investigation that may be deemed necessary in respect of the conduct of the bankrupt, the causes of his bankruptcy and the disposition of his property, and the official receiver shall report the findings on any such inquiry or investigation to the Superintendent, the trustee and the court.

(2) [Repealed, 2005, c. 47, s. 98]

Application of section 164

(3) Section 164 applies in respect of an inquiry or investigation under subsection (1).

R.S., 1985, c. B-3, s. 162; 2004, c. 25, s. 76(F); 2005, c. 47, s. 98.

Examination of bankrupt and others by trustee

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

R.S., 1985, c. B-3, s. 163; 1997, c. 12, s. 96; 2004, c. 25, s. 77(E).

enquête ou investigation qui peut être estimée nécessaire au sujet de la conduite du failli, des causes de sa faillite et de la disposition de ses biens, et le séquestre officiel fait rapport des conclusions de toute enquête ou investigation de ce genre au surintendant, au syndic et au tribunal.

(2) [Abrogé, 2005, ch. 47, art. 98]

Application de l'art. 164

(3) L'article 164 s'applique relativement à une enquête ou à une investigation prévue par le paragraphe (1).

L.R. (1985), ch. B-3, art. 162; 2004, ch. 25, art. 76(F); 2005, ch. 47, art. 98.

Interrogatoire du failli et d'autres par le syndic

163 (1) Le syndic, sur une résolution ordinaire adoptée par les créanciers, ou sur la demande écrite ou résolution de la majorité des inspecteurs, peut, sans ordonnance, examiner sous serment, devant le registraire du tribunal ou une autre personne autorisée, le failli, toute personne réputée connaître les affaires du failli ou toute personne qui est ou a été mandataire, commis, préposé, dirigeant, administrateur ou employé du failli, au sujet de ce dernier, de ses opérations ou de ses biens, et il peut ordonner à toute personne susceptible d'être ainsi interrogée de produire les livres, documents, correspondance ou papiers en sa possession ou pouvoir qui se rapportent en totalité ou en partie au failli, à ses opérations ou à ses biens.

Examen par le créancier

(2) Sur demande faite au tribunal par un créancier, le surintendant ou une autre personne intéressée et sur preuve d'une raison suffisante, une ordonnance peut être rendue pour interroger sous serment, devant le registraire ou une autre personne autorisée, le syndic, le failli ou tout inspecteur ou créancier ou toute autre personne nommée dans l'ordonnance, afin d'effectuer une investigation sur l'administration de l'actif d'un failli; le tribunal peut en outre ordonner la production par la personne visée des livres, documents, correspondance ou papiers en sa possession ou son pouvoir qui se rapportent en totalité ou en partie au failli, au syndic ou à tout créancier, les frais de cet interrogatoire et de cette investigation étant laissés à la discrétion du tribunal.

L'interrogatoire doit être produit

(3) Le témoignage de toute personne interrogée sous l'autorité du présent article doit, s'il a été transcrit, être produit au tribunal et peut être lu lors de toute procédure prise devant le tribunal aux termes de la présente loi et à laquelle est partie la personne interrogée.

L.R. (1985), ch. B-3, art. 163; 1997, ch. 12, art. 96; 2004, ch. 25, art. 77(A).

TAB 6

(a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

R.S., 1985, c. B-3, s. 87; 1992, c. 27, s. 39; 1997, c. 12, s. 74; 2004, c. 25, s. 53; 2005, c. 47, s. 70.

Priority of Financial Collateral

Priority

88 In relation to a bankruptcy or proposal, no order may be made under this Act if the order would have the effect of subordinating financial collateral.

R.S., 1985, c. B-3, s. 88; 1992, c. 27, s. 39; 1994, c. 26, s. 6; 2007, c. 29, s. 99, c. 36, s. 112; 2009, c. 31, s. 65.

89 and 90 [Repealed, 1992, c. 27, s. 39]

Preferences and Transfers at Undervalue

91 [Repealed, 2005, c. 47, s. 71]

92 and 93 [Repealed, 2000, c. 12, s. 12]

94 [Repealed, 2005, c. 47, s. 72]

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the

opposable aux autres créanciers ont toutes été prises avant l'enregistrement;

b) ne sont valides que pour les sommes dues à Sa Majesté ou à l'organisme mentionné au paragraphe 86(1) lors de l'enregistrement et les intérêts échus depuis sur celles-ci.

L.R. (1985), ch. B-3, art. 87; 1992, ch. 27, art. 39; 1997, ch. 12, art. 74; 2004, ch. 25, art. 53; 2005, ch. 47, art. 70.

Rang des garanties financières

Rang

88 Il ne peut être rendu au titre de la présente loi, dans le cadre de toute faillite ou proposition, aucune ordonnance dont l'effet serait d'assigner un rang inférieur à toute garantie financière.

L.R. (1985), ch. B-3, art. 88; 1992, ch. 27, art. 39; 1994, ch. 26, art. 6; 2007, ch. 29, art. 99, ch. 36, art. 112; 2009, ch. 31, art. 65.

89 et 90 [Abrogés, 1992, ch. 27, art. 39]

Traitements préférentiels et opérations sous-évaluées

91 [Abrogé, 2005, ch. 47, art. 71]

92 et 93 [Abrogés, 2000, ch. 12, art. 12]

94 [Abrogé, 2005, ch. 47, art. 72]

Traitements préférentiels

95 (1) Sont inopposables au syndic tout transfert de biens, toute affectation de ceux-ci à une charge et tout paiement faits par une personne insolvable de même que toute obligation contractée ou tout service rendu par une telle personne et toute instance judiciaire intentée par ou contre elle :

a) en faveur d'un créancier avec qui elle n'a aucun lien de dépendance ou en faveur d'une personne en fiducie pour ce créancier, en vue de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de trois mois la date de l'ouverture de la faillite et se terminant à la date de la faillite;

b) en faveur d'un créancier avec qui elle a un lien de dépendance ou d'une personne en fiducie pour ce créancier, et ayant eu pour effet de procurer à celui-ci une préférence sur un autre créancier, s'ils surviennent au cours de la période commençant à la date précédant de douze mois la date de l'ouverture de la faillite et se terminant à la date de la faillite.

day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Exception

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

Definitions

(3) In this section,

clearing house means a body that acts as an intermediary for its clearing members in effecting securities transactions; (*chambre de compensation*)

clearing member means a person engaged in the business of effecting securities transactions who uses a clearing house as intermediary; (*membre*)

creditor includes a surety or guarantor for the debt due to the creditor; (*créancier*)

margin deposit means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations. (*dépôt de couverture*)

R.S., 1985, c. B-3, s. 95; 1997, c. 12, s. 78; 2004, c. 25, s. 56; 2007, c. 29, s. 100, c. 36, ss. 42, 112.

Préférence — présomption

(2) Lorsque le transfert, l'affectation, le paiement, l'obligation ou l'instance judiciaire visé à l'alinéa (1)a) a pour effet de procurer une préférence, il est réputé, sauf preuve contraire, avoir été fait, contracté ou intenté, selon le cas, en vue d'en procurer une, et ce même s'il l'a été sous la contrainte, la preuve de celle-ci n'étant pas admissible en l'occurrence.

Exception

(2.1) Le paragraphe (2) ne s'applique pas aux opérations ci-après et les parties à celles-ci sont réputées n'avoir aucun lien de dépendance :

a) un dépôt de couverture effectué auprès d'une chambre de compensation par un membre d'une telle chambre;

b) un transfert, un paiement ou une charge qui se rapporte à une garantie financière et s'inscrit dans le cadre d'un contrat financier admissible.

Définitions

(3) Les définitions qui suivent s'appliquent au présent article.

chambre de compensation Organisme qui agit comme intermédiaire pour ses membres dans les opérations portant sur des titres. (*clearing house*)

créancier S'entend notamment de la personne qui se porte caution ou répond d'une dette envers un tel créancier. (*creditor*)

dépôt de couverture Tout paiement, dépôt ou transfert effectué par l'intermédiaire d'une chambre de compensation, en application des règles de celle-ci, en vue de garantir l'exécution par un membre de ses obligations touchant des opérations portant sur des titres; sont notamment visées les opérations portant sur les contrats à terme, options ou autres dérivés et celles garantissant ces obligations. (*margin deposit*)

membre Personne se livrant aux opérations portant sur des titres et qui se sert d'une chambre de compensation comme intermédiaire. (*clearing member*)

L.R. (1985), ch. B-3, art. 95; 1997, ch. 12, art. 78; 2004, ch. 25, art. 56; 2007, ch. 29, art. 100, ch. 36, art. 42 et 112.

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

Establishing values

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

Opération sous-évaluée

96 (1) Sur demande du syndic, le tribunal peut, s'il estime que le débiteur a conclu une opération sous-évaluée, déclarer cette opération inopposable au syndic ou ordonner que le débiteur verse à l'actif, seul ou avec l'ensemble ou certaines des parties ou personnes intéressées par l'opération, la différence entre la valeur de la contrepartie qu'il a reçue et la valeur de celle qu'il a donnée, dans l'un ou l'autre des cas suivants :

a) l'opération a été effectuée avec une personne sans lien de dépendance avec le débiteur et les conditions suivantes sont réunies :

(i) l'opération a eu lieu au cours de la période commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) le débiteur était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(iii) le débiteur avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement;

b) l'opération a été effectuée avec une personne qui a un lien de dépendance avec le débiteur et elle a eu lieu au cours de la période :

(i) soit commençant à la date précédant d'un an la date de l'ouverture de la faillite et se terminant à la date de la faillite,

(ii) soit commençant à la date précédant de cinq ans la date de l'ouverture de la faillite et se terminant à la date qui précède d'un jour la date du début de la période visée au sous-alinéa (i) dans le cas où le débiteur :

(A) ou bien était insolvable au moment de l'opération, ou l'est devenu en raison de celle-ci,

(B) ou bien avait l'intention de frauder ou de frustrer un créancier ou d'en retarder le désintéressement.

Établissement des valeurs

(2) Lorsqu'il présente la demande prévue au présent article, le syndic doit déclarer quelle était à son avis la juste valeur marchande des biens ou services ainsi que la valeur de la contrepartie réellement donnée ou reçue par le débiteur, et l'évaluation faite par le syndic est, sauf preuve contraire, celle sur laquelle le tribunal se fonde pour rendre une décision en conformité avec le présent article.

Meaning of *person who is privy*

(3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79; 2004, c. 25, s. 57; 2005, c. 47, s. 73; 2007, c. 36, s. 43.

Protected transactions

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Definition of *adequate valuable consideration*

(2) The expression ***adequate valuable consideration*** in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Law of set-off or compensation

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

R.S., 1985, c. B-3, s. 97; 1992, c. 27, s. 41; 1997, c. 12, s. 80; 2004, c. 25, s. 58; 2005, c. 47, s. 74.

Définition de *personne intéressée*

(3) Au présent article, ***personne intéressée*** s'entend de toute personne qui est liée à une partie à l'opération et qui, de façon directe ou indirecte, soit en bénéficie elle-même, soit en fait bénéficier autrui.

L.R. (1985), ch. B-3, art. 96; 1997, ch. 12, art. 79; 2004, ch. 25, art. 57; 2005, ch. 47, art. 73; 2007, ch. 36, art. 43.

Transactions protégées

97 (1) Les paiements, remises, transports ou transferts, contrats, marchés et transactions auxquels le failli est partie et qui sont effectués entre l'ouverture de la faillite et la date de la faillite ne sont pas valides; sous réserve, d'une part, des autres dispositions de la présente loi quant à l'effet d'une faillite sur une procédure d'exécution, une saisie ou autre procédure contre des biens et, d'autre part, des dispositions de la présente loi relatives aux préférences et aux opérations sous-évaluées, les opérations ci-après sont toutefois valides si elles sont effectuées de bonne foi :

a) les paiements du failli à l'un de ses créanciers;

b) les paiements ou remises au failli;

c) les transferts par le failli pour contrepartie valable et suffisante;

d) les contrats, marchés ou transactions — garanties comprises — du failli, ou avec le failli, pour contrepartie valable et suffisante.

Définition de *contrepartie valable et suffisante*

(2) L'expression ***contrepartie valable et suffisante*** à l'alinéa (1)c) signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport à celle des biens transmis ou cédés, et, à l'alinéa (1)d), signifie une contre-prestation ayant une valeur en argent juste et raisonnable par rapport aux bénéfices connus ou raisonnablement présumés du contrat, du marché ou de la transaction.

Compensation

(3) Les règles de la compensation s'appliquent à toutes les réclamations produites contre l'actif du failli, et aussi à toutes les actions intentées par le syndic pour le recouvrement des créances dues au failli, de la même manière et dans la même mesure que si le failli était demandeur ou défendeur, selon le cas, sauf en tant que toute réclamation pour compensation est atteinte par les dispositions de la présente loi concernant les fraudes ou préférences frauduleuses.

L.R. (1985), ch. B-3, art. 97; 1992, ch. 27, art. 41; 1997, ch. 12, art. 80; 2004, ch. 25, art. 58; 2005, ch. 47, art. 74.