COURT OF APPEAL FOR ONTARIO

CITATION: AFC Mortgage Administration Inc. v. Sunrise Acquisitions (Elmvale) Inc., 2024 ONCA 764
DATE: 20241015
DOCKET: M55415, M55416 (COA-24-CV-0967)

In the matter of section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended, and section 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C.43, as amended

Zarnett J.A. (Motions Judge)

BETWEEN

AFC Mortgage Administration Inc.

Applicant

and

Sunrise Acquisitions (Elmvale) Inc., Sajjad Hussain, Mahvesh Hussain, Muzammil Kodwavi and Safana Kodwavi

Respondents
(Appellants/Moving Parties/Responding Parties by way of cross-motion)

Jonathan Kulathungam and Catherine E. Allen, for the respondent/responding party (M55415)/moving party by way of cross-motion (M55416), Rosen Goldberg Inc.

Jason Albert Wadden and Shimon Sherrington, for the appellants/moving parties (M55415)/responding parties by way of cross-motion (M55416)

Heard: October 10, 2024

ENDORSEMENT

[1] On August 15, 2024, in the context of a receivership proceeding, Conway J. made two orders. The first, an Approval and Vesting Order (“AVO”), approved and

authorized the completion by the Receiver[1] of sales of two residential properties owned by the individual debtors.[2] The second, a Sale Procedure Order ("SPO"), concerned vacant development lands owned by the corporate debtor.[3] The SPO approved the retention of a real estate brokerage firm, the entering into of a stalking horse agreement, and a process for marketing the lands, obtaining bids and selecting a suitable bidder to buy those lands, with any actual purchase to be subject to further court approval.

[2] This motion by the corporate and individual debtors (the "Debtors") and cross-motion by the Receiver raise three issues: i) whether the Debtors may appeal the orders of Conway J. without leave under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"); (ii) if not, whether leave under the BIA should be granted; and (iii) whether Conway J.'s orders should be stayed pending appeal.

[3] For the reasons that follow, I conclude that the appeal requires leave under s. 193(e) of the BIA and that leave to appeal should not be granted. I therefore do not reach the third issue.

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[1] Rosen Goldberg Inc.
[2] Sajjad Hussain, Mahvesh Hussain, Muzammil Kodwavi and Safana Kodwavi.
[3] Sunrise Acquisitions (Elmvale) Inc.

The Receivership Order

[4] On February 29, 2024, Black J. granted a receivership order against the Debtors.

[5] The receivership order divided properties of the Debtors into two groups – the Sunrise Property and the Grand Vellore Property. The properties in issue for this motion (the vacant development land known as the Elmvale Land and the two residential properties known as the Cicada and Abbruzze Properties) formed part of the Sunrise Property group.

[6] The Receiver was empowered and authorized, under the receivership order, to market any property of the Debtors, and to sell any property (with approval of the court if the consideration exceeded certain limits). Although the receivership order gave the Receiver the discretion to act first on the Sunrise Property before the Grand Vellore Property, it made no distinction, among properties within the Sunrise Property group, as to when and in what order the Receiver should proceed to market or sell them.

[7] In his February 29, 2024 reasons for granting the receivership order, Black J. noted the Debtors' request to require realizations in a specific order in the hope that they could preserve their ownership of certain properties if there were sufficient realizations on others. He rejected the request, stating: "I decline to build

in a specific protected priority for the Debtors beyond whatever ordinary right or ability they may have to redeem."

[8] On April 5, 2024, Black J. addressed another request of the Debtors concerning the sequence of realization. He considered it to be a request for the same relief that he had already refused in his February 29 reasons, and he rejected it on the same basis.

[9] There was no appeal from the receivership order.

Conway J.'s Orders

[10] The Receiver brought a motion seeking, among other things, two orders: (i) a sale procedure order (i.e., the SPO) relating to the Elmvale Land; and (ii) an approval and vesting order (i.e., the AVO) approving sales of the Cicada and Abbruzze Properties. On August 15, 2024, Conway J. granted both the SPO and the AVO sought by the Receiver.

[11] The SPO authorized the Receiver to pursue the sale of the Elmvale Land following a particular methodology. Part of the methodology that was approved involved the Receiver entering into a Stalking Horse Agreement. It also involved retaining a real estate brokerage firm (CBRE) to list the property and marketing efforts aimed at obtaining other bids. If a sale to another bidder was approved, a "break fee" was payable to the Stalking Horse Purchaser. Under some circumstances – for example if no higher bid was elicited – the Stalking Horse

Purchaser might be approved as the actual purchaser of the Elmvale Land. But any sale, to the Stalking Horse Purchaser or to another bidder, was subject to further court approval.

[12] Conway J. rejected the Debtors' submission that the Receiver should enter into an allegedly more favorable stalking horse agreement with a separate bidder who submitted a Letter of Intent to the Receiver after it had entered into the Stalking Horse Agreement for which the Receiver was seeking approval. She noted that it would remain open to that separate bidder to bid on the Elmvale Land even without its own stalking horse agreement in place. She deferred to the Receiver's decision to market the property by entering into the Stalking Horse Agreement with the bidder of its choice.

[13] The relevant portions of Conway J.'s reasons read as follows:

> [4] With respect to the Stalking Horse Agreement, the Receiver explains the background in its First Report and the affidavit of Mr. Rosen sworn August 15, 2024. The Receiver originally considered proceeding by way of a listing and bid process. It was then approached by an interested party and entered into lengthy negotiations with that party over the terms of the stalking horse agreement. The Receiver considered the price in the Stalking Horse Agreement and whether it was too low. The Receiver's evidence is that based on discussions with CBRE and the significant uncertainty currently in the marketplace, it believes that the purchase price is reasonable. It entered into the Stalking Horse Agreement on June 5, 2024.

[5] After the Receiver entered into the Stalking Horse Agreement, the Respondents put forth a Letter of Intent dated July 24, 2024 for a higher purchase price (the "**Other Bidder**"). The Receiver responded that it had already entered into the Stalking Horse Agreement and that the Other Bidder could participate in the sale process.

[6] The Respondents submit that the Other Bidder should replace the Stalking Horse Bidder. They are critical of the way that the Receiver engaged with the Stalking Horse Bidder and say the Receiver did not act with sufficient urgency. They further argue that the Stalking Horse Agreement will send the wrong message to the market and ultimately yield a lower price for the Elmvale Property. They argue that the Stalking Horse Agreement is now stale and does not reflect the state of the market.

[7] I do not accept these arguments. The Receiver, as a court-appointed officer, has conducted its own assessment of the market and engaged and negotiated with the Stalking Horse Bidder. The Respondents do not dictate the process and the Receiver is not bound to accept their views on pricing, stalking horse bidder, or the optimal way to market the property. I am satisfied that the Receiver's assessment that the Stalking Horse Agreement is the best way to move forward should be accepted in this case. If the Other Bidder wishes to bid on the Elmvale Properties, it is free to do so. The market will speak. In addition, the Receiver has its duties as a court officer and will have to satisfy the court that the *Soundair* principles have been met when it seeks approval of any transaction arising out of the process.

[8] The break fee in the Stalking Horse Agreement is in line with others approved by this court (2.5%). The timelines in the Sale Process Order are acceptable (and the dates have been modified by the Receiver to respond to concerns raised by other stakeholders). I approve the Sale Procedure Order.

[14] With respect to the AVO, Conway J. was satisfied that a proper sales process had taken place. She rejected the Debtors' request to defer any sale of the Cicada and Abbruzze Properties until after a sale of the Elmvale Land because the proceeds from the latter might obviate the need for the former. She considered this "essentially the same argument that Justice Black considered and rejected in his endorsements of February 29, 2024 and April 5, 2024 when he granted the receivership order." She concluded that there was no basis for the Debtors to wrest away the control over the sale process that Black J. had granted to the Receiver.

The Proposed Appeal

[15] On or about August 23, 2024, the Debtors served a notice of appeal seeking to set aside the SPO and the AVO.

Analysis

(1) Is leave to appeal required?

[16] The parties agree that the BIA governs the appeal rights in issue. A party seeking to appeal an order under the BIA may do so without leave if the appeal comes within one of the categories in ss. 193(a) through (d) of the BIA, which read as follows:

> **(a)** if the point at issue involves future rights;

> **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
>
> **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars […]

Any other appeal requires leave: s. 193(e).

[17] In my view, both the AVO and the SPO may be appealed only with leave.

[18] The Debtors' arguments that the AVO is appealable as of right under ss. 193(a), (b) or (c) all fail in light of the decisions in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635; *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1; and *Hillmount Capital v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228.

[19] The AVO authorizes and approves two sales and sets out the procedure for their completion. It does not affect future rights, only present rights; s. 193(a) is inapplicable: *Bending Lake*, at paras. 27-28.

[20] Section 193(b) is inapplicable because the AVO is not likely to affect other cases of a similar nature in the receivership. No other existing cases were referred to. Although the Debtors say they may raise the sequencing issue again when the

Receiver proposes other sales, a party cannot “create a ‘case’ after the impugned order was made in order to invoke s. 193(b).” The sequencing argument was rejected at the time of the making of the receivership order which was not appealed: *Bending Lake*, at paras. 32, 41.

[21] Nor does s. 193(c) apply. The property involved in an appeal from the AVO does not involve more than $10,000, in the sense used in s. 193(c). The AVO converts one asset (land) into another (money). There is no evidence-based assertion of improvident sale, nor do the Debtors quarrel with the prices obtained, just the timing of the sales. Accordingly, the AVO does not put the value of the Debtors’ property into play or finally determine the economic interest of a claimant in the Debtors resulting in a gain or a loss. An order premised on the rejection of an argument that a sale should be postponed is not one that brings into play the value of the debtor’s property: see *Bending Lake*, at paras. 54, 59-60, 62, 64 and 69; *First National*, at para. 33; *Hillmount*, at para. 42.

[22] For similar reasons, the SPO is not an order that may be appealed without leave. The Debtors primary contention is that s. 193(c) applies to the appeal of the SPO. I disagree. Section 193(c) “does not apply to … orders concerning the methods by which receivers or trustees realize on an estate’s assets”: *Bending Lake*, at para. 54; *Re Harmon International Industries Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1, at paras. 31-35. The SPO is that type of order.

[23] I do not accept the argument that because the SPO included approval of the Stalking Horse Agreement as a step in a more extensive sales process, it no longer was an order concerning a method of realization.

[24] This case is materially different than *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59, 493 D.L.R. (4th) 503. There, the refusal of the bankruptcy judge to hear a motion to approve an already existing unconditional Agreement of Purchase and Sale ("APS") for a sale of property at $31 million, coupled with the sanctioning of a sale process with a stalking horse agreement setting a floor price $7 million lower, deprived the debtor of any right to enforce the APS and created the prospect of loss of more than $10,000.

[25] Here, there is no pre-existing unconditional APS, nor a refusal to consider enforcing one. The Stalking Horse Agreement is not the sale, but a step in a process toward a sale. The question for the Receiver, having entered into the Stalking Horse Agreement, was whether to abandon it in favour of a subsequently received Letter of Intent from a bidder who wished to be the stalking horse purchaser. The choice of the Receiver as to which stalking horse purchaser and terms to use in connection with a sales method with further steps aimed at maximizing value is about the process of realization. The decision of Conway J. to accept the recommendation of the Receiver as to its preferred stalking horse purchaser and terms in the context of the SPO is similarly about the process for

the sale of assets, the ultimate result of which is not yet known. No gain or loss results from the choice of a stalking horse purchaser in this situation any more than would result from a choice about the listing price for a property (i.e., the situation in *Re Harmon* found not to give rise to a right to appeal).

[26] This case is also unlike *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217, which involved an order directing payment to someone who was not a creditor of the insolvent estate, of funds to be generated from a sale of one of its assets. The grounds of appeal in *Comfort Capital* did not, as they do in this case, involve issues about the process for the sale of assets: at paras. 17 and 22.

[27] Nor is this a case like *Firepower Debt GP Inc. v. TheRedPin, Inc.* (12 February 2019), M50109 (C66336) (Ont. C.A.), where the contest was over whether funds were properly part of the debtors' assets or the property of third parties. In *Firepower*, the order under appeal, which determined the funds to be part of the debtor's assets available to all of its creditors, rather than the property of third parties, was held to be appealable as of right under s. 193(c). In this case, the mere possibility that a break fee might be payable to the Stalking Horse Purchaser does not place the SPO into that category. If it did, every order approving a sales process would be appealable as of right if it contemplated, in some circumstances, payment of real estate commissions on a successful sale.

[28] The Debtors rely on the decision of the British Columbia Court of Appeal in *QRD (Willoughby) Holdings Inc. v. MCAP Financial Corporation*, 2024 BCCA 318. There, a final sale was approved by the chambers judge who refused to direct the Receiver to follow up on a potentially better offer: at paras. 25-27. That order was held to be appealable as of right.

[29] I note that the approach to the interpretation of s. 193(c) in some provinces, including British Columbia, differs from that of our court as set out in *Bending Lake* (see the discussion in *QRD*, at paras. 31 to 37). But importantly for these purposes, *QRD* involved a different situation.

[30] Unlike in *QRD*, here no final sale has been approved and the question is not, as it was in *QRD*, whether the *Soundair*[4] principles justified the chambers judge's approval of the sale (see paras. 62-64). Here, the question is not about an approved sale, but about a process that has not yet resulted in one. The Stalking Horse Agreement has been approved as part of an approved sales process which contemplates significant other steps to solicit bids, including retention of a listing agent, preparation and mailing of marketing materials, advertising, and the creation of a Data Room. The sales process contemplates receipt of Phase I and then Phase II bids, an auction if required, selection of a successful bid, and

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[4] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

importantly, court approval before any sale takes place. As Conway J. noted, it permits the separate bidder, among others, to bid so that the "market" determines the sale price, and requires the Receiver to demonstrate "that the *Soundair* principles have been met when it seeks approval of any transaction arising out of the process."

[31] For these reasons, I conclude that leave to appeal is required.

(2) Should leave to appeal be granted?

[32] The principles guiding the consideration of a request for leave to appeal under s. 193(e) of the BIA were summarized in *Business Development Bank of Canada v. Pine Tree Resorts, Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29. The court is to consider whether the proposed appeal:

> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

[33] In my view, these factors require the denial of leave to appeal. I address the merits factor first, because the submissions primarily focussed on it.

[34] I am not persuaded that the proposed appeal is *prima facie* meritorious.

[35] I see no arguable error in the decision of Conway J. to grant the AVO and reject the request to postpone sale of the Cicada and Abbruzze Properties. I agree with her that this was the same request made to, and rejected by, Black J. Moreover, the timing of sales so as to maximize recovery is quintessentially a matter for the Receiver's business judgment – the receivership order clothed the Receiver with the ability to determine timing. Whether to approve that exercise of judgment was within the discretion of Conway J. Discretionary decisions of judges supervising insolvency proceedings are entitled to a high degree of deference: *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, 87 C.B.R. (6th) 243, at para. 20. No error in principle has been shown that would justify interfering with the exercise of her discretion.

[36] Similarly, with respect to the SPO, I see no arguable error that would displace deference to Conway J.'s decision to defer to the Receiver's recommendation as to how to maximize value, including through the use of a particular stalking horse agreement in the broader context of a particular sales process and methodology.

[37] As was pointed out in *QRD*, sometimes stalking horse arrangements are beneficial in insolvency contexts and sometimes they are not. Helpfully, they set a baseline and structure for other bidders to consider in deciding whether to bid. But because that baseline price can affect future bids, safeguards are appropriate,

such as setting the stalking horse price in accordance with professional advice about value and approving it only as part of a process designed to solicit other bids by market exposure over a suitable period of time: at paras. 54-61.

[38] Contrary to the submission of the Debtors, I do not consider it arguable that Conway J. lost sight of any of these considerations. She referred to the Stalking Horse Agreement having been entered into based on discussion with CBRE (the approved listing agent). And the SPO makes it clear that it forms part of an extensive marketing process designed to solicit other bids so that "the market will speak" and determine the sale price. Indeed, the Debtors do not quarrel with any aspect of the sales process or the use of a stalking horse bid as part of it. Their complaint is about the choice of stalking horse bidder and the price of the bid. These are clearly matters of judgment, not principle, and in any event involve speculation as to their ultimate impact on the value realized.

[39] As to the other factors relevant to granting leave, this is a fact-specific case that does not raise issues of general importance. Granting leave would also risk unduly hindering the insolvency proceeding, which is by its nature time sensitive, as it might delay pending sales and the sales process.

Conclusion

[40] The motion of the Debtors for directions that they have an appeal as of right, or that they be granted leave to appeal if required, is dismissed. The cross-motion of the Receiver is dismissed as moot.

[41] In accordance with the agreement of the parties, costs of these motions will be addressed as part of the proceedings in the Superior Court.

B Burnett J.A.