COURT OF APPEAL FOR ONTARIO

CITATION: Peakhill Capital Inc. v. 1000093910 Ontario Inc., 2024 ONCA 59
DATE: 20240124
DOCKET: M54775 (COA-23-CV-1357)

Simmons J.A. (Motion Judge)

BETWEEN

Peakhill Capital Inc.

Applicant
(Respondent on Appeal)

and

1000093910 Ontario Inc.

Respondent
(Appellant on Appeal/Moving Party)

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 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

Gary M. Caplan and Aram Simovonian, for the moving party

Richard Swan and Aiden Nelms, for the Receiver, KSV Restructuring Inc., for the responding party

Heard: January 19, 2024

ENDORSEMENT

[1] This is a motion by 1000093910 Ontario Inc. (the “Debtor”) for an extension of time to serve this motion, if necessary, and for directions concerning whether leave to appeal and a stay is required with respect to the reasons and an order

made in a receivership proceeding in light of ss. 193 and 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). If leave is required, the Debtor seeks leave to appeal the order, and the reasons for the order, under s. 193(e) of the BIA, and a stay of the order pending appeal.

[2] The order at issue is an order dated December 20, 2023 (the "Order"), which approved Bidding Procedures and a "Stalking Horse APS" proposed by the court appointed receiver for the sale of the Debtor's primary asset, an industrial building occupied by tenants located in the City of Vaughan (the "Property").

[3] In her reasons for making the Order, the motion judge declined to hear a cross-motion the Debtor served late in the day on December 19, 2023 seeking to amend the receivership order by: i) approving an agreement of purchase and sale for the sale of the Property entered into by the Debtor prior to the receivership order (the "original APS"); and ii) directing the court appointed receiver to permit the Debtor to complete the original APS.

[4] The Debtor served and filed a notice of appeal of the reasons for the Order and the Order on December 29, 2023, relying on s. 193(c) of the BIA as the basis for an appeal as of right, and on s. 195 of the BIA as the basis for an automatic stay pending appeal. Subsequently, after the receiver took the position that leave to appeal the Order is required, the Debtor brought this motion out of an abundance of caution.

[5] For the reasons that follow, I conclude that the Debtor has an automatic right of appeal to this court, and I direct that the appeal should be expedited.

Background

[6] On September 13, 2023, KSV Restructuring Inc. (the "Receiver") was appointed on consent as Receiver over the Debtor and all of its assets under s. 243(1) of the BIA and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The receivership order was obtained by Peakhill Capital Inc., which holds a first mortgage on the Property in the principal amount of $19,000,000. Peakhill's first mortgage matured on May 1, 2023. In accordance with the terms of the consent, the receivership order became effective on October 2, 2023 after the Debtor failed to pay certain sums specified in the consent.

[7] Among other things, the receivership order specifies that the Receiver may cease to perform any contracts of the Debtor and also states that no Person shall repudiate or terminate a contract held by the Debtor without written consent of the Receiver or leave of the Court:

> 3. THIS COURT ORDERS that the Receiver … is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …
>
> c) to manage, operate, and carry on the business of the Debtor, including the powers to … cease to perform any contracts of the Debtor;

> …
>
> 11. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, license or permit in favour of or held by the Debtor without written consent of the Receiver or leave of this Court. [Emphasis added.]

[8] On September 7, 2023, prior to the receivership order being made but with notice of the receivership proceeding, the Debtor entered into an unconditional agreement of purchase and sale (the "original APS") to sell the Property to 2557904 Ontario Inc. ("255") for $31,000,000. Upon execution of the original APS, 255 paid a deposit of $1,000,000 to the Debtor's real estate agent. The closing date under the original APS was December 21, 2023.

[9] According to the Debtor, a sale of the Property under the original APS would yield sufficient funds to pay all of the Debtor's creditors, including Peakhill, a second mortgage on the Property in the principal amount of $8,000,000, and outstanding property taxes owing to the City of Vaughan in the approximate amount of $162,786.

[10] After the receivership order was made, the Receiver had discussions with 255 concerning amending the original APS to include terms the Receiver considered necessary to implement a receivership sale, including substituting the Receiver as the vendor and allowing for a vesting order of the Property to complete the transaction.

[11] After being informed that 255 was not willing to amend the original APS, on November 13, 2023, the Receiver entered into a stalking horse agreement (the "Stalking Horse APS") with 255 to establish a minimum sale price of $24,255,000 as part of a proposed auction sale process for the Property. Under the terms of the Stalking Horse APS, 255 agreed to purchase the Property in the absence of a superior bid. The Stalking Horse APS included a break fee of $200,000 in the event 255 was not the successful bidder as well as provision for an expense reimbursement of up to $50,000 to 255 if that occurred.

[12] Around the same time, the Debtor's counsel informed the Receiver's counsel that the Debtor wished the Receiver to enforce the original APS. However, the Receiver's counsel informed the Debtor's counsel that the Receiver could not close the original APS without 255's consent and that the Debtor's proposal that the Receiver should seek to enforce the original APS was not tenable. Nonetheless, the Receiver's counsel suggested that the Debtor could bring a motion to seek to close the original APS if it thought that appropriate.

[13] At some point, the Receiver's counsel reserved time for a motion on December 20, 2023, to seek approval of Bidding Procedures to allow the Receiver to sell the Property and the Stalking Horse APS.

[14] On December 6, 2023, the Debtor's counsel informed the Receiver's counsel that it would require time on December 20, 2023, to either seek the

discharge of the Receiver or vary the receivership order to allow the Debtor to complete the original APS.

[15] On December 13, 2023, the Receiver issued its First Report in the receivership recommending Bidding Procedures, which included a marketing plan, a 30-day listing period with a specified realtor, and the Stalking Horse APS. It also served a motion returnable December 20, 2023, requesting: i) approval of the Bidding Procedures and the Stalking Horse APS, ii) an order terminating the original APS, and iii) an order directing the Debtor's real estate agent to return the deposit paid in relation to the original APS to 255.

[16] In its First Report, the Receiver said the following about its discussions with the Debtor:

> The Receiver and its legal counsel have engaged extensively with counsel to the [Debtor] regarding the Original APS. Counsel to the [Debtor] has advised that prior to the return of this motion, the [Debtor] intends to either: (a) repay Peakhill and bring a motion to terminate the receivership proceedings; or (b) bring a motion to amend the receivership order to allow the [Debtor] to close the Original APS. In connection with the foregoing, the Receiver has been advised by counsel to the [Debtor] that the [Debtor] is negotiating a commitment letter to repay Peakhill. As of the date of this Report, the Receiver has not seen a copy (including any drafts) of any such commitment letter, despite multiple requests therefor.
>
> As the Receiver has not seen any commitment letter and the [Debtor] has not filed its materials as of the date of this Report, the receiver intends to file a supplemental report with its views on any motion brought by the [Debtor]. The supplemental report may or may not

> include revised recommendations for the Court.
> [Emphasis added.]

[17] On December 19, 2023, just before 4 p.m., the Debtor served a cross-motion returnable on December 20, 2023, requesting amendments to the receivership order to approve the original APS and directing the receiver to permit it to complete the original APS.

[18] On December 20, 2023, the motion judge abridged the time for service of the Receiver's motion and approved the Bidding Procedures and Stalking Horse APS proposed by the Receiver. Although her reasons do not address the issue specifically, she apparently declined the Receiver's request to terminate the original APS and direct the return of the deposit by deleting terms from the proposed draft order submitted by the Receiver because of an objection by the Debtor's real estate agent.

[19] The Order includes a term specifying that nothing in it approves the sale of the Property to 255 under the Stalking Horse APS and that approval of such a sale would be considered on a subsequent motion following completion of the sale process under the Bidding Procedures if 255 was the successful bidder.

[20] In her December 20, 2023 reasons, the motion judge declined to hear the Debtor's cross-motion for several reasons. It was late served and thus provided essentially no notice; it could not be "piggybacked" onto an existing motions list;

and it could have been brought earlier as the facts on which it was based had been known for some time.

[21] The motion judge also concluded that, in any event, the Debtor's cross-motion had little chance of success. She noted that the cross-motion concerned the original APS, which was entered into six days before the receivership order. The closing date was the next day, December 21, 2023, and the Receiver had advised it could not close the transaction based on its terms. Further, the Receiver's agreement with 255, namely the Stalking Horse APS, was now in play and the Receiver's request for relief related to that transaction. Finally, 255, the purchaser under the original APS, had advised that it would refuse to close the original APS, which it considered to be null and void.

[22] On December 29, 2023, the Debtor served and filed a notice of appeal from the reasons for the Order and the Order in which it asked that the Order be set aside and in its place an order be made allowing it or the Receiver to enforce the terms of the original APS, including the right to specific performance. In the alternative, the Debtor sought an order remitting the matter back to the Superior Court.

[23] In its notice of appeal, the Debtor asserted, among other things, that the motion judge erred by failing to consider its cross-motion; by preferring the interests of 255 over the interests of the Debtor; and by failing to apply or consider

the principles outlined in *Royal Bank of Canada v. Sound Air Corp* (1991), 4 O.R. (3d) 1 (C.A.).

[24] On January 2, 2024, the Receiver took the position that service of the notice of appeal was improper because the Order is procedural and not substantive. Although the Debtor disagrees with the Receiver's position, as I have said, it subsequently served this motion on January 3, 2024 out of an abundance of caution.

Discussion

[25] The Debtor's primary position on this motion is that it is entitled to an automatic right of appeal under s. 193(1)(c) of the BIA. In the alternative, it requests leave to appeal under s. 193(1)(e) and a stay pending appeal under s. 195.

[26] Section193 of the BIA provides, in relevant part, as follows:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> …
>
> (c) if the property involved in the appeal exceeds the value of $10,000;
>
> …
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[27] The Debtor acknowledges that decisions from this court have interpreted s. 193(c) narrowly and restricted the automatic right of appeal so that it does not

apply to decisions or orders that: are procedural in nature; do not bring the value of the debtor's property into play; or do not result in a loss of more than $10,000: e.g. *Cardillo v. Medcap Real Estate Holdings Inc.*, 2023 ONCA 852.

[28] The Debtor also acknowledges that, on its face, the Order appears to be procedural in that it simply approves a sale process.

[29] In that respect, because the Order simply approves a sale process, it is similar to the order at issue in *Re Harmon International Industries Inc.*, 2020 SKCA 95, a decision on which the Receiver relies.

[30] In *Re Harmon,* the order at issue authorized a sale process that included a requirement to list one property for $3,800,000. The Saskatchewan Court of Appeal found that all the order in question did was "establish a process for the sale of the property", with future transactions still requiring court approval. As a result, the Court found that any claim of loss was without foundation and that the order did not "directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time." The order therefore "concern[ed] a matter of procedure only" and was "merely an order as to the manner of sale". As "no value was in jeopardy", leave to appeal was required under s. 193(e) of the BIA.

[31] However, the Debtor submits that in assessing whether an automatic right of appeal exists under s. 193(c), the court must "make a critical examination of the effect of the order sought to be appealed." In doing so, the court must undertake a

fact-specific, evidence-based inquiry to “discern the operative effect of the order … does the order result in a loss or gain, or put in jeopardy value of property, in excess of $10,000”: *Comfort Capital Inc. v. Yeretsian*, 2023 ONCA 282 at paras. 20 and 21, citing *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228 at paras. 35, 42 and 45.

[32] The Debtor asserts that in refusing to hear its cross-motion and also making the Order approving the Bidding Procedures and Stalking Horse APS but failing to terminate the original APS, the motion judge both left the original APS in place and also deprived it of the right to complete, or obtain an order for specific performance of, the original APS that had a fixed value of $31,000,000. The Debtor contends that by adopting the Bidding Procedures and Stalking Horse APS, which sets a floor price of $24,455,000 based on an offer from 255 (the purchaser under the original APS), the Order puts in play, and jeopardizes, the value of the Property for an amount in excess of $10,000. The Order is thus not merely procedural, it also affects substantive rights.

[33] The Receiver responds that the Order had no substantive effect on the original APS. Because of the receivership Order, the Debtor had no ability to complete the APS. As was the case in *Re Harmon*, the Order did nothing more than establish the sale process for the Property. It did not crystalize any loss and was merely procedural in its effect.

[34] I agree that, on their face, the motion judge's decision not to entertain the Debtor's cross-motion (the "refusal decision") and the Order both appear to be procedural in nature. Nonetheless, I conclude that, in the particular circumstances of this case, at least the refusal decision, although procedural in nature, also had the effect of putting in play, and jeopardizing, the value of property by an amount exceeding $10,000.

[35] Although the Receiver is correct in stating that because of the receivership order, the Debtor lacked the ability to complete the APS, the Receiver effectively acknowledged in its dealings with the Debtor and the Debtor's counsel leading up to the December 20, 2023 motion date that the original APS had not been terminated. Further, the Receiver had at least acknowledged, if not suggested, that the Debtor could bring a motion to seek to close the original APS, if the Debtor thought that appropriate, and had reserved its rights concerning the position it would take on such a motion.

[36] On its face, the original APS was an unconditional agreement of purchase and sale with a purchase price of $31,000,000. No basis has been advanced to support 255's claim on December 20,2023 that the original APS was null and void. The Receiver had not terminated the original APS. Nor did the motion judge accede to the Receiver's request that she do so. The Order does not address the original APS. As I see it, by declining to hear the Debtor's cross-motion, the refusal

decision deprived the Debtor of any ability to complete or enforce the original APS, a prospect the Receiver appears to have acknowledged could occur.

[37] Instead, the Order sanctioned a sale process which approved the Stalking Horse APS of $24,455,000 from the purchaser under the original APS and required payments of up to $250,000 to that purchaser if a superior bid was obtained. In my view, the refusal decision clearly put in play, and jeopardized, the value of property by an amount exceeding $10,000. Although no loss was crystallized by the refusal decision or the Order, given the circumstances of a receivership sale and the terms of the Stalking Horse APS, which established a floor price of $24,455,000 and required payment of up to $250,00 to 255 if a superior bid was obtained, the likelihood of loss in excess of $10,000, as compared to completion or enforcement of the unconditional original APS at a sale price of $31,000,00 appears inevitable.

[38] The refusal decision deprived the Debtor of any right it may have had to enforce the unconditional original APS at a price of $31,000,000 and instead required that the Property be sold, subject to the uncertainties of the market, based on a floor price of almost $7,000,000 less and a guarantee to the stalking horse purchaser of a payment of up to $250,000 in the event of a superior bid. The Debtor asserts that, because the original APS has not been terminated, either it or the Receiver can still enforce it. Whether that is so remains to be seen. In the circumstances, I conclude that the property involved on the appeal exceeds10,000 as required under s. 193(c) of the BIA.

[39] In reaching this conclusion, I recognize that the Debtor purports, in part, to appeal the motion judge's reasons. As an appeal must be from a judgment or order and not the reasons, the Debtor will be required to obtain a formal order incorporating the motion judge's decision not to consider the Debtor's cross-motion.

Disposition

[40] In the result, I conclude that the Debtor is not required to seek leave to appeal under s. 193(e) of the BIA and that its notice of appeal was validly served. As the appeal and automatic stay will hinder the progress of an ongoing receivership proceeding under the BIA, I direct that the appeal be expedited. If necessary, the Debtor may perfect the appeal without a formal order concerning the motion judge's decision not to consider the Debtor's cross-motion, but the Debtor is directed to obtain a formal order relating to that decision as soon as possible and the Receiver is directed to take any steps necessary to assist in that regard. If so advised, the parties may make brief written submissions not to exceed three pages concerning any further directions that may be required to expedite the perfection and hearing of the appeal.

[41] The Debtor may file a costs outline and make written submissions not to exceed three pages within 10 days from the release of this decision. The Receiver

may respond with written submissions not to exceed three pages within 10 days thereafter.