Court / Estate No.: 31-2688719

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP

FACTUM OF
HOMER STREET OFFICE PROPERTIES INC.
(Returnable December 14, 2020)

PART I - INTRODUCTION

1. Homer Street Office Properties Inc. ("**Homer Street**") opposes the debtor's request for an extension of these proposal proceedings because the debtor, RGN British Columbia XXIII Limited Partnership ("**RGN**"), cannot satisfy this court that it would likely be able to make a viable proposal if the requested extension was granted.

2. RGN's sole purpose, as a corporate entity, is for holding the Lease (defined below).[1] Homer Street terminated the Lease on November 19, 2020 because RGN breached the Lease in October, 2020. In particular, the indemnifier of RGN's obligations under the Lease, Redox Plc (f/k/a Regus Plc S.A.) (the "**Indemnifier**"), commenced bankruptcy proceedings in Jersey.[2] Then, RGN failed to post a security deposit of value equal to the maximum liability of the

[1] First Report to Court of KSV Restructuring Inc. as Proposal Trustee of RGN British Columbia XXIII Limited Partnership dated December 9, 2020 [Trustee's Report], p. 5, Section 2.0, para. 5.

[2] Affidavit of Roslind McQueen sworn December 13, 2020 [McQueen Affidavit], paras. 10-13 and 16.

Indemnifier, $10,000,000, within the 10 days permitted under the Lease. The 10-day period available to RGN expired on October 8, 2020.

3. RGN argues that the NOI filing on November 13, 2020 stayed Homer Street's right to terminate the Lease. RGN's argument cannot succeed. The stay of proceedings triggered on filing an NOI does not prevent the termination of a lease except for specific reasons that do not apply here.[3] Accordingly, RGN has no material asset that it might use to support a restructuring.

4. RGN's own correspondence confirms that it was prepared to surrender the Lease consensually.[4] This demonstrates that RGN does not view the Lease as critical to its restructuring. It is attempting to use these NOI proceedings not to restructure RGN itself, but to use the threat of delay and prejudice to Homer Street from being stayed as leverage to obtain a release of claims by Homer Street against the Indemnifier in the Indemnifier's own insolvency proceedings in Luxembourg.

5. It is improper for RGN to attempt to use the NOI proceedings for "hold-up" value in order to extract a release for the Indemnifier. This Court should not sanction RGN's efforts.

6. Had Homer Street not terminated the Lease, it faced material prejudice in meeting its remaining obligations under the Lease as it moved forward with the construction of the balance of the building. In particular, Homer Street had to

[3] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (CanLII), Section 65.1(2).

[4] McQueen Affidavit, para. 20, Exhibit "B".

build out RGN's space, which is unique to RGN's needs, at a cost of $20 million and risk non-payment from RGN and the incurrence of demolition costs if RGN never used the leased space as intended.[5] Homer Street's only practical, albeit equally unattractive, alternative would have been to stand still with respect to the construction of RGN's space while the balance of the building proceeded, then risk having to construct the space outside the ordinary course of construction at tremendous additional cost and significant delays in receiving rental revenue. Homer Street would incur all of this risk in a circumstance where Homer Street did not have the protection of the indemnity it bargained for under the Lease, an indemnity for RGN's obligations under the Lease from a solvent entity.[6]

7. For the foregoing reasons, and described further below, RGN's motion should be dismissed.

PART II - THE FACTS

A. The Lease

8. The lease between Homer Street and RGN (the "**Lease**") is dated August 31, 2018. Under the Lease, Homer Street acted as landlord and RGN acted as tenant in respect of premises occupying eight floors of a 25-story office building that is currently under construction in Vancouver, British Columbia.[7]

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[5] McQueen Affidavit, para. 9.

[6] *Ibid*.

[7] McQueen Affidavit, para. 3.

9. The commercial terms of the Lease included the following:[8]

(a) RGN would not be required to pay rent until the "Commencement Date", which date is at least nine months after the "Delivery Date". The Delivery Date is defined as one of various events, none of which have yet to occur;

(b) Homer Street was required to complete a substantial buildout of RGN's leased premises in accordance with RGN's designs and specifications;

(c) The Indemnifier agreed to indemnify Homer Street on five business days notice for any rent or other charges or amounts RGN owed under the Lease up to a maximum liability of $10,000,000, subjecting to a cap which reduces on a straight line basis over the term of the Lease;

(d) The bankruptcy or insolvency of the Indemnifier was an "Event of Default" under the Lease if within 10 business days of notice from Homer Street of the occurrence of the insolvency of the Indemnifier, RGN failed to post security equal to the Indemnifier's liability cap; and

(e) Homer Street was permitted to terminate the Lease immediately and without further notice whenever an Event of Default occurred.

10. The Commencement Date under the Lease was never reached and RGN was not required to start paying rent. At no point prior to Homer Street's termination of

[8] McQueen Affidavit, para 4; Lease sections 1.1, 4.4(a), 5.2, 15.1(e), 15.2(a) and 17.2, Schedules "D", "E", "F" and "G".

the Lease (described below) was any money due or owing under the Lease from RGN to Homer Street.[9]

11. The role of the indemnity and the Indemnifier under the Lease is crucial.[10]

12. As the Proposal Trustee describes in the First Report, RGN is a "special purpose entity", created for the purpose of acting as tenant under the Lease. The business functions are carried out, and income generating contracts associated with the leased premises are held, by RGN's affiliates. RGN's debts under the Lease are guaranteed by its affiliates.[11]

13. The Lease contemplated Homer Street delivering a 'turnkey' premises for RGN, built out to RGN's design and specifications before RGN ever paid a penny of rent. This arrangement contemplated Homer Street spending significant capital customizing the leased premises for RGN. Homer Street required assurance that it would be indemnified should RGN fail to take occupancy, fail to pay rent at some date in the future or commit another breach of the Lease. In the absence of the indemnity, Homer Street would risk incurring a substantial loss caused by RGN without meaningful recourse.[12]

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[9] McQueen Affidavit, para. 5.

[10] McQueen Affidavit, para. 7.

[11] Trustee's Report, Section 2.0, paras 4-5.

[12] McQueen Affidavit, para. 9.

B. The Indemnifier's Insolvency & RGN's Default Under the Lease

14. In September 2020, Homer Street learned that the Indemnifier was subject to insolvency proceedings in Luxembourg and the Bailiwick of Jersey. A trustee in bankruptcy was appointed in respect of the Indemnifier by the Luxembourg Court on October 9, 2020 following an application by the Indemnifier on September 10, 2020 in Jersey confirming its insolvency.[13] Homer Street gave notice to RGN and advised that Homer Street may terminate the Lease if the requisite security was not posted within 10 days, as provided for in the Lease.[14]

15. Following RGN's failure to post the requisite security within 10 days and the resulting Event of Default under the Lease, Homer Street and RGN had discussions aimed at resolving the default, which were unsuccessful. During those discussions, RGN did not attempt to deliver a replacement indemnifier; rather, its proposals to Homer Street involved the assignment of one of it's sub-contracts to Homer Street in exchange for hiring RGN to manage the premises.[15] RGN's proposed resolution had no basis in the Lease. Such proposals were not attractive to Homer Street.[16] During one telephone discussion in October 2020, RGN advised Homer Street that it could not continue with the Lease and asked if Homer Street wished to take back the premises.[17]

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[13] McQueen Affidavit, para. 10; Lease, section 15.1(e), Exhibit "D" to the Nicosia Affidavit.

[14] McQueen Affidavit, paras. 12-13; Exhibit "I" to the Nicosia Affidavit.

[15] McQueen Affidavit, para. 18.

[16] McQueen Affidavit, para. 18.

[17] McQueen Affidavit, paras. 14-15.

C. Homer Street Terminates the Lease

16. RGN did not post security as required in light of the Indemnifier's insolvency.

17. On November 19, 2020, Homer Street terminated the Lease by sending notice to RGN.[18]

18. On November 26, 2020, RGN's legal counsel advised Homer Street of the existence of this proceeding under the *Bankruptcy and Insolvency Act* and took the position that Homer Street's termination of the Lease was ineffective.[19]

19. Following Homer Street's termination of the Lease, RGN's legal counsel proposed that RGN agree to a full and final surrender of the Lease in exchange for a release of the Indemnifier, among other things.[20]

20. Homer Street does not intend to have any further negotiations with RGN.[21]

PART III - ISSUES AND THE LAW

21. A single issue is before the court: Should this proposal proceeding be extended?

22. Any debtor applying for an extension of time to file a proposal to its creditors must satisfy the court that it "would likely be able to make a viable proposal if the extension being applied for were granted."[22]

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[18] McQueen Affidavit, para. 16; Exhibits "K", "L" and "M" to the Nicosia Affidavit.

[19] McQueen Affidavit, para. 17; Exhibit "N" to the Nicosia Affidavit.

[20] McQueen Affidavit, para. 20, Email from L. Nicholson dated November 26, 2020, Exhibit "B" to the McQueen Affidavit.

[21] McQueen Affidavit, para. 22.

23. This proposal proceeding should not be extended, because there is no hope for RGN to make a viable proposal. RGN has nothing of value to offer Homer Street that would entice Homer Street to accept a proposal, and Homer Street is RGN's only creditor entitled to vote on a proposal.

A. RGN has no Material Assets on Which it Might Base a Proposal

24. RGN has no material assets that it might leverage to form the basis of a viable proposal. RGN was formed solely for the purpose of acquiring the Lease, but Homer Street terminated the Lease on November 19, 2020 following a breach of the Lease in October, 2020.[23]

25. RGN breached the Lease by failing to post a security deposit of value equal to the maximum liability of the Indemnifier, $10,000,000, within the 10 days available to it following Homer Street's notice to RGN of the Indemnifier's insolvency. The 10-day cure period available to RGN expired on October 8, 2020.[24]

26. RGN appears to accept that Homer Street had grounds to terminate the Lease on November 19, 2020. It argued in correspondence with Homer Street, however, that Homer Street had no right to terminate the Lease by operation of two stay

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[22] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Section 50.4(9).

[23] Trustee's Report, p.5, Section 2.0, para. 5; McQueen Affidavit, para. 16; Nicosia Affidavit, Exhibit "K".

[24] McQueen Affidavit, para. 12; Nicosia Affidavit, Exhibit "I".

provisions of the BIA. Specifically, counsel to RGN misstated the effect of the BIA as follows:[25]

> Pursuant to section 69 of the BIA, there is a stay of proceedings in respect of the Tenant prohibiting creditors, including the Landlord, from exercising any rights and remedies against the Tenant during the NOI proceedings. Section 65.1 of the BIA further provides that no person is entitled to terminate any agreement of the insolvent person by reason only that the insolvent person is insolvent or a NOI has ben filed in respect of the insolvent person. *Accordingly, the Landlord acted in violation of the stay of proceedings and the purported termination of the Lease is null and void in all respects.* [emphasis added]

27. While counsel's paraphrasing of sections 69(1) and 65.1(1) and (2) of the BIA is satisfactory, his articulation of the effect of those sections on Homer Street's right to terminate the Lease is incorrect.

28. Section 69(1) provides for an exceptionally broad stay of measures against the debtor. As a generally matter, whenever enforcement of a right against the debtor would impact the "breathing space" within which the debtor can formulate a proposal to its creditors, the enforcement measure will be precluded by the stay.[26]

29. However, section 69(1) is not controlling where the remedy a party seeks to enforce against a debtor is the termination of a contract. Rather, the termination

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[25] Letter from Lee Nicholson to Kornfeld LLP dated November 26, 2020, Exhibit "B" to the McQueen Affidavit.

[26] *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CanLII 81263 (ON SC) at 11; *Emergency Door Service Inc., Re*, 2016 ONSC 5284 at 23.

of a contract with a debtor is governed by section 65.1(1) and, in the case of a lease, 65.1(2). Section 65.1(1) provides as follows:

> **65.1 (1)** If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason ***only that***
>
> (a) the insolvent person is insolvent; or
>
> (b) a notice of intention or a proposal has been filed in respect of the insolvent person.
>
> Idem
>
> **(2)** Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:
>
> "(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
>
> (i) the notice of intention, if one was filed, or
>
> (ii) the proposal, if no notice of intention was filed." [emphasis added]

30. As Justice Ground explained in *Cosgrove-Moore Bindery Services Ltd (Re)*:[27]

> [section 65.1 of the BIA] is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or lease on a continuing basis to a person who files a notice of intention or proposal.

[27] *Cosgrove-Moore Bindery Services Ltd (Re)*, 2000 CanLII 22377 (ON SC) at 2.

31. Accordingly, where a counterparty to a contract with a debtor seeks to terminate the contract, section 65.1 applies, rather than the more general provision of section 69(1).

32. Section 65.1 of the BIA permits the termination of a contract with a debtor so long as the reason for termination is not solely because of: (a) the debtor's insolvency; (b) the NOI filing; or in the case of a lease, (c) the non-payment of rent in the period preceding the NOI filing.[28] If the termination is for any other reason, the enforcement measure is not barred by any provision of the BIA. Indeed, if the stay of proceedings provided for in section 69(1) prevented termination of contracts irrespective of the reason, section 65.1 would serve no purpose.

33. In this case, Homer Street terminated the Lease because RGN failed to replace within 10 days the security for performance of its obligations under the Lease as it was required to do once Homer Street notified RGN of the Indemnifier's insolvency. Accordingly, section 65.1 of the BIA did not preclude the termination, nor did any other provision of the BIA.

34. This case is on all fours with the decision of the British Columbia Court of Appeal in *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*.[29] In *Petcetera*, the tenant filed an NOI and the landlord terminated the lease for non-payment of post-filing rent a few weeks later. In the court below, the judge

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[28] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Section 65.1(1) and (2).

[29] *Canadian Petcetera Ltd Partnership v 2876 R Holdings Ltd.* (2010), 2010 BCCA 469 (CanLII).

relied on *dictum* from the Ontario Court of Appeal's decision *Crystalline Investments Ltd. v. Domgroup Ltd.* that "the landlord's rights against the insolvent tenant are suspended."[30] Justice Tysoe rejected the lower court's reliance on this passage, observing that in *Crystalline Investments* "Mr. Justice Carthy simply summarized the effect of s. 65.1 in passing, and his comment…was an oversimplication of the wording of the section."[31]

35. Before the British Columbia Court of Appeal in *Petcetera*, the tenant argued that section 69(1) of the BIA prevented the landlord from terminating the lease without first having the stay lifted upon application under section 69.4. Justice of Appeal Tysoe disagreed, writing as follows: [32]

> In my opinion, s. 69(1) does not stay the termination of leases because the phrase "for the recovery of a claim provable in bankruptcy" at the end of clause (a) modifies each of the earlier phrases in clause (a). I agree with counsel for the Landlord that this is confirmed by the placement of a comma after the word "proceedings" because there would be no comma if it was intended that the last phrase was to modify only the immediately preceding phrase. Thus, while the termination of a lease is an exercise of a remedy, it is not the exercise of a remedy for the recovery of a claim provable in bankruptcy.

36. Accordingly, in *Petcetera* it was held that no provision of the BIA served to prevent the landlord's termination of a lease where the sole reason for the termination was not provided for in section 65.1. The result should be the same here.

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[30] *Petcetera*, 2010 BCCA 469 (CanLII) at 27.

[31] *Ibid*.

[32] *Petcetera*, 2010 BCCA 469 (CanLII) at 29.

37. Justice Tysoe's interpretation of section 69(1) has been a matter of some debate in Ontario. In *Emergency Door (Re)*, Justice Newbould questioned Justice Tysoe's analysis insofar as, on Justice Tysoe's analysis, section 69(1) would not stay injunctive proceedings against a debtor.[33] In *Emergency Door*, one of the debtor's suppliers sought, post-filing, to proceed with an injunction against the debtor in Federal Court prohibiting it from selling certain product. Justice Newbould held that the injunction proceeding was stayed notwithstanding that following Justice Tysoe's interpretation of section 69(1) would have lead Justice Newbould to a different conclusion.

38. The facts here are readily distinguishable from those in *Emergency Door*. First, Justice Newbould was not dealing with the termination of a lease, but with a contract for the supply of goods.[34] Second, here the issue concerns whether *termination of a contract* is stayed by section 69(1), not whether *an injunction proceeding* is stayed by section 69(1). Accordingly, the *ratio* of *Emergency Door* does not apply. Rather Justice Ground's decision in *Cosgrove-Moore* and *Petcetera*, a decision of the British Columbia Court of Appeal, should be followed.

39. Without the Lease, RGN has assets consisting only of $6,000 for a sales tax receivable and $191,000 for office furniture and equipment.[35] This court should be dubious of the actual value of these assets. The Proposal Trustee does not

[33] *Re Emergency Door Service Inc.*, 2016 ONSC 5284 (CanLII) [*Emergency Door*].

[34] *Emergency Door*, 2016 ONSC 5284 (CanLII).

[35] Trustee's Report, Section 2.3.

identify the specific source of the foregoing financial data. It offers only a vague boiler plate reference in section 1.3 of the First Report to having relied upon unaudited financial information prepared by representatives and financial advisors of the Partnership and related companies in preparing the First Report. More importantly, the Proposal Trustee cautions the reader on the reliance that may be placed on this financial data:[36]

> The Proposal Trustee has not performed an audit or other verification of such information…The Proposal Trustee expresses no opinion or other form of assurance with respect to the accuracy of any financial information presented in this Report or relied upon by the Proposal Trustee in its preparation of this Report.

40. In the circumstances, RGN cannot say that it will "likely be able to make a viable proposal if the extension being applied for were granted." Given its assets, it is a near certainty that no *viable* proposal will be made.

B. Only Homer Street is Even Eligible to Vote in Favour of any Proposal

41. Aside from analyzing RGN's limited assets, this Court should consider the composition of creditors entitled to vote in favour of any proposal that might hypothetically be filed during the extension period requested. There is only one such creditor: Homer Street.

42. The evidence offered as to the identity of RGN's creditors is limited to a single paragraph in, and a Balance Sheet at Appendix "C" to, the First Report.[37]

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[36] Trustee's Report, p.4, Section 1.3, para. 2.

[37] Trustee's Report, Schedule "C".

According to the Proposal Trustee, RGN's only liability is a $268,000 debt owed to RGN Management Limited Partnership ("**RGN Management**").[38] RGN Management is related to RGN for the purposes of the BIA because both entities are controlled by related entities or are otherwise related as described in section 4(2) of the BIA.[39]

43. RGN Management is not, however, entitled to vote in favour of any proposal RGN may file. It's vote is precluded by section 54(3) of the BIA which provides as follows:

> A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

44. The singular vote available to RGN for any proposal it might file for creditors' consideration makes an assessment of the likelihood of a viable proposal a rather straightforward exercise. Only Homer Street would have a vote, and it would vote no.[40]

PART IV - ORDER REQUESTED

45. For the foregoing reasons, Homer Street asks that RGN's motion for an extension of time to file a proposal be dismissed.

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[38] Trustee's Report, p.6, Section 2.1.2, para. 1.

[39] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Section 4(2).

[40] McQueen Affidavit, para. 22.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2020.

Jeffrey Levine
Stephen Brown-Okruhlik

McMillan LLP
Lawyers for Homer Street Office Properties Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CanLII 81263 (ON SC)

2. *Cosgrove-Moore Bindery Services Ltd (Re)*, 2000 CanLII 22377 (ON SC)

3. *Canadian Petcetera Ltd Partnership v 2876 R Holdings Ltd*. (2010), 2010 BCCA 469 (CanLII)

4. *Re Emergency Door Service Inc.*, 2016 ONSC 5284 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

Section 4(2)

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are **related persons** if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the entity, or

(iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two entities

(i) both controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Relationships

(3) For the purposes of this section,

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual

designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

Section 50.4(9)

Extension of time for filing proposal

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Section 65.1

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or
(ii) the proposal, if no notice of intention was filed."

Section 69

Stay of proceedings — notice of intention

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

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

[…]

Tab 1

2005 CarswellOnt 9935
Ontario Superior Court of Justice

Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.

2005 CarswellOnt 9935, 154 A.C.W.S. (3d) 701, 277 D.L.R. (4th) 568, 29 C.B.R. (5th) 62

Golden Griddle Corporation (Plaintiff) and Fort Erie Truck and Travel Plaza Inc, 1515578 Ontario Ltd., Shawn Anthony Schertzing, Estate Trustee of the Estate of Anthony Schertzing (Deceased, Alfred Beam and Jack Vanderlaan (Defendants)

Lederman J.

Heard: November 23, 2005
Judgment: November 23, 2005
Docket: 05-CV-297282 PD3

Counsel: Brian Bellmore, Karen Mitchell for Plaintiff
D.J. Miller for Defendant, Fort Erie Truck and Travel Plaza Inc., 1515578 Ontario Ltd.
Brandon Jaffe for Trustee, Grant Thornton Limited
Douglas Harrison for Ultramar Inc.

***Lederman J.*:**

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

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

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

Whether Section 69 Stays a Claim For Injunctive and Declaratory Relief

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

5 Ms. Miller, for the defendants, submits that the *Ryder* case is not authoritative and that any reference to it subsequently has been to solely accept it without considered analysis. More importantly, she points out that the BIA provision, section 40(1), which was in force at the time of the *Ryder* decision, has since been amended in 1992. That amendment has resulted in a change in the wording of the relevant provisions. Whereas section 40(1) had read in part, ... "no creditor with a claim provable in

bankruptcy shall have any remedy against the debtor ...," the present section 69(1)(a) which deals with stay of proceedings in respect of a filing of a Notice of Intention states in part, ... "no creditor has any remedy against the insolvent person or the insolvent person's property ..."

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

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

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

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

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

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

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

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

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

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

Lifting the Stay

16 I turn now to whether the stay should be lifted

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

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

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

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

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

20 The plaintiffs assert in their affidavit material that they have been materially prejudiced in that the defendants continue to operate the restaurant using the same furniture, fixtures and decor and similar menus as it did prior to the purported termination of the lease without compliance with the provisions of the franchise agreement to the prejudice of the names and reputations of the plaintiffs. The plaintiffs submit that without an injunction the defendants will continue to breach their covenants and further financial losses, which are difficult if not impossible to measure, will be incurred.

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

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

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

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

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

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

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

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

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

29 So, neither Fort Eric nor Golden Griddle is prepared to finance the franchise and the lease. Fort Eric is under no obligation to provide further funding. In these circumstances, with losses continuing to mount, it cannot be said that the Notice of Intention was filed in bad faith to frustrate the rights of the plaintiffs. Rather, it was done as a serious attempt to resolve its financial difficulties.

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

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

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

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

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

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

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

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

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

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

Motion dismissed.

Tab 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: PSINET Ltd., Re | 2001 CarswellOnt 3035, 26 C.B.R. (4th) 288 | (Ont. S.C.J., Jul 31, 2001)

Original
2000 CarswellOnt 1561
Ontario Superior Court of Justice [Commercial List]

Cosgrove-Moore Bindery Services Ltd., Re

2000 CarswellOnt 1561, 17 C.B.R. (4th) 205, 48 O.R. (3d) 540, 96 A.C.W.S. (3d) 731

In the Matter of the Proposal of Cosgrove-Moore Bindery Services Limited of the City of Toronto, Province of Ontario

Ground J.

Heard: May 8, 2000
Judgment: May 10, 2000
Docket: 31-372219

Counsel: None given

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.6 Effect of proposal
VI.6.a General principles
Headnote
Bankruptcy --- Proposal — Effect of proposal — Position of subsequent creditors
Notice of proposal was filed — Section 65.1 of Bankruptcy and Insolvency Act prevents parties providing goods and services, or use of land, from terminating or amending contract, or accelerating payment as result of notice — To balance interests of debtor and creditor, creditors may require immediate payment for goods, services or use of land "provided after filing" of notice — Debtor leased premises from landlord and failed to pay monthly rental and utility charges due both before and after filing of notice — Debtor leased equipment from lessor and failed to make monthly lease payments both before and after filing of notice — Landlord brought motion for immediate payment of rental and utility charges and lessor brought motion for immediate payment of equipment lease payments — Both motions were brought pursuant to s. 65.1 of Act — Motions granted — Fact that some of rent, utility and equipment lease payments could be subject to claims provable in bankruptcy did not conflict with provisions of s. 65.1(4) of Act — If proposal was not accepted or approved, amounts payable under leases would have to be deducted from amounts provable in bankruptcy — Landlord and lessor could require immediate payment for charges due subsequent to filing of notice — Debtor ordered to make immediate payments — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 65.1, 65.1(4).
Bankruptcy --- Proposal — Practice and procedure
Notice of proposal was filed — Landlord brought motion in respect of rental and utility charges payable, under lease of premises, on which debtor carried on business — Lessor brought motion in respect of equipment lease payments, for equipment used by debtor — Both motions were brought pursuant to s. 65.1 of Bankruptcy and Insolvency Act and both sought orders for immediate payment of amounts due — Motions granted — Act and Rules contained no provision for motion to be brought or that court might make order directing payment — Purpose of s. 65.1 of Act is to enable debtor to continue operations while working on reorganization but at same time to give creditors some protection so that payments due during proposal period will

survive in event of ultimate bankruptcy — Lack of court jurisdiction to order immediate payment would be inconsistent with purpose — Debtor ordered to make immediate payment to landlord and lessor — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 65.1 — Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368.

Table of Authorities

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 65.1 [en. 1992, c. 27, s. 30] — considered

s. 65.1(1) [en. 1992, c. 27, s. 30] — considered

s. 65.1(2) [en. 1992, c. 27, s. 30] — considered

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 65.1(5) [en. 1992, c. 27, s. 30] — considered

s. 183 — referred to

MOTIONS within bankruptcy proposal by landlord and lessor of equipment for orders for immediate payment of amounts due.

***Ground J.*:**

1 The two motions before this Court are brought in the within Proposal and are brought pursuant to s.65.1 of the Bankruptcy and Insolvency Act ("BIA"). The motion brought by 1176726 Ontario Ltd. ("Landlord") is in respect of rentals and utility charges payable pursuant to the Lease of the premises on which Cosgrove-Moore Bindery Services Limited ("C-M") carries on its business. The motion brought by Westcoast Capital Corporation ("Westcoast") is in respect of equipment lease payments due under a Master Equipment Lease between Westcoast and C-M for substantial bindery equipment used in the business of C-M. Both motions seek orders, pursuant to subsection 65.1(4) of the BIA, for the immediate payment of amounts due under the Lease and the Master Equipment Lease in respect of periods after March 3, 2000, the date of the Notice of Intention to make a Proposal. The rentals and utility charges under the Lease due March 1, 2000 remain unpaid and the utility charges due April 1, 2000 and May 1, 2000 remain unpaid. The payments due under the Master Equipment Lease which commenced November 15, 1999 and are payable monthly on the 15th day of each month all remain unpaid.

2 It is my view the section 65.1 of the BIA is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or lease on a continuing basis to a person who files a Notice of Intention or a Proposal. I am satisfied that each of the Landlord and Westcoast is such a party.

3 I am also satisfied that the payments for the utilities required to be made under the Lease are "payments for the use of leased property" and are in the same category as rents for the purposes of subsection 65.1(4).

4 The effect of subsections (1), (2) and (5) of section 65.1 is that a party providing such goods and services or use of leased premises is prevented from exercising contractual rights which it may have to terminate or amend the contract or lease or to accelerate payment as a result of the Notice of Proposal.

5 In an attempt to balance the interests of the debtor and the creditor which is required to continue to supply goods, services or the use of leased property, Parliament has provided that the creditor may require immediate payment for goods, services or the use of leased property "provided after the filing" of the Notice or Proposal. This provision is not dependent on the date that the payments would otherwise be due pursuant to the contract or lease but focuses on the provision of goods, services or the use of leased property provided after the filing of the Notice or Proposal.

6 The fact that the total rent for the month of March, 2000 which was due March 1, 2000 and the equipment lease payments due prior to March 3, 2000 could be the subject of claims provable in bankruptcy does not, in my view, conflict with the provisions of subsection 65.1(4). Clearly, if the Proposal is not accepted or not approved by the Court, any amounts paid pursuant to

subsection 65.1(4) with respect to the rent or utilities for the period after March 3, 2000 to March 31, 2000 or equipment lease payments referable to periods after March 3, 2000 would have to be deducted from the amounts provable in bankruptcy.

7 Accordingly, I am of the view that the Landlord can require immediate payment on a per diem basis for rents and utility charges payable for the use of the premises for the period March 4 to March 31, 2000 and require immediate payment for periods thereafter while section 65.1 remains applicable and that Westcoast can require immediate payment on a per diem basis for the use of the equipment for the period March 4 to March 15, 2000 and require immediate payment for all periods thereafter while section 65.1 remains applicable.

8 Counsel for the Trustee has submitted that the Court does not have jurisdiction, on motions such as those before the Court, to make an order directing immediate payment and that the Landlord and Westcoast would have to commence with regular proceedings to effect recovery of the amounts to which I have determined above they are entitled.

9 It is true that the BIA and the Bankruptcy Rules appear to contain no provision that a motion may be brought or that the court may, on motion of a party entitled, order the immediate payment of amounts which the Court has determined are subject to the requirement of immediate payment under subsection 65.1(4). Section 183 of the BIA, referred to by counsel for the Landlord simply provides for the jurisdiction of the superior courts extending to bankruptcy matters and is, in my view, of no assistance in determining appropriate procedures where the BIA is silent.

10 I have come to the conclusion that the purpose of section 65.1 is to provide a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to pro rata unsecured claims in the event of an ultimate bankruptcy.

11 It seems to me to be inconsistent with such purpose to require the supplier of such goods and services or use of leased property to commence possibly lengthy and expensive litigation to collect the amounts for which the Court has determined that immediate payment should be made.

12 For the same reasons I do not believe that the stay provisions of the BIA should be interpreted to require an application to lift the stay with respect to payments to be made in respect of the post notice period which were due prior to the notice date.

13 Accordingly, an order will issue, on the motion of the Landlord, that C-M pay by certified cheque to the Landlord within seven days of the date of the order:

a) $58,968.67 for use of the premises from March 4 to March 31, 2000;

b) $17,625.00 for hydro and $1,772.59 for gas provided for the use of the premises from March 4 to March 31, 2000;

c) $18,412.52 for hydro and $3,220.11 for gas provided for use of the premises for April, 2000;

d) $34,567.84 for use of the premises from May 1 to 17, 2000; and

e) $10,097.18 for hydro and $1,765.87 for gas from May 1 to 17, 2000.

and that C-M make immediate payment when due of all rentals and utility charges pursuant to the Lease in respect of periods thereafter while section 65.1 remains applicable.

And an order will issue with respect of the Westcoast motion that C-M pay by certified cheque to Westcoast within seven days of the date of the order:

a) $26,007.99 for the use of the equipment for the period March 4 to March 14, 2000;

b) $73,295.25 for use of the equipment for the period March 15, 2000 to April 14, 2000;

c) $73,295.25 for use of the equipment for the period April 15, 2000 to May 14, 2000.

and that C-M make immediate payment to Westcoast when due of all equipment lease payments in respect of periods thereafter while section 65.1 of the BIA remains applicable.

14 Any party who feels compelled to do so may make brief written submissions to me on the costs of these motions on or before May 31, 2000.

Motions granted.

Tab 3

2010 BCCA 469
British Columbia Court of Appeal

Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd.

2010 CarswellBC 2852, 2010 BCCA 469, [2010] 12 W.W.R. 189, [2010] B.C.W.L.D. 8207, [2010] B.C.W.L.D. 8227, [2010] B.C.W.L.D. 8286, [2010] B.C.W.L.D. 8352, [2010] B.C.W.L.D. 8354, 10 B.C.L.R. (5th) 235, 194 A.C.W.S. (3d) 635, 295 B.C.A.C. 201, 501 W.A.C. 201, 70 C.B.R. (5th) 180, 96 R.P.R. (4th) 157

PricewaterhouseCoopers Inc., in its capacity as Trustee of the Estate of Canadian Petcetera Limited Partnership, a bankrupt (Respondent / Plaintiff) And 2876 R Holdings Ltd. and Arnold Silber (Appellants / Defendants) And Petco Animal Supplies, Inc. (Respondent / Defendant by Counterclaim)

Hall, Tysoe, D. Smith JJ.A.

Heard: August 11, 2010
Judgment: October 26, 2010
Docket: Vancouver CA037416

Proceedings: reversing in part *Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd.* (2009), 2009 CarswellBC 2196, 2009 BCSC 1135, 86 R.P.R. (4th) 139, 59 C.B.R. (5th) 191 (B.C. S.C. [In Chambers])

Counsel: A.G. Sandilands for Appellants
S.R. Coval, K.M. Jackson for Respondent Trustee, PricewaterhouseCoopers Inc.
S.L. Knowles for Respondent, Petco Animal Supplies, Inc.

***Tysoe J.A.*:**

1 This appeal concerns the issue of whether a lease was properly terminated and, if so, whether it would have been appropriate for the court to have granted relief from the forfeiture resulting from the termination. Subsequent events have unequivocally brought the lease to an end, but it remains necessary to decide these issues because their outcome potentially affects other rights and obligations between the parties.

2 The background facts are relatively straightforward. The lease in question (the "Lease") was entered into between the appellants (the "Landlord") and the respondent, Petco Animal Supplies, Inc. ("Petco"). The tenant's interest in the Lease was assigned, with the permission of the Landlord, to Canadian Petcetera Limited Partnership ("Petcetera").

3 Leases typically have default clauses. Some leases allow for monetary defaults to be cured by the tenant after notice of default is given by the landlord, while other leases permit their termination after a default without giving the tenant an opportunity to cure the default. In this case, the Lease contained a hybrid provision, which gave the tenant the opportunity to cure a default unless there was a history of tardy payments. The relevant portion of the clause, para. 24.1 of the Lease, reads as follows:

> 24.1 If and whenever:
>
> > (a) the Rental hereby reserved, or any part thereof, shall not be paid on the day appointed for payment thereof, and remains unpaid after fifteen (15) days after the giving of notice by the Landlord, (provided that if the Tenant has failed to pay the Rental on its due date at least four times over any two consecutive years of the Term or more than twice in one year of the Term, then no notice from the Landlord shall be required in order for the Landlord to exercise any remedy provided for herein in respect of any further default in the payment of Rent on its due date); or

. . . . .

> Then and in every case, it shall be lawful for the Landlord at its discretion any time thereafter to enter into and upon the Premises or any part thereof in the name of the whole and the same to have again, repossess, and enjoy as of its former estate, notwithstanding anything in this Lease contained to the contrary, and the Term and this Lease shall immediately upon such reentering become forfeited and void, at the Landlord's option ...

4 Petcetera was far from punctual in its payment of the monthly rent. It failed to pay the rent by the due date in 23 of the 24 months of 2007 and 2008 and in each of the first three months of 2009. In May 2008, the Landlord had written to Petcetera pointing out that it was entitled under para. 24.1 to repossess the premises without notice in the event of a future default. However, until the events in question in this litigation, the Landlord did not attempt to terminate the Lease.

5 Petcetera did not pay the March 2009 rent on the due date and, on the basis that it would be exploring options in connection with its financial situation, it negotiated with the Landlord regarding the payment of the rent for that month. It was agreed between them that $10,000 of the rent would be paid by March 9 and the balance of $30,525.28 would be paid on March 16. Petcetera paid the $10,000 due by March 9 but paid only $10,000 on March 16, leaving an unpaid balance of $20,525.28.

6 On March 20, 2009, Petcetera filed a notice of intention to make a proposal under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). By letter dated March 24, 2009, the Landlord demanded immediate payment of $14,379.94 representing the pro rata rent for the period from March 21 to March 31. This amount remained unpaid into April.

7 A cheque for the rent due on April 1 was mailed by Petcetera on March 30 but it was not received by the Landlord until April 2. In the morning of April 2, before the April rent cheque was received, the Landlord delivered a notice of termination to the leased premises. The notice recited the default of Petcetera in failing to pay the pro rata rent for the period from March 21 to 31 and the rent due on April 1, 2009. It stated that no notice of default was required under the Lease by virtue of Petcetera's failure to make the rent payments for January, February and March, 2009 on their due dates. The Landlord changed the locks and took possession of the premises.

8 Petcetera attempted to obtain an injunction to require the Landlord to allow it access to the premises. Petcetera was unsuccessful in its application but, as a result of interim orders, it was allowed access to the premises for most of April, and paid occupational rent for its time of occupancy. It also paid the pro rata rent for the period from March 21 to 31. After this Court refused Petcetera leave to appeal from the order dismissing its application for an injunction, the Landlord again took possession of the premises on May 1.

9 On April 21, 2009, Petcetera commenced the action against the Landlord that gave rise to the order under appeal. It sought a declaration that the purported termination of the Lease was invalid or, alternatively, an order giving it relief from the forfeiture of the Lease. The Landlord filed a counterclaim in the action against both Petcetera and Petco seeking various forms of relief, including a declaration that the Lease was terminated, damages and judgment for the expenses incurred by the Landlord consequent upon the breaches of the Lease. However, on June 15, before the action was tried, Petcetera went into bankruptcy as a result of its failure to file a proposal by the deadline imposed by s. 50.4(8) of the *BIA* (as it had been extended under s. 50.4(9)). PricewaterhouseCoopers Inc. was made the trustee of Petcetera's bankrupt estate (the "Trustee").

10 The Trustee negotiated a sale to a third party of certain assets of Petcetera, including the Lease (if it was subsisting or could be reinstated). The Trustee made application to be substituted as the plaintiff in the action in place of Petcetera, and it scheduled the action to be tried by way of a summary trial. The trial took place in July 2009 and the summary trial judge issued his reasons for judgment on August 20, 2009 (indexed as [*Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd.*] 2009 BCSC 1135 (B.C. S.C. [In Chambers])).

11 Relying on two sections of the *BIA* and the Ontario decisions of *Cosgrove-Moore Bindery Services Ltd., Re* (2000), 48 O.R. (3d) 540, 17 C.B.R. (4th) 205 (Ont. S.C.J. [Commercial List]), and *Crystalline Investments Ltd. v. Domgroup Ltd.* (2002), 210 D.L.R. (4th) 659, 58 O.R. (3d) 549 (Ont. C.A.), aff'd 2004 SCC 3, [2004] 1 S.C.R. 60 (S.C.C.), interpreting s. 65.1 of the

BIA, the judge agreed with the Trustee that the Lease was not validly terminated. His reasoning was contained in the following sentence of his reasons for judgment:

> [26] If the rights of the Landlord are "suspended" (*Crystalline*, *supra* at para. 6), if a Landlord is "prevented from exercising contractual rights which it may have to terminate" (*Cosgrove*, *supra* at para. 4), if no creditor "has any remedy against the insolvent person" once a Notice of Intention has been filed (s. 69(1) of the *BIA*), and if "no person may terminate ... or claim an accelerated payment, or a forfeiture of the term ...." (s. 65.1(1) of the *BIA*), I am satisfied that it is not possible for this Landlord to claim that pre Notice of Intention events can be relied upon to allow termination without notice.

Thus, the judge held the right of the Landlord to rely on the defaults prior to the filing of the notice of intention was suspended, and the Landlord had been required to give 15 days' notice before it could terminate the lease.

12 The order made by the judge reads as follows:

> THIS COURT ORDERS AND DECLARES that:
>
> 1. The purported termination by the Landlord on April 2, 2009 of the lease dated June 29, 1997 ("Lease") between the Landlord and Petco, assigned by Petco to 17187 Yukon Inc., and further assigned by 17187 Yukon Inc. to Canadian Petcetera Limited Partnership ("Petcetera"), for premises located at 2876 Rupert Street, Vancouver, British Columbia ("Premises"), is invalid and of no legal force and effect.
>
> 2. As at April 2, 2009, the Lease remains in effect between the Landlord, Petco and Petcetera and, subject to the terms and conditions of the Lease, Petcetera is entitled to access to and quiet enjoyment of the Premises.
>
> 3. This order is without prejudice to any other rights and remedies available to the Landlord, Petco and Petcetera under the Lease.
>
> 4. The Landlord shall pay to the Trustee the costs of this Action on a Party and Party ("Scale B") basis forthwith after assessment.

13 The judge did go on to consider the alternate relief sought by the Trustee. He stated that if he was found incorrect in holding the termination of the Lease to be invalid, then he was satisfied that it was appropriate to grant Petcetera relief from forfeiture under s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. In that regard, he considered the principles set out in several authorities, including *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490, 115 D.L.R. (4th) 478 (S.C.C.), and rejected three arguments the Landlord said prevented the court from granting the relief.

14 The Landlord had also argued that it was entitled to be reimbursed its legal and other expenses in connection with the termination and the legal proceedings pursuant to a provision in the Lease (para. 25(a)). The judge held the Landlord was not entitled to be reimbursed for those expenses because the Lease had not been validly terminated. He also stated, if he was found to be incorrect in concluding that the Lease was not validly terminated, he would have made an order pursuant to para. 25(a) that the Landlord was entitled to "all expenses incurred by the Landlord in the enforcement of its rights and remedies".

15 Although none of the parties sought to introduce new evidence on this appeal, it is common ground that the Lease has now come to an end. Counsel advised us that the summary trial judge subsequently approved an assignment of the lease to a prospective purchaser but imposed the condition that the arrears of rent be paid (the Trustee apparently did not pay any of the rent due after August 2009). The prospective purchaser declined to accept this condition, and the Landlord has retaken possession of the premises.

16 On appeal, the Landlord says the judge erred in holding the termination of the Lease to be invalid, and in holding, in the alternative, that Petcetera was entitled to relief from forfeiture. The Landlord also says the judge erred in holding that it was not entitled to reimbursement for its costs and expenses and in failing to award costs personally against the Trustee.

Termination of the Lease

17 This issue involves the interpretation of s. 65.1 and s. 69(1) of the *BIA*. Although the summary trial judge relied primarily on s. 65.1, the Trustee argues that the stay of proceedings imposed by s. 69(1) also prevented the Landlord from terminating the Lease.

18 In interpreting the provisions of the *BIA*, I agree with the following comments of Madam Justice Levine in the decision of *Port Alice Specialty Cellulose Inc., Re*, 2005 BCCA 299, 254 D.L.R. (4th) 397 (B.C. C.A.):

> [25] There is no dispute that the proper approach to the interpretation of s. 81.1 is that described in E.A. Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [26] This approach has been approved by the Supreme Court of Canada in numerous cases. The Supreme Court has also said that this approach is confirmed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 225 D.L.R. (4th) 206, at para. 20; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 212 D.L.R. (4th) 1 at para. 26.
>
> [27] In interpreting the *BIA*, courts have noted that it is a commercial statute used by business people and should not be given an overly narrow or legalistic approach: see *Re McCoubrey*, [1924] 4 D.L.R. 1227 (Alta. S.C.) at 1231-32; *Mercure v. Marquette & Fils*, [1977] 1 S.C.R. 547 at 556, 65 D.L.R. (3d) 136; *Re Maple Homes Canada Ltd.*, 2000 BCSC 1443, 99 A.C.W.S. (3d) 909, at para. 21.

19 In my respectful view, the summary trial judge did not undertake a process of interpreting s. 65.1 as a whole. Rather, he took general comments made by other judges in distinguishable circumstances and applied them to portions of the wording of s. 65.1 and s. 69(1). Subsections (1) through (6) of s. 65.1 read as follows (subsections (7) through (9) deal with eligible financial contracts, which are not relevant to this matter):

> 65.1(1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that
>
> > (a) the insolvent person is insolvent; or
> >
> > (b) a notice of intention or a proposal has been filed in respect of the insolvent person.
>
> (2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:
>
> > (c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
> >
> > > (i) the notice of intention, if one was filed, or
> > >
> > > (ii) the proposal, if no notice of intention was filed.

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

(4) Nothing in subsections (1) to (3) shall be construed

(a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed;

(b) as requiring the further advance of money or credit; or

(c) as preventing a lessor of aircraft objects under an agreement with the insolvent person from taking possession of the aircraft objects

. . . . .

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

(6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely cause it significant financial hardship.

20 In my opinion, the purpose of s. 65.1, as it relates to leases, is to prevent landlords from terminating leases on the basis of rent arrears at the time of the filing of a notice of intention to make a proposal, so that the lease will continue to subsist while the tenant formulates and negotiates a proposal with its creditors. Its purpose is similar to the provision in s. 69(1), which stays creditors from attempting to recover claims provable in bankruptcy while the debtor is endeavouring to reorganize its financial affairs with its creditors. Both sections have the purpose of maintaining the status quo among creditors and preserving the debtor's assets during the reorganization process. It was necessary for Parliament to enact a specific provision dealing with agreements (including lease agreements) because, as I will explain later, the automatic stay in s. 69(1) is not sufficiently broad to stay termination of agreements to which the debtor is a party.

21 In reading the words in s. 65.1 in their context and in their grammatical and ordinary sense harmoniously with the purpose of the section, it is my view that the section did not prevent the termination of the Lease for two reasons. First, s. 65.1 prohibits the termination of a lease "by reason only" that the tenant has not paid rent in respect of a period preceding the filing of the notice of intention. In this case, the ability to terminate the Lease (with or without prior notice) did not depend only on the late payment or non-payment of rent in respect of the period preceding the filing of Petcetera's notice of intention on March 20. The ability to terminate the Lease also depended on the non-payment of rent in respect of the period *after* March 20. Section 65.1 does not prohibit the termination of leases for non-payment of rent due after the filing of the notice of intention. Indeed, s. 65.1(4) specifically states that nothing in subsections (1) to (3) shall be construed as prohibiting a person from requiring

immediate payment for use of leased property provided after the filing of the notice of intention. In my opinion, the judge's holding failed to give effect to the words "by reason only".

22 The Trustee and Petco argue that s. 65.1 does apply because the Landlord was *only* able to terminate the Lease on the morning of April 2 by relying on the late payment of rent in respect of the period preceding March 20. They use the word "only" in this sense to signify that it was necessary for the Landlord to rely on the late payment of pre-filing rent in order to terminate the Lease without first giving notice. However, that is not the context in which the word "only" is used in s. 65.1. The word is used in the section to prevent termination when the only default giving rise to the entitlement to terminate the Lease is non-payment of rent in respect of a period preceding the filing of the notice of intention. The word is used in relation to the default in question, not the method of termination.

23 The second reason the wording of s. 65.1 did not prevent the termination of the Lease is that the Landlord was not relying on the non-payment of rent in respect of the pre-filing period in order to terminate the Lease without first giving notice of default. Rather, it was relying on the *late* payment of rent. All of the pre-filing rent, with the exception of a portion of the March 2009 rent, had been paid by March 20. The Landlord did not need to rely on the non-payment of a portion of the pre-March 20 rent to terminate without first giving notice of default because it could rely on the late payment of the rent due on January 1 and February 1, 2009 (and 23 of the preceding 24 months).

24 Petco also relies on subsection (5) of s. 65.1 (which nullifies attempts to "contract out" of the provisions of s. 65.1) and says the provisions of para. 24.1 allowing for termination without notice are in substance contrary to ss. 65.1(1) and (2). With respect, I disagree. The substance of ss. 65.1(1) and (2) does not deal with whether a landlord must first give notice of default before terminating a lease. The substance of those provisions, in the context of leases, is to prevent landlords from basing their entitlement to terminate on non-payment of rent in respect of the period preceding the filing of the notice of intention. Here, the Landlord was relying on the non-payment of rent in respect of the period following the filing of the notice of intention.

25 The two decisions relied on by the summary trial judge have no impact on the applicability of s. 65.1 in the present circumstances because neither of them dealt with the ability of a landlord to terminate a lease. In *Cosgrove-Moore Bindery Services*, the issue was whether a landlord was entitled to rely on subsection (4) of s. 65.1 to require payment of rent that was due prior to the filing of the notice of intention but related to the portion of the month following the date of the filing. In the context of the present case, this would have been the rent in respect of the period from March 21 to March 31. Mr. Justice Ground held that the landlord was entitled to payment of this rent.

26 The summary trial judge relied on the statement by Ground J. that the effect of s. 65.1 was to prevent a party providing goods or services or use of leased premises "from exercising contractual rights which it may have to terminate or amend the contract or lease or to accelerate payment as a result of the notice or proposal". In making that statement, Ground J. appears to have been focusing on clause (b) of s. 65.1(1). In any event, Ground J. was not referring to termination of leases by reason of non-payment of rent due after the filing of the notice of intention. This is apparent from his subsequent comments about the purpose of s. 65.1:

> [10] I have come to the conclusion that the purpose of s. 65.1 is to provide a commercial enterprise with the opportunity to continue operations while working toward a reorganization but at the same time to give creditors obligated to continue to supply goods, services or the use of leased property some protection that payments ordinarily due during the proposal period will not be wiped out or reduced to pro rata unsecured claims in the event of an ultimate bankruptcy.

27 The issue in *Crystalline Investments* was whether a repudiation of a lease pursuant to s. 65.2 of the *BIA* by an assignee of the original tenant affected the liability of the original tenant for the balance of the rent remaining unpaid following payment of the amount stipulated by s. 65.2. Mr. Justice Carthy simply summarized the effect of s. 65.1 in passing, and his comment that "the landlord's rights against the insolvent tenant are suspended" was an oversimplification of the wording of the section.

28 Although the summary trial judge mentioned s. 69(1) of the *BIA*, it appears he made reference to it in order to assist in his determination of the issue of whether s. 65.1 applied to prevent the Landlord from terminating the Lease without first

giving notice of default. On appeal, however, the Trustee seeks to rely independently on s. 69(1), the relevant portion of which reads as follows:

> 69.(1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,
> >
> > . . . . .
>
> until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

The Trustee says the automatic stay created by s. 69(1)(a) on the filing of the notice of intention prevented the Landlord from terminating the Lease without first having the stay "lifted" upon application under s. 69.4. The Trustee provides no authority in support of this argument.

29 In my opinion, s. 69(1) does not stay the termination of leases because the phrase "for the recovery of a claim provable in bankruptcy" at the end of clause (a) modifies each of the earlier phrases in clause (a). I agree with counsel for the Landlord that this is confirmed by the placement of a comma after the word "proceedings" because there would be no comma if it was intended that the last phrase was to modify only the immediately preceding phrase. Thus, while the termination of a lease is an exercise of a remedy, it is not the exercise of a remedy for the recovery of a claim provable in bankruptcy.

30 The wording of s. 69(1), which came into effect in 1992, was taken from the stay provision applicable when a debtor becomes bankrupt, which is now contained in s. 69.3. The general purpose of s. 69.3 was discussed by the Supreme Court of Canada in *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 (S.C.C.), at 1015-16, (1990), 78 C.B.R. (N.S.) 193 (S.C.C.), (when the provision was s. 49(1) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3):

> The aim of the section is to provide a means of maintaining control over the distribution of the assets and property of the bankrupt. In doing so, it reflects one of the primary purposes of the *Bankruptcy Act*, namely to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis. See Duncan and Honsberger, *Bankruptcy in Canada* (3rd ed. 1961), at p. 4. The object of the section is to avoid a multiplicity of proceedings and to prevent any single unsecured creditor from obtaining a priority over any other unsecured creditors by bringing an action and executing a judgment against the debtor. This is accomplished by providing that no remedy or action may be taken against a bankrupt without leave of the court in bankruptcy, and then only upon such terms as that court may impose.

It was held in *Fitzgibbon* that the stay provision did not apply to the making of a compensation order under the *Criminal Code*. Similarly, it has been held the stay provision does not apply to proceedings for contempt of court because, although contempt is a remedy against a debtor, it does not result in the recovery of a claim provable in bankruptcy (see *Neufeld v. Wilson* (1997), 86 B.C.A.C. 109, 45 C.B.R. (3d) 180 (B.C. C.A.), and *Long Shong Pictures (H.K.) Ltd. v. NTC Entertainment Ltd.* (2000), 18 C.B.R. (4th) 233, 190 F.T.R. 257 (Fed. T.D.)).

31 The above interpretation of s. 69(1) is also demonstrated by the jurisprudence dealing with new indebtedness incurred by a debtor after he or she has gone bankrupt. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the new indebtedness is not a claim provable in the bankruptcy. (See *Richardson & Co. v. Storey* (1941), 23 C.B.R. 145, [1942] 1 D.L.R. 182 (Ont. S.C.); *Bolf, Re* (1945), 26 C.B.R. 149 (Que. Bktcy.); *Venneri v. Bomasuit* (1950), 31 C.B.R. 150 (Ont. H.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), 12 C.B.R. (N.S.) 115 (C.S. Que.). Also see *Wescraft Manufacturing Co., Re* (1994), 27 C.B.R. (3d) 28 (B.C. S.C.), which appears to have held, correctly in my view, that s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal, but also held, incorrectly in my view, that s. 69.1(1) did stay its termination on account of arrears of rent due before the filing of the proposal.)

32 One other factor also militates against the wording of s. 69(1) applying to the termination of leases. As I have mentioned, the wording of s. 69(1) was taken from the stay provision that comes into effect upon bankruptcy. That provision could not have been intended to apply to leases because Parliament decided to leave the determination of the rights of landlords under leases held by bankrupts to provincial law (s. 146 of the *BIA*). In British Columbia, s. 29 of the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57, permits a trustee in bankruptcy to retain leased premises for three months and to assign the lease to a purchaser. In 1992, when Parliament enacted s. 50.4 of the *BIA* to introduce the concept of notices of intention to make proposals, it became necessary to protect leases and other executory agreements during the period in which the debtor formulated and negotiated the terms of a proposal. As a result, Parliament enacted s. 65.1 at the same time. If s. 69(1) had been intended to stay the termination of leases, it would not have been necessary for Parliament to enact s. 65.1.

33 For these reasons, it is my opinion that the Landlord did validly terminate the Lease on April 2, 2009. It is therefore necessary to consider whether the summary trial judge erred in holding, in the alternative, that Petcetera was entitled to relief from the forfeiture of the Lease.

Relief from Forfeiture

34 In addition to arguing generally that the summary trial judge should not exercise his discretion to grant relief against the forfeiture of the Lease on the basis of the factors set out in *Saskatchewan River Bungalows Ltd.*, the Landlord submitted to the judge that there were three reasons why the relief should not be granted. At the hearing of the appeal, the Landlord conceded that, with the exception of two of these matters, the judge could not be said to have erred in principle when he exercised his discretion in favour of the Trustee.

35 The first matter relied on by the Landlord was the fact that Petcetera had subleased a portion of the premises to a veterinarian without obtaining its consent, as required by para. 27(b) of the Lease. The Landlord says the court cannot relieve against forfeiture when the tenant has breached such a provision of the lease, and cites *Jawanda v. Walji* (1975), 63 D.L.R. (3d) 639, 10 O.R. (2d) 527 (Ont. Div. Ct.); *778489 Ontario Ltd. v. 841114 Ontario Ltd.*, [1992] O.J. No. 1140 (Ont. Gen. Div.); *Pink Panther Food Corp. v. N.D. McLennan Ltd.* (1990), 75 O.R. (2d) 651 (Ont. C.A.); and *Premji v. Milette* (1981), 31 B.C.L.R. 62 (B.C. S.C.). Petco responds that *Premji* accepted that jurisdiction did exist to relieve against forfeiture when the breach of covenant was against assignment and that the Ontario decisions have been superseded by *Saskatchewan River Bungalows Ltd.*

36 It is not necessary, in my view, to decide whether it is possible to relieve against forfeiture when the breach in question is a breach of the covenant requiring consent to an assignment or sublease. First, the Landlord did not forfeit the Lease on the basis of a breach of para. 27(b) and, hence, the alternate relief the judge indicated he was prepared to grant would not have relieved against the consequences of such a breach. Secondly, the judge found that he was not in a position on the evidence before him to conclude whether the sublease in question had been approved by the Landlord. As a result, the Landlord had not proven that para. 27(b) had been breached.

37 The second matter relied upon by the Landlord is the fact that s. 28 of the *Law and Equity Act* deprives the court of the power to relieve against forfeiture if a forfeiture under the covenant in respect of which relief is sought has already been waived in favour of the person seeking the relief. The Landlord says it waived forfeiture in March 2009 when it agreed the March rent could be paid in two instalments after its due date.

38 On my reading of his reasons, the summary trial judge concluded that there had not been a previous waiver within the meaning of s. 28. He relied on the following passage from *Balagno v. Le Roy* (1913), 10 D.L.R. 601 (B.C. S.C.), at 602, (1913), 18 B.C.R. 127 (B.C. S.C.):

> Relief has also been granted in such cases by our own Courts since 1881. It does not appear to me that there has been such a waiver out of Court as is contemplated by the statute. The lease is in the short form. There is no forfeiture until there has been a re-entry under the terms of the covenant. The lessor may or may not re-enter as he sees fit, but until he does, and declares the lease forfeited, there is no forfeiture to waive.

The best that can be said for the plaintiff lessor is that he elected not to re-enter.

39 In my opinion, the summary trial judge did not err in concluding there had not been a waiver of a previous forfeiture. What the parties did was simply amend the provisions of the Lease with respect to the date on which the March 2009 rent was due.

40 Accordingly, it has not been demonstrated the judge erred in holding that he would have granted the alternate relief if he was found to be incorrect in finding the termination of the Lease to be invalid. As the judge did not actually grant the alternate relief in view of his earlier holding, he did not stipulate any conditions to the relief, although he did state that if he were found to be incorrect with respect to the termination issue, he would have made an order pursuant to para. 25(a) of the Lease that the Landlord was entitled to its expenses in the enforcement of its rights and remedies.

41 In its factum, the Landlord submitted that conditions ought to have been imposed in connection with the relief from forfeiture, including the provision of postdated cheques and payment of the Landlord's legal and other expenses. At the hearing of the appeal, counsel for the Landlord agreed that it was academic to craft such conditions in view of the subsequent events that brought the Lease to an end. In my view, it would be speculation on our part to attempt to ascertain what conditions the summary trial judge would have imposed had he granted relief from forfeiture, and the issue is moot because there is no prospect that any such conditions would ever be fulfilled.

Costs and Expenses

42 A distinction must be made between costs and legal (and other) expenses. Costs are awarded pursuant to the *Rules of Court*. They are normally granted on a party and party basis in accordance with a tariff contained in the *Rules of Court*, and they amount to only a portion of the party's actual legal expenses. By contrast, it is open to the parties to a contract to include a provision for reimbursement by one party to the other party for its actual legal and other expenses in certain circumstances. These are sometimes referred to as indemnity costs or contractual costs. Para. 25(a) of the Lease is a provision for indemnity costs. Another provision of the Lease, para. 35, provides that in the event of a suit between the parties, the prevailing party is entitled to recover from the losing party all costs and expenses, including attorney's fees.

43 The Landlord says it is common practice to award the costs of the action to the landlord when relief from forfeiture is granted, even though the landlord has been unsuccessful in resisting the relief. Although s. 24 of the *Law and Equity Act* does expressly give the court authorization to impose terms as to costs, my review of the jurisprudence does not disclose a common practice to award costs to landlords. The court has the discretion to award costs to either party or make no order as to costs.

44 I am not prepared to speculate on what the summary trial judge would have done with respect to the costs of the action if he had granted relief from forfeiture. The breaches giving rise to the forfeiture were relatively minor; it was understandable for there to have been uncertainty with respect to the obligation to pay the pro rata rent for the period from March 21 to 31, and the cheque for the April rent was mailed two days before the due date and was received on the same day the Landlord terminated the Lease. The Trustee was successful on the alternate ground of relief and, in these circumstances, I would not be prepared to disturb the judge's order with respect to the costs of the action. It is, therefore, not necessary to determine whether the Trustee should have been made personally liable for costs of the action in the event they had been awarded in favour of the Landlord.

45 It appears that, if the summary trial judge had granted relief from forfeiture, he would have imposed a condition that the Landlord be reimbursed its legal and other expenses. However, the Trustee may have elected not to fulfil the condition, and the judge's order would not have made the Trustee personally liable to pay those expenses. Nor, in my opinion, could the judge have properly made an order declaring the Trustee to be personally liable to the Landlord under para. 25(a) of the Lease. The Trustee was exercising its rights under s. 29 of the *Commercial Tenancy Act*, and its actions did not amount to an affirmation by it of the Lease.

46 Petco could potentially be liable to the Landlord for expenses under para. 25(a) of the Lease, but the Landlord's counterclaim was not being tried at the summary trial. The summary trial judge may have imposed a condition regarding reimbursement of the Landlord's expenses had he granted relief from forfeiture, but the counterclaim was not before him and he could not have

properly granted judgment against Petco in respect of the expenses. In my view, the issue of legal expenses payable under paras. 25(a) and 35 of the Lease should be left to the trial of the Landlord's counterclaim. If the Landlord wishes to pursue its claim for expenses against Petcetera's bankruptcy estate, it can file the claim in the bankruptcy proceedings.

Conclusion

47 I would allow the appeal to the limited extent of setting aside para. 1 of the order and replacing it with an order relieving against the forfeiture of the Lease brought about by its termination on April 2, 2009. In view of the limited success on this appeal, I would order the parties to bear their own costs.

***Hall J.A.*:**

I agree.

***D. Smith J.A.*:**

I agree.

Appeal allowed in part.

Tab 4

 Original

2016 ONSC 5284
Ontario Superior Court of Justice [Commercial List]

Emergency Door Service Inc., Re

2016 CarswellOnt 13556, 2016 ONSC 5284, 133 O.R. (3d) 59, 272 A.C.W.S. (3d) 257, 40 C.B.R. (6th) 104

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

EMERGENCY DOOR SERVICE INC. (Applicant)

Newbould J.

Heard: August 3, 2016
Judgment: August 22, 2016
Docket: 32-2131211

Counsel: Jordan Schultz, for Rytec Corporation
David Ullman, for Debtor, Emergency Door Service Inc.
Robert A. Klotz, for Proposal Trustee

Subject: Civil Practice and Procedure; Contracts; Insolvency; Intellectual Property; Property; Public
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Statutes
II Interpretation
II.3 Rules of interpretation
II.3.l Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
E Inc. sold and installed doors sold to it by third party — E Inc. filed proposal under Bankruptcy and Insolvency Act (BIA) — Door manufacturer R Co. claimed it had exclusive patent and trademark rights in respect of certain doors pursuant to its agreements with third party — R Co. brought actions against E Inc., and sought injunctions prohibiting E Inc. from selling third party's doors — R Co. brought motion for order that statutory stay of proceedings under s. 69.3(1) of BIA did not apply to motion for injunctive relief to prevent post-filing conduct by E Inc. — Motion dismissed — Section 69(1)(a) stays injunction proceeding taken to stop post-filing conduct of debtor who has filed notice of intention to file proposal — Automatic stay under s. 69(1)(a) not lifted — If R Co. were truly suffering material prejudice, it would have moved with far more haste — R Co.'s claim was essentially for lost market share and damages, which it quantified in its claim — Such claims usually do not attract injunctive relief — As selling and installing third party's doors represented about half of E Inc.'s business, abrupt and unplanned stop to that business would likely mean E Inc. would be unable to continue with restructuring — Without stay, cost and time involved in injunction proceedings would be very disruptive to attempts to negotiate successful restructuring — There was evidence R Co. was taking advantage of proposal proceedings on E Inc.
Statutes --- Interpretation — Rules of interpretation — Miscellaneous

E Inc. sold and installed doors sold to it by third party — E Inc. filed proposal under Bankruptcy and Insolvency Act (BIA) — Door manufacturer R Co. claimed it had exclusive patent and trademark rights in respect of certain doors pursuant to its agreements with third party — R Co. brought actions against E Inc., and sought injunctions prohibiting E Inc. from selling third party's doors — R Co. brought motion for order that statutory stay of proceedings under s. 69.3(1) of BIA did not apply to motion for injunctive relief to prevent post-filing conduct by E Inc. — Motion dismissed — Section 69(1)(a) stays injunction proceeding taken to stop post-filing conduct of debtor who has filed notice of intention to file proposal — Section 69(1)(a) should be interpreted in harmonious way with s. 11.02 of Companies' Creditors Arrangement Act — Interpretation of s. 69(1)(a) did not rest on placement of second comma in English version as being purposive interpretation of section, particularly as French version did not contain such comma — When two versions of bilingual enactment appear to say different things, courts are obliged by equal authenticity rule to read and rely on both versions — Discrepancy between two versions could be reconciled by interpreting sections taking into account purpose of BIA involved in proposals made by debtor — Purposive interpretation of s. 69(1)(a) interprets word "remedy", or in French "recours", to include injunctive proceedings to prevent post-filing conduct of debtor.

Table of Authorities

Cases considered by *Newbould J.*:

Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd. (2010), 2010 BCCA 469, 2010 CarswellBC 2852, 96 R.P.R. (4th) 157, [2010] 12 W.W.R. 189, 10 B.C.L.R. (5th) 235, 70 C.B.R. (5th) 180, 295 B.C.A.C. 201, 501 W.A.C. 201 (B.C. C.A.) — considered

Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc. (2005), 2005 CarswellOnt 9935, 29 C.B.R. (5th) 62, 277 D.L.R. (4th) 568 (Ont. S.C.J.) — considered

Ma, Re (2001), 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68, 143 O.A.C. 52 (Ont. C.A.) — followed

R. v. Fitzgibbon (1990), [1990] 1 S.C.R. 1005, 107 N.R. 281, 40 O.A.C. 81, 78 C.B.R. (N.S.) 193, 55 C.C.C. (3d) 449, 76 C.R. (3d) 378, 1990 CarswellOnt 172, 1990 CarswellOnt 996 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), *(*sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, *(*sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, *(*sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 65.1 [en. 1992, c. 27, s. 30] — considered

s. 69 — considered

s. 69(1) — considered

s. 69(1)(a) — considered

s. 69.1 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 69.6 [en. 2007, c. 36, s. 37] — considered

s. 69.6(1) [en. 2007, c. 36, s. 37] — considered

s. 69.6(2) [en. 2007, c. 36, s. 37] — considered

s. 69.6(3) [en. 2007, c. 36, s. 37] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(b) [en. 2005, c. 47, s. 128] — considered

s. 11.02(1)(c) [en. 2005, c. 47, s. 128] — considered

Copyright Act, R.S.C. 1985, c. C-42

Generally — referred to

Trade-marks Act, R.S.C. 1985, c. T-13

Generally — referred to

Words and phrases considered:

remedy

[T]he interpretation of section 69(1)(a) [of the *Bankruptcy and Insolvency Act*] [does not rest] on the placement of the second comma in the English version as being a purposive interpretation of the section, particularly as the French version does not contain such a comma.

The way to . . . make a purposive interpretation of section 69(1)(a) is to interpret the word "remedy", or in French le mot "recours", to include injunctive proceedings to prevent post-filing conduct of a debtor.

MOTION for order that automatic stay provided under s. 69(1)(a) of *Bankruptcy and Insolvency Act* did not apply.

***Newbould J.*:**

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

2 Rytec Corporation ("Rytec") has commenced an action against EDS in the Federal Court and in the Court of Queen's Bench in Alberta in which it seeks in both actions an injunction against EDS. Rytec now moves for an order that the statutory stay of proceedings under section 69.3(1) of the BIA does not apply to a motion which it says it intends to bring in the Federal Court to prevent post-filing conduct on the part of EDS. [1]

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

Relevant facts

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

5 Among the products that are sold and installed by EDS are products sold to EDS by an entity known as Efaflex (Efaflex Tor-Und Sicherhaltssysteme GmbH & CO. KG) ("Efaflex"). Mr. Cornelius of EDS states in his affidavit that the doors which

are sold and installed by EDS which it acquires from Efaflex are, to the best of EDS's knowledge, based on intellectual property owned by Efaflex. EDS has entered into a licence agreement with Efaflex for the sale of these doors.

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

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

(a) On March 9, 2004, Rytec and Efaflex entered a new, non-cancellable "Technology License Agreement" in which Rytec agreed to assign the Rytec Patents and Applications to Efaflex in exchange for the exclusive license to make, have made, use, sell and offer to sell, install, maintain and service Spirals in North America, including Canada.

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

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

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

9 EDS claims under certain agreements with Efaflex as follows:

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

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

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

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

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

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

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

Does the stay of proceedings in the BIA apply?

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

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

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

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

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

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

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

65.1. He held however that section 69.1 could not prevent termination of the lease as the termination was not the exercise of a remedy for the recovery of a claim provable in bankruptcy. Tysoe J.A. stated:

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

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

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

22 Tysoe J.A. referred to and relied on a statement of Justice Cory in *R. v. Fitzgibbon* [1990 CarswellOnt 172 (S.C.C.)] that the aim of section 69.3 (1) is to provide a means of maintaining control over the distribution of the assets and property of the bankrupt and reflects one of the primary purposes of the BIA, namely to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis.

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

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

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

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

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

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

28 Taking into account the purposes of insolvency legislation was discussed by Justice Deschamps in *Ted Leroy Trucking Ltd., Re*, [2010] 3 S.C.R. 379 (S.C.C.) in considering the CCAA. At para. 70 she stated:

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

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

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

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

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

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

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

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

33 One may ask why an exception from the stay provisions in these broad terms was required for regulatory proceedings if not covered in sections 69 and 69(1). As an example, under provincial securities legislation, it is common for proceedings to be taken against a bankrupt who has contravened securities legislation for non-monetary claims such as orders preventing future access to the capital markets. If it is right that the stay in section 69(1) does not apply to such proceedings because they are not for the recovery of a claim provable in bankruptcy, the broad exception in section 69.6 would not be necessary. Moreover, one of the exceptions in section 69.6(3) preventing regulatory proceedings from continuing if it can be established to the satisfaction of a court that a viable proposal could not be made in respect of the insolvent person, confirms the legislation's intent that non-monetary claims should not be permitted if they affect the chances of a successful proposal.

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

35 In *Ted Leroy Trucking Ltd., Re* Justice Deschamps stated:

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

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

37 In my view every attempt should be made to interpret the provisions of section 69(1)(a) in a harmonious way with section 11.02 of the CCAA, thus giving effect to the *Century City* principles. This can be done by interpreting the word "remedy" to include injunctive proceedings to prevent post-filing conduct of a debtor that has filed a proposal. If a debtor were to misuse this protection from a stay, an application could be made to lift the stay.

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

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

Should the stay be lifted?

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

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

41 Thus Rytec must establish to the satisfaction of the court that it is likely to be materially prejudiced by the stay or that it is equitable on other grounds to lift the stay. If it does, it is still a matter of discretion for the court as the section provides that the court may lift the stay if so satisfied.

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

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

example, if it were apparent that the proposed action had little prospect of success, it would be difficult to find that there were sound reasons for lifting the stay.

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

44 Mr. Grosso also states that Rytec has suffered and continues to suffer through loss of market share, loss of distinctiveness of Spirals, loss of customer goodwill, loss of profits and loss of Rytec's investment in building the market and brand for Spiral doors in Canada. This results in significant prejudice to Rytec's business in Canada and the U.S. He says that since EDS began competing with Rytec, the sales of Rytec Spirals has plummeted. There is little to support the assertions.

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

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

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

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

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

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

51 There is evidence that Rytec is taking advantage of the proposal proceedings on EDS. Mr. Cornelius in his affidavit states on information and belief that he was told by Mr. Jakob Hess, a senior executive at Efaflex that on June 16, 2016, Mr. Grasso

sent an email to the owners of Efaflex and advised that EDS was bankrupt and unable to continue to conduct business in Canada. As a result of these statements Efaflex threatened to place EDS on credit hold and stop the supply of doors which had been ordered prior to the commencement of the NOI process. There is no affidavit from Mr. Grasso denying this evidence. I have little doubt that Rytec is quite prepared to see the failure of EDS if the injunction proceedings mean the end of the line for EDS.

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

Costs

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

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

Motion dismissed.

Footnotes

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

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

End of Document

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF RGN BRITISH COLUMBIA XXIII LIMITED PARTNERSHIP

Court / Estate No.: 31-2688719

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF HOMER STREET OFFICE PROPERTIES INC. (Returnable December 14, 2020)

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