

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF THE *BULK SALES ACT*,
R.S.O. 1990, c.B.14, AS AMENDED

AND IN THE MATTER OF A TRANSFER OF ASSETS FROM ELLEN'S
FOOD GROUP INC. TO TFI FOODS LTD.

BETWEEN:

**DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS TRUSTEE
IN BANKRUPTCY OF ELLEN'S FOOD GROUP INC.**

Applicant

and

TFI FOODS LTD.

Respondent

SUPPLEMENTARY FACTUM OF THE APPLICANT

**(application to set aside transfer of assets, previously returnable November 12, 2014,
returnable November 20, 2014)**

November 13, 2014

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PART I - OVERVIEW

1. The Applicant (the “**Trustee**”) provides this Supplementary Factum to address issues raised in the Responding Application Record, delivered on November 7, 2014, pursuant to the Order of Justice Wilton-Seigel dated November 3, 2014, following the delivery of the Trustee’s Factum on October 31, 2014. Capitalized terms herein have the meaning set out in the Trustee’s Factum dated October 31, 2014, unless otherwise noted.
2. The Responding Application Record provides no facts or other evidence that is relevant to any material issue in the Application.

PART II - ISSUES AND LAW

A. Value of Assets

3. TFI states that the transfer of a federal meat plant licence to it was an important aspect of the Transaction.¹ David Lam, TFI's President, values the licence at approximately \$400,000.² However, the factors that may have been important to TFI, and the specific values that it ascribed to such factors, such as the transfer of a licence, are irrelevant to the issues in the Application.

4. However, Mr. Lam, who claims to have a view as to the value of the equipment, based on his past experience in such matters, acknowledges that TFI agreed to pay \$954,000 for all of the Purchased Assets, which included the value of the licence.³ Thus, TFI has admitted the value of the Purchased Assets, and therefore the value for which TFI must account, being \$954,000 plus HST, for a total of \$1,078,000.

B. HST Refund

5. TFI states that it applied for and received an HST refund.⁴ This is of no relevance whatsoever to this Application. While an HST refund may be relevant to TFI's financial position, it is wholly unrelated to the value of the Purchased Assets, and therefore, the amount for which TFI is liable to account.

¹ Affidavit of David Lam sworn on November 6, 2014 ("Lam Affidavit"), Responding Application Record ("RAR"), p. 2, paras. 5-6

² Lam Affidavit, RAR, p. 3, para. 9

³ Lam Affidavit, RAR, pp. 3-4, para. 8 and 10

⁴ Lam Affidavit, RAR, p. 4, para. 15

C. Inquiries as to creditors

6. Mr. Lam states that he asked Pun whether any of the Company's creditors ought to be paid out, to which Pun replied that HSBC was the only major creditor.⁵ However, this does not satisfy any of the requirements under the BSA. Section 4 of the BSA requires a purchaser to obtain a statement of creditors and the amounts payable to each one, verified by *affidavit*, before paying or delivering any part of the proceeds of sale (except for up to 10% of the purchase price to be held in trust).⁶ There is no evidence that this requirement were met.

7. Moreover, this so-called attempt to obtain information on the Company's creditors is markedly different from what transpired in the case of *National Trust Co. v. H & R Block Canada Inc.* ("*National Trust*")⁷, referenced in the Trustee's Factum. In *National Trust*, there was a term in the sale agreement that required the proceeds of sale to be paid, and they in fact were so paid, to the vendor's creditors in accordance with their respective priorities.⁸

8. In the case at bar, the sale agreement does not contain any such term. Indeed, there is no evidence that TFI even made inquiries as to the amounts owing to the Company's creditors, let alone, any effort to ensure that creditors of the Company were paid in accordance with their respective priorities.

9. The only evidence provided by TFI is, simply, that it was told that HSBC was a creditor. It obtained and now has no evidence that that was the case, or that any part of the sale proceeds were even paid to HSBC. TFI relies solely on the contents of the Trustee's Report and the Receiver's Report.

⁵ Lam Affidavit, RAR, p. 4, para. 16

⁶ *Bulk Sales Act*, R.S.O. 1990, c. B-14, s. 4

⁷ *National Trust Co. v. H & R Block Canada Inc.*, 2003 SCC 66, [2003] 3 SCR 160

⁸ *National Trust*, *supra* at para. 40

10. However, the Trustee's Report simply restates what is contained in the Receiver's Report, and the Receiver's Report makes no specific findings with respect to the relationship between the sale proceeds and the payment to HSBC. Indeed, the Receiver only notes that deposits corresponding to the installments paid on account of the purchase price were received into the Company's bank account, and that on July 3, 2012, HSBC received a payment of \$150,000.⁹ This is again quite different from what transpired in *National Trust*.

11. TFI has not only failed to produce any evidence that it complied with the BSA, it has failed to produce any evidence that it even *attempted* to comply with the BSA.

D. That HSBC had knowledge of the Transaction

12. Mr. Lam states that HSBC was also TFI's banker and that he discussed the Transaction with a representative of HSBC, and that based on this, HSBC was "fully aware of the Transaction."¹⁰

13. The fact that TFI told a representative of HSBC, a secured creditor, about the Transaction is irrelevant. As before, this does not constitute compliance with the BSA. The onus was on TFI to take steps, as required by the BSA, to identify the creditors of Ellen's and the amounts owing to them, and to then take additional steps with respect to payment of the purchase price. None of that was done.

⁹ Receiver's Report, Application Record ("AR"), Tab D, pp. 39-40, paras. 38, 39, and 42

¹⁰ Lam Affidavit, RAR, p. 4, paras. 18 and 19

E. Challenge to Dr. Lee's Claim

14. Mr. Lam also notes that the promissory note (the “**Note**”) in favour of Dr. Sai Kui Lee was given by Pun, and that the Company was a guarantor.¹¹ Mr. Lam further observes that the financing statement in respect of Dr. Lee’s security interest in respect of the Company’s assets was registered two years after the date of the Note, and several months after the Transaction.¹² Finally, Mr. Lam appears to raise some concerns with respect to the actual amounts owing to Dr. Lee, and that Mr. Lam did not see information indicating that Dr. Lee called on the guarantee.¹³

15. However, all of these statements are similarly irrelevant. The Trustee, as an officer of the court, with statutory duties under the BIA will at the appropriate time call for the filing of proofs of claim and will assess the validity of all such claims as part of the administration of the bankrupt. Dr. Lee’s claim will be evaluated as part of that process, both as to the nature of the claim and its quantum.

16. Even if Dr. Lee’s secured claim is invalid, or the quantum of his claim is a lesser amount, there are many other creditors who were creditors of Ellen’s at the time of the Transaction. The value of the total claims would still likely exceed the value of the Purchased Assets. Thus, TFI would continue to be liable to account for the value of Purchased Assets, and as such, TFI’s complaints with respect to Dr. Lee’s claim are irrelevant to the issues on this Application.

¹¹ Lam Affidavit, RAR, p. 5, para. 23

¹² Lam Affidavit, RAR, p. 5, para. 24

¹³ Lam Affidavit, RAR, pp. 6-7, para. 26-31

F. TFI's Claim in the Bankruptcy

17. Mr. Lam also states, baldly, that if the Transaction is void, and TFI is required to account to the Trustee for the value of the Purchased Assets, then TFI would be making a claim in the bankruptcy for the full amount of the Transaction.¹⁴

18. However, any such claim by TFI would not be a provable claim in the bankruptcy as TFI's claim would only arise at the time that TFI actually pays the value of the assets into the estate, which would clearly be after the date of bankruptcy.¹⁵ Thus, any claim by TFI for amounts overpaid to Ellen's, if such a claim were to be made, would be at best a post-filing claim.

G. Summary

19. The Trustee submits that TFI has not tendered any evidence of compliance under the BSA. As set out in the Trustee's Factum, the burden is on TFI to provide evidence of compliance in order to uphold a sale in bulk.¹⁶

20. Despite several opportunities to provide evidence of compliance to the Receiver, to the Trustee, on this Application, in accordance with the timetable, and after expiry of the time provided in the timetable, TFI has been unable to provide any evidence of compliance with the BSA and as such, ought to be held liable thereunder.

21. Nothing provided in the Responding Application Record changes that fact, or the appropriate result in this application.

¹⁴ Lam Affidavit, RAR, p. 7, para. 32

¹⁵ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 121(1)

¹⁶ BSA, *supra*, s. 18

ORDER REQUESTED

22. The Trustee therefore requests once again that this Court:

- (a) declare that the Transaction constitutes a sale in bulk and is void for failure to comply with the BSA; and,
- (b) order TFI to pay to the Trustee the sum of \$1,078,020.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of November, 2014.


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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *National Trust Co. v. H & R Block Canada Inc.*, 2003 SCC 66, [2003] 3 S.C.R. 160

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Bulk Sales Act

R.S.O. 1990, CHAPTER B.14

Statement of creditors

4. (1) The buyer, before paying or delivering to the seller any part of the proceeds of the sale, other than the part mentioned in section 6, shall demand of and receive from the seller, and the seller shall deliver to the buyer, a statement verified by the affidavit of the seller in Form 1.

Contents of statement

(2) The statement shall show the names and addresses of the unsecured trade creditors and the secured trade creditors of the seller and the amount of the indebtedness or liability due, owing, payable, or accruing due, or to become due and payable, by the seller to each of them, and, with respect to the claims of the secured trade creditors, the nature of their security and whether their claims are due or, in the event of sale, become due on the date fixed for the completion of the sale.

Burden of proof

18. In an action or proceeding in which a sale in bulk is attacked or comes in question, whether directly or indirectly, the burden of proof that this Act has been complied with is upon the person upholding the sale in bulk.

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

Claims provable

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

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-and-

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Applicant

Respondent

Court File No. CV-14-10628-00CL

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