CITATION: Deloitte Restructuring v. TFI Foods, 2014 ONSC 7476
COURT FILE NO.: CV-14-10628-00CL
DATE: 20141230

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Deloitte Restructuring Inc., in Its Capacity as Trustee in Bankruptcy of Ellen's Food Group Inc., Applicant

AND:

TFI Foods Ltd., Respondent

BEFORE: Penny J.

COUNSEL: *M. D. Abramovitz* for the Applicant

K. Borg-Olivier and R. Walker for the Respondent

HEARD: November 20, 2014

JUDGMENT

Overview

[1] This is an application for:

(a) a declaration that a July 3, 2012 transaction between Ellen's Food Group and TFI Foods in 2012 was a bulk sale;

(b) a declaration that the transaction is void for failure to comply with the *Bulk Sales Act*, R.S.O. 1990, c. B.14;

(c) a declaration that the respondent is liable to account to the Trustee for the value of the property purchased in the transaction; and

(d) an order requiring the respondent to pay to the Trustee the consideration paid for the transaction, being the sum of $1,078,020 plus interest.

[2] For the reasons that follow, I grant the application in part. The sale was a bulk sale. It did not comply with the BSA and must be declared void, in part. The sale proceeds were clearly used to pay $150,000 to a secured creditor, HSBC. TFI is not liable to any creditors for that amount. The evidence is unclear what additional amounts may be owed to HSBC. HSBC, Dr. Lee, CRA and perhaps others are "creditors" within the meaning of s. 16(2) of the BSA and are entitled to a remedy. The evidence does not permit the precise determination of amounts, such as HST, owing as of July 3, 2012. If the parties are not able to agree on these amounts, a further application may be brought on better evidence.

Background

[3] Ellen's Food Group was in the business of manufacturing and distributing frozen foods. In July 2012, TFI acquired all Ellen's manufacturing equipment for $954,000 plus HST for a total of $1,078,020. Following the transaction, Ellen's made payments to various suppliers and creditors, related entities and to the owner, Ellen Pun.

[4] In February 2013, the applicant was appointed by the court as receiver of Ellen's under s. 243 of the BIA.

[5] Following its appointment, the applicant went to the former premises of Ellen's to discover that all the equipment had been sold. The applicant tried unsuccessfully to obtain Ellen's books and records but was only able to obtain limited documentation.

[6] In November 2013, Ellen's was assigned into bankruptcy and the applicant was appointed trustee.

[7] Neither the receiver nor the trustee received any funds. Pun herself is also bankrupt.

[8] The claim for recovery of some or all of the proceeds of sale paid by TFI is said to represent the only asset in the Ellen's bankruptcy (and, therefore, the only prospect for recovery by Ellen's creditors).

[9] TFI concedes that it failed to comply with the BSA. In particular, TFI did not: a) obtain a statement listing Ellen's secured and unsecured trade creditors and the amounts of the debts or liabilities owing to each; b) cause adequate provision to be made for immediate payment of these creditors; c) deliver the proceeds of sale to a trustee for the benefit of Ellen's creditors; or d) seek a judicial exemption.

[10] The applicant says that under s. 16 of the BSA the sale of Ellen's equipment to TFI is void and that TFI is therefore personally liable to account to the creditors of the seller for the value of the proceeds of sale.

[11] TFI, while conceding that it failed to comply with the BSA, argues that:

(1) the principal creditors are not "proper creditors" under the BSA; and

(2) the amounts sought to be recovered are speculative or excessive.

Issues

[12] Thus the two main issues on this application are:

(1) whether Dr. Lee, CRA, HSBC and perhaps others are entitled to the protection of the BSA at all; and

(2) whether the amounts claimed from TFI have been established as amounts properly owing to Ellen's creditors.

Analysis

Trade Creditors v. Creditors

[13] The BSA defines a trade creditor to be a person to whom the seller is indebted for "stock, money or services furnished for the purposes of enabling the seller to carry on business."

[14] The evidence is that Dr. Lee loaned money personally to Pun. Ellen's appears to have been a guarantor of the debt. There is no evidence demand was ever made on the guarantee. The security interest was not registered against Ellen's for two years after the debt was incurred and several months after the sale. Pun apparently continued to make payments on the loan for several months after the sale closed.

[15] The trustee lists CRA as a creditor of Ellen's in the amount of $637,000. $124,020 was the HST payable on the TFI purchase. TFI received a credit against the HST it paid on the sale.

[16] TFI argues that neither Dr. Lee nor CRA were trade creditors of Ellen's because they did not furnish stock, money or services for the purposes of enabling Ellen's to carry on business. TFI relies on the decision of the Supreme Court of Canada in *National Trust Co. v. H&R Block Canada Inc.*, [2003] 3 S.C.R. 160, 2003 SCC 66 for the proposition that "a creditor was due only what he might have recovered if the buyer had complied with the Act; anything more would be unjust enrichment."

[17] TFI reasons that, since neither CRA nor Dr. Lee would have been listed as trade creditors if the BSA had been complied with, no amount of the value of the purchase price would have been apportioned to them in any event.

[18] I am unable to agree with TFI. The *National Trust* case is distinguishable. In *National Trust*, all the proceeds of sale went to pay off a secured creditor, even though the BSA had not been complied with. The court held that requiring the purchaser to pay more to an unsecured creditor would constitute unjust enrichment because the unsecured creditor, which ranked in priority behind the secured creditor which received all the proceeds, would have received nothing even if the BSA had been complied with.

[19] The *National Trust* case does not address the simpler question of whether a non-trade creditor may attack a sale for non-compliance with the BSA where a secured creditor did not receive the entire proceeds of sale.

[20] The governing case concerning this latter scenario is, in my view, *Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.* (1998), 162 D.L.R. (4th) 376 (Ont. C.A.). There, Rosenberg J.A., writing for the court, found that merely because "adequate provision" need not be made for the payment of non-trade creditors under s. 8(1)(c) does not dispose of the issue. There are *two* ways in which a buyer might complete a bulk sale. Making "adequate provision" is the first. The second is by payment to a trustee. The trustee's responsibility is to distribute the proceeds to *all* creditors, not just trade creditors (s. 12). Rosenberg J.A. wrote:

> Thus, even though a creditor is not a person for whom provision need be made under s. 8, it is entitled to apply to set aside the sale.

A non-trade creditor still has a remedy under the BSA. Section 16(2) of the BSA makes the buyer personally liable to "the creditors." The availability of that remedy is not limited to trade creditors.

[21] Although the majority in *National Trust* was critical of one aspect of the *Sidaplex-Plastics* decision, it was not this aspect. Rather, the Supreme Court of Canada was critical of the mechanical exclusion of discretion to affect a result that could not possibly have obtained even if the BSA had been fully complied with. That is not the case (at least, not entirely the case) here.

[22] As noted by the Supreme Court in *National Trust,* the primary purpose of the BSA is to protect the interests of all creditors, secured and unsecured alike, whose debtors have disposed of all or substantially all of their assets. As a secondary purpose, the BSA ensures the fair distribution of the proceeds of the sale in bulk; specifically, that the creditors of a seller receive their ratable share of the proceeds of a sale, based on their priority ranking, and are, therefore, not prejudiced by the sale. The clear legislative intent is to deter fraud and to ensure that creditors are properly paid. The Court wrote (at para. 30):

> In light of the objectives of the *Bulk Sales Act*, a purposive approach to the interpretation of the buyer's duty to account under s. 16(2), after having failed to comply with the Act, requires that the buyer pay to the seller's creditors the amount that such creditors were deprived of as a result of the non-compliant sale. In other words, when a buyer fails to conform with the Act, he or she will be liable to the creditors for any shortfall they incurred.

[23] Here, it seems Pun mislead TFI about Ellen's creditors and diverted the proceeds of sale to uses other than the payment of those creditors. This is precisely the evil which the provisions of the BSA were designed to prevent. While it is true that the result of voiding a bulk sale may be disruptive and somewhat draconian, the BSA has not been repealed in Ontario.

[24] As between creditors and a purchaser, the risk of non-compliance falls on the purchaser. It was within TFI's power to ensure Ellen's creditors would not be disadvantaged or to seek a judicial exemption. Having failed to do so, TFI must bear the cost, subject to a credit for all amounts paid to creditors from the proceeds (as per *National Trust*) and proper proof of the amounts of valid creditor claims as of July 3, 2012.

[25] Dr. Lee and CRA, as creditors, therefore, have a remedy under the BSA to the extent the proceeds of sale were not paid to a creditor with priority. I will return to this issue below when dealing with the evidence of debts owing at the time of sale.

[26] TFI's next argument with respect to Dr. Lee is that, because there is no evidence demand was ever made on the Ellen's guarantee and no evidence about the guarantor's rights and remedies under its guarantee, Dr. Lee's claim against Ellen's is "contingent" and does not qualify as a "debt" under the BSA.

[27] In *Pizzolati & Chittaro Manufacturing Co. Ltd. v. May*, [1072] 2 O.R. 606 (C.A.) it was held that "debt" has a well-defined meaning as a sum payable in respect of a liquidated money demand which does not include an unliquidated claim for damages. Thus a person with an unliquidated claim for damages is not a creditor under the BSA.

[28] I am unable to conclude that *Pizzolati* assists TFI in this case. The fact that there may be contractual or common-law preconditions to the enforcement of a guarantee does not render the claim a claim for unliquidated damages. Form 4 under the BSA lists, as liabilities to be disclosed, "contingent liabilities" such as "endorsements and guarantees." A contingent liability is not the same as an unliquidated claim.

[29] Thus, I cannot agree that Dr. Lee's claim was unliquidated and therefore excluded from the BSA.

[30] TFI also argues that a significant portion of the purchase price was not for "stock, money or services" but, rather, for Ellen's licence. I must dismiss this argument. There is simply no evidence, beyond TFI's after-the-fact, self-serving affidavit, to support this position. None of the contemporaneous documents allocate any portion of the sale price to the licence and there is no independent evidence that the licence had any value.

[31] Finally, TFI argues that HSBC is disqualified from seeking relief under the BSA because of its alleged involvement as both TFI's banker and as a lender to Ellen's which received partial payment from Ellen's on July 3, 2012.

[32] I fail to see how HSBC's status as banker for both parties relieves TFI of the consequences of failing to comply with the BSA. There is no evidence which could possibly rise to the level of HSBC having knowingly assisted Ellen's or placing on HSBC an obligation to advise TFI about Ellen's disposition of the sale proceeds. I therefore reject this argument.

Speculative or Excessive

HSBC

[33] The applicant concedes that any amount otherwise recoverable from TFI under s. 16 of the BSA must be reduced by any amounts paid to creditors from the sale proceeds.

[34] The receiver's report states that on July 3, 2012, Ellen's made a partial payment of its debt to HSBC of $150,000. This was the day TFI paid Ellen's the final installment of $278,000 on the sale.

[35] In the financial circumstances of Ellen's described in the receiver's report, a strong inference arises, and I find, that the HSBC payment of $150,000 came from the funds paid by TFI to Ellen's on July 3, 2012. Accordingly, on the strength of this finding, I find $150,000 of the sale proceeds was paid to the secured creditor, HSBC. TFI cannot, therefore, be called upon to pay that amount a second time.

[36] The evidence was not challenged that HSBC was still owed $279,276.17 as of July 3, 2012. TFI must account for and pay this amount to the trustee.

CRA/HST

[37] HST was exigible on the sale in the amount of $124,020. There is no evidence that Ellen's remitted any of this tax to CRA. CRA conducted a source deduction audit in 2013. In

August 2013 CRA issued a notice of reassessment in the total amount of $633,900. CRA filed a proof of claim in the Ellen's bankruptcy for about $624,000 owing from the period 2010 to July 31, 2012. The applicant argues that all of this tax was a debt and is subject to s. 16 of the BSA.

[38] The evidence discloses that by the end of July 2012, Ellen's owed about $637,000 on account of HST. The evidence suggests that that only about $50,000 of this amount accrued after the transaction in issue. I conclude, therefore, that CRA's claim, in the context of this application against TFI, has a value of about about $585,000, being the approximate amount CRA was owed to and including the date of the sale.

Dr. Lee

[39] The evidence concerning what Dr. Lee was owed as of July 3, 2012 is highly unsatisfactory and internally contradictory. The trustee has not proferred any accounting of what Dr. Lee was owed. It has, instead, presented only a claim by Dr. Lee's counsel which seems at odds with other information about payments by Pun against her debt to Dr. Lee. It is therefore impossible on the evidence to know what, if any, additional liability TFI may have on account of amounts owing to Dr. Lee although it seems clear that there is some.

Other Creditors

[40] The receiver's report says that between $330,000 and $367,000 was also owed to Ellen's unsecured creditors. However, there is evidence that significant amounts included in this number may not have been owed by Ellen's at all but rather by some other Pun-owned entity. In the absence of clear evidence that Ellen's in fact owed money to these additional creditors, I do not think a claim lies against TFI for these amounts.

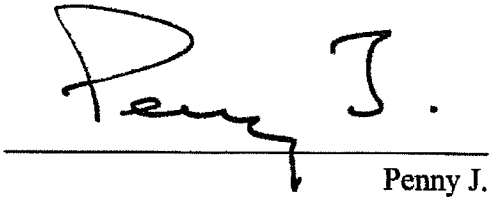
Conclusion

[41] In conclusion, I find that TFI is not liable to pay to the trustee $150,000 of the amount claimed because that amount was paid to HSBC from the proceeds of sale. TFI is liable for accrued HST owed by Ellen's to and including the sale, which I estimate at $585,000, although this number must be confirmed through negotiation or further evidence. The evidence filed does not enable me to determine what, if any, additional amounts may be owing on account of actual debts owed by Ellen's to other creditors as of July 3, 2012.

[42] I expect the parties to obtain all reasonably available data on valid claims of creditors for purposes of determining what, if any, additional amounts are properly owing by TFI on account of the value of the proceeds of sale. There should be a negotiated solution but, if accommodation cannot be reached, a further application may be made to the court for purposes of finalizing the amount for which TFI is properly liable in accordance with the principles established in these Reasons.

Costs

[43] Although success was divided, the applicant was substantially successful on the application. I fixed costs payable by TFI to the applicant in the amount of $15,000.



Penny J.

Date: December 30, 2014