CITATION: Eureka 93 Inc. et. al. (Re), 2020 ONSC 4703
COURT FILE NO.: 33-2618511
DATE: 2020/08/05

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF EUREKA 93 INC. OF THE CITY OF OTTAWA IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THREE RELATED INTENDED PROPOSALS (LIVEWELL FOODS CANADA INC., ARTIVA INC., AND VITALITY CBD NATURAL HEALTH PRODUCTS INC.)

AND IN THE MATTER OF SECTION 192 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, c. C-44, AS AMENDED, AND IN THE MATTER OF A PROPOSED ARRANGEMENT OF 12112744 CANADA LIMITED AND INVOLVING LIVEWELL FOODS CANADA INC. AND ARTIVA INC.

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea & Benoit Duchesne, for the debtors

Elliot Birnboim & Michael Crampton, for Dominion Capital LLC (noteholders)

Chad Kopach and Eric Golden for the Proposal Trustee

Hartley Bricks for the Proposal Trustee

Benjamin Blay for the Interim (DIP) Lenders

Barbara VanBunderen for Family Lending

HEARD: July 31, 2020

CASE CONFERENCE ORDER & DIRECTION

[1] A case conference was convened at the request of the parties to this ongoing insolvency proceeding. A case conference is a useful device for obtaining orders and directions which do not require an extensive motion record. Although in some circumstances, the court can entertain an oral motion at a case conference, a case conference is not an appropriate forum for determining or deciding contested issues of fact.

[2] The following are relevant events in this proceeding.

a. On February 19th, 2020 the Debtors, having served notice of four intended proposals under s. 50.4 (1) of the BIA, brought a motion for administrative consolidation, extension of time and for the approval of DIP financing.

b. The intended proposals (now proposals) are as follows:

i. Artiva Inc. (33-2618510)

ii. Livewell Foods Canada Inc. (33-2618512)

iii. Vitality CBD Natural Health Products Inc. (33-2618513); and

iv. Eureka 93 Inc. (33-2618511)

c. Eureka 93 Inc. was a publicly traded company (on the TSC Venture Exchange and then the Canadian Stock Exchange) until there was a cease trading order by the OSC.

d. These proposals deal with only four of the corporations in the Eureka 93 Group, but they are interrelated because Eureka 93 is the owner of the shares of Livewell Foods Canada Inc. and Vitality CBD Natural Health Products Inc. Livewell Foods Canada Inc. in turn owns the shares of Artiva Inc. The shares of Livewell and Vitality were pledged as security to one of the secured creditors.

e. The focus of the proceeding to date has been the attempt by the debtors to salvage value from the operations of Artiva Inc., which is the owner of a farm property and greenhouse facility in Ottawa licenced by Health Canada to produce and sell cannabis.

f. The main purpose of the DIP financing was to complete the construction of the largely completed greenhouse facility so that Artiva Inc. could commence production of Cannabis seedlings (clones).

g. The motion was opposed by the noteholders and supported by the Proposal Trustee, the first mortgagee on the Artiva property, the proposed DIP lender and the debtors. Other creditors were either in support of the financing or were neutral. I granted an order on March 9th, 2020. (See reasons at 2020 ONSC 1482)

h. The order was granted because the Court was persuaded that there was some possibility of a viable proposal with a potentially better outcome for the creditors if the financing was granted than there would be in the bankruptcy which would otherwise result. One factor in making that order was the evidence in relation to the value of the land. Another was the prospect of a market for the cannabis seedlings which the facility was expected to produce.

i. Since the granting of the initial order, Ontario has been in various stages of lockdown due to the novel coronavirus (COVID-19). This has impacted court operations as well as most businesses. Despite COVID-19, the facility owned by Artiva was largely completed and cannabis cultivation has begun.

j. Unfortunately, the contract for sale of the cannabis clones has fallen through and a new valuation of the land suggests that the value of the property has declined by almost a third since the original appraisal was completed.

k. Although the proposals have now been developed and put to meetings of creditors, the proceeding has been delayed because of factual and procedural disputes between the noteholders and the debtors.

l. The noteholders have not been prepared to vote for or against the proposals without further information. In particular, they wish to obtain their own appraisal of the land owned by Artiva, they wish to examine Mr. Poli and others concerning the disposition of assets in the United States and they wish to obtain an accurate accounting for the amounts owing under the first mortgage.

m. On July 16th, 2020, I heard a motion by the noteholders seeking production of information and documents from the debtor's appraiser, seeking cross examination of Mr. Poli and seeking examination of other witnesses. I granted an order for production of information and documents, but I dismissed the motion for cross examination in advance of the scheduled meetings of creditors. (See 2020 ONSC 4415).

n. The meetings of creditors to vote on the proposals have now taken place. There were three votes (Artiva & Livewell jointly, Vitality and Eureka 93) but the noteholders voted to postpone the votes and to seek further investigation and examinations pursuant to s. 52 of the BIA. While this possibility was contemplated at the time of discussing the motion, there is now a new wrinkle.

o. The debtors have challenged whether or not the noteholders are creditors of Artiva and entitled to vote on the Artiva proposal. Firstly, in the proposal they have assessed the value of Dominion's security as $0, based on the fact that the land is now said to be worth less than the total of the first mortgage and the DIP financing. Secondly, and independently of that question, they challenge the status of the noteholders as unsecured creditors because Artiva's only liability to the noteholders is pursuant to a guarantee.

p. It should be noted that the Trustee has, at this point, nether accepted nor rejected the noteholders proofs of claim. That is apparently because the first proof of claim was submitted without supporting documents and the revised proof of claim was submitted with what I am told was over 400 attached pages categorized by the debtors as a "data dump". The trustee had not completed a review of those documents at the time of the case conference and had not issued a notice under s. 135 of the BIA.

q. The vote at the Artiva meeting of creditors to postpone the vote and to conduct investigation and examinations was taken pursuant to s. 108 (3) of the BIA. That is to say the chair marked the proof of claim as objected to and the vote as subject to being invalidated in the event of the objection to the vote being sustained.

r. The votes on all proposals are now postponed by reason of the investigations sought by the noteholders and the inability of the debtors and noteholders to reach agreement on the voluntary production of documents or examination of witnesses.

s. The noteholders have not stated definitively that they will vote against the proposals. It is their position that they may or may not vote for the proposals, but they wish to make a fully informed decision.

t. At this point in time, the debtors wish to bring an application to invalidate the noteholder vote on the Artiva proposal pursuant to s. 108 (3) but have not done so.

u. At this point, there is no appeal to the court by the noteholders pursuant to s. 50.1 (4), 51 (3) or any other provision of the BIA permitting an appeal to the court. Instead the noteholders seek an order from the court enforcing the outcome of the vote, setting a timetable for the debtors to deliver an application and requiring the Trustee to deliver a Form 77.

[3] It is not clear to me, from the skeleton outline of arguments against the background of disputed facts, precisely what the basis is for the debtors challenging the claim of the noteholders under Artiva's guarantee. In the original motion materials, Mr. Poli deposed that the debtors were indebted to the noteholders in the amount of up to $8.5 million. There appears to be no doubt that the noteholders are the largest creditor of Eureka 93 and the vote in that proposal would be valid.

[4] Prior to these insolvency proceedings in Ontario, there were dealings with two facilities in the United States. The noteholders obtained the interest of the debtors in a facility in New Mexico in exchange for reducing the noteholder debt by $3 million. As I understand it, the noteholders are now trying to reduce the amount of that write down of debt. This transaction may also be part of the argument now advanced by the debtors that Artiva is not liable under its guarantee.

[5] The second American facility was in Montana. Apparently, another creditor seized the equipment and plant. This is the subject matter of the proposed examination of Mr. Poli. The noteholders believed they were in a first secured position in relation to this property, but then were told that the creditor they had believed was unsecured was actually in first place. The noteholders wish to conduct an investigation into this transaction to see if there is value to be unlocked and applied against the noteholder debt.

[6] Factual disputes that were mentioned during the case conference include the following:

a. What amount is owing by Artiva to the noteholders and does any amount of that debt remain secured against the land and improvements?

b. What amount of unsecured debt is owing to the noteholders by each of the corporations making proposals and what number of votes do the noteholders have in each proposal?

c. What occurred in Montana to permit an unsecured creditor that was related to the debtors to become a secured creditor that is unrelated? Do the noteholders have any recourse which might reduce the amount owing to them or increase the recovery for the benefit of creditors generally?

d. Was the release of the New Mexico facility to the noteholders properly valued and a legitimate reduction in the amount of the debt?

e. Were any of the estimates of value of the Artiva land obtained by the debtors materially misleading? What is the actual value of the property with the completed improvements? What, if any, additional value does the business of Artiva have as a going concern even if the cannabis licence is not transferrable?

[7] It is open to the court to order a trial of an issue or an inquiry be made pursuant to s. 187 (8) of the BIA and this includes the possibility of either conducting a trial or referring the matter to a master or other court official. I might be prepared to make such an order if the issues are clearly defined, if there is no efficient procedure for determining the question pursuant to another provision of the BIA and if resolution of the issue would advance matters and prevent procedural gridlock.

[8] On the other hand, the court must be cautious about permitting peripheral issues that are of interest to only one of the creditors from hijacking the proceeding or complicating what are intended to be summary processes. While a bankruptcy court may be justified in taking an inquisitorial approach in some circumstances, the court ought not to do so on the basis of nebulous and ill-defined allegations, speculation, or competing correspondence attached to emails or case conference briefs. This is the antithesis of the orderly and commercially oriented approach to insolvency mandated by the legislation.

[9] I agree that the first step is for the Trustee to determine the validity of the proofs of claim and to value the noteholder's debt. This should not remain simply a dispute between the noteholders and the insolvent debtors. The Trustee must take a position.

[10] I also agree that the vote on the proposal cannot be delayed indefinitely while the noteholders investigate possible steps they could take in the United States. On the other hand, the vote in the Eureka 93 proposal is clearly valid and Mr. Poli is readily available for cross examination. He has filed several affidavits. I have already ordered the debtor's appraiser to disclose his source information and documents and the noteholders are completing their own appraisal. All of these steps should be completed within the next two weeks.

[11] Any decision about a trial of an issue should await one of the parties properly formulating the issue and bringing it before the court in a recognizable form. That will only be necessary if the parties fail to vote on the proposal or the proposal is defeated and becomes a bankruptcy.

[12] The court orders and directs as follows:

a. The Trustee is to forthwith assess and value the proofs of claim submitted by the noteholders and to issue its Form 77 no later than August 14, 2020. The noteholders and the debtors are to fully cooperate with the Trustee.

b. The examination of Mr. Poli and others as approved by the meeting of creditors in the Eureka 93 proposal shall proceed and shall be completed by August 18th, 2020. If the Trustee wishes to conduct the examinations, the Trustee shall do so. If not, then the noteholders may do so.

c. If the Trustee accepts the proof of claim in any of the proposals and the debtor (or any other creditor) wishes to challenge the validity of the debt owing to the noteholders, the said creditor(s) shall advise the noteholders in writing of the specific basis for doing so and shall undertake to bring the necessary application before the court.

d. Subject to further order or agreement in writing and to any application or appeal which must be determined in advance thereof, the votes on the proposals shall be completed no later than August 28th, 2020.

e. I may be spoken to for further direction should that be required.

Mr. Justice C. MacLeod

Date: August 5, 2020

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CASE CONFERENCE ORDER

Mr. Justice C. MacLeod

Released: August 4, 2020