

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicant (Respondent)

and

TFI FOODS LTD.

Respondent (Appellant)

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.

MOTION RECORD

February 23, 2015

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TAB 1

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NOTICE OF MOTION

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INC. TO TFI FOODS LTD.

THE APPELLANT TFI FOOD LTD. will make a motion to a judge of the Court of Appeal on March 4, 2015 at 10:00 a.m., or as soon as the motion can be heard, at Osgoode Hall, 130 Queen Street West, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR: an order extending the time for perfecting the Appellant's appeal to March 30, 2015.

THE GROUNDS FOR THE MOTION ARE:

1. The decision appealed from was rendered on December 30, 2014.
2. The Appellant's Notice of Appeal was served on all parties and filed with this Court on January 9, 2015.

3. No transcripts of evidence are required for the appeal, and therefore the period of time to perfect the appeal expired on February 9, 2015.
4. The order appealed from has therefore not been signed and entered, as the parties have not been able to agree on the terms of the order appealed from.
5. The Appellant served and filed three copies of its factum with this court on February 9, 2015.
6. The Appellant has been unable to finalize its Appeal Book and Compendium as it has not been able to take out the order of the decision appealed from. The Appellant has therefore been unable to perfect its appeal.
7. The Appellant and Respondent are continuing to negotiate the terms of the order or decision appealed from.
8. The Respondent has indicated that it will not consent to an extension of time for perfecting this appeal.
9. An extension in the circumstances is just.
10. Rules 61.09, 61.10, 61.13, and 61.16 of the *Rules of Civil Procedure*.
11. Such further grounds as counsel may advise and this Court may deem just.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion

- (a) Affidavit of Robin Walker affirmed February 23, 2015; and

(b) such further and other evidence as counsel may advise and this Honourable Court may permit.

February 23, 2015

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Lawyers for the Plaintiff Appellant (Respondent)

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

Applicant (Respondent)

-and- TFI FOODS LTD.

Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

NOTICE OF MOTION

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TAB 2

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicant (Respondent)

and

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Respondent (Appellant)

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.

AFFIDAVIT OF ROBIN D. WALKER, Q.C.

I, Robin D. Walker, of the City of Toronto, SOLEMLY AFFIRM AS FOLLOWS:

1. I am counsel to the law firm of Paliare Roland Rosenberg Rothstein LLP, lawyers for the Respondent (Appellant). As such, I have personal knowledge of the matters described in this Affidavit.
2. The Appellant appeals from the decision of Justice Michael Penny, rendered on December 30, 2014 (the "Decision"). I attach a copy of the Decision as **Exhibit "A"**.
3. The Appellant served its Notice of Appeal on the Respondent and filed it with this Court on January 9, 2015. I attach a copy of the Notice of Appeal as **Exhibit "B"**.
4. The period of time to perfect the appeal expired on February 9, 2015.

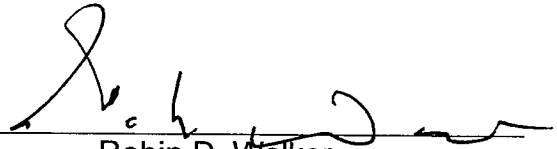
5. On February 9, 2015, the Appellant served and filed its factum on this appeal. I attach a copy of the Appellant's factum as **Exhibit "C"**.
6. The Appellant attempted to file its Appeal Book and Compendium with the Court of Appeal on that day. It was unable to do so because the Appeal Book and Compendium did not contain a copy of the order appealed from as signed and entered.
7. The order appealed from has not been signed and entered because the parties have not been able to agree on the terms of the order appealed from. I attach a copy of correspondence between counsel for the Appellant and counsel for the Respondent attempting to settle the terms of the order appealed from as **Exhibit "D"**. Respondent's counsel has indicated that the Respondent will not consent to an extension of time to perfect this appeal.
8. The parties will continue to attempt to settle the terms of the order, and will appear before Justice Penny to settle the terms of the order if they remain unable to do so promptly.
9. The Appellant has been unable to perfect its appeal because the parties have been unable to agree on the terms of the order.
10. The Registrar has given the Appellant Notice of Intention to Dismiss its Appeal for delay on March 4, 2015. I attach the copy of the Notice as **Exhibit "E"**.
11. I make this affidavit in support of the Appellant's motion for an extension of time to perfect its appeal, and for no other purpose.

AFFIRMED BEFORE ME at the City of Toronto, in the Province of Ontario on February 23, 2015

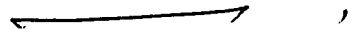


Commissioner for Taking Affidavits
(or as may be)

Denise Gougeon.
(64358R)



Robin D. Walker



TAB A

This is Exhibit "A" to the
Affidavit of Robin D. Walker, Q.C.
affirmed February 23, 2015

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

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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.

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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.

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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.

- Page 5 -

[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

1A

- Page 6 -

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 proffered 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.

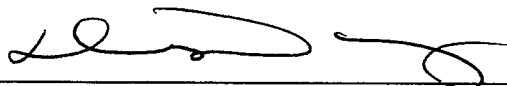


Penny J.

Date: December 30, 2014

TAB B

This is Exhibit "B" to the
Affidavit of Robin D. Walker, Q.C.
affirmed February 23, 2015

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

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

NOTICE OF APPEAL

THE RESPONDENT, TFI FOODS LTD. APPEALS to the Court of Appeal from
the order of the Honourable Justice Michael Penny dated December 30, 2014 (the
"Order"), made at Toronto, Ontario.

THE APPELLANT ASKS that the Order be set aside and a judgment be granted
as follows:

1. Dismissing the application in its entirety; and
2. The Appellant be awarded his costs of the application and this appeal.

THE GROUNDS OF APPEAL are as follows:

1. The application judge erred in law and in principle by:
 - a. holding that all of a seller's creditors are entitled to the protection of the *Bulk Sales Act*, R.S.O. 1990, c. B.14 ("*Bulk Sales Act*"); and
 - b. holding that non-trade creditors are entitled to the same protection as trade creditors under the *Bulk Sales Act*.
2. The application judge erred in principle by failing to limit the appellant's liability to the value of the assets purchased by the appellant.
3. The application judge made a palpable and overriding error in holding that the Canada Revenue Agency is a creditor within the meaning of the *Bulk Sales Act* in the total amount of \$585,000 in the absence of an adequate evidentiary basis.
4. The application judge made palpable and overriding errors in disregarding the following uncontradicted evidence, which undermined and misdirected his analysis with respect to HSBC's right to be protected as a creditor by the *Bulk Sales Act*:
 - a. HSBC was involved on both sides of the transaction the appellant entered into with the bankrupt entity, Ellen's Food Group Inc., dated June 7, 2012, and signed by the parties on June 12, 2012, for the purchase by TFI of

certain food processing equipment and related intellectual property (the "Transaction");

- b. TFI told HSBC about the Transaction, including the exact amounts being paid; and
- c. TFI was entitled to expect that HSBC would take the necessary steps to ensure that it was protected.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that an appeal lies to the Court of Appeal from a final order of the Superior Court of Justice;
2. Rule 61 of the *Rules of Civil Procedure*;
3. Leave to appeal is not required.

January 9, 2015

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**DELOITTE
RESTRUCTURING INC.**
Applicant/Respondent

v. **TFI FOODS LTD.**

Respondent/Appellant

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

COURT OF APPEAL FOR ONTARIO

NOTICE OF APPEAL

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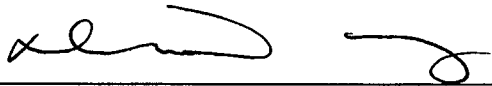
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TAB C

This is Exhibit "C" to the
Affidavit of Robin D. Walker, Q.C.
affirmed February 23, 2015

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

Applicant
(Respondent in Appeal)

and

TFI FOODS LTD.

Respondent
(Appellant)

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.

FACTUM OF THE RESPONDENT (APPELLANT)

February 9, 2015

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COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

**Applicant
(Respondent in Appeal)**

and

TFI FOODS LTD.

**Respondent
(Appellant)**

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.**

FACTUM OF THE RESPONDENT (APPELLANT)

PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. The appellant is TFI Foods Ltd. ("TFI"), the respondent on the Application.
2. This matter was heard in the Superior Court of Justice on November 20, 2014, in front of the Honourable Mr. Justice Penny.
3. By this appeal, the appellant challenges certain of the findings of the learned applications judge, in connection with his judgment dated December 30, 2014.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

4. By its Application, the respondent Trustee sought to impose a draconian penalty on a *bona fide* purchaser, TFI, for technical non-compliance with the *Bulk Sales Act*¹ (the "Act").

5. In its Application, the Trustee sought payment from TFI of an amount equal to the total amount TFI paid, inclusive of taxes, in connection with a purchase of equipment and a licence from a bankrupt entity, Ellen's Food Group Inc. ("Ellen's").

6. TFI challenged the Application on a number of bases. It argued that the Trustee itself failed to comply with the terms of the *Act* by, among other things, by:

- (a) seeking to extract payment from TFI well in excess of the value of the bulk stock purchased;
- (b) failing to credit TFI for amounts actually paid to Ellen's creditors out of the proceeds of the sale; and
- (c) failing to do the necessary due diligence to determine which putative creditors were, in fact, "trade creditors" at the relevant time, and therefore entitled to protection under the *Act*.

7. In the words of the learned applications judge, "success was divided" on the Application, although the Trustee "was substantially successful."²

¹ *Bulk Sales Act*, R.S.O. 1990, Chapter B.14 ["Act"].

² Reasons of Justice Penny, December 30, 2014 ("Reasons"), ABC Tab 2, at ¶ 43.

8. By this appeal, TFI challenges certain of the learned applications judge's interpretations of the *Act* and conclusions as set out in detail below. It is TFI's position that, with respect, the applications judge made certain errors which, if left uncorrected, would permit the Trustee to extract an excessive and unfair remedy from TFI, which would be inconsistent with the evidentiary record and with a purposive interpretation of the *Act*.

PART III - SUMMARY OF FACTS

The Transaction

9. TFI is one of the leading seafood importers in North America. It offers its customers a wide range of seafood, Japanese, Chinese, and other Asian specialty products. TFI is headquartered in Toronto, and has branches in Vancouver, Calgary, and Montreal.³

10. TFI entered into an agreement with Ellen's, dated June 7, 2012 and signed by the parties on June 12, 2012, for the purchase by TFI of certain food processing equipment (which was listed in an appendix to the agreement) located at 30 Sims Crescent, in Richmond Hill, Ontario, and related intellectual property (the "Transaction").⁴

11. One of the key features of the Transaction from TFI's perspective was the transfer of a Canadian Food Inspection Agency ("CFIA") federal meat plant licence (the "Licence"), which was associated with the 30 Sims Crescent location (the lease of which TFI agreed to assume in connection with the Transaction).⁵

³ Affidavit of David Lam, Appeal Book and Compendium ("ABC"), Tab 5 ["Lam Affidavit"], at ¶ 3.

⁴ Lam Affidavit, ABC Tab 5, at ¶ 4.

⁵ Lam Affidavit, ABC Tab 5, at ¶ 5.

12. The transfer of the Licence was critical from TFI's perspective because it would allow TFI to be "grandfathered" into the existing location. If the Licence was not transferred, TFI would have to apply for a new licence, which would be a very costly process and would likely take several months for approval. TFI would not have purchased the equipment from Ellen's if it was not able to obtain the Licence transfer at the same time.⁶

13. TFI and Ellen's negotiated the terms of the Transaction at arm's length.⁷

14. Ellen's provided TFI with a complete list of the equipment at the 30 Sims Crescent location. TFI did not obtain a formal appraisal of the equipment; however, based on its experience in the industry, it developed a view as to the value of the equipment.⁸

15. The value TFI ascribed to the Licence was approximately \$400,000 (based on estimated costs associated with waiting time to get CFIA approval; professional fees to deal with CFIA; and costs of compliance with expected requirements for renovations, etc.).⁹

16. Ellen's initially asked for \$1.5 million for the equipment and the Licence. TFI ultimately agreed to a purchase price of \$954,000, which included the value of the Licence and the equipment, plus any associated intellectual property.¹⁰

⁶ Lam Affidavit, ABC Tab 5, at ¶ 6.

⁷ Lam Affidavit, ABC Tab 5, at ¶ 7.

⁸ Lam Affidavit, ABC Tab 5, at ¶ 8.

⁹ Lam Affidavit, ABC Tab 5, at ¶ 9.

¹⁰ Lam Affidavit, ABC Tab 5, at ¶ 10.

17. HST was payable on the Transaction in the amount of \$124,020 (i.e., 13% of \$954,000). The total amount owed by TFI on the transaction was therefore \$1,078,020, inclusive of tax.¹¹

18. Before entering into the Transaction, Ellen's advised TFI that HSBC was the only major creditor that needed to be paid out on closing.¹²

19. HSBC was also (and continues to be) TFI's banker. TFI discussed the Transaction with its bank manager, Kenneth Liu. Mr. Liu approved and cleared all the cheques when Ellen Yuk Yee Pun ("Pun"), the principal of Ellen's, presented them at the bank.¹³

20. TFI made the required payments to Ellen's in four separate installments, as follows:

(a) June 15, 2012 - \$200,000

(b) June 20, 2012 - \$100,000

(c) June 21, 2012 - \$500,000

(d) July 3, 2012 - \$278,020.¹⁴

21. Ellen's provided TFI with an invoice, dated July 5, 2012, reflecting the details of the Transaction, including the payments made by TFI.¹⁵

¹¹ Lam Affidavit, ABC Tab 5, at ¶ 11.

¹² Lam Affidavit, ABC Tab 5, at ¶ 16.

¹³ Lam Affidavit, ABC Tab 5, at ¶ 18.

¹⁴ Lam Affidavit, ABC Tab 5, at ¶ 12.

¹⁵ Lam Affidavit, ABC Tab 5, at ¶ 13.

22. Ellen's bank account statements for June and July 2012 reflect receipt of the above-noted payments made by TFI in connection with the transaction.¹⁶

23. Ellen's paid its secured creditor HSBC \$150,000.00 out of the proceeds of the Transaction on July 3, 2012, which was the date of the final payment from TFI.¹⁷

24. After the Transaction, TFI applied for, and received, a refund in connection with the HST component of the Transaction.¹⁸

25. On an application brought by HSBC, Ellen's was placed into Receivership by order dated February 25, 2013. It was assigned into bankruptcy by order dated October 30, 2013. The Trustee subsequently commenced its Application in the Superior Court.¹⁹

Ellen's Other Creditors

26. TFI learned from the Trustee's report that, contrary to Pun's representations to TFI, Ellen's had a number of creditors other than HSBC.²⁰

27. In particular, the Trustee's report states that, as of the date of the Transaction, Ellen's owed a certain Dr. Sai Kui Lee the sum of \$674,284.07.²¹

28. It appears that the alleged debt arose out of a loan made by Dr. Lee to Pun in her personal capacity. The loan amount was \$857,623.000, and was evidenced by a promissory note dated April 18, 2011.²²

¹⁶ Lam Affidavit, ABC Tab 5, at ¶ 14.

¹⁷ Lam Affidavit, ABC Tab 5, at ¶ 17.

¹⁸ Lam Affidavit, ABC Tab 5, at ¶ 15.

¹⁹ First Report of Deloitte Restructuring Inc., in its capacity as Trustee in Bankruptcy of Ellen's Food Group Inc., dated August 21, 2014 ["Trustee's Report"], ABC Tab 4, at ¶ 2, 4.

²⁰ Trustee's Report, ABC Tab 4, at ¶ 28.

²¹ Trustee's Report, ABC Tab 4, at ¶ 28.

29. As reflected in the promissory note, Ellen's was a guarantor of Pun's debt. There is no evidence that suggests that Ellen's received any benefit or consideration in return for providing a guarantee.²³

30. It appears that Dr. Lee only registered a security interest against Ellen's on January 28, 2013, almost two years after the date of the promissory note and several months after the Transaction.²⁴

31. The amount of Ellen's debt to Dr. Lee listed in the Trustee's report (\$674,284.07) was entirely inconsistent with evidence in the record of repayments by Pun to Dr. Lee.²⁵

32. It appears that the Trustee made no attempt to address the apparent inconsistency between the amounts repaid by Pun and the amounts that Dr. Lee now claims to be owed.²⁶

33. The Trustee's report also indicates that Ellen's owed unsecured creditors an amount ranging between \$330,580.40 and \$367,827.57. These figures were derived from the Receiver's review of an accounts payable listing provided by Pun.²⁷

34. At the initial meeting of creditors, held on November 26, 2013, it became clear that certain individuals and entities who believed they were creditors of Ellen's were, in fact, creditors of one of the "several different entities created by the corporate director (Ellen

²² Lam Affidavit, ABC Tab 5, at ¶ 22.
²³ Lam Affidavit, ABC Tab 5, at ¶ 23.
²⁴ Lam Affidavit, ABC Tab 5, at ¶ 24.
²⁵ Lam Affidavit, ABC Tab 5, at ¶ 25-29.
²⁶ Lam Affidavit, ABC Tab 5, at ¶ 30.
²⁷ Trustee's Report, ABC Tab 4, at ¶ 28(e).

Pun)", and that such individuals and entities therefore did not have a valid claim against Ellen's.²⁸

Findings of the Applications Judge

35. The Trustee commenced its application against TFI in the Superior Court, seeking payment by TFI of \$1,078,020 plus interest.

36. TFI conceded from the outset that it had failed to comply with the terms of the *Act* and was therefore potentially subject to its remedial effect. However, TFI raised a number of challenges to the Trustee's application. Principally, TFI argued that non-trade creditors were not entitled to the protections of the *Act* in connection with the Transaction, and that inadequate evidence existed on which to determine TFI's potential liability under the *Act*.

37. The principal findings of the learned Applications judge were as follows. The appellant challenges those findings of the applications judge which are set out in bold text:

- (a) **The remedies under the *Act* are available to non-trade creditors (including Dr. Lee and CRA) as well as trade creditors;**
- (b) Dr. Lee's claim, although arguably a contingent liability, is not excluded under the *Act*;
- (c) **There is no evidence to support the position that a significant portion of the price paid by TFI was for Ellen's licence;**

²⁸ Trustee's Report, ABC Tab 4B, at Appendix "B".

- (d) HSBC's involvement in the transaction on behalf of both TFI (as banker) and Ellen's (as lender) does not disqualify it from obtaining relief under the Act;
- (e) TFI cannot be called upon to pay \$150,000 which was already remitted to HSBC by Ellen's out of the sale proceeds;
- (f) There is no evidence on the record from which one can conclude what, if any, liability TFI may have on account of amounts owing to Dr. Lee or Ellen's other creditors;
- (g) TFI is liable for accrued HST owed by Ellen's "to and including the sale", in an amount estimated at \$585,000.

38. The appellant also challenges the the applications judge's failure to make any finding as to TFI's maximum liability to the creditors under the Act.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

Standard of Review

39. The applications judge's interpretation and application of the Act is a matter of law, reviewable on a standard of review of correctness.²⁹ His decisions involving questions of mixed fact and law arise from his interpretation of the Act, and are also subject to the standard of correctness.³⁰

²⁹ *Housen v. Nikolaisen*, 2002 SCC 33 at ¶ 8 ["Housen"].
³⁰ *Housen*, at ¶ 36.

Statement of Issues

40. The learned applications judge made four principal errors which the appellant challenges on this appeal:

- (a) The finding that non-trade creditors are entitled to the same protections under the *Act* as trade creditors;
- (b) The finding that HSBC was entitled to protections of the *Act* notwithstanding its role on both sides of the transaction;
- (c) The finding that no portion of the purchase price was attributable to the purchase of Ellen's licence; and
- (d) The failure of the applications judge to determine TFI's maximum exposure under the *Act*.

Ellen's Non-Trade Creditors Are Not Entitled to Protection Under the Act

41. The *Act* defines "creditor" to mean "any creditor, including an unsecured trade creditor and a secured trade creditor".³¹

42. A secured trade creditor is defined as:

a person to whom a seller is indebted, whether or not the debt is due,

(a) for stock, money or services furnished for the purposes of enabling the seller to carry on business, or

(b) for rental of premises in or from which the seller carries on business, and who holds security or is entitled to a preference in respect of a claim.³²

³¹ *Act*, at s. 1.

³² *Act*, at s. 1.

43. An unsecured trade creditor is defined as "a person to whom a seller is indebted for stock, money or services furnished for the purpose of enabling the seller to carry on a business, whether or not the debt is due, and who holds no security or who is entitled to no preference in respect of a claim".³³

44. Although the definition of "creditor" could be read to suggest that even creditors *other than* trade creditors are entitled to the *Act's* protections, when read as a whole, it is apparent that the *Act* in fact applies *only to* trade creditors (whether secured or unsecured).

45. For example, section 4 provides that the "statement of creditors" which is to be provided by the seller in connection with a bulk sale "shall show the names and addresses of the unsecured trade creditors and the secured trade creditors of the seller...".³⁴

46. Similarly, section 8 provides that the buyer in a bulk sale may acquire the property of the seller, *inter alia*, "if the seller delivers a statement verified by the seller's affidavit showing that the claims of *all unsecured trade creditors and all secured trade creditors* of the seller of which the buyer has notice have been paid in full" (emphasis added).³⁵

47. Although the applications judge made no explicit finding in this regard, there can be no dispute that neither Dr. Lee nor CRA is a "trade creditor".

48. Ellen's did not receive "stock, money or services furnished for the purpose of enabling it to carry on business" from Dr. Lee or CRA, nor did it rent premises from Dr.

³³ *Act*, at s. 1.

³⁴ *Act*, at s. 4, emphasis added. A blank copy of "Form 1 – Statement as to Seller's Creditors" is included in Schedule "B".

³⁵ *Act*, at s. 8.

Lee or CRA in which it carried on business. In short, Dr. Lee and CRA are not the sort of creditor envisaged by the *Act*.

49. The applications judge relied on this court's decision in *Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.* ["*Sidaplex*"]³⁶ to support his finding that "the availability of [remedies under the *Act*] is not limited to trade creditors."

50. With respect, the *Sidaplex* decision cannot be reconciled with the Supreme Court of Canada's decision *National Trust Co. v. H & R Block Canada Inc.* ["*National Trust*"]³⁷, released some five years after *Sidaplex*. It is respectfully submitted that *Sidaplex* is not good law and should not be followed. There is no basis for the protections of the *Act* to be extended to non-trade creditors.

51. In *National Trust*, Justice Deschamps (in dissent) referred to the mechanism under the *Act* whereby a "buyer must demand of the seller a statement providing the details of debts owing to secured and unsecured trade creditors". As Justice Deschamps explained, the objective of this mechanism "is to make the buyer responsible for obtaining the statement in question, and to compel the buyer to withhold payment of the selling price until the buyer has arranged for payment of the debts owing to trade creditors"³⁸.

52. TFI could have fully complied with the *Act* by obtaining the statement from Ellen's and ensuring that any outstanding debts owed to trade creditors were paid. As a non-trade creditor, Dr. Lee and CRA would not have been listed on the statement and would therefore not have been entitled to any proceeds of the sale.

³⁶ *Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.*, 40 O.R. (3d) 563 (C.A.) ["*Sidaplex*"].

³⁷ *National Trust Co. v. H & R Block Canada Inc.*, [2003] 3 SCR 160 ["*National Trust*"].

³⁸ *National Trust*, at ¶ 54.

53. Bastarache J., in *National Trust*, quoted with approval the statement from the decision below to the effect 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".³⁹

54. Dr. Lee and CRA (and other non-trade creditors) would have received nothing if TFI had complied with the Act. Dr. Lee and CRA may have other statutory or common law remedies against the vendor, including in the context of the Ellen's bankruptcy. However, pursuant to the Act they are not creditors entitled to any remedy whatsoever.

55. The learned applications judge acknowledged the *National Trust* case, but sought to distinguish it from the present situation. With respect, his attempt to do so led him into error. Although he correctly noted that *National Trust* did not confront the precise matter at issue here, he failed to recognize the universality of the principle that "a creditor was due only what he might have recovered if the buyer had complied with the Act", which applies to, and governs, the situation at hand.

56. This principle was re-emphasized by Bastarache J. in his application of a "purposive approach" to the interpretation of the Act: "Under the purposive approach, creditors are put back in the position they would have been in had the buyer complied with the Act."⁴⁰

57. The applications judge did not quarrel with the proposition that non-trade creditors such as Dr. Lee and CRA would have received no proceeds of the sale if the Act had been

³⁹ *National Trust*, at ¶ 21.

⁴⁰ *National Trust*, at ¶ 31.

complied with. On that basis, such non-trade creditors are not entitled to relief under the Act.

HSBC Is Not Entitled to the Protections of the Act

58. The applications judge rejected TFI's argument that HSBC is not a proper creditor under the Act. With respect, his conclusion in this regard was an error of law.

59. The uncontradicted evidence reflects that HSBC was aware of, and had actual knowledge of, the Transaction at the time it occurred, and elected to "lie in the weeds" rather than act promptly to protect and enforce its financial and/or security interest.

60. The Supreme Court of Canada noted in *National Trust* that the Act "reflects a desire to deter fraud and to ensure that creditors are properly paid".⁴¹

61. There is no evidence of fraud by TFI in connection with the Transaction. The parties entered into arms-length negotiations and TFI purchased the equipment and the Licence in good faith, and in the belief that the vendor's creditors would be paid out of the proceeds of the Transaction. As the applications judge correctly noted, "Pun mislead TFI about Ellen's creditors and diverted the proceeds of the sale to uses other than the payment of this creditors."⁴²

62. The evidence on the record discloses that:

- (a) HSBC was involved on both sides of the Transaction, acting as TFI's banker and knowingly receiving some portion of the actual proceeds of the Transaction from Ellen's;

⁴¹ *National Trust*, at ¶ 44.

⁴² Reasons, ABC Tab 2, at ¶ 23.

- (b) TFI told HSBC about the Transaction, and HSBC knew the exact amounts being paid by TFI to Ellen's; and
- (c) Ellen's paid HSBC \$150,000 from the proceeds of the Transaction.

63. TFI was entitled to expect that Ellen's would pay HSBC, which TFI understood to be Ellen's only major creditor, out of the proceeds of the sale. It was also entitled to expect that HSBC, with knowledge of the transaction, would take the necessary steps to ensure that it was protected. For some reason, HSBC failed to do so. Instead, it apparently accepted the payment of \$150,000 from Ellen's and took no further action.

64. TFI was the prejudiced party, relative to HSBC, and it is inconsistent with a purposive approach to the *Act* to reward HSBC, at the expense of TFI, for choosing to lie in the weeds rather than enforcing its security interest against its customer, Ellen's.

Value of the Licence

65. David Lam, the President of TFI, provided the following sworn evidence with respect to the Licence which TFI purchased in the Transaction:

- (a) The transfer of the Licence was one of the key features of the Transaction from TFI's perspective;⁴³
- (b) The transfer of the Licence was critical from TFI's perspective because it would allow TFI to be "grandfathered" into the existing location. If the Licence was not transferred, TFI would have to apply for a new licence, which would be a very costly process and would likely take several months

⁴³ Lam Affidavit, ABC Tab 5, at ¶ 5.

for approval. TFI would not have purchased the equipment from Ellen's if it was not able to obtain the Licence transfer at the same time.⁴⁴

- (c) The value TFI ascribed to the Licence was approximately \$400,000 (based on estimated costs associated with waiting time to get CFIA approval; professional fees to deal with CFIA; and costs of compliance with expected requirements for renovations, etc.).⁴⁵

66. The Trustee elected not to cross-examine Mr. Lam. His evidence was unchallenged and uncontradicted.

67. Mr. Lam noted that, based on his experience, if TFI did not purchase Ellen's licence, it would incur significant costs, both in terms of actual expenditures required to obtain a new licence, and in terms of costs from its inability to use the purchased equipment for several months while awaiting a new licence. On the basis of that evidence, it is entirely credible that some significant portion of the purchase price would be attributable to the value of the licence.

68. Nevertheless, the applications judge discounted Mr. Lam's evidence in its entirety. He found that "none of the contemporaneous documents allocate any portion of the sale price to the licence" and concluded that "there is no independent evidence that the licence had any value."⁴⁶

69. The applications judge ignored the fact that the sale documents lacked specificity with respect to allocation of the sale price to particular assets, and that the documents

⁴⁴ Lam Affidavit, ABC Tab 5, at ¶ 6.

⁴⁵ Lam Affidavit, ABC Tab 5, at ¶ 9.

⁴⁶ Reasons, ABC Tab 2, at ¶ 30.

provided that the sale price was based on the imputed cost of the equipment, plus "all intellectual properties."⁴⁷ There is no evidence that any specific intellectual property was transferred from Ellen's to TFI, and it would be entirely reasonable to conclude that the reference to "associated intellectual property" was intended to capture the value of the Licence, as described by Mr. Lam in his sworn testimony.

70. The applications judge discounted Mr. Lam's testimony on the basis of a paper record; he did not have the benefit of *viva voce* evidence. He failed to explain why he did not accept Mr. Lam's sworn evidence, which was not challenged by cross-examination, and so his findings should be granted little deference.⁴⁸

71. Mr. Lam's evidence should have been credited. It was sworn testimony that the Trustee elected not to challenge through cross-examination. Furthermore, it finds support in the sale documents, which made clear that the purchase price was based on more than simply the value of the tangible equipment.

72. There is no dispute that the Licence formed no part of the "stock in bulk", the value of which would be available to creditors pursuant to section 16 of the *Act*. If Mr. Lam's evidence had been credited, TFI's potential liability under the *Act* would have been capped at the sale price less the value of the Licence.

⁴⁷ Trustee's Report, Appendix E, s. 4, ABC Tab 4E.

⁴⁸ See e.g. *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193, at ¶ 80.

TFI's Maximum Exposure Under the Act

73. One of the principal issues canvassed in the proceeding below was TFI's maximum exposure under the *Act*. The applications judge made no explicit finding in this regard.

74. The Trustee took the position below that TFI was liable for a total of \$1,078,020, which the Trustee stated was "the value of the assets purchased from the Company". The Trustee's position in this regard was plainly incorrect, and should have been recognized as such by the applications judge.

75. Although it is clear that TFI paid Ellen's a total of \$1,078,000 in connection with the Transaction, it is equally clear from the sales agreement and the sales invoice that the value of the assets purchased by TFI was \$954,000.⁴⁹ The additional \$124,020 was paid on account of HST, and was not part of the value of the assets.⁵⁰

76. The relevant statutory provision in this regard is section 16 of the *Act*,⁵¹ which provides that a non-compliant buyer is liable to account to the creditors of the seller for the value of the stock in bulk. The amount paid by TFI on account of HST is self-evidently not part of the value of the stock in bulk.

77. The applications judge made note of the fact that, with respect to the \$124,020 paid by TFI on account of HST, "there is no evidence that Ellen's remitted any of this tax to CRA."⁵² Although this might be a relevant consideration with respect to the size of CRA's

⁴⁹ \$400,000 of which was apportioned by the purchaser to the value of the Licence.

⁵⁰ Trustee's Report, ABC Tabs 4E and 4F, at Appendix E and F

⁵¹ *Act*, s. 16.

⁵² Reasons, ABC Tab 2, at ¶ 37.

claim against Ellen's, it is clearly not a relevant consideration with respect to TFI's maximum liability.

78. As set out above, the applications judge also erred in failing to credit Mr. Lam's evidence concerning the portion of the sale price attributable to the value of the Licence.

79. The applications judge's failure to make a finding as to TFI's maximum liability pursuant to the *Act* was a reversible error. On the basis of the evidentiary record before him, he should have found that TFI's maximum liability under the *Act* was the sale price, exclusive of HST, less the value of the Licence – that is, \$554,000.

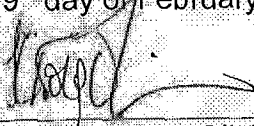
PART V - ORDER REQUESTED

80. The appellant respectfully requests an order directing that:

- (a) non-trade creditors are not entitled to the protections of the *Act* in connection with the Transaction;
- (b) HSBC is not entitled to the protections of the *Act* in connection with the Transaction;
- (c) the amount paid by TFI to Ellen's on account of HST – that is, \$124,020 – formed no part of the "value of the stock in bulk" purchased in the Transaction, for purposes of calculating TFI's maximum exposure under the *Act*;
- (d) the value of the Licence – that is, \$400,000 – must be deducted from the \$954,000 purchase price in calculating TFI's maximum exposure under the *Act*;

- (e) TFI's maximum exposure under the *Act* in connection with the Transaction is \$554,000;
- (f) the Trustee obtain and disclose information on the valid claims of creditors and on the amounts properly owing by TFI, consistent with the sub-paragraphs above; and
- (g) the appellant is entitled to its costs of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February 2015.



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Lawyers for the Respondent

Court File No. C59848

COURT OF APPEAL FOR ONTARIO

BETWEEN:

DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS TRUSTEE IN
BANKRUPTCY OF ELLEN'S FOOD GROUP INC.Applicant
(Respondent in Appeal)

and

TFI FOODS LTD.

Respondent
(Appellant)IN THE MATTER OF THE *BULK SALES ACT*, R.S.O. 1990, c. B. 14, AS AMENDEDAND IN THE MATTER OF A TRANSFER OF ASSETS FROM ELLEN'S FOOD GROUP
INC. TO TFI FOODS LTD.

CERTIFICATE

I estimate that 1 hour will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 9th day of February, 2015.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Housen v. Nikolaisen*, 2002 SCC 33
2. *Sidaplex-Plastics Suppliers Inc. v. Elta Group Inc.*, 40 O.R. (3d) 563 (C.A.)
3. *National Trust Co. v. H & R Block Canada Inc.*, [2003] 3 SCR 160
4. *Law Society of Upper Canada v. Neinstein*, 2010 ONCA 193

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SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bulk Sales Act, RSO 1990, c B.14

Definitions

1. In this Act,

"creditor" means any creditor, including an unsecured trade creditor and a secured trade creditor; ("créancier")

"secured trade creditor" means a person to whom a seller is indebted, whether or not the debt is due,

(a) for stock, money or services furnished for the purpose of enabling the seller to carry on business, or

(b) for rental of premises in or from which the seller carries on business, and who holds security or is entitled to a preference in respect of a claim; ("fournisseur garanti")

"unsecured trade creditor" means a person to whom a seller is indebted for stock, money or services furnished for the purpose of enabling the seller to carry on a business, whether or not the debt is due, and who holds no security or who is entitled to no preference in respect of a claim. ("fournisseur non garanti")

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.

Completion of sale

8. (1) Where the buyer has received the statement mentioned in section 4, the buyer may pay or deliver the proceeds of the sale to the seller and thereupon acquire the property of the seller in the stock in bulk,

- (a) if the statement mentioned in section 4 discloses that the claims of the unsecured trade creditors of the seller do not exceed a total of \$2,500 and that the claims of the secured trade creditors of the seller do not exceed a total of \$2,500 and the buyer has no notice that the claims of the unsecured trade creditors of the seller exceed a total of \$2,500 and that the claims of the secured trade creditors of the seller exceed a total of \$2,500; or
- (b) if the seller delivers a statement verified by the seller's affidavit showing that the claims of all unsecured trade creditors and all secured trade creditors of the seller of which the buyer has notice have been paid in full; or
- (c) if adequate provision has been made for the immediate payment in full of all claims of the unsecured trade creditors of the seller of which the buyer has notice and of all claims of secured trade creditors of the seller that are or become due and payable upon completion of the sale of which the buyer has notice, so long as their claims are paid in full forthwith after completion of the sale, but where any such creditor has delivered a waiver in Form 2 no provision need be made for the immediate payment of the creditor's claim.

Idem

(2) Where the buyer has received the statement mentioned in section 4, the buyer may pay or deliver the proceeds of the sale to the trustee and thereupon acquire the property of the seller in the stock in bulk, if the seller delivers to the buyer,

- (a) the consent to the sale in Form 3 of unsecured trade creditors of the seller representing not less than 60 per cent in number and amount of the claims that exceed \$50 of all the unsecured trade creditors of the seller of whose claims the buyer has notice; and
- (b) an affidavit of the seller deposing that the seller delivered or caused to be delivered to all of the seller's unsecured trade creditors and secured trade creditors personally or by registered mail addressed to them at their last known addresses at least fourteen days before the date fixed for the completion of the sale copies of the contract of the sale in bulk, the statement mentioned in subsection 4 (1), and the statement of affairs in Form 4, and deposing that the affairs of the seller as disclosed in the statement of affairs have not materially changed since it was made.

Documents to be exhibited

(3) Duplicate originals of the documents mentioned in clause (2) (b) shall be attached as exhibits to the affidavit mentioned therein.

Effect of buyer failing to comply with Act

16. (1) A sale in bulk is voidable unless the buyer has complied with this Act.

Personal liability of buyer

(2) If a sale in bulk has been set aside or declared void and the buyer has received or taken possession of the stock in bulk, the buyer is personally liable to account to the creditors of the seller for the value thereof, including all money, security and property realized or taken by the buyer from, out of, or on account of, the sale or other disposition by the buyer of the stock in bulk.

FORM 1
STATEMENT AS TO SELLER'S CREDITORS
Bulk Sales Act
 (Section 4 (1))

Statement showing names and addresses of all unsecured trade creditors and secured trade creditors of of the of in the of and the amount of the indebtedness or liability due, owing, payable or accruing due or to become due by the seller to each of them.

UNSECURED TRADE CREDITORS

Name of Creditor	Address	Amount

SECURED TRADE CREDITORS

Name of Creditor	Address	Amount	Nature of Security	Due or becoming due on the date fixed for the completion of the sale

AFFIDAVIT

I, of the of in the of make oath (or affirmation) and say:

1. That the foregoing statement is a true and correct statement
 - (a) of the names and addresses of all the unsecured trade creditors of the said and of the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the said to each of the said unsecured trade creditors; and
 - (b) of the names and addresses of all the secured trade creditors of the said and of the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the said to each of the said secured trade creditors, the nature of their security, and whether they are or in the event of sale will become due and payable on the date fixed for the completion of the sale

(and, if the seller is a corporation)

2. That I am of the Corporation, and have personal knowledge of the facts herein deposed to.

SWORN (or affirmed) before me, etc.

DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS
TRUSTEE IN BANKRUPTCY OF ELLEN'S FOOD GROUP
INC. -and- TFI FOODS LTD.

Applicant
(Respondent in Appeal)

Respondent
(Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM

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Lawyers for the Respondent (Appellant)

TAB D

This is Exhibit "D" to the
Affidavit of Robin D. Walker, Q.C.
affirmed February 23, 2015



A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

From: Mervyn Abramowitz [mailto:MAbramowitz@krmc-law.com]
Sent: Friday, February 20, 2015 4:33 PM
To: Kris Borg-Olivier
Cc: Catherine Hristow; Philip Cho
Subject: FW: TFI

Hi Kris,

We have reviewed your proposed draft order, provided to us along with your letter of February 18. We have the following comments:

1. The Application Record contains a draft order. It would be appropriate to start from that document, rather than creating another that appears to be derived from the reasons for decision;
2. The title of proceedings should match the format in the Notice of Application, as issued;
3. The recitals should refer to the specific materials relied on – the records, facts, briefs of authorities;
4. The main parts of the order should mirror as much as possible the relief sought in the Notice of Application, given that Justice Penny's reasons recite the relief sought, and immediately after states that the Application is granted in part;
5. The order should not reference the various statements and findings of the judge, that are merely support for the relief granted;
6. The reasons are clear that TFI is liable to account for and pay to the Trustee the amounts owing, as of the date of the impugned transfer, or shortly thereafter, to HSBC in the sum of \$279,276.17, and to CRA in the amount of \$585,000. The reasons are also clear that the amounts owing to CRA and the other creditors are subject to either additional proof or adjustment based on the parties confirming them, but they still provide, at the very least, that TFI must pay to the trustee the value of CRA's claim against Ellen's Food Group.

We note that you only expressed your intention to provide us with a draft order in this matter for the first time in your email of February 10, that is, after the date required to perfect your client's appeal, and you did not provide us with any draft order until February 18, received while I was out of the country. We have responded as soon as we could. We note therefore that it appears that your client did not perfect its appeal within the time prescribed by the Rules. As we pointed out in our email to you of February 6, in response to your request the day before, the estate inspectors did not agree to extend the time for the perfection of your client's appeal. The trustee repeats that the estate inspectors specifically considered the issue of any extensions of the time to perfect the appeal and refused to consent to any such

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extensions. We similarly cannot agree to any extension with respect to the filing of the court order, should any such consent be required.

We are prepared to consider any further draft order you may wish to provide to us. However, our actions are not to be taken as consenting to any extension of the time required to perfect the appeal.

Mervyn D. Abramowitz C.S.
Partner
Certified Specialist - Civil Litigation

Kronis, Rotsztein, Margles, Cappel LLP
Barristers and Solicitors
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The contents of this message and any attachments may be subject to legal privilege, which is claimed and not waived. If you have received this message in error, please contact our office to advise us and then delete the message without making or retaining any copies. Thank you.

From: Kris.Borg-Olivier@paliareroland.com [<mailto:Kris.Borg-Olivier@paliareroland.com>]
Sent: Wednesday, February 18, 2015 11:32 AM
To: Mervyn Abramowitz
Cc: Robin.Walker@paliareroland.com
Subject: TFI

Hi Mervyn – I hope you are well.

As you know, we need to settle the terms of the order from the application before Penny J. We need to have the order finalized and entered in time to allow us to include it in the Appeal Book and meet the Court of Appeal's deadline (in a notice received yesterday) of March 4.

We have taken a crack at a draft of the order, which I've attached. Please review and let us know if it is satisfactory. If you have any suggested changes, please feel free to make them directly into the Word document.

Thanks,
Kris

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T A B E

This is Exhibit "E" to the
Affidavit of Robin D. Walker, Q.C.
affirmed February 23, 2015

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke.

A COMMISSIONER FOR TAKING AFFIDAVITS, ETC.

COURT OF APPEAL FOR ONTARIO
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COUR D'APPEL DE L'ONTARIO
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File No.: C59848

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

Deloitte Restructuring Inc., In its capacity as trustee in Bankruptcy
of Ellen's Food Group Inc.

Applicant
Respondent

- and -

TFI Food Ltd.

Respondent

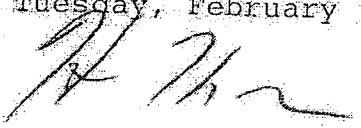
Appellant

Notice of Intention to Dismiss Appeal for Delay

TAKE NOTICE of my intention to dismiss this appeal for delay if it is not perfected in accordance with the Rules of Civil Procedure on or before: Wednesday, March 4, 2015. This notice is given pursuant to Rule 61.13(2.1), the Notice of Appeal having been filed on: Friday, January 9, 2015.

An extension of time for the perfection of the appeal may be obtained only by the filing of the consent of the parties to that end or by Order of the Court or a Judge thereof.

Date: Tuesday, February 10, 2015


Huguette G. Thomson
Registrar and Manager of Court Operations
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DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS
TRUSTEE IN BANKRUPTCY OF ELLEN'S FOOD GROUP
INC.

-and- TFI FOODS LTD.

Applicant (Respondent)

Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**AFFIDAVIT OF ROBIN D. WALKER, Q.C.
AFFIRMED FEBRUARY 23, 2015**

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DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY OF ELLEN'S FOOD GROUP INC. -and- TFI FOODS LTD.

Applicant (Respondent)

Respondent (Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT
TORONTO

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