

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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B E T W E E N:

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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.

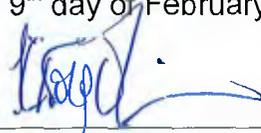
PART V - ORDER REQUESTED

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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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

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.

Applicant
(Respondent in Appeal)

-and- TFI FOODS LTD.

Respondent
(Appellant)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM

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