CITATION: Eureka 93 Inc. et. al. (Re) 2020 ONSC 4415
COURT FILE NO.: 33-2618511
DATE: 2020/07/20

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

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

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

BEFORE: Mr. Justice Calum MacLeod

COUNSEL: E. Patrick Shea, for the debtors

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

Andrew Lenz, for PR, creditor

Eric Golden, for the Proposal Trustee

Shawn Bustin for Family Lending Inc./AgriRoots

HEARD: July 16, 2020

DECISION AND REASONS

[1] Following a recent case conference in this ongoing insolvency proceeding, there were two motions returnable before me this morning. Pursuant to my direction, the documents were filed electronically, and the motion was argued in a virtual courtroom by teleconference on the Zoom platform.

[2] The first motion was a motion by Eureka 93 and the associated companies (the debtors) for an interim order pursuant to s. 192 of the *Canada Business Corporations Act*[1] permitting an "arrangement" within the meaning of that *Act*. Essentially this was an order permitting certain of

[1] RSC 1985, c. C-44, as amended

the debtor corporations to amalgamate with a new numbered corporation contingent on approval by a majority of the creditors when those creditors meet to consider the proposal under the BIA.

[3] That motion was unopposed and I signed the order.

[4] The opposed motion was a motion by the noteholders. The noteholders seek an order that the debtors produce documents relevant to an appraisal, that Seann Poli be cross-examined and that a representative of the first mortgagee or of Family Lending Group be examined in advance of the meeting of creditors.

[5] For the reasons that follow, I have concluded that the motion by the noteholders should not be granted at this time. I regard it as premature. I have given certain direction regarding the land appraisals as discussed below.

Factual Background

[6] This matter first came before me in a substantive manner on March 6th, 2020 which, as it transpired, was just before the suspension of normal court operations due to COVID-19. At that time, over the objection of the noteholders represented by Dominion Capital, I granted the debtors and extension of time to make a proposal under the BIA and I approved $2.3 million in DIP financing.[2] That relief was subject to certain terms; in particular regular reports by the proposal trustee. I subsequently granted extensions of time.[3] The meeting of creditors to vote on the proposal is now scheduled for July 28, 2020.

[7] As described in my original reasons, Eureka 93 and the related corporations were intended to be a vertically integrated hemp and cannabis enterprise. The corporate network created for that purpose has collapsed into insolvency. Prior to these proceedings, there were steps taken in the United States. In particular, there was a corporation in New Mexico which came to be the property of the noteholders and was credited against the noteholder debt and there was a corporation in Montana which found its way into the control of another secured party and somehow cut the noteholders out of a secured position.

[8] At the time of the March 6th motion, the idea behind the DIP financing and the backbone of the intended proposal was to salvage some value from Artiva Inc. which is the owner of 100 acres of farmland in Ottawa. At the time, there was a largely completed high security greenhouse on the land designed for cannabis cultivation and Artiva held a cannabis cultivation licence. The intent of the financing was to complete the construction, plant a crop and establish cash flow in advance of the proposal. At the time, the evidence before me included an appraisal of the land with the uncompleted greenhouses. It was not a business valuation.

[9] An insolvency such as this is seldom a happy situation for the creditors. The property itself is subject to a first mortgage to Olympia Trust (represented by Family Lending), to at least one

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[2] See 2020 ONSC 1482
[3] See 2020 ONSC 2532

construction lien, and to a second mortgage to Dominion Capital collateral to a guarantee of some or all of the noteholder debt. Now of course it is also subject to the DIP financing.

[10] In approving the DIP financing, I weighed the risks to the secured and unsecured creditors against the potential benefits of permitting the debtors to proceed with their plan. I discussed the assumptions and risks at paragraphs 11 & 12 of my reasons and in granting approval I required regular reports by the proposal trustee. I also provided in paragraph 27 of my reasons that if there was significant deviation from the plan or any of the assumptions failed to materialize, the noteholders of any other creditor could move to lift the stay or amend the order. No one has done so.

[11] In fact, the plan unfolded largely as anticipated. The DIP financing was drawn down. The construction was functionally completed. A first crop was established. What did not occur was either a sale of the "clones" or an offer to purchase the enterprise. Artiva is now cultivating plantlets and it still has a licence to do so but, as of this moment, against the background of COVID-19 and consolidations and disruption in the legal cannabis market, it has made no sales. There has been another development as well. The original appraisal of the land value was done in 2018. In June of this year, the debtors obtained an updated appraisal. Now the appraiser values the land, even with the completed greenhouses, as having lost 1/3 of its value.

[12] Based on the new valuation of the land, the debtor proposes to value the security represented by the second mortgage at $0. While that question is somewhat hypothetical unless the land is sold (which will establish its actual value) the impact of this is also to make the noteholders the largest unsecured creditor. As such the noteholders would effectively control the proposal. If the noteholders vote against the proposal, there will be a bankruptcy.

[13] The noteholders have changed counsel since March. I am aware of why that occurred, but it is not material for present purposes. Unsurprisingly, the noteholders are very unhappy to be faced with a stark binary choice to either vote for the proposal or to trigger a bankruptcy. There are other options of course. They could seek amendments to the proposal and could seek to defer the vote, but the dilemma is the same. They seek more information.

[14] Firstly, they wish to obtain their own appraisal and for that purpose they wish to compel the debtors to provide documents and information to the appraiser. The debtors have provided access to the land and the facility or are prepared to do so. The dispute seems to arise from the noteholders' scepticism about the debtors' appraisals and their disbelief that the appraisers only looked at comparable land values and not at business documents.

[15] Secondly, they wish to cross examine Mr. Poli on his affidavits and to question him about various aspects of the management (or mismanagement) of the debtor corporations. It is their hope that they might discover other assets which could be applied against their debt or at least get a better understanding of whether they can put any faith in the proposal as it is currently structured.

[16] Finally, they wish to examine a representative of the first mortgagee or at least Mr. Nelson who swore an affidavit at the time of the original motion. The purpose of this is primarily to understand why the first mortgagee and the DIP lender agreed with the $2.3 million in DIP financing. The noteholders also wish to clearly understand how the outstanding balance on the

first mortgage is calculated so that they can better evaluate the extent to which their second mortgage is impaired.

[17] The wish by the noteholders for more and better information is understandable. The narrow question before me is whether s. 163 (2) of the BIA is available for these purposes in advance of voting on the proposal and if so, whether I should grant the requested orders.

Analysis

[18] It is important to understand that apart from this proceeding, there does not appear to be any litigation between the noteholders and any of the other creditors or the debtors. There has been no attempt to lift the stay under the BIA to launch such litigation. Nor have I seen any evidence of demands made under the *Mortgages Act, PPSA* or under the security instruments themselves. This motion is solely for an order under s. 163 (2) which reads as follows:

> **(2)** On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

[19] It is to be noted that such an order is not automatic. It is distinct from the power of a trustee under s. 163 (1) to conduct an examination under oath on ordinary resolution of the creditors. S. 163 (2) requires the requesting party to show "sufficient cause" and is for the purpose of investigating the administration of the estate of the insolvent party. All counsel agree that the test is properly enunciated in *Re. Josipovicz* at paras. 14 & 15.[4]

[20] In particular, that case stands for the proposition that the section does not authorize a "fishing expedition" by a creditor for its own benefit or to pursue a private remedy. The order must be for the general benefit of the creditors. In *Josipovicz* the trustee required the information and was in support of the motion. Here, the creditor seeks the order in advance of voting on a proposal essentially so that it can make a more informed choice.

[21] I agree with counsel for the bankruptcy that the BIA is designed to provide for the orderly disposition of the affairs of individuals and entities that are insolvent including the possibility (with the approval of a majority of the creditors) of avoiding bankruptcy through a proposal. As such, the *Act* provides a mechanism to freeze events by means of a stay and it then provides a series of rights, decision points and powers of investigation.

[22] It is accurate to say that while the debtors have clearly committed acts of bankruptcy and while the filing of notice of intention to make a proposal is a bankruptcy event, the debtors are not, at this point in time, bankrupt within the meaning of the Act. I also agree that the scheme of s. 163 is generally to give the Trustee the power to investigate the affairs of a bankrupt and normally, as

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[4] 2012 ONSC 5361

was the case in *Josipovicz* to authorize a creditor to conduct such investigations where the Trustee is unable or unwilling to take those steps. [5] No one is suggesting that an order under s. 163 (2) is not available in a Part III proposal but equally I have not been referred to any authority where such an order was made in advance of the vote.

[23] S. 50 of the BIA imposes on the Trustee a responsibility to investigate and report to the creditors at the meeting to vote on the proposal. As of the date of the motion, that report was in preparation but had not been delivered. S. 52 of the BIA permits the creditors to vote to adjourn the meeting for further investigation or for examination under oath. So the noteholders have three alternatives at least. They may vote for the proposal. They may vote against the proposal and trigger a bankruptcy. They may vote to adjourn the meeting for the purpose of examinations under oath.

[24] In my view the request for cross examinations in advance of the meeting of creditors is premature. I appreciate that it might be more efficient to order the cross examinations now rather than waiting to see if the creditors vote to request such an examination and if so whether the trustee is willing or able to undertake it. But without having the report of the trustee and attending the meeting where the creditors may pose questions, it is difficult to meet the test in s. 163 (2).

[25] I am not prepared to make the order for examination under oath in advance of the meeting. The proposal trustee has not expressed any concern about lack of cooperation or lack of access to information. Moreover, although the other creditors were on notice of this motion and took no position on it, and despite the fact that the noteholders may control the meeting, I am of the view that it is in the interests of all creditors to be able to attend the meeting, receive and review the proposal and to cast their votes including a vote on whether to request further investigation.

[26] I am certainly not prepared to order examination under oath in relation to what happened in Montana in isolation from what happened in New Mexico or other transactions that took place before the notice of intention was filed. There is no evidence that this would be to the benefit of creditors generally. At this stage, no one appears to be willing to fund litigation or other proceedings in the United States that might hold out any prospect of a greater net recovery in this proposal or in a bankruptcy.

[27] On the question of the appraisal, there is no question that the noteholders are entitled to obtain their own appraisal of the value of the land and for that purpose under their security instruments they are entitled to relevant information and cooperation of the debtor. This is not disputed.

[28] I also agree that they are entitled to access any source documents which the appraiser retained by the debtor consulted in preparing his opinion. I will make an order that the appraiser disclose the sources of information consulted to form those opinions to the extent they are not listed in the appraisals themselves and to produce such information if it is not appended to the appraisals. I do so on the basis that these appraisals were tendered in evidence and are expert reports.

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[5] See *Re Bradford,* (2003) 42 CBR (4th) 178 (Ont. Dep. Reg.)

[29] I am not prepared to make an order under the BIA for disclosure of business documents that might be necessary to prepare a business valuation as opposed to the value of the land. I agree that the purpose of the appraisal sought by the noteholders is for them to make their own business decisions and not for the purpose of litigation. This is not a motion under the *Rules of Civil Procedure.*

[30] To be clear, this is a ruling on the motion as argued. That is a request for orders under specific provisions of the BIA. It is not in any way a ruling on whether or not the noteholders have independent rights to information pursuant to their security instruments or other statutory provisions. They undoubtedly do have such rights. They certainly have a right to demand a mortgage payout statement from Olympia for example. They will have rights for information necessary to value any other assets over which they hold security. Those matters are not before me.

Conclusion

[31] In conclusion there will be an order that the appraiser retained by the debtor and responsible for the two appraisals now in evidence confirm if he consulted any documents or relied on any information other than listed in the reports. The appraiser is also to produce copies of all documents he reviewed if they are not already appended to the appraisal reports.

[32] The motion by the noteholders is otherwise dismissed. This is without prejudice to any requests for information that may lawfully be demanded other than pursuant to s. 163 (2) of the BIA and is without prejudice to renewal of a motion after the meeting of creditors.

[33] If it is necessary, I will hear costs submissions or receive them in writing.

Mr. Justice C. MacLeod

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Mr. Justice C. MacLeod

Date: July 17, 2020

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DECISION AND REASONS

Mr. Justice C. MacLeod

Released: July 20, 2020