CITATION: Deloitte Restructuring v. TFI Foods, 2015 ONSC 2165
COURT FILE NO.: CV-14-10628-00CL
DATE: 20150407

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

REASONS ON SETTLEMENT OF ORDER

[1] This was 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] In a judgment dated December 30, 2014 (2014 ONSC 7476), I granted the application in part. I found the sale was a bulk sale. The sale did not comply with the BSA and was declared void, in part. Sale proceeds were used to pay $150,000 to a secured creditor, HSBC. TFI was, therefore, not liable to any creditors for that amount. The evidence was unclear what additional amounts might be owed to HSBC and other creditors, which included CRA. CRA was, I found, a "creditor" within the meaning of s. 16(2) of the BSA. I held that if the parties were unable to agree on the amounts owed to the remaining creditors (i.e., whether those amounts were equal to or exceeded the total amount for which TFI was personally liable to account under s. 16(2) of the BSA), a further application could be brought on better evidence.

[3] The parties have returned to court with written submissions because they are unable to agree on the terms of the formal order. The issue in dispute involves the amount for which TFI is liable to account to the creditors under s. 16(2) of the BSA.

[4] Deloitte, the trustee in bankruptcy for Ellen's, says the total amount for which TFI is liable includes HST; that is, the purchase price of $954,000 plus HST of $124,020 less the amount paid to the secured creditor of $150,000, which equals $928,020.

[5] In essence, Deloitte argues that this matter was resolved at the first hearing and that TFI is simply attempting to reargue an issue that has been dealt with. At a technical level, Deloitte argues that the application was allowed in part. The application sought an order requiring TFI to pay the trustee the consideration for the transaction, being the sum of $1,078,020. The only part of the application not allowed related to: a) the $150,000 paid to HSBC; and b) the quantification of what individual creditors were owed and whether those amounts exceeded the amount for which TFI could be held liable. Deloitte argues that the $1,078,020 figure sought in its application included $124,020 of HST and, since no deduction was made for HST in my prior reasons, the matter of HST must have been resolved in its favour.

[6] TFI says the total amount for which it can be held liable under s. 16(2) excludes HST; that is, the purchase price of $954,000 less the amount paid to the secured creditor of $150,000, which equals $804,000.

[7] TFI argues that this issue was not resolved in my earlier reasons. TFI maintains that, under s. 16(2) of the BSA, its personal liability to account to the creditors is capped at "the value of the stock in bulk" that was sold. The "value of the stock in bulk," it argues, does not include HST. Therefore, the starting point for the calculation of the global amount for which TFI is personally liable to account, absent any evidence of a different amount (of which there is none), is $954,000, the agreed purchase price for the purchase of Ellen's equipment.

[8] TFI seeks to bolster its position with the further argument that, under *National Trust Co. v. H&R Block Canada Inc.*, 2003 SCC 66, creditors are not to be placed in a better position than they would have been in had the BSA been complied with. HST, TFI argues, was payable to the government, not Ellen's and thus, the $124,020 of HST would never have been available to be paid out to Ellen's creditors at large.

[9] The parties have characterized the present submissions as arising from their inability to settle the order. They were, however, being kind. On closer inspection of the material, I find that their disagreement really arises from the fact that I failed to deal with the disputed point in my December 30, 2014 Reasons. I must, therefore, apologize to the parties for the inconvenience of having to come back to the court for clarification of this issue.

[10] On the original application, TFI took the position that, as reflected in the sales agreement and invoice, the value of the goods purchased by TFI was $954,000. There was no evidence of any other value. The additional $124,020 was paid "on account of HST and would not have been available to pay off any of Ellen's creditors."

[11] That the $124,020 represented HST owed to the government is not in controversy. However, the statement that the $124,020 would not have been available to pay off any of

Ellen's creditors is not entirely true because CRA was a creditor of Ellen's and the $124,020 would, obviously, have been available to pay CRA. I agree with TFI, however, to the extent that the $124,020 could not be regarded as a sum "available" to the creditors at large.

[12] At the initial hearing, the Trustee relied on the following passage from the decision of Bastarache J., in *National Trust, supra* (para. 30):

> 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.

I do not think, however, that this conceptual language describing the general purpose of s. 16(2) was intended to expand the scope of the words of the BSA itself.

[13] Section 16(2) states that a non-compliant purchaser in a bulk sale is personally liable to account for "the value of the stock in bulk" that was sold.

[14] Section 12(1) of the BSA governs the distribution of proceeds of the sale when a trustee is appointed. The trustee must distribute the proceeds in accordance with the priorities set out in the *Bankruptcy Act,* R.S.C. c. B-3. Section 67(2) of the *Bankruptcy Act* provides that deemed trusts under federal or provincial legislation are generally invalid in the context of a bankruptcy. This appears to be consistent with s. 222(1.1) of the *Excise Tax Act*, R.S.C. 1985, c E-15, which provides that deemed trusts intended to secure HST claims are ineffective in a bankruptcy.

[15] The golden rule of statutory interpretation can be found in the decision of the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21:

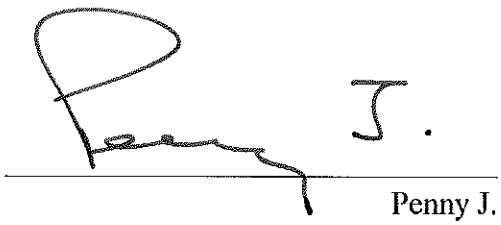
> Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[16] The plain and ordinary meaning of "value of stock in bulk," read in its entire context, harmoniously with the scheme and object of the BSA, cannot, in my view, include HST exigible on the goods sold. The principal meaning of value is "worth." There is no evidence that the stock acquired by TFI was "worth" anything other than what it agreed to pay in an arms' length transaction. TFI had an offset for the tax. Section 16(2) says that the non-compliant purchaser is liable for the value of the "stock" which it acquired, not the additional amount of value-added

taxes which become payable on a sale of that stock. Nor does the BSA make the purchaser liable for, as Deloitte's application says, "the *consideration paid for* the transaction."

[17] Tax obligations in general, and HST obligations in particular, are given no special protection under the BSA in a bankruptcy situation. While CRA may qualify as a creditor under the BSA, that does not mean that HST owed to CRA qualifies as part of the "value of the stock in bulk" that TFI acquired. In the circumstances of this case, I am able to come to no other conclusion but that the value of the stock in bulk in this case was $954,000, not $1,078,020. Accordingly, the maximum amount for which TFI can be held liable under s. 16(2) is $954,000 less $150,000 paid to the secured creditor, which equals $804,000.

[18] No further order as to costs.



Penny J.

Date: April 7, 2015