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BANKRUPTCY UPDATE

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OCTOBER 2008

RESTRUCTURING WITHOUT A PLAN

On 15 August 2008, the British Columbia Court of Appeal released its reasons for judgment in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (CA036261). Tysoe J.A., for the court, said that a CCAA stay of proceedings "should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors." CCAA filings designed to permit a debtor company to carry on business and to run a sales process for the sale of all or a substantial portion of the debtor company's business is relatively common. A CCAA sales process is often viewed as the best option for the debtor company's stakeholders. It can provide stability, transparency, a forum for the resolution of issues, and the best opportunity to preserve stakeholder value. Going concern sales and liquidations have been completed in CCAA cases where the prospect of the debtor company thereafter putting a plan or arrangement to its creditors is uncertain or non-existent. In 2001, the Ontario Court of Appeal said that such processes are consistent with the broad remedial purpose of the CCAA:

> [W]e cannot refrain from commenting that Farley J.'s decision to approve the Owns-Illinois bid is consistent with previous decision in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. (*Re Consumers Packaging Inc*. (2001), 27 C.B.R. (4th) 197 (Ont. C.A.))

In obiter Tysoe J.A. asks whether a sale of assets without prior creditor approval is appropriate. But the court was not faced with that question and so did not answer it. While, the two quoted statements may seem to be at odds, it is not clear that they are as the British Columbia Court of Appeal's decision is narrower than might at first appear.

As always, the circumstances of the case frame the decision. The debtor company was engaged in the development of 360-acre site as a golf course, single-family lots, multi-residential units, a hotel and apartments. The development had proceeded in phases, but encountered a critical difficulty when sources of water for the irrigation of the partially completed golf course evaporated. Both outstanding mortgages had matured. There was little on-going construction activity. The debtor was unable to obtain refinancing. The mortgagees demanded payment, delivered section 244 BIA notices and privately appointed a receiver. The debtor company then applied for protection under the CCAA and obtained an *ex parte* initial order, including super-priority DIP financing of about $2.3 million, with the intention of completing the project. At the come-back hearing the mortgagees sought the termination of the CCAA proceeding and the appointment of an interim receiver under subsection 47(1) of the BIA.

The mortgagees were together owed in excess of $29 million. The evidence before the Court was that the development had a liquidation value of $10 million with no source of water for irrigation, a liquidation value of $28 million with a source of water for irrigation and a going concern value with completion of the development of approximately $50 million. The debtor company, supported by the Monitor, sought an opportunity to stabilize the development and pursue a source of irrigation with a view to completing the project. The debtor company hoped that if this could be achieved there would be sufficient funds to pay all creditors in full. While not stated in the Court's reason for decision, it seems fair to conclude that the priority DIP charge, delay and lack of control by the mortgagees added to their risk of loss, but held out the hope that the project could be completed for the benefit of lower ranking creditors and equity holders. One might also venture to say that a stalled real estate project cries out less for protection than more fragile operating businesses. Notwithstanding these factors, the Chambers judge, in the exercise of his discretion under section 11 of the CCAA, concluded that the CCAA proceedings and the priority DIP financing should continue.

The mortgagees sought leave to appeal. The focus of the leave application (reasons at 2008 Carswell BC 1756) was the unusual imposition of a stay and priority financing over the objections of the mortgagees of a single purpose real estate development company, as opposed to active manufacturing or other similar companies. It was principally on this basis that leave to appeal was granted.

Tysoe J.A. considered the standard of review on appeals from discretionary CCAA orders. He concluded that appellate courts should accord a high degree of deference to decisions made by Chambers judge in CCAA maters. He quoted Newbury J.A. in *Re New Skeena* that appellate courts should not interfere with an exercise of discretion where "the question is one of weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

The court concluded that it was not suggested in the petition or in any Monitor's report that the debtor company intended to propose an arrangement or compromise to its creditors before "embarking on its restructuring plan". Tysoe J.A. stated that the fundamental purpose of the CCAA is to facilitate compromises or arrangements between companies and their creditors. There was no evidence before the court that the debtor company intended to propose an arrangement or compromise with its creditors before embarking in its restructuring plan (i.e., the attempt to complete the development within the context of the CCAA proceeding). Absent such an intention it was not appropriate to grant a stay. As Tysoe J.A. held: "What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote."

At the beginning of this note we contrasted the views expressed by the Ontario Court of Appeal in *Consumers Packaging* with the British Columbia Court of Appeal's reasons for judgment in *Cliffs Over Maple.* But, while the B.C. Court of Appeal makes reference to asset sales, the debtor company had proposed no assets sales or other restructuring steps. The debtor company was not proposing any kind of restructuring, even on a broad, liberal and remedial view. Under the guise of a restructuring the debtor company sought an injunction against the mortgagees and priority financing to continue its business in the ordinary way. As Tysoe J.A. suggests, if creditors, including the mortgagees and subject to appropriate classification, voted in favour of the course proposed by the debtor company, that might become a restructuring. Until then it failed to qualify.

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