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LIMITED PARTNERSHIPS AND THE *CCAA*

In the Matter of Forest and Marine Financial Corporation (2009) BCCA 319, the British Columbia Court of Appeal was called upon to consider whether a limited partnership qualifies for protection under the *Companies Creditors' Arrangement Act ("CCAA")*. The Court also considered whether, in the circumstances of the case, a stay of proceedings should have been issued with respect to the limited partnership. In addressing these issues, the Court also commented on whether a secured creditor's declaration that it would not support any form of restructuring plan is sufficient to effectively "doom to failure" a plan of arrangement under the *CCAA*.

FACTS

The appeal was brought by Asset Engineering LP ("AE"), a secured creditor of Forest and Marine Financial Limited Partnership, a limited partnership under the laws of British Columbia (the "Partnership"). The Partnership was in the business of providing financing and investment services to companies engaged in the forest and marine industries in British Columbia and was a part of a group of related investors and corporations referred to informally as the F & M Group. The Partnership was the main operating entity of the Group and owned the operating assets of the Group. Forest and Marine Financial Corp. was the General Partner. The Partnership's main liability was a debt owing to AE in the amount of approximately $13,000,000.

On March 26, 2009, in response to AE's application for the appointment of an Interim Receiver, the Group applied for protection under the CCAA. The Petitioners included the General Partner but not the Partnership. Mr. Justice Masuhara granted a stay of proceedings to the Group pursuant to Section 11 of the CCAA and to the Partnership pursuant to the Court's inherent jurisdiction.

At the comeback hearing on May 1, 2009, AE argued that the Partnership did not qualify for protection under the *CCAA*. It also argued that the *CCAA* cannot be used simply to "buy time" for a refinancing that will not involve a compromise or

arrangement that would have to be voted on by creditors. Finally, AE argued that it would not vote in favour of any compromise arrangement, so that any plan put forward under the *CCAA* would be doomed to fail. Notwithstanding these arguments Masuhara J. continued the stay of proceedings.

DECISION

Drawing on the decision of Farley J. in *Lehndorff General Partner Ltd.* (1993) 9 B.L.R. (2d) 275 (Ont Gen Div.), the Court of Appeal found that, while a limited partnership was not a qualifying entity under the CCAA, it lay within the jurisdiction of the Supreme Court to control its own process and "sweep in" the business of a limited partnership if the business of the corporate petitioners was clearly related to and intertwined with that of the partnership.

In considering whether a stay of proceedings should have been granted in this case, the British Columbia Court of Appeal referred to its finding in the *Cliffs Over Maple Bay* case that a stay is ancillary to the fundamental purpose of the CCAA and should only be granted in furtherance of the CCAA's purpose – for an insolvent company to gain the approval of its creditors for a proposed compromise or arrangement of its debts. In the *Cliffs Over Maple Bay* case, which involved a single purpose real estate development company, the Court had found that the debtor company had no intention of proposing a plan of arrangement and that its business would not continue even if it did file a plan of arrangement. Consequently, the Court held that the purpose of the CCAA would not be engaged.

In the *Forest & Marine* case, the Court of Appeal found that the Partnership was at the centre of a complicated corporate group that had carried on an active business since 1983. The Court found that this was quite different from the situation in the *Cliffs Over Maple Bay* case, the Court held:

> "The CCAA is appropriate for situations such as this where it is unknown whether the 'restructuring' will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties."

Noting that the principal of the F & M Group had deposed that the petitioners intended to "prepare a plan of arrangement or compromise and present the same to the creditors", and that the Chambers Judge had found that there was a "broad constituency of interests at play", the Court of Appeal was not persuaded that Masuhara J. had erred in law or applied a wrong principle in reaching his conclusion that the granting of a stay of proceedings was appropriate.

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The Court of Appeal next addressed AE's argument that the stay should not have been granted "where the proposed plan involves the refinancing of a major secured creditor and where there is a critical and central, unfulfilled prerequisite to the proposed plan"; the alteration or simplification of the F & M Group's corporate structure. The Court held that it knew of no authority "that suggests that such a restructuring could not qualify as a 'plan of arrangement' under the *CCAA* or that a refinancing by itself cannot qualify provided in each case a compromise or arrangement between debtor and creditors is contemplated".

Finally, the Court of Appeal considered the impact of AE's insistence that it would refuse to vote in favour of any plan put before a meeting of creditors by the F & M Group. Again, noting the broad constituency of interests at stake, and perhaps remembering the Chambers Judge's finding that on the evidence of value before him, AE was fully secured, the Court of Appeal held that it was not aware of any authority that permitted a creditor to forestall an application under the *CCAA* on that basis and it doubted whether Parliament intended that the Court's exercise of its statutory jurisdiction could be neutralized in such a manner.

In conclusion, the Court dismissed the appeal by AE from the Comeback Order and permitted the F & M Group to move forward with its restructuring under the *CCAA*.

If you would like more information about this update, please contact the author or any other member of **BLG's Insolvency and Restructuring Group.**

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