

NOVA SCOTIA COURT OF APPEAL

Citation: Royal Bank of Canada v. LaHave Equipment Ltd., 2007 NSCA 106

Date: 20071107

Docket: CA 287360

Registry: Halifax

Between:

Royal Bank of Canada

Applicant

v.

LaHave Equipment Limited

Respondent

Judge:

The Honourable Justice Fichaud

Application Heard:

October 26, 2007, in Halifax, Nova Scotia, In Chambers

Held:

Application is dismissed.

Counsel:

John S. McFarlane, Q.C. and Sarah Dykema, for the applicant
Michael K. Power, for the respondent

Decision:

[1] The Royal Bank applies, under s. 195 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 (“*BIA*”), for an order lifting a stay of a receiving order.

[2] LaHave Equipment Limited (“LaHave”) borrowed from the Royal Bank. LaHave gave the Bank security over its land and building in Bridgewater. LaHave experienced financial difficulties and, on March 28, 2007, the Bank appointed a receiver for LaHave’s assets and undertaking.

[3] On August 17, 2007, the receiver entered into an agreement of purchase and sale to sell LaHave’s assets to Bluenose R.V. for a purchase price of \$1.5 million dollars, with a closing date of September 30, 2007. If this transaction closes, after the 5% commission, HST, first mortgage balance and property taxes, the Bank’s unsecured shortfall against LaHave will approximate \$145,250.

[4] The Bank filed a petition in bankruptcy against LaHave. The Bank claimed indebtedness of \$1,305,284.77, and valued its security at \$1,198,476.97, leaving an unsecured claim of \$106,807.80 against LaHave.

[5] LaHave opposed the petition for the receiving order. By consent and under s. 192(1)(j) of the *BIA*, the contested petition was heard and determined by the Registrar in Bankruptcy, Richard W. Cregan, Q.C. After a hearing on September 17-18, 2007, the Registrar issued a decision on October 1, 2007. The decision granted the Royal Bank’s petition for a receiving order. In his decision, the Registrar found that (1) LaHave owed the Royal Bank in excess of \$1,000 unsecured, supported by a reasonable valuation of the Bank’s security, (2) LaHave committed an act of bankruptcy within six months preceding the date of the petition, by ceasing to meet its liabilities generally as they became due, and (3) LaHave was not entitled to a stay of proceedings under subsections 43(10) or (11) of the *BIA*.

[6] A receiving order was issued on October 3, 2007.

[7] On October 9, 2007, LaHave filed a notice of appeal from the decision of the Registrar to the Supreme Court of Nova Scotia. The appeal was taken under s. 192(4) of the *BIA*:

A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

[8] Sections 193-196 of the *BIA* are under the heading “Appeals”. This heading “Appeals” does not precede s. 192(4), under which LaHave appealed the Registrar’s decision to the Nova Scotia Supreme Court. Section 193 says that “an appeal lies to the Court of Appeal from any order or decision of a judge of the court” in specified situations. Section 194 says that “the decision of the Court of Appeal on any appeal” is final and conclusive subject to further appeal to the Supreme Court of Canada. Section 195, the provision under which the current application is made, says:

Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[9] Under s.195, “all proceedings under an order or judgment appealed from shall be stayed” unless the Court of Appeal or a judge of the Court of Appeal varies or cancels the stay.

[10] LaHave submits that its appeal from the decision of the Registrar to the Nova Scotia Supreme Court creates an automatic stay under s. 195 of the *BIA*. The Royal Bank responds by making this application for an order under s. 195 that I cancel that stay.

[11] No appeal has been taken by anyone to the Court of Appeal. No notice of appeal has been filed with the Court of Appeal. The originating document here is a “Notice of Application” filed by the Royal Bank, directly to a chambers judge of the Court of Appeal.

[12] At the scheduled date of hearing of this application, on November 1, 2007, I raised with counsel the issue whether I have jurisdiction to hear the Bank’s application. My concern was whether the automatic stay in s. 195 and the power of a chambers judge of the Court of Appeal to vary that stay, applied only when there has been an appeal from a judge of the Supreme Court to the Court of Appeal

under s. 193. In other words, does s. 195 apply when the only appeal is from the Registrar to the Nova Scotia Supreme Court judge under s. 192(4)?

[13] I asked counsel to provide written submissions on the jurisdictional issue. The submissions were filed on November 5.

[14] In my view, I have no jurisdiction to hear this application. Section 195 is under the heading “Appeals” which immediately proceeds s. 193. Section 193 defines such an appeal as follows:

... an appeal lies to the Court of Appeal from any order or decision of a judge of the court ...

The “appeal” contemplated by s. 195 is an appeal under s. 193 to the Court of Appeal from a decision of a judge. There is no such appeal here. So there is no automatic stay under s. 195. An appeal from a Registrar to the Supreme Court of Nova Scotia is dealt with in s. 192(4), and Rule 30 under the *BIA*. Nothing in that proceeding triggers the automatic stay of s. 195 or any jurisdiction of a chambers judge of the Court of Appeal. The authorities cited in counsel’s memoranda, governing the principles under s. 195, concern appeals to the Court of Appeal from a judge under s. 193: eg. *Yewdale v. Campbell, Saunders Ltd.* (1994), 34 C.B.R. (3d) 74 (B.C.C.A., in Chambers); *Re Dugas* (2003), 43 C.B.R. (4th) 127 (N.B.C.A. in Chambers); *Badlands Land & Cattle Co. v. Walker Ranch Ltd. (Trustee of)* (1996) 39 C.B.R. (3d) 66 (S.C.A. In Chambers). See also *Amex Bank of Canada v. T.D. Bank*, [1996] A.J. No. 297 (Alta C.A. In Chambers). I have no jurisdiction to hear this originating application outside any umbrella of an appeal having been filed with the Court of Appeal. See Chief Justice Clarke’s discussion of the issue in *Re NsC Diesel Power Inc. (Bankrupt)* (1996), 155 N.S.R. (2d) 90 (C.A. in chambers), ¶ 46-57.

[15] I make no comment whether a judge of the Supreme Court of Nova Scotia may or may not have the power to grant a stay, interim injunction, or other interim relief pending the hearing by the Supreme Court judge of LaHave’s appeal from the decision of the Registrar (eg. see *Amex*, ¶ 1,5).

[16] I dismiss the application, without costs, on jurisdictional grounds, and express no view on the merits.

Fichaud, J.A.