

**IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY**
Citation: LaHave Equipment Ltd. (Re), 2007 NSSC 283

Date: October 1, 2007
Docket: S.H. No. 280400
Registry: Halifax

PETITION

IN THE MATTER OF: **The Bankruptcy of LaHave Equipment Limited**

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: September 17, 18, 2007

Counsel: John S. McFarlane, Q.C. and Sarah Dykema representing the
Royal Bank of Canada

Michael K. Power representing LaHave Equipment Limited

BACKGROUND

- [1] The Royal Bank of Canada has petitioned the court for a Receiving Order against LaHave Equipment Limited, a body corporate, with its registered office in Bridgewater, Nova Scotia.

- [2] The parties have agreed that I, as Registrar in Bankruptcy, have the power to hear this petition.

- [3] LaHave had been in the business of selling and servicing construction and forestry equipment in Bridgewater for 57 years. It also had a presence in Truro. Its President is George Kent who has been involved with it for 37 years, the latter half of which he has been its President. He is, through a holding company, its majority owner.

- [4] LaHave had represented various lines of equipment. In 1995 it had the opportunity of becoming a representative of the Case organization, a leading provider of heavy equipment to the construction, forestry and other related industries.

- [5] Case requires its dealerships to have premises which comply with its standards. They must meet certain performance goals. Personal guarantees are required.
- [6] Some years before, LaHave had purchased a vacant property near the present 100 series highway, thinking that it would be a good place to relocate its operations. There was a fire in its premises. The fire and Case's requirements dictated the need for a new building. It was time to make the move. A building was designed and constructed on this property, all in accordance with the standards prescribed by Case. For example, the service bays were built with high ceilings and heavy duty floors to receive the heavy equipment.
- [7] In 2001 Case decided it wanted one dealership for Atlantic Canada and was not satisfied with LaHave's sales of its products. It terminated the dealership with LaHave. This is the subject of a lawsuit which will be reviewed later in this decision.
- [8] The Royal Bank has been LaHave's banker for some time. It had provided a

line of credit. Other financing was through arrangements with suppliers and G. E. Commercial which provided floor plan financing. Case had also provided appropriate financing facilities particularly with respect to the sale of its products. However, with the loss of the Case dealership and the downturn in the forest industry, LaHave lost a critical portion of its business.

[9] This resulted in stress in its arrangements with the Bank. Its accounts which had been administered through the local branch of the Bank were transferred in June 2002 to the Bank's Special Loans Group - Atlantic and fell under the supervision of Ross Backman, its Manager. Mr. Backman remains in charge of these accounts and was a witness at this hearing.

[10] At this time Mr. Kent had already realized the precariousness of LaHave's finances and had put his mind to what might be done with it. He had engaged a business broker, Corporate Navigators, in hope that it might find a sale for its assets or shares, or some other arrangement with others.

[11] On July 26, 2006 Mr. Backman wrote to Mr. Kent noting that the financial information indicated that as at May 31, 2006 from the first of the year there

was a net loss of \$266,278.00 and confirming that its performance no longer supported the existing credit facility.

[12] The Bank was prepared to provide time for the sale of the business, provided the credit facility would be reduced from \$2,000,000 to \$1,350,000, on a margined basis to that amount, a mortgage on the real property, subject to a first mortgage with the Business Development Bank of Canada be given, and shareholder loans be postponed.

[13] The financial statement for the year 2005 showed retained earnings of \$513,843; the previous year they were \$902,247. The sales for that year were \$5,257,825; the previous year they were \$8,985,714. The loss for the year was \$388,404; the previous year there was a profit of \$95,488.

[14] Through 2006 the situation continued to deteriorate. LaHave has since gone out of business. It owes money to the Bank and to several creditors. The Bank urged Mr. Kent to accept Peter D. Wedlake, FCIRP, of Green Jain Wedlake Inc. as a monitor to assist in liquidating the assets. This appointment took place on March 7, 2007. Mr. Wedlake's efforts primarily

focused on selling the assets. Mr. Kent on the other hand was more concerned that efforts be put to selling the business as a going concern. He felt a strong responsibility to the staff and the community.

[15] On March 28, 2007, the Bank appointed Green Jain Wedlake Inc. as Receiver and Manager pursuant to the powers in its security documents. As of this date there was of a total indebtedness to the Bank of \$1,327,794.00, for which the Bank estimated it held security for \$1,272,022.00, leaving a deficiency of \$55,772.00.

[16] The Bank took the next step on May 1, 2007 by filing with this court a petition for a receiving order.

**APPLICABLE PROVISIONS OF THE BANKRUPTCY AND
INSOLVENCY ACT**

[17] A petitioning creditor is required by Section 43(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) to establish that:

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of Bankruptcy within the six

months preceding the filing of the application.

[18] As to secured creditors Section 43(2) provides:

If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a Bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

[19] The acts of Bankruptcy are listed in Section 42(1) and include:

(j) if he ceases to meet his liabilities generally as they become due.

AMOUNT OF UNSECURED INDEBTEDNESS

[20] The Bank must prove that LaHave owes it one thousand dollars.

[21] The petition claims an indebtedness of \$1,305,284.77 for which security has been valued at \$1,198,476.97 leaving an unsecured claim of \$106,807.80. In the meantime the Receiver has obtained a sale for the property. It is scheduled to close by the end of October. The resulting estimated allocation of the debt between secured and unsecured is given in paragraph [49].

[22] This sale was brokered through Cushman & Wakefield LePage, a commercial real estate brokerage with an international presence, with Tom Gerard being the lead representative. Prior to listing the property for sale the Bank had the benefit of two appraisals prepared by Ernest C. Smith, an accredited appraiser with At-Tech Appraisal Consultants Ltd. Both these gentlemen gave evidence at the hearing.

[23] La Have contends that this sale is unacceptable. It says that the property is worth considerably more than that stated in the appraisals and reflected in the current sale price.

[24] It says that the real value is enough to pay the Bank and the other creditors in full, and possibly leave something for the shareholders. It submits that the present agreement should not stand and that time should be allowed to find what it considers a more appropriate price.

[25] In support of this position LaHave called Mark Seamone, a broker with Exit Realty, a brokerage in Bridgewater. Mr. Kent also gave evidence on this point. It is appropriate that I review in some detail the evidence of these

four gentlemen.

Ernest C. Smith

[26] The Bank in 2005 engaged Ernest C. Smith, an accredited appraiser of long experience to prepare a valuation of the property. This was at a time of enthusiasm and activity in the area. The Town of Bridgewater was encouraging the development of a big box commercial area. It promised services and made available lands owned by it. Wal-Mart had opened a store and Canadian Tire Corporation was about to do the same.

[27] Mr. Smith gave evidence of the methodology he used. He noted that there are three basic approaches - cost, income and direct comparisons. The first two are of limited utility. Let me quote what he says on page 23 of his report to the Bank of May 6, 2005, about the direct comparison approach.

The Direct Comparison Approach is the final and oftentimes preferred approach to value. This approach reflects actions of buyers and sellers in the marketplace. The approach involves comparing the subject property with others of a similar character and function which have sold in the open market as of recent date. Units of comparison are extracted from the comparable and applied to the subject under appraisal. In industrial/commercial building analysis, these units of comparison or indicator rates are usually selling prices per square foot of building.

This valuation offers the best means to project a fair and

supportable estimate through actual market evidence and account for the implications of the rapidly escalating worth of the underlying land.

[28] Using this approach he concluded that the value of the land was \$990,000 and of the building, \$800,625, resulting in a rounded off total value of \$1,800,000.

[29] At the request of the Receiver earlier this year Mr. Smith prepared a Re-evaluation Update. His report dated May 11, 2007 is strongly influenced by a downward shift in activity in the area, resulting in lower value for property in the area. He considered both the valuation of the building and of the land. Based on market evidence he concluded that the building had held the value at \$800,625, but that the land value had declined to \$780,000, resulting in a rounded value of \$1,580,000.

[30] There had not been the follow through with development anticipated in the enthusiasm of 2005. There were changes in demand and changes in supply. There were changes in the configuration of the adjacent roads. The promised services had not been completed. Such is the basis for Mr. Smith's reduced valuation.

[31] In the later report Mr. Smith offered a “Forced Sale Estimate” of \$1,300,000. If the property had to be disposed of through foreclosure, bankruptcy, or receivership, there would not be the time for it to be exposed to the market long enough to invite the interest and the negotiations characteristic of the normal market. With time being critical, a forced sale can be expected to fall short of that which would result when there is otherwise time for a proper exposure to the market.

[32] Counsel for LaHave questioned him on a number of small points. However, I am quite satisfied that his reports are proper and done to high professional standards. I take them as proper determinations of the value of the property on their respective dates.

Mark Seamone

[33] Mark Seamone’s firm, Exit Realty, specializes in property in Lunenburg and Queens County. In March 2007 he was asked by Mr. Kent to prepare a market value analysis. He subsequently prepared a report dated August 17, 2007 which was admitted in evidence.

- [34] After reviewing available information he was of the view the property had an approximate value of \$2,700,000. The land value was based on the costs of the Wal-Mart and Canadian Tire projects, which were completed at the time of high activity in the area. He considered the cost of construction to be between \$100 and \$150 per square foot.
- [35] He did not submit this figure as a valuation but rather as a reasonable asking price which would leave some “wiggle room”.
- [36] He acknowledged that there were no comparable properties for sale in the area. He also acknowledged that, notwithstanding the building was of very good quality, it was designed for a specific function which might not be suitable to prospective new owners.
- [37] Mr. Seamone had never listed a property of this size. His experience is mainly residential and small commercial. He has a broker’s licence but no professional designation. He could not give any estimate of the time it would take to sell the property or of a likely final selling price.

Tom Gerard

[38] The Bank and the Receiver engaged Cushman & Wakefield LePage, to prepare a listing proposal. The matter was handled by its representative Tom Gerard.

[39] Mr. Gerard has been in the commercial real estate business since his graduation in Economics from Dalhousie University in 1987. He has the professional designations of SIOR and CCIM. They relate to expertise in commercial, office and industrial real estate.

[40] I quote from the proposal what Mr. Gerard says about the highest and best use of the property, the suggested list price and probable selling price.

Highest and Best Use:

The subject property is in excellent overall condition and offers very marketable features. In particular, a high exposure and growing location, a large site with significant street frontage, a new adaptable structure in excellent condition, a unique combination of service/showroom and administrative space with high ceiling heights, drive through bays and large graded yard space will appeal to a variety of users.

Although there may also be interest in the property from the retail 'big box' type users/developers, the retail activity in the immediate area has slowed and there is still substantial availability of commercial land for sale surrounding the First Pro Shopping Centre site. We therefore believe the property will most likely sell to an owner occupied type user requiring excellent highway

exposure and access and a similar type setup to the Lahave Equipment operation.

Suggested List Price & Probable Selling Price:

Replacement cost new of this facility would be in the range of \$1,500,000 (\$100 per square foot) excluding the land value.

As a vacant site, the subject property would have a market value in the range of \$2.50 - \$3.00 per square foot (\$700,000 - \$850,000). The overall replacement cost value (land and building) would therefore be in the range of \$2,200,000 - \$2,300,000.

However, given that the property is already improved with a specific user style building, the ideal owner occupied type purchaser may be limited, particularly from the Lunenburg County area. Also, the market would also view the property as a 'fire sale' opportunity. However, we do expect interest in the property, and would anticipate receiving multiple offers with an ultimate sale value in the range of \$1,300,000 - \$1,500,000.

To achieve a maximum price and allow some room for negotiation we recommend a list price of \$1,795,000.

[41] By the end of June 2007 the property was listed by this brokerage with an asking price of \$1,795,000. Appropriate advertising was done. Mr. Gerard received comments within the real estate community suggesting the price was high.

[42] The first offer of \$972,000 came from Bluenose RV Centre on July 19, 2007. It carries on a recreational vehicle sales business on land adjacent to

the property. It would use the property to extend its present operations.

This was followed by three successive offers from Leisure Days RV Centre on July 23, July 25 and August 1 for \$1,100,000, \$1,230,000 and \$1,300,000 respectively. This offeror is a national business also selling recreational vehicles intending to establish a presence in the Bridgewater area, thus a competitor of Bluenose.

[43] Bluenose on August 9 made an offer of \$1,500,000. This was followed the next day with an offer by Leisure of \$1,400,000 which was revised upward the next day to \$1,800,000. This offer was accepted but with the right to withdraw, if due diligence results were unsatisfactory. On August 15 the offer was withdrawn because it was found the costs to renovate were too high.

[44] On August 20 Bluenose's renewed offer of \$1,500,000 was accepted.

[45] On September 5 the conditions precedent deadline expired. The agreement is now firm, subject only to the Receiver obtaining legal approval to complete the sale. It is scheduled to close by the end of October.

[46] In addition to the appraisals and opinions regarding market value mentioned above there were indications from a local office of Remax in March 2007 that the market value was \$1,667,000 to \$1,850,000 and from J.J. Barnickle, a national commercial brokerage, \$1,650,000.

George Kent

[47] Mr. Kent has taken strong exception to the valuations prepared by Mr. Smith and the marketing strategy followed by Tom Gerard. He thinks that the agreement which the Receiver now has with Bluenose RV Centre is not the best that can be obtained.

[48] He acknowledges that Cushman has not received a better offer. He would like Exit to have up to six months to try to find a better price. He thinks that he has a very valuable property and that in time there is a good chance an interested party will come along, recognize the real value of the property and offer a significantly greater amount than provided in the existing agreement, thereby making further bankruptcy proceedings unnecessary. He gave no specifics to back up his expectations.

BANK'S ESTIMATE OF THE VALUE OF ITS SECURITY

- [49] Mr. Wedlake's review of the Bank's position as of September 6, 2007, which takes into account the sale of the property to Bluenose at \$1,500,000 less 5% commission and HST, first mortgage of \$288,000 and property taxes of \$18,012, results in an estimated shortfall of \$145,250.
- [50] The evidence as a whole makes it clear that, at the time of the petition and continuing to the time of the hearing, there has been substantial unsecured liability to the Bank and that liability far exceeds one thousand dollars.
- [51] It is not necessary that the exact amount of the unsecured debt be proved. What is required is that the petitioner make a reasonable estimate of the value of its security and then of the unsecured deficiency. I quote from *Re McKelvey*, 1983 Carswell Ont. 200 where Sutherland J. commented at para.4 that
- the only obligation upon a petitioning creditor in such circumstances is to make a reasonable estimate of the value of its securities ...
- [52] I quote from: *Re C. Tokmakjian*, 2003 Carswell Ont. 4616 (Cameron J.)

34 The petitioning secured creditor need not prove the value of its

security. It need only provide an estimate which it must establish is not a sham or absurdly low. The petitioning secured creditor must establish that \$1,000 of unsecured debt is owing.

[53] From *Re Hugh M. Grant*, 1982 Carswell Ont. 156 (Gray J.) at para. 20

If the estimate by the petitioning creditor is real and not a sham, two authorities (*Re Button; Ex parte Voss*, [1905] 1 K.B. 602 at 604 (C.A.), and *Re Baker; Goodyear Tire and Rubber Co. V. Baker* (1937), 19 C.B.R. 73 (Ont.)) stand for the proposition that the court should not enter into a determination of the true value after the declaration of the estimated value.

[54] From *Re 484030 Ontario Ltd.*, (1992) 12 C.B.R. (3rd) 302 (Ont. Ground J.)

at para. 26

...it is not the function of the bankruptcy court, at the hearing of the petition, to value security. It is sufficient to find that there is at least \$1000 owing to the petitioning creditor.

and at para. 28

It is therefore not necessary for the creditor to establish the process by which it valued its security unless its estimate is considered by the court to be a sham or absurdly low.

[55] There is nothing before me to suggest that the valuation of the security is a sham or absurdly low. The determinant factor is the marketing of the property.

[56] Mr. Kent had been trying to sell the business as a going concern from the time of the termination of the Case dealership in 2001. The business closed

early this year. It costs money to maintain it. Meanwhile the Bank is not being paid. It is losing interest. What does it do? It has an appraisal from 2005. It has it updated. It engages a reputable commercial broker. Its work results in two competitors in the recreation vehicle business bidding it up and settling at \$1,500,000. The value stated is slightly short of the recent revised valuation, but more than the Forced Sale Estimate. This is all in the context of a repressed market for property in the area and of the building being very trade specific, most likely requiring extensive renovation for any other business. It is suggested that, rather than renovate such a building, it would be cheaper for a business to buy raw land of which there is plenty available in the area and build to its own requirements. Apparently this was the reasoning behind Leisure RV withdrawing its offer.

[57] Mr. Kent has no specific suggestions which could lead to a better sale in the reasonably near future.

[58] I have no difficulty in finding that the Receiver and the Bank have acted reasonably in accepting the Bluenose offer. The valuation then of the Bank's security is reasonable. It is thus established that LaHave at the time

of the petition was and still is indebted to the Bank for a least one thousand dollars which is not secured.

ACT OF BANKRUPTCY

- [59] The Bank alleges that the act of Bankruptcy on the part of LaHave is that during the six months before the application it ceased to meet its liabilities generally as they became due.
- [60] The indebtedness to the Bank has been proved. As well, satisfactory evidence has been given that at the time of the petition, not only was LaHave in default in its obligations to the Bank, but also had accounts payable exceeding \$400,000, obligations for vacation pay, severance pay, and pension plan, overdue utility accounts and trade accounts, arrears in the first mortgage held by Mr. Kent, and arrears in its obligation to G. E. Commercial under its floor plan financing.
- [61] Mr. Kent testified at some length how for some time he had held cheques payable to various creditors on his desk disbursing them according to his priorities when he had money. There was always a significant number of

cheques he had to hold back. I am satisfied the evidence is clear that at the time of the filing of the petition LaHave had ceased to meet its liabilities generally as they become due. The requirement of proof of a Bankruptcy offence within the previous six months is sufficiently met.

LITIGATION WITH CASE

[62] LaHave submits that I should dismiss the petition following Subsection 43(7) which provides:

(7) Dismissal of application - If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

[63] It says that its counterclaim against Case will result in a damage award sufficient to satisfy the Bank and its other creditors. Thus it is presently able to pay its debts.

[64] A copy of the pleadings was presented to the court. The action was commenced in July 2003 by Case Credit Ltd., and CNH Canada Ltd. against LaHave. The first Plaintiff is involved in financing arrangements with Case dealerships and the second Plaintiff is involved in the marketing

arrangements with the dealerships. The claim is with respect to three pieces of equipment which were provided and financed by the Plaintiffs before the LaHave dealership was terminated and the outstanding balance with respect to other matters at the time of termination, including parts, totalling in all \$256,840.58.

[65] The claim is answered by a defence questioning the inaction of the Plaintiff in not removing the equipment and not taking back the parts inventory and by a counterclaim alleging that the Plaintiffs wrongly terminated the dealership.

[66] The Plaintiffs also on March 6, 2007 commenced an action against Mr. Kent claiming that he had given the Plaintiff a guarantee of this indebtedness of LaHave and seeking from him the sum claimed in the action against LaHave. The defence filed for Mr. Kent alleges the guarantee is now void and raises the same issues as LaHave raised in its defence. The actions were consolidated in May.

[67] Counsel for LaHave advise that documents have been exchanged, there have

been examinations for discovery and the action can be set down for trial.

[68] Concern was expressed that, if the petition is granted, the counterclaim would not be pressed and Mr. Kent would be left to defend the claim in the first action in order to defend the claim against him on the guarantee.

[69] It will of course be the Trustee's responsibility, if the petition is granted, to consider first whether the claim of the Plaintiff should be allowed and second whether the counterclaim should be pressed. If the Trustee decides not to press the counterclaim, it will be open to Mr. Kent, being a substantial creditor, to apply to the court for authorization to press the counterclaim in his own name under Section 38.

[70] To dismiss the petition under Section 43(7) I must be satisfied by LaHave that it is able to pay its debts. This means that I must be satisfied that the counterclaim will succeed. This is more than I can do.

STAY

[71] LaHave submits that I should stay the proceedings following Subsection

43(10) and (11) which provide:

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's property and for any period of time that may be required for trial of the issue relating to the disputed facts.

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

[72] I do not think that Section 43(10) applies to the situation. It is true that LaHave denies the truth of the allegations of both the unsecured amount owing and the act of Bankruptcy. Extensive evidence was given on both these points, on the basis of which I am able to make findings. There is no point in staying the matter for a trial of the issues. Section 43(11), however, allows for a stay "for other sufficient reason". The reason put to me is that time should be given to find a better offer.

[73] There is an accepted offer scheduled to close by the end of October. The offer is subject, if the petition is granted, to approval of the inspectors, or of the court, if there is not sufficient time to appoint inspectors. If the petition is not granted, it is subject to approval of the court in the present

receivership proceedings. For the purposes of what is before me I have already determined that the Receiver has acted reasonably in accepting this offer.

[74] It would seem to me that granting a stay to allow or maybe force the Receiver to renege on the sale in hope of finding a better sale, where there is no real evidence that such is likely, is too much to ask the court to do. There will be a lost sale, substantial holding expenses and lost interest.

[75] There would be a similar result, if a stay were granted to allow the action against Case to proceed. The finding of a better sale could take several months. The resolution of the action with Case may take longer.

[76] I quote the following paragraphs from pages 157 and 158 of Houlden & Morawetz: *The 2007 Annotated Bankruptcy and Insolvency Act*

In *Re Mediacost Inc.* (1990), 80 C.B.R. (N.S.) 39 (Ont. S.C.), the future prospects and the past history of the debtor were not good, and the debtor needed further capital to remain in business: the court refused a stay even though it meant that a number of employees would lose their jobs and the principals of the debtor company would lose their investment.

Where the court found that a plan put forward for solving the debtor's financial difficulties was unrealistic and unworkable, a

stay was refused: *Re Caslexa Construction Inc.* (1996), 43 C.B.R. (3d) 197 (Ont. Gen. Div.).

[77] A stay would put the matter into limbo for longer than is fair to the Bank and the other creditors. The costs mount daily. The likelihood of advantage arising from the stay is small. A stay will not be allowed.

CONCLUSION

[78] In summary:

1. LaHave owes the Bank in excess of one thousand dollars which is unsecured. This is supported by a reasonable valuation of its security.
2. LaHave has committed an act of Bankruptcy within six months immediately preceding the date of the petition, having ceased to meet its liabilities generally as they become due.
3. The submissions of LaHave that the petition be refused because of the Case litigation and alternatively that a stay be granted are rejected.

[79] The Bank is accordingly entitled to a Receiving Order against LaHave.

R.

Halifax, Nova Scotia
October 1, 2007