IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *LaHave Equipment Ltd. v. Royal Bank of Canada* , 2007 NSSC 381

Date: 20071119
Docket: SH No. 286580A
Registry: Halifax

Between:

LaHave Equipment Limited

Appellant

v.

Royal Bank of Canada

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	November 14, 2007, in Halifax, Nova Scotia
Written Decision:	January 15, 2008 **(Oral: November 19, 2007)**
Counsel:	Michael K. Power, for the appellant John S. McFarlane, Q.C., and Sarah Dykema, for the respondent

Robertson, J.: (Orally)

[1] LaHave Equipment Ltd. ("LaHave") appeals pursuant to s. 192(4) of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 ("*BIA")* the decision of Richard W. Cregan, Q.C., Registrar of Bankruptcy, who issued a receiving order against LaHave on October 3, 2007, in favour of the Royal Bank of Canada ("RBC").

[2] This appeal was initially to have been heard by me on November 27, 2007, but was advanced to November 15, 2007 in advance of the scheduled sale of real property assets of the bankrupt estate situated at Bridgewater, Nova Scotia to Bluenose RV, now scheduled to close November 25, 2007.

[3] An order approving the sale and a declaration that the consent of inspectors of the estate of LaHave be dispensed with, was granted by Justice John M. Davison on November 8, 2007.

[4] In his written decision dated October 1, 2007, the Registrar of Bankruptcy had found that:

(a) LaHave owed RBC in excess of $1,000 which was unsecured, and that this was supported by a reasonable valuation by RBC of its security;

(b) LaHave committed an act of bankruptcy within six months immediately preceding the date of the petition, in that it had ceased to meet its liabilities generally as they become due;

(c) LaHave was not entitled to a stay of the receiving order as a result of an ongoing claim for damages by LaHave against a former supplier, Case Credit Ltd. and CNH Canada Ltd., or for any other reason.

[5] The events that led up to the petition in bankruptcy are as follows:

LaHave has been in the business of selling and servicing forestry equipment for 57 years. Its president and majority owner is George Kent.

RBC entered into an agreement with LaHave on July 25, 2006, whereby RBC agreed to lend $2 million to LaHave subject to certain conditions. The

security for this loan was LaHave's assets, which consisted, in part, of land and a building situated in Bridgewater, Nova Scotia (the "Property').

Prior to 2007, LaHave was experiencing difficulties meeting its liabilities to its creditors as those liabilities were due. On March 28, 2007, Green Hunt Wedlake Inc. was appointed by RBC as Receiver and Manager (the "Receiver") of LaHave, pursuant to its security documents.

RBC filed a petition in bankruptcy against LaHave on April 30, 2007, and this petition was then filed with the Court on May 1, 2007. At the time of the filing, RBC claimed it had an unsecured claim of $106,807.80 against LaHave.

On August 17, 2007, an agreement of purchase and sale (the "Agreement") was entered into between Bluenose RV (the "Purchaser") and the Receiver of the Property. The purchase price of the Property was $1.5 million, with a closing date of September 30, 2007, with a right to extend the closing to October 31, 2007. With the exception of one offer of $1.8 million for the Property that was withdrawn by the potential purchaser upon inspection of the Property, there had been no other offers on the Property in excess of $1.5 million.

LaHave opposed the petition for the receiving order and the matter came on for hearing before the Registrar in Bankruptcy Richard W. Cregan, Q.C. on September 17 and 18, 2007.

[6] The grounds of appeal are as follows:

1. That the Registrar erred in law in deciding that the valuation of the Royal Bank real property security was reasonable;

2. That the Registrar erred in law in finding that LaHave Equipment Limited owed the Bank any money as an unsecured creditor;

3. That the Registrar failed to take into account the case of *Case Credit Ltd. and CNH Canada Limited v. LaHave Equipment Limited* (counterclaim) and the potential damage award available to all creditors of LaHave Equipment Limited;

4. That the Registrar erred in law in failing to consider the conflict of interest;

5. That the Registrar failed to exercise the authority under s. 43(7) of the Bankruptcy and Insolvency Act and dismiss the petition for other sufficient cause; and

6. That the Registrar failed to exercise the authority under s. 43(10) of the Bankruptcy and Insolvency Act and stay the proceedings in any event.

STANDARD OF REVIEW

[7] In the absence of manifest errors the Appellate Court should not substitute its discretion for that of the trial judge, in this case the Registrar of Bankruptcy. *Paulin v. Nat. Bank of Can* (1985), 56 C.B.R. (NS) 3 61 N.B.R. (2d) 179, 158, A.P.R. 179 (C.A.). A receiving order is a product of an exercise of judicial discretion, that should not be interfered with by the reviewing judge unless the earlier decision is based on wrong principles or unless it is wrongful in that no weight or not sufficient weight had been given to the relevant considerations: *Banque Nationale de Paris (Canada) v. Opiola* 2001 CarswellAlta (Alta C.A.); *Re Fred Walls & Son Holding Ltd.,* 2003 CarswellBC 451 (B.C.C.A. [in Chambers]); *Re Maple City Ford Sales* (1986), Ltd (1996), 41 C.B.R. (3d) 181, 1996 CarswellOnt 3717 (Ont. C.A.).

[8] The appellant concedes that LaHave committed an act of bankruptcy within the 6 months immediately proceeding the date of the petition. The appellant also concedes that LaHave ceased to meet its liabilities generally as they became due. In fact, LaHave had ceased operation before the petition was issued.

[9] However, LaHave disputes that the valuation of the real property security was reasonable or that the Bank was an unsecured creditor at the time of the petition, May 1, 2007, arguing that they were still within the limit of the line of credit facility.

[10] As of April 23, 2007, Peter D. Wedlake, the Receiver prepared a statement of the estimated security position of the RBC, who was then owed $1,327,794. It was Exhibit P-4 before the Registrar. The land and building valuation was $923,250. He arrived at this valuation by taking 75% of the estimated market value of $1,776,000 less selling costs and prior charges. He then found that the RBC was an unsecured creditor in the sum of $55,772.

[11] Exhibit P-5 is a further reconciliation prepared by John McFarlane, Q.C. and Mr. Backman of the RBC, as of April 30, 2007. This exhibit identifies statutory claims, relating to severance pay in the amount of $73,545.03 that would rank ahead of the RBC's security. The unsecured remainder was then calculated upward to $106,807.80.

[12] The Registrar accepted that the RBC had established that it was an unsecured creditor of $1000.

[13] With respect to the valuation the Registrar stated beginning at para. 49:

> [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.

This is a correct statement of the law and in my view a correct application of the law to the facts that were before the Registrar.

[14] The Registrar then went on to conduct a lengthy analysis of the evidence with respect to appraised value and market value of the Property examining the evidence of Tom Gerard of Cushman & Wakefield LePage; Ernest C. Smith, an accredited appraiser Al-Tech Consultants; and Mark Seamone, a broker with EXIT Realty. The Registrar also considered the evidence of George Kent who took strong exception to the valuation.

[15] He found at para. 56:

> [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.
>
> ...
>
> [58] I have no difficulty in finding that the Receiver and the Bank have acted reasonably in accepting the Bluenose offer. ...

[16] Today, Mr. Kent continues to assert that the Bank's valuation of the property was absurdly low, given that the Bank had in its files an appraisal on the value of the building dated May 2005 showing a value of $1.8 million. What could have changed in 2 years to reduce its value to half?

[17] It is important to note that George Kent made every effort to ensure that LaHave remained an operating company after the loss of their dealership agreement with Case Credit Ltd. From 2001 he attempted to sell the whole of the business, preserving jobs and meeting the company's obligations to its unsecured creditors. Had it not been for the loss of the dealership agreement and a dramatic downturn in the forestry industry Mr. Kent might have been successful in this attempt. He did resist the option of LaHave selling off the real property asset separately as he believed this would not maximize its value. The RBC made the decision for him.

[18] The Registrar accepted Mr. Wedlock's evidence with respect to the valuation and the forced sale conditions that result after the petition. His evidence is as follows at p. 111 of the transcript:

> Well I guess everybody's, the public's initial reaction is that they're buying it from a Trustee or a Receiver so they're going to, they're going to get a deal. Our, I guess, limitation as to, as to what we might be able to achieve really sometimes comes down to one of time. As I say in most instances we're not like the owner that might be prepared to wait a year or more to find the right person to come along to offer a price. We are operating under shorter time frames because costs continue to run while assets remain unrealized and, and so there is that. In the end of the day it comes down to what someone's willing to pay for the property and, and what the demand out there is for. You know, I've had fish plants that I couldn't sell. I've got truck stops that I can't sell and in this particular situation I think we were very fortunate in that a competitor decided hat he was interested in the property right next door to an existing business and he wanted it to be there, located there because of the competitive nature and the existing operator didn't

> want his competitor next door. So we got into a little bit of bidding war that was, we were quite fortunate because there was really no other interest in the property at that number.

[19] It is not the Registrar's function to value the security. He must however satisfy himself that the valuation is not a sham or absurdly low. On the evidence before him, he was thus satisfied and found evidence that the Bank was in fact unsecured for a sum in excess of $1000 as per the requirement of s. 43(1) (a) and (b) and s. 43(2) of the *BIA.*

[20] It is also important to note that the Registrar does not simply look at the conditions as they existed at the date the petition was filed but has an obligation to review all of the evidence to the date of the hearing, which in this case was 4 months and seventeen days after the petition was filed.

[21] Apart from the estimate of value of the bankrupt estate made by Mr. Wedlake and the RBC as at the end of April 2007, from the evidence that was before the Registrar, it is clear that the situation began to deteriorate as the business was not operating and statutory claims for severance and unfunded pension obligation began to mount, claims that would rank ahead of the RBC. As the Registrar stated the best indicator of property valuation is found in the market place and the history of offers made and Exhibit 9 in the evidence bear this out. Indeed, in my view had the Registrar heard the matter at an earlier date, this would not have changed his position on valuation of the asset as being reasonable with respect to the Registrar's findings.

[22] It is not up to me to substitute my own discretion on the reasonableness of the valuation approach adopted by Mr. Wedlake. Nor can I find that on reviewing all the evidence that was before Mr. Cregan, that his determination that the valuation was not a sham or absurdly low is an unreasonable finding or a finding not supported by the evidence. There is no manifest error in his findings, with respect to the first 2 grounds of appeal.

[23] With respect to the 3rd, 4th, and 6th ground of appeal that the Registrar failed to take into account the potential benefit of the litigation (counterclaim) LeHave initiated against Case Credit Ltd., the Registrar found that this was too speculative to cause him to consider a stay pursuant to s. 43 (7) or that a stay should otherwise be considered under s. 43 (10) and (11) "other sufficient cause."

[24] The Registrar found at para. 68 of his decision:

> 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.

and at para. 70:

> 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.

[25] With respect to s. 43 (10) and (11) the Registrar also rejected the argument that given more time for the property to be marketed a higher purchase price might be returned.

[26] He found commencing at para. 72:

> 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.
>
> ...

Then at para. 77:

> 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.

[27] In my view of all of the evidence before the Registrar, I can find no manifest error in these findings. The Case litigation was commenced in 2003 and although some discoveries have been held, no notice of trial has been issued. The Registrar's finding that the prospects success are too remote at this juncture to determine is reasonable, as was his determination that there is no evidence before him to suggest that a delay in the sale would yield a better result.

[28] With respect to the ground of appeal relating to the conflict of interest generated by a lawyer in the firm of Stewart McKelvey representing Case in the litigation against LaHave and Mr. McFarlane, representing the RBC in the petition against LaHave, the fact of a potential conflict is not material in that Stewart McKelvey will not be offering advice to the Trustee with respect to whether or not to pursue the Case litigation. And indeed should the Trustee not choose to continue with the counterclaim against Case, Mr. Kent, I am satisfied does as a substantial unsecured creditor of LaHave, has the option to pursue the claim pursuant to s. 38 of the *BIA*. The failure of the Registrar to comment on this issue does not in my view materially change any of the circumstances upon which his decision was grounded.

[29] In the result, LaHave's appeal against the decision of the Registrar's is dismissed.

Justice M. Heather Robertson