IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: RJM Fisheries Ltd. (Re), 2011 NSSC 39

Date: February 1, 2011
Docket: Hfx No. 338236
Registry: Halifax

IN THE MATTER OF: **Motion by ISLENSKA UMBODSSALAN HF/ ICELANDIC SALES AGENCY LIMITED for an Order lifting a stay of proceedings in relation to RJM FISHERIES LIMITED pursuant to Section 69.4 of the *Bankruptcy and Insolvency Act***

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: January 21, 2011

Counsel: Ben R. Durnford representing Islenska Umbodssalan HF/ Icelandic Sales Agency Limited

R. Gary Faloon, Q.C., representing the Trustee, A. C. Poirier & Associates Inc.

Robert G. MacKeigan, Q.C. representing PricewaterhouseCoopers Inc., Interim Receiver

Background

[1] This is an application under Section 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") by Islenska Umbodssalan / Icelandic Sales Agency Limited ("Islenska") for an order lifting the stay of proceedings against RJM Fisheries Limited ("RJM"), now in effect as a result of its bankruptcy.

[2] Islenska is an Icelandic corporation engaged internationally in the fishing business. RJM is a Nova Scotia corporation located in Pubnico, Nova Scotia. Its business is that of processing fish. It was solely owned by Arnold de Mings. However, in May 2008, Islenska became owner of 49% of the shares of RJM. Mr. de Mings retained control with the ownership of the remaining shares.

[3] Notice of the Intention of RJM to file a proposal under the *BIA* was received by Islenska through its counsel from A. C. Poirier & Associates Inc., trustee in bankruptcy, by letter dated October 20, 2010. This was followed on October 22, 2010 with an application being made before me by Islenska for the appointment of an interim receiver of the salt fish inventory of RJM and

its proceeds. The evidence before me was contained in the affidavit of Birgir Bjarnason, the general manager of Islenska. In this affidavit Mr. Bjarnason reviewed the relevant history of the relationship between the two corporations, beginning with the details of ownership mentioned above. Particularly, he deposed that Mr. de Mings had continued as manager of RJM responsible for day to day operations and had communicated regularly with him, and that all important decisions were made cooperatively between the two corporations, but that communication had broken down approximately six to eight weeks before.

[4] The arrangement between them is described in paragraph 6 of the affidavit which I quote:

> In the past two years, Islenska financed the operations of RJM by pre-paying for fish it intended to purchase from RJM. Islenska would sell RJM raw fish to be processed. It would then pay for the fish to be processed by RJM, on the understanding that RJM would deliver the fish to it for sale in Europe when processing was complete. Delivery of processed product would often be delayed to allow for it to be sold in optimal market conditions.

[5] The salt fish inventory consisted of Pollock which was being stored in Tusket, Nova Scotia, to which Islenska had access, but which was removed by RJM to another facility, the location of which was unknown to Islenska,

and Cod which was being stored in Spain awaiting sale to European customers. The specific location of the Cod was being kept from Islenska, as were the catch certificates which are required to effect its sale.

[6] Islenska's position has been that, pursuant to the arrangements mentioned above, it has a proprietary interest in both inventories. RJM and its Trustee have throughout refused to acknowledge this interest.

[7] According to the Statement of Affairs filed with the Notice, of the $1.3 million indebtedness of RJM, approximately $1.1 million is owed to Islenska.

[8] After considering this information and further details in the affidavit, I found that it was proper to appoint PricewaterhouseCoopers Inc. (PWC) as interim receiver.

[9] PWC have completed their work in a manner apparently satisfactory to all concerned. This was facilitated by a consent order granted on November 5, 2010. Along with the application for the interim receiver, Islenska made an

application for the lifting of the stay of proceedings resulting from the filing of the Notice of Intention to enable it to commence an application in the Supreme Court to have its proprietary interest in the two inventories determined.

[10] This second application was completed with another consent order dated November 5, 2010 whereby all parties agreed that the stay be lifted. An application respecting the proprietary interest was then commenced and was scheduled for November 24, 2010, adjourned to December 6, 2010, and then adjourned *sine die* to enable the parties to negotiate.

Bankruptcy of RJM

[11] RJM made an assignment in bankruptcy on January 5, 2011. A. C. Poirier & Associates Inc. is the Trustee. A new stay of proceedings pursuant to Section 69.3 of the *BIA* has been imposed. The purpose of the present application is to lift this stay. It was first before me on January 14, 2011.

[12] The Trustee, through its counsel, Mr. Faloon, refused consent to my hearing it. Nevertheless, there was some discussion and the matter was adjourned

sine die with the parties being urged to resolve their differences respecting the substantive issue of Islenska's proprietary interest in the inventories, or failing that, whether the stay should be lifted, or failing that, who could hear the application, I or a judge.

[13] The substantive issue is simply who owns the two inventories of fish or their proceeds. All the other issues are procedural. Islenska wants to continue the application directly before a judge. The Trustee wants the strict procedures of the *BIA* to be followed. As the parties were unable to reach agreement, the hearing resumed before me on January 21st.

Authority of a Registrar to Lift a Stay of Proceedings

[14] I should first deal with the question of my authority to hear this present application. The Trustee refused to consent to my hearing it, saying that it is not covered by Subsection 192(1) of the *BIA* which states my powers as Registrar. However, the following reference in *Houlden, Morawetz & Sarra: The 2011 Annotated Bankruptcy and Insolvency Act* (*HMS)* at F§114(1), page 429, second paragraph was brought to my attention:

> The application for leave can be made to the registrar, s. 192(1)(k), or to the judge.

This paragraph permits a registrar :

> (k) to hear and determine any matter relating to practice and procedure in the courts;

No case is cited. However, I am satisfied this is a procedural matter and is thus covered by this paragraph. I take it that the learned authors are of this view. Nothing was suggested to me to fault this reference. I followed it and ruled that I have authority.

Position of the Trustee, Section 81

[15] As mentioned above, RJM had consented to the stay imposed by the proposal proceeding being lifted. Such consent was given on its behalf by Mr. Faloon as its counsel. It is clear from the documentation presented, the Trustee, then acting as the trustee in the context of the proposal proceeding and as advisor to RJM, was in agreement with the overriding question being directly put before a judge so that the propriety interest would be determined and the consequences be worked through. Now that the assignment has been made, Mr. Faloon has become counsel to the Trustee. His instructions have been to oppose the stay being lifted so that this question must be settled under the strict provisions of the *BIA*.

[16] The only provision of the *BIA*, brought to my attention that might be applicable, is Section 81 which I quote:

> 81. (1) Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.
>
> (2) The trustee with whom a proof of claim is filed under subsection (1) shall within 15 days after the filing of the claim or within 15 days after the first meeting of creditors, whichever is the later, either admit the claim and deliver possession of the property to the claimant or send notice in the prescribed manner to the claimant that the claim is disputed, with the trustee's reasons for disputing it, and, unless the claimant appeals the trustee's decision to the court within 15 days after the sending of the notice of dispute, the claimant is deemed to have abandoned or relinquished all his or her right to or interest in the property to the trustee who may sell or dispose of the property free of any right, title or interest of the claimant.
>
> (3) The onus of establishing a claim to or in property under this section is on the claimant.
>
> (4) The trustee may send notice in the prescribed manner to any person to prove his or her claim to or in property under this section, and, unless that person files with the trustee a proof of claim, in the prescribed form, within 15 days after the sending of the notice, the trustee may then, with the leave of the court, sell or dispose of the property free of any right, title or interest of that person.
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> (5) No proceedings shall be instituted to establish a claim to, or to recover any right or interest in, any property in the possession of a bankrupt at the time of the bankruptcy, except as provided in this section.
>
> (6) Nothing in this section shall be construed as extending the right of any person other than the trustee.
>
> (underlining added)

[17] There is a very extensive commentary on this section in *HMS* at F§181. It is

designed to deal with property belonging to others taken inadvertently into possession by the Trustee while taking possession of the bankrupt's property. If the trustee does not accept the claims of others, then the procedure outlined must be followed. This is clearly stated in Subsection (5). The result is that simply where one asserts against a trustee a proprietary interest in property which was in possession of the bankrupt at the time of the assignment and the interest is not conceded by the trustee, the person must proceed under this section to assert it. No alternative remedy can be sustained.

[18] The difficulty with this section is the requirement that the property be in the possession of the bankrupt on the date of the assignment. I understand that the proceeds of the Cod inventory were still in PWC's hands on the date of the assignment and that there is a question of whether possession of the remaining inventory for the purposes of this section was with RJM or PWC. If the question of possession is continued to be disputed, the matter will have to be referred to the registrar or a judge before the substantial issue can be addressed. If the substantial issue cannot be resolved, it also will have to be similarly referred.

[19] If the stay is lifted, Islenska can renew its application in the Supreme Court to have a judge determine the validity of the proprietary interest. Either way, if the parties cannot reach an agreement, the matter will have to be judicially resolved.

Should the Stay be lifted?

[20] With this background, I must now address the principal question now before me. Should I lift the stay of proceeding so that Islenska can proceed with a fresh application to have its proprietary interest determined? The authority on this point is Section 69.4 which I quote:

> A creditor who is affected by the operations of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

[21] I reviewed the case law on this section in *Jenkins, Re*: Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd., 2005 NSSC 234 . I quote from it paragraphs [6] to [11]:

Law

[6] Section 69.4 has been recently interpreted by the Ontario Court of Appeal in *Re Ma* (2001), 24 C.B.R. (4th) 68. This case concerned the creditor of an undischarged bankrupt bringing a motion for an order lifting the stay of proceedings to permit the commencement of a fraudulent misrepresentation action against the bankrupt.

[7] The central issue was whether an applicant is required to establish a *prima facie* case for the proposed action. This question was earlier reviewed in *Re Fancisco* (1995), 32 C.B.R. (3rd) 29 (Ont. Bktcy.), affirmed at (1996), 40 C.B.R. (3rd) 77 (Ont. C.A.)

[8] In that case a *Construction Lien Act* proceeding involved an action against a director who became bankrupt. Leave was sought to proceed against the bankrupt. Adams J found that the pleadings were sufficient to bring the claim arguably within s.178(1)(d) and lifted the stay.

He said at page 30:

> In considering an application for leave, the function of a bankruptcy court is not to inquire into the merits of the action sought to be commenced or continued. Instead, the role is one of ensuring that sound reasons, consistent with the scheme of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c .B-3, exist for relieving against the otherwise automatic stay of proceedings.
> (underlining added)

[9] In *Re Ma* this statement was affirmed.

[10] The point is also expressed using a different adjective to describe the reasons required in *Wychreschuk v. Sellors* (1988), 71 C.B.R. (N.S.) 37 (Man. Monnin J.) in paragraph 5:

> In order for leave to be granted, an applicant must demonstrate to the court that there exits compelling reasons to permit an action either to commence or proceed.
> (underlining added)

[11] The practical result of these authorities is that the applicant in a section 69.4 application is not required to prove a *prima facie* case, or actually prove any facts respecting the case, rather it is for the applicant to satisfy

> the court either that it is likely to be materially prejudiced by the stay or that there are other equitable grounds for lifting it.

[22] Let me also quote from *HMS*, the first paragraph of F§114:

> One of the objects of the *Bankruptcy and Insolvency Act* is to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis: *R. v. Fitzgibbon* (1990), 78 C.B.R. (N.S.) 193 (S.C.C.). Sections 69, 69.1, 69.2 and 69.3 are designed to prevent proceedings by a creditor that might give the creditor an advantage over other creditors.

[23] I suggest that these sections are intended to give the court strong central supervisory authority to assure efficient management of all litigation in which the bankrupt is or may become a party.

[24] Islenska's counsel submits that with the stay it would be prejudiced in a material way in that it would be prevented from having the substantial issue of dispute resolved by an application directly to a judge. With the stay it will have to work through the procedure of Section 81, which may not be applicable to a substantial portion of the property in question. Simply put, Section 81 may not be applicable and does not provide the efficiency a direct application to a judge in a Supreme Court application would. As Islenska is a substantial majority creditor, the status of its claim of a proprietary interest

in a substantial portion of the alleged assets of the estate is something needed to be resolved quickly for the efficient administration of the estate. It has more than anyone else a real interest in the efficiency of this administration.

[25] The only answer to this given by the Trustee is its preference to let the administration flow in the usual course under the *BIA*. However, it appears that the requirements for using Section 81 may not be met. Alternative approaches under the *BIA* were not suggested.

[26] I strongly exhort the parties to work together. If they cannot agree on a total resolution, at least they should agree as to how to proceed and put the substantial issue as quickly as possible before a judge.

Conclusion

[27] I accept the submissions of Islenska that it is likely to be materially prejudiced, should it not be able to bring this matter before a judge in the manner it wishes.

[28] An order lifting the stay with respect to an application to determine the proprietary interest of Islenska in the inventory and proceeds in question will be granted.

R.

Halifax, Nova Scotia
February 1, 2011