SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2024 NSSC 214

Date: 20240722
Docket: 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The Bankruptcy of Atlantic Sea Cucumber Limited

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	July 5, 2024, by correspondence: Stay and s. 38 applications, in Halifax, Nova Scotia
Final Written Submissions:	July 15, 2024
Counsel:	Darren O'Keefe and Caitlin Fell, for Atlantic Sea Cucumber Limited ("ASC," the "Debtor," or "the bankrupt") Joshua Santimaw, for the Trustee msi Spergel Inc. ("the Trustee") Michelle Kelly, K.C., Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Taiwei Haiyang Aquatic Food Co. Ltd. ("WTH") Megan Taylor, for the Atlantic Golden Age Holdings Limited ("AGAH")

By the Court:

[1] Sea cucumbers are ugly, bottom-dwelling scavengers possessed of lumps and bumps galore. The gentle reader may draw their own comparisons to this litigation.

[2] This hydra-headed dispute currently brings four applications before me, all by consent pursuant to s. 192(1)(j) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "*BIA*"), aside from such other jurisdiction as I have. The participants each indicated that consent at a case management conference on June 7, 2024. It was further subsequently agreed that the motions by Weihai Taiwei Haiyang Aquatic Food Co. Ltd. ("WTH") would be heard by correspondence; the motions by Atlantic Sea Cucumber Limited ("ASC," "the Debtor," or "the Bankrupt") would be heard in person. This cooperation has expedited the proceedings considerably. It is notable, given the temperature of the underlying disputes.

[3] The applications, paraphrased, are:

- By WTH for leave to proceed under s. 38 of the *BIA* to challenge security claimed by Atlantic Golden Age Holdings Ltd. ("AGAH")

over ASC's assets. AGAH and ASC are related companies; WTH is a seven-figure unsecured creditor[1], following pre-bankruptcy litigation between it and ASC (2023 NSSC 27);

- By WTH under ss. 37 and/or 119(2) of the *BIA* to stay a current sales process of ASC's assets, pending the outcome of the above challenge, if leave is granted;
- By ASC to remove Gavin MacDonald, solicitor for WTH, as an inspector of the ASC's bankrupt estate pursuant to s. 116(2) of the *BIA*; and
- By ASC to remove Gavin MacDonald and his firm, Cox & Palmer, as solicitor for WTH in these proceedings.

[4] Each of these motions are opposed by one or more participating stakeholders. Costs are also in issue. The solicitor's disqualification and inspector removal applications were adjourned to an in-person hearing on September 13, 2024. The parties agreed the other matters could be heard by correspondence.

[5] The sales process was originally contemplated to have opened on May 31, 2024, with a bid deadline of July 15, 2024, followed by a prompt selection on July

[1] Except for a $5,000 preferred creditor claim which does not change anything in this analysis.

17, 2024 and submission for Court approval forthwith thereafter. I was advised that the process had not yet been started as of July 10, 2024, but I am now advised by counsel for the Trustee that it began during the week of July 15, 2024. I was further advised at case management that the six week period between the start and the selection would be expected to remain, putting the earliest potential application for Court approval into early September. Nonetheless, it remains important for the first two motions to be addressed expeditiously.

[6] AGAH claims to be a secured creditor of ASC; the Trustee has allowed this claim, after obtaining an independent legal opinion from a respected firm (and after having re-submitted it for reconsideration by that firm, at WTH's behest). WTH disputes this conclusion and allowance of claim, and maintains this contest. WTH seeks permission to litigate this under s. 38 of the *BIA*. AGAH claims that the proper method is to contest the matter under s. 135 of the *BIA*, and that the time has elapsed to do so.

[7] WTH also seeks to stay the sales process, pending the outcome of the above. The security dispute and the sales dispute are related as so-called "credit bids" are permitted under the Sales and Investment Solicitation Process ("SISP") and it is in

evidence that AGAH intends to do so[2]. The validity and scope of the claimed security thus has a direct impact on the bidding process and realization, not just the allocation and distribution of the net proceeds.

[8] In making this challenge to the SISP, WTH acknowledges the heavy burden upon it in asking the Court, in effect, to override the decision of the inspectors to proceed with the SISP; I also note and will discuss that the SISP in turn would be subject to Court ratification shortly thereafter.

[9] In considering the materials and submissions, and proposed sale timeline, I became concerned whether any harvesting, quota, or similar licenses would be subject to revocation or expiry which could impact the realizable value of the estate in the short term. Counsel for ASC confirmed to the Court that the federal Department of Fisheries and Oceans ("DFO") is not taking any active steps with respect to any of ASC's licenses; ASC has sought leave at the Supreme Court of Canada to appeal the decision in *Atlantic Sea Cucumber Ltd. v. Weihai Taiwei Haiyang Aquatic Food Co. Ltd*., 2024 NSCA 35, and the "status quo" of licenses at

[2] The Trustee appears originally to have contemplated stalking horse bids as well; this does not appear in the SISP as approved. However, AGAH characterizes its contemplated bid as a "stalking horse credit bid" – affidavit of Gavin MacDonald affirmed June 24, 2024 (the "MacDonald affidavit"), exhibit I. The Trustee contemplates this as well – MacDonald affidavit, Exhibit J, paragraph 2(d).

DFO is pending the outcome of that leave application[3]. That application relates to conversion to CCAA proceedings and is separate from the present issues. I am not aware of the timeline of the leave application, or when it will be argued or decided.

Preliminary matter – WTH's Corporate Registration in Nova Scotia

[10] After submissions (and after a case management conference setting down the disqualification / inspector applications noted above), ASC objected to WTH's ability to proceed with its motions based on s. 17(1) of the *Corporations Registration Act*, RSNS 1989, c. 101, which reads:

> 17 (1) Unless and until a corporation holds a certificate of registration that is in force, it shall not be capable of bringing or maintaining any action, suit or other proceeding in any court in the Province in respect to any contract made in whole or in part in the Province in connection with any part of its business done or carried on in the Province while it did not hold a certificate of registration that was in force, provided, however, that this Section shall not apply to any company incorporated by or under the authority of an Act of the Parliament of Canada or by or under the authority of an Act of the Legislature. [emphases added]

[11] This was by way of submission by counsel for ASC. No affidavit or other supporting evidence was provided. However, the status of WTH at the time of ASC's bankruptcy (and of WTH's application) was effectively admitted by WTH in its reply. In summary, WTH *was* registered in Nova Scotia in 2021, but with a typographical error (being ***Weihei*** Taiwei Haiyang Aquatic Food Co. Ltd. instead

[3] Counsel referred to the hiatus as being related to this application for leave to appeal; however, the Trustee reported that "The Department of Fisheries has agreed to step aside until a sales process can be completed." [emphasis added] – MacDonald affidavit, exhibit J, paragraph 4. Both may be the case; which will come first is indeterminate.

of ***Weihai*** Taiwei Haiyang Aquatic Food Co. Ltd.). This does not appear to have been raised at the time of the WTH/ASC litigation (heard starting in November 2022 and decided in February 2023: 2023 NSSC 27), or otherwise until now.

[12] WTH corrected this filing with the Registry of Joint Stock Companies as of July 12, 2024. It further submits that this is curative and refers this Court to the binding decision in *Brekka v. 101252 PEI Inc.,* 2015 NSCA 73 as to the appropriate remedy.

[13] *Brekka* dealt with a situation in which the Claimant corporation was not registered (at all) in the Province; Justice Duncan (as he then was) concluded that although this was a bar to an action during such non-registration, he could substitute a party claimant who was so registered, in the interests of business efficacy and in avoidance of the claimant having to "start over." This was upheld on appeal.

[14] I am not sure the appeal decision in *Brekka* assists WTH, except to the extent it stands for the proposition that a proceeding should not be a nullity if it just means starting over without any substantive change in the rights and obligations of the parties, with the associated "throw away" resources, as suggested in para. 36-7 of the trial decision (2013 NSSC 390). The remedy sought at bar is not to

substitute a party but to proceed *by* that party despite alleged non-registration. I agree with counsel for ASC that complete non-registration is not a matter the Court can waive, as opposed to staying or otherwise pausing a proceeding pending rectification of the issue: *C.B.M. Contracting & Development Ltd. v. Johnstone* (1980), 39 NSR (2d) 156 (S.C., A.D.) at paras. 72-74

[15] I believe WTH can proceed, but not for the reasons it submits.

[16] First, it is clear that the registrant party is one and the same entity, albeit with a misspelling. As WTH points out in paragraph 7 of its brief on this issue, WTH held "a certificate of registration that is in force," albeit with an error that I would not consider misleading *in this context*. There is no evidence of how that misspelling arose – whether though clerical error by the company, counsel, or the Registry of Joint Stock Companies. This is not a case of *non-registration*, but of *deficient* registration whose origin is unknown.

[17] This discrepancy appears not to have been a subject of the underlying ASC/WTH litigation, which would have been the time to raise it. Leaving aside any issue estoppel issues that may result, the current application is not an "action, suit, or other proceeding" *brought* by WTH within the meaning of s. 17. It is a bankruptcy proceeding in which WTH is a stakeholder, albeit an active one and the

stakeholder bringing the motion. I do not read the registration requirements of the *Corporations Registration Act* as precluding any participation by a non-registrant in the litigation process whatsoever; I read "bring or maintain" as meaning it cannot file or proceed with an action in its own name (as was the situation in *Brekka*) as a non-registrant, as opposed to *participating* in a proceeding other than as a claimant. To hold otherwise would, for example, preclude an unregistered *defendant* from bringing any motion or application in a Nova Scotia in which it is engaged.

[18] Second, the registration requirement pertains to proceedings "in respect of any contract….in connection with any part of its business done….." That appears to have been the situation in the ASC/WTH litigation, when (to repeat) the issue does not appear to have been raised. That is not the case now. This is a bankruptcy proceeding in which WTH is a judgment creditor. WTH's standing in these proceedings arise from its status as creditor, not from its status as having engaged in contractual relationships or doing business with ASC. Put another way, it may be a creditor because it had a contract and did business with ASC, but the steps WTH is taking now arise from its status as a judgment creditor, not from the underlying facts that *made* it a judgment creditor. To hold that the current application arises out of a contract or business affair within the meaning of s. 17

would in effect allow a debtor to "re-litigate" all or part of the underlying fact scenario with respect to a particular creditor, and circumvent both the *BIA* claims process and general principles of *res judicata*.

[19] To summarize: I find that WTH was registered, albeit with an unexplained spelling error of unknown origin, at the relevant time; if it wasn't, the time to raise the issue was during the WTH/ASC litigation and not now; and in the event I am wrong on both of those counts, WTH is not before this court "bringing or maintaining" an action, nor is it before this court in respect of a contract or business carried on in the Province, but instead in its capacity as a judgment creditor. Lastly, the defect has been cured.

S. 38 application – and how it relates to s. 135 in this case

[20] Sections 38 of the *BIA* reads:

> **Proceeding by creditor when trustee refuses to act**
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> **38 (1)** Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
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> **Transfer to creditor**
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> **(2)** On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.

Benefits belong to creditor

(3) Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate.

Trustee may institute proceeding

(4) Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate. [emphasis added]

[21] And Section 135 reads:

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

> **(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.
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> **Expunge or reduce a proof**
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> **(5)** The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter. [emphases added]

[22] WTH says that it has asked the Trustee to disallow AGAH's secured claim, and the Trustee, having done so, is subject to an application by WTH to allow it to proceed under s. 38. The Trustee says that it has not "refused or neglected" to act, and (under legal advice) has made the determination that AGAH's secured claim is valid. It does not, however, object to the s. 38 application[4].

[23] AGAH adds that WTH's remedy is under s. 135 and it, having not applied to Court under s. 135(4) within the prescribed time, is bound by the Trustee's determination. It submits that WTH missed the appeal period.[5] WTH's remedy, if any, lies under s. 135(5) and not s. 38.

[24] The s. 135(4) argument may be disposed of summarily. That subsection applies to appeals against a Trustee's decision to *dis*allow a claim or priority (or

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[4] MacDonald affidavit, Exhibit G. Also Exhibit J, paragraph 2(c).

[5] Para. 18 of AGAH's brief of July 2, 2024. It will be noted that the secured claim was allowed on May 8, 2024; WTH raised the issue of proceeding under s. 38 on May 28, 2024 (Exhibit G, *supra*) – within the s. 135 appeal period – satisfying me that the current s. 38 application is not a standalone attempt to do an end run around a "missed" limitation period.

valuation of a contingent or unliquidated claim, which is not the case here). It does not apply to decisions of the Trustee to *allow* a claim or security.

[25] It is true that WTH could have (and still can) object to the Trustee's decision under s. 135(5). AGAH says that WTH has failed to justify this[6].

[26] I was not explicitly informed why WTH did not proceed under s. 135(5) and seeks instead to use s. 38. However, a close reading of the two channels of attack – s. 38 or 135(5) – reveal an important difference in the practical consequences in this case, where (a) AGAH's claim of security is over substantially all of ASC's assets; (b) there aren't enough assets to satisfy everyone, perhaps by a long shot[7]; and (c) there are substantial other creditors besides AGAH and WTH[8].

[27] If a challenge is successful under s. 135(5) at WTH's instance, WTH will have borne the expenses of doing so and the benefit of that challenge belongs to creditors generally (in this case, by making the proceeds of the company's assets distributable among creditors, of whom WTH is a minority). Under s. 38, if WTH

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[6] Para. 14 of AGAH's brief of July 2, 2024.
[7] ASC has a claim against Beaini & Associates Engineers Limited which may range between $2.46 million and $4.61 million; these are referred to as being in the "preliminary stage" and if successful could materially affect estate recovery; I am speaking of tangible assets that are the subject of the current SISP. MacDonald affidavit, Exhibit C, para. 31, which is the Trustee's Preliminary Report. AGAH claims that its security is inadequate to discharge its debt, filing as secured for $2,678,494.93 and as unsecured for $312,484.69 (MacDonald affidavit, Exhibit B)
[8] WTH represents about 50% of the provable unsecured creditors listed as of April 17, 2024 and about 28% of total provable claims – *ibid*.

(and other participating creditors, if any) is successful, it first gets its claim and costs and only the remainder goes to the estate.

[28] It therefore makes perfect sense to me that WTH seeks leave under s. 38 instead of s. 135(5); and s. 135(4) is inapplicable to its situation.

[29] The question then becomes whether s. 38 is *appropriate* to apply to WTH. It requires the following:

1. A request by a creditor to the Trustee to take an action that the creditor believes to be in the interest of the estate;
2. A refusal or neglect by the Trustee to take that step;
3. An order from the Court, on notice to other creditors and on such conditions as the court directs.

[30] WTH adds, and I agree, that there is a fourth criteria, namely that "there is threshold merit to the proposed proceeding, ie it is not obviously spurious": *Smith v. Pricewaterhousecoopers Inc.,* 2013 ABCA 288 at para. 16.

[31] AGAH submits that the Trustee has not "refused or neglected" to take a step in the proceedings, in allowing AGAH's security. It says WTH just doesn't like the answer it got.

[32] The Trustee obtained not one, but two independent legal opinions on the validity of AGAH's security. They are from a respected practitioner and firm, Marc Dunning of Burchell Wickwire Bryson. The first one, dated June 26, 2023 is in evidence.[9] The second is not but appears to have been rendered between April 18, 2024[10] and May 8, 2024[11].

[33] The first opinion appears to be a fairly standard form type of corporate security opinion. It does not refer to the issues raised by WTH, other than a passing reference that it is "not aware of facts that would permit annulment of the Security under s. 95 of the *BIA*." In addition to s. 95, WTH also raises issues under s. 96 of the *BIA* as well as the *Statute of Elizabeth*, the *Assignment and Preferences Act*, and s. 137(1) of the *BIA*.

[34] It is neither necessary nor appropriate to opine on these issues at this juncture. The only consideration is whether there are threshold arguments to be made in respect of them, so as to allow leave to proceed under s. 38. I am convinced that there are, in light of the allegations of the timing of advances, registration, and relationships between ASC and AGAH. To be clear, there is no

[9] Appendix B to the second report of msi Spergel Inc. dated July 11, 2023.
[10] Where it is referenced in para. 7 of the minutes of the First Meeting of Creditors. MacDonald affidavit, Exhibit D.
[11] When the Trustee allowed AGAH's claim – MacDonald affidavit, Exhibit H.

present finding other than to be satisfied that the issues are arguable and not spurious; they were also raised promptly.

[35] I also note a reference in paragraph 25 of the Trustee's report dated April 17, 2024[12] that:

> " [i]t is the Trustee's opinion that AGAH's security should be reviewed by the Court and whether it is valid and enforceable against the Bankrupt Estate should be determined by the Court." [emphasis added].

No such reference to the Court has been made.

[36] I return to AGAH's submission that there has not been a "neglect or failure" by the Trustee to take a step in the proceeding; that in fact it has done so but that WTH doesn't like the answer it got. There is some initial attraction to this argument. But it does not bear close scrutiny. It is true that the Trustee made a determination, and did so on legal advice; there is no assertion that it did not make this determination in good faith. But the fact remains that WTH indeed did ask the Trustee to "take any proceeding that in his [sic] opinion that would be for the benefit of the estate." It has requested that the Trustee disallow the security. The

[12] MacDonald affidavit, Exhibit C.

Trustee did not do so – reaching the opposite conclusion. WTH now seeks to do so, and as noted above there is a benefit to the estate if (with or without other creditors) it does so and is successful.

[37] Even if I had both legal opinions before me, with great respect they remain just that – opinions. Opinions are open to disagreement; otherwise, they are facts. Whether a Court accords with those opinions is an open question; but it is a question which even the Trustee, at least at first, thought should be asked. In the Trustee's absence of doing so, WTH seeks leave to explore that question. I believe it should have that opportunity, on the notice required under s. 38(1). If the Trustee, before I sign the relevant order, obtains inspector permission and "signifies to the Court his [sic] readiness to institute the proceeding" under s. 38(4), so be it.

[38] I add this: if I am the one to hear the security challenge, it can be in a matter of weeks, not months. I make no comment on jurisdictional matters at this point, but raise it to illustrate that it is definitely possible with the cooperation of counsel – which I reiterate has been notable and laudable given the contentious nature of the files and their histories – to determine that issue relatively expeditiously. I can be contacted if needed.

[39] A final procedural note. Both AGAH and the Trustee object to the MacDonald affidavit on the basis that it seeks to adduce evidence by counsel on substantive issues in a contentious proceeding. If that is what it did within the body of the affidavit itself, I would agree. However, it consists almost exclusively of exhibits, in the form of reports, email exchanges, and other documentation. While the *effect* of those materials may fairly be disputed, there was no dispute before me as to their authenticity. To the extent that paragraphs 9-12 explain the exhibits with comments such as "….advising me that the Trustee accepted the proof of claim…." and "….regarding my instructions to challenge AGAH's proof of claim and security," I have read the exhibits independently of the purported explanations, and can't see where such comments add anything contentious. It will be recalled that there is motion to remove Mr. MacDonald and Cox & Palmer as counsel, to be heard in September. I expect I will hear more about "solicitor as affiant" at that time, and whether by virtue of having sworn this (or any other) affidavit, Mr. MacDonald has become disqualified from continuing as advocate, or if has his firm. For now, it is sufficient to say that nothing in the affidavit – as opposed to the result the Court should derive from the information provided in the exhibits to the affidavit, or whether it should have come from another source – was disputed.

s. 37 and s. 119(2) – Halting or suspending the SISP process

[40] The SISP was implemented – albeit now on a different timeline – by tied vote of the inspectors. Mr. MacDonald, for WTH, dissented. Ms. Kell, for AGAH, voted in favour. The Trustee resolved the tie in favour. WTH now seeks to overturn that decision, pursuant to ss. 37 and 119(2) of the *BIA*. In doing so, it acknowledges the heavy burden associated with asking the Court to interfere with decisions of the inspectors respecting the administration of the estate. So do I.

[41] Section 37 reads:

> **Appeal to court against trustee**
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> **37** Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

[42] And s. 119(2) reads:

> **Creditors may override directions of inspectors**
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> **119 (1)** Subject to this Act, the trustee shall in the administration of the property of the bankrupt and in the distribution thereof among his creditors have regard to any directions that may be given by resolution of the creditors at any general meeting or by the inspectors, and any directions so given by the creditors shall in case of conflict be deemed to override any directions given by the inspectors.
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> **Decisions of inspectors subject to review by court**
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> **(2)** The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it

> deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.

[43] The case law is clear: inspectors' decisions are entitled to deference, if derived in good faith and within the scope of commercially reasonable conduct. The Court is not a mulligan for a creditor (or inspector) who doesn't get their way in the administration of the estate.

[44] In *Re Costello*, 32 CBR (4th) 22 (Ont. SC), Justice Leitch summarized the law as follows:

> [12] Before the *Bankruptcy and Insolvency Act* contained a provision such as s. 119(2), courts were reluctant to oppose or override decisions made by the inspectors. This attitude was clearly expressed in the decision of the Ontario Court of appeal in *Feldman, Re* (1932), 13 C.B.R. 313 (Ont. C.A.), at 314 where the court said this:
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> > In other words, the whole scope and foundation of the *Bankruptcy Act* is that in the practical administration of the estate of the bankrupt, the governing authority shall be the inspectors and not the court, the inspectors being practical men named by the creditors, and unless it is shown that they are actually fraudulently or in some way not in good faith for the benefit of the estate, the administration of the affairs of the estate is to be governed according to their directions.
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> [13] Although subsequent to the decision in Feldman, Re, the *Bankruptcy and Insolvency Act* was amended to include s. 119(2) which clearly gives the court the authority to intervene in decisions made by inspectors, the principles expressed in Feldman, Re continue to be applied by courts in Ontario. Again in 1998, the Court of Appeal concluded in Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CanLII 2673 (ON CA), 38 O.R. (3d) 280 (Ont. C.A.) at p. 286:
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> > The court will seldom intervene with administrative decisions made by inspectors. The test is clearly set out in the case *of Re Feldman…*
>
> [14] However, there is a view that an inspector's decision could be overturned by the court in circumstances beyond those proposed in *Feldman, Re*—that is, not only if the inspectors have acted fraudulently or not in good faith for the benefit of the estate, but also if their decision is not commercially viable or is unreasonable

> (*Public Eyecare Management Inc., Re* (1998), 7 C.B.R. (4th) 255 (Ont. Gen. Div. [Commercial List]) considering *Melnitzer, Re* (1991), 1991 CanLII 8346 (ON SC), 9 C.B.R. (3d) 30 (Ont. Bktcy.)). [emphasis added]

[45] As noted in *Costello*, courts have held that juridical restraint is not the same as a requirement of bad faith or fraud; commercial impracticability can also attract Court intervention. In *Taylor Ventures Ltd.*, (1999), 13 CBR (4th) 146 (BCSC), Justice Burnyeat dealt with a situation in which the inspectors refused an application to allow enhanced expenses on legal fees. In overruling that decision, he stated:

> [19] In dealing with all situations where the court is asked to overturn a decision reached by Inspectors, I am satisfied that the present standard of review should be whether it can be said that the decision was "commercial imprudent", "unreasonable" or lacking "commercial viability." However, it is necessary to distinguish between resolutions of Inspectors dealing with the day to day commercial questions which face the Trustee and the Inspectors and resolutions of Inspectors dealing with the fundamental question of whether or not the Trustee will have available to it the legal advice which is required if the Trustee is in a position to perform the functions required of it. Even in the most simple of estates, it is often necessary for the Trustee to retain legal counsel. The Trustee and that legal counsel should have the assurance of payment and neither should have to gamble on the question of whether the Inspectors will pass a resolution pursuant to s.197(7) of the ***Act*** in due course.
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> [20] In this case, I am satisfied that the Inspectors have not acted in a way which can be described as "conscientious" and "fair minded." They have allowed their views about the services rendered and their disappointment about what now appears to be the likely recovery in the Estate to influence the question of whether or not they should pass such a resolution. I am satisfied that they have acted in a way which can be described as "unreasonable." I am also satisfied that the appropriate test is whether the Inspectors have acted with "reasonableness and commercial viability." However, I am also satisfied that the Inspectors have acted in a way which can be described as "clearly unreasonable" if I am in error in setting out the test to be applied. While Greer J. describes the decision of the Inspectors in ***Public Eyecare***, *supra*, as being "clearly unreasonable", it is clear that he is satisfied that the test in ***Feldman***, *supra*, has been expanded to include that of "reasonableness and commercial viability." I am similarly satisfied. [emphases added]

[46] A similar view was expressed by our Court of Appeal in *Re Hoque*, 1996 NSCA 30, by Hallett, JA (for the Court), at paras. 35 and 41:

> [35] When it comes to making business decisions relating to the sale of the bankrupt's assets, a trustee, with the authorization of the inspectors, must exercise reasonable business judgment. The trustee must provide advice to the inspectors equivalent to the advice one would expect from a reasonably competent trustee in the circumstances. Both the trustee and the inspectors are entitled to rely on legal advice from counsel for the estate. And, of course, a trustee must act with honesty and integrity. Finally, the courts should show deference to business decisions made by those entrusted by the creditors and authorized by the **Act** to make such decisions.
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> …
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> [41] I agree with the comments of Mcfarlane J. in **Re Groves-Raffin Construction Ltd. (No. 2)**, 1978 CanLII 2580 (BC SC), [1978] 4 W.W.R. 451, 28 C.B.R. (N.S.) 104 (B.C. S.C.) where he stated at (C.B.R.) 112:
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> > "In considering the conduct of a trustee it is well to keep in mind that the scheme of the Act is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate." [emphases added]

[47] If the current SISP was simply an inspectors' reasonable, commercially justifiable judgment call that was calculated to be for the general benefit of the estate but was one which WTH did not like, it would fall under the category of "tough."

[48] But I am satisfied that is not the situation here. The SISP is inextricably linked to AGAH's status as a disputed, non-arm's length secured creditor. It permits debt bids. AGAH has indicated that it intends to avail itself of this, in the

form of its debt plus a premium and a break fee.[13] The SISP process contemplates a bid selection two days after the bid deadline, and an application for Court approval forthwith thereafter.

[49] Ordinarily, this would not be a situation in which the Court would intervene prior to the ratification application either. But in this case, it is a chicken-and-egg when one (*and only one*) creditor, related to the Debtor, claims to be in a superior position to the others in priority, and that priority is – and from inception has been – in live dispute. The SISP contemplates (and AGAH contemplates) a credit bid, and this in turn assumes and effectively disposes of the issue of whether AGAH is a secured creditor. As noted above, I am satisfied that the security dispute meets the low threshold of being "not spurious." Allowing the SISP to go forward in its present form would effectively foreclose the security dispute and put AGAH in a different bidding class than others, and with no prospect for any recovery to creditors other than AGAH[14]. The fact that the bid is then subject to Court

[13] Exhibit "I" to the MacDonald affidavit.

[14] In saying this, I have not lost sight of the contingent claim against Beaini. The strength of that case is unknown to me. I only know it is at "preliminary stages." The SISP does not specifically refer to this, but it does contemplate a sale of "Assets" and "Business" of ASC which are defined expansively enough to include this chose in action. Given that AGAH has filed as both a secured and as an unsecured creditor, and its claimed security includes "all present and future intangibles….including….choses in action of every nature and kind…" I surmise that AGAH does not place a high value on this potential asset for bidding purposes. MacDonald affidavit, Exhibit B, PPRS search result, general collateral paragraph (c).

approval is important, but not determinative when it is contemplated to be on the immediate heels of the selection process.

[50] I am satisfied that this is one of those rare cases in which the Court should insert itself in the inspectors' split decision, and stay the SISP at present under s. 119(2); Section 37 is in turn triggered as the Trustee's decision to proceed with the SISP is based on the inspectors' resolution. In the sense that the SISP, as currently framed, has the potential net effect of precluding any potential recovery to unsecured creditors[15], it is "not commercially viable or reasonable."

[51] I am encouraged that, at least for the moment, there is no indication that the assets are wasting, particularly in the form of licenses. As noted above, DFO is holding the "status quo" pending the outcome of the application for leave to appeal the CCAA proceedings at the Supreme Court of Canada[16]. Indeed, the SISP has been delayed from its original timeline from May 31, 2024 – week of July 17, 2024 to *starting* in the week of July 15, 2024. I was told at case management that this delay was due to retainers not having been paid; it was implied by an email received on July 15, 2024 that a responsible Trustee's vacation may have also

[15] I appreciate that the contemplated AGAH credit bid contemplates a premium and a break fee. If made as contemplated, it would have the potential to place some cash in the estate. Given what I heard about the cash burn to date – I was advised at case management that ASC is out of cash – and expected future costs and fees, I expect there would be no net distribution to other creditors worth talking about.

[16] Or perhaps, as noted above and in the Trustee's report in MacDonald affidavit, Exhibit J, "until a sales process can be completed." If so, that further reinforces that the value of the licenses is not in imminent jeopardy.

caused or at least contributed to this delay as well. There was no indication that the intervening month and a half has had a material adverse effect on the estate.

[52] I am mindful that in addition to property, plant, equipment, and receivables, at bankruptcy ASC also had inventory, presumably in the form of various iterations of sea cucumber.[17] I have no information on the current inventory situation; however it is fair to say that if the value at bankruptcy has deteriorated and/or has not been realized, that has taken place by now and does not appear to have been a factor in delaying the SISP between its original contemplated timeframe and now. I do not see how staying the matter will materially affect the value of at-bankruptcy inventory any further. There is no indication that other assets are deteriorating.

[53] Put another way, there is no evidence of any financial prejudice to the ASC estate in staying the SISP pending the *expeditious* outcome of the security challenge, or a modification of the SISP so as to make the status of that challenge irrelevant to the sale. If any of those ingredients change – asset endangerment, delay in resolution of the security challenge, SISP amendment, or such other facts

[17] Internal balance sheet of ASC, MacDonald affidavit Exhibit C, paragraph 18.

as may materially adversely affect the estate or which may segregate the sale and security issues – those may be addressed at the proper time.

[54] I am also mindful that the inspectors – representatives of AGAH and WTH – object to each other's status as inspectors.[18] The existing matrix is certainly contentious, and a tied vote was broken by the Trustee. While again, a fractious relationship in itself does not generally trigger the Court's intervention to inspectors' decisions, I am satisfied it is appropriate where the effect of that decision is effectively to foreclose other valid issues that are put before, and actively pursued in, the Courts.

[55] The SISP is stayed pending further order of a Court of competent jurisdiction.

Costs

[56] I suggest much of the practical effect of this decision turns on whether WTH in fact pursues its s. 38 litigation – remembering that at this stage it only has leave to do so and then, only after notice to and opportunity to participate by other

[18] MacDonald affidavit, Exhibit J. Paragraph 2(g) of that exhibit refers to an objection by WTH of Mr. Taylor as an inspection unless she "reclused" herself as counsel to AGAH. I take the liberty of reading that as "recused." As noted above, this Court is to hear an application to remove Mr. MacDonald as an inspector in September. That application may be affected as well by whether WTH in fact engages in the contemplated s. 38 litigation.

stakeholders; and the results of any such litigation. I also suggest that the result of the sales process, whatever that may ultimately look like, is very much influenced by the results of such litigation, should it occur. Finally, whether Cox & Palmer or Mr. MacDonald have continuing roles remains to be seen. To that end, my inclination is to award costs in the cause of the current applications, or at the very least pending the determination of the disqualification / removal applications. However, if the parties wish I will hear them on costs not less than 15 nor more than 45 days from the release of this decision. I may be contacted as to whether this is to be by written submissions or otherwise.

Summary and conclusion

[57] A recapitulation is in order.

[58] First, WTH is not precluded by virtue of the *Corporations Registration Act* from the motions at issue in this decision.

[59] Second, Section 135(4) of the *BIA* does not apply to the Trustee's decision to allow AGAH's claim as a secured creditor. While WTH could have applied to the Court under s. 135(5), it has the right not to do so and to seek to pursue its remedy under s. 38.

[60] Third, I have decided that WTH has a valid basis upon which to obtain the Court's leave to proceed under s. 38 of the *BIA*. If it does not do so expeditiously, or if there is imminent waste to the estate by reason of DFO activity, or such other waste as may satisfy a Court that one or more proceedings must come to a head, I am sure those facts will come to light.

[61] Fourth, since the SISP and the status of the AGAH security are inextricably linked, and there is no current prejudice to the value of the estate known to the Court, I am satisfied that this is one of those rare cases in which the Court should exercise its discretion under s. 119(2) and stay the SISP under s. 37. If the SISP is modified in such a way as to address this link (such as excluding credit bids), that may very well change things. That is speculative at this point. In issuing this stay, I am also mindful that the SISP, as currently formulated, calls for Court ratification; however, the timeline for doing is so narrow that it would render meaningless any proceeding to challenge AGAH's security, in the event that AGAH makes its contemplated credit bid and if it is selected.

[62] The issue of costs may be addressed as above.

[63] Mr. MacDonald shall prepare and circulate an order for stakeholder input, and for submission to the Court.

[64] I conclude by reiterating my thanks to all counsel for their professionalism, sometimes under strained timelines, in this ongoing epic for epicures.

Balmanoukian, R.