# IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N :***

| | | |
|---|---|---|
| | ) | ***F. Tayar***, |
| | ) | ***W. M. Onchulenko***, |
| ***WHITE OAK COMMERCIAL FINANCE, LLC*** | ) | ***C. S. Linthwaite*** *and* |
| | ) | ***L. R. Feldman*** |
| | ) | *for the Appellants* |
| | ) | *(via teleconference)* |
| *(Applicant) Respondent* | ) | |
| | ) | ***C. E. Howden***, |
| | ) | ***J. E. Dacks*** *and* |
| *- and -* | ) | ***M. S. Wasserman*** |
| | ) | *for the Respondent* |
| | ) | *(via teleconference)* |
| ***NYGÅRD HOLDINGS (USA) LIMITED, NYGÅRD INC., FASHION VENTURES, INC., NYGÅRD NY RETAIL, LLC, NYGÅRD ENTERPRISES LTD., NYGÅRD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGÅRD INTERNATIONAL PARTNERSHIP*** | ) | |
| | ) | ***G. B. Taylor***, |
| | ) | ***R. A. McFadyen*** *and* |
| | ) | ***M. LaBossiere*** |
| | ) | *for the Receiver* |
| | ) | *Richter Advisory Group Inc.* |
| | ) | *(via teleconference)* |
| | ) | |
| | ) | *Chambers motion heard:* |
| *(Respondents) Appellants* | ) | ***December 17, 2020*** |
| | ) | |
| | ) | *Decision pronounced:* |
| | ) | ***December 31, 2020*** |

**COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this motion was heard remotely by teleconference.**

## LEMAISTRE JA

### Introduction

[1] Richter Advisory Group Inc. (the receiver) seeks to cancel any stay of proceedings regarding the sale of 1771 Inkster Boulevard in Winnipeg that

was engaged by section 195 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the *BIA*) when the appellants filed their notice of appeal (the stay). It also seeks an order for short leave, abridging the time to file and serve its materials on the motion (see rr 42 and 43.1(2) of the MB, *Court of Appeal Rules*, MR 555/88R).

[2] For the reasons that follow, the order for short leave is granted and the stay is cancelled.

Background

*Receivership Order*

[3] The appellants are the corporate entities that operated retail, wholesale and business operations of the Nygård clothing and fashion business in Canada and the United States of America. Nygård Holdings (USA) Limited, Nygård Inc., Fashion Ventures, Inc. and Nygård NY Retail, LLC entered into a credit agreement with White Oak Commercial Finance, LLC (White Oak) and Second Avenue Capital Partners, LLC (collectively, the lenders) dated December 30, 2019 (the credit agreement). Pursuant to the credit agreement, 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygård International Partnership (NIP) are guarantors, Nygård Enterprises Ltd. (NEL) and Nygård Properties Ltd. (NPL) are limited recourse guarantors and White Oak has a security interest in 1771 Inkster. NPL owns the property located at 1771 Inkster.

[4] After White Oak lost confidence in the appellants' ability to comply with the credit agreement, it applied for the appointment of a receiver of the

appellants' assets, undertakings and properties pursuant to section 243(1) of the *BIA*, and section 55(1) of *The Court of Queen's Bench Act*, CCSM c C280.

[5] The appellants had filed notices of intention to make a proposal in bankruptcy under the *BIA* (the proposal proceedings) and asserted that they had sufficient equity to pay the lenders in full. They opposed White Oak's application and argued that the motion judge should permit them to pursue the proposal proceedings rather than appoint a receiver.

[6] The motion judge found that the appellants had not been acting in good faith and with due diligence towards the proposal trustee and the lenders; that the proposal proceedings were untenable; and that the appellants had breached the credit agreement. Accordingly, he appointed the receiver "to take control of the [appellants'] business and provide experienced and effective oversight" in order to protect the "interests of the [l]enders" and all stakeholders (the receivership order) (2020 MBQB 58 at para 32). He also granted a stay of the proposal proceedings.

[7] The receivership order authorises and directs the receiver to "market and pursue all offers for sales" of the assets, undertakings and properties of the appellants used in relation to a business carried on by any of the appellants, including "negotiating such terms and conditions of sale as the [r]eceiver in its discretion may deem appropriate . . . and . . . engaging a real estate broker with respect to the sale of the [appellants'] real property, subject to prior approval of [the Court] being obtained before any sale [exceeding $250,000]".

[8] The motion judge made a subsequent order which amends the receivership order (the general order). This order limits the receiver's authority over the properties of NEL and NPL as follows:

> . . . "Property" shall include only such property, undertakings, and assets of NEL and NPL in which [White Oak has] an interest pursuant to the Credit Agreement . . . and the Loan Documents (as defined in the Credit Agreement) . . ..

*Order Under Appeal*

[9] The receiver accepted an offer to purchase (the sale agreement) regarding the buildings and fixtures located at 1771 Inkster, including certain chattels (the Inkster property), and sought an order approving the sale agreement, as well as a vesting order. According to the sale agreement, the sale closes no later than 60 days following court approval.

[10] The appellants opposed the receiver's motion to approve the sale agreement and brought their own motion seeking to discharge the receiver. They also sought to lift the stay of the proposal proceedings.

[11] At the hearing of the motions, the appellants argued that the lenders had been paid in full and NPL had satisfied its guarantee under the credit agreement, therefore, the receiver was not authorised by the receivership order to proceed with the sale of the Inkster property. They also argued that the stay of the proposal proceedings should be lifted to allow them to pursue the proposal proceedings.

[12] The motion judge concluded that, because the receiver was appointed by the court (rather than as a private receiver), it must continue to act for the benefit of all stakeholders until discharged by the court.

[13] The motion judge was satisfied that the receiver had "successfully managed the liquidation process to substantially pay the debt owing to the

[l]enders" but did not agree with the appellants that "the [r]eceiver has become a trespasser and continuing to liquidate real property is wrongful and inappropriate".

[14] He concluded that the receivership order authorised the receiver to "market and sell the Inkster [p]roperty to satisfy the [l]enders' debt, the [r]eceiver's borrowing charge, the landlord's charge and other creditors claims".

[15] The motion judge was satisfied that there were still a number of outstanding matters to be completed by the receiver. He accepted that the items listed in para 64 of the receiver's ninth report were still outstanding, including claims of landlords for "COVID Rent", potential priority claims under section 81.4 of the *BIA* by former employees and/or the Crown and transactions contemplated by the terms of a settlement agreement between the receiver, landlords, lenders and NPL, among others.

[16] The motion judge accepted that NPL is "a limited recourse guarantor pursuant to the [c]redit [a]greement" and that it may have rights to subrogation.

[17] In support of their argument that they should be permitted to pursue the proposal proceedings, the appellants submitted a report prepared by a licensed insolvency trustee (the AGI report). The motion judge rejected the opinion in the AGI report that NEL and NPL are solvent entities because, in his view, it was based on "inappropriate accounting treatment". Accordingly, he found that the proposal proceedings were not a viable alternative.

[18] On November 19, 2020, the motion judge approved the sale. He also refused to discharge the receiver and lift the stay of the proposal proceedings. As a result, the sale closes no later than January 18, 2021.

Grounds of Appeal

[19] Relying on sections 193(a)-193(c) and 193(e) of the *BIA*, the appellants filed a notice of appeal of the motion judge's order. They raise the following grounds of appeal:

1. Whether the motion judge erred in law by failing to discharge the receiver;

2. Whether the motion judge erred in law by determining that NPL "may" rather than "does" have a right of subrogation to the lenders' security pursuant to section 2 of *The Mercantile Law Amendment Act*, CCSM c M120, as a guarantor;

3. Whether the motion judge erred in law by granting the vesting order;

4. Whether the motion judge effectively consolidated the estates of NPL as guarantor and NIP as debtor;

5. Whether the motion judge erred in law in concluding that the receivership order gave the receiver the authority to sell the Inkster property after the debt which formed the basis of the receivership order had been completely satisfied; and

6. Whether the motion judge erred in fact and law when he concluded that the proposal proceedings were not viable.

The *BIA*

[20] Section 193 of the *BIA* provides for an appeal to the Court of Appeal as of right if the issue on appeal involves future rights, the decision is likely to affect other similar cases, the property involved exceeds in value $10,000 or if the aggregate unpaid claims of creditors exceed five hundred dollars. In any other case, leave is required. While the appellants have not filed a motion seeking leave to appeal, their notice of appeal states, "Should leave to appeal be necessary, the appellants request such leave."

[21] Section 195 of the *BIA* stays all proceedings under an order that has been appealed. It provides as follows:

> **Stay of proceedings on filing of appeal**
> **195** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

Chambers Motion

[22] In its motion before this Court, the receiver seeks an order for short leave, an order cancelling any stay imposed by section 195 of the *BIA* and costs. It also seeks a declaration that the appellants require leave to appeal and an expedited appeal hearing, if necessary. The parties addressed only the

motion to cancel the stay in their materials and oral argument. The request for the declaration and the expedited hearing were adjourned without opposition from the appellants.

Test for Cancelling the Stay of Proceedings

[23] The parties agree, as do I, that the factors to be considered in determining whether the stay should be cancelled are (1) the merits of the appeal; and (2) the relative prejudice to the parties, including whether irreparable harm would be suffered if the stay is not cancelled (see *Business Development Bank of Canada v Paletta & Company Hotels Ltd*, 2012 MBCA 115 at paras 9-15; and *Royal Bank of Canada v Bodanis*, 2020 ONCA 185 at para 11).

[24] The applicable principles were summarised by Fruman JA in *After Eight Interiors Inc v Glenwood Homes Inc*, 2006 ABCA 121 as follows (at paras 5-6):

> The applicant seeking a cancellation of a s. 195 stay bears the burden of establishing compelling reasons supporting a cancellation: ***Yewdale v. Campbell, Saunders Ltd.*** (1994), 9 B.C.L.R. (3d) 253 (C.A.) at paras. 14-15; ***Re Dugas*** (2003), 261 N.B.R. (2d) 99 (C.A.) at para. 14. In the normal course, some variation of the tripartite test outlined by the Supreme Court in ***Manitoba (A.G.) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110 and ***RJR-MacDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311 is applied on stay applications. This test would involve a consideration of whether there is a serious issue to be appealed, whether the applicants would suffer irreparable harm if the stay is not lifted and whether the applicants would suffer greater harm than the respondents if the stay is not lifted.
>
> However, in ***Amex Bank of Canada v. Toronto Dominion Bank*** (1996), 181 A.R. 279 (C.A.) at paras. 7-11, Hunt J.A. noted that, while all or part of the tripartite test may be relevant, the discretion

> granted by s. 195 is broader. Accordingly, a contextual approach is appropriate, meriting consideration of all the facts of the case. Consistent with this approach, courts considering applications to cancel a s. 195 stay have focused on relative prejudice to the parties and the interests of justice generally: ***Yewdale***, *supra* at paras. 21-27; ***Re Dugas***, *supra* at paras. 14-15; ***RBI Plastic Inc. v. Sport Maska Inc.***, [2005] N.B.J. No. 542 (C.A.)at para. 4; ***Marmot Concrete Equipment Ltd. v. Whissell*** (1996), 40 Alta. L.R. (3d) 231; ***Kubota Canada Ltd. v. Case Credit Ltd.***, 2004 ABCA 41 at paras. 17-20.

Positions of the Parties

[25] The receiver asserts that there are compelling reasons to cancel the stay. It argues that there is little merit to the appeal. It says that the motion judge's decision was discretionary and is entitled to significant deference. The receiver points out that the motion judge has heard 18 motions and reviewed nine reports filed by the receiver. He has considered the detailed credit agreement and has intimate knowledge of the factual matrix underpinning this case.

[26] Regarding prejudice, the receiver argues that the stay prevents the sale of the Inkster property from closing by January 18, 2021, in accordance with the sale agreement. It asserts that, if the sale does not close as required, then the sale agreement comes to an end and the purchaser is free to walk away from the sale or seek compensation for any delay to the closing date.

[27] The appellants assert that their grounds of appeal meet the low bar required when determining whether there is a serious issue to be appealed. They submit that the relative prejudice favours leaving the stay in place. The appellants say that, if the stay is cancelled, the sale will close and the appeal of the motion judge's order approving the sale will be rendered moot. They

also say that the prejudice to NPL arises from it losing its Inkster property and that the proceeds from the sale standing in place of the property does not reduce the resulting prejudice.

Analysis

[28] As an initial matter, the stay under section 195 of the *BIA* is triggered upon the filing of an appeal as of right or upon leave to appeal being granted (see *Robson Estate v Robson*, [2002] OJ No 5710 at paras 5-6 (CA)). In its notice of motion, the receiver seeks a declaration that the appellants require leave to appeal and that the stay is inapplicable until leave has been granted. I have not had the benefit of argument on this issue. However, in my view, section 193(c) of the *BIA* may apply to this case as there is no dispute that the value of the property involved in this appeal exceeds $10,000 (see *MNP Ltd v Wilkes*, 2020 SKCA 66). While I would not normally endorse proceeding on the basis of a possible right of appeal, in light of the urgency here and my conclusion regarding the merits of the appeal, I am prepared to assume for the purposes of this motion that the stay was triggered by the filing of the appeal.

*Merits of the Appeal*

[29] The merits of the appeal must be assessed in light of the applicable standard of review. The motion judge's decision was discretionary and, absent an error in law or a material misapprehension of the evidence, is entitled to deference on appeal, unless the decision is so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton et al*, 2009 MBCA 81 at para 25; and *Paletta* at para 8).

[30] Errors of law are assessed on the standard of correctness. Errors of mixed fact and law, or fact alone, are reviewable for palpable and overriding error, unless an error of mixed fact and law involves an error relating to an extricable principle of law, in which case the standard of correctness applies to that extricable question (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 8-37; and *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61 at para 13).

[31] Whether the appellants have established a serious issue to be appealed requires consideration of the arguable merits of the appeal (see *Paletta* at paras 14-15; and *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 72-75). If the issues raised by the appellants cannot be dismissed through a preliminary examination and a more thorough examination is necessary, then the appeal will have arguable merit (see *Sattva* at para 74).

[32] The appellants assert that the motion judge misapprehended the law regarding the discharge of a receiver. They argue that, once the party that applied for the receivership order has been satisfied, the receiver loses its authority and ought to be discharged. In my view, this ignores the distinction appropriately recognised by the motion judge between a privately appointed receiver and a court-appointed receiver. A court-appointed receiver acts as a court officer for the benefit of all stakeholders and generally administers the estate in receivership until completion (see *Ostrander v Niagara Helicopters Ltd et al* (1973), 40 DLR (3d) 161 (Ont H Ct J); *Canadian Commercial Bank v Simmons Drilling Ltd* (1989), 62 DLR (4th) 243 at 247-48 (Sask CA); Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Carswell, 2011) at

601-608; and Muir Hunter, *Kerr and Hunter on Receivers and Adminsitrators*, 18th ed (London, UK: Sweet & Maxwell, 2005) at paras 12-4, 12-9).

[33] In this case, the receiver was appointed by the court for the benefit of all stakeholders. Therefore, in my view, the motion judge correctly articulated the applicable law regarding the discharge of a receiver. I disagree with the appellants' assertion that further analysis was required.

[34] The appellants' remaining grounds of appeal turn on their assertion that the lenders have been paid in full. They argue that, because the debt owed pursuant to the credit agreement has been paid, the purpose of the receivership order has been fulfilled, NPL's guarantee has been satisfied, the lenders no longer have an interest in the Inkster property permitting its sale and the receiver should be discharged.

[35] The appellants concede that there are "clean up tasks" yet to be completed and that the receiver should not be discharged immediately. However, they say that sufficient money has been taken in by the receiver to account for the total amounts owing with money left over.

[36] The receiver disagrees. It says that proceeds from the sale of assets of NIP and NPL have been received and applied to existing obligations, including money owed to White Oak under the credit agreement and the cost of the receivership. However, there has not been any allocation made yet as to what cash, from NIP and NPL assets, have been paid to White Oak.

[37] The receiver also points out that its supplemental ninth report establishes there are intercompany debts that have not yet been paid (for instance, NPL owes NIP $2.5 million) and the AGI report indicates that NPL

will have a substantial tax obligation resulting from its corporate income tax owing for the fiscal years ending May 31, 2020 and May 31, 2021.

[38] In my view, it is clear from the record that there are a number of issues that have yet to be determined in the receivership. The appellants' assertion that the lenders have been paid overly simplifies a complicated factual matrix. The motion judge found otherwise, and I am not convinced that he erred.

[39] The record demonstrates that the motion judge has a detailed and intimate knowledge of the appellants' affairs in the *BIA* proceedings. He carefully outlined and understood the positions of the parties on the motions. He also understood the implications of his conclusions. I am satisfied that he properly applied the appropriate jurisprudence in making the orders that he did. I am not persuaded that he erred in his analysis of the facts or the conclusions he drew based on the application of the law to the facts. Moreover, the arguments raised on appeal were all before the motion judge and were addressed by him.

[40] It was in that context that the motion judge exercised his discretion. Therefore, in my view, the likelihood of a successful appeal is very low.

*Relative Prejudice*

[41] Regarding the relative prejudice, the receiver submits that, if the stay is not cancelled, prejudice flows from the sale agreement. In other words, if the sale cannot close by January 18, 2021, the terms of the sale agreement cannot be satisfied, the contract ends and the purchaser is no longer obligated to complete the purchase. Furthermore, the receiver may be liable for

damages for any delay to the closing date. The receiver contends that the sale agreement was a "hard fought transaction" and that, if the purchaser does not complete the purchase, there is little prospect of another purchaser for the Inkster property. If the Inkster property is not sold, then the funds that would flow from its sale are not available to satisfy the remaining obligations of NPL.

[42] The appellants argue that there have been prior extensions to the closing date of the sale agreement and there is no evidence that another extension is not acceptable to the purchaser. While the evidence demonstrates that the appellants had a plan to sell the Inkster property in March to pay the lenders, the appellants say that the lenders have been paid in full and there is no longer a need to sell the Inkster property. The appellants argue that, despite having no current plan to use the Inkster property to operate a business, NPL should maintain the right to possess and control its property and losing this right is not compensable. Finally, they argue that cancelling the stay will effectively frustrate the appeal.

[43] In my view, the relative prejudice weighs in favour of cancelling the stay. If the stay is not lifted, the sale agreement will come to an end. Despite the prior extensions which arose due to the condition of the Inkster property and which resulted in a reduction in the purchase price, I am not prepared to speculate that the closing date might be extended beyond January 18, 2021.

[44] As I have already explained, I do not agree with the appellants' assertion that the lenders have been paid in full. Moreover, NPL was prepared to sell the Inkster property in March 2020 to satisfy the appellants' creditors. It is not currently using the Inkster property to operate a business and the

approval and vesting order provides that the net proceeds from the sale will "stand in the place and stead of the Inkster property". I fail to see the prejudice to NPL if the sale closes in January 2021.

[45] I agree that cancelling the stay will render part of the appeal moot, but the appellants may still pursue their appeal (or motion for leave, if necessary) of the motion judge's refusal to discharge the receiver.

[46] Even though cancelling the stay will effectively frustrate the appeal regarding the sale of the Inkster property, the grounds of appeal are not strong and cancelling the stay will result in little, if any, prejudice to the appellants. However, leaving the stay in place will substantially prejudice the interests of the creditors (see *Plaza Mining Corp, Re*, 1983 CarswellBC 556 at para 20 (CA)). The receivership order and the general order authorise the sale of the Inkster property (in which White Oak has an interest pursuant to the credit agreement) and were never appealed. The sale agreement was hard fought and there is little prospect of another purchaser. In my view, in light of the lack of merit to the appeal and the relative prejudice, it is in the interests of justice to lift the stay.

Conclusion

[47] In the result, the motion for short leave is granted and the stay is cancelled with costs.

"leMaistre JA"