

**SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY**

Citation: *Atlantic Sea Cucumber Ltd. (re)*, 2023 NSSC 231

Date: 20230714

Docket: Hfx No. 525172

Registry: Halifax

RE: Atlantic Sea Cucumber Ltd.

Decision

Judge: The Honourable Justice Peter Rosinski

Heard: July 13, 2023, in Halifax, Nova Scotia

**Final
Written:** July 19, 2023

Counsel: Joshua Santimaw, for the Trustee (MSI Spergel)
Darren O’Keefe, for Atlantic Sea Cucumber Ltd.
Gavin MacDonald and Meghan Kells, for Weihai

By the Court:

Introduction

[1] This Court is sitting specifically as the Supreme Court of Nova Scotia in Bankruptcy and Insolvency.

[2] Atlantic Sea Cucumber Ltd. [“ASC”] has been insolvent since at least **May 1, 2023**, when it filed a Notice of Intention [“NOI”] to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 [“BIA”].

[3] **No proposal** has yet been made to its creditors.

[4] The most recent extension of a stay of proceedings was granted by Registrar Raffi Balmanoukian, on May 31, 2023. It was set to expire on **July 15, 2023**.¹

The request for an abridgement of the filing and service timelines for documents in support of an Application in Chambers filed July 6, 2023

[5] On **July 6**, ASC filed an Application in Chambers pursuant to our Civil Procedure Rule [“CPR”] 5.03.

¹ I appreciate that under the *BIA* s. 50.4(9) only a maximum of 6 months is available (until approximately November 1, 2023) for the Company to have filed their Proposal, otherwise they are deemed to have made an assignment into bankruptcy per s. 50.4(8).

[6] A creditor of ASC, *Weihai Taiwei Haiyang Aquatic Food Company Limited* [“WTH”], opposes the Application.

[7] I provisionally heard the Application’s merits on July 13, 2023.

[8] I say “provisionally”, because I first have to decide herein whether to abridge the filing and service dates of the Application documents, before I consider the merits of the Application.

[9] I do not find that there has been a satisfactory explanation by the Applicant for why this Application was not commenced earlier than July 6, 2023 - and specifically not 10 days before July 13, 2023.

[10] Had it been filed and served as required by s. 11 of the *Companies’ Creditors Arrangement Act* [“CCAA”] (10 days before the hearing) on the Respondent (by my estimation June 27, 2023), it could have been docketed for 2 p.m. on July 13, 2023, without complaint by the Respondent WTH.

[11] WTH has argued that I should not abridge the time for filing and service.

[12] I agree with WTH.

[13] ASC was in control of the preparation of its Application. It knew on May 31, 2023, that the Stay of proceedings would end on July 15, 2023. It made a choice as to when it filed/served its Application.²

[14] ASC knowingly took a risk that the Court would not grant an abridgement of the time for filing and service of its Application.³

[15] I am satisfied that the Respondent WTH was prejudiced in its ability to effectively respond to this Application on July 13, 2023, *inter alia*, as a result of the following:⁴

² I note that the Second Report from the Trustee was dated and I presume not earlier available than July 11, 2023. However, I infer that the Trustee's Counsel and Counsel for ASC were in regular communication at all relevant times, and that the Trustee would have provided ASC's counsel with a "heads-up" as to when its Second Report would likely be available.

³ There is no evidence that it requested WTH's agreement to the late notice herein. Moreover, why did it not to go back to the Registrar of Bankruptcy and request a further extension of the Stay of proceedings? No reasons have been put forward why it did not. However, I note that in two Reports the Trustee referenced the underlying situation. In its **May 24, 2023, First Report, the Trustee stated:** "The Company is in the process of formulating a plan to maximize recovery for the creditors and continue operations. The Company requires an extension of 45 days in order for it to be in a position to make a viable proposal. The Trustee is of the opinion that: (a) the Company has acted, and is acting, in good faith and with due diligence; (b) the Company would likely be able to make a viable proposal if the extension being applied for were granted; and, (c) that no creditor would be materially prejudiced if the extension being applied for were granted." In its **July 11 Second Report**, the Trustee stated: "**The Company seeks to continue the NOI proceedings under the CCAA, pursuant to section 11.6, to maximize the value of its business while it runs the Sale Process (as defined below) on a going concern basis, for the benefit of all stakeholders.** The Company would also benefit from the flexibility afforded under the CCAA, including the option to implement reverse vesting structures to preserve the value of the existing regulatory approvals attached to certain valuable contracts, including Sam's Club and Costco. The Company proposes to commence a 'stalking horse' sale process... The time period for the Company to file a proposal under the NOI will expire on July 15, 2023. The Company will not be in a position to make a proposal by such date. Accordingly, and in order to provide the time for the Sale Process described herein to be conducted and completed, the Company is seeking to convert the NOI proceedings to CCAA proceedings and to transition Spergel's role from Proposal Trustee to Court-appointed Monitor."

⁴ Although decided entirely within the procedural ambit of our Civil Procedure Rules, I find Justice Beveridge's reasons in *Aurelius Capital Partners v. General Motors Corporation*, 2009 NSSC 100, helpful to my "is it in the interests of justice to do so?" analysis here whether to abridge the timelines.

1. counsel for WTH only became aware on July 4, 2023, that ASC was contemplating the Application.

I further infer that WTH only became aware on or about **July 5, 2023** of the registrations by Golden of its security between the time of Justice Coughlan's release of his written decision on **February 2, 2023** and when WTH registered his Order of **April 13, 2023** - see Exhibit "N" to the Kells' affidavit, being an email July 5, 2023 from Mr. Santimaw to counsel for WTH, Gavin MacDonald, wherein it appears that to date the forms of security provided by ASC to Golden were not expressly identified, but rather only that Golden was a secured creditor in the total amount of \$2,835,269. Mr. Santimaw had requested an independent legal opinion from Burchell Wickwire Bryson LLP regarding section 13.4 of the *BIA* "with respect to the validity and enforceability of certain security granted by [ASC] to [Golden]." The opinion is found at the Exhibit and confirmed Golden's secured creditor status as a result of a January 2, 2018, loan agreement in an amount up to \$2.174 million, a March 5, 2023 General Security Agreement registered in the Nova Scotia Personal Property Registry on March 14, 2023, and an April 13, 2023 collateral

mortgage (mistakenly referenced in the Kells' Affidavit para. 8 as executed and registered on April 23, 2023) with respect to real property securing up to \$2,748,183 and registered in the Nova Scotia Land Registry on April 13, 2023. WTH's judgement was registered against those properties in the Nova Scotia Land Registry on April 28, 2023 (according to the Burchell independent opinion).⁵

2. although it had the Monitor's May 24, 2023, First Report, **WTH prepared its written submissions to this Court, without the benefit of the Monitor's July 11, 2023, Second Report** (although it had it before it presented its oral arguments herein).
3. WTH, as did the Court, received **two late-filed affidavits of Mr. Gao**, which superficially were not in proper form, and which are the only evidence presented by the Applicant.

The first affidavit is dated sworn July 7, 2023, and the latter affidavit as submitted was also "sworn virtually by videoconference in Shanghai China before [counsel Darren O'Keefe] at St. John's,

⁵ While the Trustee's First Report did identify Golden as a secured creditor in the amount of \$2,835,269, the nature of the security was not precisely identified. Moreover, notably in the creditor mailing list there is no address identified for WTH, which was considered an unsecured creditor. I infer WTH did not then receive a copy of the First Report.

Newfoundland and Labrador this [blank] day of 2023.” As I understand it the second affidavit was sworn between July 8 and 10, 2023.⁶

4. WTH was entitled to cross-examine Mr. Gao- but did not request to do so. I am satisfied that this was because I infer that its counsel was genuinely satisfied that this was not possible, before the hearing ended on July 13, 2023: his being in China, resulting in significant time differences with Nova Scotia; he required translation services when testifying at the trial before Justice Coughlan; how one would quickly enough have arranged a “court room” equivalent in China suitable for audiovisual connection and simultaneous interpretation, or an interpreter here in Halifax?

[16] In argument, WTH questions the *bona fides* of Mr. Gao, who is the beneficial owner of both ASC and Golden, generally, and specifically regarding the validity of the Collateral Mortgage and Loan, and the timing of the registrations thereof.

⁶ From the proceeding in Halifax before me, it was clearly apparent that his own counsel Mr. O’Keefe was having difficulty swearing affidavits from him and doing so in a timely manner.

[17] Had WTH counsel insisted on cross-examining Mr. Gao, I am satisfied that it is unlikely the hearing could have concluded before the present stay of proceedings expired on Saturday, July 15, 2023, and likely it would have been weeks before a hearing date could be found for which the Court and all necessary parties were available.⁷

[18] WTH would also have had an opportunity to explore with Mr. Gao whether Golden and ASC fall within the definition of “related to or dealing at arm’s length with a debtor company” pursuant to s. 2(2) and 3 of the *CCAA*.⁸

[19] Conversely, I consider the prejudice to ASC of not granting it an abridgement of time.

⁷ Although I cannot use Justice Coughlan’s conclusion in his written decision in 2023 NSSC 27, from paragraph 16: “I have no confidence in Mr. Gao’s evidence and do not accept it.”, this could have been explored by counsel for WTH had it requested, and had Mr. Gao been available for, his cross-examination. The Court may have also benefited from the opportunity to ask him some questions of clarification regarding his affidavits.

⁸ I note that in the Burchell’s legal opinion they note the following qualifications: “We are not sufficiently familiar with the details of the relationship between [ASC] and [Golden] to know whether any funds were advanced or whether [ASC] is indebted to [Golden]. ... We express no opinion as to the priorities as between the Security held by [Golden] and any other Security or any other competing claims and we express no opinion as to the validity of any enforcement steps taken or contemplated... We are not aware of facts that would permit annulment of the Security under section 95 of the *BIA*. In particular, we are not aware of information indicating that the persons granting the Security were insolvent at the time they purported to grant Security or that the Security was otherwise entered into in fraud of creditors rights.”

[20] If ASC cannot convert the proceeding to one under the *CCAA*, it will remain under the *BIA*. The stay of proceedings was set to imminently expire.⁹

[21] In my view, the parties could still request an extension of time of the stay of proceedings under the *BIA* on July 17, 2023.

[22] Ultimately, I see very little prejudice to the Applicant, as a result of my decision to not abridge the relevant time periods for filing and service of documents in support of the Application in Chambers to convert the proceeding from the *BIA* to the *CCAA*.¹⁰

[23] I am not persuaded that my declining to abridge the time periods, even if my decision will trigger the assignment into bankruptcy under the *BIA* or merely

⁹ As an epilogue to the July 13, 2023 hearing, and my July 14, 2023 written advisement to counsel that I had decided to decline converting the *BIA* proceeding to one under the *CCAA*, I note that thereafter counsel sent various emails with concerns. These included: Mr. Santimaw's of July 14, 2023 at 4:56 p.m. seeking clarification whether my decision "means that the Company should continue its proposal proceedings under Part III of the *BIA* or if it is deemed bankrupt under section 50.4 (8) of the *BIA*"; Mr. MacDonald's of July 14, 2023 at 5:37 p.m., wherein he stated: "We are responding to the email of Mr. Santimaw... We submit therefore the calculation of this period of time is governed by the *Interpretation Act (Canada)* ... As a result, we submit that the stay of proceedings expires tomorrow, Saturday, July 15, 2023, since it is not a holiday. At that time, the Company will be deemed to have made an assignment in bankruptcy."; Mr. Santimaw's reply on July 14, 2023 at 6:46 p.m.: "An order was issued extending the stay of proceedings. The computation of time of the operative paragraph of that Order should not be governed by the *Interpretation Act (Canada)*, but the [Nova Scotia] Civil Procedure Rules." I was unaware of these emails until July 17. By that time, I understood that one of my colleagues or the Registrar of Bankruptcy was in the process of addressing those concerns of the parties on July 17, 2023.

¹⁰ While an argument can be made that there is substantive prejudice to the Applicant to the extent that ASC will not have the benefit of what it referred to as the "flexibility" or advantages of the *CCAA* as opposed to the *BIA*, these are presently speculative, or at best not provably ascertainable, and the burden is upon ASC in this Application.

continuation under the *BIA*, will jeopardize the interests of the stakeholders collectively.

[24] I exercise my discretion not to abridge the time for filing and service upon WTH.

[25] Therefore, the Application was not properly before the Court on July 13, 2023, and I am unable in the circumstances to grant the relief sought in the Application.¹¹

[26] On this basis, I dismiss the Application.

A handwritten signature in black ink, appearing to read "Rosinski, J.", with a large, stylized initial "R" at the beginning.

Rosinski, J.

¹¹ Upon request by the Applicant (although it made no request in that regard) the matter could have been adjourned further to a hearing date after July 13, 2023. I would have been prepared to adjourn the matter over to such a date. I appreciate that by that date, the Application herein would be moot, if the Stay had expired on July 15, 2023, which would have triggered a deemed assignment in bankruptcy.