O'KEEFE & SULLIVAN

BY FASCIMILE: (902) 424-0524

Office of the Registrar
Supreme Court of Nova Scotia
1815 Upper Water Street
Halifax, NS, B3J 1S7
Attn: Caroline McInnes

15 November 2023

To the Supreme Court Registry:

Re: In the matter of the Notice of Intention to make a Proposal of Atlantic Sea Cucumber Ltd.

Court No. 45461
Estate No. 51-2939212

Please find the brief of the Appellant, Atlantic Sea Cucumber Ltd. enclosed herewith for filing with the Registry.

Thank you for your assistance.

Regards,

DARREN D. O'KEEFE
dokeefe@okeefesullivan.com

Encl.

cc. Service List, attached as **Schedule "A"**

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

District of Nova Scotia
Division No. 01 – Halifax
Court No. 45461
Estate No. 51-2939212

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, c B-3, AS AMENDED

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ATLANTIC SEA CUCUMBER LTD. OF THE COMMUNITY OF HACKETTS COVE, IN THE PROVINCE OF NOVA SCOTIA

APPEAL BRIEF OF THE APPELLANT

To the Service List attached hereto as Schedule "A"

Darren O'Keefe
O'Keefe & Sullivan
Solicitors for the Appellant
Suite 202, 80 Elizabeth Ave.,
St. John's, NL, A1A 1W7
Email:
dokeefe@okeefesullivan.com

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APPEAL BRIEF OF THE APPELLANT

A. Overview of Appeal

1. The Registrar in Bankruptcy, Raffi Balmanoukian, (the "**Registrar**"), dismissed the motion filed by Atlantic Sea Cucumber ("**ASC**") seeking, *inter alia*, to abridge time, and an extension of the Initial Stay. The Registrar did so on entirely procedural grounds.

2. The only material in the Registrar's possession aside from that filed by ASC was the Second Report of the Proposal Trustee, MSI Spergel Inc. ("**MSI**"), which supported ASC's request for an extension.

3. In essence, ASC suffered the consequence of being deemed bankrupt for the sole reason that its request for an extension was sought "at the 11th hour". Thus, the question for appeal is whether the denial was fair or did it violate ASC's right to natural justice.

4. ASC seeks to have the Decision overturned and replaced by an Order for the 45-day extension originally requested, with the 45-day period to commence from the date of the replacement Order.

B. Concise Statement of Facts

5. ASC filed a Notice of Intention to Make a Proposal ("**NOI**") under section 50.4(1)[1] of the ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3, as amended, (the "**BIA**"), on 1 May 2023. MSI was appointed as Proposal Trustee.

6. On 26 May 2023, ASC filed an application to extend the Initial Stay by 45 days pursuant to s. 50.4(9) of the BIA. This application was granted on 31 May 2023. The main opposing party was Weihai Taiwei Haiyang Aquatic Food Company Limited ("**WTH**"), an unsecured judgment creditor of ASC. They indicated at this hearing it would be their preference for ASC to be bankrupt as opposed to attempting to resecure under the BIA.

7. On 4 July 2023, ASC notified counsel for WTH that it intended to file an application to convert the insolvency proceeding from a BIA proceeding to a proceeding under the ***Companies' Creditors Arrangement Act***, RSC 1985, c C-36, as amended, (the "**CCAA**").

8. On 6 July 2023, ASC filed an application to convert the NOI to proceedings under the ***Companies' Creditors Arrangement Act***, RSC 1985, c C-36, as amended, (the "**CCAA**"), and appoint the Proposal Trustee as Monitor (the "**Conversion Application**"). The earliest available date that could be provided by the Honourable Supreme Court was 13 July 2023.

9. The Conversion Application was heard as a contested application on its merits on 13 July 2023. The only opposing party was WTH. The hearing lasted approximately 2 hours.

10. WTH opposed the application on numerous grounds, including, the Court should not abridge time for the Conversion Application, as would be typical in proceedings commenced or continued under the BIA or CCAA.

11. Although ASC met the substantive test for CCAA conversion, Justice Rosinski denied the Conversion Application on the basis that it would not allow for an abridgement of time as requested. The Court found that because the service requirements in the Nova Scotia *Rules of Court* were not strictly followed, the Conversion Application was not properly before it (***Atlantic Sea Cucumber Ltd (Re)***, 2023 NSSC 231).

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[1] BIA, section 50.4(1) [TAB 1]

12. The adverse decision on the Conversion Application immediately jeopardized ASC's ability to continue its BIA proposal process due to the proximity in time to the expiry of the stay of proceedings granted 31 May 2023. As such, ASC filed an application for a further 45-day extension of the NOA stay of proceedings on 15 July 2023 (the "**Extension Application**"). The Proposal Trustee supported the Extension Application, while WTH, again, opposed it.

13. On 17 July 2023, the Registrar heard the contested Extension Application on its merits and denied the Extension Application at the conclusion of the hearing, resulting in the Decision.

C. Issues

14. The issues for appeal are as follows:

    i. Should the Registrar have referred the Extension Application to the Superior Court, given that it was a contested application and therefore outside of his jurisdiction?

    ii. Should the Registrar have granted the Extension Application because (i) the test under BIA s. 50.4(9) was met; and (ii) ASC having met the test, there were insufficient reasons for the Registrar to then exercise his discretion to deny the Extension Application.

D. Standard of Review

15. The standard of review to be applied by a judge reviewing a decision of the registrar in bankruptcy and questions of law and matters of principle is correctness. Findings of fact should be interfered with only if manifest error is demonstrated. The standard on mixed questions of fact and law lies along a spectrum. See, ***Sager (Re)***, 2023 NSSC 42, para. 47[2].

16. ASC submits that the issues under appeal relate to the Registrar's application of legal principles to accepted facts, and that the proper standard is therefore correctness.

E. Law and Argument

i. Should the extension have been granted?

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[2] *Sager (Re)*, 2023 NSSC 42 [TAB 2]

17. ASC submits that the Registrar's decision to refuse the NOI extension was incorrect and should be overturned on the merits.

18. Section 50.4(9) of the BIA outlines a three-part test for the granting of additional extensions to the stay of proceedings following the 30-day period referred to in s. 50.4(8):

> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.

19. Although the Registrar conceded that ASC met the "viability" test, he found that ASC did not satisfy the requirement for good faith and due diligence. He then stated that, even if he was wrong, he would exercise his discretion to deny the extension (Decision, paras. 15, 19).

20. In reviewing the Registrar's reasoning, it is important to note that he had the Proposal Trustee's Second Report, which supported the requested for an extension and demonstrated that ASC had a viable proposal and had acted with good faith and due diligence.

21. Further, WTH conceded at the hearing, and the Registrar agreed, that it would not be materially prejudiced by an extension under s. 50.4(9) BIA (Decision, para 13).

(i) Was the s. 50.4(9) BIA Test met re: Good Faith and Due Diligence?

22. ASC submits that it acted with good faith and due diligence following the initial extension to formulate a proposal. Through this process, ASC and its professional advisors determined that conversion to a CCAA would best maximize recovery for all stakeholders.

23. The Registrar acknowledged that there were "notable developments" on ASC's file during the prior stay period, yet he did not accept this as persuasive evidence of good faith or due diligence. Instead, he interpreted the s. 50.4(9)(a) requirement as relating only to efforts toward "the development of a viable proposal, not to other insolvency options" (emphasis added). ASC submits that this is a legally incorrect interpretation which was not supported by the one case cited by the Registrar, a fact that he admitted (Decision, para 22):

> In ***Re Royalton Banquet and Convention Centre Ltd.*** 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal". While there is no indication on whether any other work was done at all (unlike the present case), I read this as supporting the view that due diligence related to moving the (likely viable) proposal forward – not other options[3].

24. With respect, the above statement from *Re Royalton* cannot be extrapolated to infer the underlying facts required to support the Registrar's interpretation. It is far more reasonable to assume that, had the debtor in *Re Royalton* undertaken efforts of any other nature, such as those related to alternative insolvency options, they would have been identified.

25. Moreover, the interpretation adopted by the Registrar contravenes the intent of the BIA and CCAA. It would be wasteful and commercially impractical to arbitrarily insist that, even where a debtor's professional advisors conclude that another insolvency option would be more appropriate, their efforts during the remainder of the relevant stay period must still be devoted to the original option for the debtor to secure a s. 50.4(9) extension until it is granted.

26. Leaving aside the Registrar's incorrect interpretation of the law on this issue, it is clear from the Second Report that the review conducted by the Proposal Trustee during the period in question was substantive and far broader than simply exploring the option of a CCAA filing.

27. As an officer of the Court with a comparatively greater insight into ASC's business, its efforts and its prospects, ASC submits the Proposal Trustee ought to have been given significant deference. The Registrar did not even refer to the content of the Second Report in the Decision. When urged to give weight to the Trustee's opinion on ASC's good faith and due diligence, he stated that he did not consider this appropriate because it was 'a determination to be made by the Court, not by the Trustee' and suggested that to do so would be tantamount to asking a barber for a haircut (Decision, para. 21).

28. Alternatively, the Registrar should have substantively justified his decision to disregard the Proposal Trustee's evidence and analysis and replace it with his own determination. Given that the Decision had the extremely harsh effect of bankrupting the company, ASC's right to natural justice required thoughtful and considered reasons that went to the substance of the Second Report. For example, the Registrar did not even reference the Trustee's express

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[3] *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 [TAB 3]

opinion that forcing ASC into bankruptcy by denying the Extension Application was contrary to the interests of ASC's stakeholders:

> 55. The Company requires the continued stay of all proceedings and enforcement processes taken or that might be taken in respect of ASC, the Proposed Monitor, or their respective employees and representatives, and accordingly, the Company is seeking a Stay Period until August 31,2023. This will provide the time necessary to canvass the market fully and formally for purchasers of the business as a going-concern through a court-supervised Sale Process.
>
> 56. Under the circumstances, a bankruptcy and liquidation would result in a worse outcome for the stakeholders of ASC than the sale transaction contemplated by the Stalking Horse Agreement.

29. ASC states that it was incumbent upon the Registrar to balance all factors and provide reasons adequately explaining the result reached, and this was particularly important considering the significant consequences of the dismissal to ASC and its stakeholders as weighed against the fact that the Decision relied on a procedural irregularity – late filing – that resulted in no actual prejudice to WTH or to any other creditor (see ***Thind v. A.M. Fredericks Underwriting Management Ltd.***, 2020 BCSC 1733, para 34)[4].

(ii) Did the Registrar appropriately exercise discretion?

30. The Registrar stated that even if the test under s.50.4(9) had been met, he would exercise discretion to deny the relief in any event.

31. The scope of the Registrar's discretion under s. 50.4(9) of the BIA must be interpreted in accordance with the broad remedial objectives of the BIA. ASC submits respectfully that the Registrar did not fully consider these objectives in the present case.

32. Justice Glennie of the New Brunswick Court of Queen's Bench considered a request for extension in ***Re Convergix Inc.***, 2006 NBQB 288, as follows (paras. 38-40):

> [38] In considering applications under section 50.4(9) of the BIA, an **objective standard** must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See Re ***Cantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.
>
> [39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

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[4] *Thind v. A.M. Fredericks Underwriting Management Ltd.*, 2020 BCSC 1733 [TAB 4]

(a) The Insolvent Corporations have retained professional services of Grant Thornton Limited to assist them in their restructuring;

(b) The Insolvent Corporations have completed a business plan;

(c) The Insolvent Corporations are diligently working on the Restructuring;

(d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and

(e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person **would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal.** In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.)[5].

33. It is apparent that the Registrar did not take the broad and commercially reasonably approach illustrated by Justice Glennie on the sixth application for an extension requested in that case. Instead, the Registrar gave weight to the submissions of WTH while simultaneously disregarding or misinterpreting submissions made by ASC and/or the Proposal Trustee regarding (a) the importance of a stay given the outcome on the Conversion Application and (b) their experience on insolvency extensions, as being something more than the helpful or benign, factual nature in which they were intended. Such miscommunications are regrettable, but they should not prejudice ASC or its stakeholder.

34. Given the Registrar's ultimate reliance on his discretion to decline the Extension Application with tenuous legal authority to do so, it is relevant to raise his unnecessarily negative characterizations of ASC, ASC's counsel, the Proposal Trustee, and his counsel, all of which taken together raise the prospect of ostensible <u>if not actual</u> apprehension of bias[6]:

[4] On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13, 2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. **I was advised by counsel that the determination to seek to proceed**

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[5] *Re Convergix Inc.*, 2006 NBQB 288 [TAB 5]

[6] As the transcript will show, the quoted excerpts and paraphrased comments cited by the Registrar, in connection with his subjective interpretation thereof, omit relevant context in a way that recklessly risks materially misleading readers of the Decision and, consequently, causing significant reputational harm to the individuals involved. [TAB 6]

under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

...

[14] I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a further extension application. **In short, the "no brainer" that the Debtor thought it had in obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline**.

...

[21] **Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism – a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate.** It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when **the Trustee's representative (a different individual from that later involved in the file) became quite agitated** when I challenged the timeline leading up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

...

[26] At all Court stages of this and the CCAA proceeding, **there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result."** It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so ex parte (although again, in fairness, having in fact given short notice to adverse parties).

[27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

[28] Inconsistent with good faith as well is the current state of affairs. **Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."**

...

[30] In this case, the Debtor is essentially saying, "**we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA.** We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a

> balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.
>
> ...
>
> [34] **Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission**. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. **It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.**
>
> [emphasis added]

35. Notwithstanding the Registrar's remarks set out above, he states at para. 31 of the Decision:

> In making these comments, I wish to be clear that **I am not making negative aspersions as to any individual.** I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the debtor's principal is in China and that this posed logistical and perhaps language barriers.
>
> [emphasis added]

36. Removing all adverse implications from the Decision as they relate to individual motives or actions, as the above noted statement by the Registrar requires, his use of discretion to refuse the Extension Application boils down to an objection to its timing and perception of urgency.

37. ASC also does not agree that it came forward '**thrice**' on an emergency basis. Aside from the Extension Application at issue, the prior stay extensions were made in the normal course.

38. As to the third occasion, while this is not an appeal of the Conversion Application decision, and it would be inappropriate to argue its merits while pending before the Court of Appeal, the Court's refusal to abridge time and consequent denial of the conversion order were highly unusual and could not have been reasonably anticipated based on Canadian case law and conventional insolvency practices (see Faskin Insolvency & Restructuring Bulletin dated 3 August 2023)[7].

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[7] Faskin Insolvency & Restructuring Bulletin dated 3 August 2023 [TAB 7]

39. Contrary to the Registrar's view, the Extension Application was thus unanticipated and was advanced on a last-minute basis solely out of necessity, not for a strategic purpose.

40. It also appears that the Registrar was influenced regarding ASC's exercise of good faith and use of discretion by his understanding that "security [to a related company] was granted just after Justice Coughlin's decision in favour of WTH against the Debtor (2023 NSSC 27)", which is incorrect. Security was granted by ASC to a related company in 2018. Following the Coughlin decision, ASC was faced with a significant monetary judgment and thus sought advice from insolvency professionals. As is standard practice, that advice included a security review. Counsel then flagged the failure to register the intercompany agreement in question and it was registered in accordance with the original intent.

41. ASC's submits that the Extension Application stood on its own merits and should have been granted based on the existing case law and the accepted approach across Canada. The Decision cannot be sustained based on a proper interpretation of the relevant insolvency legislation and objective review of the facts.

ii. Should the Registrar have referred this contested matter to the Superior Court?

42. Section 192 of the BIA sets out the powers and jurisdiction of registrars. As noted in ***Re Ghajar***, 2023 ONSC 6041, para 8, citing ***Bankruptcy and Insolvency Law of Canada***, 4th Edition at §8.164[8], "a registrar derives its authority from the Act and the Rules and has no inherent jurisdiction. If authority for an act cannot be found in the BIA or the [Rules], then the registrar cannot perform it". The authors then state that "if the power to hear a matter is not expressly conferred on the registrar by s. 192 or some other section of the Act or the Rules, the registrar has no jurisdiction to hear it".

43. Section 192(1)(a) of the BIA specifies that registrars of the courts have the power and jurisdiction to "hear bankruptcy applications and to make bankruptcy orders <u>if they are not opposed</u>". None of the other powers identified in s. 192(1) or elsewhere in the BIA or Rules contradict or enlarge this limitation to permit the hearing of a contested matter of this nature without the consent of the parties.

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[8] *Re Ghajar*, 2023 ONSC 6041 [TAB 8]

44. The Registrar was aware in advance of the Extension Application that WTH sought to oppose ASC's extension and sought to hear the matter even though ASC filed the Extension Application with the Supreme Court and not with the Registrar (Decision, para 7).

45. WTF then attended the hearing and fulsomely voiced its opposition to the requested extension. As is clear from the Decision, the Registrar considered WTH's arguments and gave weight to WTH's position in reaching the Decision.

46. ASC submits that it was outside of the Registrar's powers and jurisdiction as conferred by the BIA and Rules to hear the application. It was, at minimum, incumbent upon the Registrar to either obtain the express consent of the parties to have the matter heard notwithstanding that it was outside his jurisdiction or to refer the matter to a judge for determination pursuant to s. 192(6) and he failed to do either, resulting in the Decision now under appeal.

F. Conclusion

47. A registrar derives its authority from the BIA and Rules and has no inherent jurisdiction. Per the BIA and Rules, a registrar may hear uncontested matters or matters on consent of the parties. They do not have the authority to decide contested matters. In the words of the Registrar, "don't ask a barber if you need a haircut" (Decision, para 21).

48. ASC submits that the Registrar was obligated to either secure express consent from the parties to hear the matter given that it was contested, or, alternatively, to refer it to the Superior Court. If this Honourable Court agrees that the Registrar exceeded his jurisdiction without the requisite consent of the parties to do so on a contested matter, then ASC asks that the matter be considered on a *de novo* basis and seeks the relief outlined below.

49. With respect to his assessment of the s. 50.4(9) test under the BIA, the Registrar effectively disregarded the Proposal Trustee's opinion as to ASC having exercised good faith and due diligence and seemingly gave more weight to a judgment creditor despite WTH's unproven priority claim. The Registrar also gave little or no weight to the fact that creditors would not be materially prejudiced experienced by an extension.

50. The Registrar expressly denies making negative findings with respect to any individual and identified no wrongdoing to support the exercise of his discretion to deny the Extension

Application. Unfortunately, the Registrar's findings on due diligence and good faith and his decision to refuse the Extension Application on a discretionary basis - even if the s. 50.9(4) test is met – seem to contradiction this. Instead, the Decision appears to have been largely informed by unfounded legal principles and unsubstantiated factual assumptions.

51. Given that the Proposal Trustee found that restructuring was feasible, and the opposing creditor admitted that it would not be prejudiced by the stay extension, ASC submits that the reasons identified by the Registrar are insufficient to justify his findings on good faith or due diligence and fail to legitimize his alternative exercise of discretion to deny the Extension Application.

52. ASC repeats the foregoing and states that the test under s. 50.4(9) of the BIA was met and that allowing the continuation of the stay was also consistent with the remedial purposes of the legislation. ASC therefore asks that the Decision be overturned.

G. Requested Relief

53. ASC respectfully submits that this is an appropriate case in which to overturn the Decision and replaced by a decision of this Honourable Court to grant the stay of proceedings for an additional 45-day extension as originally requested, with the 45-day period to commence from the date of the replacement Order.

54. ASC seeks costs in the cause.

All of which is respectfully submitted this 13 day of November 2023.

O'KEEFE & SULLIVAN

Solicitors for the Appellant
Suite 202, 80 Elizabeth Ave.,
St. John's, NL
A1A 1W7
Per: Darren D. O'Keefe

SCallaghan@edc.ca	proptax@halifax.ca
ATLANTIC CANADA OPPORTUNITIES AGENCY Blue Cross Centre 644 Main St. PO Box 6051. Moncton, NB E1C 9J8 Ghislain.martin@canada.ca	**OFFICE OF SUPERINTENDENT OF BANKRUPTCY** Maritime Centre, 1505 Barrington Street, 16th Floor, Halifax, NOVA SCOTIA, B3J 3K5, 877/376-9902

TAB 1

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Notice of intention

- **50.4 (1)** Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating
    - **(a)** the insolvent person's intention to make a proposal,
    - **(b)** the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
    - **(c)** the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

  and attaching thereto a copy of the consent referred to in paragraph (b).
- **Marginal note:Certain things to be filed**

  (2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver
    - **(a)** a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
    - **(b)** a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
    - **(c)** a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.
- **Marginal note:Creditors may obtain statement**

  (3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.
- **Marginal note:Exception**

  (4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that
    - **(a)** such release would unduly prejudice the insolvent person; and
    - **(b)** non-release would not unduly prejudice the creditor or creditors in question.

- **Marginal note:Trustee protected**

  (5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

- **Marginal note:Trustee to notify creditors**

  (6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

- **Marginal note:Trustee to monitor and report**

  (7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

    - **(a)** shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;

    - **(b)** shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —

        - **(i)** with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and

        - **(ii)** with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and

    - **(c)** shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

- **Marginal note:Where assignment deemed to have been made**

  (8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

    - **(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

Schedule "A"

O'KEEFE & SULLIVAN 80 Elizabeth Ave., 2nd Floor St. John's, NL A1A 1W7 **Darren D. O'Keefe** Tel: 709.700.0911 darren@okeefeandcompany.com **RECONSTRUCT LLP** Royal Bank Plaza, South Tower 200 Bay Street Suite 2305, P.O. Box 120 Toronto, ON M5J 2J3 **Caitlin Fell** (LSO #60091H) Tel: 416.613.8282 cfell@reconllp.com **Shaun Parsons** (LSO #81240A) Tel: 416.613.8284 sparsons@reconllp.com Fax: 416.613.8290 **Lawyers for the Company**	**ATLANTIC SEA CUCUMBER LTD** 212 Pauls Point Rd, Hacketts Cove, NS B3Z 3K7 **Songwen Gao** sam@atlanticseacucumber.ca **The Company**
BOYNECLARKE LLP 99 Wyse Road, Suite 600 Dartmouth, NS B3A 4S5 **Joshua J. Santimaw** Tel: (902) 460-3451 jsantimaw@boyneclarke.ca **Lawyer for the Proposal Trustee**	**MSI SPERGEL INC.** 21 King Street West, Suite 1602, Hamilton, ON L8P 4W7 **Trevor Pringle** Tel: (905) 527-2227 tpringle@spergel.ca **The Proposal Trustee**
ATLANTIC GOLDEN AGE HOLDING INC. 19 Carirnwell Close Halifax NS B3P 0A6 samunisky@gmail.com **A Secured Creditor**	**CANADA REVENUE AGENCY** 4695 Shawinigan-Sud Blvd Shawinigan-Sud QC G9P 5H9
EXPORT DEVELOPMENT CANADA 150 Slater St., Ottawa, ON K1A 1K3	**HALIFAX REGIONAL MUNICIPALITY** PO Box 1749 Halifax, NS B3J 3A5

To the Service List attached hereto as Schedule "A"

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Notice of intention

- **50.4 (1)** Before filing a copy of a proposal with a licensed trustee, an insolvent person may file a notice of intention, in the prescribed form, with the official receiver in the insolvent person's locality, stating
    - **(a)** the insolvent person's intention to make a proposal,
    - **(b)** the name and address of the licensed trustee who has consented, in writing, to act as the trustee under the proposal, and
    - **(c)** the names of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books,

  and attaching thereto a copy of the consent referred to in paragraph (b).

  (2) Within ten days after filing a notice of intention under subsection (1), the insolvent person shall file with the official receiver
    - **(a)** a statement (in this section referred to as a "cash-flow statement") indicating the projected cash-flow of the insolvent person on at least a monthly basis, prepared by the insolvent person, reviewed for its reasonableness by the trustee under the notice of intention and signed by the trustee and the insolvent person;
    - **(b)** a report on the reasonableness of the cash-flow statement, in the prescribed form, prepared and signed by the trustee; and
    - **(c)** a report containing prescribed representations by the insolvent person regarding the preparation of the cash-flow statement, in the prescribed form, prepared and signed by the insolvent person.

  (3) Subject to subsection (4), any creditor may obtain a copy of the cash-flow statement on request made to the trustee.

  (4) The court may order that a cash-flow statement or any part thereof not be released to some or all of the creditors pursuant to subsection (3) where it is satisfied that
    - **(a)** such release would unduly prejudice the insolvent person; and
    - **(b)** non-release would not unduly prejudice the creditor or creditors in question.

  (5) If the trustee acts in good faith and takes reasonable care in reviewing the cash-flow statement, the trustee is not liable for loss or damage to any person resulting from that person's reliance on the cash-flow statement.

(6) Within five days after the filing of a notice of intention under subsection (1), the trustee named in the notice shall send to every known creditor, in the prescribed manner, a copy of the notice including all of the information referred to in paragraphs (1)(a) to (c).

(7) Subject to any direction of the court under paragraph 47.1(2)(a), the trustee under a notice of intention in respect of an insolvent person

- **(a)** shall, for the purpose of monitoring the insolvent person's business and financial affairs, have access to and examine the insolvent person's property, including his premises, books, records and other financial documents, to the extent necessary to adequately assess the insolvent person's business and financial affairs, from the filing of the notice of intention until a proposal is filed or the insolvent person becomes bankrupt;
- **(b)** shall file a report on the state of the insolvent person's business and financial affairs — containing the prescribed information, if any —
    - **(i)** with the official receiver without delay after ascertaining a material adverse change in the insolvent person's projected cash-flow or financial circumstances, and
    - **(ii)** with the court at or before the hearing by the court of any application under subsection (9) and at any other time that the court may order; and
- **(c)** shall send a report about the material adverse change to the creditors without delay after ascertaining the change.

(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

- **(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
- **(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- **(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- **(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by

- **(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
- **(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
- **(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

- **Marginal note:Extension of time for filing proposal**

  (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

  - **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
  - **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
  - **(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

- **Marginal note:Court may not extend time**

  (10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

- **Marginal note:Court may terminate period for making proposal**

  (11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

  - **(a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,
  - **(b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
  - **(c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

- **(d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

- **(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;
- **(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
- **(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

- **(a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- **(b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
- **(c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- **(d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

TAB 2

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Sager (Re)*, 2023 NSSC 42

Date: 20230207
Docket: Halifax, No. 509526
Registry: Halifax

In the matter of the Bankruptcy of:

Arthur Ian Sager

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	May 16, 2022, in Halifax, Nova Scotia
Written Decision:	February 7, 2023
Counsel:	Tim Hill, K.C., Counsel for Mr. Sager Gavin MacDonald, for the Trustee

By the Court:

Background

[1] On March 3, 2020, a bankruptcy order was issued upon the application of the Bank of Montreal ("BMO") against Arthur Ian Sager ("Sager"), who consented to the order (the "Bankruptcy Order").

[2] As a first-time bankrupt, Sager was entitled, pursuant to section 168.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ("*BIA*"), to an automatic discharge from his bankruptcy after nine months (December 3, 2020) unless an opposition to his discharge was filed.

[3] On October 22, 2020, the Trustee filed its Notice of Intended Opposition to Discharge of Bankrupt (Form 80) and the Report of Trustee on Sager's Application for Discharge (Form 82).

[4] On November 13, 2020, an examination of Sager was undertaken pursuant to section 163 of the *BIA*.

[5] Sager brought a motion for an absolute discharge from bankruptcy, pursuant to the *BIA*, which was heard on March 31, 2021.

[6] On September 27, 2021, Registrar R.A. Balmanoukian issued a written decision (the "Decision") denying an absolute discharge and ordering a discharge upon payment of the sum of $200,000 to the estate of Sager in bankruptcy (the "Estate"). In addition to providing for a monthly payment schedule, the Registrar gave Sager the option to meet this condition of a $200,000 payment by causing Taksindu La Limited ("Taksindu") to assign a mortgage (the "Taksindu Mortgage") over 150 Pentz Road, Lunenburg County, Nova Scotia, ("150 Pentz Road") to the Trustee (collectively, the "Conditional Discharge").

[7] Counsel for Sager filed a Notice of Appeal on October 6, 2021, pursuant to section 192(4) of the *BIA*. The Notice referenced the following grounds for appeal:

> 1. The Registrar ordered the Appellant to cause Taksindu to assign its mortgage against the Real Property [150 Pentz Road] (the

"Mortgage"), there being no justification in law to order Taksindu, a third party, to give up its security;

2. The Registrar in essence made a finding of fraud against the Appellant, by determining that the granting of the Mortgage was a fraudulent preference, contrary to the established jurisprudence, there being no prior civil court proceeding making such a determination;
3. The Registrar made findings of fact not supported by evidence, including, *inter alia*:
   (a) Kocken Energy Systems Inc. ("Kocken") was the "operating entity" of Kocken Energy Systems International ("KESI");
   (b) Taksindu was funded in part from KESI cashflow, and that such funding "reduced Mr. Sager's equity that would have otherwise been available to creditors when he filed for bankruptcy";
   (c) That all Taksindu's funds came from KESI;
   (d) That the advances from Taksindu were made after Kocken became insolvent; and
   (e) Such other findings as may be determined.
4. The Registrar, having found that section 173(1)(a) of the *BIA* did not apply, found that:
   (a) contrary to section 173(1)(b) of the *BIA*, the Appellant failed to keep the books and records as are usual and proper in his business, there being no evidence of such failure;
   (b) contrary to section 173(1)(d) of the *BIA*, the Appellant failed to account satisfactorily for a loss in assets, there being no evidence of such failure, and in the face of a finding by the Registrar that the fact that the Appellant's assets were not of a value exceeding fifty cents on the dollar of his unsecured liabilities arose from circumstances for which the Appellant could not justly be held responsible; and
   (c) contrary to section 173(1)(e) of the *BIA*, the Appellant contributed to his bankruptcy by rash and extravagant speculations, again in the face of a finding by the Registrar that the fact that the Appellant's assets were not of a value exceeding fifty cents on the dollar of his unsecured liabilities

arose from circumstances for which the Appellant could not justly be held responsible;

all of those findings being internally inconsistent and predicated on no evidence.

5. In making his order, the Registrar failed to properly take into account the circumstances leading up to the bankruptcy, the conduct of the creditor funding the Trustee, and the advanced age and circumstances of the Appellant.

Facts

[8] The Sager Venables Family Trust (the "Trust") was set up in December, 2005. The beneficiaries are Sager, his spouse, Susan Venables ("Venables"), their children and grandchildren.

Taksindu

[9] The Trust owns all the shares of Taksindu, which in turn owns the shares of 3297807 Nova Scotia Limited and of 3274835 Nova Scotia limited (the latter company was renamed Thirteen Rivers Limited ("TRL"). The Trust also owns all the shares of Pine Grove Developments Inc. ("PGD").

[10] Until October 2019, Sager was the President and sole director of Taksindu. Taksindu owns shares in the Barbadian company, KESI, which was the sole customer of Kocken.

[11] In October, 2019, Venables became the President, Director, and Recognized Agent of Taksindu. Since this time, Sager has been involved in the management of the affairs of Taksindu with Venables.

[12] Taksindu is a holding company which advanced funds to Sager and Venables secured by mortgages on the properties at 150 Pentz Road and Oakland Drive.

Kocken

[13] Sager was the President and a Director of Kocken, which is now bankrupt following a failed restructuring. Fifty percent of the Kocken shares were owned by William Famulak ("Famuluk") and 50 percent by Taksindu. Sager guaranteed the debts of Kocken to BMO. His inability to repay the guarantee is the cause of his bankruptcy .

[14] In January, 2013 Kocken was awarded contracts for two clients in Pakistan. Those contracts made it necessary for Kocken to seek an experienced fabrication shop. Fulton Engineered Specialties Inc. ("Fulton") was engaged. Fulton failed to deliver and Kocken lost approximately $1.6 million with respect to these contracts.

[15] In April, 2017, Kocken was awarded damages against Fulton in the amount of $1,262,000, and against its principal in the amount of $532,000 (reported at 2017 NSSC 103). None of these awards were paid. Fulton ceased operating and its principal disappeared.

[16] In April 2015 Kocken had acquired a plant in St. Antoine, N.B. Kocken received financing from BMO in relation to the plant in November 2015.

[17] Kocken had annual gross sales of approximately $7,000,000 in the fiscal year ending in July 2015, and $5,100,000 in the fiscal year ending in July 2016. Kocken sustained significant losses, with the main contributors being the downturn in the oil and gas industry and the default of Fulton.

[18] On November 8, 2016, BMO froze all of Kocken's accounts.

[19] On December 7, 2016, Kocken filed a Notice of Intention to Make a Proposal pursuant to section 50.4(1) of the *BIA*. BDO Canada Limited acted as trustee under the proposal. The proposal process was long and drawn out and was largely opposed by BMO.

[20] Throughout 2017 and 2018, Kocken was working on three projects. Two of these were identical $2.8 million contracts for the manufacture of gas processing plants for California Resources Corporation ("CRC"). The other contract was valued at $2.85 million for the manufacture of a gas processing plant for Pakistan Exploration (Pvt) Limited.

[21] In July 2018 CRC cancelled its two contracts. CRC refused to take delivery or pay the remainder due under the contracts and, in July 2020, CRC filed in the United States for Chapter 11 bankruptcy with $5 billion in debt.

Kocken Bankruptcy Proposal

[22] Ultimately, on March 3, 2017, Kocken filed a proposal. The meeting of creditors to consider the proposal was adjourned on a number of occasions until May 26, 2017, when an amended proposal was unanimously approved by the creditors and subsequently by the Court.

[23] Kocken was ultimately unable to meet the terms of the proposal, but Kocken did pay BMO $1,150,000 under the proposal prior to default.

[24] At the date of Kocken's bankruptcy, the company owed Sager $98,729.13 for salary cheques not cashed. This was assigned to PGD for a total of $233,961.20 owed to PGD by Kocken.

[25] Following the bankruptcy of Kocken, BMO sought to call the mortgage loan of TRL on property located at 5422 Highway 331, LaHave, Nova Scotia. TRL was able to obtain alternative financing and BMO assigned the loan and security to the new lender for payment in full of said loan in the amount of $132,142.74.

Properties – 150 Pentz and Oakland Drive

[26] Sager has a joint tenancy interest with Venables in two properties: (1) 150 Pentz Road – the matrimonial home, and (2) Oakland Drive, Bridgewater, Nova Scotia – an income property previously owned by 3297807 Nova Scotia Limited ("329 Ltd.").

[27] Sager and Venables were building a house at 150 Pentz Road. Originally, there was a $500,000 construction mortgage from BMO. They took a first draw of $111,000 on that mortgage. Subsequently they used lines of credit with BMO. Having run out of financing options they began borrowing money from Taksindu. 150 Pentz Road is subject to a first mortgage to Toronto-Dominion Bank in the amount of $471,000, and a second mortgage to Taksindu in the amount of $450,000.

[28] For the period from February 5, 2016, until May 16, 2016, Sager and Venables borrowed $88,715.16 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated May 16, 2016.

[29] On November 8, 2016, the Kocken bank accounts were frozen by BMO. On November 28, 2016, BMO issued demands in respect of the full loan amount owed

by Kocken and the guarantee held by Sager, which guaranteed the full amount of Kocken's debt.

[30] For the period from July 18, 2016, until December 22, 2016, Sager and Venables borrowed $51,500 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated December 22, 2016.

[31] For the period from January 3, 2017, until February 21, 2017, Sager and Venables borrowed $11,500 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated February 28, 2017.

[32] For the period from August 18, 2017, until December 29, 2017, Sager and Venables borrowed $25,975.93 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated January 24, 2018.

[33] In December 2017 BMO declined to make a second draw, and imposed conditions that Sager and Venables could not meet. As a result, they obtained a new mortgage from Toronto-Dominion Bank and paid out BMO.

[34] For the period from January 4, 2018, until March 15, 2018, Sager and Venables borrowed $82,401.08 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated April 4, 2018.

[35] For the period from April 16, 2018, until November 6, 2018, Sager and Venables borrowed $108,600.00 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated November 9, 2018.

[36] The property was appraised on December 12, 2018, at a value of $759,500.

[37] On January 18, 2019, the Taksindu Mortgage was executed and registered on title to 150 Pentz Road in second priority. TD Canada Trust ("TD") holds the first charge on 150 Pentz Road.

[38] On June 28, 2019, the Proposal as subsequently amended was annulled and Kocken was declared bankrupt.

[39] For the period from October 31, 2019, until November 25, 2019, Sager and Venables borrowed $56,000 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated November 27, 2019.

[40] For the period from December 2, 2019, until December 24, 2019, Sager and Venables borrowed $23,000 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated January 2, 2020.

[41] For the period from January 3, 2020, until January 22, 2020, Sager and Venables borrowed $20,400 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated January 20, 2020.

[42] For the period from February 5, 2020, until March 2, 2020, Sager and Venables borrowed $12,250 from Taksindu in respect of construction expenses for 150 Pentz Road. These advances were evidenced by a promissory note dated March 4, 2020.

[43] In respect of Sager's personal debts owned to BMO, in addition to the payments made by Kocken during the proposal period, the following amounts were paid in the period after Kocken became in default and before Sager was adjudged bankrupt (all amounts rounded):

Type of Debt	*Amount Paid ($)*	*Source of Funds*
Personal Line of Credit	60,000	Loan from Taksindu
Personal Line of Credit	90,000	Loan from Taksindu
Homeowner's Line of Credit	111,000	Susan Venables
BMO Mastercard	5,000	Loan from Taksindu
Mortgage - 150 Pentz Road	500,000	TD
Mortgage - Pine Grove Developments	500,000	RBC
Mortgage TRL	135,000	Private Lender
Total	**$1,400,000**	

[44] Sager declared a monthly deficit in his income to the Trustee, and four assets that are either exempt property or, effectively, fully encumbered by mortgages.

[45] On March 3, 2020, the Bankruptcy Order was issued.

Issues

[46] The issues are as follows:

(a) Did the Registrar err in law in providing Sager with the option of having Taksindu assign the Taksindu Mortgage to the Trustee as a means of paying the sum of $200,000 to the Estate?

(b) Did the Registrar err in law by, in essence, making a finding of fraud against Sager by determining that the granting of the Taksindu Mortgage was a fraudulent preference where there had been no prior civil proceeding making such a determination?

(c) Did the Registrar err in making findings of fact regarding the relationship and transfer of funds between Taksindu, Kocken, and KESI and the timeline in respect of when transfers occurred and when Kocken became insolvent?

(d) Did the Registrar err in making findings of fact, when determining sections 173(1)(b), (d), and (e) of the *BIA* applied?

(e) Did the Registrar fail to properly take into account the circumstances leading to the bankruptcy, the conduct of BMO and the advanced age and circumstances of Sager in ordering the Conditional Discharge?

Standard of Review

[47] The standard of review to be applied by a judge reviewing the decision of a Registrar on appeal was discussed in *Perrier v. Canada (Revenue Agency)*, 2018 BCSC 463, varied on other grounds, 2021 BCCA 269, as follows:

> The standard of review on appeals from a registrar in bankruptcy on questions of law and matters of principle is correctness. Findings of fact should be interfered with only if manifest error is demonstrated.

[48] An appeal of a Registrar's order is not a trial *de novo*. This was restated in *Heritage Salmon Ltd. v. Atlantic Ova Pro Ltd.*, 2006 NSSC 224, where Justice McDougall stated the following:

> 17 Under section 183 of the *BIA* (specifically s. 183(1)(c)), the Nova Scotia Supreme Court has jurisdiction to deal with bankruptcy matters arising in this Province. In the case of *Achilles, Re* (1993), 23 C.B.R. (3d) 20, 83 B.C.L.R. (2d) 116, 1993 Carswell BC 574 (B.C. S.C.), it was stated that:
>
> > An appeal under s. 192(4) of the Act is a true appeal and the decision of Master Bolton sitting as a Registrar in Bankruptcy should not be disturbed unless it is clearly wrong.
>
> ...
>
> 21 Recently the Nova Scotia Court of Appeal had occasion to consider the concept of "palpable and overriding error" in the context of a ground of appeal. In *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81, 2005 CarswellNS 198 (N.S. C.A.) the Honourable Justice Nancy J. Bateman, at paras. 13 and 14, had this to say:
>
> > 13 An appeal is not a re-trial. The powers of an appellate court are strictly limited. A trial judge's factual findings and inferences from facts are insulated from review unless demonstrating palpable and overriding error. On questions of law the trial judge must be correct. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and, therefore, be subject to a standard of correctness (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, (S.C.C.)).
> >
> > 14. **Palpable error** was clearly and simply described recently by the Ontario Court of Appeal in *Waxman v. Waxman* (2004), 186 O.A.C. 201 (Ont. C.A.):
> >
> > > [296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246 [S.C.R.]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
> > >
> > > [297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the

> challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Minister of National Revenue v. Schwartz*, [1996] 1 S.C.R. 254, 193 N.R. 241 at 28 [S.C.R.].
>
> . . .
>
> [300] ...the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. ...

[49] In the recent case of *Macfarlane v. BDO Canada Limited*, 2020 NSSC 45, Justice Wright stated the following after considering the decisions of Justice Robertson in *G.W. Holmes Trucking (1990) Ltd., Re*, 2005 NSSC 290, Justice Saunders in *Barrington & Vokey Ltd., Re* (1996), 158 N.S.R. (2d) 391 (N.S.S.C. [In Chambers]), Justice Blair in *Olympia & York Developments Ltd., Re* (1998), 80 O.T.C. 369 (Ont. Bktcy.) and Holden & Morawetz on *Bankruptcy and Insolvency Law of Canada* (3rd ed.), section 131:

> 24 Accordingly, Mr. Macfarlane as appellant must satisfy this court that the Registrar arrived at an incorrect result in law in deciding the issues before him. It is not for this court to simply substitute its opinion unless satisfied that the Registrar erred in principle or in law in the way that he has applied or exercised his discretionary power to annul the ADO [Absolute Discharge Order].

[50] Lastly, the Ontario Court of Appeal in *Re Sally Creek Environs Corp.*, 2010 ONCA 312, stated the following regarding the standard of review:

> 67 As this is the second level of appeal, two standards of review must be addressed. The first is the standard governing the commercial court judge's review of the registrar's decision. The second is the standard applicable to this court's review of the Superior Court decision.
>
> 68 The parties agreed before this court that the applicable standard that governs the commercial court judge's review of the registrar's decision is that set out by the Supreme Court in the case of *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.). All findings of fact by the registrar are deserving of deference unless he made a "palpable and overriding error". Questions of law and matters of principle are reviewed on the standard of correctness. The standard on mixed questions of fact and law lies along a spectrum. At one end, the palpable and overriding error standard applies to questions that primarily involve fact-finding or the making of factual inferences. At the other, where there is an error in

characterizing or considering the proper legal standard to be applied, the standard is correctness.

69 It is worth noting that in *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), at para. 56, the Supreme Court has made clear that the term "palpable and overriding", though "elegant and expressive" was not intended to displace the earlier formulations of "unreasonableness", "clearly wrong", or "unsupported by the evidence".

70 Great deference must be accorded to the exercise of discretion, such as where the decision maker chooses from among a range of available alternatives. In order to interfere with a discretionary determination, the reviewing court must first find that "the registrar erred in principle or in law or failed to take into account a proper factor or took into account an improper factor, which led to a wrong conclusion": *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* (2006), 79 O.R. (3d) 241 (Ont. C.A.), at para. 48. Where there has been such an error in the making of a discretionary decision, the reviewing court may exercise the discretion afresh.

71 In this case, the decision of the amount by which the Trustee's fees should be reduced because of misconduct is an exercise of discretion. While decisions of registrars are not subject to judicial review as they are decisions of the court, the appeal court should not lose sight of the fact that the *BIA*, in particular s. 192(1), grants registrars significant authority and broad discretion to apply their expertise in overseeing the bankruptcy process. As the commercial court judge noted at para. 80 of her reasons, "[c]learly, the Registrar's expertise in taxing trustees' fees is a significant factor, particularly taking into account the totality of the evidence."

Discretionary nature of the Registrar's Decision

[51] The *BIA* recognizes the important role a Registrar plays in a bankruptcy discharge and, as such, grants them broad discretion as trier of fact. The Registrar's authority in this matter flows from section 172 of the *BIA*, which reads:

Court may grant or refuse discharge

172 (1) On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court **may**

(a) grant or refuse an absolute order of discharge;

(b) suspend the operation of an absolute order of discharge for a specified time;

(c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.

Powers of court to refuse or suspend discharge or grant conditional discharge

(2) The court **shall**, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,

(a) refuse the discharge of a bankrupt;

(b) suspend the discharge for such period as the court thinks proper; or

(c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[*Emphasis added*]

[52] In the case at bar, the Registrar was conscious of the discretion granted him by the *BIA*, as demonstrated at para. 13 of the Decision:

> [13] I say 'discretion' deliberately. If a bankrupt has misconducted themselves within the meaning of the BIA (including but not limited to running afoul of ss. 68, 95, 96, 158, 173, etc.) then the Court must proceed with care with its disposition. It is common ground that the Court's discretion under s. 172 is 'considerable', as Mr. Hill phrases it in his brief. My s. 172(1) authority does not predicate itself on debtor 'misconduct', *per se*. When a fact is proven under s. 173, then 172(2) comes into play which precludes the Court from issuing an absolute discharge; however, my discretion remains otherwise broad.

[53] In considering the effect of section 173 being triggered, the Registrar's Decision, stated the following:

> [33] As I have noted, once s. 173 is triggered, I have the authority under s. 172(2)(c) to require the bankrupt to "perform such acts, pay such moneys....or comply with such other terms as the Court may direct." I emphasize that this is a discretion that is independent of any s. 95 preference analysis. My disposition does not turn on s. 95, or the Taksindu timeframe, in any way.

[54] Section 172 grants the Registrar considerable breadth of discretion to fashion a discharge appropriate to the circumstances before him.

[55] The Registrar's discretion to award an absolute discharge is restricted by section 172(2) because, if the Bankrupt has performed any of the acts described in section 173, the Registrar may not grant an absolute discharge. Otherwise, the Registrar's discretion remains considerable.

Analysis

Issue 1 - Did the Registrar err in law in providing Sager with the option to assign the Taksindu Mortgage to the Trustee as a means of paying the sum of $200,000 to the Estate?

[56] The Registrar's Decision stated the following in respect of the option provided to Sager to make payment by causing Taksindu to assign the Taksindu Mortgage on 150 Pentz Road to the Trustee:

> [61] Lastly, I am ordering that this payment to the estate *may be made, at Mr. Sager's option* exercisable within 30 days of release of this decision, by Taksindu assigning its mortgage on 150 Pentz Road to the Trustee for the general benefit of creditors, provided that the outstanding balance under that mortgage is at least $200,000.
>
> ...
>
> If Mr. Sager declines this option, *or if he cannot procure Taksindu's assignment*, or if he makes no election within the prescribed period that Taksindu then completes accordingly, the order for direct payment by Mr. Sager to the Trustee of $200,000 shall prevail.
>
> [emphasis added]

[57] I agree with the Respondent on this point. There was no order requiring Taksindu to make payment. The Registrar's extension of the option for repayment to take the form of assignment of the Taksindu mortgage was consistent with how Sager managed the affairs of Taksindu and his other related companies prior to bankruptcy and, particularly, how Sager handled the transfer and re-finance of Oakland Drive.

[58] In its Report, the Trustee explained this transaction as follows:

> (a) [Mr.] Sager, acting in his capacity as President of 329 Ltd., consented to sell [Oakland Drive] an asset appraised at $343,000 to [Mr. Sager and Ms. Venables] for $247,000 (approximately a $100,000 discount). Although no proceeds flowed to 329 Ltd. its mortgage to Taksindu was released; and
>
> (b) [Mr.] Sager, acting in his capacity as President of Taksindu, consented to 329 Ltd. selling Oakland [Drive] and its $250,000 mortgage being released. In exchange, Taksindu allegedly received $147,939.48 from the TD Oakland Mortgage

> Proceeds, consented to TD Bank registering a priority mortgage over Oakland [Drive] and subsequently registered a second position mortgage in the amount of $100,000 against Oakland [Drive] from [Mr. Sager and Ms. Venables].

[59] Sager was provided another option on how to make the $200,000 payment to the Estate. It is clear from this comment that the intention of the Registrar was that Sager pay $200,000 into the Estate as a condition of his discharge. The option of having the Taksindu Mortgage assigned was merely an alternative means to meet this obligation if Sager elected to pursue this route and was able to cause Taksindu to execute the assignment.

[60] As noted above, the *BIA* provides broad authority to the Registrar to: "require the bankrupt, as a condition of his discharge, to perform such acts … or comply with such other terms as the court may direct."

[61] By making the transfer an option at the discretion of Sager and acknowledging the possibility that Sager might not be able to procure the assignment from Taksindu, the Registrar respected the separate legal personality of Taksindu and, notwithstanding the assertion in the Notice of Appeal, made no order requiring the assignment of the mortgage by Taksindu.

[62] In short, no order was made against Taksindu and there is, therefore, no error of law on this ground of appeal.

Issue 2 - Did the Registrar err in law by, in essence, making a finding of fraud against Mr. Sager by determining that the granting of the Taksindu Mortgage was a fraudulent preference where there had been no prior civil proceeding making such a determination?

[63] Section 95(1) of the *BIA* states the following:

> Preferences
>
> 95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
>
> > (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the

> day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
>
> (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

[64] In order for the Court to make a determination that the Registrar erred in law in respect of this alleged finding of fraud, the Registrar would need to make a finding of fraud in the Decision. In fact, the Registrar states the following:

> [30] Before I embark on how I will treat this asset for the purposes of discharge, I wish to make it plain that I am *not* analyzing the Taksindu mortgage from a s. 95 BIA preference perspective. It does not fall within the 12 months preceding Mr. Sager's bankruptcy, although certainly the storm clouds were gathering. Although I disagree with Mr. Hill's assertion that I do not (apparently ever) have jurisdiction to make a finding under s. 95, I need not and do not make a jurisdictional or factual decision here. ...
>
> *[Emphasis in original; footnote omitted]*

[65] Footnote 23 of the Decision further elaborates on this point:

> Mr. Hill cites the summary nature of this Court and summary proceedings' incompatibility with findings of fraud as authority for this proposition, referencing *Re Pantziris*, 2016 ONSC 1329. He says the Ontario Court's discussion at para. 13 is "also an accurate exposition of the law in Nova Scotia." It is not. See *Re Coyle*, 2011 NSSC 238 and *Re Gushue*, 2004 NSSC 64. Although further development on this point is unnecessary for this case, I wish to insert this literal footnote on the issue, as it was a subject of some discussion in oral argument.

[66] The Registrar is clear that they were not making a finding of fraud or applying section 95.

[67] In the Decision at paragraph 33, the Registrar further stated:

> My disposition does not turn on s. 95, or the Taksindu timeframe in any way.

[68] As per the wording of section 95 of the *BIA*, "fraud" is not a requirement to establish a section 95 transaction. As such, even if the Registrar had, "in essence",

made a finding of fraud against Sager this would have no impact on the Conditional Discharge.

[69] In addition, it is important to note that section 95 of the *BIA* is not a remedy against a bankrupt but against a recipient of property. The submissions on behalf of Sager do not recognize that the rights of Taksindu are unaffected by the Conditional Discharge. The Taksindu Mortgage remains good and valid security for the amounts advanced to Sager and Venables and, to the extent the Conditional Discharge is unpaid, is in priority to the Estate's right of payment since the Conditional Discharge payments are unsecured.

[70] Taksindu has not had its legal rights altered in any way.

[71] I find the Registrar turned his mind to the interaction of section 95 of the *BIA* and the facts of the Taksindu Mortgage. There was no finding of fraud made against Sager. It is clear from the Registrar's Decision that the Registrar did not render their Decision in consideration of any section 95 analysis. The Taksindu Mortgage remains good and valid security in second priority position on 150 Pentz Road notwithstanding the Conditional Discharge. There is no error of principle or otherwise that would warrant overturning the Registrar's Decision on this issue.

[72] Describing the actions of the Registrar as a section 95 issue adds confusion to the issue. The real question is was it proper as a matter of law for the Registrar to consider the equity in the property without reference to the Taksindu secured charge in calculating the amount to be paid.

[73] The Registrar's consideration of Sager's interest in 150 Pentz Rd., without reference to the secured charge of Taksindu, to assess the appropriate monetary condition for discharge was permissible because of the broad discretion granted to the Registrar by the legislation put in place by Parliament to set those conditions. The Registrar's actions were consistent with section 172 of the *BIA*, which expressly contemplates orders based on future assets or income. Counsel for the Respondent correctly points out that the *BIA* provides a mechanism for a bankrupt to seek relief by modifications of conditions where they cannot be met.

[74] I find there is no error of law on this issue because the Registrar was acting in accordance with their statutory discretion.

[75]

Issue 3 – Did the Registrar err in making findings of fact regarding the relationship and transfer of funds between Taksindu, Kocken, and KESI and the timeline in respect of when transfers occurred and when Kocken became insolvent?

[76] Sager's evidence during the section 163 examination and the evidence provided in the Trustee's First Report to the Court dated February 19, 2021 (the "Report") shows a convoluted and complicated corporate structure of companies controlled and overseen by Sager. This structure was created by Sager. This complexity was amplified by a lack of clear records, and inconsistent evidence provided by Sager during the proceeding.

[77] Counsel for Sager cites four specific findings of fact in respect of the interactions between a variety of the companies owned and controlled by Sager as a basis for overturning the Conditional Discharge.

(a) Kocken Energy Systems Inc. ("Kocken") was the "operating entity" of Kocken Energy Systems International ("KESI");

[78] At para. 34 of the Decision, the Registrar found that "...Taksindu itself was funded at least in part from KESI cash flow which in turn was from **the contracts in which Kocken was the "operating" entity**". [*Emphasis added*]

[79] The interaction between Kocken and KESI was complicated, as evidenced by the Trustee's Report outlining the control and shareholder information in respect of both companies.

[80] Sager was the President and a Director of Kocken until its bankruptcy. The Directors and Officers of KESI are unknown to the Trustee. Taksindu is a 50 percent shareholder in KESI and, as outlined above, was controlled and managed by Sager at the relevant time.

[81] Para. 9 of the Registrar's Decision references the Report, at paragraph 28, where KESI is described as "a Barbados company which in turn engaged Kocken for operations."

[82] Kocken was a Canadian company engaged by KESI to construct oil and gas processing equipment for customers of KESI.

[83] How funds were transferred between Kocken and KESI, as it pertains to Sager's bankruptcy and to Kocken's bankruptcy, is not clear. The Trustee stated in its Report at para. 28 that:

> ... the collection and payments from the end customer to [KESI] and subsequent release of funds to Kocken was the subject of significant debate between the parties within the Kocken corporate insolvency proceedings.

[84] What is uncontested is that KESI engaged Kocken to manufacture product which KESI then sold to third party clients pursuant to the contracts negotiated and held by KESI. In essence, KESI was the sales agent and Kocken was the manufacturer.

[85] The Registrar found Kocken to be the operating entity for contacts which is consistent with the operational role Kocken filled for KESI.

[86] I find that there is no palpable and overriding error in describing Kocken as the operating entity in respect of the contracts it substantially performed on behalf of KESI. The reality was that funds flowed between KESI and Kocken based on their relationship. Kocken manufactured equipment to fulfill contracts obtained by KESI.

(b) Taksindu was funded in part from KESI cashflow, and that such funding "reduced Mr. Sager's equity that would have otherwise been available to creditors when he filed for bankruptcy";

[87] In calculating the equity in 150 Pentz Road, counsel for Sager argued that, by omitting the debt owed to Taksindu, the Registrar "made a finding inconsistent with the evidence". He argued that the evidence was that "KESI dividends flowed through Taksindu to Kocken."

[88] The evidence provided by Sager initially was that Taksindu received one or two dividend payments from KESI which were used to provide funds to Sager and Venables to renovate 150 Pentz Road.

[89] Almost three months later, Sager amended this evidence stating that the dividends in question were loaned by Taksindu to Kocken.

[90] In trying to determine where Taksindu received the money as a holding company to loan the money to Sager and his spouse, Sager provided no

explanation. In providing incomplete and contradictory evidence, Sager created the confusion around these corporate entities.

[91] The Registrar's Decision, stated the following in respect of the interaction between Kocken and KESI as it pertained to the funds available for Taksindu to advance to Sager and Venables:

> [34] With that said. In my view, and in my s. 172(2) discretion, it would be unfair and unjust to creditors to allow Mr. Sager to have the benefit of his interest in *this* asset calculated on the basis of including the Taksindu debt. It is clear that it was used as a vehicle not only to continue construction after his business troubles arose, but Taksindu itself was funded at least in part from KESI cash flow which in turn was from the contracts in which Kocken was the "operating" entity. In so doing, this reduced Mr. Sager's equity *that would otherwise have been available to creditors* when he filed for bankruptcy, calculated in accordance with principles laid down by this Court.
>
> [*Emphasis in original; footnote omitted*]

[92] Regarding the interaction between KESI and Kocken, footnote 27 of the Decision provides additional clarity as to the reasoning of the Registrar:

> I have not forgotten Mr. Sager's disputed assertion that the dividends were loaned back to Kocken. However, no matter how you slice it, Taksindu's ability to fund this construction had at least some nexus to the Kocken/KESI operations.

[93] Kocken was a manufacturer in New Brunswick. KESI sought contracts to sell oil and gas equipment internationally which was produced by Kocken in New Brunswick. Kocken's only client was KESI. KESI's source of manufactured goods was Kocken.

[94] Therefore, KESI would have nothing to sell but for what Kocken made. It was reasonable to say that Kocken was the operating entity because it made the goods to sell.

[95] Despite the complicated nature of the transactions between KESI and Kocken (created and overseen by Sager) and the conflicting evidence provided by Sager, there was a valid evidentiary basis for the Registrar to find a nexus between the operations of KESI and Kocken which allowed funds to be available to Taksindu. Alternatively, I find any error by the Registrar did not rise to the level of being a palpable and overriding error.

(c) All Taksindu's funds came from KESI

[96] Counsel for Sager argues that the Registrar erred in finding that Taksindu was fully funded by KESI.

[97] The Report, at para. 28, stated the following in respect of the funding of Taksindu:

> ... Taksindu is also a shareholder of Kocken International which was identified by Sager at his examination as the source of funding into Taksindu which permitted Taksindu to advance funds to the Sager Family [Mr. Sager and Ms. Venables] and 329 Ltd.
>
> Correspondence from Sager's counsel dated February 4, 2021 amended Sager's evidence to also include funds from two financings (2017 and 2019) by PGD [Pinegrove Developments] (defined below) generating a total of $334,523.32 which, in addition to the Kocken International [KESI] distributions, were the reported sources of funds available to Taksindu for loans to 329 Ltd. and the Sager Family [Mr. Sager and Ms. Venables]....The supplemental explanation suggests that Kocken International [KESI's] dividends to Taksindu (dates and amounts requested but Sager was unable to confirm) must have exceeded $395,000 since Taksindu, under Sager's direction, is alleged to have advanced $480,342.17 to the Sager Family [Mr. Sager and Ms. Venables] secured against 150 Pentz Road, and $250,000 to 329 Ltd. to purchase Oakland [Drive] (total loans of $730,342.17 less PGD refinancing amounts of $334,523.32)

[98] The Report and Sager's evidence do not identify any other source of funds for Taksindu to lend to Sager and Venables.

[99] The Registrar's Decision determined that Taksindu was "funded, at least in part, from KESI cash flow".

[100] The Registrar did not find that Taksindu received all its funds from KESI but that Taksindu was funded, at least in part, from KESI cash flow. This finding is supported by the evidence and I find there is no error in fact.

(d) That the advances from Taksindu were made after Kocken became insolvent

[101] Kocken faced a variety of financial challenges beginning in 2013.

[102] Between Kocken's fiscal year end in July 2015 and the fiscal year end in July 2016, Kocken lost approximately $1,900,000 in annual gross sales. Sager described Kocken as "sustaining significant losses."

[103] Beginning on February 5, 2016, Sager and Venables began to borrow funds from Taksindu, evidenced by the promissory notes described above.

[104] On November 8, 2016, Kocken's bank accounts were frozen by BMO and on November 28, 2016, BMO issued demands to Kocken in respect of its loans and to Sager in respect of his guarantee.

[105] Kocken filed its NOI on December 7, 2016. Sager was the President and Director of Kocken at the time the NOI was filed. Only an insolvent person or company may file a NOI. Therefore, Kocken admitted it was insolvent as of December 7, 2016, and more than likely was insolvent for some period of time prior to that date.

[106] As noted above, from November 28, 2016, when BMO demanded on the guarantee of Sager until Sager consented to the Bankruptcy Order issued on March 3, 2020, Sager and Venables borrowed in excess of $340,127.01 from Taksindu.

[107] I find there is no error in the Registrar determining that advances from Taksindu were made to Sager following the insolvency of Kocken based on the evidence before him. All funds advanced after the filing of the NOI were made after Kocken admitted its insolvency. Funds were advanced under the first (and a portion of the second) promissory note issued by Sager and Venables to Taksindu prior to the filing of the NOI.

Issue 4 – Did the Registrar err in making findings of fact, when determining that facts in Sections 173(1)(b), (d) and (e) of the BIA were established?

[108] The Registrar's Decision at paragraph 30 states: "Specifically, I refer to the "books of account" and "failure to account" in 173(1)(b) and 173(1)(d), and the "unjustifiable extravagance in living" in s. 173(1)(e)" for his analysis under sections 172 and 173 of the *BIA*. Each section is addressed below.

(a) Section 173(1)(b): Book of Accounts and s. 173(1)(d): Failure to Account

[109] Sections 173(1)(b) and (d) of the *BIA* read as follows:

> (b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period

beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

...

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

[110] The following exchange occurred between Sager and the Trustee's counsel during the section 163 examination, in respect of the encumbrances on Oakland Drive:

> Q: Okay, and then there's a balance that's described as going to you and your wife of almost $177,000. There doesn't appear to be any payment to [329 Ltd.] for the purchase price, how did it get paid?
>
> A: I don't know. I don't know. But, as I said this morning, it's all – everything is convoluted, you know? Its [*sic*] like you take out of one pocket, you know? We had to keep the thing rolling, and I honestly don't know where that money went for – for – if – I know that – the – the - Taksindu has a mortgage on a property. I don't know the answer to that question, I'm sorry.

[111] The evidence shows a pattern of behaviour by Sager of treating the companies, which he controls himself or with Venables, as a variety of different bank accounts and sources of funds from which he can draw in any manner he deems to be advantageous. This is illustrated by the manner in which 329 Ltd. conveyed Oakland Rd., the willingness of Taksindu to release its charge on that property, and the willingness of Taksindu to lend to Sager and Venable in an unsecured fashion. All of this was supported by promissory notes, until such time as they obtained financing from TD for 150 Pentz Road. Following the TD mortgage being recorded, the Taksindu Mortgage was recorded.

[112] The Registrar's Decision states the following at para. 59:

> In saying this, I am also not exonerating Mr. Sager for this level of cash flow/asset comingling and more-than-occasional failure to provide coherent and credible explanations for certain transactions. However, they were far more often teapots than the tempests the Trustee attempted to make them out to be.

[113] The Registrar's Decision noted "cash flow/asset comingling and more-than-occasional failure to provide coherent and credible explanations for certain transactions" based on the evidence before him. Although this finding did not reach the level of tempests, the Registrar found the evidence sufficient to support a finding under sections 173(1)(b) and (d).

[114] Given that the Registrar made these findings under s. 173, he had no other choice but to make a conditional discharge order.

[115] The Registrar had a valid evidentiary basis for his conclusion. Therefore, there is no palpable and overriding error to permit the Court to overturn it.

(c) s. 173(1)(e): Unjustified Extravagance in Living

[116] Section 173(1)(e) reads as follows:

> (e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs.

[117] In making the finding of fact that section 173(1)(e) applied to Sager, the Registrar stated in the Decision (at footnote 25) that he considered the following in making the finding that Sager lived an "unjustifiable" extravagant life:

> In saying this I am, for current purposes, confining my comment to whether it is reasonable to continue to build a million-dollar home while on the eve of business failure and the call on the guarantee which Mr. Sager admits is his "only cause of bankruptcy." I appreciate that the home was not to the owners' satisfaction but as the 2018 appraisal in Exhibit V to Mr. Sager's January 9, 2021 affidavit states, it was 97% complete and no holdback was recommended. Thus, Mr. Sager had the option to sell or at least stop construction. Although Mr. Sager refers to a list of items to be completed in a 2020 letter to the Trustee contained at Tab O of the Trustee's report, there is no such list.

[118] I disagree with Sager's counsel, who states at para. 49 of his brief that: "There was zero evidence to support a finding that Mr. Sager engaged in 'hazardous speculations ... by unjustifiable extravagance in living...gambling or .... culpable neglect of the bankrupt's business affairs'" .

[119] Sager, who was the Director and President of Kocken (as well as personal guarantor for the debt of the company) knew or ought to have known about his financial peril when Kocken's accounts were frozen and BMO subsequently issued demands on Kocken and personally upon Sager in respect of his guarantee.

[120] Kocken was the primary source of income for Sager and he did not cash a paycheck for the 12 months prior to Kocken's bankruptcy. Since Kocken went bankrupt in 2019, Sager's main sources of income have been the Canada Pension Plan and Old Age Security payments.

[121] Venables works for PGD, managing the company's affairs. Venables has no pension or investment income but takes money from the Trust when required. Venables's 2019 Tax Return reflected annual income in the amount of $50,134.12.

[122] Despite this financial picture, Sager and Venables continued to borrow money from Taksindu secured by promissory notes from December 22, 2016 until March 2, 2020 – one day prior to the issuance of Sager's Bankruptcy Order when, based on the evidence before the Registrar, they had no capacity to repay the borrowed funds. The Registrar's finding that this type of continued spending on a property that was 97% complete in 2018 was an "unjustifiable extravagance in living" was based on the evidence. This finding does not rise to the standard of "palpable and overriding error".

[123] I find the Registrar had a valid evidentiary basis for their findings and, even if the Registrar erred in their findings of fact in respect of sections 173(1)(b), (d) or (e), I find that any such errors do not rise to the level of "palpable and overriding" as contemplated by the standard of review.

Issue 5 – Did the Registrar fail to properly take into account the circumstances leading to the bankruptcy, the conduct of the Bank and the advanced age and circumstances of Mr. Sager in ordering the conditional discharge?

[124] In articulating the factors which he considered in exercising his discretion to grant a conditional discharge, the Registrar stated the following:

> [58] After carefully considering all of the above, I am ordering Mr. Sager, as a condition of his discharge, to pay the sum of $200,000 into his estate for the benefit of creditors, payable at the rate of at least $2,500 per month. This is, to reiterate, in the exercise of my discretion under s. 172(2). It is inspired by, but not a direct precipitate of, my calculation of the "Taksindu-removed" equity in 150 Pentz Road, my analysis of the other impugned transactions, the sometimes intertwined and often nitpicky and fruitless inquiries (some might say persecutions) by BMO and the Trustee, and the circumstances of the failure of Kocken/KESI as the bankruptcy trigger. **I also factor in Mr. Sager's age, prospects, and circumstances, including the very salient fact that this is his first bankruptcy after a storied lifetime.** I indeed submit to Mercutio's wisdom in observing that 'tis enough. 'Twill serve. Mr. Sager deserves a reasonable opportunity to exit this process, in a manner that is fair to his general body of creditors, before he like Mercutio's assassin Tybalt festers in his shroud.
>
> [*Emphasis added*]

[125] Counsel for Sager states that "taking into account the advanced age of Mr. Sager and his income, it was inappropriate to make a finding that he ought to pay another $200,000."

[126] Reading the Registrar's Decision as a whole I find there is no basis for this ground of appeal. The Registrar showed no animus to Sager in the Decision. The finding was within the discretion provided to the Registrar as the trier of fact; he properly considered the totality of the circumstances to determine that a conditional discharge at $200,000 was appropriate, including the behaviour of BMO, Sager's age, his first time bankruptcy, and past business success.

Conclusion

[127] I find there is no basis to find that the Registrar erred in principle or in law or failed to take into account a proper factor which led to a wrong conclusion. To the extent there are any errors of fact, they are not palpable or overriding.

[128] The appeal is dismissed, with costs payable to the Trustee.

[129] Should the parties be unable to agree on the issue of costs, I will accept submissions, in writing, within 30 days of the date of this decision.

Bodurtha, J.

TAB 3

COURT FILE NO.: 31-959422
DATE HEARD: June 11, 2007

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY

RE: Royalton Banquet and Convention Centre Ltd.

Counsel: Richard Jones for the Proponent, Applicant

Emilio Bisceglia for the Respondent Creditor Westplex Centre Inc.

Reasons

Andrew M. Diamond, Deputy Registrar in Bankruptcy

Introduction

The applicant seeks an extension of time to file a proposal under the *Bankruptcy and Insolvency Act* (BIA). On May 14, 2007 the applicant filed a Notice of Intention (NOI) to make a Proposal under section 50.4(1) of the BIA[1]. Pursuant to section 50.4 (8) of the BIA the debtor has 30 days from the date of filing its NOI to file a proposal or obtain an extension of time to file the proposal from the court. This matter was heard on June 11, 2007 on short service to the respondent despite the fact that the motion was booked with the court office on May 25, 2007.

Preliminary Issues

Jurisdiction

The jurisdiction of the Registrar in Bankruptcy is setout and limited to those powers setout in section 192 of the BIA. One of the things that a Registrar cannot hear, without consent of the parties, is an opposed application for a Division I Proposal. As this is an opposed application for an extension of time for filing such a proposal, which, if not granted would, under section 50.4 (8) (a) of the BIA result in the assignment of the debtor into bankruptcy, I think it is appropriate that I first address my authority to deal with the matter.

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[1] See exhibit A to the moving party's affadavit

Section 192 (1) (k) of the BIA grants to the registrar in bankruptcy the power and jurisdiction to "hear and determine any matter relating to practice and procedure in the courts". I am of the view that the question of whether to grant additional time to file a proposal under the BIA and, if so, how much time to grant, is an issue dealing with "the practice and procedure of the bankruptcy court" and thus falls within my jurisdiction.

Second, section 192 (1) (j) grants to the registrar in bankruptcy the power and jurisdiction to "hear and determine any matter with the consent of all parties". Both parties were represented by experienced and competent counsel and both counsel had no reservations in my hearing and determining this issue.

Timing

Counsel for the applicant advised the court that it was urgent that I release my reasons by today as he and the trustee had calculated that the thirty days from filing the NOI expired at the end of June14, 2007 [2]. However, on reviewing the materials today it appears to me that the 30 days for filing their proposal expired at the end of the day yesterday, June 13, 2007. If I had been so advised I would have prepared these reasons before the expiry of the 30 days. The error is that of the applicant and the trustee.

This raises the question of whether, having brought the motion within the 30 days, the clock for the purposes of section 50.4 (8) is stopped or conversely is the applicant now out of time? Section 50.4 (8) reads:

> Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62 (1) within a period of **thirty days** after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9).
>
> (a) the insolvent person is, **on expiration** of that period or that extension as the case may be, deemed to have thereupon made an assignment; (emphasis added)
>
> (b) ...

The wording of section 50.4(8) must be contrasted to the wording of section 135 (4) of the BIA, which reads:

> (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. (emphasis added)

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[2] The trustee's belief that the 30 days expires on June 14, 2007 was confirmed by telephone message from the trustee to the court off today (June 14, 2007) in which the trustee advised court staff that if they required these reasons by 3:30 pm today.

The general rule of statutory interpretation is that when parliament uses different language it intends different meanings. Section 135 (4) clearly contemplates the extension being granted after the expiry of the 30 days provided that the application for the extension was made within the 30 days. Section 50.4 (8) does not have the same saving language. Section 187 (11) grants to the court the power to "extend time either before of after the expiration thereof on such terms, if any, as it thinks fit to impose". However in subsection 50.4 (10) parliament specifically excluded the court from using this jurisdiction to extend the time under subsection 50.4 (9). The thirty days referenced in subsection 50.4 (9) is the same 30 days referenced in subsection 50.4(8), as result, I am of the view that I am specifically not empowered to extend the time past 30 days to allow for the filing of the proposal or the obtaining of an extension of that 30 days.

As a result I conclude that the applicant was deemed to have made and assignment in bankruptcy on June 13, 2007. It is not available to the applicant to file a proposal today. The applicant is bankrupt. Having said that, in the event that I am wrong with respect to the timing issue, I think it appropriate that I provide reasons as if the time did expire at the end of the day today.

Background

The respondent is the owner of a building designed and built to be used as a banquet hall. The applicant, is the respondent's tenant. There has been a lengthy history of disputes between the parties over the terms of the lease and in particular the applicant's duties to maintain the premises. This dispute culminated in a hearing before Mr. Justice Morawetz heard March 1, 2006. In short Morawetz J found for the respondent landlord. The respondent appealed and on April 5th 2007 the Court of Appeal dismissed the appeal. Based on the decision of the Court of Appeal and the applicant's alleged failure to comply with the order of Mr. Justice Morawetz the landlord brought a motion seeking *inter alia* termination of the lease. Before that motion could be heard the applicant filed its NOI.

The underlying cause of the disagreement between the applicant and the respondent is explained in paragraphs 2-4 of the reasons of Mr. Justice Morawetz where he finds that:

> [2] in January 2006, the principals of the [applicant] entered into an agreement, through a different corporation to acquire a second banquet hall, La Perla Banquet Hall, which is located a short distance away from the existing banquet hall that operates under the name of the applicant. When the [respondent] became aware of this acquisition plan, the [respondent]/[applicant] relationship changed dramatically.
>
> [3] The [respondent] became concerned that the [applicant] would be taking steps to abandon the leased premises and transferring the [applicant's] business to the newly acquired banquet hall. So far, notwithstanding a high degree of suspicion, there is no evidence to indicate that the [applicant] has been engaged in activity designed to transfer business from the existing banquet hall to the newly acquired banquet hall
>
> [4] The [respondent] reacted by requiring strict compliance with the provisions of the Lease.

On the hearing of this motion the respondent lead uncontroverted evidence that the applicant is now engaged in moving potential business from the hall owned by the respondent to a new hall

which is owned and currently being renovated by a company controlled by the same principals as the applicant. The evidence is that all new bookings that are attempted to be made using the applicant's phone number for dates after the start of September are for the new company at the new location. As a result, as of September the applicant will not be able to be sold as a going concern as it will have no bookings. Respondent's counsel submits that the applicant is using the courts and the bankruptcy system to simply "rag the puck" until their new place is available while at the same time running down the old location so that it will not be a competitor once they move.

Analysis

Section 50.4 (9) of the BIA reads in part:

> (9) The insolvent person may, before the expiration of the **thirty day period mentioned in subsection (8)** or any extension thereof granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court may grant such extensions, not exceeding forty-five days for any individual extension and not exceeding in the aggregate five months after the **expiration of the thirty day period mentioned in subsection (8),** if satisfied on each application that
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> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
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> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
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> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted. (emphasis added)

I agree with counsel for the respondent that in order to be granted an extension the applicant has the onus of demonstrating that it satisfies each of the three elements of the test. As found in *Re Heritage Flooring Ltd.* (2004), 3 C.B.R. (5th) 50[3] "the debtor must prove on the balance of probabilities that an extension is justified…". I will deal with element of the test in turn.

Good faith

The evidence is that the applicant has, since at least January 2007, made some attempts to sell its business. The applicant's position as set out in its notice of motion it that:

> There are substantial outstanding disputes between [the applicant] and the respondent involving claims by the respondent that the applicant is required to make substantial expenditures on upgrading and refurbishing the premises. Those disputes must be resolved as part of any restructuring as a going concern of the business and undertaking of the applicant.

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[3] As cited in *Houlden & Morawetz* at E 1.2

Counsel for the applicant conceded in oral submissions that it is impossible for the applicant and respondent to work together. Furthermore, as set out above, the uncontroverted evidence is that the principals of the applicant are in the process of moving all of its potential business to a new company at a new location. In light of this I cannot find that the applicant has satisfied the onus of demonstrating that it has acted in good faith with respect to making a proposal.

Due diligence.

As mentioned above the NOI was filed on May 14, 2007. At the end of the hearing I directly (over the objection of the respondent's counsel) asked the representative of the trustee what work had been done since May 14, 2007 in preparing the proposal. The trustee answered candidly and honestly that no work had been done on preparing the proposal. As a result I find that the applicant has not exercised the necessary due diligence to be granted an extension.

Likelihood

On its own material the applicant is deficient in this regard. In paragraph 11 of the affidavit of the president of the applicant he swears that the:

> [applicant] requires an extension of time to file its Proposal in order to continue efforts to resolve outstanding disputes and to determine the most advantageous terms for a restructuring and any possible related transactions. If [the applicant] is granted the extension, I am **hopeful** that [the applicant] will be able to make a viable proposal to its creditors within the extension period being sought. (emphasis added)

As I said at the hearing and as counsel agreed, being "hopeful" of winning the lottery is not the same thing as it being "likely". To quote Mr. Justice Farley in *Benson v. Third Canadian General Investment Trust Ltd* "If wishes were horses, then beggars will ride." There is no evidence before me that a proposal is likely. Counsel for the applicant conceded that based on the status of the relationship between the applicant and the respondent, the only type of proposal that is even conceivable at this time is a liquidation proposal. That is not what is implied by the applicant's affidavit, and as a result I find that the granting of the extension will not likely result in a viable proposal.

Conclusion

I am of the view that the 30-day period to file a proposal expired yesterday, June 13, 2007 and as a result the applicant is bankrupt as of today and unable to file a proposal. However, if I am wrong with respect to the calculation of the 30-day period then, as set out above, the granting of an extension of time to file a proposal is a matter of discretion. In exercising that discretion I find that the Applicant should not be granted an extension. The Applicant's motion for leave to extend the time for filing a proposal pursuant to section 50.4(9) of the BIA is denied.

Andrew M. Diamond
Deputy Registrar in Bankruptcy
Superior Court of Justice.

Released: June 14, 2007

TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thind v. A.M. Fredericks Underwriting Management Ltd.*, 2020 BCSC 1733

Date: 20201019
Docket: 186491
Registry: Vancouver

Between:

Karnail Singh Thind and Gajindera Kaur Sodhi

Plaintiffs

And

A.M. Fredericks Underwriting Management Ltd., Intact Insurance also known as Intact Insurance and in, French, Intact Compagnie D'Assurance also known as Intact Insurance Company and also known as Intact Financial Corporation

Defendants

Before: The Honourable Madam Justice Norell

Oral Reasons for Judgment

Counsel for the Plaintiffs:	J.S. Malik
Counsel for the Defendants:	C.W. MacKinlay
Place and Date of Hearing:	New Westminster, B.C. September 29, 2020
Place and Date of Judgment:	New Westminster, B.C. October 19, 2020

[1] The plaintiffs apply pursuant to Rule 6-2(7) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 for an order adding International Insurance Company of Hannover SE, now known as HDI Global Specialty SE ("Hannover"), as a defendant in this action, and to amend the style of cause and notice of civil claim accordingly. The application is made after the expiry of the limitation period for a claim against Hannover.

Nature of Claim

[2] The plaintiffs are owners of a building on Fraser Street in Vancouver, BC. On June 8, 2016, the building suffered a fire. Counsel advised the building is mixed-use and had commercial tenants on the bottom two floors, and residential tenants on the upper floors.

[3] The defendants, Intact Insurance, also known as Intact Compagnie D'Assurance and Intact Insurance Company and Intact Financial Corporation (collectively referred to as "Intact"), admit they are one of two insurers who insured the building under a subscription policy of insurance (the "Policy"). Pursuant to the terms of the Policy, Hannover was the other insurer and each of Intact and Hannover are liable for 50% of insured losses. The liability of Intact and Hannover is stated in the Policy to be several.

[4] The defendant, A.M. Fredericks Underwriting Management Ltd. ("Fredericks"), is the insurance broker.

[5] The plaintiffs' claim is a first-party coverage claim for property damage and loss of rental income they allege they suffered as a result of the fire.

History of Litigation

[6] The plaintiffs made a claim under the Policy. On June 6, 2018, the plaintiffs filed the notice of civil claim. Only Intact and Fredericks were named as defendants. The plaintiffs allege that the building suffered property damage. The plaintiffs' legal firm was CGM Lawyers. The lawyer signing the notice of civil claim was Ms. Manjeet K. Sandhu. Mr. Deepak Chodha states he owns CGM Lawyers and he was the

responsible lawyer on the file. Ms. Sandhu appears to have had day-to-day conduct of the file.

[7] On June 29, 2018, counsel for the defendants advised Ms. Sandhu that his firm was retained and that there is another defendant that should be added in the action. He asked that Ms. Sandhu contact him to discuss this.

[8] On August 16, 2018, Ms. Sandhu advised defendants' counsel that upon receipt of the Policy and her clients providing their proof of loss, she would seek instructions to amend the notice of civil claim.

[9] On August 28, 2018, counsel for the defendants provided a copy of the Policy to plaintiffs' counsel. The Policy states that the two subscribing insurers are Intact and Hannover, each severally liable for 50% of insured losses.

[10] What followed for the next year was a series of requests by defendants' counsel to Ms. Sandhu to have her file an amended notice of civil claim and produce a proof of loss. I note here that a party cannot be added by filing an amended pleading. An application pursuant to Rule 6-2(7) is required: *Alexis v. Duncan*, 2015 BCCA 135 at para. 21.

[11] Counsel for the defendants followed up with Ms. Sandhu on November 19, 2018, January 15, 2019, and March 1, 2019. On November 19, 2018, Ms. Sandhu advised that the plaintiffs were preparing the proof of loss and, upon receipt, she would amend the notice of civil claim. These would be forwarded "in due course". On January 15, 2019, defendants counsel requested the amended notice of civil claim and proof of loss by the end of the month. On March 1, 2019, counsel for the defendants advised he would be seeking to have the action dismissed if plaintiffs' counsel did not respond by March 22, 2019. On March 22, 2019, Ms. Sandhu advised that the plaintiffs were out of B.C. and would not be returning until March 27, 2019, and that she would prepare an amended notice of civil claim and provide a filed copy by no later than March 29, 2019. On March 27, 2019, Mr. Robert Delamar, another lawyer at the plaintiffs' legal firm, advised defendants' counsel that

Ms. Sandhu had taken a two-week medical leave and that he understood she planned to amend the notice of civil claim upon her return to the office.

[12] Defendants' counsel continued to follow up with Ms. Sandhu on May 24, 2019 and June 27, 2019. On July 9, 2019, Ms. Sandhu advised she would be making amendments to the notice of civil claim within the next two weeks.

[13] On August 28, 2019, Ms. Sandhu filed and served a notice of intention to proceed.

[14] On October 15, 2019, the plaintiffs filed an amended notice of civil claim, but did not apply to add Hannover as a defendant. The amended claim now included a claim for loss of rental income and particularized some of the alleged losses. The proof of loss was not produced.

[15] On January 29, 2020, the defendants filed and served their response to the amended notice of civil claim.

[16] On February 11, 2020, counsel for the defendants requested counsel for the plaintiffs to provide dates for discoveries and trial. On March 16, 2020, the plaintiffs' legal firm served a notice to produce, and responded regarding the setting of discoveries and trial. On April 1, 2020, counsel for the defendants sent a letter to counsel for the plaintiffs confirming that the action had been tentatively set for trial for seven days commencing on three possible dates in February 2023.

[17] On April 8, 2020, Ms. Munn, another lawyer in the legal firm of the plaintiffs, filed a notice of application seeking to further amend the notice of civil claim by adding Hannover as a defendant. The application was returnable on June 17, 2020. The notice of application was served on April 20, 2020.

[18] On May 6, 2020, Ms. Munn filed and served a notice of intention to withdraw in the action on behalf of Mr. Chodha. Ms. Munn signed the notice. The notice was delivered to defendants' counsel on May 7, 2020. On May 14, 2020, counsel for the defendants inquired of Ms. Munn who was counsel of record as defendants' counsel

had never had any interactions with Mr. Chodha. Ms. Munn replied that Mr. Chodha had always been counsel of record and Ms. Sandhu assists him with files. Ms. Munn signed the notice as Mr. Chodha was not available.

[19] Due the COVID-19 pandemic, the plaintiffs' application was adjourned as it did not meet the criteria to be heard. However, counsel for the plaintiffs in this application acknowledges that even if the application could have been heard, the materials filed in support of the application were insufficient.

[20] On July 22, 2020, counsel for the defendants filed their application response and a notice of application to dismiss the claim for want of prosecution, or in the alternative, an order for document production. On August 10, 2020, Mr. Chodha sent a letter to defendants' counsel requesting an adjournment of the defendants' application then set for August 14, 2020, in exchange for a list of documents and proof of loss. Defendants' counsel refused. On August 14, 2020, the defendants' application was heard before Master Cameron. The plaintiffs' application to add Hannover was not heard as the plaintiffs had not filed their application record. Master Cameron ordered that the defendants produce documents by August 28, 2020, and that the plaintiffs had leave to refile their application to add Hannover as a defendant by August 28, 2020.

[21] On August 28, 2020, the plaintiffs served a list of documents. It appears to be incomplete. The plaintiffs also filed this application to add Hannover as a defendant and amend the pleadings.

[22] No examinations for discovery have taken place.

[23] Mr. Chodha has sworn two affidavits. He states that he owns CGM Lawyers, and the procedure in his office is that on litigation matters, he remains the clients' main point of contact and various junior lawyers assist him by handling day-to-day matters. He supervises the lawyers and is ultimately responsible for what does or does not take place on files. He states "he will not blame" Ms. Sandhu for any errors on this file. If Ms. Sandhu made any errors, those are ultimately his fault for failing to

supervise her properly and ensure the clients' interests were protected. He states the plaintiffs are "entirely blameless" in this matter. He was instructed to sue the proper and necessary parties from the very beginning of the file. The failure to do so rests with his office and ultimately him.

Legal Principles

[24] The plaintiffs acknowledge that the limitation period to bring a claim against Hannover has passed. Pursuant to s. 6 of the *Limitation Act*, S.B.C. 2012, c. 13, the limitation period is two years and it expired at the latest by August 29, 2018, when defendants' counsel provided the Policy to plaintiffs' counsel.

[25] Pursuant to ss. 22(1)(d) and 22(4) of the *Limitation Act*, the court may add a party to an existing action commenced within a limitation period, despite the expiry of the limitation period for an action against the proposed party. Those subsections provide:

> 22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
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> ...
>
> (d) new parties may be added or substituted as plaintiffs or defendants.
>
> (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.

[26] Rule 6-2(7)(c) of the *Supreme Court Civil Rules* states:

> (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
>
> (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
>
> (i) any relief claimed in the proceeding, or
>
> (ii) the subject matter of the proceeding

> that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[27] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at paras. 45-46 [*Neilson*], Madam Justice Neilson discussed that an applicant pursuant to the former Rule 15(5)(a)(iii), now Rule 6-2(7)(c), must establish two requirements. First, the applicant must show that "there is a question or issue between the plaintiff and the proposed defendant that relates to the relief, remedy, or subject matter of the proceeding". Second, the applicant must show that it is just and convenient that the proposed defendant be added and to decide the issues between the parties in the existing proceeding. This is a discretionary decision to be "exercised judicially, and in accord with the evidence adduced and the guidelines established in the authorities". The factors to be considered, as discussed in *Letvad v. Fenwick*, 2000 BCCA 630 [*Letvad*] at para. 29 and adopted from *Teal Cedar Products (1977) Ltd., v. Dale Intermediaries Ltd.* (1996), 71 B.C.A.C. 161, include:

a) the extent of the delay;

b) the reasons for and any explanation for the delay;

c) any prejudice arising from the delay; and

d) the degree of connection between the existing action and the new parties and claims contemplated.

[28] If it is clear there is an accrued limitation defence, as is the case here, the question is "whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence": *Neilson* at para. 47. To answer that question, the court must consider the above factors. The fundamental principle is to balance the interests of justice and convenience in relation to all of the parties: *Lui v. West Granville Manor Ltd.* (1987), 11 B.C.L.R. (2d) 273 at 303 (C.A.).

[29] There is a presumed prejudice to the proposed defendant if the limitation period for the claim against it has expired: *Letvad* at para. 30. However, the prejudice is presumed only with respect to the period which has passed after the

limitation period expired plus the one year for service of the notice of civil claim: *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 [*McIntosh*] at paras. 7-8. The reason for this is that the action could have been filed within the limitation period and served at the end of one year without any prejudice to the defendant.

[30] Finally, as this case involves a situation where counsel has stated that the delay is his responsibility, and not the fault of the clients, the discussion in *McIntosh* at para. 10 is relevant. There, the Court discussed that the question of what is just and convenient requires a balancing of the interests of the parties and proposed parties, and not the conduct of the lawyers unless there is irremediable prejudice:

> [10] ... It is important not to be diverted from the conduct of the parties to the conduct of their lawyers, except to the extent that the conduct of the lawyers may be at the heart of real prejudice to the other side. In this case, the plaintiffs were neither the cause of the failure to add Bavaria in the first instance nor the cause of any of the delays. They should not be prejudiced because of conduct on the part of their lawyer unless that conduct was the cause of irremediable prejudice to the other side. ...

(See also *Neilson* at paras. 93 and 102).

Analysis

[31] In this case, it is conceded for the purposes of this application that the first requirement is met. I agree. The issue of coverage between the plaintiffs and Hannover relates to the remedy and subject matter of the claim against Intact. It is identical relief arising out of the same policy. I therefore turn to the second requirement and the factors to be considered in exercising discretion as to whether it is just and convenient to add Hannover to this action.

Extent of Delay

[32] Counsel for Hannover argues that the plaintiffs should have been aware of Hannover's involvement since September 2015 when the Policy was issued. Even if the plaintiffs were unaware of the content of the Policy, their counsel should have been aware prior to filing the notice of civil claim. Basic investigation would have revealed who the parties to the Policy were and the extent of their obligation to

insure the plaintiffs. Even if the plaintiffs had lost their copy of the Policy, they could have requested another copy from the broker prior to filing the notice of civil claim.

[33] In my view, it is not appropriate to consider the time period from September 2015. The fire had not taken place at that time. The fire was on June 8, 2016. The notice of civil claim was filed just within the two year limitation period in early June 2018, and the time to serve the claim expired in June 2019. Another ten months passed until the time the application was first filed in April 2020 and nearly 14 months until this new application was filed with leave of Master Cameron in August 2020. I do not consider this an inordinate amount of time; however, what colours whether that time is significant is the reasons for and explanation for the delay and whether any prejudice was incurred during that last time period. I turn to that next.

Reasons for and Explanation for the Delay

[34] Plaintiffs' counsel (who is not from Mr. Chodha's firm) argues that Mr. Chodha has clearly and unequivocally taken the responsibility for the failure to bring an application earlier to add Hannover as a defendant. When the mistake is that of the lawyer, the clients should not be prejudiced unless the prejudice to Hannover is irremediable: *McIntosh* at para. 10.

[35] Hannover's counsel argues that the plaintiffs' evidence is insufficient with respect to the reasons and explanation for the delay. The defendants had been dealing with Ms. Sandhu as counsel for the plaintiffs. She was informed on multiple occasions of the need to amend the pleadings. No affidavit is filed from Ms. Sandhu explaining why she did not act. Further, no affidavit was filed from the plaintiffs regarding their instructions to their counsel, and what they knew and when they knew it. Counsel argues that the evidence suggests there was a breakdown in communication between the plaintiffs and their counsel, and that possibly, the delay was a result of the plaintiffs. For example, Hannover's counsel refers to: Ms. Sandhu saying the plaintiffs were out of town; no proof of loss being received by Ms. Sandhu; and the notice of intention to withdraw. Counsel argues that if the plaintiffs have not been responsive to requests from counsel, then this is not the fault

of counsel. These should have been explained. Finally, Hannover's counsel argues that Mr. Chodha's evidence that it is his fault, and not the plaintiffs, is insufficient. Mr. Chodha does not explain the other evidence such as the notice to withdraw and why he did not supervise Ms. Sandhu. There was either an error within the counsel's firm or an external problem with the clients, and there is no clear evidence that the plaintiffs were not at fault. Counsel argues that Mr. Chodha's statement about what his "instructions were" is hearsay. This evidence should have come from the plaintiffs.

[36] In response, plaintiffs' counsel acknowledges he does not have an affidavit from Ms. Sandhu, but states that Mr. Chodha takes responsibility and opens himself to a potential claim from the plaintiffs as a result of his affidavit. Given Mr. Chodha's admissions, there is no need to get affidavits from the plaintiffs. Plaintiffs' counsel does not agree that Mr. Chodha's statement regarding his instructions is necessarily hearsay, but even if it is, hearsay evidence is admissible on an interlocutory application. Plaintiffs' counsel also argues that if Hannover's counsel had a concern regarding Mr. Chodha's evidence, they could have applied to cross-examine him.

[37] In my view, since at least August 2018, plaintiffs' counsel should have known that Hannover should be a party to the action, and upon learning this, counsel should have immediately brought an application to add Hannover as a defendant. An affidavit from Ms. Sandhu would have been preferable, but given Mr. Chodha's affidavit that he accepts responsibility for any error, I do not find an affidavit from Ms. Sandhu was necessary. The more significant issue is whether the evidence discloses that the delay was actually the fault of the client and not the lawyer. Hannover's counsel points to the plaintiffs being out of town for a few days and the lack of a proof of loss. In my view, the former does not suggest any fault on the plaintiffs, and the failure to produce a proof of loss in a timely way could be a result of many factors, not necessarily a failure by the plaintiffs. The notice of intention to withdraw does raise questions regarding the relationship between the plaintiffs and the lawyers, but again does not necessarily mean there was not an instruction by the plaintiffs to Mr. Chodha to sue all proper and necessary parties or that the lawyers

were not getting instructions. While I appreciate there is a lack of detail in Mr. Chodha's affidavit as to why he did not supervise more closely or why Ms. Sandhu did not act, there is no compelling evidence to disregard his unequivocal statement that the plaintiffs were entirely blameless, and that he accepts responsibility for whatever fault there is.

Any Prejudice arising from the Delay

[38] Plaintiffs' counsel argues there is no evidence from Hannover or Intact of any actual or irremediable prejudice in the ability of Hannover to defend the action if it is now added as a defendant. There is only assumed prejudice from the passage of time. There is no evidence from any adjuster involved. Counsel argues that, presumably, the defendants and Hannover have the same adjuster, but counsel concedes there is no evidence of this.

[39] Hannover's counsel argues that prejudice is presumed where a limitation period to commence an action has expired and an action was not served within the year available for service. Further, the amendments in October 2019 expanded the claim to include a claim for lost rent which is substantial. Hannover's counsel also refers to the general prejudice from the passage of time. He notes that Hannover will have to locate the previous tenants. Counsel argues that witnesses and documents may disappear. The plaintiffs have compounded this by not providing a proper list of documents including supporting evidence for the claim for lost rent. In response to the last point, plaintiffs' counsel argues if the defendants are not happy with the disclosure, they can bring an application to address that or conduct examinations for discovery.

[40] Alternatively, Hannover's counsel argues that if the court is inclined to add Hannover, it should be subject to the limitation defence being preserved to be decided at trial. He refers to the fourth option at para. 48 of *Neilson*. In response, plaintiffs' counsel argues this option does not apply. The limitation period has expired, and the fourth option is only applicable when it cannot be decided on the joinder application whether the limitation period has expired. As it is conceded, the

limitation period has expired, the only applicable option is to add Hannover or not, and if added, the limitation defence is gone.

[41] Apart from losing a limitation defence, I am not satisfied that Hannover has suffered any irremediable prejudice or any actual prejudice in its ability to defend the action. There is no evidence of either. For example, there is no evidence that witnesses have disappeared or documents have been destroyed. Any prejudice is that which is presumed by the passage of time. Intact and Hannover are represented by the same counsel. That counsel has been defending the action since its inception. In the circumstances, it is difficult to see how the ability of Hannover to defend this action has been affected. Hannover's interest in the litigation is identical to that of Intact. As for the ability to prepare for trial, no examinations for discovery have yet taken place, and the trial is tentatively scheduled more than two and a half years in the future.

[42] I also agree with plaintiffs' counsel that the fourth option discussed in *Neilson* is not applicable. The limitation period has expired, and there is no need to preserve that defence for decision on a fuller record.

Degree of Connection

[43] The defendants concede for the purposes of this application that there is a connection between the existing claims and the claim against Hannover. I agree. As already discussed, the claim against Hannover is identical to that against Intact and is founded on the same document.

Other Factors

[44] Hannover's counsel argues that the plaintiffs need not suffer any prejudice because there is a way any loss to the plaintiffs can be remedied. Counsel argues the plaintiffs can bring a claim against Mr. Chodha for failing to do what should have been done from the beginning. In my view, that is a consideration when there is irremediable prejudice, but not otherwise.

[45] Hannover's counsel argues that adding Hannover would be a tacit endorsement of the dilatory approach of plaintiffs' counsel. Plaintiffs' counsel disagrees. He argues the Court can make an order for costs if the Court finds it appropriate to do so. In my view, permitting the addition of Hannover as a defendant is not an endorsement of the handling of this matter by plaintiffs' counsel. I have already noted the application should have been brought immediately. This decision is a determination that, in accordance with the guidelines in the case authorities, and after considering all relevant factors, it is just and convenient to add Hannover. The exercise of that discretion includes a consideration that the application should have been brought earlier.

Just and Convenient

[46] Considering all of the above, and for the reasons given above, I find that plaintiffs' counsel did not bring an application to add Hannover in a timely way, and that this was an error on the part of counsel and not the plaintiffs. The delay in bringing the action, while not to be condoned, was not inordinate. While the addition of Hannover will deprive it of a limitation defence, the refusal of such an application would equally deprive the plaintiffs of one half of their claim against Hannover. Hannover has not established evidence of any actual or irremediable prejudice in its ability to defend the action. The same counsel are defending Intact and Hannover. In my view, balancing the interests of all parties and the proposed party, Hannover, I find that it is just and convenient that the plaintiffs' application be granted and Hannover be added as a defendant in this action.

Order

[47] Hannover is added as a defendant to this action. The plaintiffs are granted leave to amend the style of cause to add Hannover as a defendant and to file and serve the draft amended notice of civil claim attached to the notice of application filed August 28, 2020, (as appropriately amended to correct the underlining) within two weeks from the date of this order being entered.

[48] If the parties cannot agree on costs, they may make written submissions no longer than three pages, on a schedule to be agreed between the parties within the next 30 days, and to be delivered to me through Supreme Court Scheduling.

"Norell J."

TAB 5

Convergix, Re 2006 NBQB 288

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

Court Numbers: 12381, 12382, 12383, 12384 and 12385
Estate Numbers: 51-879293, 879309, 879319, 879326 and 879332

IN THE MATTER of the Proposals of Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., InteliSys Aviation Systems Inc.

BEFORE:	**Justice Peter S. Glennie**
HEARING HELD:	**Saint John**
DATE OF HEARING:	**July 27, 2006**
DATE OF DECISION:	**August 1, 2006**

COUNSEL:

R. Gary Faloon, Q.C., on behalf of the Applicants

DECISION

GLENNIE, J. (Orally)

[1] The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the *Bankruptcy and Insolvency Act*. For the reasons that follow, I conclude that such corporations are permitted to do so.

OVERVIEW

[2] The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., and InteliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of InteliSys Aviation Systems of America Inc. ("IYSA").

[3] For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

[4] The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada).*

[5] Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, InteliSys Aviation Systems Inc., ("InteliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by InteliSys.

Filing of Notice of Intention to make a Proposal

[6] The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") on June 27th, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28th, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

[7] On June 29th, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

Extension Pursuant to Subsection 50.4(9) of the BIA

[8] IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

[9] The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

[10] The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

[11] Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

[12] The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of $520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

ANALYSIS

[13] There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [***Howe Re,*** [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [***Nitsopoulos Re,*** [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

[14] Section 2 of the BIA provides that 'persons' includes corporations.

[15] When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from ***Bankruptcy and Insolvency Law of Canada*** by Hon. L.W. Houlden and Hon. G. B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

> The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure,* [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd. (*1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation)*, 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).
>
> The *Act* puts day-to-day administration into the hands of business people - - trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Rassell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

[16] In ***Howe,*** *supra,* the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

[17] The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated

that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

[18] Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

[19] The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I proposal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett,*** Court File No. 31-207072T, where he stated:

> It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and. . .does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. . .I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. . .and determination of abuse (if any) can be dealt with on that application.
>
> Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.

[20] In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

[21] In ***Nitsopoulos,*** *supra,* a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

[22] The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

[23] He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

[24] Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

[25] In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

[26] In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

[27] I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by InteliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

[28] In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

(a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive

and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

[29] In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, InteliSys (NS) Co. and InteliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

[30] In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

[31] In view of the reasoning in ***Howe*** and ***Nitsopoulos***,, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

[32] In ***Re Pateman*** [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

[33] In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

[34] I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

Extension of Time for Filing a Proposal

[35] The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10th, 2006.

[36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: ***Re Doaktown Lumber Ltd.*** (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[37] An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

(a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
(b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
(c) No creditor of the Insolvent Cororations would be materially prejudiced if the extension is granted.

[38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***Re Cantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.

[39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

(a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
(b) The Insolvent Corporations have completed a business plan;
(c) The Insolvent Corporations are diligently working on the Restructuring;
(d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
(e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well

happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

[41] The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

[43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

CONCLUSION AND DISPOSITION

[44] In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to Section 50.4(9) of the BIA, the time for filing a Proposal is extended by 45 days to September 10th, 2006.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

TAB 6

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Registrar: Raffi A. Balmanoukian, Registrar in Bankruptcy

Heard: July 17, 2023, in Halifax, Nova Scotia

Final Written Submissions: July 17, 2023

Counsel:
Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor")
Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee")
Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated **July 25, 2023.**

Balmanoukian, Registrar:

[1] On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act* , RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

[2] On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of

Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

[3] On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

[4] On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13,

2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

[5] On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

[6] WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal Interpretation Act, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

[7] That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

[8] I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

[9] I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

[10] WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth.* It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

[11] Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken* (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not

determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

[12] Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

[13] WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

[14] I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in

obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

[15] This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

[16] In *Re T&C Steel Ltd. et al*, 2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In Enirgi Group Corp. v Andover Mining Corp., 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
> > [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

[17] The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

[18] In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*, 2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
> > Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these

> words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

[19] While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken*, I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

[20] That leaves us with 50.4(9)(a) – the due diligence and good faith tests – and with my discretion.

[21] Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism – a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved in the file) became quite agitated when I challenged the timeline leading

up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

[22] The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward – not other options.

[23] Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension – not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors

and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

[24] Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

[25] I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test – that there is good faith; not the presence or absence of bad faith.

[26] At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would

follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

[27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

[28] Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

[29] In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.
>
> [19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable. [emphases added]

[30] In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

[31] In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at

best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

[32] Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

[33] The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport* 2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.* 2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.* 2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

[34] Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was

concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

[35] It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

[36] As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

[37] Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

[38] Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Balmanoukian, R.

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

ERRATUM

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	July 17, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 17, 2023
Erratum Date:	July 25, 2023
Counsel:	Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor") Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee") Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Erratum:

[1] Meaghan Kells was added as co-counsel for the objecting creditor.
[2] Additional underlining was included in paragraph 29.
[3] The word "Debtor" was added the counsel section on the title page and added to the decision in paragraph 1.

TAB 7

Fasken

Out of Time & Out of Luck: Court Declines Abridgement of Time for Filing and Service in Insolvency Proceedings

Insolvency & Restructuring Bulletin

AUGUST 3, 2023

In the recent decision of *Atlantic Sea Cucumber Ltd (Re)*, 2023 NSSC 231 the Supreme Court of Nova Scotia in Bankruptcy and Insolvency (the "Court") departed from the long-standing norm in insolvency proceedings of granting an abridgement of time for filing and service of applications. The debtor company, Atlantic Sea Cucumber Ltd. ("ASC") applied to convert their Notice of Intention to make a proposal ("Proposal Proceedings") under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"). The Court ultimately denied the application based on the procedural issues with timing of filing and service.

In the subsequent decision of *Atlantic Sea Cucumber Ltd (Re)*, 2023 NSSC 238, the Court then declined to grant the requested stay extension application respecting the Proposal Proceedings. Both decisions are presently under appeal.

Denial of the Abridgement of Time for Filing and Service

Justice Rosinski decided not to abridge the time for filing and service of ASC's application to convert its Proposal Proceedings to *CCAA* proceedings, finding there to be no satisfactory explanation for why the application was not filed and served ten days before the hearing, as prescribed by the *CCAA*. ASC had control of the preparation of the application and knew the hearing date almost a month and a half in advance. In this regard, the Court said that ASC "knowingly took a risk the Court would not grant an abridgement of the time for filing and service of its Application."

The Court held that abridging time would prejudice Weihai Taiwei Haiyang Aquatic Food Company Limited ("WTH"), a creditor of ASC who opposed the application. ASC only advised WTH two days prior to filing that they were considering a conversion application. WTH did not have the most recent report of the Monitor to base their written submissions on and they, like the Court, received ASC's supporting affidavits late and not in proper form, which effectively prevented any cross-examination on the contents. In contrast, Justice Rosinski stated that ASC would incur very little prejudice as a result of his decision given their ability to still request an extension to the stay of proceedings respecting the Proposal Proceedings.

In the result, the Court declined to grant the application to convert to *CCAA* as the application was not properly before it, given the time for filing and service was insufficient.

Denial of the Extension of Time to File a Proposal

ASC then brought an application mere days after their failed *CCAA* conversion application for an extension of time to file a proposal within its Proposal Proceedings. Again, ASC asked for an abridgement of time for filing and service of this application.

The Registrar in Bankruptcy determined that the application for the extension was not out of time, before turning to the test for such extensions established under Section 50.4(9) of the *BIA*. The Court held that the purpose of ASC's application was not to provide time to develop a proposal, but to assemble materials asking for future extensions stating that "the 'no brainer' that the Debtor thought it had in obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline." Despite these comments, on a bare balance of probabilities, the Court found that ASC met the proposal viability component under Section 50.4(9).

In regard to the due diligence component of the extension test, the Court stated that ASC focused on converting the insolvency to *CCAA* proceedings rather than on developing a viable proposal. The Court further found that ASC failed to meet the element of good faith, given ASC's record of attempting to "strong arm" the Court by bringing "emergency" applications on the last day possible on three occasions. The Court held that the Debtor consistently tried to push their agenda upon the Court in disregard of the good faith element. For these reasons, Registrar Balmanoukian denied the extension. Even if the test for an extension had been met, the Court indicated it would have declined to grant the application using its discretionary powers.

Implications and Conclusions

Both decisions in *Atlantic Sea Cucumber* are a notable departure from the practice in insolvency proceedings for courts to abridge the time for filing and service of applications. Prior to this set of decisions, the courts have routinely granted such orders to accommodate the real-time nature of insolvency litigation. We will continue to watch whether other courts adopt similar approaches, given both *Atlantic Sea Cucumber* cases have been appealed.

For the time being, the *Atlantic Sea Cucumber* cases are an important reminder to parties to an insolvency proceeding that the procedural rules continue to apply to them. This is especially so with respect to the rules regarding service and appropriate notice of applications on interested parties, such that those parties can adequately consider their position and respond if necessary.

TAB 8

CITATION: Re Ghajar, 2023 ONSC 6041
COURT FILE NO.: 31-2706801
DATE: 20231025

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *In the Matter of the Bankruptcy of Tourag Ghajar*

BEFORE: Associate Justice Rappos

COUNSEL: *Brandon Jaffe*, for A. Farber & Partners Inc.

Calvin Ho, for Nazanen Khorasani

HEARD: October 24, 2023 (via video conference)

ENDORSEMENT

[1] On January 26, 2021, Tourag Ghajar filed an assignment in bankruptcy and A. Farber & Partners Inc. was appointed as trustee of his bankruptcy estate (the "**Trustee**").

[2] The Trustee has discovered that, on April 17, 2020, Mr. Ghajar transferred his interest in 524 Bristol Road, Newmarket (the "**Property**") to his spouse, Nazanen Khorasani (the "**Transfer**"), for no consideration other than the assumption of the mortgage registered against title to the Property.

[3] The Trustee brings a motion seeking an order: (a) declaring the Transfer to be a transfer at undervalue and void as against the Trustee under subsection 96(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"); and (b) setting aside the Transfer. In the alternative, the Trustee seeks judgment against Ms. Khorasani in an amount equal to the value of the Trustee's interest in the Property as at the date of the Transfer.

[4] The Trustee and Ms. Khorasani have agreed to a litigation timetable for delivery of materials and the completion of cross-examination/written questions to the Trustee. I hereby approve of the timetable agreed to by the parties.

[5] An outstanding issue that needs to be determined is whether an Associate Judge, sitting as a Registrar in Bankruptcy under the BIA, has jurisdiction to hear the Trustee's transfer at undervalue motion.

[6] It appears to be the practice in Ontario that transfer at undervalue motions are heard by Judges, as I was unable to find any reported decision in the province where a registrar in bankruptcy heard and decided a transfer at undervalue motion under section 96 of the BIA.

[7] Section 192 of the BIA is the principal section of the statute that sets out the power and jurisdiction of registrars.

[8] As noted in *Bankruptcy and Insolvency Law of Canada, 4th Edition* at §8.164, "a registrar derives its authority from the Act and the Rules and has no inherent jurisdiction. If authority for an act cannot be found in the BIA or the [*Bankruptcy and Insolvency General Rules*], then the registrar cannot perform it." The learned authors of the text go on to state that "if the power to hear a matter is not expressly conferred on the registrar by s. 192 or some other section of the Act or the Rules, the registrar has no jurisdiction to hear it."

[9] Subsection 192(1)(f) permits a registrar to hear and determine any unopposed or *ex parte* application. Subsection 192(1)(j) permits a registrar to hear and determine any matter with the consent of all parties.

[10] Both of these subsections are not applicable, as the Trustee's motion is opposed, and Ms. Khorasani does not consent to the motion being heard by an Associate Judge sitting as a Registrar in Bankruptcy.

[11] Subsection 192(1)(k) permits a registrar to hear and determine any matter relating to practice and procedure in the court. I was unable to locate a reported decision where a registrar in bankruptcy relied on this provision to hear a contested transfer at undervalue motion.

[12] None of the other subsections of section 192(1) are applicable.

[13] As the parties did not make submissions to the court on whether "practice and procedure" under section 192(1)(k) could be interpreted to include jurisdiction to hear a transfer at undervalue motion under section 96, I am not in a position to render a decision on this issue.

[14] Mr. Jaffe noted his concern regarding whether a registrar in bankruptcy has jurisdiction under the BIA to grant declaratory relief. I am aware of the decision in *Visual Bible International Inc. v. Cinemavault Releasing Inc.*, 2005 CanLII 16592 where Master MacLeod (as he then was) questioned whether a Master (now known as an Associate Judge) has jurisdiction to grant declaratory relief.

[15] I have consulted with Commercial List Team Lead Justice Conway, and she confirmed that the Trustee's motion can be heard by a Commercial List Judge.

[16] As a result, it is left to another day for the Court to determine whether a registrar in bankruptcy had jurisdiction to hear a contested transfer at undervalue motion without the consent of the parties, especially one that seeks declaratory relief. I note that I am aware of decisions from

Manitoba[1], Alberta[2], and New Brunswick[3] where registrars in bankruptcy heard and decided motions under section 96 of the BIA. However, in none of the decisions did the registrar deal with or consider the issue of whether the registrar has authority to grant declaratory relief.

[17] I hereby order that the Trustee's motion be traversed to be heard by a Judge presiding over the Commercial List.

Associate Justice Rappos

DATE: October 25, 2023

[1] *Bankruptcy of Dwight Logeot*, 2022 MBKB 214
[2] *Indarsingh, Re*, 2015 ABQB 158 and *Mihalich, Re*, 2013 ABQB 66
[3] *PricewaterhouseCoopers Inc. v. Legge*, 2011 NBQB 255.