Court File No. 31-1855569

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
(COMMERCIAL LIST)

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
QUALITY MEAT PACKERS LIMITED

BRIEF OF AUTHORITIES OF SYNERGY SWINE INC.
(motion returnable April 10, 2014)

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TAB 1

2002 CarswellOnt 3975, 38 C.B.R. (4th) 159

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2002 CarswellOnt 3975, 38 C.B.R. (4th) 159

1512759 Ontario Ltd., Re

In the Matter of the Proposal of 1512759 Ontario Limited Operating as the Post Group

Ontario Superior Court of Justice

Ground J.

Heard: November 14, 2002
Judgment: November 14, 2002
Oral reasons: November 14, 2002
Written reasons: November 18, 2002
Docket: 31-OR-411660

Subject: Insolvency

Bankruptcy --- Proposal — General

Debtor company filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Prior to expiry of 30-day period for making proposal, debtor company's largest and only secured creditor brought application pursuant to s. 50.4(11) of Act for declaration of termination of period for making proposal — Application granted — Debtor company was unlikely to be able to make viable proposal before expiration of 30-day period — Debtor company was highly unlikely to be able to make proposal within 30-day period that would be accepted by creditors — Debtor company's largest and only secured creditor had stated that it would not support any proposal made by current management of debtor company — Debtor company had defaulted on three different loans over past year — No evidence existed of any expression of interest from, or any approaches to, new lenders or equity investors — Financial condition of debtor company did not make it very attractive investment — In order to survive, debtor company had to resort to financing at 30 per cent interest rate and on very onerous terms — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 50.4(11).

Statutes considered:

2002 CarswellOnt 3975, 38 C.B.R. (4th) 159

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

Generally — referred to

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(a)-50.4(11)(d) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — referred to

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — referred to

APPLICATION by creditor pursuant to s. 50.4(11) of *Bankruptcy and Insolvency Act* for declaration of termination of 30-day period for filing proposal prior to its actual expiry.

Ground J. **(orally):**

1 The test under Subsection 50.4 (11) of the *Bankruptcy and Insolvency Act* for the termination of the 30-day period to make a proposal is that the court must be satisfied that one of the situations in clauses (a) to (d) of the sub-section exists. I am not entirely satisfied that Mr. Marshall has established bad faith on the part of The Post Group in giving the Notice of Intention or in instituting the lawsuit. Obviously bad blood had developed between the parties and The Post Group was taking such action as it saw necessary in an attempt to save its business and fend off liquidation of the business through the enforcement of the security held by OLE Canada Inc. ("OLE").

2 With respect to clauses (b) and (c) however, the test is that it is not likely that The Post Group will make a variable proposal within the next 10 days or, it is not likely that The Post Group will make a proposal within the next 10 days that will be accepted by the creditors. OLE is the only secured creditor. It is not disputed that, whatever amount is ultimately determined as the amount owing to OLE, that amount will dwarf the other creditors. OLE has stated that, for good reasons, it will not support any proposal made by the current management. Although it is theoretically possible that The Post Group could come up with a new lender or equity investor in the next 10 days prepared to advance sufficient funds to pay off the OLE loan, that is, in my view, highly unlikely. The Post Group has defaulted on three different loans over the past year. There is no evidence of any expression of interest from, or even of any approaches to, new lenders or equity investors. The financial condition of The Post Group, even taking it at its highest, does not make it a very attractive investment. In order to survive this long, The Post Group has had to resort to financing at a 30% interest rate and on very onerous terms and that, of itself, speaks volumes.

3 Therefore, on a balance of probabilities based on the evidence before this court, I am satisfied that it is unlikely that The Post Group will be able to make a viable proposal before the expiration of the 30-day period and that it is highly unlikely that The Post Group will be able to make a proposal within the 30-day period that will be accepted by the creditors. Accordingly, an order will issue:

1. declaring that the 30-day period provided to 1512759 Ontario Limited operating as The Post Group to file a proposal pursuant to the *Bankruptcy and Insolvency Act* is immediately terminated,

2. terminating the stay of proceedings in favour of 1512759 with respect to OLE and appointing the Fuller Landau Group Inc. as Trustee in Bankruptcy of 1512759.

4 Costs payable to OLE on a partial indemnity scale, out of the estate, as a first charge against the estate. Counsel for OLE to make brief written submissions to me on or before December 15, 2002, as to quantum.

Application granted.

END OF DOCUMENT

TAB 2

1997 CarswellOnt 2753, 47 C.B.R. (3d) 182

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1997 CarswellOnt 2753, 47 C.B.R. (3d) 182

Com/Mit Hitech Services Inc., Re

In the Matter of the Proposal of Com/Mit Hitech Services Inc. of the City of Ottawa, in the Province of Ontario

Ontario Court of Justice, General Division (In Bankruptcy)

Farley J.

Judgment: July 25, 1997
Docket: Ottawa 33-097110

Counsel: *Michael J. MacNaughton*, for The Toronto-Dominion Bank.

Frank Bennett, for Com/Mit Hitech Services Inc.

Subject: Insolvency; Corporate and Commercial

Bankruptcy --- Proposal — General

After banking relationship of 14 years, bank reviewed debtor company's financial position and offered amended arrangement — Rather than meeting bank's conditions, debtor company became involved in new enterprise — Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Bank applied for termination of 30 day period for debtor to file proposal under s. 50.4(8) of Act prior to expiration of 30 days — Debtor company was cautioned by bank, and by not heeding bank's conditions they had not acted in good faith — Bank, as major creditor, had lost all faith in debtor company that was eroding its assets at considerable rate and 30 day period was terminated prior to its expiration — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 50.4(8), 50.4(11)(d), 244.

Banking and banks --- Loans and discounts — General

Bank requested repayment of outstanding loan from debtor company on ground it was in breach of credit conditions — Debtor company filed notice of intention to file proposal — Debtor company cross-applied for continuation of line of credit from bank — Debtor company was in material breach of terms of demand loan — Bank was not required to continue line of credit intact given breach and demand — Bank was not required to advance any further money or credit under s. 65.1(4)(b) of Act and debtor's application was dismissed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 65.1(4)(b), 244.

The bank advised the debtor that it was in breach of its credit conditions in that the debtor's investment in leases exceeded 125 per cent of the total bank debt. It required the debtor to restore the debt to equity ratio by repatriating money invested in a bar, a carpet cleaning service, and two retail discount stores. The debtor complied with respect to the bar, but made additional investments in the acquisition of the assets of another carpet cleaning business.

The bank called its loan and sought a s. 244 notice under the *Bankruptcy and Insolvency Act.* The bank was the debtor's main creditor apart from a small tax liability. The bank sought a declaration under s. 50.4(11) that the 30 day period be terminated, or, alternatively, an order that s. 69 no longer operated in respect of the bank. The debtor cross-applied for an order restraining the bank from interfering with the banking relationship pending further order or the failure of the debtor to make a proposal and allowing the debtor to draw on its line of credit up to its limit. It also sought a reference to determine damages alleged to have been suffered because of the bank's action.

Held: The bank's motion was allowed; the cross-motion was dismissed.

Since the erosion of the debtor's assets would be no more than $35,000-40,000, no material prejudice to the bank was made out under s. 50.4(11)(d) or s. 69.4. Given the bank's position as 90 per cent creditor, it was in a veto position. In addition, the debtor had not been diligent nor had it acted in good faith in ignoring the conditions imposed by the bank.

The debtor was in material breach of the terms of a demand loan. The bank had continued to honour cheques for six days after its demand. The bank was not required to advance any more money or credit.

Cases considered by *Farley J.*:

Baldwin Valley Investors Inc., Re (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) — referred to

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]) — referred to

Doaktown Lumber Ltd., Re (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) — referred to

Statutes considered:

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

Generally — referred to

s. 50.4(8) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(a) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(b) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(c) [en. 1992, c. 27, s. 19] — considered

s. 50.4(11)(d) [en. 1992, c. 27, s. 19] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(2) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(4)(b) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

s. 69.4 [en. 1992, c. 27, s. 36] — considered

s. 69.4(b) [en. 1992, c. 27, s. 36] — considered

s. 244 — referred to

s. 244(2) — considered

APPLICATION by bank for termination of 30 day period for debtor to file proposal; CROSS-APPLICATION by debtor for continuation of line of credit.

***Farley J.*:**

1 Both sides requested that this motion and cross motion be heard on an urgent basis today. The motion by The Toronto-Dominion Bank ("Bank") was for an order pursuant to s. 50.4(11) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("BIA") for a declaration that the 30 day period provided for in s. 50.4(8) be terminated, or in the alternative for an order pursuant to s. 69.4 declaring that s. 69 no longer operates in respect of the Bank. Com/Mit Hitech Services Inc. ("Debtor") crossmotioned for an order (a) restraining the Bank from interfering with its

banking relationship with the Debtor pending further order of the Court or upon failure of the Debtor to make a proposal pursuant to BIA; (b) allowing the Debtor to draw upon its line of credit up to the established present level of $2.75 million with the Bank including allowing the Debtor to issue cheques to its employees and retained cheques for services rendered and to be rendered by the proposal trustee and lawyers; and (c) directing a reference to determine the amount of damages caused by the Debtor by the (alleged) breach of the Bank's obligations pending the operation of the stay of proceedings. As to costs, the Bank's counsel advised that he felt $1,500 either way was appropriate; the Debtor's counsel (acknowledged that if the Bank were successful, the question of costs would be a Pyrrhic victory) advised that it should be $4,500 either way. In light of the very pressing situation I advised counsel that I would give my decision and reasons later today (alterting them by phone). Given that I am otherwise involved in an all day hearing, these reasons will of necessity have to be short or rambling.

2 After a banking relationship of some 14 years, the Bank issued a request for repayment of its outstanding loan of $2.6 million on July 10, 1997 and a s. 244 notice pursuant to the BIA. On July 18th, the Debtor filed a Notice of Intention to File a Proposal. The Debtor as advised in its material "is in the business of leasing small equipment and has over approximately 700 leases in its portfolio extending over 5 years. In addition, it operates 2 stores [Crazy Chesters] which sell used computer equipment, office equipment and retail clothing at reduced prices." It also had an $174,000 investment in a bar called The Station and a $1.14 million investment in Clean Net Inc. ("Clean") which was involved in carpet cleaning equipment. These investments appear to have been made within the last year as no investments were shown on the May 31, 1997 balance sheet for the previous year (i.e. May 31, 1996). Thus the character of the Debtor as a borrower from the Bank changed significantly from when the banking relationship commenced and far more importantly from when the then existing loan arrangements were made in 1994. On Dec. 12, 1996 the Bank advised the Debtor that it was in breach of the credit conditions including that the Debtor's investment in leases be not less than 125% of the total Bank debt. On Jan 15, 1997 the Bank, after a review of the Debtor's financial position, offered an amended arrangement, which was accepted by the Debtor (and its President, Kim Gottdank, the majority shareholder, as guarantor). The new arrangement required that the "debt to equity level is to be restored to 3:1 by way of cash infusion/repatriation by March 31, 1997 of monies invested in other related investments/ventures." The 125% ratio above was to be restored as well. The Station bar was to repatriate $150,000 by January 15, 1997 (apparently this did occur then or shortly after). Clean was to repatriate $1.2 million by March 31, 1997. The Debtor was to provide the Bank with a detailed plan for the liquidation of Crazy Chesters' inventory over the short term. None of these conditions except the Station one has occurred. Rather instead of divesting, it appears that the Debtor is in some way to be involved in a new carpet cleaning enterprise through the proposed acquisition by Clean.net Inc. ("New Clean") of the Easy Off assets. As Mr. Gottdank advised:

> 9. I am finalizing the purchase of a business known as "Easy Off" from an American public company. The business comprises the placing of carpet cleaning equipment on consignment to primarily major food chains which in turn rent the equipment to its customers and concurrently sell these customers cleaning solutions. "Easy Off" is well known in Canada for over 30 years and has an 80% share of the market place. It operates in over 2700 locations in Canada. The financing of the purchase is with Coventry Financial Corporation. The purchase will produce to COM/MIT a cash flow of a minimum of a $1,000,000.00 per year. This cash flow will be used to continue to service the Toronto Dominion Bank debt as well as pay some of its principal. I have made this known to the Bank on numerous occasions and supplied them all the documentation in connection with the purchase of "Easy Off". As a result of the demand and notice, the closing has been postponed to a date in August, 1997.

> 13. COM/MIT is prepared to grant the Bank additional security for its loan for a period of one year to obtain a new lender.
>
> 14. By giving the Bank increased first security over the new assets including accounts receivable and inventory, except for assets acquired through lease financing, the Bank will be in a better position than if the company were bankrupt.

3 Notwithstanding to my view ample evidence on the face of the material and by way of correspondence and by way apparently of discussion in a meeting, Mr. Gottdank advises:

> 15. Neither the Bank nor its lawyer, have given particulars of the defaults despite many requests.

4 It should be noted that aside from a very small tax liability, the overwhelming creditor is the Bank (given that there appears to be a negative accounts payable situation which may reflect prepayments of accounts). On any basis the Bank is in the position of being a 90% plus creditor of the Debtor. The Bank is very close to being in essence "all the creditors" of the Debtor.

5 S. 50.4(11) provides:

> 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 be likely able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not be likely 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.

6 S. 69.4 provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

7 I considered the question of material prejudice as to s. 50.4(11) and s.69.4 in *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]). In this present case, there was no evidence as to value either on a going concern, liquidation or other basis. Based upon the worst cash flow information given by the Debtor, the erosion of assets would be approximately $50,000 per month. Thus before the Bank would have the opportunity of opposing an extension of time to make the proposal would only be another three weeks (with a possible erosion on that basis of some $35,000-$40,000). Given the relative magnitudes, I do not see that the Bank has made out the aspect of material prejudice. There was no specific argument as to s. 69.4(b) regarding "it is aquitable on other grounds to make such a declaration." Thus it would not appear to me that the Bank should succeed on the basis of s. 50.4(11)(d) or its alternate request for relief under s. 69.4.

8 However it should be noted that s. 50.4(11) is disjunctive as to its four grounds. As to (a), ordinarily one would not think it appropriate to terminate the situation after just one week if the Bank had pulled the plug without any prior cautioning. However, one must look at this in context. The Debtor was cautioned as far back as December 1996; a new banking relationship was forged in January 1997. Rather than trimming one's sails to accommodate the prevailing wind (aside from disposing of the bar), the Debtor did not pay heed to the other conditions imposed in January, 1997. Rather to the contrary, there is a proposal that there be a further investment in the carpet cleaning field and that the Bank should not expect to receive anything with respect to its loan except that which might evolve out of the cash flow of New Clean which might in some way be made available to Clean (the financing proposal of Coventry Financial Corporation is unclear as to how this is to be accomplished and what exactly the relationships would be). In going essentially in a 180º way against what was agreed to in January 1997, it appears to me that the Debtor is not acting in good faith and with due diligence.

9 As for (b) and (c), it must be recognized that the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor (and Mr. Gottdank). It was acknowledged by the Debtor that what it had proposed to date (see paragraphs 9, 13, 14 of Mr. Gottdank's affidavit above) was insufficient to sway the Bank and therefore there was no viability there. Nothing was even alluded to as to anything else that might be done; rather what was proposed was to wait until the 30 day period was up to give the Debtor breathing room. I would note that the question of additional assets coming under the security of the Bank was a somewhat elusive concept notwithstanding the Coventry term sheet which suggested that half of its $4 million funding for the Easy Off assets would be funded by subordinated security. It would not seem to me that the Debtor can make out any valid case for opposing the Bank on the basis of s. 50.4(11)(b) or (c). See also *Baldwin Valley Investors Inc., Re* (1994), 23 C.B.R. (3d) 219 (Ont. Gen. Div. [Commercial List]) at pp 221-2; *Doaktown Lumber Ltd., Re* (1995), 36 C.B.R. (3d) 136 (N.B. Q.B.) at pp. 136-7.

10 Thus on any of the grounds (s. 50.4(11) (a), (b) or (c)) I am of the view that the Bank has made out its case for termination of the 30 day period.

11 As to the Debtor's cross motion, I will deal with this more generally given the conclusion I have reached with respect to the Bank's motion. The Bank's extension of credit was on a demand basis. The Debtor is in material breach of the terms of that demand loan. There would not appear to me in the circumstances to be any requirement of continuing the line of credit intact including allowing the Debtor to call upon the unused portion thereof given the breach and additionally because of the demand. Section 244(2) of the BIA is aimed at providing enforcement of security not at the provision of new money. Section 65.1(4)(b) provides that s. 65.1(1),(2) and (3) do not require "the further advance of money *or* credit" (emphasis added). In respect of the demand, it should be noted that I am not commenting upon whether the line of credit should continue to exist during the "reasonable period of time to repay" period. However, in that regard I would note that the Bank continued to honour cheques for 6 days after its demand. But as well to my mind it is important to appreciate that there were material breaches of a number of important covenants and that it was a demand as opposed to term loan. I do not see that there is any validity to the Debtor s claim for relief; I would dismiss its cross motion.

12 The Bank is entitled to its requested costs of $1,500 payable forthwith.

Application granted; cross-application dismissed.

END OF DOCUMENT

TAB 3

1994 CarswellOnt 255, 23 C.B.R. (3d) 225

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1994 CarswellOnt 255, 23 C.B.R. (3d) 225

Cumberland Trading Inc., Re

Re proposal of CUMBERLAND TRADING INC.

Ontario Court of Justice (General Division [Commercial List]), In Bankruptcy

Farley J.

Judgment: January 24, 1994
Docket: Doc. 31-282225

Counsel: *Kevin J. Zych*, for secured creditor, Skyview International Finance Corporation.

Jeff Carhart, for debtor, Cumberland Trading Inc.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Proposal — General

Proposals — Notice of intention — Secured creditor moving for declaration that stay of proceedings no longer operated to prevent it from enforcing its security — Secured creditor not quantifying material prejudice to it resulting from continued operation of stay — Motion dismissed.

A secured creditor demanded payment in full of its operating financing loan to the debtor and gave notice of intention to enforce its security under the *Bankruptcy and Insolvency Act* (the "Act"). Two days before the expiration of the time to repay, the debtor filed a notice of intention to make a proposal. A stay of proceedings under s. 69 of the Act resulted. The secured creditor indicated that it would not approve any proposal the debtor might make; it held 95 per cent of the debtor's admitted secured creditors' claims and 67 per cent of all creditors' claims. It argued that the continued operation of the stay would be materially prejudicial to its rights.

The secured creditor brought a motion for a declaration that the stay provisions of ss. 69 and 69.1 of the Act no longer operated to prevent it from enforcing its security. It also moved for a declaration that the 30-day period to file a proposal provided in s. 50.4(8) was terminated and for an order removing the debtor's choice for trustee under the notice of intention to file a proposal and substituting another.

Held:

The motion for a declaration regarding the stay was dismissed; the motion for a declaration that the 30-day period was terminated and for an order substituting another trustee was allowed.

The secured creditor was not entitled to the benefit of s. 69.4(*a*). Its claim that it would be materially prejudiced by the continued operation of the stay was not supported by sufficient evidence. The secured creditor argued that the only way the debtor now had to finance its operations was by turning the secured creditor's accounts receivable and inventory into cash, thereby eroding the secured creditor's security. However, the secured creditor did not quantify the prejudice to it from these actions, nor did it quantify the expected deterioration of its security if the stay was not lifted.

Cases considered:

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.) — *referred to*

N.T.W. Management Group Ltd., Re (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.) — *not followed*

Triangle Drugs Inc., Re (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *referred to*

Statutes considered:

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

s. 50.4(1)

s. 50.4(8)

s. 50.4(11)

s. 69

s. 69.1

s. 69.4

s. 244

1994 CarswellOnt 255, 23 C.B.R. (3d) 225

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Motions by secured creditor for declaration that stay provisions of *Bankruptcy and Insolvency Act* no longer operated to prevent it from enforcing its security, for declaration that 30-day period to file proposal had terminated and for order allowing substitution of trustee.

***Farley J.*:**

1 Skyview International Finance Corporation ("Skyview") brought this motion for a declaration that the stay provisions (ss. 69 and 69.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended ("BIA") no longer operate in respect of Skyview taking steps to enforce its security (including accounts receivable and inventory) given by Cumberland Trading Inc. ("Cumberland") which it has been financing for the last 9 years. In addition Skyview moved for a declaration that the 30 day period to file a proposal mentioned in s. 50.4(8) BIA was terminated. Thirdly, Skyview was asking for an order removing Doane Raymond Limited ("Doane") which was Cumberland's choice as trustee and substituting A. Farber Associates ("Farber") as trustee under the Notice of Intention to File a Proposal of Cumberland. In the alternative to the relief awarded in the last two aspects, Skyview wished to have an order appointing Farber as interim receiver.

2 On January 5, 1994 Skyview demanded payment in full of its operating financing loan to Cumberland and gave a s. 244 BIA notice of its intention to enforce its security in ten days. The affidavit filed on behalf of Skyview indicated that Cumberland was not cooperating with it in providing appropriate financial information for the last half year. This was disputed in the affidavit filed by Cumberland. Suffice it to say that there has been a falling out between the two. Skyview asserted that it was owed $966,478 and that there was an exposure to it under a guarantee given on Cumberland's behalf to a potential of approximately $200,000 U.S. Skyview's deadline for repayment was January 16th. On January 14th Cumberland filed with the Official Receiver a Notice of Intention to make a Proposal (s. 50.4(1) BIA) and pursuant to s. 69 BIA there would be a stay of proceedings upon this filing.

3 Skyview's president swore that:

> 21. In light of the unpleasant and frustrating experience Skyview has had to endure over the preceding 3 to 4 months with Cumberland, including specifically the persistent refusal by Cumberland to account for its sales from the Retail Business, the misrepresentation of Cumberland's pre-sold orders referred to above and particularly its secretive purported "termination" of its direction to accord to pay sums to Skyview in reduction of Cumberland's indebtedness, Skyview's faith and confidence in the management of Cumberland has been irreparably damaged such that Skyview would not be prepared to vote in terms of any proposal which Cumberland may make.

and further that

> 24. The continued operation of a stay of proceedings preventing Skyview from enforcing its security will be materially prejudicial to the rights of Skyview. The assets of Skyview consist primarily of inventory and re-

> ceivables (both from the Distribution Business and the Retail Business). With each day that passes Cumberland is converting its inventory (financed by Skyview) into cash (primarily in the Retail Business) and receivables (primarily in the Distribution Business) and it is Skyview's fear that those sums will be used by Cumberland to pay its other creditors and to fund the professional costs which it inevitably must incur in formulating and implementing a proposal. This fear is especially heightened insofar as the receivables generated from the Retail Business are concerned as they are under the direct and immediate control of Cumberland and are not collected by Accord.

4 Cumberland's Notice of Intention to File a Proposal acknowledges that Skyview is owed $750,000. On that basis Skyview has 95% in value of Cumberland's admitted secured creditors' claims and 67% of all creditors' claims of whatever nature. No matter what, Skyview's claim is so large that Skyview cannot be swamped in any class in which it could be put. Clearly Skyview would have a veto on any vote as to a proposal, at least so far as the secured class, assuming the secureds are treated as a separate class. This leaves the interesting aspect that under the BIA regime one could have a proposal turned down by the secured creditor class but approved by the unsecured creditor class and effective vis-à-vis this latter class, but with the secured class being able to enforce their security. One may question the practicality a proposal affecting only unsecured creditors becoming effective in similar circumstances to this situation.

5 Cumberland's essential position is that it must have some time under BIA to see about reorganizing itself. While I am mindful that both BIA and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") should be classified as debtor friendly legislation since they both provide for the possibility of reorganization (as contrasted with the absence of creditor friendly legislation which would allow, say, creditors to move for an increase in interest rates if inflation became rampant), these acts do not allow debtors absolute immunity and impunity from their creditors. I would also observe that all too frequently debtors wait until virtually the last moment, the last moment or, in some cases, beyond the last moment before even beginning to think about reorganization (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spadework. It is true that under BIA an insolvent person can get an automatic stay by merely filing a Notice of Intention to File a Proposal — as opposed to the necessity under CCAA of convincing the court of the appropriateness of granting a stay (and the nature of the stay). However BIA does not guarantee the insolvent person a stay without review for any set period of time. To keep the playing field level and dry so that it remains in play, a creditor or creditors can apply to the court to cut short the otherwise automatic (or extended) stay; in this case Skyview is utilizing s. 50.4(11) to do so.

6 Cumberland relies upon *Re N.T.W. Management Group Ltd.* (1993), 19 C.B.R. (3d) 162 (Ont. Bktcy.), a decision of Chadwick J. Skyview asserts that *N.T.W.* is distinguishable or incorrectly decided and secondly that the philosophy of my decision in *Re Triangle Drugs Inc.* (1993), 16 C.B.R. (3d) 1 (Ont. Bktcy.) should prevail. In *Triangle Drugs* I allowed the veto holding group of unsecured creditors to in effect vote at an advance poll in a situation where there appeared to be a gap in the legislation. The key section of BIA is s. 50.4(11) which provides:

> 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.

It does not seem to me that there is any gap in this sector of the legislation.

7 As the headnote in *N.T.W.* stated, Chadwick J. viewed a situation similar to this one as requiring that the debtor must have an opportunity to put forth its proposal when he stated at p. 163:

> The bank had stated that it would not accept any proposal. However, since the companies had not yet had the opportunity to put forth their proposal, it was impossible to make a final determination under s. 50.4(11)(*c*). The companies should have the opportunity to formulate and make their proposal.

However I note that in this instance Cumberland has filed its Notice of Intention to File a Proposal the day before Skyview's s. 244 notice would have allowed it to take control of the security. Cumberland's president swore that:

> 2. The efforts which Cumberland is currently undertaking represent a bona fide effort, made in good faith, to re-structure its finances in order to preserve the business of the company for the benefit of all of the creditors of the company, including Skyview. It is my belief that the proposal process will represent a significantly better treatment of all such creditors then would be available through either an enforcement by Skyview of its security against the assets of Cumberland, a bankruptcy of Cumberland or other processes available in the circumstances.

and further that:

> I intend to submit a proposal, pursuant to the provisions of the Bankruptcy and Insolvency Act, which represents the most advantageous treatment available, in my view, to all of the creditors of Cumberland and which allows for the continued viability of the business of Cumberland. This proposal is being prepared, and will be presented, in complete good faith. In the course of reviewing and preparing this proposal material with Mr. Godbold, I have determined that the legitimate claim of Skyview does not, in fact, represent in excess of 66-2/3 of all of the claims against Cumberland. At this time, Doane Raymond Limited is already in the position of Trustee under the pro-

> posal, in accordance with the provisions of the Bankruptcy and Insolvency Act. In addition, as noted above, I am prepared to consent to the appointment of Doane Raymond Limited as interim receiver of Cumberland. In the circumstances, I respectfully submit that the stay in favour of Cumberland pursuant to the Bankruptcy and Insolvency Act should not be lifted.

No explanation was given as to the lower share indicated for Skyview but in any event there was no assertion that Skyview lost its veto.

8 However we do not have any indication of what this proposal proposes to be — notwithstanding that 10 days have now passed since Cumberland filed its Notice of Intention to File a Proposal and five days since Skyview served Cumberland with this motion. In a practical sense one would expect, given Skyview's veto power and its announced position, that Cumberland would have to present "something" to get Skyview to change its mind — e.g. an injection of fresh equity or a take out of Skyview's loan position. However there was not even a germ of a plan revealed — but merely a bald assertion that the proposal being worked on would be a better result for everyone including Skyview. This is akin to trying to box with a ghost. While I agree with the logic of Chadwick J. when he said at p. 168 of *N.T.W.* that:

> C.I.B.C. the major secured creditor has indicated they will not accept any proposal put forth, other than complete discharge of the C.I.B.C. indebtedness. Other substantial creditors have taken the same position. There is no doubt that the insolvent companies have a substantial obstacle to overcome. *As the insolvent companies have not had the opportunity to put forth this proposal, it is impossible to make the final determination*. In *Triangle Drugs Inc.* Farley J. had the proposal. Well over one-half of the secured [sic; in reality unsecured] creditors indicated they would not vote for the proposal. As such, he then terminated the proposal. We have not reached that stage in this case. The insolvent companies should have the opportunity of putting forth the proposal.
>
> [emphasis added]

9 However this analysis does not seem to address the test involved. With respect I do not see this logical aspect as coming into play in s. 50.4(11)(*c*) which reads:

> The court may, on application by ... a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) ... if the court is satisfied that
>
> . . . . .
>
> (*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
>
> . . . . .
>
> and where the court declares the period in question terminated, paragraphs (8)(*a*) to (*c*) thereupon apply as if that

> period had expired.

It seems to me that clause (*c*) above deals specifically with the situation where there has been no proposal tabled. It provides that there is no absolute requirement that the creditors have to wait to see what the proposal is before they can indicate they will vote it down. I do not see anything in BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming. I think that this view is strengthened when one considers that the court need only be satisfied that "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 ..." (emphasis added). This implies that there need not be a certainty of turndown. The act of making the proposal is one that is still yet to come. I am of the view that Skyview's position as indicated above is satisfactory proof that Cumberland will not likely be able to make a proposal that will be accepted by the creditors of Cumberland.

10 Skyview of course also has the option of proceeding under s. 69.4 BIA which provides:

> A creditor who is affected by the operation of sections 69 to 69.3 may apply to the court for a declaration that those sections no longer operate in respect of that creditor, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (*a*) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
>
> (*b*) that it is equitable on other grounds to make such a declaration.

11 Is Skyview entitled to the benefit of s. 69.4(*a*) BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor *qua* person, organization or entity. If it were otherwise then a "big creditor" may be so financially strong that it could never have the benefit of this clause. In this situation Skyview's prejudice appears to be that the only continuing financing available to Cumberland is that generated by turning Chamberland's accounts receivable and inventory (pledged to Skyview) into cash to pay operating expenses during the period leading up to a vote on a potential proposal, which process will erode the security of Skyview, without any replenishment. However Skyview does not go the additional step and make any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. In other words, Skyview presently estimates that it would be fortunate to realize $450,000 on Cumberland's accounts receivables and inventory, but it does not go on to give any foundation for a conclusion that in the course of the next month $x of this security would be eaten up or alternatively that the erosion would likely be in the neighbourhood of $y per day of future operations. The comparison would be between the "foundation" of a maximum of $450,000 and what would happen as to deterioration therefrom if the stay is not lifted. I note there was no suggestion by Cumberland that there would be no erosion of Skyview's position by, say, getting a cash injection or by improving margins by increasing revenues or decreasing expenses. Skyview's request for its first relief request is dismissed since in my view Skyview did not engage in the correct comparison of material prejudice.

12 I note that Cumberland does not oppose Skyview's request for an interim receiver. But for my conclusion that Skyview succeeds in its second relief request (to have the 30 day period in which to file a proposal terminated) and the ancillary third relief request of substitution of Farber for Doane as trustee, I would have granted the fourth relief request of appointing Farber as interim receiver. I would also award Skyview costs of $600 payable out of the estate of Cumberland from the proceeds first realized.

Order accordingly.

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TAB 4

2008 CarswellOnt 6257
Ontario Superior Court of Justice [Commercial List]

Tool-**Plas** Systems Inc., Re .

2008 CarswellOnt 6257

IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION 101 OF THE COURTS OF JUSTICE ACT, AS AMENDED

Morawetz J.

Heard: September 29, 2008
Judgment: October 24, 2008
Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, **Tool**-**Plas**
T. Reyes for Proposed Receiver, RSM Richter
R. van Kessel for EDC and Comerica
C. Staples for BDC
M. Weinczok for Roynat

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Debtors and creditors --- Receivers — General principles — Miscellaneous principles

Table of Authorities

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

***Morawetz** J.:*

1 **Tool**-**Plas** Systems Inc. (the "Company") brings this application to place itself into receivership under s. 101 of the CJA.

2 Mr. Bish submits that the relief is necessary, in that the Company has no ability to carry on business as usual. It has no funding to continue operations. He also submits that there is a real risk of value dissipation. His submissions are based on the evidence set out in the affidavit of Mr. Claeys and reference was also made to the Richter Motion Record.

3 Section 101 of the CJA provides that the requested order can be made if the Court finds that it is just *or* convenient to do so. In the circumstances of this case I am satisfied that it is both just and convenient to make the receivership order. In making this order I am taking into account that the Company has disclosed that the purpose of the receivership is to implement an

immediate sale transaction if same is approved by the Court. I have also taken into account the urgency of the matter, which is described in the Richter materials.

4 Mr. Szucs made submissions with respect to the status of his claim. In my view, these submissions are best addressed on the sale approval motion.

5 Order to go in the form presented.

End of Document

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*,
R.S.C. 1985, c. B-3, AS AMENDED

Court File No. 31-1855569

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF QUALITY MEAT PACKERS LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF SYNERGY SWINE INC. (motion returnable April 10, 2014)

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