COURT OF APPEAL FOR ONTARIO

CITATION: Downing Street Financial Inc. v. Harmony Village-Sheppard Inc., 2017 ONCA 611
DATE: 20170720
DOCKET: M48044 (C63937)

Tulloch J.A. (In Chambers)

BETWEEN

Downing Street Financial Inc., in Trust

Applicant (Respondent in Appeal)

and

Harmony Village-Sheppard Inc., as General Partner of Harmony Village-Sheppard LP, and City Core Developments Inc.

Respondents (Respondents in Appeal)

David P. Preger and Michael J. Brzezinski, for the moving party, Court-appointed Receiver, Rosen Goldberg Inc.

Barbara Green, for the responding parties, Fortress Shepard (2016) Inc., Fortress Real Developments and Derek Sorrenti

Raymond M. Slattery, for the responding party, Purchasers

Mitchell Wine, for the responding party, Jozef Zubrzycki

Sean Zweig, for the responding party, the Successful Bidders

David T. Ullmann, for the responding party, Downing Street Financial Inc., in Trust

Heard: June 29, 2017

Tulloch JA:

A. INTRODUCTION

[1] The moving party on this motion was Rosen Goldberg Inc., the receiver in the underlying insolvency proceedings (the "Receiver"). The Debtor is Harmony Village-Sheppard LP. The responding parties on the motion were Fortress Shepard (2016) Inc., Fortress Real Developments and Derek Sorrenti (collectively, "Fortress").

[2] The Receiver's purpose in bringing this motion was to defeat Fortress' appeal from a court order approving an asset sale (the "Approval Order") and thereby to secure that sale, for which the closing date was June 30, 2017. Fortress had filed a Notice of Appeal in this court, dated June 21, 2017, in which it had sought to appeal the Approval Order, asserting that this court had jurisdiction solely based on s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[3] I heard the motion on June 29, 2017, and, given its urgency, I granted the motion orally and notified the parties that written reasons would follow. These are my written reasons.

B. BACKGROUND

(1) The Property and the Stakeholders

[4] Before its insolvency proceedings, the Debtor had been developing some real estate in Toronto (the "Property") as a residential condominium project,

marketed to seniors. At the time of the Receiver's appointment, the Debtor had pre-sold 223 units in this project to various purchasers (the "Unit Purchasers"), although construction had not yet begun.

[5] The Property is subject to three encumbrances. Downing Street Financial Inc. ("DSFI") holds the first in priority, securing payment of approximately $20 million. The second in priority, held by JYR Capital Mortgage Investment Corp. and Li Ruixia as tenants in common, secures payment of approximately $1,395,000. The third encumbrance is a syndicated mortgage involving 542 investors. According to Fortress, Sorrenti and a related company are the trustees of this syndicated mortgage.

(2) The Approval Order

[6] The Superior Court judge who reviewed the sale (the "motions judge") made the Approval Order on June 19, 2017, and issued a brief endorsement on the same date. The Approval Order, granted in response to a motion by the Receiver, approved the Receiver's sale of the Property to Pinnacle International One Lands Inc. ("Pinnacle").

[7] The sale to Pinnacle was the culmination of a court-approved sale process under the Receiver's supervision in which Pinnacle and Fortress had competed for the Property.

(3) The "Stalking Horse Bid"

[8] Pursuant to the Receiver's appointment order, dated January 20, 2017, the Receiver conducted a "stalking horse" sale process, in which a sale agreement between the Receiver and Fortress would constitute the "stalking horse bid" (the "Stalking Horse Bid"). The Stalking Horse Bid would have required Fortress to assume the Debtor's agreements of purchase and sale with the Unit Purchasers. The Stalking Horse Bid also was a credit bid. On closing, the first mortgagee, DSFI, would have been paid in full, while the purchaser would have assumed the existing debt secured under the second and third charges.

[9] The Receiver and Fortress each provided different explanations for why Fortress repudiated the Stalking Horse Bid. However, the parties agreed in their submissions that, beyond the deal discussed in the next paragraph, the "stalking horse" process did not attract any offers for the Property.

[10] According to Fortress, Fortress always had intended to find a developer to build the condo project, and it ultimately had negotiated a sale of the Property to Pinnacle (the "Pinnacle-Fortress APS"). The Pinnacle-Fortress APS required Pinnacle to assume the terms of the Stalking Horse Bid. Fortress advised the Receiver of its deal with Pinnacle, and the Receiver acquiesced on the condition that the sale price of the Pinnacle-Fortress APS would not exceed the Stalking

Horse Bid's sale price, so that Fortress' intermediary role would not cost the Debtor's estate any value.

[11] However, in Fortress' narrative, the Stalking Horse Bid failed because, on April 4, 2017, only three days before the court-approval hearing for the Pinnacle-Fortress APS, Pinnacle informed Fortress that it no longer was willing to assume the contracts with the Unit Purchasers. Fortress informed the Receiver of this problem, and the Receiver refused to save the deal by amending the requirements of the Stalking Horse Bid.

[12] In the Receiver's version, Fortress told the Receiver on April 6, 2017, the day before the hearing to approve the Pinnacle-Fortress APS, that Fortress would not complete the purchase of the Property pursuant to the Stalking Horse Bid because Fortress no longer was willing to assume the Unit Purchasers' contracts.

(4) Subsequent Offers and Negotiations

[13] According to the Receiver, its subsequent efforts produced three offers for the Property. One of them, from an offeror whom the Receiver does not identify, which involved a price that the Receiver found unacceptably low. The other two offers were from Fortress and from Pinnacle, respectively. Fortress' offer, dated April 13, 2017, involved the same price as the Stalking Horse Bid and similar financial terms. The important differences were that Fortress would not assume the contracts with the Unit Purchasers, but that Fortress' deposit would be slightly

higher. Pinnacle communicated its offer to the Receiver several days later. The Receiver accepted Pinnacle's offer on May 2, 2017, and informed Fortress of this acceptance on May 3, 2017.

[14] The Receiver asserts that it had legitimate concerns regarding Fortress' financial capacity. The Receiver's motion record includes some e-mail correspondence raising such concerns. The correspondence suggests that Fortress was unwilling to provide a deposit large enough to satisfy the Receiver.

(5) Fortress' Opposition to Pinnacle's Offer

[15] Fortress advised the Receiver on April 28, 2017 that it would oppose any deal between the Receiver and Pinnacle. Fortress alleged that Pinnacle had improperly exploited its earlier negotiations with Fortress to develop its own direct offer to the Receiver.

[16] On June 16, 2017, several days before the scheduled hearing of the Receiver's motion for approval of Pinnacle's bid, Fortress submitted to the Receiver a new, third, offer to purchase the Property. This offer relied on a financing commitment from another party, MarshallZehr, to cover the cash component of Fortress' offer, all closing costs, and the costs of the financing. During the hearing of this motion, counsel for Fortress conceded that the Receiver had correctly identified several conditions of the MarshallZehr financing that would limit Fortress' ability to obtain additional financing from other parties. However,

counsel for Fortress asserted that such formal conditions would not be a practical obstacle to the Fortress offer's feasibility.

C. FORTRESS' APPEAL

[17] After the granting of the Approval Order on June 19, 2017, Fortress filed a Notice of Appeal in this court, dated June 21, 2017. The relief that Fortress seeks from this court is the following: an order setting aside the Approval Order, and an order directing the Receiver to accept Fortress' June 16, 2017 offer that would also serve as an approval and vesting order for a sale on that offer's terms.

[18] Based on the Notice of Appeal and Fortress' submissions on this motion, the essence of Fortress' planned argument on appeal would seem to be that the motions judge did not apply the right legal test when making the Approval Order; his brief endorsement said that he approved Pinnacle's bid because it was "the best offer to purchase the Property from the point of view of the majority of stakeholders." In oral argument for this motion, counsel for Fortress suggested that this language in the motions judge's endorsement demonstrates that the motions judge did not correctly apply the relevant principles from *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.).

[19] The Notice of Appeal relies only on s. 193(c) of the *BIA* in support of this court's jurisdiction to hear the Appeal. Fortress explicitly disclaims reliance on s. 193(e), the provision for leave to appeal, by asserting in the Notice that it does not

require leave to appeal. Rule 31 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, precludes reliance by an appellant on s. 193(e) of the *BIA* when that appellant's Notice of Appeal does not include the relevant application for leave to appeal. Therefore, jurisdiction pursuant to s. 193(e) is unavailable in this case.

[20] Fortress chose to rely exclusively on s. 193(c) despite the clear direction in recent case law in favour of narrow construal of the rights to appeal in ss. 193(a) to (d) of the *BIA*: *Re Enroute Imports Inc.*, 2016 ONCA 247, 35 C.B.R. (6th) 1, at para. 5. As Brown J.A. explained in his chambers decision in *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 365, at paras. 50-53, these automatic rights of appeal create disharmony between the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") and the *BIA* because s. 13 of the *CCAA* imposes a leave requirement for all appeals from orders made under that statute. Therefore, the goal of regulatory harmony between these two major insolvency statutes favours narrow construal of the *BIA*'s automatic rights of appeal. This jurisprudential context, along with Fortress' strategic decision not to seek leave to appeal, informed my decision on s. 193(c).

D. ANALYSIS

(1) Subsection 193(c) of the *BIA*

[21] Subsection 193(c) of the *BIA* provides a right to appeal to the Court of Appeal "if the property involved in the appeal exceeds in value ten thousand

dollars". As Blair J.A., in chambers, noted in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 17, a narrow construal of "property involved in the appeal" is necessary because otherwise the low quantum of this automatic right to appeal would make s. 193(e) practically redundant.

[22] In *Bending Lake*, at para. 53, Brown J.A., summarizing prior case law, identified three kinds of order from which s. 193(c) would not grant a right to appeal: (i) orders that are procedural in nature; (ii) orders that do not bring into play the value of the debtor's property; and (iii) orders that do not result in a loss. I will consider only the third category because doing so will suffice to resolve the s. 193(c) analysis.

(2) Does the Approval Order "Result in a Loss?"

[23] As Brown J.A. explained at para. 61 of *Bending Lake*, for an order to "result in a loss" in the relevant sense, "the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor."

[24] Fortress is correct that, in *Bending Lake*, Brown J.A. relied on the fact that there was no competing bid for the disputed property, as well as the fact that there was an absence of any valuation of the debtor's estate in the record before the motions judge: *Bending Lake*, at paras. 63-66. In contrast, in this case, there were competing bids with different purchase prices.

[25] Nevertheless, I do not accept that the Approval Order "resulted in a loss" in the relevant sense.

[26] Although some of the factors on which Brown J.A. relied do not apply in this case, these distinctions do not defeat the broader reasoning of *Bending Lake*. I quote from para. 64 of *Bending Lake* at length:

> The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the [appellant] must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The [appellant] must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal. [Emphasis added.]

[27] I focus here on the requirement for "some basis in the evidentiary record" to support an assertion that the impugned sale would cause a loss to the Debtor's estate, as opposed to a "bald assertion" to that effect. In its submissions before me, the primary basis for Fortress' assertion that the impugned order might "result in a loss" is the fact that the nominal purchase price in Fortress' offer was higher than the nominal purchase price in Pinnacle's offer.

[28] The passage that I have quoted from *Bending Lake* casts the issue as whether "the Receiver could have obtained a higher sales price for the Debtor's property." However, given the diversity among financing structures for commercial sale agreements, I do not think that I betray the spirit of Brown J.A.'s reasons by reading his comments to contemplate a more substantive assessment of competing offers than a mere comparison of formal prices.

[29] On this motion, Pinnacle presented compelling evidence to suggest that the practical value of its offer exceeded that of Fortress' offer.

[30] First, the deposit in Pinnacle's offer was much higher than the deposit in Fortress' offer. This factor gains salience from the correspondence that demonstrates that, during the sale process, Fortress resisted the Receiver's demands to increase the deposit in its offer substantially.

[31] Second, the Pinnacle offer was entirely in cash, whereas only approximately 40% of the Fortress offer was in cash. Fortress planned to fund the rest of its offer through credit. This factor gains salience from the structure of the Debtor's pre-existing secured debt. Fortress explains in its submissions that Fortress (more specifically, Sorrenti), along with a related company, is trustee for the 542 investors who collectively hold the beneficial interest in the Debtor's third encumbrance, a syndicated mortgage. Fortress further submits that its ordinary business is in "real estate consulting and arranging financing for real estate development projects".

Fortress' submissions before me did not assuage the concern that the effect of the Fortress offer, if accepted, would have been to allow Fortress to preserve its business interest in the Property as a development project at the risk of providing less recovery for other creditors, including the investors for whom Sorrenti acts as trustee. Indeed, Fortress explained in its submissions that it entered into a Joint Venture Agreement with another firm in the hope, based on "anticipated profits", of providing full repayment of the second and third mortgages on the Property.

[32] Third, Fortress conceded in its submissions that its offer would not have involved assuming the Unit Purchasers' contracts. Instead, it promised a "friends and family VIP event" for the Unit Purchasers and opportunities for first access and special pricing. This concession undermines Fortress' assertion that the Stalking Horse Bid would have succeeded had it not been for Pinnacle's refusal to assume the Unit Purchasers' contracts.

[33] Fourth, the Receiver's Report states that the highest-ranking secured creditor, DSFI, supported Pinnacle's bid over Fortress', despite the fact that both offers purported to provide full recovery to DSFI.

[34] Fifth, Fortress does not dispute the Receiver's assertions that the "stalking horse" process attracted no bidders other than Fortress and Pinnacle and that the Receiver's subsequent efforts procured only one other offeror, who offered a price

that was unacceptably low and that caused concern that the market's valuation of the Property might be much lower than Pinnacle's.

[35] Although Fortress' argument for the application of s. 193(c) is slightly more plausible than that of the appellant in *Bending Lake*, Fortress has not demonstrated a sufficient basis in the record that was before the motions judge for me to conclude that there is an arguable case that the Receiver could have obtained a better deal than Pinnacle's.

[36] Therefore, s. 193(c) did not grant a right of appeal to Fortress because the impugned order did not "result in a loss or gain" in the relevant sense.

(3) Leave to Appeal (s. 193(e))

[37] As I noted earlier in these reasons, Fortress did not meet the procedural requirements for consideration of an application for leave to appeal. Therefore, what follows is *obiter dicta*. However, since both parties made alternative submissions on s. 193(e), I will address the issue briefly.

[38] Although leave to appeal pursuant to s. 193(e) is discretionary and "must be exercised in a flexible and contextual way", the prevailing considerations are whether the proposed appeal :

> (i) raises an issue of general importance to the practice in insolvency matters or the administration of justice as a whole;
>
> (ii) Is it *prima facie* meritorious; and

> (iii) Would it unduly hinder the progress of the insolvency proceedings: *Enroute*, at para. 7.

[39] I will address the second criterion, i.e., the *prima facie* merit, first. As I mentioned above, the Notice of Appeal and Fortress' submissions on this motion suggested that the primary ground for Fortress' appeal was that the motions judge applied the law incorrectly when he approved Pinnacle's bid because it was "the best offer to purchase the Property from the point of view of the majority of stakeholders."

[40] The allegation was that the motions judge misapplied the criteria from *Soundair* for judicial review of a receiver's sale of property. *Soundair*, at p. 6, identifies four duties of a judge reviewing a receiver's sale. Those duties are to:

> (1) "consider whether the receiver has made sufficient effort to get the best price and has not acted improvidently";
>
> (2) "consider the interests of all parties";
>
> (3) "consider the efficacy and integrity of the process by which offers are obtained"; and
>
> (4) "consider whether there has been unfairness in the working out of the process." [Emphasis added.]

Furthermore, at p. 7, *Soundair* prescribes a deferential standard of review in this court.

[41] Given this framework and the facts of the sale process that I summarized above, the argument that the motions judge misinterpreted or misapplied the

Soundair test is implausible. The motions judge's comment that the Pinnacle offer was best "from the point of view of the majority of stakeholders" does not indicate a failure to have considered Fortress' interests. Therefore, the appeal was *prima facie* meritless.

[42] I will address the other factors more briefly. This appeal did not raise any issue of general importance to insolvency practice or the broader administration of justice; it was a fact-specific dispute about the propriety of a receiver's sale. Additionally, given the difficulty that the Receiver had faced in finding prospective purchasers other than Pinnacle and Fortress, a hearing of the appeal probably would have unduly hindered the Debtor's insolvency proceedings.

E. DISPOSITION

[43] These are my reasons for my granting of the Receiver's motion on June 29, 2017. The Receiver did not seek an order for costs of the motion.

Released: JUL 2 0 2017

J.A.