SC CV 93 016

CV 04496

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN BANKRUPTCY

IN THE MATTER OF AN INTENT
TO FILE A PROPOSAL BY BARSOUM
DRUGS LTD.

BETWEEN:

156190 CANADA LTD., also
known as DMG MULTI-SERVICES

Applicant

- and

BARSOUM DRUGS LTD.

Respondent

Applications for (1) appointment of an interim receiver under s.47.1 of the Bankruptcy and Insolvency Act; (2) declaratory relief as to ownership of goods subject to sale arrangements; (3) injunctive relief; and (4) declaratory relief under s.69.4 of the Act; all dismissed with costs.

Heard at Yellowknife on March 15th 1993

Judgment filed on March 22nd 1993

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

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REASONS FOR JUDGMENT

1 156190 Canada Ltd., also known as DMG Multi-Services ("DMG") seeks an order appointing Deloitte & Touche Inc. ("Deloitte") as an interim receiver of the property of Barsoum Drugs Ltd. ("Barsoum") at Iqaluit on Baffin Island in the Northwest Territories.

2 As an alternative, DMG also asks the Court to declare that goods provided by it to Barsoum but not yet sold by Barsoum remain the property of DMG and are not the property of Barsoum within the meaning of the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 as amended. In addition, DMG asks for an injunction restraining Barsoum

from selling or otherwise disposing of the goods provided by DMG to Barsoum. Moreover, DMG asks for a declaration pursuant to section 69.4 of the **Bankruptcy and Insolvency Act.**

I. INTERIM RECEIVER

I. Background

3 This is not the first application for the appointment of an interim receiver of Barsoum's property under the **Bankruptcy and Solvency Act** in recent weeks. The earlier application of the Commissioner of the Northwest Territories and others for the appointment of Deloitte in that capacity was however dismissed. DMG's counsel held a watching brief on that application but did not take part in it. This is therefore a fresh application based on DMG's position as a creditor of Barsoum; indeed, DMG appears to be the major creditor and it remains to be seen whether or not it is to be classed as a secured or unsecured creditor.

4 Barsoum filed a notice of intention to make a proposal under the **Bankruptcy and Insolvency Act** on March 1st 1993, pursuant to s.50.4 of the Act. By doing so, Barsoum acknowledged its insolvency. That having been done, DMG is in a position to invoke s.47.1 of the Act, and does so. That section states:

> **47.1(1) Where a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1), the court may at any time thereafter, subject to subsection (3), appoint as interim receiver of all or any part of the debtor's property, for such term as the court may determine,**

(a) the trustee under the notice of intention or proposal;
(b) another trustee; or
(c) the trustee under the notice of intention or proposal and another trustee jointly;

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) carry out the duties set out in subsection 50(10) or 50.4(7), in substitution for the trustee referred to in that subsection or jointly with that trustee;
(b) take possession of all or part of the debtor's property mentioned in the order of the court;
(c) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
(d) take such other action as the court considers advisable.

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

(a) the debtor's estate; or
(b) the interests of one or more creditors, or of the creditors generally.

Deloitte, whose consent to act as an interim receiver of Barsoum's property has been filed, is however not the trustee named in reference to the notice of intention filed pursuant to s.50.4 by Barsoum. That trustee appears to be Miller, McClelland Limited ("Miller") of Edmonton, Alberta, whose president Leon E. Miller, C.A., C.I.P., a trustee under the Act, has been actively engaged in carrying out the functions of the trustee at Iqaluit since the notice was filed. Greg Stevens, C.A., C.I.P., a vice-president of Deloitte has also been in Iqaluit, having gone there when requested to do so by officials of the Government of the Northwest Territories at the time when the earlier application of the Commissioner was before the Court.

Statements made in the affidavit of Mr. Stevens sworn on March 3rd 1993 are disputed by Nader Barsoum, an officer and principal shareholder of Barsoum. Among other things, Mr. Stevens expressed the view that appointment of an interim receiver was very urgently required because at that time no one was monitoring the operations of

Barsoum. Furthermore, Mr. Stevens expressed the opinion that since the trustee under s.50.4 of the Act, namely Miller, was in Edmonton and not at Iqaluit, and since that trustee had no power to control or monitor cash receipts of Barsoum, Barsoum would have several weeks in which to liquidate its assets at fire sale prices to the direct detriment of all creditors. According to Mr. Stevens, his personal observation while at Iqaluit showed that Barsoum was conducting sales at prices 20% below the regular price and this was causing fears in the business community at Iqaluit that other businesses would suffer from the effects of such sales.

7 The situation described by Mr. Stevens was based on the situation as he found it towards the end of February. In the meantime, as already mentioned, Miller had been actively represented by Mr. Miller at Iqaluit as shown in the exhibit material referred to in the affidavit of Kara Rodrigue sworn on March 8th 1993. Among other things, Mr. Miller had by then determined that many of the rumours circulating at Iqaluit regarding Barsoum and its business were in fact untrue. Of considerable significance to the present application and the fears referred to by Mr. Stevens, are the controls put into effect by Mr. Miller with the consent of Barsoum, which are designed to ensure that all sums received by Barsoum are duly deposited in the local bank for purposes of the insolvent's estate, without being applied to the Bank's claims against Barsoum. It is true that these controls do not intrude otherwise on the conduct of Barsoum's business. However they do at least meet the allegation that there are wellfounded fears that Mr. Barsoum is siphoning off money from Barsoum's operations so as to defeat his creditors. Furthermore, this arrangement ensures that Mr. Barsoum, the only pharmacist in the

business, will remain available to provide pharmaceutical services to Barsoum's customers at Iqaluit.

As Mr. Miller has pointed out, the expense of an interim receiver is likely to be in the region of $96,000, bearing in mind costs at Iqaluit and of providing the services of the receiver there from a southern location. Be that as it may, Mr. Miller is prepared to apply for appointment as an interim receiver of Barsoum's property if there is a failure of the controls which he has put in place. It is Mr. Miller's opinion, as an experienced trustee in bankruptcy, that the controls which he has had put in place will be effective. I am satisfied by the reports of Mr. Miller, as exhibited to Ms. Rodrigue's affidavit, that the situation at Iqaluit in reference to Barsoum is for the present time under adequate control.

In reaching that conclusion, I have not ignored the affidavit material relied upon by DMG. That material, for example the affidavit of Giles Lizotte sworn on March 3rd 1993, refers to a conditional sale agreement dated September 3rd 1992 by which equipment and inventory sent to Barsoum by DMG is said to remain the sole property of DMG. It is alleged by Lizotte that Barsoum has been disposing of this equipment and inventory without recording the sales involved, so as to meet the demands of other creditors and defeat the interests of DMG in these items.

It was not until Barsoum's solicitors filed the affidavit of Katherine Dann sworn on March 15th 1993, however, that a copy of this conditional sale agreement was made

available to me for examination in these proceedings from the Court's file. At that, this copy of the document does not include what are described as approximately 80 pages annexed to it which purport to contain lists of various goods. Without more, it is impossible to know from the record what is included in these lists by way of either equipment or inventory. This is of course quite an important point, bearing in mind that there is a schedule of payments in the agreement with respect to the equipment whereas the only payment condition respecting the other items (merchandise and inventory) is that payment in full is to be made before October 1st 1993.

11 The agreement purports to give DMG a right to repossess the goods to which it refers in the event of Barsoum's insolvency. The less than fully satisfactory nature of the agreement can be illustrated by quoting from the relevant provisions of the agreement which leave one in some doubt as to what precisely is intended. Paragraph 22 of the agreement states in part:

> **22° Without prejudice to any other rights herein expressed of (sic) provided by law, DMG may immediately repossess the equipment identify (sic) in Annex A or any other equipment or inventory that belongs to Barsoum (sic) without notice, (and?) the term (sic) shall be forfeited in the event that ...**
>
> **22.02 Barsoum becomes insolvent ...**
>
> **(words in parenthesis inserted here)**

12 At least equally problematic, in terms of this Court's supervision of the functions of an interim receiver appointed as requested by DMG, are paragraphs 26 and 27 of the agreement, which read as follows:

> **26° For this agreement, the parties are making election of domicile in Val d'Or and all notifications, demands and suit relating to this present agreement must be made at the elected domicile and before the Judge of such domicile to the**

competent Court.

27° This agreement shall be governed by and construed in accordance with the laws of the Province of Quebec and the laws of Canada applicable therein. The parties hereby acknowledge that it is their wish that this Agreement and all documents relating to this Agreement be in the English language only. Les parties aux présentes reconnaissent avoir voulu que cette convention ainsi que tous les documents qui s'y rattachent soient rédigés en langue anglaise seulement.

3 DMG is listed as an unsecured creditor of Barsoum, to the extent of $1,500,000, in Miller's preliminary analysis of Barsoum's financial position as set out in the exhibit material referred to in the affidavit of Katherine Dann sworn on March 8th 1993 and filed on behalf of Barsoum. Barsoum's total debt as shown in this material is $3,131,953.00. DMG is clearly the largest creditor, whether secured or unsecured.

4 An affidavit of Lloyd W. Stang sworn on February 26th 1993 for use in the earlier proceedings brought by the Commissioner and others for the appointment of an interim receiver alleges that Barsoum granted DMG a debenture in the amount of $1,500,000 in November 1992 and that this debenture was registered in the Companies Registry of the Northwest Territories under No. D3138 on February 16th 1993. The affidavit reveals that Boyd Denroche, the law firm representing DMG in the present proceedings had been instructed to bring proceedings in this Court to have a receiver-manager appointed pursuant to the debenture. It is noteworthy that this has not been done. Instead, DMG's solicitors are relying upon s.47.1 of the **Bankruptcy and Solvency Act**, as if the debenture were non-existent.

5 Mr. Stang's affidavit describes the equipment and merchandise supplied to

Barsoum by DMG as having an approximate value of $1,200,000, of which approximately $500,000 is the value of perishable merchandise. No breakdown between equipment supplied and merchandise is given in the affidavit apart from this. A letter exhibited to the affidavit Lois Toms, sworn on February 26th 1993 in the earlier proceedings, indicates that the value of the equipment may be as low as $250,000. Mr. Barsoum's affidavit sworn on March 12th 1993 indicates that $170,000 approximately has been paid to DMG on the equipment to date. Without more complete and precise information, this suggests that DMG has not been totally ignored financially by Barsoum to the extent that DMG's counsel would have me believe. Furthermore, the financial records exhibited to the affidavit of Katherine Dann sworn on March 12th 1993 and filed on behalf of Barsoum reveal payments made to DMG by Barsoum in 1993 to a total of $7,118.20 prior to the events leading to the filing of notice under s.47.1 of the **Bankruptcy and Insolvency Act**, contrary to the allegations of DMG's counsel that DMG had been totally ignored in terms of payments by Barsoum for several months prior to the filing of that notice.

16 Given the desirability in my view of avoiding precipitate action which would prejudice not only Barsoum's hopes of recovery but also the legitimate interests of its creditors (and of its customers at Iqaluit), and noting that the courts generally exercise considerable caution in such matters as held in **Re Borts Ltd.** (1927), 8 C.B.R. 536 (Ont.S.C.); **Re Rosenstein** (1921), 1 C.B.R. 393, 397 (Que.S.C.); **Re Weiss** (1923) 5 C.B.R. 383 (Que.S.C.); and **Re Stuart & Sutterby** (1930), 12 C.B.R. (Ont.C.A.), I remain to be satisfied that an interim receiver is necessary at this point in time to protect the

interests of DMG in the circumstances revealed to the Court to date. I note, in any event, that an application for appointment of an interim receiver must reveal evidence of the actual (and not merely suspected or feared) danger of dissipation of assets: **Re L.A.T. MacDonald Enterprises Ltd.** (1982), 42 C.B.R. (N.S.) 17 (Ont.S.C.).

II. DECLARATION OF OWNERSHIP

7 Given the unsatisfactory nature of the evidence submitted with respect to the alleged conditional sale agreement, the questions to which the evidence adduced to date gives rise as to its legal scope and effect, not to mention the scope and effect of paragraph 26 of the document above mentioned, the absence of any evidence of the identity or description of the equipment or other goods in which DMG claims ownership (beyond the location of these things on Barsoum's premises at Iqaluit; if that is whereby they are in fact); and the effect, if any, of the requirements of our **Conditional Sales Act**, R.S.C. 1985, c. C-14, not to mention the law referred to in paragraph 27 of the agreement; I consider it to be inappropriate to make any declaration as to ownership or other property interests in the goods supplied to Barsoum by DMG for purposes of the present proceedings in these problematic circumstances and without a trial of the relevant issues.

III. INJUNCTIVE RELIEF

8 Once again, the evidence provided to date is insufficient to satisfy me that

injunctive relief should be granted to restrain Barsoum from selling or otherwise disposing of goods supplied to it by DMG under the conditional sale agreement or the debenture. No attempt was made by counsel for DMG to rest its case on the well-known tripartite test for the issuance of an interlocutory injunction. It has not been yet shown to the Court that this test can be met. Nor has the usual undertaking as to damages been filed.

IV. SECTION 69.4

19 Section 69.4 of the **Bankruptcy and Insolvency Act** provides:

> **69.4 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.**

20 Unlike the Commissioner and others who sought an interim receiver of Barsoum's property in the earlier proceedings, DMG did not, it would appear, avail itself of the procedures referred to in s.69(2) of the Act, so as to obtain an exemption from the operation of sections 69 to 69.3 of the Act. I held in the earlier proceedings that a declaration under s.69.4 is inappropriate and unnecessary where the provisions of s.69(2) apply. That is not the case here.

21 The case put forward by DMG, speaking directly to the Court on its own behalf and no longer relying on the Commissioner and others to make its case, is that DMG is likely

to be materially prejudiced by the continued operation of sections 69 to 69.3 of the **Bankruptcy and Insolvency Act**. Unless a declaration is made pursuant to s.69.4, DMG's hands appear to be tied by sections 69 to 69.3 both in judicial and in extra-judicial proceedings such as a seizure under the **Seizures Act**, R.S.N.W.T. 1988, c. S-6: **Vachon v. Can.Emp. & Imm.Comm.** (1985) 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 63 N.R. 81.

2 It is not enough, of course, that DMG is of opinion that it is likely to be materially prejudiced by the continued operation of sections 69 to 69.3, in the absence of a court-appointed receiver. It is for the Court to decide if that is the case.

3 The Court is aware that the Commissioner and others have taken steps to realise on their mortgage security on Barsoum's business premises. The Royal Bank is said to be taking such steps as are open to it to enforce its banking securities against Barsoum. There is mention in the materials filed of difficulties encountered over the supply of electric power and fuel to Barsoum because of delays in payment of its debts to the suppliers. Barsoum is probably in other financial difficulty at the same time, given these circumstances.

24 The preliminary assessment made by Mr. Miller, on the other hand, suggests that DMG, if it is in fact unsecured as a creditor, is likely to end up with only 25 cents on the dollar in a bankruptcy, sharing with other unsecured creditors. DMG's only claim to material prejudice as a result of the stay imposed by s.69 to s.69.3 of the **Bankruptcy and Insolvency Act** must rest on it being in fact a secured creditor whose security is being

eroded by Barsoum selling off the goods on which it relies for security at fire sale prices in order to try and stay in business by generating cash flow. And here we are faced again with the problematic nature of the security, if any, comprised by the so-called conditional sale agreement.

25 No attempt has been made to provide this Court with evidence of the relevant law of the Province of Québec, it appearing that this is the law of the contract pursuant to paragraphs 26 and 27 of the agreement. Assuming, in the absence of such evidence, that the law in question is in effect the same as the law of the **forum**, namely the Northwest Territories, I note that the expression "conditional sale" is defined in part by s.1 of the **Conditional Sales Act** to mean for purposes of that Act:

> **(a) a contract for the sale of goods under which possession is or is to be delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time on payment of the whole or part of the price or the performance of any other condition.**

26 While this seems clearly applicable in respect of identifiable items of equipment, it seems much less readily applicable to general merchandise and inventory whose origins are not readily identifiable as being from DMG. The ownership of the equipment by Barsoum seems to be intended by the agreement, on full and satisfactory payment as therein provided. On the other hand, that is not what seems to be contemplated in respect of the merchandise and inventory, which is presumably intended primarily, if not entirely, for sale by Barsoum to the public with payment to be made to DMG before October 1st 1993, long after these goods may have been sold by Barsoum.

Whatever the true situation may be under the agreement, there is nothing before the court to show that section 2 of the **Conditional Sales Act** has been complied with. That section reads as follows:

> **2.(1) Where the possession of goods has been delivered to a buyer under a conditional sale, unless the conditional sale is evidenced and is registered in accordance with this Act, every provision contained in the conditional sale by which the property in the goods remains in the seller is void**
> **(a) as against a creditor; and**
> **(b) as against a subsequent purchaser or mortgagee claiming from or under the buyer in good faith, for valuable consideration and without notice.**
>
> **(2) The provision referred to in subsection (1) must be evidenced by a writing signed before or at the time of, or within 60 days after delivery of the goods, by the buyer or the agent of the buyer, giving a description of the goods by which they may be readily and easily known and distinguished, and stating the amount unpaid of the purchase price or the terms and conditions of the hiring.**
>
> **(3) The writing referred to in subsection (2) or a true copy of the writing must be registered in the Document Registry within 60 days after it has been signed.**
>
> **(4) Where goods are brought into the Territories and are subject to a conditional sale agreement, unless**
> **(a) the agreement contains such a description of the goods that they may readily and easily be known and distinguished, and**
> **(b) a copy of the agreement is registered in the Document Registry within 60 days after the seller has received notice of the place to which the goods have been brought,**
> **the seller is not entitled to set up any right of property in or right of possession to the goods as against a creditor or as against a subsequent purchaser claiming from or under the buyer in good faith, for valuable consideration and without notice, and the buyer shall, notwithstanding the agreement, be deemed to be the owner of the goods as against any such seller.**
> **(5) Where the buyer is a corporation, the residence of that buyer shall for the purposes of this section be deemed to be at the place where the principal place of business of the corporation in the Territories is situated.**

8 Furthermore, there is nothing before the court to show whether section 3 of that Act is applicable or that, if so, it has been complied with. Section 3 states:

> **3. Where an agreement has been made outside the Territories with reference to goods not then in the Territories by which, under the law governing the agreement, the seller has, on default in payment of the price or the insolvency of the buyer,**
> **(a) a right of revindication,**
> **(b) a preference for the price of the goods sold, or**

> **(c) a right to a dissolution of the sale and to resume possession of the goods notwithstanding the possession of the buyer,**
>
> **and the goods are brought into the Territories, unless the agreement is registered in the Document Registry within 60 days after the seller has received notice of the place to which the goods have been brought, the seller is not entitled to any of the remedies mentioned in paragraphs (a) to (c) as against a creditor or as against a subsequent purchaser claiming from or under the buyer in good faith, for valuable consideration and without notice.**

29 While provision is made in section 5 of the **Conditional Sales Act** for late registration, the fact that no evidence of any registration under the Act has been offered is suggestive of an absence of any registration whatsoever pursuant to the Act.

30 On the evidence before me, therefore, there is nothing to persuade me that the so-called conditional sales agreement provides DMG with any basis of security entitling it to rank ahead of unsecured creditors claiming against Barsoum, even if, which I doubt, it can be classified as a conditional sale agreement in the Northwest Territories.

31 That being the situation, I am not satisfied that DMG is likely to be materially prejudiced by the continued operation of s.69 to s.69.3 of the **Bankruptcy and Insolvency Act** for the time being.

V. CONCLUSION

DMG's application is dismissed with costs to Barsoum in any event. Costs may be spoken to, if necessary, by appointment.

M. M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
March 22nd 1993

Counsel for 156190 Canada Ltd,
also known as DMG Multi-Services: M. Triggs, Esq.

Counsel for Barsoum Drugs Ltd.: G. Watt, Esq.

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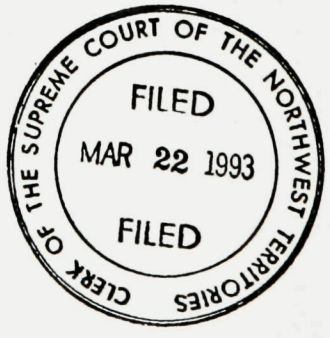

THE SUPREME COURT OF THE NORTHWEST TERRITORIES

March 29, 1993

TO: DISTRICTION

Amendment: CV 04496
In Bankruptcy
In the Matter of an Intent to File
A Proposal by Barsoum Drugs

Between: **156190 Canada Ltd., also known as DMG Multi-Services**

Applicant

- and -

Barsoum Drugs Ltd.

Respondent

Please replace pages 8 and 9 of the above judgment with the attached.

Thank you in advance.

Laurie Moroz

Laurie Moroz
Judge's Secretary

ATTCH.

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