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CV 04464

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES and THE NORTHWEST TERRITORIES BUSINESS CREDIT CORPORATION

Plaintiffs

- and -

SIMPSON AIR (1981) LTD., EDWARD JAMES GRANT and NOREEN ADA GRANT

Defendants

Motion by receiver-manager to approve sale of assets granted.
Cross-motion by trustee in bankruptcy for a stay dismissed.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

Heard at Yellowknife, N.W.T.
on May 6, 1994

Judgment filed May 11, 1994

Counsel for the Plaintiffs and the Receiver Manager:	Douglas G. McNiven
Counsel for the Defendants and the Trustee in Bankruptcy:	Earl D. Johnson, Q.C.
Counsel for Deh Cho Air Ltd.:	Garth Wallbridge

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REASONS FOR JUDGMENT

1 On this application the receiver-manager of Simpson Air (1981) Ltd. ("the company") sought court approval for a proposed sale of some assets. The Trustee in bankruptcy of the company sought a stay of the sale. Due to the urgency of the situation, having regard to the seasonal nature of the company's business, I issued an order approving the sale but with written reasons to follow. These are those reasons.

2 The company is engaged in the business of operating scheduled and chartered airline services from a base at Fort Simpson, Northwest Territories. The nature of this type of business in this environment is that much of the revenue is generated during a short summer season. The defendants, Edward James Grant and Noreen Ada Grant, are the shareholders, directors and officers of the company as well as guarantors of the company's indebtedness.

3 The Northwest Territories Business Credit Corporation ("B.C.C.") is a statutorily created agent of the Government of the Northwest Territories the purpose of which is to act as a "lender of last resort" to local businesses. In 1989 and 1990, the B.C.C. advanced loans to the company. These loans were secured by promissory notes, a chattel mortgage, a fixed and floating charge debenture, and the personal guarantees of the Grants. The loan account went into default and litigation was commenced by the B.C.C. in February of 1993. Negotiations continued thereafter and a settlement agreement was executed on July 6, 1993.

4 The defendants defaulted under the terms of the settlement agreement. The B.C.C., on December 8, 1993, appointed Deloitte & Touche Inc. ("the Receiver") as receiver and manager of the company's property and assets. While this was a private appointment pursuant to the terms of its security, the plaintiffs also obtained an order from this court to facilitate the preservation of the company's assets. The Receiver then commenced running the business.

5 Notwithstanding the receivership, negotiations continued through to early April of this year between the B.C.C. and the Grants for a purchase of the assets by the Grants. Several offers were made by them and deadline extensions given by the B.C.C. On April 6, 1994, the Receiver was advised that the Grants would be making a new offer for the company's assets. Later that same day, however, the Receiver was informed that the company directors had authorized an assignment into bankruptcy for the company. On

that date, the firm of BDO Dunwoody Ward Mallette Inc. (the "Trustee") was appointed the trustee in bankruptcy of the company's estate.

6 Throughout the ongoing negotiations with the Grants, the Receiver was also in negotiations with third parties who were interested in purchasing various assets of the company. On March 31, 1994, an offer was received from Deh Cho Air Ltd. to purchase certain assets for the total sum of $306,000. The Receiver notified the Grants of this offer and gave a time limit for their own offer. When the Receiver learned of the bankruptcy, it accepted the Deh Cho Air offer. It is this sale agreement that the Receiver brings before this court for approval.

Based on all that has been submitted to me, I am satisfied that the proposed price is a fair and competitive one for the assets being sold. I am also satisfied that no commitments were made by the Receiver to the Trustee to delay a sale of assets. Finally, I am also satisfied that the intended purchasers are ready, willing and able to complete the transaction and that indeed the commercial viability for this transaction rests on it being concluded swiftly.

8 The Trustee, however, seeks a stay of the sale for at least 30 days so it can investigate the feasibility of obtaining financing for a purchase of the company's business as a "going concern". It is submitted on the Trustee's behalf that a piecemeal sale of assets significantly diminishes the value of the overall business as an operating entity.

The Trustee also advances the proposition that it is entitled to a stay by virtue of the combined operation of various sections of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 ("the Act").

9 On an application such as this where a receiver seeks court approval of a proposed sale, the court must consider (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (b) the interests of all parties; (c) the efficacy and integrity of the process by which the offer was obtained; and (d) whether there has been unfairness in the working out of the process: Crown Trust Co. v. Rosenberg (1986), 39 D.L.R. (4th) 526 (Ont.H.C.J.). I am satisfied that all of these concerns have been met.

10 A privately appointed receiver-manager, such as in this case, is the agent of the party that made the appointment. It is the duty of the receiver-manager to protect that party's security. And while the receiver-manager must act reasonably and in good faith, it is not subject to general fiduciary duties to other parties. So long as the actions taken are taken in good faith, the court will be extremely reluctant to set aside the receiver-manager's decisions. See Arctic Co-Operatives Limited v. Sigyamiut Ltd. (1991), 5 C.B.R. (3d) 271 (N.W.T.S.C.); and Downsview Nominees v. First City Corp., [1993] 3 All E.R. 626 (P.C.).

11 The Trustee's submission that the proposed sale is not a good business decision

is found in the affidavit of D. Harvey Hall, a senior vice-president of the Trustee firm:

> **"From my review of the materials submitted by Deloitte, it appears that Deloitte never obtained a valuation of the business as a going concern. Based on the company's financial statements for the period ending September 30, 1993, the company had earned $319,000.00. ... This possibility should be investigated before an asset sale is made. The business was never advertised for sale. In my opinion, advertising may have attracted purchasers willing to pay a significant amount more than the proposed sales by Deloitte."**

12 In making this submission the Trustee is acting in a wholly legitimate way to try to maximize the return to all creditors. The Trustee's obligation is to effect recovery of the bankrupt's assets in the interests of all creditors. But a review of the material filed by the Trustee undermines the cogency of this submission.

13 The unaudited financial statements for the company as at September 30, 1993, show income for 1993 to that date of $188,800 from operations and a further gain of $130,211 from the disposal of capital assets. The company did not "earn" $319,000 in its operations. In addition, the company had an accumulated deficit in excess of $350,000 due to previous operating losses. Its long-term debt went from $505,672 at the end of 1992 to $569,315 at September 30, 1993. While no detailed accounting analysis was provided to me, these figures basically speak for themselves in terms of assessing the company's viability as a going concern. The current principal owing to B.C.C., as estimated by the Receiver, is $628,000. And the Receiver says that the operations continue to lose money.

14 The lack of viability is also evidenced by the continuing inability of the Grants to obtain new financing from November, 1993, right up to the assignment in bankruptcy. And there was nothing placed before me that would suggest there is any reasonable prospect of a financing package for the whole business.

15 The Act does provide, in section 69.3, for a stay of proceedings on a bankruptcy. But, the Act also provides that the bankruptcy does not prevent a secured creditor (such as the B.C.C.) from realizing or otherwise dealing with its security "unless the court orders otherwise". It has been held that there must be "cogent reasons" to order otherwise: Re Dunham (1982), 40 C.B.R. (N.S.) 25 (Ont.S.C.).

16 The policy of the Act is to not interfere with the rights of secured creditors except insofar as may be necessary to protect the estate as to any surplus. The Act is clear that the Trustee takes subject to the rights of the secured creditors. And courts generally are loath to interfere in commercial arrangements. See, generally, Houlden & Morawetz, Bankruptcy and Insolvency Law of Canada (3rd Ed.), page 3-153; and Royal Bank of Canada v. Sefel Geophysical Ltd. (1989), 76 C.B.R. (N.S.) 29 (Alta.Q.B.).

17 This is not a situation like that found in Re Dominion Lock Company Ltd. (1985), 56 C.B.R. (N.S.) 148 (Que.S.C.). There the trustee in bankruptcy asked the court to stay the realization of security by the secured creditors. The trustee gave evidence that he was about to receive an offer which would put him in sufficient funds to pay all secured

creditors and have an excess for the benefit of unsecured creditors. In that case the stay was granted.

18 But here there is no such evidence or indeed anything from which one can conclude with reasonable assurance that funds will become available. On the other hand, the current proposal represents an offer that is fair and firm.

19 The Trustee says that the major impediment to securing financing has been the lack of the exact figure required to redeem the B.C.C. security. Mr. Hall says in his affidavit:

> **"3. I have received a proof of claim submitted by the Northwest Territories Business Credit Corporation ("NWTBCC") on the 29th of April, 1994 by facsimile, and later by mail. Attached and marked as exhibit "C" is a copy of the Proof of Claim with some of its attachments. The Proof of Claim refers to a debt in the amount of $794,353.89. It refers also to assets valued at $906,000.00. It attaches a valuation of collateral held in the amount of $976,000.00.**
>
> **4. I received a letter on April 18, 1994 from Stevens of Deloitte indicating that the amount required to redeem the security was $650,000.00 and this letter is attached hereto and marked exhibit "D".**
>
> **5. I attended at the offices of Deloitte & Touche Inc. ("Deloitte") on the 24th of April, 1994 to obtain a figure for the value of the amount owing to NWTBCC. I reviewed a copy of a "Statement of Receipts and Disbursements" dated April 24, 1994 provided by R. Gregory Stevens ("Stevens") of Deloitte and same is attached hereto as exhibit "E". Based on that document, and a follow-up discussion with Stevens, it was agreed that the amount owing to NWTBCC was $598,000.00 inclusive of $72,000.00 in fees for Deloitte and $24,000.00 in legal expenses.**
>
> **6. I received a telephone call on May 3, 1994 from Stevens, who indicated**

that the balance to redeem was $670,000.00. I received another letter from NcNiven Kelly & O'Neil, the Calgary lawyers for Deloitte dated May 4, 1994 indicating that the balance owing is $700,590.00 and same is attached hereto and marked exhibit "F".

7. It has been extremely difficult to obtain financing from a lender that we believe is prepared to advance funds by reason that the balance owing has not been clearly stated."

20 I fail to see why the B.C.C. or the Receiver had such difficulty in providing a figure for the redemption amount. But, nevertheless, it was clear that the amount would be at least in the $600,000 range so some steps could have been taken to obtain a financing commitment. There was a Consent Judgment entered in this action on February 1, 1994, against all defendants in the sum of $628,755.44 plus costs. It seems to me that there was sufficient information already on hand to negotiate a financing package. Also, there is no evidence before me as to the basis for or reasonableness of Mr. Hall's belief as to the presence of a lender prepared to advance funds.

21 In any event, pursuant to sections 131 and 132 of the Act, the B.C.C., as a secured creditor, is allowed to amend the valuation of its security where it has not been redeemed. And, in a situation where the security is valued on an "estimated" basis, the secured creditor could reject the amount tendered for redemption should the Trustee choose to redeem: Re Bell's Limited (1986), 60 C.B.R. (N.S.) 244 (Sask.Q.B.). The lack of a definitive redemption value, in these circumstances, is not fatal.

22 I am therefore not persuaded that a stay should be granted on the basis that the proposed sale is a bad business decision.

23 The Trustee's submissions as to an entitlement to a stay by reason of the Act are framed on the basis of sections 79, 128 and 130 of the Act:

79. Where property of a bankrupt is held as a pledge, pawn or other security, the trustee may give notice in writing of his intention to inspect the property, and the person so notified is not thereafter entitled to realize his security until he has given the trustee a reasonable opportunity of inspecting the property and of exercising his right of redemption.

. . .

128. (1) Where the trustee has knowledge of property that may be subject to a security, the trustee may, by serving notice in the prescribed form, require any person to file, in the prescribed form and manner, a proof of the security that gives full particulars of the security, including the date on which the security was given and the value at which that person assesses it.

(1.1) Where the trustee serves a notice pursuant to subsection (1), and the person on whom the notice is served does not file a proof of security within thirty days after the day of service of the notice, the trustee may thereupon, with leave of the court, sell or dispose of any property that was subject to the security, free of that security.

(2) A creditor is entitled to receive a dividend in respect only of the balance due to him after deducting the assessed value of his security.

(3) The trustee may redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in the proof of security, by the secured creditor.

. . .

130. Notwithstanding subsection 128(3) and section 129, the creditor may, by notice in writing, require the trustee to elect whether he will exercise

the power of redeeming the security or requiring it to be realized, and if the trustee does not, within one month after receiving the notice or such further time or times as the court may allow, signify in writing to the creditor his election to exercise the power, he is not entitled to exercise it, and the equity of redemption or any other interest in the property comprised in the security that is vested int he trustee shall vest in the creditor, and the amount of his claim shall be reduced by the amount at which the security has been valued.

24 The purpose of these sections is to give a trustee in bankruptcy the opportunity to redeem security held by a secured creditor.

25 In this case the notice to inspect (section 79) and the notice to file proof of claim (section 128) were given by the Trustee on April 7, 1994. The proof of claim was received by the Trustee on April 29, 1994.

26 Service of the notice to inspect means that the Trustee must be given a "reasonable opportunity" of inspecting the property and of exercising the right of redemption. What is meant by "reasonable opportunity" is not explained. In my opinion this concept is similar to that of "reasonable time" to be given to a debtor to satisfy a demand for payment. The question of what is "reasonable" must be looked at in the light of all of the facts and circumstances in the individual case: per Estey J. in Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd. (1982), 135 D.L.R. (3d) 1 (S.C.C.) at page 16.

27 In this case the Trustee took no steps to inspect the assets since service of the notice. Considering all of the circumstances of this case there has been a reasonable

opportunity to do so and to redeem.

28 But the Trustee's main point is that section 130 requires the creditor to put the trustee to an election before the creditor can realize the security. I do not agree.

29 Section 130 provides a mechanism whereby a creditor may force the issue with a trustee who for whatever reason has done nothing with respect to the security, i.e., neither redeemed it or indicated a lack of desire to redeem. The operative word in that section is "may". It is discretionary to the creditor. It is not a condition precedent to the creditor's right to realize its security. There is nothing in the context of the section or necessarily implied in the scheme of the legislation to support the proposition that the Trustee advances here.

30 Having regard to all of the circumstances of this case I have concluded that the Receiver has, with regard to this proposed sale, acted in an economically efficient and commercially reasonable manner. I find no cogent reason why the sale should not go forward. I see no unfairness in the working out of the process.

31 The Trustee, in its cross-application, sought various directions in addition to a stay. One of those relates to an accounting of the loan account between the B.C.C. and the company. This is a reasonable request and one that is essential to the Trustee's work. For that reason I will include a direction to that effect.

32 These reasons, therefore, confirm my earlier order as follows:

1. The proposed sale of assets by the Receiver (as identified in the Notice of Motion filed on May 2, 1994, by the plaintiffs) is approved.

2. All consequential relief (as set out in paragraphs 2, 3, 4, 5 and 6 of the Notice of Motion) necessary to give effect to the sale is granted.

3. The Trustee's cross-application for a stay is dismissed.

4. Within 30 days from completion of the sale, the plaintiffs are to provide to the Trustee a statement of the loan account of Simpson Air (1981) Ltd. setting out a history of all credits, debits and charges.

33 The plaintiffs and the Receiver shall have their costs of this application against the Trustee. The costs shall be taxed on the basis of one set of costs with no limiting rule to apply.

John Z. Vertes
J.S.C.

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