COURT OF APPEAL FOR ONTARIO

CITATION: Business Development Bank of Canada v. 170 Willowdale Investments Corp., 2025 ONCA 251
DATE: 20250403
DOCKET: COA-24-CV-0826

Zarnett, Sossin and Copeland JJ.A.

BETWEEN

Business Development Bank of Canada

Applicant

and

170 Willowdale Investments Corp.

Respondent (Appellant)

Application under Subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

David W. Trafford, for the appellant

Tony Van Klink, for the respondent The Fuller Landau Group Inc.

Tim Hogan, for the respondent Royal Bank of Canada

Heard: March 19, 2025

On appeal from the order of Justice Peter J. Osborne of the Superior Court of Justice dated July 22, 2024, with reasons reported at 2024 ONSC 4600.

Zarnett J.A.:

A. OVERVIEW

[1] In 2023, the respondent, The Fuller Landau Group Inc. ("FLG"), was appointed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") and the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as receiver of the assets and undertakings of the appellant, 170 Willowdale Investments Corp. (the "Debtor").

[2] The Debtor's primary asset was real property on which it had operated a hotel. In 2024, with court authorization, FLG sold the real property and related assets (the "hotel assets") for $8 million. A portion of the proceeds were used to fully pay creditors who had security on the real property, and to pay transaction costs.

[3] In the motion that gives rise to the order under appeal, FLG sought approval to distribute the balance of the proceeds, first to satisfy the claims of the Debtor's remaining creditors, and then to the Debtor itself (as a surplus had been realized). FLG also sought its own discharge. In portions of his order that are not challenged on appeal, the motion judge, among other things, authorized distributions to the Canada Revenue Agency to satisfy the Debtor's tax liabilities, to a former employee to satisfy termination entitlements, and to the Debtor (of the surplus then

calculated to exceed $1 million). The order also made provision for the discharge of FLG as the receiver[1].

[4] This appeal concerns the one aspect of the motion judge's order that the Debtor contests, namely the authorization of distributions by FLG of about $900,000 to the respondent Royal Bank of Canada ("RBC"). To the extent that authorization is reversed, the surplus that would be paid to the Debtor would increase.

[5] The Debtor's principal argument revolves around the fact that the source of funds to make the distribution to RBC was primarily the net proceeds of the real property that comprised part of the hotel assets sold by FLG. The Debtor submits that those net proceeds are governed by para. 4 of the Approval and Vesting Order (the "AVO") that authorized the sale. It argues that the effect of that paragraph is to deny RBC any portion of the net proceeds derived from the sale of the real property because, although a creditor, RBC did not hold security over the real property before it was sold. The Debtor also argues that one portion of the indebtedness to RBC is not currently due and payable, and a distribution to RBC on account of it before that debt is due and payable is inappropriate.

[6] For the reasons that follow, I would dismiss the appeal. The AVO does not have the effect for which the Debtor contends. The AVO provided for creditor

[1] Free of the receivership and with the surplus that was realized, the Debtor intends to continue in business.

claims to maintain the same nature and priority against the net proceeds as they had against the real property before it was sold, placing RBC behind creditors who had security over the real property. It did not terminate RBC's status as a creditor or subordinate its rights to those of the Debtor.

[7] The motion judge properly authorized distribution to RBC of those portions of its debt which were due and payable. Although a minor portion of the RBC debt was not yet payable, there was no question that it would be, and in the circumstances of this case, with the receivership coming to an end, there was no prejudice to the Debtor in FLG paying that portion of the debt rather than holding the funds until their due date.

B. BACKGROUND

The RBC Indebtedness

[8] RBC extended three credit facilities to the Debtor: (i) a Highly Affected Sectors Credit Availability Program ("HASCAP") Loan; (ii) a VISA credit card facility; and (iii) a Canada Emergency Business Account ("CEBA") Loan.

[9] The HASCAP Loan and the VISA facility were advanced on a secured basis, governed by a General Security Agreement ("GSA") which extended to, among other things, personal property and any money held by the Debtor. However, the security granted did not include the Debtor's real property. The CEBA Loan was unsecured.

[10] As of June 20, 2024, the amount outstanding on the RBC Credit Facilities included:

a. $818,747.43 plus a *per diem* interest accrual of $85.23 in respect of the HASCAP Loan;
b. $60,926.23 in respect of the CEBA Loan;
c. $6,950.10 plus a *per diem* interest accrual of $3.17 in respect of the VISA credit card facility; and
d. professional fees.

The Appointment Order

[11] FLG was appointed under an order dated May 23, 2023 (the "Appointment Order") as receiver of the assets and undertakings of the Debtor, including the real property on which its hotel was situated, and the proceeds thereof. FLG was authorized to take possession and control of the Debtor's property, market it, and sell it (with court approval if the transaction exceeded certain limits). All proceedings by creditors against the Debtor were stayed, as was the enforcement of any remedies against the Debtor, FLG, and the Debtor's property. FLG was authorized to hold funds arising from the receivership and distribute them in accordance with further orders.

The Approval and Vesting Order ("AVO")

[12] The AVO is dated May 15, 2024. It authorized FLG to complete the sale of the hotel assets including the real property.

[13] All parties accept that the vast majority of the proceeds of sale were attributable to the real property that formed part of the sale[2].

[14] The AVO contained two provisions that are central to the arguments on the appeal.

[15] Paragraph 2 of the AVO provides that the Debtor's interest in the hotel assets would vest in the purchaser free and clear of all "Claims", a term defined to include, among other things, secured interests and unsecured claims:

> THIS COURT ORDERS AND DECLARES that upon the delivery of a Receiver's certificate to the Purchaser…all of the Debtor's right, title and interest, if any, in and to the [hotel assets]…shall vest absolutely in the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Mr. Justice Osborne dated May 23, 2023; (ii) all charges,

[2] The Debtor concedes that a minor amount ($67,800) of the net proceeds was attributable to personal property that was part of the sale, to which the RBC's security applied, and that even on the Debtor's interpretation that amount should be distributed to RBC.

> security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act*, (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the [hotel assets] are hereby expunged and discharged as against the [hotel assets]. [Emphasis added.]

[16] Paragraph 4 of the AVO addresses the determination of the nature and priority of Claims. It provides:

> THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the [hotel assets] shall stand in the place and stead of the [hotel assets], and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the [hotel assets] with the same priority as they had with respect to the [hotel assets] immediately prior to the sale, as if the [hotel assets] had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale. [Emphasis added.]

C. THE DECISION BELOW

[17] The motion judge found that all of the claimed indebtedness to RBC was due and payable. He rejected the Debtor's argument that the AVO precluded any distribution to RBC sourced from the sale of assets over which RBC had no security interest, namely the real property. He gave several reasons for this conclusion.

[18] First, under the Appointment Order, FLG was appointed over all “Property” of the Debtor, “including the [r]eal [p]roperty, and all the proceeds thereof”. As a result, the net proceeds of the sale were within the scope of the receivership. Although RBC had no security over the real property, it was clear (at least for the HASCAP and VISA facilities) that given the terms of its GSA, RBC had a security interest in any money of the Debtor which would include the net proceeds of the sale.

[19] Second, the motion judge considered it antithetical to the entire concept of the receivership if significant assets of the Debtor were sold by FLG for the specific purpose of satisfying creditor claims, only to have the proceeds of such sales, net of amounts owing to those with specific registered security against the real property, vest in the Debtor thus requiring creditors to commence new proceedings to recover those debts.

[20] Third, he considered that the language in para. 4 of the AVO, stating that the net proceeds stand in the stead of the real property, was standard language intended to make the point that when an asset is sold by a receiver, the proceeds do not automatically fall outside scope of a receivership such that the Debtor is entitled to take them notwithstanding proven claims of creditors.

D. ANALYSIS

[21] As noted above, the Debtor advances two grounds of appeal. The first – that on a proper interpretation of para. 4 of the AVO, the Debtor should receive the amount authorized to be paid to RBC because RBC's right to any distribution was foreclosed – is a legal question. A standard of correctness applies to it: *Housen v Nikolaisen*, [2002] S.C.R. 235, at para. 8. The second ground of appeal is that the motion judge's decision to approve FLG's recommended distribution to RBC cannot stand as it applies to the amount of the CEBA Loan, which was not yet payable. That discretionary decision is reviewed on a deferential standard and will only be interfered with if the motion judge misdirected himself, came to a decision that was clearly wrong, or gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, at para. 27.

(1) The Motion Judge Did Not Err in Rejecting the Debtor's Interpretation of Para. 4 of the AVO

[22] The Debtor argues that the motion judge's interpretation of para. 4 of the AVO was flawed because he failed to pay proper attention to its plain language. Under it, the nature and priority of RBC's claim was to be determined as it was "immediately prior to the sale, as if the [hotel assets] had not been sold". According to the Debtor, since RBC had no security interest in the real property immediately prior to the sale, the plain language means that RBC has no right to receive any

proceeds of the real property sale; those amounts should be paid to the Debtor rather than RBC. On the Debtor's theory, the motion judge erred by proceeding on the basis that RBC had security over money held by the Debtor, such as proceeds of sale, since that security interest only could attach after the sale was made and the determination of RBC's claim was to be made "as if the [hotel] assets had not been sold". Similarly, the Debtor contends that the motion judge also erred by considering the policy implications of para. 4 of the AVO, and what he thought was an undesirable outcome, as sufficient to override the effect of the AVO's plain language.

[23] I explain below why I do not accept the central planks of this argument.

(a) The Proper Interpretive Approach to Para. 4 of the AVO

[24] The interpretation of a court order is "much like the interpretation of a statute": *Fontaine v. Ontario*, 2020 ONCA 688, at para. 29. A statute is interpreted "by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 118. Similarly, an order is to be understood by examining the text, context, and purpose of the provision in issue.

(b) The Text

[25] Provisions such as para. 4 of the AVO determine the priority of creditor claims, as among the holders of those claims, to a fund generated by a sale, and

specify the manner in which that is done. In dealing with a similar provision of an Approval and Vesting Order in *Urbancorp Cumberland 2 GP Inc. (Re)*, 2020 ONCA 197, at para. 72, the following statement was made: "It is those matters [Claims and Encumbrances that would or may have affected the purchaser's title to the acquired asset] that are to be dealt with, as among the holders of the Claims and Encumbrances, and to determine their priority, 'as if the Vacant Units had not been sold'" (emphasis added).

[26] In this case, para. 4 of the AVO says that "for the purposes of determining the nature and priority of Claims the net proceeds from the sale of the [hotel assets] shall stand in the place and stead of the [hotel assets], … and all Claims and Encumbrances shall attach to the net proceeds from the sale of the [hotel assets] with the same priority as they had with respect to the [hotel assets] immediately prior to the sale, as if the [hotel assets] had not been sold…".

[27] Claims are defined in para. 2 of the AVO to include secured and unsecured claims. As is apparent from the definition, a "Claim" is something held by a creditor. The Debtor does not have a "Claim".

[28] Para. 4 of the AVO is thus limited to determining, as amongst creditors, the nature of their claims and their relative priority in respect of the net proceeds of the sale. For that purpose, it requires two related questions to be answered: (i) what is the nature of the creditor's claim (for example, is it secured or unsecured) and

(ii) what is the claim's priority as against other creditors (for example, is it a first ranking security, a subsequent ranking security, or is it unsecured). The text of the provision requires those questions to be answered by reference to what the answers would be immediately before the real property was sold and as if it had not been sold.

[29] As it applies to RBC, the nature of its claim is as an unsecured creditor in relation to the net proceeds of the sale of the real property, because regardless of any other security it held, it held no security over that property before it was sold. It thus ranked, in terms of priority to the net proceeds, behind those creditors who had security over the real property before it was sold – in other words, behind creditors whose claims were in the nature, and had the priority, of secured claims against the real property.

[30] Accordingly, the text of the provision does not assist the Debtor. Under para. 4 of the AVO, creditors who held security over the real property were entitled to be paid from the net proceeds before RBC was paid anything. That occurred. But para. 4 of the AVO does not say that a creditor with an unsecured claim receives nothing even when net proceeds remain after those with prior secured claims have been paid. Nor does it say that the Debtor has priority in relation to the net proceeds over a creditor with an unsecured claim. Rather the text of para. 4, read in light of the inclusion of unsecured claims in the definition of Claims in para. 2 of the AVO, only ranks creditors who had no security over the real

property before it was sold behind those creditors who did. It does not subordinate creditors with unsecured claims to the Debtor or cancel and release unsecured claims.

[31] Moreover, the text of the provision does not say that once priorities among creditors have been determined and respected, rights as between a creditor and the Debtor are to be determined as though the real property had not been sold. That paradigm is to be used only to determine creditors' rights as among them. As noted in *Urbancorp*, at para. 73, these provisions should not be read beyond their proper scope, as though they said for all purposes that claims were to be determined as though no sale was made.

(c) Context

[32] The context supports the conclusion derived from the text.

[33] The AVO as a whole authorized a sale to realize proceeds in a receivership. Paragraph 2 of the AVO vested title in the purchaser free of any claims, secured or unsecured, of the Debtor's creditors. Paragraph 4 deals with priority among creditors in relation to the proceeds of the sale. Nothing in that context elevates the right of the Debtor over those of any creditor.

[34] As the motion judge appropriately noted, it would be antithetical to the entire concept of the receivership if significant assets of the Debtor were sold by FLG for the specific purpose of satisfying creditor claims, only to have the proceeds of such

sales, net of amounts owing to those with specific registered security against the real property, vest in the Debtor leaving other creditors with proven claims unpaid. Shareholders of an insolvent company restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, cannot recover where creditor claims are not paid in full: s. 6(8). A debtor placed into bankruptcy may only recover a surplus that remains after payment in full of creditors: *BIA*, s. 144. Similarly, a debtor placed in receivership under the *BIA* cannot reasonably expect any surplus available to it to be enhanced by bypassing proven claims of creditors.

[35] Accordingly, nothing in the context supports an interpretation of para. 4 of the AVO that contemplates the Debtor receiving the net proceeds instead of a creditor who did not have security over the real property but who nonetheless has a valid claim against the Debtor.

(d) Purpose

[36] Similarly, an examination of the purpose of para. 4 of the AVO leads to a conclusion that is contrary to the Debtor's contention. The purpose of para. 4 is to provide for the ranking of creditor entitlements to the net proceeds of sale within the broader purpose of the AVO itself, which was to allow a sale and vest the property in the purchaser free of Claims of creditors. Nothing about those purposes

is consistent with distributing proceeds to the Debtor while leaving a creditor with a proven claim unpaid.

(e) Conclusion

[37] The text, context, and purpose of para. 4 of the AVO do not support the Debtor's interpretation. I therefore reject this ground of appeal.

(2) The Motion Judge Did Not Err in Authorizing a Distribution on Account of the CEBA Loan

[38] The Debtor argues that the motion judge should not, in any event, have authorized a distribution to RBC of the amount owing for the CEBA Loan since it was not yet payable. It does not challenge the motion judge's determination that the HASCAP Loan and the VISA facility were due and payable. It asserts that the motion judge made a palpable and overriding error in finding that the CEBA Loan was due and payable given an email sent by RBC on November 20, 2023 (after FLG was appointed receiver) advising that the deadline for payment of the CEBA Loan was extended to December 31, 2026.

[39] The motion judge did not advert to the November 20, 2023 email, but any error in considering the CEBA Loan to be payable was not overriding. Rather, it was harmless in the circumstances.

[40] There was no question that the CEBA Loan was due, in the sense of being owing, whether or not the time for payment had arrived. Moreover, the loan bore

interest which was in default. Given that the receivership was coming to an end, FLG would have had to either pay the loan or make provision for its payment, for example, by holding funds sufficient to retire the loan in a reserve. There was no suggestion by the Debtor that it was economically disadvantaged by RBC receiving the funds now rather than FLG holding them in a reserve until the end of December 2026. Nor was there any suggestion by the Debtor of circumstances that could occur under which the CEBA Loan might not ultimately be payable.

[41] Accordingly, payment to RBC of the CEBA Loan, as part of the conclusion of the receivership was a reasonable disposition, whether or not the CEBA Loan was yet payable.

[42] I therefore reject this ground of appeal.

E. DISPOSITION

[43] I would dismiss the appeal.

[44] I would award costs of the appeal to FLG in the amount of $27,969.76 out of the funds under its control in the receivership. The Debtor did not challenge the reasonableness of that amount but asked that FLG be deprived of costs because it should not have responded to the appeal; rather only RBC should have because only its interests were engaged. I reject that submission. It was part of FLG's mandate to respond to the appeal of an order it had sought and there was no impropriety in it having done so.

[45] There shall be no costs of the appeal to RBC.

Released: April 3, 2025 “B.Z.”

“B. Zarnett J.A.”
“I agree. Sossin J.A.”
“I agree. Copeland J.A.”