COURT OF APPEAL FOR ONTARIO

CITATION: Skymark Finance Corporation v. Mahal Venture Capital Inc., 2025 ONCA 141
DATE: 20250226
DOCKET: COA-24-CV-0702

Paciocco, Monahan and Wilson JJ.A.

BETWEEN

Skymark Finance Corporation

Applicant (Appellant)

and

Mahal Venture Capital Inc. and Golden Miles Food Corporation

Respondents (Respondents)

Cliff Prophet and Heather Fisher, for the appellant MNP Ltd., in its capacity as Receiver of 12175622 Canada Inc. and GPM Food Inc.

Chris Burr, for the respondents KSV Restructuring Inc., in its capacity as Receiver of Mahal Venture Capital Inc. and Golden Miles Food Corporation

Geoff Daley, for the respondent City of Brantford

Heard: January 15, 2025

On appeal from the order of Justice Jana Steele of the Superior Court of Justice, dated June 18, 2024.

Monahan J.A.:

OVERVIEW

[1] This appeal raises the issue of who, as between the vendor and the purchaser, is liable for the payment of outstanding municipal taxes in the context

of a sale by a receiver of assets in respect of which an approval and vesting order was granted.

[2] The motion judge found that the purchaser was liable for the outstanding taxes because in her view the taxes were not yet due at the time of the closing of the transaction and therefore were assumed by the purchaser in accordance with the terms of the asset purchase agreement between the parties (the "APA") and the Approval and Vesting Order (the "AVO").

[3] As I explain below, in my view the motion judge erred in her characterization of the outstanding taxes. Although the quantum of the taxes had not yet been determined as of the closing of the transaction, the liability for the taxes arose prior to closing. As such, the liability for the taxes remained with the vendor, in accordance with the relevant provisions of the APA, and were vested out of the purchased assets, in accordance with the AVO. I would therefore allow the appeal.

FACTUAL BACKGROUND

[4] Mahal Venture Capital Inc. and Golden Miles Food Corporation (collectively, the "Debtors") owned property (the "Property") used in connection with the operation of a flour mill in Brantford, Ontario (the "City"). On October 1, 2021, KSV Restructuring Inc. ("KSV") was appointed as receiver of the assets of the Debtors, including the Property, pursuant to a court order.

[5] On or about October 28, 2021, the City informed KSV that the Property was not properly assessed for tax purposes and that the City had submitted a reassessment request to the Municipal Property Assessment Corporation ("MPAC"). The City also informed KSV that omitted tax notices for prior taxation years would be issued after the MPAC reassessment.

[6] On November 15, 2021, KSV filed an assignment in bankruptcy under the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (the "BIA") on behalf of the Debtors and, on November 22, 2021, the court approved a sale process for KSV to sell the Debtors' assets.

[7] In January and February 2022, KSV followed up with the City regarding the status of the MPAC reassessment and was informed that it had been delayed because of restrictions imposed due to the COVID-19 pandemic.

[8] On March 18, 2022, KSV, in its capacity as receiver and trustee in bankruptcy, entered into the APA with 12175622 Canada Ltd. ("121" or the "Purchaser") whereby 121 agreed to purchase substantially all of the Debtors' assets, including the Property.

[9] On April 11, 2022, the court granted the AVO and the transaction closed on May 18, 2022 (the "Closing Date").

[10] In connection with the closing, KSV had obtained tax certificates from the City disclosing that approximately $167,000 was owing in respect of property taxes

levied on the Property. However, those certificates did not include the omit taxes that were anticipated to be levied following the MPAC reassessment of the Property, which had not yet been completed. On May 25, 2022, KSV paid the City the amount reflected on the tax certificates that have been received as of that date.

[11] On November 24, 2022, following the completion of the MPAC reassessment, the City delivered a tax assessment to 121 which included three omitted tax bills totaling $1,091,423 (the "Omit Tax Claim") in respect of the taxation years 2020, 2021 and 2022.

[12] On February 24, 2023, counsel for 121 forwarded the tax bills reflecting the Omit Tax Claim to counsel for KSV and indicated that, because the tax bills included liabilities that arose prior to the Closing Date, such liabilities were the responsibility of the Debtors rather than 121. In addition, 121 appealed the tax reassessment, although that appeal was subsequently withdrawn.

[13] KSV obtained court authorization to reserve $1,500,000 from the sale proceeds pending determination of liability for the Omit Tax Claim.

[14] In January 2024, MNP Ltd. (the "Purchaser's Receiver") was appointed by the court as receiver of the assets of 121 and a related entity.

THE APA AND THE AVO

[15] The key provisions of the APA were those dealing with "Assumed Liabilities" and "Permitted Encumbrances".

[16] Section 2.2 of the APA provided that, notwithstanding any other provision of the APA, the Purchaser will assume only the Assumed Liabilities:

> 2.2 **Assumption of Assumed Liabilities**. At the Closing Time, on and subject to the terms and conditions of this Agreement, the Purchaser shall assume and agree to pay when due and perform and discharge in accordance with their terms, the Assumed Liabilities. Notwithstanding any other provision of this Agreement, the Purchaser shall not assume any Liabilities other than the Assumed Liabilities, except as required under Applicable Law.

[17] "Assumed Liabilities" are defined as including "all Liabilities relating to the Purchased Assets or Related to the Business arising on or after the Closing Date" (emphasis added).

[18] The APA further provided, in section 2.1, that the Purchaser acquired the purchased assets "free and clear of all Encumbrances other than Permitted Encumbrances".

[19] The definition of "Permitted Encumbrances" included the following provision relating to liability for taxes:

> Encumbrances related to Taxes and utilities arising by operation of law (statutory or otherwise) which relate to or secure Liabilities that in each case are not yet due or are not in arrears or, if due or in arrears, the validity of which is being contested. [Emphasis added.]

[20] Thus, if a tax liability was due or in arrears prior to or on the Closing Date, it would not be a Permitted Encumbrance, and would be unenforceable as against the Purchaser.

[21] Turning to the AVO, its key legal effect was to convey by court order absolute title to the Property, free and clear of all claims and encumbrances other than Permitted Encumbrances.[1] The AVO "expunged and discharged" as against the purchased assets all encumbrances other than Permitted Encumbrances, and provided that all such expunged encumbrances "are non-enforceable and non-binding as against the Purchaser." Any claims and encumbrances that previously attached to the Purchased Assets would now attach, instead, to the net proceeds of the sale, with the same priority they had immediately prior to the sale.

THE MOTION JUDGE'S REASONS

[22] The linchpin of the motion judge's analysis was that the Omit Tax Claim did not arise until the relevant tax bills were issued in November 2022, more than six months following the Closing Date, and beyond a 45-day post-closing adjustment period contemplated by the APA (the "Post-Closing Adjustment Period"). The motion judge made this finding on the basis of the wording of the omitted tax bills, which stated that the amount of tax "past due" was $0. The motion judge was therefore of the view that "the liability in respect of the Omit Tax Claims could not have arisen until the Omit Tax Bills were issued on November 25, 2022." This meant that the Omit Tax Claim was an Assumed Liability as well as a Permitted

[1] See, in particular, s. 4 of the AVO.

Encumbrance and was the responsibility of the Purchaser rather than the Debtors' Receiver, KSV.

[23] The motion judge acknowledged that s. 307(3) of the *Municipal Act*, 2001, S.O. 2001, c. 25 (the "*Municipal Act*") provides that "[t]axes imposed for a year shall be deemed to have been imposed and to be due on January 1 of the year unless the bylaw imposing the tax provides otherwise." The Purchaser's Receiver had argued that, even though the tax bills reflecting the Omit Tax Claim were issued in November 2022, the tax liabilities were deemed by virtue of s. 307(3) of the *Municipal Act* to have been "imposed and to be due" on January 1 of the relevant taxation years, namely, 2020, 2021 and 2022, respectively. Therefore, the Purchaser's Receiver asserted that the liability for the Omit Tax Claim arose prior to the Closing Date, with the consequence that it was not an Assumed Liability nor a Permitted Encumbrance, and was expunged and discharged as against the purchased assets and non-enforceable as against the Purchaser in accordance with s. 4 of the AVO.

[24] The motion judge was not persuaded by this argument because "the contracting parties specifically addressed the division of liabilities between them." According to the motion judge, if the relevant tax bills had been issued prior to the expiry of the Post-Closing Adjustment Period, liability for the Omit Tax Claim would have remained with the Debtors. But because the bills were issued after the expiry of the Post-Closing Adjustment Period, they were liabilities assumed by the

Purchaser. The motion judge also pointed out that s. 349 of the *Municipal Act* contemplates that assessed taxes may be recovered from the taxpayer that is originally assessed for them as well as from any subsequent owner of the assessed land, which in this case included the Purchaser.

[25] The Purchaser's Receiver had also relied upon this court's decision in *Credit Union Central of Ontario Limited v. Heritage Property Holdings Inc.*, 2008 ONCA 167, 40 C.B.R. (5th) 184, which involved the sale of a golf course in accordance with the terms of an approval and vesting order. Prior to the closing of the transaction, MPAC had advised the purchaser that it intended to reassess the property and that the reassessment would result in a substantial increase in realty taxes for prior taxation years. The purchaser sought an undertaking that the vendors' receiver would pay "all arrears of taxes" to the date of closing, but that request was denied by the vendors' receiver. Following the closing of the transaction, the parties sought clarification as to which of them was legally responsible for the additional realty taxes that would be owing for the period up to the closing as a result of the MPAC reassessment.

[26] The motion judge in *Heritage Property* had held that any increase in taxes resulting from the reassessment was a "contingent potential tax liability" that was the responsibility of the purchaser because as of the date of closing the additional tax liability had not "crystallized". This court allowed the appeal and set aside the motion judge's order, finding that the increased tax liability was the responsibility

of the vendors' receiver since it was a future claim for realty taxes that existed at the time of closing even though not yet quantified.

[27] The motion judge in the present case distinguished *Heritage Property* on the basis that here, the definition of Permitted Encumbrances specifically referred to taxes "that are not yet due", whereas no such language was included in the relevant contractual documents or the AVO in *Heritage Property*. The motion judge also observed that the language of the vesting order in *Heritage Property* was broader than that employed in the current AVO.

[28] Finally, the motion judge pointed out that the principal of the Purchaser was the same as the principal of the Debtors and thus this individual would have had knowledge of the potential for a tax reassessment of the Property. At the same time, however, the motion judge did not regard this as legally significant since, in her view, the determination of responsibility for the Omit Tax Claim turned on the terms of the relevant contractual documents.

[29] The motion judge concluded that the Omit Tax Claim was not yet "due" at the Closing Date, since the relevant tax bills stated that the amount "past due" was $0. Therefore, the Omit Tax Claim was a Permitted Encumbrance and was the responsibility of the Purchaser's Receiver.

ISSUES ON APPEAL AND STANDARD OF REVIEW

[30] The appellant argues that the motion judge erred in the following respects:

(i) by holding that liability for the Omit Tax Claim only "arose" when the liability was quantified through the issuance of the relevant tax bills, and was therefore the responsibility of the Purchaser as an Assumed Liability under the APA and the AVO;

(ii) by holding that the Omit Tax Claim was not "due" until the issuance of the relevant tax bills, despite s. 307 (3) of the *Municipal Act*, and was therefore not vested out of the purchased assets by the AVO and was enforceable against the Purchaser; and

(iii) by holding that the principal of the Purchaser knew that the Omit Tax Claims existed prior to the Closing Date.

[31] Both parties agree that the first two issues involve extricable questions of law for which the standard of review is correctness.

[32] The parties also agree that the third issue is one of mixed fact and law, for which the proper standard of review is "palpable and overriding error".

[33] I agree with the parties' characterization of the applicable standard of review and proceed on that basis.

ANALYSIS

(1) The motion judge erred in finding that liability for the Omit Tax Claim only arose when the relevant tax bills were issued on November 25, 2022

[34] It is a fundamental principle of insolvency law that a claim may be said to exist or have arisen even though the quantum of the claim has not yet been determined: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at paras. 26-27; Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra,

Bankruptcy and Insolvency Law of Canada, loose-leaf (2025-Rel. 2), 4th ed. (Toronto: Thomson Reuters, 2009), at §6:106. This principle is reflected in the *BIA* itself, which expressly provides that a debt or liability is deemed to be a provable claim if the obligation giving rise to the claim has been incurred, even though the quantum of the claim is unknown as of the date of the bankruptcy.[2] The *BIA* sets out a process for a trustee in bankruptcy to determine whether a "contingent or unliquidated claim" is a provable claim.[3]

[35] This principle was the basis for the court's holding in *Heritage Property* that liability for a tax reassessment existed as of the closing even though the relevant tax bills had not yet been issued and thus the quantum of the liability was at that time unknown. As Moldaver J.A. (as he then was) explained at para. 27:

> Those taxes are properly characterized as a future claim for realty taxes that existed at the time of closing but remained to be quantified. As such, it cannot be said to be "contingent" because liability for the increased taxes to the date of closing had crystallized prior to the date of closing.[4]

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[2] See s. 121(1) of the *BIA*, which provides that provable claims shall be deemed to include "debts and liabilities, present or future, to which the bankrupt is subject on the date on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt is discharged by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt…"

[3] See ss. 121(2) and 135 of the *BIA*.

[4] The motion judge attempted to distinguish *Heritage Property* on the basis that para. 4 of the AVO in this case does not refer to "taxes" which came into existence either before or after any previous order of the court, as the AVO in *Heritage Property* did. I note, however, that the AVO in this case expunged "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". That includes monetary claims by government creditors, including for unpaid taxes: *Grant Thornton Limited et al. v. 1902408 Ontario Ltd*, 2022 ONSC 2011, 99 C.B.R. (6th) 273, at para. 47.

[36] In this case, the dates upon which the liability for the Omit Tax Claim arose are authoritatively determined by s. 307(3) of the *Municipal Act* which, as noted above, provides that taxes are "deemed to have been imposed and to be due" on January 1 of the relevant taxation year, unless the bylaw imposing the tax provides otherwise. No such bylaw has been passed in this case, which means that liability for the Omit Tax Claim is deemed to have arisen on January 1, 2020, 2021 and 2022, respectively.

[37] The motion judge held that s. 307(3) did not apply because the parties had addressed the division of liabilities between them in the APA. This observation is, respectfully, beside the point. The parties were obviously free to allocate responsibility as amongst themselves for liabilities that arose prior to the Closing Date. But the parties could not through their contract override or "contract out" of the "deeming" provision in s. 307(3). Municipal taxes are by statute deemed to be imposed and due on January 1 of the relevant taxation year, regardless of how the parties might choose to allocate responsibility as between themselves for ensuring that the tax is actually paid.

[38] The motion judge emphasized that the omitted tax bills stated that the amount "past due" was $0. But given the deeming provision in s. 307(1), the date on which a municipal tax is due does not depend upon the wording of the relevant tax bills. The tax is due as a matter of law on January 1 of the relevant taxation year, subject only to the municipality having provided otherwise through any bylaw.

[39] The motion judge also relied upon s. 349(1) of the *Municipal Act* as supporting her conclusion that the Omit Tax Claim was the responsibility of the Purchaser. Section 349(1) provides as follows:

> Taxes may be recovered with costs as a debt due to the municipality from the taxpayer originally assessed for them and from any subsequent owner of the assessed land or any part of it.

[40] This provision does not deal with the date upon which a tax is due but, rather, from whom the tax may be collected. In other words, the fact that a tax may be collected not only from the person originally assessed for it but also from a subsequent owner of the land does not speak to when the tax is due. As explained above, that determination is made in accordance with s. 307(3) and not s. 349(1).

[41] In short, the motion judge erred in finding that liability for the Omit Tax Claim arose only when the relevant tax bills were issued on November 25, 2022, rather than on January 1 of the relevant taxation years. Accordingly, the liability arose prior to the Closing Date and was not assumed by the Purchaser, in accordance with s. 2.2 of the APA.

[42] Not only is this result consistent with *Heritage Property*, but it also reflects the significance and purpose of approval and vesting orders in the context of insolvency proceedings. As Pepall J.A. emphasized in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 70 C.B.R. (6th) 181, at para. 73, the purpose of a receivership is to enhance and

facilitate the preservation of a debtor's assets for the benefit of creditors. Approval and vesting orders play a critical role in that context by serving as a "vital legal bridge" that facilitates a receiver giving good and undisputed title to a purchaser. This is the "holy grail" sought by purchasers in insolvency proceedings and facilitates the maximization of proceeds in realization of the debtor's assets: *Third Eye*, at paras. 80-81.

[43] These purposes would be undermined if purchasers who acquire assets pursuant to court-approved vesting orders were to later find themselves subject to claims that arose prior to closing but had not yet been quantified or liquidated. Faced with such uncertainty, a purchaser would discount the purchase price to make provision for the as-yet-unquantified risk: *Grant Thornton*, at para. 51. Indeed, in this case the lender that provided financing for the transaction indicated that it would not have proceeded with the financing if it was aware that the Omit Tax Claim was a continued liability as against the Purchaser and the purchased assets.

[44] I would therefore give effect to this ground of appeal and find that the Omit Tax Claim was not an Assumed Liability under the APA.

(2) The motion judge further erred in finding that the Omit Tax Claim was a Permitted Encumbrance that continued to attach to the Property after the Closing Date

[45] The motion judge determined that the Omit Tax Claim only became "due" when the relevant tax bills were issued. Because that occurred after the expiry of the Post-Closing Adjustment Period, the motion judge concluded that the liability was a Permitted Encumbrance that continued to attach to the purchased assets despite the AVO.[5]

[46] As I have explained above, the liability for the Omit Tax Claim was imposed and was due on January 1 of the relevant taxation year, by virtue of the deeming provision in s. 307(3) of the *Municipal Act*. I will not repeat that analysis here but merely reiterate that, because the Omit Tax Claim became "due" prior to the Closing Date, it was not a Permitted Encumbrance under the APA or the AVO. As such, it was expunged and discharged as against the Property, and the motion judge erred in finding otherwise.

[5] As an aside, the motion judge treated as relevant whether the relevant tax bills were issued prior to the expiry of the Post-Closing Adjustment Period, rather than prior to the Closing Date. The APA defined a Permitted Encumbrance as one that was not yet due as of the Closing Date. According to the motion judge, the Omit Tax Claim only became due when the relevant tax bills were issued. Thus, on the motion judge's own logic, tax bills issued during the Post-Closing Adjustment Period became "due" after the Closing Date and should have been categorized as a Permitted Encumbrance. Yet the motion judge stated that if a tax reassessment occurred during the Post-Closing Adjustment Period the liability would not have been a Permitted Encumbrance and would have remained the responsibility of the Debtors' Receiver..

(3) It is unnecessary to determine whether the motion judge erred in finding that the Purchaser would have known about the MPAC tax reassessment prior to the Closing Date

[47] Although the motion judge indicated that the principal of the Purchaser would have known about the MPAC reassessment, she did not rely upon this finding in concluding that the Purchaser assumed liability for the Omit Tax Claim. Given that I would allow the appeal on other grounds, it is unnecessary to consider whether the motion judge erred in this factual finding. Nor, for the same reason, do I need to consider the Respondents' submission that the fact that the Purchaser appealed the Omit Tax Claim constituted evidence showing that the Purchaser knew about the Claim prior to the Closing Date.

DISPOSITION

[48] The appeal is allowed, and the motion judge's order is set aside.

[49] I would order that KSV, in its capacity as the Debtors' Receiver, is liable for the Omit Tax Claim.

[50] Pursuant to the parties' agreement on the quantum, I order KSV to pay costs in the amount of $25,000 all inclusive.

Released: February 26, 2025 "D.M.P."

"P.J. Monahan J.A."
"I agree. David M. Paciocco J.A."
"I agree. D.A. Wilson J.A."