O'KEEFE & COMPANY

NL COURT OF APPEAL FINDS NO CONFLICT OF INTEREST WHERE ACCOUNTANTS ACT IN DUAL CAPACITY

June 1st, 2022

Wabush Hotel Limited v Business Development Bank of Canada, 2017 NLCA 35

In this case, the Newfoundland & Labrador Court of Appeal considered whether a receiver is conflicted if it previously assisted the debtor in financial restructuring efforts.

Background

The debtors, Wabush Hotel Limited and two related companies, received a large business loan from the Business Development Bank of Canada ("BDC") in July 2014. When it became evident that the debtors were experiencing financial difficulty in 2015, PricewaterhouseCoopers Inc. ("PWC") was retained, at BDC's request, to review their financial position and to assist them in developing a business plan. In relation to this mandate, PWC signed an engagement letter with the debtors on 23 December 2015 (the "Engagement Agreement").

Once PWC obtained access to and reviewed the debtors' financial and business records, it was apparent that their business operations were unsustainable. This finding was reported to BDC. After the debtors then failed to meet their obligations for three consecutive months, BDC sent demands for payment and notices of intention to enforce security in March 2016. The debtors failed to make any payments on the debt in response.

The debtors owed BDC an aggregate amount of $7.2 million, including interest, by the time that BDC applied for an order pursuant to s. 243 of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3 ("BIA"), for the court appointment of a receiver to manage the assets, undertakings, and property of the debtors. The receivership order was granted in June 2016 and PWC was named as the receiver. The form of order granted was based on the model receivership order used in Atlantic Canada.

The debtors appealed the court appointment of the receiver. The issues on appeal were (i) whether PWC ought to have been precluded from acting as receiver due to conflict of interest; and (ii) whether the form of receivership order was appropriate.

Decision

At the appeal hearing, counsel for the debtors characterized the appointment of PWC as receiver as a "clear conflict of interest" and a betrayal, arguing that PWC could not act as their principle's "best friend" one day, then turn around and take over his businesses on behalf of their creditors the next.

The Court of Appeal determined that no conflict of interest arose from PWC's previous review of the debtors' business operation which would disqualify it from subsequently acting as court appointed receiver. In so holding, the Court observed that the debtors' objection was inconsistent with the express terms of the Engagement Agreement, including a provision located directly above the signature line which stated as follows:

The undersigned further understands that PricewaterhouseCoopers Inc. is not precluded from accepting any other mandate in respect of the Company, including but not limited to appointments under statute or by court order, should circumstances so warrant.

The Court accepted BDC's argument that, having known about and consented to the potential possibility that PWC could be appointed receiver by virtue of the above statement, the debtors could not now claim that PWC should be discharged due to conflict of interest.

Further support for this position was found in 620320 Saskatchewan Ltd. v. PricewaterhouseCoopers Inc., 2003 SKQB 175, where the question of whether a receiver was in a conflict due to its previous monitor role with the same debtor had also been raised, notwithstanding a provision like one above having been contained in the engagement letter governing the monitor arrangement. The debtor's objection in that case was likewise dismissed, with the Registrar concluding at para 4 as follows:

I mention the point relating to PWC as both a "monitor" and receiver to show that it was specifically recognized that there would be no conflict if PWC was appointed receiver. In fact, even without the acknowledgement in the engagement letter, it would appear logical and cost effective to ensure that the monitor would be the receiver if that eventuality occurred. This would avoid the potential for duplication and increased fees by the appointment of an entity that had not already become familiar with the debtor companies through the previous work carried out as a monitor.

With respect to the second issue, the Court declined to revisit the form of receivership order used. The Court agreed with BDC's submission that neither a realization plan or a claims plan would have been appropriate, given that the assets of the three related companies were all located in Labrador West and financing for the debtors was provided principally by BDC and Bank of Montreal.

The Court accepted that this situation was distinguishable from the case of Hickman Equipment (1985) Ltd. (Receivership), Re. (2004), 241 N d. & P.E.I.R. 294, a complex bankruptcy proceeding where a claims plan was developed by the receiver in conjunction with the bankruptcy court.

Costs on the appeal were awarded to BDC.

Takeaways

No conflict of interest identified for accounting rm designated to act as receiver after previously being engaged by secured creditor to review and recommend restructuring for indebted hotel companies. Model Order appropriate for use in uncomplicated receivership.

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