

Insolvency & Corporate Restructuring

September 2013

Avant Enterprises Inc. (Re), 2013 B.C.S.C. 993

Avant Enterprises Inc. (Re), 2013 B.C.S.C. 993 should provide receivers with comfort that, in the right circumstances, they can look to a party opposing the taxation of their accounts for security for some of the costs they could incur in defending their fees.

Facts

Ernst & Young Inc. (“**EY**”) was appointed by HSBC Bank (“**HSBC**”) as receiver (the “**Receiver**”) over the assets of Bay City Auto Inc. and Abenante Motor Sports Inc. (collectively, the “**Debtors**”). Pursuant to the Appointment Order (the “**Receivership Order**”), the Receiver was granted a first priority charge over the assets for “...any expenditure or liability...incurred by the Receiver, including the fees of the Receiver and...its legal counsel...” The Receivership Order also required that the Receiver had to pass its accounts on a summary basis.

The Debtors’ assets were ultimately sold to Avant Enterprises Inc. (“**Avant**”), which was a related company to the Debtors. In addition, by Court Order (the “**Assignment Order**”) HSBC assigned to Avant its interest in the indebtedness owing to it by the Debtors, to a combined maximum of \$1,169,863 (the “**Assigned Indebtedness**”). The Assignment Order authorized the Receiver to distribute to Avant from the sale proceeds amounts up to the maximum of the Assigned Indebtedness, less any amounts held back that the Receiver was required to pay for the Receiver’s (and its counsel’s) current and future accounts.

After a lengthy exchange of correspondence between counsel for Avant and the Receiver’s Counsel, the Receiver ultimately forwarded \$80,000 to Avant on the express condition that the money would be paid back to the Receiver if the costs of taxation exceeded the amount retained.

The Receiver then attempted to summarily pass its accounts in accordance with the Receivership Order, which Avant opposed and had the accounts referred for an assessment. A lengthy letter-writing campaign ensued between the parties. Counsel for Avant continued to ask for

information and documentation regarding the accounts, and counsel for the Receiver requested clarification for the basis of Avant’s opposition.

At this point, there was very little money left in the Debtors’ estate - certainly not enough to cover the outstanding amounts owing to the Receiver, and definitely not enough money to cover the costs of an opposed assessment. Accordingly, the Receiver sought an order that Avant pay security for its costs on a full indemnity basis for the assessment and return \$80,000.

The issue was whether Avant was required to pay security for costs.

The Decision

The Court held in favour of the Receiver. Avant was ordered to pay security for the Receiver’s costs on a full indemnity basis. The Court, after reviewing the case law, held that a Receiver is conducting the administration of the estate when passing its accounts and is entitled to its costs on a full indemnity basis.

The Court noted that Avant provided the Receiver no indication that it intended to oppose the Receiver’s accounts prior to being advanced the \$80,000, precluding the Receiver from the opportunity to advance less money to Avant in contemplation of a more expensive taxation procedure. The Court also noted that the Receiver could no longer look to HSBC for an indemnity for its fees as it assigned its interests to Avant.

The Court noted that the facts in this case created a situation where the Receiver was being “... asked to forego its own fees and expenses and be thousands of dollars out of pocket in costs incurred by it to complete the duties imposed upon it by the Court when it was appointed as the Receiver...”

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Takeaway

This case may give Receivers further options in situations where there is very little money in the estate and the Receiver is faced with opposition for its fees. In the right circumstances a Court may grant security for costs from the opposing party.

It is clear in this case that the Receiver's options were

limited, so a security for costs order was appropriate. This relief may not be as effective in a situation where other parties could be called on to indemnify the Receiver for its costs, or if the communications between the parties militate against requiring the opposing party to post security. Each situation is different, and the likelihood of success in obtaining security for costs should be carefully considered by the Receiver's legal counsel before proceeding.

Pallett Valo LLP Insolvency & Corporate Restructuring Practice

We provide legal advice to debtors, secured and unsecured creditors, trustees and receivers in the context of proceedings under the "Bankruptcy & Insolvency Act" (BIA) and the "Companies Creditors Arrangement Act" (CCAA). Over the course of the last several years, we have guided lenders, suppliers and landlords through numerous significant CCAA proceedings.

The lawyers in our Insolvency & Corporate Restructuring Practice regularly appear in Commercial Court in Toronto and are frequently involved in litigation and other proceedings under the BIA and related provincial legislation, for the recovery of assets and setting aside of fraudulent transactions. We have proven our ability to recover assets even in the most difficult of circumstances. On the commercial side, we assist clients and Trustees/Receivers in the restructuring process, as well as the purchase and sale of businesses and assets in transactions involving insolvent entities.

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