CITATION: Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc., 2007 ONCA 856
DATE: 20071207
DOCKET: C47773

COURT OF APPEAL FOR ONTARIO

MOLDAVER, SIMMONS AND GILLESE JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF STINSON HOSPITALITY INC., DOMINION CLUB OF CANADA CORPORATION, THE SUITES AT 1 KING WEST INC. and 2076564 ONTARIO INC.

Appellants

A N D:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENTS ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF STINSON HOSPITALITY INC. AND DOMINION CLUB OF CANADA CORPORATION

BETWEEN:

ED MIRVISH ENTERPRISES LIMITED AND 1 KING WEST INC.

Applicants (Respondents)

and

STINSON HOSPITALITY INC. and DOMINION CLUB OF CANADA CORPORATION and HARRY STINSON

Respondents (Appellants)

Thomas McRae and Arthur O. Jacques for the appellants/respondents Stinson Hospitality Inc. and Dominion Club of Canada Corporation and Harry Stinson

Joseph Latham for the court appointed monitor of Stinson Hospitality Inc. and Dominion Club of Canada Corporation, Ira Smith Trustee & Receiver Inc.

Patricia M. Conway and Jeffrey C. Carhart for the respondent/applicants Ed Mirvish Enterprises Limited and 1 King West Inc.

Mark H. Arnold for Toronto Standard Condominium Corporation No. 1703 and Johan Demeester

Christopher E. Reed for the Trustee

Heard: December 4, 2007

On appeal from the order of Justice Sarah Pepall of the Superior Court of Justice dated September 24, 2007.

ENDORSEMENT

[1] The motion judge concluded that the assignments into bankruptcy of the corporate appellants should be annulled under s. 181 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "Act") because leave to file the assignments had not been obtained as required by paragraph 11 of the motion judge's prior order of August 24, 2007 appointing a receiver. We see no error in the motion judge's conclusion. In particular, we reject the appellants' argument that the term "Proceeding" as it appears in paragraph 11 of the August 24, 2007 order does not apply to an assignment in bankruptcy.

[2] Paragraph 10 of the August 24, 2007 order refers to a "Proceeding" as meaning a "proceeding or enforcement process in any court or tribunal". Section 49 of the Act provides that an assignment is inoperative until it is filed with the official receiver. Section 12(2) of the Act deems the official receiver(s) in each bankruptcy division to be an officer(s) of the court. Significantly, it is apparent from the Certificates of Appointment issued by the official receiver in this case that a court file number was generated when the assignments in bankruptcy were filed. Given these factors, the motion judge did not err in concluding that the assignment in bankruptcy made by each of the corporate appellants constituted a "Proceeding" within the meaning of paragraph 11 of the August 24, 2007 order.

[3] The appellants also argued that since the August 24, 2007 order was made under a provincial statute (s. 106 of the *Courts of Justice Act*, R.S.O. 1990, C. 43) the requirement to obtain leave to file an assignment in bankruptcy as set out in paragraph 11

of the order is of no force and effect because of the paramountcy of federal bankruptcy legislation.

[4] We reject this argument. The leave requirement does no more than permit the court supervising the receivership to control its own process and does not restrict the appellants' ability to make an assignment in bankruptcy where that step is otherwise proper. Accordingly, no issue of paramountcy arises.

[5] The appeal is therefore dismissed with costs to the respondent Mirvish on a partial indemnity scale fixed at $12,500.00 inclusive of disbursements and applicable G.S.T.

[6] Nothing in these reasons should be taken as expressing an opinion on the question of whether the appellant Harry Stinson retains the residual power as the sole director of the appellant corporations to pass a resolution to voluntarily assign the corporate appellants into bankruptcy or on any questions concerning whether the bankruptcy of the corporate appellants would amount to an abuse of process or be improper for other reasons. These issues were not determined by the motion judge and were not the subject of this appeal.

"M. Moldaver J.A."
"Janet Simmons J.A."
"E.E. Gillese J.A."