Case Name:

Canadian Imperial Bank of Commerce v. Isobord Enterprises Inc.

Between
Canadian Imperial Bank of Commerce, plaintiff, and
Isobord Enterprises Inc., defendant

[2002] M.J. No. 172

2002 MBQB 127

164 Man.R. (2d) 315

32 C.B.R. (4th) 185

44 C.E.L.R. (N.S.) 281

113 A.C.W.S. (3d) 383

Docket: CI 00-01-20935

Manitoba Court of Queen's Bench
Winnipeg Centre

Hanssen J.

April 16, 2002.

(22 paras.)

Bankruptcy -- Secured creditors -- Claims by Crown -- Receivers -- Claims -- Priorities -- Crown -- Pollution control -- Enforcement -- Clean-up, cost of, liability for -- Orders -- Scope of powers respecting.

Application by the Bank for an order directing the receiver for Isobord Enterprises to pay out proceeds from the sale of assets. Isobord was subject to a receiving order that required that no action, application or administrative proceedings could be taken against it, the property or the receiver, without the written consent of the receiver or leave of the court. With the court's approval, the receiver sold substantially all of Isobord's assets, and paid out most of the funds, holding back $1.1 million pending resolution of this action. After the receiving order was made, and without consent of the court or the receiver, Manitoba Conservation issued an order requiring Isobord to develop a rodent control program. When Isobord failed to do so, Manitoba Conservation contracted a third party to do it. It now claimed a priority charge for the cost of the rodent control program. The Board argued that Manitoba Conservation failed to take the necessary steps to trigger its claim for priority.

HELD: Application allowed. Manitoba Conservation failed to apply for an order authorizing an environment officer to enter the affected area. There was no emergency situation that required it to act without judicial approval. Because the steps taken did not comply with the Environment Act, it did not acquire a claim against Isobord.

Statutes, Regulations and Rules Cited:

Environment Act, C.C.S.M. c. E125, s. 24, 24(4), 24(5), 24(6), 24(9).

Bankruptcy and Insolvency Act, s. 14.06(7), 14.06(7)(b).

Counsel:

G. Bruce Taylor, for Arthur Andersen Inc., Receiver and Manager of Isobord Enterprises Inc.
Lisa S. Corne and David R.M. Jackson, for Canadian Imperial Bank of Commerce.
Alan Ladyka, for Manitoba Conservation.
Denis Guenette, for Manitoba Finance.
Russ Wookey, for Legault Farms Ltd. and Andreas Boersch.
Donald Douglas, for Miralta Capital II Inc. and MCF Management Inc.
R. Literovich and D. Anderson, for Farm Credit Corporation.

HANSSEN J.:--

SYNOPSIS

1 Canadian Imperial Bank of Commerce ("CIBC") as agent for a syndicate of senior secured lenders of Isobord is seeking an order directing Arthur Andersen Inc., the Receiver and Manager of Isobord ("Receiver"), to pay to CIBC the sum of $1.1 million which remains in the Receiver's possession as the result of a sale of some of Isobord's assets.

2 The main issue is whether the Government of Manitoba ("Manitoba Conversation") has a charge against these funds, which ranks prior to that of the senior secured lenders, for costs it incurred in implementing a rodent control program on the Isobord property.

3 I am granting CIBC the order it is requesting as Manitoba Conservation has failed to satisfy me that it has a prior charge against the funds.

BACKGROUND

4 Pursuant to the terms of a Credit Agreement dated January 17, 1997, the senior secured lenders advanced loans to Isobord totaling approximately $58 million. Isobord defaulted in its obligations under the agreement. As a result, on February 1, 2001 this Court appointed Arthur Anderson Inc. as Receiver and Manager of all of Isobord's assets, property and undertaking. Paragraphs 24 and 25 of the order contained a stay of proceedings in the following terms:

> This Court orders that no one claiming an interest in the property or any part thereof, shall be at liberty to exercise such interests, including, without limitation, any right of possession of any part of the property, except with the consent of the Receiver or leave of this Honourable Court first being obtained on 3 days notice to the Receiver;
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> This Court orders that no action, application or administrative proceedings or administrative order, self-help remedies, or any other acts, proceedings, or private remedies ... shall be taken, commenced, or continued against Isobord, the property, or the Receiver without the specific written consent of the Receiver or leave of this Honourable Court being obtained on 3 days notice to the Receiver.

5 With the approval of this Court, substantially all of Isobord's assets, property and undertaking were sold by the Receiver to Dow Pipeline Ltd. pursuant to an Asset Purchase Agreement dated May 8, 2001. Under a Vesting Order dated June 26, 2001, title to the assets was vested in Dow free and clear of all claims and all claims against the assets were instead vested in the net sale proceeds received by the Receiver.

6 The real property sold by the Receiver to Dow consisted of two separate parcels. Parcel 1 houses the main plant building used in the particleboard manufacturing process formerly carried on by Isobord. A limited number of straw bales are stored on this parcel. Parcel 2 is used as a straw storage yard.

7 Parcel 3, another piece of real property owned by Isobord, was excluded from the sale and continues to be owned by Isobord. It is a straw storage yard on which Isobord stored straw bales.

8 Parcel 1 is separated from Parcel 2 and Parcel 3 by a government road allowance owned by Her Majesty the Queen in Right of the Province of Manitoba. Parcel 2 and Parcel 3 abut each other.

9 On March 21, 2001, Manitoba Conservation, without seeking leave from this Court, issued Order D1-042 to Isobord Enterprises Inc. pursuant to s. 24(4) of The Environment Act, C.C.S.M. c. E125. The Order required Isobord to develop a rodent control program for Parcels 2 and 3, to submit a copy of the plan to the director, and to implement the program specified in the Order. The Order was served on the Receiver on March 22, 2001.

10 By a letter to the Receiver dated June 19, 2001, Manitoba Conservation advised that because Isobord had failed to comply with the requirements of Order D1-042, it had contracted with Poulin's Exterminators to conduct a two-phase rodent control program on Parcels 2 and 3. By another letter dated October 30, 2001, Manitoba Conservation informed the Receiver that as of that date, it had incurred costs totaling $94,818.00 in implementing the rodent control program. It also stated that it anticipated an additional $6,000.00 per month would be incurred until a long-term plan for removal of the straw bales could be implemented.

11 Manitoba Conservation claims a charge in priority to all other claims against the proceeds realized from the sale to Dow by virtue of s. 14.06(7) of the Bankruptcy and Insolvency Act ("BIA") and s. 24 of The Environment Act, C.C.S.M. c. E125 for the costs incurred or to be incurred by it in implementing the rodent control program.

12 The relevant portion of s. 14.06(7) of the BIA provides:

> (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a ... receivership for costs of remedying any environmental condition or environmental damage affecting real property of the debtor is secured by a charge on the real property and on any other real property of the debtor that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
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> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law

13 The relevant portion of s. 24 of The Environment Act provides:

> Emergency action by director
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> 24(4) Where the director has reason to believe that a situation exists that does or is likely to result in unsafe conditions or in irreparable damage to the environment, or upon consultation with a medical officer of health is of the opinion that the existing situation constitutes or is likely to constitute an imminent threat to environmental health, the director shall, in writing, order the person in authority to take such emergency action as the director deems necessary to avert and remedy the situation and to
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> (a) cease or modify the activity specified in the order for such period of time as may be necessary to rectify the problem; or
> (b) clean or repair the area affected; or
> (c) restore the environment to a condition satisfactory to the director; or
> (d) any or all of those things specified in clauses (a), (b) and (c) within such period of time as the director specifies.
>
> Application for court order

> 24(5) Where a person required by an order made under subsection (4) to rectify the situation fails to comply with the terms of the order, the director may, upon notice to the person, apply to a judge or justice for an order authorizing an environment officer to enter the affected area or premises and there take or cause to be taken such steps as may be necessary to resolve the situation; and the judge or justice may grant the order or such other order as the judge or justice deems proper subject to such terms and conditions as the judge or justice deems necessary.
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> Emergency action by director
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> 24(6) Where the director believes that any delay in obtaining an order under subsection (5) will negate or frustrate the purpose of the order, the director may, without obtaining the order of the judge or justice and with no further notice to the owner or lessee of the area or premises, enter the premises or cause entry to be made in the premises and there take or cause to be taken such steps that may be necessary to prevent or halt the damages; but the director shall not take or cause to be taken any further steps except under the authority of an order of a judge or justice obtained under subsection (5).
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> .....
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> Failure to comply with order an offence
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> 24(9) Where any action is taken or caused to be taken, by the director, or a person acting on the instructions of the director in accordance with subsections (5) or (6), the costs incurred by the government are a debt due to the government by the person to whom the order was issued, and are recoverable by the government in a court of competent jurisdiction.

14 CIBC takes the position that Manitoba Conservation never acquired a valid claim against Isobord under s. 24(9) of The Environment Act because:

> (a) it failed to take the necessary steps under ss. 24(5) and (6) of The Environment Act to trigger such a claim; and
> (b) Order D1-042 was a nullity as it was issued in contravention of the stay of proceedings imposed by the February 1, 2001 court order.

15 In the alternative, it takes the position that any claim by Manitoba Conservation would be limited to costs incurred prior to the completion of the sale. It also maintains that any charge against the real property under s. 14.06(7) of the BIA would not affect Parcel 1 as it is not contiguous to the land affected by Order D1-042.

16 On November 2, 2001 this Court made an order authorizing the Receiver to distribute a portion of the proceeds from the sale to Dow but it directed the Receiver to retain the sum of $1,100,000.00 pending the determination of the validity and priority of Manitoba Conservation's claim.

ANALYSIS

17 If Manitoba Conservation has a valid claim against the sale proceeds by virtue of s. 24(9) of The Environment Act, that claim would rank above the claim of the secured lenders by virtue of s. 14.06(7)(b) of the BIA. However, it has failed to satisfy me it has such a claim.

18 Pursuant to s. 24(9) of The Environment Act, costs incurred by the Government of Manitoba for any action taken or caused to be taken by the director or a person acting on instructions of the director in accordance with ss. 24(5) or (6) of the Act become a debt due to the Government. However, the steps taken by Manitoba Conservation following Isobord's non-compliance with Order D1-042 were not in accordance with the requirements of ss. 24(5) and (6).

19 Subsequent to Isobord's failure to comply with the order, Manitoba Conservation did not apply for an order authorizing an environment officer to enter the affected area and take such steps as might be necessary to resolve the situation as it was required to do by s. 24(5). It simply went ahead and contracted directly with Poulin Exterminators on April 18, 2001 to develop and implement a rodent control program. There was no emergency situation which required it to act without first obtaining judicial approval that might have justified its actions under s. 24(6) of The Environment Act.

20 Given the absence of judicial approval, the steps taken by Manitoba Conservation were not in accordance with ss. 24(5) and (6) and, as a result, it did not acquire a claim against Isobord under s. 24(9) of The Environment Act.

CONCLUSION

21 As there is no basis for any claim by Manitoba Conservation against the proceeds of the sale to Dow, it is unnecessary for me to deal with any of the other issues raised by CIBC.

22 Accordingly, there will be an order directing the Receiver to pay to CIBC the sum of $1.1 million which remains in the Receiver's possession as a result of the sale to Dow.

HANSSEN J.

cp/e/qlemo