2011 ONSC 638
Ontario Superior Court of Justice [Commercial List]

Royal Bank v. Walker Hall Winery Ltd.

2011 CarswellOnt 453, 2011 ONSC 638, 197 A.C.W.S. (3d) 330

Application Under Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, as Amended, Section 101 of the Courts of Justice Act, R.S.O. 1990 c. C.43, as Amended and Rule 14.05(d)(g) and (h) of the Rules of Civil Procedure Royal Bank of Canada, Applicant and Walker Hall Winery Ltd., Walker Hall Holdings Ltd., and Lukezic Group Ltd., Respondents

Morawetz J.

Heard: December 24, 2010
Judgment: January 27, 2011
Docket: 09-8457-00CL

Counsel: J. Ross Macfarlane, for Applicant, Royal Bank of Canada
J. Lukezic, for himself and (Agent), for Walker Hall et al. and as Shareholder of Walker Hall
R. van Kessel, for BDO Canada Limited, Receiver

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Table of Authorities

Cases considered by *Morawetz J.*:

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

***Morawetz J.*:**

1 The Receiver moved for an order:

(a) approving its activities from May 1, 2010 - November 30, 2010;

(b) approving an agreement to sell Walker Hall's ("Walker Hall" or the "Debtor") wine inventory, barrels and glasses;

(c) approving the Receiver's fees and disbursements, including those of its legal counsel to November 30, 2010;

(d) sealing the second wine appraisal, offers to purchase assets and the agreement to sell the wine inventory, barrels and glasses; and

(e) for such further direction as may be appropriate.

2 In support of the requested relief, the Receiver filed its Second Report which provides complete details of the Receiver's activities.

3 Counsel to the Receiver also submitted a detailed factum. Paragraphs 3 - 42 summarized the facts, followed by a statement of issues and law at 43 - 47.

4 Counsel to RBC supported the submissions of the Receiver and also advised that RBC consents to the relief sought and that RBC is trying to mitigate its losses.

5 Mr. Lukezic, representing the Debtor and himself, as shareholder, opposed the relief sought by the Receiver. Mr. Lukezic filed a Motion Record, which was somewhat unusual in its form.

6 The first part of Mr. Lukezic's Motion Record was entitled Responding Motion. It commenced with a factual summary which related, in part, to events prior to the receivership and in other parts, to matters where Mr. Lukezic has commenced separate proceedings. The narrative then comments on the wine inventory. The narrative also states that there is a pending appeal of my decision of July 30, 2010 which denied Mr. Lukezic's motion to set aside or vary the receivership order.

7 The Responding Motion concludes with the statement of requested relief that Mr. Lukezic seeks an order, that a stay be put into place regarding any and all actions or proceedings until the appellate court hears the matter. The narrative in the Respondent Motion was not sworn.

8 The Responding Motion references a number of exhibits. Exhibits "A" to "E" were not part of any affidavit.

9 Exhibit "A" is correspondence from Mr. Lukezic to Mr. van Kessel. Exhibit "B" is a Notice of Motion to consolidate Action CV-10-8837-00CL (James Lukezic and Walker Hall Winery Ltd., plaintiff and Genova *et al*, defendants, with Action CV-10-8836-00CL (James Lukezic and Walker Hall, plaintiff and RBC, as defendant). Exhibit "C" is a Certificate of Perfection relating to the appeal of my July 30, 2010 decision. Exhibit "D" is a document entitled "Factum". The factum, however, appears to be directed at the conduct of RBC that Mr. Lukezic alleges amounts to a conspiracy and breach of duty on behalf of RBC. Exhibit "E" is an Inventory Breakdown Evaluation produced by Mr. Buzinel who describes himself as an enologist of Walker Hall.

10 Exhibit "F" is an affidavit of Mr. Lukezic which recites some pre-receivership history and, as well, challenges the appraisal of the wine obtained by the Receiver. The affidavit does not reference Mr. Buzinel's report.

11 This motion involves the Receiver's request to approve the items set out in [1]. It is noted that Mr. Lukezic brought a motion to set aside or vary the receivership order, which motion has been dismissed and is presently under appeal. At the present time, the Debtor is in receivership and, in my view, the Receiver is authorized by its mandate to bring this motion.

12 Mr. Lukezic takes issue with the appraisals of the wine provided to the Receiver. He states that the appraisal based on input from Mr. Jackson cannot be relied upon as Mr. Jackson was known to having a relationship with a competitor of Mr. Lukezic. This statement is contained in the Responding Motion. It is not sworn. There is no mention of Mr. Jackson in the affidavit of Mr. Lukezic, sworn December 21, 2010. In his affidavit, Mr. Lukezic challenges the second appraisal citing a possible conflict and that the appraisal was provided by a low-quality wine producer.

13 Mr. Lukezic brought a motion to obtain copies of all appraisals obtained by the Receiver. This motion was dismissed by Lederman J. on October 6, 2010. Mr. Lukezic did not appeal this decision.

14 Mr. Lukezic was provided the opportunity to obtain a third appraisal — provided that he paid for it. Mr. Lukezic did not obtain a third appraisal. As noted, his Responding Motion references the report of Mr. Buzinel. This document is not properly in evidence as it does not form part of any affidavit. In any event, Mr. Buzinel, being described as the enologist of Walker Hall cannot said to be independent. Even if the document was properly in evidence, I would give it little or no weight.

15 Thus, the only appraisals properly in evidence are those obtained by the Receiver. Mr. Lukezic takes issue with the appraisals, but the only reference in his affidavit is to the effect that the second appraisal was obtained from Degasperis, a competitor of the Debtor and a low quality producer of wine. These allegations were not supported by any other evidence and, in any event, do not address the issue of the value of the wine.

16 The sales and marketing process was approved by order dated May 12, 2010. The marketing efforts of the Receiver are summarized in the Receiver's factum at 37 - 39.

17 I accept the summary of facts provided by the Receiver as well as the statements of law. I do not accept the submissions of Mr. Lukezic. His submissions are not supported by the evidence. I have not been persuaded that the Receiver has acted improperly.

18 In my view, the appraisals obtained by the Receiver support the submissions of the Receiver that the proposed sale is fair and reasonable in the circumstances.

19 I am satisfied that the Receiver has complied with the *Soundair* principles (*Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 (Ont. C.A.)) in all respects. I am also satisfied that the proposed sale of the wine inventory, barrels and glasses is fair and reasonable in the circumstances. In arriving at this conclusion, I have also taken into account that RBC has consented to the sale and is taking steps to mitigate its losses. RBC is the primary secured creditor and has the significant economic interest in these proceedings.

20 The proposed sale is approved.

21 The Receiver has also requested that the appraisals, the offers and the Sale Agreement be sealed, submitting that the documents contain sensitive commercial information, the disclosure of which could pose a serious threat to the commercial interests of the stakeholders, and further that, in view of Mr. Lukezic's ongoing activities, it would be detrimental to the sales process to divulge the information to Mr. Lukezic.

22 I have been persuaded by these submissions. I have also considered the principles forth in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) and, in my view, it is both necessary and appropriate to seal the appraisals, the offers and the Sale Agreement, pending the closing of the transaction or further order.

23 I have reviewed the requested fees and disbursements of the Receiver and its counsel. Although the requested fees are significant and Mr. Lukezic challenges all aspects of the receivership, I consider them to be reasonable in the circumstances. These fees have to be considered in the context of these proceedings which have involved a number of court attendances that have been required to respond to litigation initiated by Mr. Lukezic.

24 The fees and disbursements of the Receiver and its counsel are approved.

25 Finally, the Receiver seeks approval of its activities from May 1, 2010 to November 30, 2010. No adverse comment to the activities of the Receiver has been reported other than the comments of Mr. Lukezic. I have not been persuaded by the submissions of Mr. Lukezic to the effect that the Receiver has not acted properly in the discharge of its mandate.

26 I am satisfied that the Receiver has conducted itself appropriately and, accordingly, the activities of the Receiver for the period May 1, 2010 to November 30, 2010 are approved.

27 Finally, in my view, Mr. Lukezic has failed to establish any basis for a stay regarding any and all actions or proceedings until the appellate court hears the matter. The motion brought by Mr. Lukezic on behalf of the respondents is dismissed.

28 Counsel to the Receiver requested costs against Mr. Lukezic. The relief sought by the Receiver required court approval regardless of whether it was opposed by Mr. Lukezic. In the circumstances, I have not been persuaded that costs are appropriate.

29 An order shall issue to give effect to the foregoing.

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