Citation: Wolfe et al v Taylor et al, 2021 MBCA 83 | Date: 20210929
Docket: AI21-30-09586

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner
Madam Justice Janice L. leMaistre

BETWEEN:

	F. J. Trippier *and*
LINCOLN WOLFE and	***I. Vakurova***
5606269 MANITOBA LTD.	*for the Appellants*
	R. A. McFadyen
(Applicants) Respondents	*for the Respondents*
	T. W. Turner
- and -	*for Pitblado LLP, a*
	judgment creditor of
	Taylor Bros. Farm Ltd. and
DUANNE TAYLOR and	*Edwin Potato Growers Ltd.*
5608067 MANITOBA LTD.	
	J. J. Burnell *and*
	A. Sandhu
(Respondents) Appellants	*for Deloitte Restructuring*
	Inc., the Court-Appointed
	Liquidator for Taylor Bros.
- and -	*Farm Ltd. and Edwin*
	Potato Growers Ltd.
TAYLOR BROS. FARM LTD. and	*Appeal heard and*
EDWIN POTATO GROWERS LTD.	*Decision pronounced:*
	September 15, 2021
(Respondents)	*Written reasons:*
	September 29, 2021

On appeal from 2021 MBQB 16

BEARD JA (for the Court):

I. THE ISSUE

[1] At the conclusion of the hearing of this appeal, this Court indicated that the appeal would be dismissed with costs, with reasons to follow. These are our reasons.

[2] This appeal is one step in a lengthy legal proceeding under *The Corporations Act*, CCSM c C225 (the *Act*), to liquidate the business and assets of a large farming operation near Portage la Prairie, Manitoba. The farming operation was carried on by the respondent Duanne Taylor and the applicant Lincoln Wolfe through a complex organization of corporations. Mr. Taylor, through 5608067 Manitoba Ltd., and Mr. Wolfe, through 5606269 Manitoba Ltd., were the equal owners of Edwin Potato Growers Ltd. (EPG) and Taylor Bros. Farm Ltd. (TBF). Mr. Taylor was also employed as the manager of TBF pursuant to a 2008 employment contract.

[3] This appeal addresses a discrete issue in the liquidation process related to the validity and amount of intercompany debt between EPG and TBF (the intercompany debt), as found by the liquidator, Deloitte Restructuring Inc. (the liquidator). It arises out of a decision of this Court that resolved related issues and returned this issue to the liquidation judge for determination (see 2020 MBCA 44 (*MBCA 2020*)). Mr. Taylor has appealed that decision, alleging that the liquidation judge erred in approving the intercompany debt.

[4] In addition to the parties, the liquidator and a judgment creditor, Pitblado LLP, have filed facta and participated in oral argument. In this

appeal, they are taking the same position as Mr. Wolfe, so they will be referred together as the applicants, where appropriate.

[5] There were two issues before the liquidation judge, both of which are before this Court on appeal: whether there should be a full hearing with an in-depth audit of the finances of TBF and EPG (the process issue); and whether the liquidator erred in allowing the intercompany debt claim (the intercompany debt issue).

II. BACKGROUND

[6] This proceeding has considerable judicial history, including a contested arbitration under the TBF unanimous shareholders agreement and several earlier decisions of this Court. Most of that history is not directly relevant, so it is not necessary to review it in detail. A more detailed review of the facts that are relevant to this appeal is set out in *MBCA 2020* at paras 1-26, 54-56.

[7] Briefly, Mr. Taylor and Mr. Wolfe began farming together in early 2008, operating through two jointly owned corporations, EPG and TBF. Most of the land they owned was held by EPG, while all of the active farming operations were carried on through TBF. This Court noted that the two corporations were "conducting business together, with EPG effectively operating as part of TBF [in an] arrangement [that] is typical of the manner by which many enterprises structure and conduct their affairs" (*MBCA 2020* at para 54).

[8] By March 2015, Mr. Taylor and Mr. Wolfe were no longer able to agree on the operation of TBF and EPG, so Mr. Wolfe commenced liquidation

proceedings under the *Act*. This led to the granting of a liquidation order and the appointment of the liquidator on April 28, 2017.

[9] As part of its duty to settle claims by or against EPG, the liquidator admitted a claim by TBF against EPG for $916,366 (the intercompany debt). This claim first appeared in the liquidator's proposed liquidation schedules dated August 8, 2018, and sent on August 9, 2018. Mr. Taylor disputed the payment of this claim, arguing that TBF owed money to EPG for other claims in a total amount that would offset the intercompany debt (the offsetting debts).

[10] Mr. Wolfe took the position that the two corporations should be treated as one for the purpose of allocating assets to the payment of debts. The liquidation judge accepted this position, making the issues related to the intercompany debt moot. This Court found that EPG and TBF were operated as separate entities and declined to treat them as one (see *MBCA 2020* at paras 55-56). The result was that the issues related to the intercompany debt were no longer moot, and they were referred back to the liquidation judge with the following instructions (at paras 73-74):

> We are of the view that the liquidation judge has meaningful supervisory jurisdiction to review a determination made by the liquidator during the claims process. That jurisdiction has not yet been exercised in connection with the intercompany debt. Therefore, the matter should be remitted to the liquidation judge for that purpose.
>
> While it will be the liquidation judge's decision as to how to conduct that review, given the extensive litigation which has already taken place over these issues and the need to respect the proportionality principle, a summary proceeding in keeping with the liquidation process would appear to be the desired approach. A quick resolution also takes into consideration the fact that no

> further information substantiating their position has been provided by [Mr. Taylor/5608067 Manitoba Ltd.] either by affidavit or other form notwithstanding a promise to do so in the August 24, 2018 letter.

[11] Following the filing of further affidavits, a responding report by the liquidator, legal briefs and oral argument, the liquidation judge found that there was an intercompany debt owing by EPG to TBF in the amount of $916,366 (see para 19). It is that finding that is the subject of this appeal.

III. THE LIQUIDATION PROCESS

[12] The liquidation process under the *Act* is only available to liquidate corporations that are not insolvent. For this reason, once the liquidator determined that TBF was insolvent, it did not continue with the liquidation of its assets.

[13] As noted by this Court in *MBCA 2020*, a liquidation judge has "supervisory jurisdiction to review a determination made by the liquidator during the claims process" (at para 73). That jurisdiction is found in both the *Act* (see sections 210, 214, 216) and the terms of the liquidation order.

[14] Under the liquidation order, the liquidator was "expressly empowered and authorized to do any of the following where the [l]iquidator may in <u>its sole discretion</u> consider it necessary or desirable" (emphasis added). This includes, among other things, to settle, extend or compromise any indebtedness owing to TBF and EPG and, also, to develop a plan for the liquidation of TBF and EPG, the satisfaction of their liabilities and the

payment of any surplus. That plan required either the approval of the parties or the Court and, upon approval, the liquidator would implement the plan.

[15] Neither the *Act* nor the liquidation order sets out a standard of review for the review by a court of decisions of a liquidator.

IV. ANALYSIS

Onus of Proof and Standard of Review

[16] As Mr. Taylor is challenging the liquidator's decision to allow TBF's intercompany debt claim, he has the onus of proof. This is consistent with the jurisprudence in many similar situations, and was described in *Comfort Capital Inc v Yeretsian*, 2020 ONCA 846, leave to appeal to SCC refused, 39671 (29 September 2021), as "[o]n the review, the onus shifts to the party disputing that recommendation to show sufficient reason why it should not be followed" (at para 17). (See, also, *Coast Capital Savings Credit Union v The Symphony Development Corporation*, 2011 BCSC 333 at para 20; *DBDC Spadina Ltd et al v Norma Walton et al*, 2015 ONSC 5608 at para 2; *Ontario Securities Commission v Paramount Equity Financial Corporation et al*, 2018 ONSC 5327 at para 35; *Faurschou v Faurschou Farms Ltd*, 2021 MBQB 106 at para 16.)

[17] The process issue was not before the liquidator; it arose in relation to the proceeding before the liquidation judge. The standard of review applicable on an appeal of the liquidation judge's decision was set out in *MBCA 2020* at paras 28-30. Briefly, the liquidation judge's orders are, for the most part, discretionary and entitled to significant deference on appeal. Unless the liquidation judge has misdirected himself on the law or made a

palpable and overriding error in fact or fact and law, appellate interference is justified only if the order is so wrong as to amount to an injustice.

[18] The validity of the intercompany debt was determined by the liquidator, whose decision was being reviewed by the liquidation judge. As noted earlier, neither the *Act* nor the liquidation order sets out the standard of review to be applied. There is jurisprudence holding that the review is not necessarily a *de novo* hearing, and that there should be deference shown to the decision of a receiver or liquidator. As was stated in *Coast Capital* (at paras 20, 27):

> . . . [T]he Court's review of the receiver's determinations must be conducted on a principled basis; the review must not trample upon the integrity of the claims process. The review or appeal process should not detract from the requirement that parties who choose to engage in the claims process in the first instance must take it seriously. . . .
>
> . . . The starting point is that deference must be afforded to the receiver. . . .

(See also *DBDC Spadina* at paras 1-3; and *Ontario Securities Commission* at paras 34-35.)

[19] In some cases, courts have applied a deferential standard of review when reviewing a decision by a receiver or other similar delegate to accept or reject a claim against a corporation. For example, in *DBDC Spadina*, the judge found that "[o]n an appeal from a disallowance of a claim, the court should only intervene in the case of an error of law or a palpable and overriding error of fact" (at para 3). (See also *Ontario Securities Commission* at para 35; and *Comfort Capital* at paras 17-18.) Finally, we note that the

reasoning in this line of cases does not take into account the standard of review principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and what, if any, impact they would have on the review of the liquidator's decision.

[20] While the liquidation judge in this case considered the decision of the liquidator, he did not address the issues of deference and standard of review; however, it does not appear that counsel raised those issues with him and they were not argued before us. As we have concluded that the outcome would be the same by any standard, it is not necessary to determine the correct standard.

The Liquidation Judge's Decision

[21] The liquidation judge found that the liquidator based its assessment of the intercompany debt on records of the corporations that Mr. Taylor controlled, as well as on additional evidence that included financial statements provided by independent accountants, MNP LLP (see para 16). He noted and accepted the admonition of this Court regarding the need for a quick resolution (see paras 6, 17). He then stated that "[i]f there are relevant documents and other substantive evidence available to [Mr. Taylor and 5608067 Manitoba Ltd.] that would cast doubt on the financial statements prepared by the third-party firm of accountants it hired, the time for producing them is long past" (at para 18).

[22] The liquidation judge concluded by finding that, based on the parties' thorough review of the documents and evidence at the hearing, along with the liquidator's finding that there was an intercompany debt owing, the

intercompany debt claim should be accepted (see para 19). Thus, he rejected Mr. Taylor's process issue argument that there should be a further audit of the corporate records and full pre-trial discovery to determine the validity and amount of the intercompany debt (see paras 13-14).

The Parties' Positions

[23] Mr. Taylor points out that he has provided two affidavits disputing the accuracy and legitimacy of the intercompany debt that were unchallenged either by cross-examination or by affidavits in reply. His position is that the liquidation judge erred by (1) failing to consider his unchallenged evidence; (2) failing to appreciate that there will be no separate claims process to determine whether TBF owes money to EPG because TBF is insolvent; (3) assuming that the MNP LLP financial statements were accurate; and (4) failing to consider his arguments that TBF owed EPG on account of rent and equipment sales.

[24] At the appeal hearing, Mr. Taylor focussed his argument on two issues. His primary argument was that the records and evidence do not support the intercompany debt finding, due to what he says is offsetting rent owing by TBF to EPG. He pointed to the fact that, although the land on which TBF was farming included land owned by EPG, there is no recording of rent revenue to EPG for any year between 2010 and 2018, other than in 2013, when the EPG financial statements record the sum of $200,000 as rental revenue. He argued that rent for the remaining years, if owing, would more than offset the intercompany debt found owing by EPG.

[25] Second, he argued that the summary process did not provide sufficient opportunity to adequately review the intercompany debt claim and, in particular, the rent, and that a full audit was required. In the end, however, his position was that this Court should accept his evidence that there is no intercompany debt owing and grant his appeal. He argued that, because the applicants did not challenge his affidavit to address the unrecorded rent or file any evidence in reply, they should not be granted a further procedure to do so now.

[26] The applicants argue that there was no requirement for them to file affidavits in reply or to cross-examine Mr. Taylor because the evidence already filed was sufficient to refute his position regarding offsetting debts. They point to evidence that TBF had already received credit for some of the debts that Mr. Taylor says remain owing. Further, they argue that, while the affidavits provided by Mr. Taylor establish that he was disputing the intercompany debt, they do not provide any evidence to support his claims.

[27] The applicants' position is that Mr. Taylor has failed to provide any persuasive basis upon which to impugn the liquidator's finding, as adopted by the liquidation judge, of the validity or amount of the intercompany debt. They argue that a detailed accounting would prevent a fair and just resolution of the claim, and they state that the appeal should be dismissed.

Analysis

Intercompany Debt Issue

[28] We will first address the intercompany debt issue, which raises questions of fact. The liquidator was required to determine whether the

evidence supported a finding that the intercompany debt, as set out in the financial statements, was owing.

[29] The liquidator first referenced the intercompany debt claim in the proposed distribution schedules dated August 8, 2018. Mr. Taylor immediately objected to that claim, which his counsel confirmed by email dated August 17, 2018, and by letter dated August 24, 2018. Mr. Taylor did not deny that the debt appeared on the financial statements for both companies. Rather, in the letter, his counsel stated that a "thorough accounting" was needed to review a number of claims that TBF had against EPG (i.e., the offsetting debts) and that "my client will provide information relevant to the amounts owing to EPG by TBF." The liquidator replied by filing a supplemental report dated August 29, 2018, attaching financial statements for both TBF and EPG showing the intercompany debt as owing.

[30] Mr. Taylor provided two affidavits to address this issue, one sworn on August 30, 2018, and a second sworn on September 21, 2020. While he repeated the same offsetting debt claims as in the August 24, 2018 letter, he did not provide any further significant information or documentation substantiating those claims, contrary to his promise in the letter.

[31] As Mr. Taylor focussed on the rent claim in his oral argument, we will address that first. Mr. Taylor did not point to any documents, records or other evidence that supported his claim that rent was payable by TBF for any of the years between 2010 and 2018, other than the payment received by EPG in 2013. The applicants pointed to evidence confirming an arrangement to rent the land to other corporations in 2015 and 2016, so in those years there was no rent payable by TBF, and to evidence that TBF was not involved in

active farming after that time. Thus, the only years that are at issue are 2010-2012 and 2014.

[32] The applicants argue that the EPG financial statements, which show no rent revenue in 2010-2012 or 2014, should be accepted. Although unaudited, they were prepared by an independent accounting firm and were never questioned by Mr. Taylor at any time before August 9, 2018, although he had earlier questioned the shareholder accounts in those statements. The applicants point out that, not only are the EPG financial statements consistent with those of TBF regarding the amount of the intercompany debt in each year, but also that the debt is consistent with TBF's general ledger, which was provided by Mr. Taylor.

[33] Further, at the oral hearing, Mr. Taylor agreed that he could not say that there were records regarding rent in years other than 2013. He said that there was no lease, he acknowledged that he had not seen any rent documents and he doubted that they exist.

[34] It is noteworthy that Mr. Taylor did not say that there was an agreement or arrangement for TBF to pay rent in any of the years at issue. As one of two principals in the farming operation, he would have had to agree to a rent arrangement, or at least have had knowledge of it, but he gave no evidence—either as a shareholder, director, officer or the manager of TBF—that there had been any such agreements or arrangements in any of the years that he now questions. Further, he did not provide any evidence from the accountants, MNP LLP, on this issue, or indicate that he had made any inquiries of them, and he did not point to any other documents or witnesses who could speak to the rent issue.

[35] This lack of evidence of any rental arrangement is particularly problematic given that TBF and EPG had structured their affairs to operate these businesses together. This was demonstrated early on, when, according to Mr. Taylor, they changed the shareholdings from 70/30 to 50/50 to take advantage of a government program that benefitted new farms. This raises the question of whether there were business reasons to explain why no rent was paid in the years at issue.

[36] As Mr. Taylor is disputing the liquidator's finding regarding the intercompany debt, it was incumbent upon him to point to some evidence to support his position. He has not done that.

[37] The liquidation judge found that "on the basis of the material filed before [him] for the purposes of [the] hearing and after considering the arguments presented by counsel, [he] would accept the intercompany debt claim as filed" (at para 19). While he came to the same conclusion as did the liquidator, it appears that he did so by undertaking his own analysis of the evidence, which would equate to a review based on the standard of correctness. This is the highest standard of review that affords no deference to the decision under review. Thus, even if a lower standard that afforded more deference should have been applied, his finding would clearly meet that standard. For this reason, it is not necessary to determine the applicable standard of review.

[38] We are of the view, based on the available documents and evidence, and given that Mr. Taylor pointed to no evidence in support of his allegation of offsetting debts, that neither the liquidator nor the liquidation judge made

any error in finding that the intercompany debt was outstanding or in including that debt for payment in the distribution.

The Process Issue

[39] The liquidation judge was also required to determine the process issue. Although this Court in *MBCA 2020* stated that "a summary proceeding in keeping with the liquidation process would appear to be the desired approach" (at para 74), the liquidation judge offered the parties the opportunity to file further affidavits, to submit written briefs, and to make oral arguments.

[40] In making his decision regarding process, the liquidation judge had to weigh the cogency of the evidence and the likelihood that a more protracted process would produce a different result against the additional expense and delay that would result from that process. In our view, he made no errors of law or palpable and overriding errors of fact or mixed fact and law in coming to the conclusion that a full hearing, as requested by Mr. Taylor, was not warranted in the circumstances of this case.

[41] At the end of the day, the determination of the procedure was a discretionary decision. Taking into account the need for proportionality and finality, that decision does not meet the standard of being "so wrong as to amount to an injustice" (at para 17 herein).

V. DECISION AND COSTS

[42] For these reasons, we dismissed the appeal at the hearing with costs to the applicants.

[43] The applicants asked that, to avoid another appearance, we fix costs, rather than ordering costs under the tariff. We directed the parties to make written submissions on costs, which we have now received. Based on those submissions, we are ordering that costs are payable by the respondents as follows:

- $6,750 to Lincoln Wolfe and 5606269 Manitoba Ltd., as set out in their counsel's letter dated September 15, 2021;

- $6,828.08 to the liquidator, as set out in its counsel's letter dated September 21, 2021; and

- $1,000 to Pitblado LLP.

Beard JA

Pfuetzner JA

leMaistre JA