IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership,* 2024 BCSC 1722

Date: 20240823
Docket: H230802
Registry: Vancouver

Between:

Bank of Montreal

Petitioner

And

Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd., Harlow Holdings Ltd., 1104227 B.C. Ltd., Cloudbreak Holdings Ltd., CM (Canada) Asset Management Co. Ltd., Forseed Haro Holdings Ltd., 1115830 B.C. Ltd., Terrapoint Developments Ltd., Kang Yu Zou, Wei Dong, Wei Zou, Xia Yu and Treasure Bay HK Limited

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	K.M. Jackson L.C. Hiebert M. Gill
Counsel for the Respondent Forseed Haro Holdings Ltd.:	C. Dennis, K.C. L.E. Dewar
Counsel for the Respondent Terrapoint Developments Ltd.:	C.D. Brousson
Counsel for the Respondent Treasure Bay HK Limited:	M.J. Harmer
Counsel for the Receiver, Deloitte Restructuring Inc.:	C. Hildebrand P. Rubin

Counsel for the Proposed Purchaser, 1045 Haro Street Limited Partnership:	L. Williams A. Bowron
Place and Date of Hearing:	Vancouver, B.C. August 23, 2024
Place and Date of Judgment:	Vancouver, B.C. August 23, 2024

Introduction

[1] This is a receivership proceeding.

[2] In December 2023, the petitioner, Bank of Montreal ("BMO"), applied to appoint a receiver of the first three respondents, Haro-Thurlow Street Project Limited Partnership, Haro and Thurlow GP Ltd. and Harlow Holdings Ltd. (collectively, the "Debtors"). The Debtors' owned land and buildings in the heart of downtown Vancouver, which they had acquired years earlier in the hopes of completing a condominium development. Unfortunately, by late 2023, the Debtors had not progressed in that respect beyond some preliminary planning of a high rise development.

[3] The ownership of the Debtors is complex and relates to various of the relief sought at this hearing. The ownership interests are within a limited partnership, including a general partner, a nominee and three limited partners (110, Terrapoint and Forseed, as defined below). This ownership structure is summarized in *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 [*Reasons*], as follows:

> [5] The respondent, Haro-Thurlow Street Project Limited Partnership ("HTLP"), is the beneficial owner of the development property in Vancouver (the "Property"). The respondent, Harlow Holdings Ltd. ("Harlow Holdings"), is the legal owner of the Property. The respondent, Haro and Thurlow GP Ltd. ("HTGP"), is the general partner of HTLP. I will refer to all of these respondents collectively as the "Borrowers".
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> [6] HTLP is beneficially owned by its limited partners, the respondents, 11044227 B.C. Ltd. ("110"), as to 45%; Forseed Haro Holdings Ltd. ("Forseed"), as to 45%; and Terrapoint Developments Ltd. ("Terrapoint"), as to 10%. 110, Forseed and Terrapoint are collectively called the "Partners".
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> [7] 110 is beneficially owned by the respondent, 1115830 B.C. Ltd. ("111"), which is, in turn, beneficially owned by the respondent Kang Yu Canning Zou ("Mr. Zou"). Mr. Zou is a director of HTGP, Harlow Holdings, 110 and 111. He is also a director of the respondents, Cloudbreak Holdings Ltd. ("Cloudbreak") and CM (Canada) Asset Management Co. Ltd. ("CM"). I will refer to all of these respondents collectively as the "CM Group".
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> [8] Forseed, the members of CM Group and Terrapoint are guarantors of the Debt.
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> [9] The respondent Wei Dong is Mr. Zou's wife. The respondents, Wei Zou and Xia Yu, are Mr. Zou's parents (the "Parents").

[4] When this proceeding began, BMO was owed a substantial amount of money. The petition referenced that approximately $95.3 million was owed to BMO under its loans; by the time of the earlier hearing, BMO indicated that its loans were outstanding in an amount in excess of $82.2 million, after recovery of some cash collateral held.

[5] At this time, BMO is said to be owed approximately $86.7 million, which is accruing at about $19,500 per diem (excluding fees and costs). One stakeholder has, however, recently raised an issue which, if successful, could have the effect of substantially increasing the amount of BMO's debt.

[6] BMO's security is in a first-ranking position over all of the Debtors' real and personal property. BMO also holds other cash collateral. BMO's security also includes various guarantees provided by the CM Group, Forseed and Terrapoint.

[7] After a two-day contested hearing in late December 2023, I issued the *Reasons* on January 11, 2024. Effective January 12, 2024, I granted an order appointing Deloitte Restructuring Inc. as receiver manager (the "Receiver") (the "Appointment Order"). Given submissions by the Debtors concerning the possibility of a refinancing to repay BMO, I delayed the ability of the Receiver to commence a sales process until after April 26, 2024.

[8] The Debtors appealed the Appointment Order. In addition, the Debtors failed to obtain any refinancing of their debt. As a result of later negotiations between the major stakeholders, the parties agreed to further delay the Receiver's sale efforts such that the Receiver began its sale efforts on June 16, 2024.

The Applications

[9] The Receiver applies for a number of orders:

a) Approval of a sale agreement between the Receiver and 1045 Haro Street Limited Partnership (the "Sale Agreement"). The sale (or "Transaction") is to be completed through the auspices of a reverse vesting order ("RVO").

In addition, the Receiver seeks permission to distribute proceeds of the Transaction to BMO in its discretion, so as to avoid further interest costs for that debt;

b) Certain declaratory relief with respect to ownership of the interests in the land and buildings and ownership of the limited partners interests (the "Ownership Order"); and

c) An order approving the Receiver's activities.

[10] The material before me today includes the Receiver's First Report dated August 16, 2024 (the "Report"), which has been circulated to the service list. Appended to the Report is a redacted copy of the Sale Agreement.

[11] Earlier this morning, the Receiver applied to seal the Receiver's Confidential Supplemental to the Report dated August 22, 2024 (the "Supplemental Report"). The Supplemental Report includes what the Receiver described as confidential information relating to various offers received through the sales process. It also appended an unredacted copy of the Sale Agreement. Notwithstanding, I am advised that unredacted copies of the Sale Agreement has been circulated to the major stakeholders.

[12] After considering the matter in accordance with test outlined in *Sherman Estate v. Donovan*, 2021 SCC 25, I granted a sealing order with respect to the Supplemental Report. That sealing order will expire, again according to *Sherman Estate*, upon the closing of the Transaction.

[13] I turn now to the remaining relief sought on these applications.

Sale Approval re the Transaction and RVO

[14] The Receiver's Report, at para. 48 and following, outlines the course of the sale process that began February 2024.

[15] The Receiver's pre-marketing sale activities took place in the context of an earlier sales process that was undertaken by the Debtors in spring/summer 2023, before this proceeding began. That sales process gave rise to a letter of intent from Chard Developments Ltd. ("Chard"). Unfortunately, that sale was not consummated due to disagreements among the Limited Partners, although it remains relevant to some degree by reason of the results of the present sales process.

[16] The steps completed by the Receiver include:

a) A process to choose a broker for the transaction, including a request for proposals by March 11, 2024. Various brokers were allowed into the virtual data room after executing non-disclosure agreements. Four proposals were received. After meeting with three of the brokers, CBRE Limited ("CBRE") was chosen, in part because it had been the listing broker that gave rise to the Chard transaction. On March 20, 2024, the Receiver and CBRE entered into a listing agreement which the Receiver states provides for a reasonable compensation structure, consistent with industry standards;

b) CBRE commenced its sale efforts in March 2024. The marketing process includes what I would describe as the usual steps: the creation of a virtual data room, and preparation of marketing brochures, a confidentiality agreement and a template purchase and sale agreement. CBRE then emailed an offering summary to over 1,600 prospective purchasers, located locally, nationally and internationally;

c) Nine parties executed confidentiality agreements and four parties toured the property;

d) Four parties submitted offers by the bid deadline of May 9, 2024. A summary of those offers is included in the Supplemental Report; for obvious reasons, I will not address the specifics in these reasons. In any event, it is clear from the information contained in the Supplemental

> Report that the offer put forward for approval on this application is the highest from a financial point of view, in terms of recovery to the creditors.

[17] On June 28, 2024, the Receiver entered into the Sale Agreement with Chard (Chard being the party who emerged as the successful offeror during the earlier sales process). The Transaction was originally structured as a straightforward purchase and sale of assets. However, on August 13, 2024, the Receiver and Chard subsequently negotiated the Transaction to conclude through an RVO, with 1045 Haro Street Limited Partnership ("Haro LP") as the purchaser.

[18] The first issue is whether the sales process was satisfactory. Counsel have referred to the factors that are typically considered, as set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137 (C.A.).

[19] Leaving aside an objection by Forseed, which I will address below, I am more than satisfied that that the Receiver has made sufficient sale efforts in the overall circumstances and after considering the interests of all the parties. The sales process was fair, transparent and efficient and resulted in an extensive canvassing of the market to identify potential purchasers. There is no indication that there was any unfairness in the sales process.

[20] The sole issue raised by Forseed relates to the integrity of the sales process. Forseed's counsel raised concerns as to whether 110, one of the Limited Partners, was involved in any way with Chard, who is behind Haro LP, the purchaser.

[21] I find it troubling that Forseed only raised this issue during the course of his submissions today. This is particularly so given that Forseed received the unredacted purchase and sale agreement a week ago. The timing and method of Forseed's communication of these concerns has put the parties in a difficult position in terms of responding to them. However, counsel for the other parties have addressed those concerns as best they can in the course of their later submissions. The Receiver indicates that they are not aware of any involvement by 110 in the Transaction. This was similarly confirmed directly by 110's counsel in Calgary, along

with Haro LP's counsel who attended at this application. Accordingly, on the face of it, there is nothing to suggest that 110 is involved in the Transaction.

[22] Forseed's counsel raises the prospect that "they do not know what they do not know", in terms of whether there has been some unfairness in the sales process. At its highest, I consider this point to be utter speculation without any evidentiary foundation. I decline to give this "concern" any further consideration.

[23] Finally, as I indicated to Forseed's counsel during his submissions, I have some difficulty understanding, even assuming 110 is involved in the Transaction, whether that would affect the overall dynamics of the Haro LP offer. Again, this offer presents the best recovery to the overall stakeholder group, which would be a significant factor pointing to approval of the Transaction in any event.

[24] In summary, I do not see any difficulties with respect to the sales process and I consider that it is appropriate to consider the offers on their merits.

[25] The Haro LP Transaction will clearly, from a financial point of view, provide the most recovery to the stakeholders. Even so, it is quite apparent that many of the stakeholders will suffer substantial losses.

[26] But for one objection, there is wholesale support for approval of the Haro LP offer. BMO, as the first-ranking secured creditor, clearly has a substantial interest in this proceeding and supports approval of the Transaction. Terrapoint, a Limited Partner and guarantor, also supports approval of the Transaction. Finally, I am advised through Terrapoint's counsel that 110, another Limited Partner, supports approval of the Transaction.

[27] The only objection to the Transaction comes again from Forseed. Forseed's counsel was apparently instructed to oppose the sale "on the record". Forseed's objection is based on its view that further marketing of the property is necessary and that the Receivers' sale efforts should continue.

[28] I disagree. There is nothing to indicate that the sales process has been anything other than thorough and that it has produced the best offer in the circumstances. While one might hope that economic conditions in BC will improve in the future such that the property will become more valuable, that is based on nothing but speculation. I would adopt the submissions of some counsel on this application in saying that a "bird in the hand" is more valuable than relying on speculation that some other higher offer *might* materialize in the circumstances.

[29] I do not agree that further marketing of the Debtor's property is appropriate.

[30] That brings me to the question as to whether the Transaction should be approved within an RVO structure or as a normal purchase/sale transaction of the underlying assets.

[31] Counsel have referred me to the well-known authorities, including *Harte Gold Corp. (Re),* 2022 ONSC 653, which decision has been applied many times in this Court. The factors from *Harte Gold Corp.* (para. 38) are:

> (a) Why is the RVO necessary in this case?
>
> (b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?
>
> (c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and
>
> (d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[32] Very recently, the practice of granting RVO's in a receivership was considered in *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476, aff'd *British Columbia v. Peakhill Capital Inc.*, 2024 BCCA 246 [*Peakhill BCCA*]. On appeal, the court agreed that this Court has jurisdiction to grant an RVO pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 [*BIA*] (paras. 20-25). In addition, at para. 30, the court found that enhancing the recovery from assets in an insolvency matter for the benefit of stakeholders through the

avoidance of property transfer tax (PTT) was a legitimate basis upon which to structure a transaction under an RVO.

[33] In the Report, the Receiver addressed the *Harte Gold Corp.* factors. I agree with the points made by the Receiver, including:

a) Is the RVO necessary? I accept that the RVO is not necessary in the absolute sense, but the structure of an RVO will result in a net benefit to the estate. This arises from the fact that the Receiver will avoid having to pay any PTT to the Province of BC (the "Province"), just as was done in *Peakhill Capital*. In addition, this structure allows for the transfer of certain leases and service contracts to the purchaser without an assignment of those agreements;

b) Does the RVO structure produce an economic result at least as favourable as any other alternative? The answer to that question is undoubtedly "yes". This structure will result in more funds available for the stakeholders, given that the Transaction allows for sharing of the PTT savings as between the Receiver and Haro LP;

c) Is any stakeholder worse off under the RVO structure? The only party who could conceivably be said to be "worse off" is the Province with respect to any PTT that might otherwise be payable. The Province has not raised any objection to the Transaction, no doubt arising from the result in *Peakhill BCCA*. I would add in any event that I do not consider that the Province is a "stakeholder" in that sense under the RVO structure. At present, the Province is not owed any money or interest that it is being denied to it as a result of the RVO structure. Simply put, the RVO structure does not give rise to any liability to pay PTT to the Province; and

d) Does the consideration being paid for the property reflect the importance and value of the licences, permits or other intangible assets being preserved under the RVO structure? Again, the answer is "yes". In

> addition to the value of the lands and buildings, the Transaction allows for Haro LP to assume various contractual rights at the reflected purchase price, which would be the same under a normal purchase/sale transaction.

[34] In many earlier decisions, courts have emphasized the extraordinary or exceptional nature of the relief sought arising from an RVO structure: see, for example, *Quest University Canada (Re)*, 2020 BCSC 1883 at paras. 168 and 180, leave to appeal ref'd *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364, and *PaySlate Inc. (Re)*, 2023 BCSC 608 at paras. 87-99.

[35] In *Peakhill BCCA*, the court discussed that the context in which RVOs are described as "extraordinary" or "exceptional" relief is one where the varying stakeholder interests may be weighed and considered within the statutory framework and objectives:

> [31] … The goal of maximizing recovery for creditors is a *bona fide* purpose intended to further the objectives of the *BIA*. Avoiding PTT was simply the means by which that benefit was conferred. To use the language of the provisions, the RVO is a transaction that may reasonably be considered to have been undertaken or arranged primarily for a *bona fide* purpose other than for the purpose of obtaining the tax benefit. …
>
> [32] … In my view, the comment that RVOs are exceptional or extraordinary orders simply reflects the fact that, in any given situation, the rights of all persons engaged in an insolvency must be carefully weighed to decide whether an RVO best fulfills the purposes and objects of the statutory scheme. …
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> [Emphasis added.]

[36] I have turned my mind to this context and the circumstances, including the *Harte Gold Corp.* factors, as above. I find that the RVO is an appropriate structure for the Transaction in the circumstances.

[37] The next issue to be addressed relates to the releases that are sought in the draft order.

[38] The proposed releases are in favour of the Receiver, Haro LP (as the "Purchaser" under the Sale Agreement), the Nominee (the party holding title to the

lands and buildings and whose shares are to be transferred to Haro LP) and the Retained Assets (which will continue to be held by the Nominee).

[39] The release will relate to any claims relating to the Transferred Assets or any Claims or Encumbrances and the Transferred Liabilities against or relating to the Nominee, the Transferred Assets, or the Retained Assets existing effective immediately prior to the Effective Time (all of defined in the Sale Agreement). The release will also relate to anything arising from the insolvency of the Nominee, the GP or the LP prior to the Effective Time, the commencement or existence of these receivership proceedings or the completion of the Transaction.

[40] *Harte Gold Corp.* at paras. 78-86 also addressed the factors that are usually considered in terms of whether to approve releases as being reasonable and appropriate in the circumstances. The stakeholders have been given notice of the proposed releases in the application materials. No one has raised any objections.

[41] I am satisfied that: the releases sought are rationally connected to the purpose of the restructuring; the releases contribute to the restructuring; the releases benefit the Debtors as well as the creditors generally; and that the releases are fair, reasonable, and not overly broad.

[42] I also grant the Receiver the authority to distribute proceeds arising from the closing of the Transaction to BMO, as it may determine in its discretion. This will allow BMO's debt to be paid down as soon as possible to lessen the carrying costs for the benefit of the stakeholders.

The Ownership Order

[43] The Receiver seeks various declarations relating to beneficial ownership of not only the real property (land and buildings in the name of the Nominee), but also of the partnership units. The specific declarations sought are:

a) that Haro-Thurlow Limited Partnership (the "LP") is the sole beneficial owner of the Real Property, as defined in the Sale Agreement between the Receiver and Haro LP; and

b) that Haro and Thurlow LP Ltd. (the "GP") and the Limited Partners of the LP (110, Forseed and Terrapoint), are collectively the beneficial owners of all of the property units of, and interests in, of and interest in the LP.

[44] These declarations are sought as an alternative to the Receiver providing statutory declarations with respect to the various entities referred to, in terms of their residency and the beneficial ownership of the property. The Receiver understands that Haro LP seeks these declarations in relation to its obligations with respect to withholding tax, pursuant to s. 116 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp).

[45] The Receiver had made repeated attempts to obtain statutory declarations from the Limited Partners but they have not been forthcoming. In addition, the declarations provided by the LP, the GP, the Nominee and 110 have not been provided in a form that is satisfactory to Haro LP.

[46] The Receiver's counsel has addressed the jurisdictional basis for this declaratory relief.

[47] Firstly, counsel refers to R. 20-4(1) of the *Supreme Court Civil Rules*, which provides that the Court may make binding declarations of right, whether or not consequential relief is or could be claimed.

[48] Secondly, I have also been referred to s. 183 of the *BIA*, which provides that this Court is invested with jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy matters. However, on that front, the Appointment Order was based on the Court's jurisdiction under s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*] only, and not the *BIA*.

[49] Nevertheless, counsel submits that jurisdiction may still be found under s. 183 of the *BIA*, based on the wording of s. 243(2) which provides that a "receiver" includes a person who is appointed to take possession or control of assets under a court order made under "an Act of a legislature of a province" that provides for or authorizes the appointment of a receiver" (i.e. the *LEA*). I am advised that this analysis was undertaken by the Ontario Superior Court of Justice in the receivership proceedings relating to *Victoria Gold Corp.* in August 2024 (Court File No.: CV-24-00725681-00CL), although I was not provided with any written materials.

[50] In any event, I am satisfied on the basis of the *Supreme Court Civil Rules* that I have the jurisdiction to grant the declaratory relief requested.

[51] The Receiver obviously does not purport to have had intimate knowledge of the ownership structure of the LP, the GP and the Limited Partners. Nevertheless, the Receiver has sought out what documents exist to support the proposition, including as attached to the Affidavit #1 of Yiota Petrakis sworn August 16, 2024. The evidence in support includes:

a) In the LP, GP and Nominee's response to petition filed December 12, 2023, they state (paras. 4-5) that: the Nominee is the legal owner and the LP is the beneficial owner of the land and buildings; that the GP is the LP's general partner; and, that the partnership is beneficially owned by 110 (as to 45%), Forseed (as to 45%) and Terrapoint (as to 10%);

b) At the December 2023 hearing, counsel put forward the above ownership interests, again as reflected at paras. 5-7 of the *Reasons*, as above;

c) Various unit certificates evidencing ownership of the GP unit and the various Class A, B, and C units in the LP indicate that: the GP unit is held by the GP and the Class A, B, and C units are held by Forseed, Terrapoint, and 110 in the percentages that I have referred to above;

d) An amended and restated nominee agreement dated October 3, 2018, which states in one of the Whereas clauses that Harlow Holdings Ltd., the

Nominee, has agreed to hold registered title to the property as nominee, agent, and bare trustee for the LP; and

e) An equitable mortgage and estoppel agreement dated October 3, 2018 provided by Harlow Holdings Ltd., the Nominee, and LP to BMO, which again confirms that the LP is the beneficial owner of the lands and premises.

[52] Considering all of the evidence put forward and the submissions of counsel, I am satisfied that the ownership interests of the LP, GP and the Limited Partners is as submitted by the Receiver. In addition, I am satisfied that the declarations should be granted as sought.

Approval of Receiver's Activities

[53] The Receiver also seeks an order approving its activities as set out in the Report and the Supplemental Report. No party objected to that relief.

[54] I am satisfied that approval of the Receiver's activities is appropriate to provide the court's officer with that further protection. However, I directed that counsel add wording to limit the scope of the approval, as is typically included in orders approving court officers' activities. That limiting language will provide that only the Receiver in its personal capacity and with respect to its own personal liability shall be entitled to rely upon and utilize in any way such approval, as was endorsed in *Target Canada Co. (Re)*, 2015 ONSC 7574.

[55] With that additional wording, the approval order is appropriate in the circumstances and is granted.

Conclusions

[56] All of the relief sought by the Receiver is granted, as above. This advance of these receivership proceedings will allow the stakeholders to move toward an overall

conclusion of the sale proceedings, to be followed by a consideration of the remaining issues that arise between the stakeholders.

"Fitzpatrick J."