IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Royal Bank of Canada v. MBA Asset Management Inc.,* 2024 BCSC 546

Date: 20240315
Docket: H220275
Registry: Vancouver

Between:

Royal Bank of Canada

Petitioner

And

MBA Asset Management Inc., iFly Vancouver Inc., Free Flight Formation Inc., 1088384 B.C. Ltd., TDR Electric Inc. (aka TDR Electric Inc.), Taylor Douglas Ross and Parkway Construction GP, LLC

Respondents

Before: The Honourable Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioner:	J. Poulsen
Counsel for MBA Asset Management Inc.:	B. Hicks
Counsel for iFly Vancouver Inc:	V. Tickle
Counsel for the Receiver:	M. Gill K. Jackson
Counsel for Lynda Sharpe:	V. Barta
Counsel for Grant Norwitz:	W. Lyon
Place and Date of Trial/Hearing:	Vancouver, B.C. March 15, 2024
Place and Date of Judgment:	Vancouver, B.C. March 15, 2024

[1] **THE COURT:** Judgment. On May 19, 2023, Justice Shergill appointed KPMG Inc. as the receiver of three companies: iFly Vancouver Inc., Free Flight formation Inc., and 1088384 B.C. Ltd.(the “Debtors”).

[2] The Debtors were collectively involved in building a vertical wind tunnel facility that would offer customers the experience of skydiving without the encumbrance of a parachute or the bother of jumping out of an airplane. However, the project ran out of funds before the facility was completed.

[3] By May 2023, the project consisted of a large excavation on leased land, very specialized equipment in storage, and broken contracts with the franchisor. The debtors owed their bank, the Royal Bank of Canada, RBC, more than $7 million. RBC is the only secured creditor. Their landlord, MBA Asset Management Inc. was on the hook as a guarantor. Its guarantee was secured by a mortgage.

[4] RBC commenced this action with the appointment of a receiver. The receivership order was made pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA]*, and section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[5] On July 2023, on the receiver's application, I made a sale process order. Pursuant to the sale process order, the receiver marketed the debtor's assets. They obtained only two offers, one from MBA for $8 million, and the other from an outside buyer for the equipment alone for $300,000. The real difference between the two offers is much smaller than $7.7 million because the $8 million offer requires RBC to give up security worth approximately $7.1 million. The net difference is about $600,000, which is, of course, significant.

[6] The receiver applies for a vesting order approving the sale to an entity established by MBA and other shareholders. It is clearly the best offer in view, and it offers the prospect that the site and equipment may be turned to their originally intended purpose. No one opposes the application.

[7] On its face, applying the *Soundair* considerations (after *Royal Bank v. Soundair Corp.,* [1991] OJ No. 1137 (C.A.) at paragraph 16), the proposed sale is one that should be approved. The receiver has made a sufficient effort to get the best price and has not acted improvidently. The sale process has been efficacious and exhibited integrity. The sale accommodates the interests of all stakeholders who are in the money. RBC has agreed to release MBA from its liability as a guarantor. There has been no unfairness in the working out of the process. Overall, the transaction appears fair and reasonable.

[8] However, the transaction requires further close scrutiny because of its form. The order sought is a reverse vesting order or RVO. It contemplates not the sale of assets to be vested in the purchaser free and clear of encumbrances, but a series of steps to make the purchaser the sole shareholder of iFly, assign to the purchaser 1088384's tenancy, transfer to Free Flight all of iFly's assets and liabilities that the purchaser does not wish to obtain or assume, remove iFly from this proceeding, and render Free Flight bankrupt within 30 days.

[9] The court has jurisdiction to approve an RVO in the context of a receivership ordered under section 243 of the *BIA; PaySlate Inc. (Re),* 2023 BCSC 608, at paras. 84 to 86; *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476, at paras. 21 to 22.

[10] The authorities warn and the receiver accepts that an RVO is an unusual or extraordinary measure, not justified merely on the ground of convenience or benefit to the purchaser; *Harte Gold Corp.*, 2022 ONSC 653, at para. 38; *PaySlate at para. 87; Peakhill* at paras. 40 to 48.

[11] RVOs require close scrutiny and must be justified by compelling and exceptional circumstances because of the risk to creditors and other stakeholders not before the court; Janis Sarra, *"Reverse Vesting Orders - Developing Principles and Guardrails to Inform Judicial Decisions",* 2022 CanLiiDocs 431, quoted in *PaySlate* at para. 89 and *Peakhill* at paras. 47 to 48.

[12] In *Peakhill*, at paras. 51 and 55, Justice Loo suggests that the absence of prejudice to creditors is crucial. In *Harte Gold,* at para. 38, Justice Penny proposed a series of questions to be addressed, including:

> (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?

[13] The receiver addresses these questions with the following submission. With respect to the foregoing factors, the receiver submits that the transaction:

> (a) enhances the value and best facilitates the preservation of iFly's current business by maintaining the permits and licences currently in place with the City of Richmond;
>
> (b) preserves the company's historical tax attributes;
>
> (c) preserves iFly's interest in the approved contracts and avoids any litigation around the assignment of rights and interests in respect thereof; and
>
> (d) contemplates a purchase price which is significantly greater than the only other offer received, which provided for the acquisition of only the company's equipment.

[14] In addition to the foregoing, the receiver is not aware of any stakeholder that is worse off under a reverse vesting order structure in this case.

[15] The evidence in support of this submission is unsatisfying. The reference to permits and licences is unexplained in the evidence. I am told it is a reference to building permits and business licenses. I do not know what would be required in terms of money and time to replace them.

[16] The historical tax attributes are apparently tax losses of value to an owner of iFly's shares. There is no evidence as to their magnitude or value.

[17] The third point carries considerable force because it has been made clear to me that there is a real dispute between the franchisor and the purchaser that will have to be resolved, very possibly by litigation. The RVO would permit that dispute to be resolved economically as between parties directly interested in the outcome without extending the receivership at the expense of entities such as RBC.

[18] I am advised by counsel that the receiver engaged in extensive negotiations with the purchaser, in which the purchaser made it clear that it was only interested in pursuing this transaction by way of an RVO, not an ordinary asset vesting order. It would have been much better if this important fact had been placed in evidence in the receiver's report or an affidavit. However, the receiver and its counsel are officers of the court, and I accept what they say.

[19] Counsel for RBC was informed of the negotiations and had input into the terms of the sale agreement and the RVO. The bank is writing off a part of the debt owed to it and is clearly satisfied that it is unlikely to do better.

[20] The shareholders of iFly consists of two factions. One faction is participating with MBA and the purchaser. The proposed transaction puts the other faction out of the picture. They do not oppose the transaction, but their counsel, Mr. Barta, observes that it is at least possible that an ordinary AVO could conceivably leave value in the company. To that extent, the RVO treats the shareholders unequally. I do not assign weight to this possibility because it is speculative. It is belied by the decision of the shareholders represented by Mr. Barta not to oppose the transaction, and the debtors are far enough underwater that it seems highly implausible that there could be any value in the shares at the end of the day.

[21] I think this case falls close to the line, but on balance, I am satisfied that I should make the order sought. I am persuaded that the proposed transaction is neutral or benefits all stakeholders and an RVO is necessary to achieve it.

"Gomery, J."