

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MCAP Financial Corporation v. QRD
(Willoughby) Holdings Inc.*,
2024 BCSC 1654

Date: 20240830
Docket: S237489
Registry: Vancouver

Between:

MCAP Financial Corporation

Petitioner

And

**QRD (Willoughby) Holdings Inc., QRD (Willoughby) Limited Partnership,
QRD (Willoughby) GP Inc., Quarry Rock Developments Inc., Richard Lawson,
Matthew Weber, Canadian Mortgage Servicing Corporation, Overland Capital
Canada Inc., Wubs Investment Ltd. and Steelcrest Construction Inc.**

Respondents

Before: The Honourable Mr. Justice Walker

Oral Reasons for Judgment

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capacity as Receiver:

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Place and Dates of Hearing:

Vancouver, B.C.
August 23 and 30, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 30, 2024

Introduction

[1] On July 9, 2024, I granted an order (“July 9 Order”) sought by the Receiver, MNP Ltd. (“MNP”), approving an asset purchase transaction contemplated by an offer to purchase and contract of purchase, as amended, dated July 5, 2024 (“Asset Purchase Agreement”), between MNP and the purchaser, Redekop Ferrario Properties (DD) Corp. (“Redekop”). I issued an asset vesting order (“AVO”) approving the purchase price of \$35.31 million (the form of order was entered on July 10, 2024). The AVO also included a term, requested by MNP, granting it liberty to subsequently seek approval of a further amended agreement of purchase and sale to be implemented by a reverse vesting order (“RVO”).

[2] My oral reasons for judgment approving the Asset Purchase Agreement at the hearing of MNP’s application on July 9 (“July 9 Approval Hearing”) have been transcribed and signed but are unreported.

[3] An appeal of my July 9 Order brought by the owners and the developer of the lands to be sold, who asserted MNP’s efforts to market the property were insufficient, QRD (Willoughby) Holdings Inc., QRD (Willoughby) Partnership, QRD (Willoughby) GP Inc., Quarry Rock Developments Inc., Richard Lawson and Matthew Weber, was dismissed by the Court of Appeal on August 16, 2024 (the parties were advised through a memorandum issued by the Court of Appeal stating reasons would follow at a later date).

[4] MNP and Redekop have since negotiated a further amended purchase agreement on the same commercial terms as the Asset Purchase Agreement, structured as an RVO share sale as opposed to an asset sale (“RVO Transaction”). If approved, Redekop will retain certain assets (including intangible assets) it views worthwhile. All of the debtors’ unwanted assets and liabilities would be transferred to an entity known as “Residual Co.”

[5] MNP now applies for approval of the RVO Transaction in order to proceed with the amended transaction. MNP’s application is unopposed.

[6] RVOs are a relatively recent method used in insolvency cases to avoid the purchaser assuming an insolvent debtor's unwanted assets and liabilities. Typically, an RVO is structured so that "unwanted" assets and liabilities are removed and vended to a residual company while the desired or "good assets" remain with the debtor whose shares are acquired by the purchaser.

[7] RVOs are gaining increasingly wide use in insolvency proceedings, extending beyond their original application in restructurings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, into cases brought under the proposal and (as in this case) the receivership provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [BIA]: *Peakhill Capital Inc. v. Southview Gardens Limited Partnership*, 2023 BCSC 1476 at paras. 1-6, 31-34 [*Peakhill SC*], aff'd, *sub nom.*, *British Columbia v. Peakhill Capital Inc.*, 2024 BCCA 246 at paras. 2-3, 21-25 [*Peakhill CA*]; *Harte Gold Corp. (Re)*, 2022 ONSC 653 at para. 22; *Arrangement relatif à Blackrock Metals Inc.*, 2022 QCCS 2828 at paras. 85-86, leave to appeal ref'd 2022 QCCA 1073; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras. 127-128; *PaySlate Inc. (Re)*, 2023 BCSC 608 at paras. 78-86; *Just Energy Group Inc. et. al. v. Morgan Stanley Capital Group Inc. et. al.* 2022 ONSC 6354 at para. 33; *Aquilini Development Limited Partnership v. Garibaldi at Squamish Limited Partnership*, 2024 BCSC 764 at paras. 30-32.

[8] The RVO Transaction calls for, *inter alia*, an increase in the purchase price of \$842,000. The increased amount, less professional fees for implementation (estimated at \$100,000) and the cost to defend the appeal (\$100,000) would be paid to the next secured creditor in priority, Canadian Mortgage Servicing Corporation ("CMSC"), who, MNP advises, was owed approximately \$7.55 million when the receivership order was issued on November 8, 2023.

[9] The RVO Transaction includes broad form release language in favour of Redekop, its nominee and the nominee's retained assets, and the current and former directors, officers, employees, legal counsel and advisors of Residual Co.

[10] MNP’s position is that if the RVO Transaction is not approved, it and Redekop would fall back on the Asset Purchase Agreement approved in the AVO.

When RVOs are Granted

[11] RVOs are not routinely granted as they circumvent the processes established in insolvency legislation enacted by Parliament. RVOs may be granted where the applicant can demonstrate extraordinary circumstances exist, typically, e.g., where intangible assets such as licenses, permits, intellectual property, and tax attributes are difficult or impossible to transfer to the purchaser through an asset vesting order. Close scrutiny of the proposed RVO is required to ensure that the restructuring is fair and reasonable having regard to the objectives and constraints of the statutory scheme in issue (in this case, the *BIA*). An RVO is not to be granted merely because it may be more convenient or beneficial for the purchaser. There must be an evidence-based rationale for value in the proposed RVO transaction: *Harte Gold* at para. 38; *Blackrock Metals* at paras. 114-116; *Just Energy* at para. 33; *PaySlate* at paras. 91, 141; *Aquilini* at para.32; Janis Sarra, “Reverse Vesting Orders – Developing Principles and Guardrails to Inform Judicial Decisions”, 2022 CanLIIDocs 431 at 1-2.

[12] In addition to establishing extraordinary circumstances exist, the applicant seeking approval of the RVO must satisfy these factors (known as the *Harte Gold* factors) set out at para. 23 in *Harte Gold*:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

See also, e.g., *Peakhill SC* at paras. 31-48; *Blackrock Metals* at paras. 99, 114-116; *Just Energy* at para. 33; *PaySlate* at para. 89; *Aquilini* at para. 33.

Harte Gold Factors

[13] When MNP’s application to approve the RVO Transaction first came for hearing, I agreed with MNP, and found, that it had clearly established all but one of the prerequisites to issue an RVO (including the first five *Harte Gold* factors ((a) to (e)).

[14] However, in terms of the reasonableness and fairness of the additional consideration to be paid (*Harte Gold* factor (f)), no evidence of market value was provided.

[15] The only information I had came from MNP’s Fourth Report dated August 12, 2024, as follows:

Benefits of a Reverse Vesting Order Transaction

35. The Receiver understands that the primary benefit of the Redekop RVO Offer, as compared to the Redekop [AVO] Offer, is that it will not trigger payment of Property Transfer Tax (“**PTT**”). The estimated amount of PTT payable for the transaction under the Redekop Offer is approximately \$1.68 million.

36. Because of the PTT Savings, Redekop is prepared to increase its purchase price under the Redekop RVO Offer by \$842,000. The additional sales proceeds (net of increased costs and fees) will be paid to CMSC, materially increasing its recovery. The Receiver seek this as an important benefit in the circumstances, as it will significantly mitigate the shortfall to be suffered by CMSC (a bona fide, secured creditor).

[16] I will pause to note that MNP’s application to approve the RVO Transaction is unopposed. The Province, who was served with the application, did not attend the hearing and has not advised it opposes the RVO Transaction, even though it is structured to avoid an obligation to pay PTT (which the Court of Appeal in *Peakhill CA* described at para. 30 as “a perfectly proper form of transaction...”).

[17] MNP did not explain the rationale for an increased purchase price that is approximately \$838,000 less than the estimated PTT.

[18] Nor did MNP or any party to the application provide any evidence to support reasonableness and fairness of value. As the case authorities point out, an evidence-based rationale to support the *Harte Gold* factors is necessary.

[19] MNP did not provide any information and evidence concerning the value of the specific intangible assets that would remain with Redekop under the RVO Transaction that MNP identifies in its Fourth Report excerpted below:

37. In addition to the financial benefit to CMSC, the RVO structure will allow Redekop to retain specific assets held by the Companies in connection with the Project which include:
 - i. Development permit;
 - ii. Agreements with the Township. The Project currently has a number of agreements with the Township of Langley associated with the development permit such as the Servicing Agreement and Erosion and Sediment Control Agreement;
 - iii. Letters of Credit. The Project currently has three letters of credit with the Township of Langley; and
 - iv. Building Permits. The Project has 18 distinct building permits, one for each building in the Project. The building permits for Building One and Building Two have been completed by the Receiver, but approved BP's remain.

(the “*Intangible Assets*”).

...

38. Redekop has confirmed that it wants to acquire all of the Intangible Assets. An RVO will allow Redekop to acquire the Intangible Assets without incurring additional costs and delay in requesting those to be assigned and/or re-issued in their favour which may benefit the purchaser in completing the Project.

[20] Nor was there any evidence regarding the potential value of non-transferrable tax attributes that may be available to Redekop discussed by MNP below:

39. In addition, an RVO may allow the purchaser to retain certain tax loss attributes which would be unavailable in an asset sale. The assessment of tax loss attributes and the purchaser's ability to use any attributes has not been assessed by the Receiver, but their potential use remains an additional benefit to be considered.

[21] I adjourned the application to allow MNP the opportunity to obtain evidence to satisfy the final *Harte Gold* factor (f). I did that even though it appeared that MNP

had time to do so given MNP's advice in its Fourth Report of something I was first alerted to from that report. MNP reported that prior to the July 9 Approval Hearing, it engaged in discussions with the primary secured lender and CMSC to pursue an RVO structure. According to MNP (at para. 30 of its Fourth Report), "due to time constraints, materials to convert the Redekop Offer to an RVO could not be prepared in time for the Approval Hearing."

[22] If appropriate evidence concerning value could be adduced to support the RVO Transaction, it would result in some recovery by CMSC and promote the statutory objectives of the *BIA: Peakhill CA* at para. 21.

[23] Since the adjournment, MNP provided further advice in its Supplemental Report to its Fourth Report dated August 28, 2024 ("MNP SR") concerning the intangible assets, tax attributes, and valuation. MNP also advises in the MNP SR that all potential purchasers and bidders were notified about the potential to structure a purchase through a share sale effected through an RVO (MNP SR, paras. 24-27, 30).

[24] As seen from the discussion below, the primary benefit to Redekop in the RVO Transaction is the savings of a significant amount of the PTT obligation arising under the AVO. Other benefits to Redekop include the likelihood that the existing Development and Building Permits ("Permits") would be transferred to Redekop (avoiding additional costs and delay in construction) and potential tax losses unavailable in an asset sale would be retained.

[25] For the Permits, MNP has clarified that they may be assigned or re-issued to Redekop under an asset sale but at additional cost (of mainly professional fees that MNP describes as "immaterial"; see MNP SR, paras. 9-11), which would also delay the resumption of construction. In addition, MNP points to potential risks of additional terms being imposed by the Township of Langley ("Township"), such as increased security, upon reapplication. According to MNP, the risk that the Township would not agree to transfer the Permits to Redekop is "minimal" (MNP SR, para. 12). For those reasons, MNP reports that it and Redekop "attributed nominal value to Redekop's

ability to retain the Permits” in the purchase price under the Redekop RVO Offer (MNP SR, paras. 11, 28-29).”

[26] Performance of the existing agreements with the Township is secured by the letters of credit (“LOCs”). According to MNP, those agreements have no standalone monetary value other than an amount equivalent to the administrative and professional costs to renegotiate them, such as architect and engineering fees to provide revised estimates for required work and possible changes to the security. For those reasons, MNP and Redekop attribute “no meaningful value to Redekop’s retention of the Township Agreements under the Redekop RVO Offer” (MNP SR, para. 12).

[27] There is no benefit to Redekop in respect of the LOCs (in the amount of \$1,991,248) since Redekop is required to replace them whether it proceeds per the AVO or through the RVO Transaction. The LOCs were issued at the request of the petitioner, MCAP Financial Corporation, and they form part of the overall indebtedness to MCAP. When the LOCs are replaced, the amount owing on the MCAP debt will be reduced by an equivalent amount.

[28] MNP reports that potential tax losses may be retained by Redekop through an RVO structure but advises that it has not estimated their potential value or Redekop’s ability to take advantage of them (noting that the debtors operated under a limited partnership structure which generally complicates and adds risk to a purchaser’s ability to utilize tax loss attributes: MNP SR, para. 22). In the circumstances, MNP and Redekop “do not attribute significant value to the potential tax loss attributes” (MNP SR, para. 23). I accept the Receiver’s submission that the cost of undertaking an analysis of potential tax attributes is prohibitive in the circumstances of this case.

[29] Thus, the meaningful benefit of the RVO Transaction is the savings to Redekop of close to half of the PTT obligation arising under the AVO and to a lesser extent, assuming the Permits and Township Agreements will be transferred to Redekop, additional costs and delay associated with reapplications and the risk of

new requirements such as additional security. The increased purchase price also results in some recovery to CMSC.

[30] The rationale for the increased purchase price falling below the overall savings amount of the PTT was appropriately explained in oral submissions today. It is the result of arm's-length negotiations between commercial parties concerning the manner in which the PTT savings should be split between Redekop and CMSC. Moreover, I was told the increase in purchase price exceeded that offered by another bidder.

[31] In the circumstances, and in the absence of any objection from any party that may be affected by the RVO Transaction, I accept and find that MNP has established the reasonableness of the consideration arising from the increased purchase price and satisfied the remaining *Harte Gold* factor, (f).

Release

[32] The proposed RVO contains broad form releases that are not contained in the AVO.

[33] In addition to MNP, its directors and officers, employees, counsel, and advisors, the RVO Transaction includes broad form release language in favour of Redekop, its nominee and the nominee's retained assets, and the current and former directors, officers, employees, legal counsel and advisors of Residual Co.

[34] Importantly, the proposed release language does not release the principals of the debtors, such that, e.g., they remain liable as guarantors.

[35] The release language is sufficiently narrow in scope in order to effect the RVO Transaction, e.g., to permit an individual(s) to act as directors or officers of Residual Co. I am satisfied that the proposed release language, which I am advised is identical to the language approved in *Peakhill SC*, is necessary and appropriately ancillary to the RVO Transaction.

Summary

[36] In summary, I am satisfied that the RVO Transaction should be approved. MNP has acted in the interests of all creditors to maximize recovery. There has been no unfairness in the process.

[37] Lastly, I also approve the Receiver's unopposed application to increase its borrowings to \$2.789 million in order to effect the RVO Transaction.

"Walker J."