Court of King's Bench of Alberta

Citation: ATB Financial v Mayfield Investments Ltd, 2024 ABKB 635

Date: 20241030
Docket: 2403 12343
Registry: Edmonton

Between:

ATB Financial

Plaintiff

- and -

Mayfield Investments Ltd., Howard Pechet, Chalmers Investment Corp. Ltd., Mayfield Homes Ltd., and Pechet 2018 Family Winery Trust by its trustee and litigation representative Jason Pechet

Defendants

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] The applicant, Mayfield Investments Ltd (**Mayfield**), applies (**Application**) to stay the effects of a consent receivership order granted September 6, 2024 (filed September 10, 2024) (**Consent Receivership Order**) and an October 24, 2024 certificate (**Lender's Certificate**) filed by ATB Financial (**ATB**), until November 30, 2024[1] or, alternatively, until after Mayfield's application under the *Companies Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*) (*CCAA* Application) is decided. ATB opposes the Application.

[1] The Application originally requested a stay until February 1, 2025, but in oral argument counsel amended the request to November 30, 2024.

II. Background

[2] Mayfield, either in its own capacity or through several subsidiaries or other entities, holds direct or indirect interests in a portfolio of commercial real estate properties and businesses in Alberta, including among others the Camrose Resort and Casino, the Medicine Hat Lodge and the Stage West Dinner Theatre. Some of the assets underlying its interests are regulated by Alberta Gaming, Liquor and Cannabis Commission (**AGLC**). Mayfield indirectly employs in the range of greater than 450 people.

[3] Mayfield has been in financial distress and in default of its financial obligations to ATB since March 2021. It continues to be insolvent, although Mayfield argues it is on the eve of solvency.

[4] Mayfield and its personal guarantor, Howard Pechet (together the **Credit Parties**), entered into credit facilities with ATB; their obligations are secured by various security agreements.

[5] Following initial default in March 2021, the Credit Parties and ATB entered into an Initial Forbearance Agreement dated June 29, 2022. There were further defaults, and, among other things, the parties executed a First Forbearance Amending Agreement dated August 31, 2022, a Second Forbearance Amending Agreement dated December 16, 2022, and a Third Forbearance Amending Agreement dated March 22, 2023.

[6] On August 29, 2023, ATB demanded repayment of the Credit Parties' indebtedness.

[7] On December 12, 2023, ATB delivered a demand letter and corresponding Notices of Intention to Enforce Security pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*). ATB demanded repayment of Mayfield's indebtedness, plus all accrued and accruing interest, standby fees, costs, prepayment fees, and expenses.

[8] The parties negotiated. On February 5, 2024, the parties entered into a further forbearance agreement (**Amended and Restated Forbearance Agreement**).

[9] Following that, the Credit Parties engaged in a sales process that failed to generate any proposal sufficient to repay the indebtedness to ATB.

[10] Mayfield also committed further "Forbearance Defaults" as defined under the Amended and Restated Forbearance Agreement. On April 15, 2024, ATB issued a "Forbearance Notice of Default and Reservation of Rights Letter" to the Credit Parties. Mayfield then committed further Forbearance Defaults.

[11] As of June 14, 2024, the Credit Parties were indebted to ATB for more than $38 million. Further, the "Forbearance Period", as defined in the Amended and Restated Forbearance Agreement, had expired.

[12] On June 25, 2024, ATB applied to appoint a receiver and manager (**Receivership Application**). The Receivership Application was scheduled to be heard by the Court on July 4, 2024; however, this was adjourned because the parties entered into another agreement dated

effective July 4, 2024 (**First A&R Forbearance Amending Agreement**), which amended the Amended and Restated Forbearance Agreement.

[13] The Credit Parties defaulted under the First A&R Forbearance Amending Agreement. On August 16, 2024, ATB delivered a "Notice of Defaults, Terminating Events, and Reservation of Rights" letter to the Credit Parties.

[14] On August 29, 2024, Mayfield filed the *CCAA* Application.

[15] On August 30, 2024, the Forbearance Period under the First A&R Forbearance Amending Agreement expired.

[16] On September 4, 2024, at the Credit Parties' request, the parties entered into further negotiations about a potential further extension of the Forbearance Period.

[17] On September 6, 2024, immediately before the Court was to hear the Receivership Application and the *CCAA* Application, the parties entered into a Second Forbearance Amending Agreement dated effective August 30, 2024 (**Second A&R Forbearance Amending Agreement**).

[18] The Second A&R Forbearance Amending Agreement contemplated that the parties would consent to the entry of the Consent Receivership Order on September 6, 2024, but that the activation of the receivership under the Consent Receivership Order would be stayed until the earlier of certain conditions (as set out below).

[19] On September 6, 2024, Justice Lema granted the Consent Receivership Order and adjourned the *CCAA* Application *sine die*. The *CCAA* Application has never been brought back before the Court.

[20] Paragraph 3 of the Consent Receivership Order provides for the stay (**Stay**) of the Consent Receivership Order, to be effective until the earlier of:

> […] (i) October 31, 2024, or such date as may be amended or extended by the written agreement of the Lender and the Debtor, in their sole discretion; or, (ii) the date on which the Lender files a certificate, substantially in the form attached as Schedule "B" hereto (the "**Lender's Certificate**"), certifying that a Forbearance Default (excluding and in addition to the Current Forbearance Default Events) has occurred. Upon the filing of the Lender's Certificate, the Stay shall, without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver pursuant to paragraph 2 hereof. […]

[21] The Amended and Restated Forbearance Agreement, as amended by the Second A&R Forbearance Amending Agreement, required (among other things) the Credit Parties to deliver an unconditional commitment letter from Canadian Western Bank (**CWB**) in a form acceptable to ATB (**CWB Commitment Letter**), by October 15, 2024. The Credit Parties did not do so. This is not in dispute. These defaults, along with others, constituted "Forbearance Defaults" under the Second A&R Forbearance Amending Agreement which entitled ATB to file a Lender's Certificate.

ATB did not file a Lender's Certificate initially, to allow the Credit Parties more time to cure the defaults and, in particular, to obtain the CWB Commitment Letter.

[22] By October 19, 2024, Mayfield had not delivered the CWB Commitment Letter and has still not done so. Several Forbearance Defaults continued, and continue now, to be uncured.

[23] On October 23, 2024, Mayfield filed its application seeking to stay "the effects of the Consent Receivership Order", returnable on October 28, 2024. The application is supported by an affidavit of Mayfield's then President, Jason Pechet (**Pechet**).

[24] On October 24, 2024, ATB filed the Lender's Certificate. As of that date, the aggregate indebtedness owed to ATB was more than $38.8 million.

[25] On October 28, 2024, the Receiver filed its First Report. It summarizes the Receiver's activities since the Lender's Certificate was filed on October 24, 2024, which included, among other things:

(a) attending at the Medicine Hat Lodge, the Camrose Resort and Casino and Mayfield's head office;

(b) meeting with Mayfield's Vice President of Operations, general managers and employees;

(c) inspecting some of the properties and identifying operational and maintenance requirements and capital deficiencies;

(d) meeting with representatives of AGLC;

(e) obtaining and reviewing Mayfield financial information;

(f) working on operational procedures;

(g) reviewing insurance;

(h) communicating with employees about the receivership and the Receiver's intentions. On October 25, 2024, the Receiver provided a letter to all Mayfield employees outlining the details of the receivership and the Receiver's intention to, among other things, continue operating Mayfield's business without interpretation, to maintain the employment of all current Mayfield employees and to determine the most appropriate sales strategy for Mayfield's assets (which could include selling Mayfield as a going concern);

(i) putting restrictions on fund outflow and reviewing cash flow forecasts;

(j) maintaining an onsite presence at the Medicine Hat Lodge and Camrose Resort and Casino since October 24, 2024; and

(k) terminating the employment of Mayfield's President, Pechet, effective on October 24, 2024.

[26] On October 25, 2024, ATB provided the Court its response materials to the Mayfield application, including an October 24, 2024 affidavit of ATB's Director, Risk Advisory & Management.

[27] On October 25, 2024, legal counsel amended Mayfield's application and brief of argument and provided a supplemental Pechet affidavit.

[28] On October 28, 2024, the Receiver filed its First Report and ATB filed additional materials. I heard the Application and briefly reserved my decision.

III. Issues

[29] Mayfield argues that it is not just and convenient to decide on or continue Mayfield's receivership (including where debtor refinancing is imminent), that the Court has the power to stay the effects of the Consent Receivership Order and the Lender's Certificate (including staying the actions of the Receiver even after the granting of the Consent Receivership Order and the filing of the Lender's Certificate), and that Mayfield meets the tripartite test for a stay (either until November 30, 2024 or until its *CCAA* Application is heard).

[30] ATB argues that the question of whether it is just and convenient to appoint the Receiver has already been decided by Justice Lema when he granted the Consent Receivership Order, and that the Credit Parties are estopped from arguing that the Consent Receivership Order should be stayed. ATB notes that no appeal or application to set aside or vary the Consent Receivership Order has been filed, and in any event any application to set aside or vary the order would be unsuccessful. ATB argues that the test to stay the Consent Receivership Order is not met in any event.

[31] In argument, I posed the question to Mayfield's counsel whether anyone other than the Receiver had standing to continue Mayfield's initial application or to file the amended Application, given the terms of the Consent Receivership Order and following the delivery of the Lender's Certificate. Paragraphs 2, 4 (and, in particular, 4(j)), 8, 9 and 10 of the Consent Receivership Order were discussed or considered. Ultimately, since no party (including the Receiver) objected to Mayfield's standing to continue the amended Application, but rather argued it on the merits, I have proceeded on the basis Mayfield has standing to continue the Application.

[32] Accordingly, based on the materials provided and the parties' submissions, the issues on this Application are:

(a) What is the effect of the Consent Receivership Order and the Lender's Certificate?

(b) Is Mayfield estopped from arguing that the Consent Receivership Order should be stayed?

(c) Should the Consent Receivership Order be stayed?

IV. Analysis

A. The Effect of the Consent Receivership Order and the Lender's Certificate

[33] As noted above, paragraph 3 of the Consent Receivership Order provides that, upon the filing of the Lender's Certificate, the Stay shall "without further action by any person or further Court order, be terminated, effective immediately, and all provisions of this Order shall immediately take effect, including, without limitation, the appointment of the Receiver".

[34] Mayfield does not dispute that ATB was entitled to file the Lender's Certificate or that the Lender's Certificate was validly filed based on Mayfield's Forbearance Defaults. Accordingly, since October 24, 2024, the Consent Receivership Order's terms have been activated. Since that date, the Receiver has been and is the receiver over Mayfield's property and the stay of proceedings against Mayfield has been and is in place.

[35] Therefore, I agree with ATB that the question of whether it is "just and convenient" to appoint a receiver under section 243 of the *BIA* or section 13(2) of the *Judicature Act*, RSA 2000 c J-2 has been overtaken. The Consent Receivership Order provided a clear and simple mechanism to terminate the Stay under paragraph 3 of the Consent Receivership Order, and those provisions have been engaged and implemented. Put another way, whether it is just and convenient to appoint a receiver was decided by this Court on September 6, 2024 based on the agreement and consent of ATB and Mayfield.

[36] The issue, then, is not whether the Stay under paragraph 3 of the Consent Receivership Order should be *extended*, as it was originally articulated by Mayfield. That Stay has ended on its own terms and cannot be extended. The issue is whether the Consent Receivership Order, looking at the situation now, should be stayed after its terms have been active for only a few days.

B. Mayfield is Not Estopped from Arguing that the Consent Receivership Order Should be Stayed

[37] ATB argues that Mayfield's Application is subject to issue estoppel, relying on ***Toronto (City) v CUPE***, Local 79, 2003 SCC 63 at para 23:

> 23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, per Binnie J.).

[38] In my view, the argument that issue estoppel applies fails on the first ground. The issue is not precisely the same on this Application as it was on the day the Consent Receivership Order was presented to the Court and granted. On September 6, 2024, the issue was whether it was just and convenient to appoint a receiver over Mayfield's property at that time, coupled with the Stay on certain conditions. There is new evidence before the Court that was not before the Court on

September 6, 2024. The issue now, as I alluded to above, is whether the Consent Receivership Order, now activated through an agreed and court-ordered process, should be stayed.

[39] Accordingly, I find that Mayfield was not legally barred by issue estoppel from bringing the Application. This finding is consistent with the Court's jurisdiction to consider an application for stay of receivership proceedings "at any stage of the proceeding" pursuant to section 17(1) of the *Judicature Act*. That determination is made at the time of the application based on the then prevailing circumstances.

[40] However, to be clear, the finding that issue estoppel does not apply does not mean Mayfield can ignore its previous consent to the Consent Receivership Order and its effects. Negotiated forbearance agreements, including the use of consent orders, are an important part of insolvency practice. Commercial certainty for all stakeholders dictates that parties should expect that courts will hold them to their bargains, absent further agreement or circumstances that would make it appropriate to nullify or remove the order (including, for example, and without limitation, for matters such as fraud or misrepresentation): ***Servus Credit Union Ltd v Proform Management Inc***, 2020 ABQB 316 at paras 42-50, 60; ***Royal Bank of Canada v Walker Hall Winery Ltd***, 2010 ONSC 4236 at paras 36-48, aff'd 2011 ONCA 314 leave denied 2011 CanLII 65628 (SCC). There is no application to set aside or vary the Consent Receivership Order based on fraud or misrepresentation, or on any other basis. The relief sought is a stay.

[41] Mayfield's consent to the Consent Receivership Order will be considered within the applicable legal framework as to whether the Consent Receivership Order should be stayed.

C. The Consent Receivership Order is Not Stayed

[42] Mayfield argues that the Court's authority to order a stay extends to the ability to order a stay of the actions of a receiver/manager well into an extant receivership, relying on ***BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc***, 2020 ONSC 3659 at paras 44-54 and 77. I agree with ATB that ***BCIMC*** is wholly distinguishable and does not assist Mayfield's position. ***BCIMC*** did not involve a stay of a receivership, but rather the Court's refusal to approve a receiver-proposed Sale and Investor Solicitation Process for a condominium project where the debtor was in the position to immediately, and without conditions, pay out the indebtedness of the secured creditor. The Court gave the debtor an opportunity to pay out the secured debt, the receivership debt and interest within 72 hours instead of approving the sale. In this case, as noted further below, Mayfield has not established that it is in a position to imminently and unconditionally pay or redeem its indebtedness to ATB.

[43] However, a proceeding or judgment can be stayed under rule 1.4(2)(h) and sections 17(1) and (4) of the *Judicature Act* pending trial, pending other processes in the action, or in favour of different proceedings which may overlap with the existing proceedings: see, for example, ***1499925 Alberta Ltd v NB Developments Ltd***, 2023 ABKB 114 at paras 96-100 and 108-109 (and cases cited therein).

[44] The parties agree that the applicable test for a stay in this proceeding is the tripartite test. It has been described in ***Stephenson v Romspen Investment Corporation***, 2020 ABCA 316 at para 13:

> [13] The well-known tripartite test for a stay pending appeal is set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, 334, 111 DLR (4th) 385, following ***Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd***, 1987 CanLII 79 (SCC), [1987] 1 SCR 110, 38 DLR (4th) 321. The applicant has the burden of showing that: (i) there is a serious question to be tried, or an arguable issue that is not frivolous or vexatious; (ii) there will be irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay.

[45] See also ***HML Contracting Ltd v Pinder***, 2022 ABCA 185 at paras 18-19.

[46] Even where the tripartite test is not met, the Court may have a residual discretion to grant a stay "where the interests of justice so require": ***HML Contracting*** at para 19; ***Attila Dogan Construction and Installation Co Inc v AMEC Americas Limited***, 2015 ABCA 406 at para 33; ***Stephenson*** at paras 14, 17 and 37.

1. Serious Question or Arguable Issue

[47] I agree with ATB that Mayfield has not raised a serious question or arguable issue with respect to a stay in this action, as it pertains to the Consent Receivership Order, *per se*. The Consent Receivership Order was a final receivership order (subject to the usual comeback provision) granted with Mayfield's consent and agreement, including the conditions upon which the receivership would be activated. By consenting to its terms, Mayfield is in much the same position as the debtors in ***Servus***, as described by Justice Lema at paras 50-56:

> [50] By signing the consent receivership order, the debtors acknowledged their indebtedness to Servus, their default status, the triggering of Servus's enforcement options (which included applying for a receiver), and that the appointment of a receiver was warranted i.e. once the period of forbearance, purchased (in part) by the provision of the consent receivership order, had expired without clearance of Servus's debt.
>
> [51] The debtors effectively surrendered, on a contingent basis: "If we are not able to clear our defaults in full by the end of the forbearance period, you can enter this receivership order."
>
> [52] I note here that, since at least the making of the first forbearance agreement (which, as noted, featured the debtors signing the CRO), the debtors have been represented by their current and very capable counsel.
>
> [53] It is not open to the debtors or the guarantor, at this stage, to offer arguments about why the receivership order is not "just or convenient" in light of this agreement. Servus lived up to its end of the deal, forbearing from taking enforcement action, first (formally) for four months and then a further (formal) two and a half months, plus informally in the lead-ups to the two forbearance agreements. By the end of those periods, the debtors had not accomplished the one thing that could stave off enforcement action: clearing Servus's debt in full.

> [54] Then followed the Interim Monitoring Period, during which Servus consented to being stayed from enforcement, but the debtors' defaults, and Servus's associated enforcement rights, remained the same at its expiry.
>
> [55] Servus has not agreed to any further forbearance or stay period. The consequence that it could seek the receivership order in such circumstances is precisely what the debtors agreed to.
>
> [56] Having effectively conceded their default status and the triggering of Servus's enforcement options, and having expressly agreed that Servus could seek the entry of the consent receivership order in that circumstance, the debtors have blocked themselves from resisting the granting of the orders i.e. beyond forbearance-related arguments, as discussed further below.

[48] In fact, Mayfield is in an even more difficult position than the debtor in ***Servus***, as the Consent Receivership Order has already been granted. In ***Servus***, the Court still had to consider whether granting the receivership order on consent was just and convenient. Here, the Consent Receivership Order is already activated, the Receiver has been appointed and has already commenced its work.

[49] The Consent Receivership Order has not been appealed. There is no application to vary it pursuant to the comeback provision in paragraph 34 of the order. As noted above, there is no suggestion it was procured by fraud or misrepresentation or is otherwise tainted.

[50] However, Mayfield also relies on the existence of its *CCAA* Application. It argues that the receivership should be stayed to allow Mayfield to pursue protection under the *CCAA* which it argues is preferable to a receivership. Mayfield relies on several cases by which it argues courts consider several criteria when faced with competing applications for the implementation of a receivership and proceedings under the *CCAA*: ***Pacific Shores Resort & Spa Ltd (Re)***, 2011 BCSC 1775; ***Douglas Channel LNG Assets Partnership v DCEP Gas Management Ltd***, 2013 BCSC 2358; ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60. Mayfield argues this establishes a serious question or arguable issue.

[51] ATB argues that Mayfield should have raised its argument about the *CCAA* Application at the time the Consent Receivership Order was granted. The transcript of the attendance before Justice Lema is not before me. What is before me is that both matters were before Justice Lema, the Consent Receivership Order was granted, and the *CCAA* Application (which is not addressed in any material way in the Consent Receivership Order) was adjourned *sine die*. The fact the *CCAA* Application was adjourned *sine die*, rather than dismissed, suggests that it was contemplated as a possibility that it could be brought back on.

[52] I have considered Mayfield's arguments and am satisfied that the pre-existing *CCAA* Application sufficiently meets the low threshold of a serious question or arguable issue in the context of an application to stay the Consent Receivership Order. Whether Mayfield is barred from raising the *CCAA* Application for failing to raise this issue before Justice Lema also raises a serious question or arguable issue that would have to be addressed, if necessary, on a more complete record of what happened on September 6, 2024. I make no findings in that regard.

[53] I raised with Mayfield's counsel the practical question of exactly how the stay would implement what Mayfield appears to seek, namely maintaining control of the management of Mayfield's assets pending the *CCAA* Application (and pending a hoped-for CWB refinancing) given that the Receiver has already been appointed. Stays in this context typically pause proceedings and operate prospectively, not retroactively. Arguably, a prospective stay of the Consent Receivership Order would simply postpone further activity by the Receiver but would not necessarily reverse the effect of the Consent Receivership Order and give possession and control of Mayfield's property back to Mayfield's directors. What Mayfield really seeks is a stay of the Consent Receivership Order that is retroactive back to before October 24, 2024 when the Receiver's appointment was activated by the filing of the Lender's Certificate. Effectively, it seeks an unwinding of events since October 24, 2024.

[54] Counsel provided me no authority that would support a retroactive stay of proceedings. However, the Court of Appeal has noted that the jurisdiction to grant retroactive stays (at least in *CCAA* proceedings) is a novel issue. For example, in ***Wiebe v Weinrich Contracting Ltd***, 2021 ABCA 242, the Court of Appeal, at para 20, a single Justice of the Court stated:

> [20] As previously recognized by this Court, stays in insolvency proceedings are very common, and "the ability of a case management judge to grant retroactive stays is of significance to the practice": 2019 ABCA 323 at para 17. This question was not answered in the first appeal, which was determined on the basis of procedural fairness. Therein, however, the Court noted: "Whether a supervising judge in *CCAA* proceedings has the jurisdiction to grant a retroactive stay of proceedings regarding third party claims is a novel issue yet to be considered by a Canadian commercial court: 2020 ABCA 396 at para 42.

[55] In the circumstances, I proceed on the basis that Mayfield has raised a serious question or arguable issue about whether the Consent Receivership Order should be stayed until November 30, 2024 to allow it to pursue the *CCAA* Application (and associated refinancing), and also about whether the Court could potentially implement a stay on such conditions to allow Mayfield's directors to pursue that application during the stay period.

2. Irreparable Harm

[56] Mayfield argues that it will suffer irreparable harm if a stay is not granted because its assets will "likely be irreversibly disposed of, with little recourse". It also argues that receivership will decrease the value of Mayfield's business and assets, and that the opportunity cost of seizing and likely dissolving Mayfield's assets "when it is so close to a possible Court-sanctioned *CCAA* proceeding is impossible to calculate".

[57] I agree with ATB that Mayfield has failed to establish irreparable harm, for several reasons, including but not limited to:

(a) the alleged immediate irreversible loss or devaluation of Mayfield assets is not established. The Receiver has taken steps to work with AGLC to ensure a smooth transition and has been granted a temporary casino facility licence for the Camrose Casino and Resort until January 22, 2025. Further, the Receiver's First Report has

indicated the Receiver's intentions to continue operating Mayfield's business without interruption and to determine the most appropriate sales strategy which could include selling Mayfield as a going concern;

(b) the ability of Mayfield to continue operations for the benefit of its employees and charities with which it works, and to maintain Mayfield's present asset values, pending refinancing or a *CCAA* Application, has not been established. The Receiver's opinion is that cash levels, of at least some of the businesses, are insufficient to maintain business operations and meet critical expenditures, and has been advised by Mayfield's Vice President of Operations that Mayfield was forecast to have insufficient funds, without a cash injection, to operate beyond November 1, 2024. Mayfield has not established on a balance of probabilities that Mayfield's past or potential future sales of assets, or possible further infusions of capital from the Pechet family or others, are sufficient for ongoing operations or to address capital deficiencies or repairs already identified by the Receiver;

(c) Mayfield does not have a concrete refinancing plan in place. Mayfield has been advising ATB (since June 2024) and the Court (since at least August 2024), that a CWB refinancing is forthcoming or imminent. The evidence now before the Court illustrates that CWB has not yet provided credit approval (let alone executed a CWB Commitment Letter), and Mayfield's 2023 financial statements are still being prepared or, at best, have only very recently been provided to CWB;

(d) it is not clear that an unconditional repayment of the indebtedness to ATB would be possible upon a CWB refinancing, even if it occurs. The CWB refinancing appears now to contemplate funding of $30 million instead of $35 million[2], and it is not clear that a $4.125 million deposit relating to the transfer of the Camrose Casino Corporation casino facility licence is imminently releasable. Further, Mayfield argued that getting the CWB Commitment Letter during the proposed stay would help Mayfield to "better negotiate with ATB"; it did not argue that the CWB Commitment Letter *would* allow Mayfield to expeditiously and unconditionally pay out the ATB indebtedness; and

(e) Mayfield is not "so close to a possible Court-sanctioned *CCAA* proceeding" as it asserts. It has not taken any steps to bring the *CCAA* Application back before the Court.

[58] Mayfield's stay application fails on the irreparable harm element of the tripartite test.

3. Balance of Convenience

[59] Mayfield's application also fails on the balance of convenience element of the test.

[60] ATB has agreed to forbear on enforcement of its security for many months. Based on the understanding, among other things, that a CWB Commitment Letter was imminent, ATB agreed

[2] Pechtel advised the Court during argument that a $35 million CWB refinancing was still available but may be necessary. This was not in his affidavit. It would not have changed my decision even if were accepted as evidence.

to further forbear for a short time, by agreeing to the terms of the Consent Receivership Order. It was entitled to file the Lender's Certificate and crystallize the benefits of its bargain with Mayfield. The CWB Commitment Letter has still not arrived almost two months later, Mayfield remains in default, and there are further Forbearance Defaults. ATB has lost confidence that the CWB Commitment Letter is forthcoming. The indebtedness to ATB is significant and ATB is the primary secured creditor with assets at risk. A subordinate secured creditor supports ATB's position on the Application. No stakeholder other than Mayfield, through its directors/shareholders, voiced opposition the continuation of the receivership.

[61] Again, critically, Mayfield agreed to the terms of the Consent Receivership Order and the clear terms that the receivership would be activated upon the filing of a Lender's Certificate. Mayfield took the benefit of the bargain and, in its Application, seeks to resile from it. While I have held that Mayfield is not legally barred by issue estoppel to make the Application, Mayfield attempts to effectively unwind its consent and agreement, which was relied on by Mayfield and the Court, and it seeks to do so mere days after the consequences of its consent and agreement are brought to bear. While not technically attempting to relitigate precisely the same issue, as a practical matter it is doing just that because it has not (in my view) established a favourable material change in its circumstances since the Consent Receivership Order was granted. These are significant factors against Mayfield's position when considering the balance of convenience. As noted above, parties must expect courts to enforce their bargains, and I am satisfied it is appropriate to do so in this case.

[62] Finally, the Stay has been terminated, the Receiver has already been appointed and activated, and the Receiver has been diligently pursuing its mandate since October 24, 2024. It has already communicated with employees about the receivership, terminated Mayfield's President, taken possession and control of Mayfield's assets, and started working on financial and interim borrowing plans. ATB argues that the egg cannot be unscrambled now. I find that, while the egg may not be fully scrambled at this point, it has been cracked and is already bubbling on the griddle. It would be inconvenient, and may cause confusion and unintended consequences, to try to put the egg back together by granting the relief Mayfield seeks.

[63] In all the circumstances, the balance of convenience does not support a stay of the Consent Receivership Order.

4. Conclusion re Tripartite Test

[64] Mayfield has failed to establish the elements of the tripartite test.

[65] I note that both parties also referred to ***Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co***, 2002 ABQB 430 at para 27, which outlines factors a court may consider in determining whether it is appropriate to appoint a receiver. Although not technically applicable in this case because the Receiver has already been appointed, I found many of the ***Paragon*** factors relevant to the application of the tripartite test for a stay in this receivership context. I considered the ***Paragon*** factors and find that, to the extent they could be applicable in this situation, they support my conclusion not to grant the requested stay.

5. No Exercise of Any Residual Discretion

[66] In the event I have residual discretion to grant a stay notwithstanding that Mayfield has failed to establish the elements of the tripartite test, on the basis that "the interests of justice so require", I find that the interests of justice do not support granting a stay and I would decline to do so in this case, including for the reasons noted above.

V. Conclusion

[67] Mayfield's Application is dismissed.

Heard on the 28th day of October, 2024.
Dated at the City of Calgary, Alberta, this 30th day of October 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Chuck Russell, K.C., and Jared Lane, McLennan Ross LLP
for Mayfield Investments Ltd.

Pantelis Kyriakakis and Nathan Stewart, McCarthy Tétrault LLP
for ATB Financial

Darren Bieganek, K.C., Duncan Craig LLP
for Howard Pechet

Kelly Bourassa, Blake, Cassels & Graydon LLP
for Ernst & Young Inc. in its capacity as court-appointed receiver of Mayfield Investments Ltd.

Susy Trace, Miller Thomson LLP
for Agriculture Financial Services Corporation

David Archibold, Sharek Logan & Van Leenen LLP
for Camrose Regional Exhibition & Agricultural Society

Terry Czechowskyj, K.C., Miles Davison LLP
for Albert Stark