SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00689769-00CL **DATE:** November 15th 2022

NO. ON LIST: 6

TITLE OF PROCEEDING: AVENA FOODS LIMITED v WESTOAK NATURALS INC. et al

BEFORE JUSTICE: OSBORNE

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE OSBORNE:

1. Two motions are before me today.
2. The Applicant, Avena Foods Limited, seeks the appointment of a receiver over certain assets held by the Respondent, Westoak Naturals Inc.
3. BDO Canada Limited, in its capacity as the Proposed Receiver, seeks an order, if it is in fact appointed as Receiver, approving a stalking horse agreement and proposed sale solicitation process.
4. The relief sought is unopposed. There are no secured creditors of the Respondent aside from the Applicant.
5. I will address the proposed receivership first.
6. The Respondent is indebted to the Applicant in the amount of approximately $1.41 million on a secured basis pursuant to an asset purchase and supply agreement. The terms of that agreement provided that the Applicant had sold to the Respondent the rights to distribute certain gluten-free oats and oat products under the brand name "Only Oats".
7. The security granted was over certain intellectual property assets including the unregistered "Only Oats" trademark in word and design form, other intellectual property rights acquired by the Respondent relating to the Only Oats Mark [as defined in the motion materials], related inventory, accounts receivable, proceeds, and packaging, labelling and marketing materials.
8. It is not disputed that the Respondent has defaulted on its obligations under that agreement. Repayment of amounts owing has been demanded by the Applicant who has delivered the usual section 244 BIA notice.
9. The Applicant takes the position that the appointment of a receiver is urgent and necessary to preserve the diminishing value of the Only Oats brand. The Respondent has ceased operations and is no longer selling those products. Aside from the urgency that might be inferred from those circumstances, oats are bought and sold on a seasonal cyclical basis not atypical for agricultural products, with the result that certainty with respect to the intellectual property rights and use of the brand name must be determined or resolved on a timely basis in advance of the buying and selling cycle for oats.
10. It is for those reasons that the Applicant seeks not only the urgent appointment of the Receiver, but supports and endorses the request of the proposed Receiver to immediately commence a sales process.
11. Section 243(5) of the BIA requires that a receivership application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.
12. The "locality of the debtor" is defined in section 2 of the BIA as:
    a. the principal place where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event;
    b. the principal place where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event; or
    c. in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated.
13. The determination of the principal place where the debtor has carried on business or resided has been considered by numerous courts. The following factors have been found to be relevant to such a determination (See *Malartic Hygrade Gold Mines Ltd., Re*, 1966 CarswellOnt 30 (Ont. Sup.Ct. in Bkrptcy at paras 35-38); *Flax Investment Ltd., Re*, 1979 CarswellOnt 248 (Ont. Sup. Ct. in Bkrptcy at paras 5-15; and *Sam Levy & Associes Inc. v. Azco Mining Inc*., 2001 SCC 92 at paras. 22-23):
    a. the location of the head office;
    b. the jurisdiction of incorporation;
    c. the jurisdiction of residence of directors and officers;
    d. the location of the creditors; and
    e. where business operations took place.

14. Courts have also recognized the balance of convenience in determining the locality of the debtor. (See *Malartic, supra,* at para. 50).
15. The Respondent is an Ontario corporation with its registered head office here. While one of its principals is in Saskatchewan, its former principal who is also a guarantor of the obligations of the Respondent under the agreements referred to above, and who remains a party to those agreements, is located in Ontario. The Applicant is the only secured creditor and, while federally incorporated, has its head office and principal place of business in Ontario.
16. The principal place in which a debtor carried on business can be different from the principal place where the debtor resides. The obvious result of that is that multiple jurisdictions could potentially qualify as the locality of the debtor.
17. I am satisfied that Ontario is a locality of the debtor within the meaning of the BIA here. I recognize that the Applicant commenced an action against the Respondent in Saskatchewan to preserve certain rights in respect of the payment for inventory, but that is not determinative of this issue under the BIA, although it certainly may be a relevant factor.
18. Here, however, there is no risk of double recovery or inconsistent findings or judgments, and any amounts recovered by the Applicant as a result of a sales process [if approved in the context of a receivership] will be credited against amounts owing by the Respondent.
19. Both parties are located here, have counsel here, the proposed receiver is here, there are no other secured creditors [and particularly none in other jurisdictions such as Saskatchewan] and it is efficient that the matter proceed here.
20. The test for the appointment of a receiver pursuant to section 243 of the BIA or section 101 of the CJA is not in dispute. Is it just and convenient to do so?
21. In making a determination about whether it is, in the circumstances of a particular case, just and convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security. (See *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 CanLII 8258).
22. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties. (See *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 7101 at para. 27).
23. However, the presence or lack of such a contractual entitlement is not determinative of the issue. The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient. (See *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).
24. As I observed in *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, the Supreme Court of British Columbia, citing Bennett on Receivership, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and with which I agree. (See: *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25):
    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;
    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;
    c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;
e. the preservation and protection of the property pending judicial resolution;
f. the balance of convenience to the parties;
g. the fact that the creditor has a right to appointment under the loan documentation;
h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
i. the principle that the appointment of a receiver should be granted cautiously;
j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
k. the effect of the order upon the parties;
l. the conduct of the parties;
m. the length of time that a receiver may be in place;
n. the cost to the parties;
o. the likelihood of maximizing return to the parties; and
p. the goal of facilitating the duties of the receiver.

25. It is not essential that the moving party establish, prior to the appointment of a receiver, that it will suffer irreparable harm or that the situation is urgent. However, where the evidence respecting the conduct of the debtor suggests that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver may be warranted. [See *Bank of Montreal v. Carnival National Leasing Ltd*., 2011 ONSC 1007 at paras. 28-29].
26. In all the circumstances here, I am satisfied that it is just and convenient to appoint a receiver. The Respondent has ceased operations and is not carrying on business. The value of the assets [i.e., the intellectual property and the brand names] has the very real potential, if not probability, to decrease if not monetized promptly. Finally, the cost of the receivership will be borne by the Applicant and will not prejudice any other party.
27. I am also satisfied that the terms and scope of the proposed receivership as set out in the draft order submitted, are appropriate. They are generally consistent with the Model Order of the Commercial List.
28. BDO Canada Limited is appointed as Receiver.
29. I will now address the second issue, being the request to approve a stalking horse agreement and proposed sales process. It is not necessary to repeat the relevant facts set out above.
30. The Applicant is prepared to act as a stalking horse bidder, being the sole secured creditor of the Respondent, and it has expressed an interest in acquiring the assets over which it has security. The proposed stalking horse agreement would provide for the sale and purchase of those assets on an "as is, where is" basis for the sum of $1 million, although that is to be satisfied by way of a credit bid. It will, nonetheless, set a baseline for the proposed sales process.
31. The sales process itself is set out in the Pre-Filing Report of the Proposed Receiver. It contemplates a marketing strategy including publication of notice of the sales process in the national newspaper as well as specifically to Known Potential Bidders [as defined in the materials]. If a Superior Offer is received, the Receiver will conduct an auction.
32. In considering a sales solicitation process, including the use of a stalking horse bid, the Court should assess the following factors (See *CCM Master Qualified Fund v. bluetip Power Technologies*, 2012 ONSC 1750 at para. 6):
    a. the fairness, transparency and integrity of the proposed process;
    b. the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
    c. whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
33. These factors are to be considered in light of the well-known *Soundair* Principles, which, while applicable to the test for approving a transaction following a sales process, not surprisingly track the same principles

applicable to that process itself. (See *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
b. the interests of all parties;
c. the efficacy and integrity of the process by which the party obtained offers; and
d. whether the working out of the process was unfair.

34. The use of stalking horse bids to set a baseline for a sales process can be a reasonable and useful approach. As observed by Justice Penny, it can maximize value of a business for the benefit of stakeholders and enhance the fairness of the sales process as it establishes a baseline price and transactional structure for any superior bids. (See *Danier Leather Inc., Re*, 2016 ONSC 1044 at para. 20).
35. The terms and elements of the proposed solicitation sales process here are appropriate and align with the objectives of the receivership in the first place, all as referred to above.
36. Moreover, the Receiver is of the view exercising its own business judgement and experience that the proposed stalking horse agreement and sales process are fair, transparent and represent the best option in the circumstances to maximize the value of the secured assets.
37. For all of these reasons, the stalking horse agreement and the sales process are approved.
38. Both orders to go in the form signed by me today. They are effective immediately and without the necessity of issuing and entering.