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JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	MALGORZATA NOWAK PROFESSIONAL CORPORATION and MALGORZATA NOWAK
DOCUMENT	**BENCH BRIEF OF ATB FINANCIAL**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Dentons Canada LLP Bankers Court 15th Floor, 850 - 2nd Street S.W. Calgary, Alberta T2P 0R8 Attn: Derek Pontin Ph. (403) 268-6301 Fx. (403) 268-3100 File No.: 141950-252

BENCH BRIEF OF THE APPLICANT ATB FINANCIAL

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I. INTRODUCTION

1. This Bench Brief is provided in support of an application by ATB Financial ("**ATB**"), seeking an Order:

   (a) abridging the time for service of this Application and dispensing with service on any party other than those served;

   (b) appointing BDO Canada Limited ("**BDO**"), as receiver and manager (the "**Receiver**") over the assets, undertakings, and properties of Malgorzata Nowak Professional Corporation (operating as Sanitas Dental Health) (**"Malgorzata PC**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 ("**BIA**"), and section 13(2) of the *Judicature Act*, RSA 2000 c J-2;

   (c) adjudging the Defendant, Malgorzata Nowak ("**Nowak**") bankrupt pursuant to section 42(1)(j) and 43(1) of the BIA and granting a bankruptcy order in respect of all of the undertaking, property and assets of Nowak;

   (d) appointing BDO, Licensed Insolvency Trustee in the Province of Alberta, as bankruptcy trustee (the "**Trustee**") of Nowak;

   (e) declaring various communications between ATB, on the one hand, and Malgorzata PC and Nowak (together the "**Debtors**") on the other hand, to have been communications made in the course of seeking to achieve settlement and accordingly protected under settlement privilege and inadmissible to the Court as evidence;

   (f) granting costs of this application to ATB on a solicitor and client, full indemnity basis; and

   (g) such further and other relief as counsel may advise and this Honourable Court may permit.

II. FACTS

2. Malgorzata PC is a corporation operating a dental office in Calgary, Alberta.[1]

3. Nowak is a dentist licensed to carry on business in the Province of Alberta[2].

4. Nowak's husband, Jerzy Michal Nowak ("**Michal**") is the corporate representative of the dental business.[3]

5. Pursuant to a commitment letter entered into by Malgorzata PC dated December 2, 2021 (the "**Loan Agreement**"), ATB made available to Malgorzata PC various credit facilities.[4]

[1] Affidavit of Heather Gertner, sworn September 25, 2023 (the "**Heather Affidavit**") at para 7.
[2] Affidavit of Jerzy Michal Nowak, sworn October 20, 2023 (the "**Michal Affidavit**") at para 2.
[3] Michal Affidavit, at para 1.
[4] Heather Affidavit at para 3, and as referred to Exhibit "A."

6. In support of the repayment of the indebtedness of Malgorzata PC, Nowak provided to ATB an unlimited guarantee of all debts and liabilities of Malgorzata PC.[5]

7. To secure its obligations to ATB, Malgorzata PC granted to ATB an interest in all of its present and after acquired personal property, pursuant to a general security agreement (the "**GSA**").[6]

8. ATB's collateral is principally comprised of dental equipment, fixtures and related tenant improvements, as the principal business of Malgorzata PC is carrying on its dental practice.

9. ATB is a judgment creditor of Nowak in the principal amount of $964,391.64 as of November 1, 2022, plus accrued judgment interest, plus costs on a solicitor and client basis.[7]

10. Only a single payment in the amount of $500 has been made to ATB upon the judgment.[8]

11. ATB has effected seizure of all assets within the operating business of Malgorzata PC.[9]

12. ATB has had extensive discussions with the Debtors, and the Debtors' representatives, in respect of strategic alternatives for repayment, and nothing has been resolved to ATB's satisfaction.[10]

13. ATB has lost confidence that the Defendants can resolve this indebtedness, and there is no expectation that payment can or will be made in respect of this judgment.

14. The Debtors have not entirely disclosed their financial information to ATB and have preferred other creditors over ATB. Nowak drives a Maserati sports car. Malgorzata PC has borrowed funds to pay subordinate creditors to ATB, including its landlord despite judgment and seizure by ATB.

15. ATB is entitled under its security to appoint a receiver over Malgorzata PC.

16. BDO has consented to act as receiver and bankruptcy trustee, should the Court so appoint it.

III. ISSUE

17. ATB asserts it is just and convenient for a receiver manager to be appointed in respect of Malgorzata PC. ATB has judgment, is entitled to the appointment under its security, and sees zero alternative prospect for it to be repaid the amounts it is owed.

18. Nowak owes a debt to ATB that is in excess of $1,000 and has committed an act of bankruptcy within the past 6 months. ATB meets the test for Nowak to be petitioned into bankruptcy, for the benefit of Nowak's creditors.

19. To the extent the Debtors have raised argument, in the Michal Affidavit, that a settlement was reached among ATB and the Debtors, in March of 2023 or otherwise, this is not reflected in any evidence and is rejected by ATB.

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[5] Affidavit of Nicole Hart, sworn on October 26, 2022 at para 9 (the "**Nicole Affidavit**"), and as referred to in Heather Affidavit in Exhibit "A".
[6] Nicole Affidavit at paras 10-11.
[7] Heather Affidavit at para 5.
[8] Heather Affidavit at para 5.
[9] Heather Affidavit at para 8.
[10] Heather Affidavit at para 9-11

20. Further, the communications attached to the Michal Affidavit are clearly "without prejudice" communications and subject to settlement privilege. Such communications may only be admitted if a settlement was reached, which it was not – such communications are barred from disclosure and irrelevant to the questions of whether a receiver should be appointed and/or a bankruptcy order made in respect of Nowak.

IV. LAW AND ARGUMENT

A. Appointment of a receiver manager of Malgorzata PC is just and convenient

21. Each of section 243 of the BIA, as amended and section 13(2) of the *Judicature Act*, 2000 c J-2 vest in this Honourable Court authority to appoint a Receiver where it is just and convenient to do so.

22. In *Paragon Capital Corporation Ltd v Merchants & Traders Assurance Co*, 2002 ABQB 430, Justice Romaine held that the following factors may be considered in determining whether it is just or convenient to appoint a receiver:

> 27 The factors a court may consider in determining whether it is appropriate to appoint a Receiver include the following:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver 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 the 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 the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
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> k) the effect of the order upon the parties;
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> l) the conduct of the parties;
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> 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;
>
> p) the goal of facilitating the duties of the receiver.
>
> Bennett, Frank, *Bennett on Receiverships*, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)[11]

23. Where the security instrument governing the relationship between a debtor and secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the moving party seeking to have the receiver appointed. While the receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the moving party is merely seeking to enforce a term of an agreement that was assented to by both parties.[12]

24. Having regard to the factors listed in *Paragon*, ATB notes that:

    a) the Security granted by Malgorzata PC authorizes the appointment of a Receiver;

    b) the risk to ATB is significant, with indebtedness in excess of $964,391.64;

    c) a receiver will be best positioned to preserve and realize upon the business assets, including ideally as a turn-key operation or a going concern – by contrast, ATB would be forced to liquidate under its security, and unlikely to recover the same value;

    d) the appointment of a Receiver will facilitate handling of any medical records and narcotics at the clinic location;

    e) a court-supervised platform for realization will be transparent, efficient and maximally beneficial for all stakeholders, including ATB, the Defendants and other creditors; and

    f) a balance of convenience is strongly supportive of granting the relief requested, as there is no reasonable or viable alternative to achieve the same value.

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[11] *Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Co*, 2002 ABQB 430 ("***Paragon***") at para 27 [**TAB 1**]. See also, *Lindsey Estate v Strategic Metals Corp,* 2010 ABQB 242 at para 32 aff'd by 2010 ABCA 191 [**TAB 2**] and *Re Schendel Management Ltd*, 2019 ABQB 545 at para 44 [**TAB 3**].

[12] *Textron Financial Canada Ltd v Chetwynd Motels Ltd*, 2010 CarswellBC 855, at paras 55 and 75 [**TAB 4**]. *Enterprise Cape Breton Corp v Crown Jewel Resort Ranch Inc*, 2014 NSSC 128 at para 27 **[TAB 5**], citing *Bank of Montreal v Sherco Properties Inc*, 2013 ONSC 7023 [**TAB 6**].

25. ATB respectfully submits that the security granted by Malgorzata PC to ATB allows for the appointment of a Receiver. The balancing of the interests of the parties favours ATB and the appointment of a Receiver. There are no other remedies short of the appointment of a Receiver available to ATB that will adequately protect its interests

26. ATB respectfully submits that this Honourable Court ought to exercise its discretion to appoint BDO as a Receiver by reason of it being just, convenient and otherwise appropriate that a Receiver of the undertaking, property and assets of Malgorzata PC be appointed.

B. The test for a bankruptcy order has been met and the same should issue for Nowak

27. Section 183(1)(d) of the BIA as amended, vests in this Honourable Court authority to exercise original, auxiliary and ancillary jurisdiction in bankruptcy.

28. Section 43(1) of the BIA sets out two requirements a creditor must satisfy to file an application for a bankruptcy order:

    a) "the debt or debts owing to the applicant creditor or creditors amounts to one thousand dollars"; and

    b) "the debtor has committed an act of bankruptcy within the six months preceding the filing of the application."

29. Having regard to the two requirements under section 43(1) of the BIA:

    a) ATB is a judgment creditor of Nowak in an amount vastly exceeding $1,000; and

    b) Nowak has committed an act of bankruptcy, in ceasing to meet her liabilities generally as they become due.

30. In *Valente v. Courey,* 2004 CarswellOnt 681, the Ontario Court of Appeal described three "special circumstances", which would support an application in the context of a single creditor seeking a bankruptcy order:

> 8 It is now-well settled in the case law that the failure to pay a single creditor can constitute an act of bankruptcy under s. 42(1)(j) when there are special circumstances, which have been recognized in three categories:
>
> a) where repeated demands for payment have been made within the six-month period;
>
> b) where the debt is significantly large and there is fraud or suspicious circumstances in the way the debtor has handled its assets which requires that the processes of the BIA be set in motion; and
>
> c) prior to the filing of the petition, the debtor has admitted its inability to pay creditors generally without identifying the creditors.
>
> *Re Holmes* (1976), 1975 CanLII 667 (ONSC), 9 O.R. (2c) 240, 60 D.L.R. (3d) 82 (S.C.); see also Houlden and

> Morawetz, *The Annotated Bankruptcy and Insolvency Act*
> (Toronto: Carswell, 2003) at 147 D10(3).[13]

31. The existence of a judgment constitutes a continuing demand for payment, particularly when the judgment is large, has been long outstanding, and is the subject of ongoing enforcement efforts.[14]

32. ATB has demanded financial statements of debtor and conducted judgment debtor examinations; ATB retained an independent agent to try to achieve realization of the business assets (Avail); and ATB has had extensive without prejudice discussions with the Debtors in respect of repayment of the Indebtedness. All of this constitutes ongoing demand for payment over almost a year, and only a single payment of $500 has ever been made.

33. In *Sultan Management Group (Re),* 2022 ABQB 262, this Court confirmed that special circumstances are not limited to the three traditional categories, set out in *Re Valente*:

> 99 Some authorities indicate that "special circumstances" are not limited to the three categories in *Re Valente: Coredent #2* at para 114; *Banque Nationale de Paris (Canada) v Opiola*, 1998 ABQB 965 at para 8; *Re Smith (WA)* (1992), 1992 CanLII 12969 (MB KB), 80 Man R (2d) 216, 13 CBR (3d) 47 (QB) at para 19; *Winant (Syndic de la succession de),* 2011 QCCS 1190 at paras 54-58. In *Coredent #2*, at paras 115-123, Justice Lema held that a large debt, substantially greater than the debtor's assets and resulting in a "massive anticipated shortfall", could be a special circumstance. The shortfall in that case was approximately $800,000.[15]

34. That case was affirmed on appeal, reiterating that special circumstances are not confined to three closed categories, and the Court has moved to a "more contextual and purposive approach to special circumstances endorsed here".[16]

35. Cited in *Sultan Management Group (Re)*, the case of *ATB Financial v Coredent Partnership*, 2020 ABQB 587, 2020 CarswellAlta 1802 is particularly notable, reflecting a bankruptcy order made in context of a dental practitioner. This Court in *Coredent* engaged in a lengthy review of applicable principles. Among other things, Lema J cited the following[17]:

    a) if a petitioner can satisfy the requirements of the BIA, I see no reason for denying him access to the process and remedies of the [Bankruptcy and Insolvency] Act because there may be other civil routes open to him;

    b) the BIA is not a second-rate or fallback statute that can only be invoked if other avenues fail;

    c) I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order. In fact, the jurisprudence would seem to be to the contrary;

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[13] *Valente v. Courey*, [2004] CarswellOnt 681 ("***Valente (Re)***") at para 8 [**TAB 7**].
[14] *Ibid* at para 16.
[15] *Sultan Management Group (Re),* 2022 ABQB 262 ("***Sultan Management Group (Re #1)***") at para 99 **[TAB 8].**
[16] *Sultan Management Group (Re)*, 2023 ABCA 110 ("***Sultan Management Group (Re #2)***") at para 24 **[TAB 9].**
[17] *ATB Financial v Coredent Partnership*, 2020 ABQB 587, 2020 CarswellAlta 1802, at paras 153-156 **[TAB 10]**

d) although the bankruptcy process is meant to benefit the class of a debtor's creditors, not the civil interests of a single creditor, as I stated in *Re Diena*, another case involving an application by a judgment creditor, "it is not surprising that [the] judgment creditor now seeks to invoke one of the legal mechanisms available to unsecured creditors; unpaid judgment creditors tend to do that";

e) O objected that the bankruptcy petition was an abuse and that FC should be confined to a re-taking of the equipment and suing on the deficiency. . . . However, Catzman J. in *Re Four Twenty-Seven*, *supra*, said at p. 188 C.B.R.:

> I also reject the debtors' submission based upon the alleged improper or ulterior motive of the petitioning creditor. It is not an abuse of process or an improper purpose to commence a petition for the collection of a debt. It is not improper to petition to gain remedies not available outside of bankruptcy, including a thoroughgoing investigation of the bankrupt's affairs. Indeed, on the evidence, I consider this to be a prototypical case where the full arsenal of investigatory mechanisms and remedies available to a trustee in bankruptcy would be useful, appropriate and desirable. [emphasis added]

f) the onus is on the debtor to show sufficient cause why the order should not be granted. If the onus is not discharged, the receiving order will issue; and

g) ordinarily, if all elements of a petition for a receiving order have been proved and there is no improper conduct on the part of the petitioning creditor, the court should, in the absence of exceptional circumstances, make the receiving order.

36. On the basis of the foregoing, ATB respectfully submits that a bankruptcy Order for Nowak is justified and appropriate..

C. All communications between ATB and the Debtors concerning settlement proposals were made “without prejudice” and are subject to settlement privilege

37. After judgment was rendered, extensive discussions occurred between ATB and the Debtors concerning strategic alternatives for repayment and potential for settlement.

38. The Debtors have chosen to improperly submit these discussions into evidence, in the form of email correspondences between ATB and the Debtors (the “**Emails**”), attached to the Michal Affidavit.

39. The Emails are a selective body of communications, not a complete picture of all of the discussions among the parties.

40. The Emails were clearly made in the context of settlement and were accordingly exchanged on a without prejudice basis.

41. In *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35*,* the Supreme Court described the general purpose and breadth of settlement privilege, commonly referred to as the “without

prejudice" rule. It is a common law rule of evidence that prevents parties from using the information discussed in settlement negotiations against one another in litigation. [18] The Court stated:

> 34 Settlement privilege applies even in the absence of statutory provisions or contract clauses with respect to confidentiality, and parties do not have to use the words "without prejudice" to invoke the privilege: "What matters instead is the intent of the parties to settle the action… Any negotiations undertaken with this purpose are in admissible" (*Sable Offshore,* at para 14). Furthermore, the privilege applies even after a settlement is reached. The "content of successful negotiations" is therefore protected: *Sable Offshore,* at paras. 15-18. As with other class privileges, there are exceptions to settlement privilege.[19]

42. Settlement privilege serves an important policy function, in encouraging parties to discuss potential settlements without fear of recourse. There are limited exceptions, as described by the Supreme Court In *Sable Offshore Energy Inc v Ameron International Corp,* 2013 SCC 37:

> 19 To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co*., [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 1912 CanLII 582 (ON SCDC), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).[20]

43. In *Phoa v Ley,* 2020 ABCA 195, the Alberta Court of Appeal more recently described the test for settlement privilege:

> 15 To be protected from disclosure by reason of settlement privilege, each part of a three-part test must be satisfied by the party asserting that privilege: first, that at the time of the communication a litigious dispute existed or was in contemplation; second, the communication must be made with the express or implied intention that it would not be disclosed, that is the communication would not be disclosed in the event negotiations failed; and third, the purpose of the communication must be to attempt settlement. [21]

44. There is no dispute the Emails were exchanged in context of a litigious dispute – ATB is a judgment creditor.

45. The Emails were clearly made with the implied intention they would not be disclosed, in the event a settlement was not achieved. There is no logical scenario in which ATB would assent to the Emails being disclosed, absent a formalized, documented, signed and paid mutual settlement agreement, which does not exist.

46. The purpose of the Emails was to attempt settlement of the Indebtedness. The test for settlement privilege to apply to the Emails is met.

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[18] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 ("***Bombardier***") at para 31 **[TAB 11].**
[19] *Ibid* at para 34.
[20] *Sable Offshore Energy Inc. v. Ameron International Corp.,* 2013 SCC 37 ("***Sable***") at para 19 **[TAB 12].**
[21] *Phoa v. Ley,* 2020 ABCA 195 ("***Phoa***") at para 15 **[TAB 13].**

47. ATB respectfully submits the Michal Affidavit is improper and inadmissible, as it substantially and for all intents and purposes only describes privileged communications.

48. If the Michal Affidavit is to be admitted, it is submitted that admission can only be for the very limited purpose of confirming no settlement was reached; the Michal Affidavit can have no bearing on ATB's applications for receivership order and bankruptcy order.

49. It is noted that, in the context of the inadmissible settlement discussions, conditional offers were discussed among ATB and the Debtors and the conditions were not met. There was a total failure to achieve a settlement. The Debtors made later, lower offers to ATB, which is both express and implied rejection of any prior discussions.[22]

V. CONCLUSION

50. ATB respectfully submits, having regard to the law and circumstances, it is just and convenient to appoint BDO as receiver and manager of the undertaking, property and assets of Malgorzata PC.

51. ATB respectfully submits that all necessary factors exist and a bankruptcy order ought to made in respect of Nowak.

52. ATB respectfully submits that the Emails, comprising the essential body and purpose of the Michal Affidavit, must be disregarded for being subject to settlement privilege and inadmissible in evidence.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 26th day of October, 2023.

DENTONS CANADA LLP

Per: _____
Derek M. Pontin
Counsel for ATB Financial

[22] Michal Affidavit, at pages 154-155.