

CANADA / JUDGMENT

1449 Sandhurst Place Holdings Ltd. (Re)

2022 BCSC 62

COURT

Supreme Court of British Columbia

DECIDED

11 January 2022

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2022 BCSC 62 1449 Sandhurst Place Holdings Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1449 Sandhurst Place Holdings Ltd. (Re),

2022 BCSC 62

Date: 20220111

Docket: B210542

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of 1449 Sandhurst Place Holdings Ltd.

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

Counsel for the Applicant, Jeana Ventures Ltd.:

P.J. Reardon

Counsel for the Debtor, 1449 Sandhurst Place Holdings Ltd.:

H.A. Frydenlund

Counsel for the Attendee, ADC Holdings Ltd.:

M.C. Sennott

Place and Date of Hearing:

Vancouver, B.C.

January 7, 2022

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2022

- [1] This is an application for a bankruptcy order under s. 43 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-5 [BIA]. The applicant, Jeana Ventures Ltd. ("Jeana") is a shareholder of the debtor, a company called 1449 Sandhurst Place Holdings Ltd. ("Sandhurst"). The application is opposed by Sandhurst's other shareholder, ADC Projects Ltd. ("ADC"). ADC holds 51% of the shares in Sandhurst in trust for Jeana.
- [2] Sandhurst is a single-purpose entity that, until recently, held title to an investment property in West Vancouver. The relationship between the two shareholders has broken down and they have been and continue to be embroiled in other litigation concerning Sandhurst and its affairs, among other things. It is that other litigation that forms the basis of ADC's opposition to this application.
- [3] Jeana says that Sandhurst owes it a debt in excess of \$1,000 and has committed an act of bankruptcy in the last six months, thereby satisfying the conditions for a bankruptcy order under that provision. The act of bankruptcy alleged is that Sandhurst has ceased to pay its liabilities as they become due. Those liabilities include, primarily, a shareholder loan owing to Jeana in the amount of \$1,714,497 plus interest and costs, of which \$545,267 is said to be secured by way of a mortgage. Jeana also alleges that Sandhurst has failed to pay two higher ranking mortgages and a lien claim that had, until recently, encumbered title to the West Vancouver property that was Sandhurst's main asset.
- [4] I say "until recently" because, in other litigation, ADC sought a winding-up order in relation to Sandhurst under s. 324 of the Business Corporations Act, S.B.C. 2002, c. 57. In that proceeding, Horsman J. made an order placing Sandhurst into receivership. The receiver has since sold the investment property. The two mortgages ranking ahead of Jeana's indebtedness have been paid in full from the proceeds of sale. The lien has been discharged.
- [5] By order made by Coval J. on October 6, 2021, the receiver was permitted to pay the balance left after payment of various administrative and receivership costs, being a net sum of \$543,048.10, to Jeana's lawyers in trust, once the receiver is satisfied that no funds are owing to the Canada Revenue Agency ("CRA").
- [6] Jeana is seeking a bankruptcy order so that it can reverse the priorities and be paid those funds now, ahead of any claim on them that may be advanced by the CRA. Jeana cites *Bank of Montreal v. Scott Road Enterprises Ltd.*, (1989) 36 B.C.L.R. (2d) 118 (C.A.), as authority for the proposition that this is a valid and proper purpose for seeking a bankruptcy order.

- [7] ADC disputes that Jeana is a creditor of Sandhurst with standing to bring this application. According to ADC, it and Jeana are parties to a shareholders' agreement that contains a shotgun buyout clause. That clause is said to permit either shareholder to force a buyout of the shares and shareholder loans held by the other shareholder. Jeana says that it duly triggered that clause on October 20, 2020 and that, consequently, Jeana has been obliged since then to sell to ADC its shares and its shareholder loan position for \$800,000, but it has refused to do so.
- [8] Jeana denies that the shotgun buyout clause was properly invoked. It has commenced its own action against ADC, arguing that ADC and its principal are guilty of serious breaches of fiduciary duty, including misappropriation of funds and various fraudulent acts in relation to the Sandhurst venture and other business they have been involved in together. ADC has brought a counterclaim in that action, seeking, among other things, to enforce the buyout obligation. The action is scheduled to go to trial on October 17, 2022 for 15 days.
- [9] On that basis, ADC says that Jeana has, at best, only questionable standing as a creditor of Sandhurst to seek a bankruptcy order. It cites various authorities for the proposition that in the absence of clear evidence that the requisite preconditions for the order are satisfied, the application should be refused. In particular, it has been held that where the underlying debt forming the foundation for the order is disputed, the matter should go to trial, rather than be resolved in bankruptcy court; see: *Inex Pharmaceuticals Corp. (Re)*, 2006 BCCA 108 at para. 19; *Aquasure Technologies Inc. (Re)*, [2008] 45 C.B.R. (5th) 300 at para. 6; *Bearcat Exploration Ltd. (Re)*, 2003 ABCA 365, at para. 15. ADC also cites *Sather Ranch Ltd. (Re)*, 2019 BCSC 677, as an example of a case in which the court refused to make a bankruptcy order when the real dispute was seen to be between two shareholders who were at loggerheads, rather than about a clearly insolvent enterprise unable to satisfy its obligations as they came due.
- [10] Jeana argues that ADC's authorities are distinguishable, insofar as they all involved a bona fide dispute raised by the debtor, rather than a shareholder, as to the existence or extent of the underlying debt asserted by the applicant creditor. I pause to note that the facts in *Sather Ranch* in particular are not so easily distinguished on that basis. There, the validity and extent of the applicant shareholder's debt was, as here, challenged by the other shareholder, rather than by the debtor company itself.
- [11] But I agree that *Sather Ranch* is distinguishable on other grounds, insofar as the result in that case flowed partly from a finding that the applicant shareholder was pursuing a bankruptcy "as a tactical move to use the BIA to his advantage" in the ongoing dispute between the shareholders. The reason Jeana has given for seeking a bankruptcy order in this case is to reverse priorities. In addition, the court in *Sather Ranch* was unable on the evidence before it to discern the actual state of accounts as between the parties, a controversy that was held to be more properly dealt with in the related litigation.

- [12] Jeana relies on 0757376 B.C. Ltd. (Re), 2011 BCSC 1268. In that case, Burnyeat J. dismissed an appeal from a master's bankruptcy order. The master had granted that order on the application of a shareholder and creditor, relying on the debtor company's failure to repay the debt that it owed to him, despite the fact that the extent of the indebtedness was disputed by another shareholder. The result appears to have turned on the fact that the debtor company had clearly failed in the previous six months to meet its obligations as they became due and at least \$1,000 was clearly owed to the petitioning shareholder, even if the precise amount of the indebtedness was disputed.
- [13] In this case, what is in issue is not the state of the accounts between the parties but rather whether the debt that is admittedly owing is properly owed to Jeana or ADC.
- [14] Regardless of the outcome in the other litigation between the parties, it is not seriously disputed that Jeana is presently owed the debt that it asserts. In that regard, Jeana notes that the order of Coval J. made October 6, 2021 has directed that the net balance of the sale proceeds be paid to Jeana's solicitors, in partial payment of the same debt that is asserted on this application, or at least the secured portion of it. I agree that it would be inconsistent for this court to refuse the relief sought on this application on the basis that the unsecured portion of that same debt may not be owing to Jeana after all.
- [15] The relief that ADC seeks in the related litigation includes an order compelling Jeana to sell its shares and shareholder loan position to ADC following the final disposition of the matter. ADC does not allege that such a sale has already occurred or that Jeana has been holding its interest in the loan in trust for ADC since October 20, 2020. There is no interim order in place that restricts the exercise of Jeana's rights as creditor.
- [16] Jeana's loan to Sandhurst was stated to be repayable on demand. On November 16, 2021, Jeana demanded repayment. Sandhurst was unable to repay the outstanding balance, given that its only significant asset had recently been sold through a receivership, leaving a sizeable shortfall well in excess of \$1,000.
- [17] In summary, I am satisfied that both elements of the test have been satisfied and that there is no reason to refuse the relief sought. I am therefore granting the application.
- [18] As the successful party, Jeana is entitled to its costs.

"Milman J."

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