

CANADA / JUDGMENT

Nishiyama (Re)

2020 BCSC 551

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Supreme Court of British Columbia

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2020 BCSC 551 Nishiyama (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nishiyama (Re),

2020 BCSC 551

Date: 20200327

Docket: S1813807

Registry: Vancouver

In the Matter of the Part XIII of the

Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-6,

As Amended

And

In the Matter of Masahiko Nishiyama,

Bankrupt Under the Laws of Japan

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

Counsel for the Bankrupt, Masahiko Nishiyama:

C.G. Reedman

Counsel for the Attendee, Hatsumi Kinoshita:

T.S. Brayer

Counsel for the Trustee, Hiroshi Miromoto, and Receiver, Alvarez & Marsal Canada Inc.:

C.D. Brousson

J.D. Bradshaw

Counsel for the Resolution and Collection Corporation:

R. Richardson

G.G. Plottel

Place and Date of Hearing:

Vancouver, B.C.

February 24 and March 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 27, 2020

- [1] THE COURT: The applicant, Alvarez & Marsal Canada Inc. (the "Receiver"), is the court-appointed receiver over all of the assets, undertakings, and property that is owned or beneficially owned by Masahiko Nishiyama in Canada. The Receiver seeks multiple forms of relief on this application, including the approval of a sale of a luxury condominium located at 4102-1028 Barclay Street, Vancouver, British Columbia (the "Barclay Condominium"). The respondents on the application are Mr. Nishiyama and Ms. Hatsumi Kinoshita (the "Respondents"). Ms. Kinoshita is apparently the common law wife of Mr. Nishiyama.
- [2] The Respondents argue that Ms. Kinoshita owns the beneficial interest in the Barclay Condominium as a result of an undated agreement, that they assert was signed in January 2015 and that was described as the "Family Law Agreement" in the application materials.
- [3] The Respondents do not oppose many of the forms of relief being sought by the Receiver, including the intended sale of the Barclay Condominium. They do, however, oppose the Receiver transferring the balance of the proceeds of sale of the Barclay Condominium to Hiroshi Miromoto, who is the Trustee in Japan over the bankruptcy estate of Mr. Nishiyama (the "Trustee"). The question of whether the proceeds from the sale of the Barclay Condominium should be transferred to the Trustee was initially the only issue that arose. Thereafter, counsel for Ms. Kinoshita applied for an adjournment to obtain further evidence.

BACKGROUND AND HISTORY

- [4] The background and history of this matter is important because it identifies the various parties and the roles they play and because it provides context to the submissions that were made on this application. I have described the general history of this matter in various

earlier judgments. Most recently, I did so in an application brought by the Receiver in which the Receiver sought the disclosure of documents and the right to examine the Respondents. Those reasons for judgment are indexed at 2020 BCSC 224 (the "Disclosure and Examination Reasons").

- [5] The history that follows mirrors the description that I provided in the Disclosure and Examination Reasons:
- [3] Two separate chronologies provide context and backdrop for this application. The first chronology is longer and broader in scope and it involves an entity known as The Resolution and Collection Corporation ("RCC"). RCC was established in Japan in July 1996. It was formerly known as the Housing Loan Administration Corporation. RCC is a wholly owned subsidiary of the Deposit Insurance Corporation of Japan.
- [4] Commencing in the early 2000s, RCC obtained various judgments against Mr. Nishiyama and other associated individuals and companies. Those judgments, which total approximately \$475 million CAD, remained unpaid. A subsequent investigation indicated that Mr. Nishiyama had dissipated his assets on a massive global scale through numerous persons and corporations.
- [5] Criminal proceedings were commenced against Mr. Nishiyama in Japan in November 2015. That prosecution was based on various charges that alleged Mr. Nishiyama had dissipated and concealed assets to prevent execution on two earlier civil judgments.
- [6] On June 26, 2016, Mr. Nishiyama was found guilty on the charges he faced. Specifically, it was determined that he had purposefully concealed assets and that he had conspired with others to move assets out of Japan and into other jurisdictions, including Canada. He was sentenced to three years in prison. On July 26, 2018, he was granted parole.
- [7] The matter first made its way to British Columbia in March 2016 when RCC applied for, and I granted, a Mareva injunction on an interim basis preventing Mr. Nishiyama from dealing with or further dissipating any assets he might have in British Columbia. That order was made in an action between RCC and Mr. Nishiyama that bears Action Number S162298 in the Vancouver Registry (the "RCC Action"). The Mareva injunction was then confirmed in a separate ex parte hearing in April 2016.
- [8] It is relevant that in RCC's application for a Mareva injunction, it argued, and I accepted, that Mr. Nishiyama owned or controlled two entities known as Rainbow One Investments Ltd. and Sun Moon Management, respectively. The orders I made on that application extended to these two entities.

- [9] It is also relevant that RCC pursued parallel proceedings in each of Hong Kong and Singapore, where, as of March 2016, various accounts and assets of Mr. Nishiyama, worth approximately \$90 million US, were affected by the orders that were made in those jurisdictions. Since March 2016, I have overseen most, but not all, of the proceedings in both the RCC Action and in this proceeding bearing Action Number S1813807 in the Vancouver Registry (the "Bankruptcy Action").
- [10] On September 29, 2016, RCC applied in British Columbia to enforce various judgments of the Japanese courts in the amounts of \$477,071,714.63 CAD plus interest and costs. I granted various orders that were sought on that application (the "Recognition Order"). Thereafter, RCC undertook extensive efforts to locate various assets that Mr. Nishiyama owned or held either directly or indirectly in British Columbia.
- [11] The second chronology that I have referred to is more focussed in nature. By order of the Kyoto District Court in Japan on March 15, 2016, the Trustee was appointed the trustee over the bankruptcy estate of Mr. Nishiyama. By order of Madam Justice Maisonville, of this Court, made on December 21, 2018, the Trustee was recognized by this Court as the foreign representative in these proceedings.
- [12] By virtue of an order I made on February 14, 2019 in the Bankruptcy Action (the "Receivership Order"), Alvarez & Marsal Canada Inc. was appointed Receiver over all of the assets, undertakings, and properties of Mr. Nishiyama under s. 272(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. Portions of the Receivership Order provided:
4. Each of (i) the Debtor; (ii) all of the Debtor's current and former agents, accountants, legal counsel, and other persons acting on its instructions or behalf; and (iii) all other individuals, firms, corporations, government bodies or agencies, or other entities having notice of this Order, (collectively "Persons" and each "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property of the Receiver, and should deliver all such Property (excluding Property subject to liens the validity of which has been dependent on maintaining possession) to the Receiver upon the Receiver's request.
 5. All Persons, other than government authorities, shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, corporate and accounting records, and any other papers, records or information of any kind related to the Property or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (collectively, the "Records") in that Person's possession or control. The Records shall include all of the contents of the SDB [which for present purposes is not important]. Upon request, government authorities shall advise the Receiver of the existence of any Records in that Person's possession or control.

- [13] On application for directions by the Receiver, I granted a further order on July 19, 2019, that, inter alia, declared all of the assets of Sun Moon Management Ltd., including a condominium on Barclay Street in Vancouver (the "Barclay Condominium") and a vehicle were the property of Mr. Nishiyama, and therefore subject to the Receivership Order (the "Property Declaration Order").
- [14] The Property Declaration Order set out terms for a property claims process for personal property located at the Barclay Condominium. On August 13, 2019, Ms. Kinoshita filed a proof of claim with the Receiver relating to personal property located in the Barclay Condominium.
- [15] On September 9, 2019, the Receiver issued and delivered a notice of revision or disallowance that both accepted and rejected parts of Ms. Kinoshita's claim.
- [16] The Receiver was then contacted by counsel for Mr. Nishiyama and Ms. Kinoshita and advised that Ms. Kinoshita was asserting a claim over the Barclay Condominium and that she would be bringing an application to court to, inter alia, assert that the Barclay Condominium was the property of Ms. Kinoshita under the terms of a family law agreement between Mr. Nishiyama and Ms. Kinoshita (the "Family Law Agreement"). In support of her application, Ms. Kinoshita swore an affidavit on October 3, 2019, and she disclosed a redacted copy of the Family Law Agreement.
- [17] Counsel for Mr. Nishiyama also gave notice that Mr. Nishiyama would be applying to set aside both the civil judgments that were originally made in Japan as well as the subsequent appointment of the Trustee. It is noteworthy that as early as March 2019, Mr. Nishiyama indicated an intention to advance these and other claims in Japan. I was advised by British Columbia counsel for Mr. Nishiyama, at this application, that no such appeals, claims, or challenges, had yet been filed by Mr. Nishiyama in Japan.
- [18] Still further, counsel for Mr. Nishiyama indicated an intention to set aside the various orders that had been made in this Court in both the RCC Action and in the Bankruptcy Action. I understand those applications have been set down for the end of February 2020.
- [19] Two further facts are relevant. First, as noted earlier in these reasons, Ms. Kinoshita is apparently the common-law wife of Mr. Nishiyama. Though this matter has an extended history, Ms. Kinoshita's existence and her involvement in some of the events I have described was apparently unknown to RCC, the Trustee or the Receiver until she filed her proof of claim with the Receiver. Second, the legal positions and status of Ms. Kinoshita and Mr. Nishiyama are, for various reasons, at times different, and each was separately represented in the application before me.

THE VARIOUS FORMS OF RELIEF BEING SOUGHT ON THIS APPLICATION

- [6] The Notice of Application filed by the Receiver seeks multiple forms of relief. This includes:

- a) Approval of the actions, conduct and activities of the Receiver that are set out in the first report of the Receiver dated February 12, 2020.
 - b) Approval of the sale of the Barclay Condominium together with certain contents of that condominium for the purchase price of \$4,330,000 (the "Purchase Price"). The contents of the Barclay Condominium that are included in the Purchase Price are described in the materials before me as the "Included Personal Property".
 - c) A vesting order.
 - d) A description of how the proceeds from the Purchase Price are to be distributed. This deals with taxes, fees, utilities and services, interest and penalties. It also deals with real estate commissions and amounts that have been disbursed by the Receiver on account of the preservation, maintenance and upkeep of the Barclay Condominium. Still further, it authorizes the Receiver to take such additional steps as may be required to give effect to the conveyance of the Barclay Condominium. Finally, it authorizes the Receiver to sell or dispose of the contents of the Barclay Condominium that were not included in the Purchase Price, as well as the sale of a Mercedes S550, on the terms and conditions described in the application materials.
- [7] None of this, as I have said, is in dispute. I have reviewed the materials in the Application Record, including the materials that pertain to the efforts undertaken by the Receiver, and listing agent on behalf of the Receiver, to sell the Barclay Condominium. I am satisfied, based on these materials, that the Purchase Price is appropriate and represents the market value of the Barclay Condominium.
- [8] I also observe the question of whether various taxes are owed to the Canada Revenue Agency, to provincial taxation authorities, and/or to municipal taxation authorities is presently being addressed by the Receiver. The Receiver proposes to hold back sufficient funds to ensure that these various taxes are properly addressed and then to remit the balance of the Purchase Price to the Trustee.
- [9] The relief that is opposed by the Respondents is found at para. 3(c)(iv) of the Notice of Application, and it states:

The balance then remaining of the proceeds of sale of the Condo and Included Personal Property to be paid to the Trustee to the credit of the Japanese bankruptcy proceedings and to be held by the Trustee pending further order, authorization or approval of the Japanese Court or agreement of the Trustee and Kinoshita.

THE HISTORY OF THIS APPLICATION AND THE POSITION OF THE RESPONDENTS

- [10] The background to this particular application is also relevant in several ways. That history underlies the primary submissions made by the Respondents, and in particular by Ms. Kinoshita. Ms. Kinoshita argued, when the parties first appeared on February 24, 2020, that moving the funds that were obtained from the sale of the Barclay Condominium back to the

Trustee in Japan would effectively remove adjudication of her claims from the courts of this province. It was submitted that this would be inappropriate, at least in part, because Ms. Kinoshita first filed an application to set aside various orders of this Court on November 5, 2019, and that her application had thereafter been delayed on several occasions. Accordingly, the present application was said to be "unfair" in various respects.

- [11] Apart from arguing that the courts of British Columbia had jurisdiction over her claim, she filed no material to indicate that she could not advance any claims or interest in the Barclay Condominium before the Trustee in Japan. Nevertheless, at the application on February 24, 2020 and because I had not yet reviewed the various authorities that were presented by the Receiver at the application, I raised the question of whether Ms. Kinoshita had any means of asserting her purported interest in the Barclay Condominium under the Family Law Agreement within the bankruptcy proceedings in Japan. I did not yet know whether that information was relevant on a principled basis to the issue before me, but I, nevertheless, considered that it might be pertinent to the "fairness" argument being advanced on behalf of Ms. Kinoshita. I asked counsel for the Receiver to provide me with that information, in affidavit form, within the next few days, and I told counsel that I would provide them with oral reasons on March 10, 2020. I had also told counsel for Ms. Kinoshita that he could file responsive materials if he considered that that was necessary or appropriate.
- [12] On February 26, 2020, I received an affidavit from the Receiver. In it, Mr. Ikuta, a lawyer and agent for the Trustee, deposed:
- [4] I have been advised by the Trustee and verily believe it to be true that:
- (a) As a third party to the Japanese bankruptcy, it would be open to Kinoshita to bring a legal action for unjust enrichment or an applicable tort essentially taking the position that the condo proceeds did not belong to the bankruptcy estate and instead belong to Kinoshita (the "Kinoshita Claim").
 - (b) As long as the Kinoshita Claim remained outstanding and no Japanese order, authorization or approval was made by the Japanese court for distribution of the net proceeds prior to the Kinoshita Claim being commenced or dismissing or addressing the Kinoshita Claim after it was commenced, the net proceeds would:
 - (i) continue to be held by the Trustee;
 - (ii) the Japanese bankruptcy file would remain open;
 - (iii) no final dividend would be made to the creditors of the bankruptcy estate.
- [5] I make this affidavit to assist this Honourable Court with the answer to the question it raised concerning potential legal avenues which might be available to Kinoshita to pursue in Japan, but it should remain clear that the Trustee does not agree that there is any validity whatsoever to Kinoshita's Claim to the net condo proceeds either in Canada or in Japan.

[13] On Friday, March 6, 2020, I received a letter from counsel for Mr. Nishiyama indicating that Mr. Nishiyama had recently filed a petition to "set aside" the judgment(s) in Japan that the Resolution and Collection Corporation ("RCC") had obtained against him years earlier. On that same day, I received a letter from counsel for Ms. Kinoshita in which counsel wrote:

Further, Ms. Kinoshita requires additional time to provide a response to the opinion letter provided by the Trustee. She has been unable to do so in the time remaining. She has received advice that there could be significant, potentially insurmountable barriers to litigating her claim as to beneficial ownership of the property. It seems that in Japan a security deposit that is a significant percentage of the amount at issue could be ordered payable by a party before they can have their day in court. An order that Ms. Kinoshita pay millions of dollars into court before she can proceed with her claim would have the effect of preventing her from being able to proceed with her claim.

Ms. Kinoshita will be requesting six weeks to obtain a written opinion from a Japanese lawyer and translated it into English. It seems that the minimum time a translator can translate Japanese legal documents is in two weeks, which is why we will be asking for six instead of four.

[14] Counsel's correspondence did not include or make reference to a formal application for an adjournment. Nevertheless, I contacted the Registry asking that when the parties appeared on March 10, 2020, the day we had scheduled for me to deliver my oral Reasons for Judgment, they be prepared to address the issue of an adjournment.

[15] On March 10, 2020, counsel for Ms. Kinoshita confirmed that he now sought a six-week adjournment to obtain a legal opinion. That adjournment was opposed by the Receiver. Counsel for Ms. Kinoshita again provided me with no authority which indicated that any impediment or difficulty on the part of Ms. Kinoshita, with advancing her interest in the Barclay Condominium before the Trustee in Japan, was relevant to the application that had been brought by the Receiver.

[16] Counsel for Ms. Kinoshita did argue on the basis of Marciano (Séquestre de), 2011 QCCS 7086 ("Marciano SC"), that because Mr. Nishiyama was now challenging one or more of RCC's earlier judgments, which grounded a part of the Japanese bankruptcy proceedings, it was not appropriate for this Court to recognize the foreign insolvency. Because counsel for the Receiver participated in the application by phone and because he had not earlier seen the Marciano SC decision, I asked him to provide me with his comments, in writing, in the next day or two. On that same day, counsel for the Receiver provided me, through the Registry, with his written submissions. In those submissions, I was advised that Marciano SC had been reversed by the Quebec Court of Appeal in Marciano (Séquestre de), 2012 QCCA 1881 ("Marciano CA").

[17] I was also directed to an article authored by G. Levine and entitled "The Interplay between Comity, Public Policy and Paramountcy in Recognition of Foreign Judgments and Insolvency Matters," (2014) Ann Rev Insol 27, in which the author addresses the Marciano cases and the central facts and issues in those decisions. The article also reveals how different the underlying facts in the Marciano cases are from the circumstances in the present case. Mr. Levine wrote:

Mr. Marciano had been condemned by a California jury to pay tens of millions of dollars to several parties as damages for defamation. Although he appealed the civil judgments, Marciano did not post the significant bond necessary to stay execution and, as a result, the judgments being executory. These judgments led to an involuntarily bankruptcy petition being granted in California, which Marciano also appealed. Because a significant portion of Marciano's assets were located in Quebec, Marciano's bankruptcy trustee applied for recognition under s. 267 and following of the BIA.

Judge Schrager, then of the Quebec Superior Court, analyzed the relationship between the foreign recognition proceedings of the Civil Code of Quebec ("CCQ") and those set forth in the BIA. Pursuant to Articles 3155(2) of the CCQ, a Quebec Court is precluded from recognizing a foreign judgment that is not final. However, s. 281 of the BIA provides that a foreign representative is "not prevented" from seeking recognition of a foreign proceeding that is under appeal and the "court may grant leave" notwithstanding the appeal. Judge Schrager made the following comments in [R. v. Marciano, 2011 QCCS 7086]:

[90] section 281 BIA is permissive by way of exception to the Common Law (and Civil Law) rule. This is not an appropriate case to recognize a foreign insolvency which is subject to an appeal. It might make some sense to recognize a foreign main proceeding that was under appeal where the foreign insolvency proceeding in question relates to a business reorganization. If a Canadian subsidiary or a Canadian place of business were involved and intimately linked to the US business, the recognition of a US stay order pending appeal might be appropriate. It might well be necessary to maintain the status quo of the Canadian enterprise in such example.

[91] The Bankruptcy Judgment in this case is in the nature of the compulsory execution of the Civil Judgments. The Canadian recognition is in furtherance of that goal, i.e. the confiscation and liquidation of property to ultimately satisfy the Civil Judgments. Such a foreign bankruptcy judgment should not be recognized or enforced before it is final. This applies even more strongly where the Civil Judgments which give rise to the debt upon which the Bankruptcy Judgment is based are not themselves final.

The Quebec Court of Appeal took a different approach, emphasizing paramountcy and comity. Judge Dalphond writing for the Court noted that one of the principal purposes of the adoption of the Model Law in the foreign recognition sections of the BIA is to promote "cooperation between authorities" and further held:

Under s. 269, a foreign representative such as Gottlieb was entitled to petition the Superior Court of Quebec, a Canadian province where Marciano owns directly or indirectly substantial assets, for a recognition of the US bankruptcy judgment even if not final since s. 281 of the BIA provides that foreign proceedings does not have to be final.

The fact that under Quebec Rules of Civil Procedure a foreign civil judgment cannot be enforceable if it is not final is not relevant since 281 of the BIA prevails over the Quebec Rules when there is a conflict.

[18] A review of the Marciano SC decision reveals that Schrager J. had been concerned with the fact that both the bankruptcy orders and the civil judgments were under appeal and subject to a stay of proceedings in the United States, making them executory in the foreign main jurisdiction. However, this concern was not shared by the Quebec Court of Appeal in Marciano CA, which said:

[101] To sum up, Schrager J. erred regarding the application of s. 189 BIA in the context of a cross-border bankruptcy. Moreover, his decision to rescind and quash was based on the erroneous conclusion that a foreign bankruptcy judgment, which is not final and itself based on civil judgments that are not final, is not enforceable under the BIA. ...

[19] Apart from the fact that Marciano SC has been overturned, the following matters are also relevant:

- a) the application sought by the Trustee in this instance does not seek foreign recognition of the Japanese bankruptcy as that recognition order was made by this Court in December 2018; and
- b) all orders are in fact final in the foreign main proceeding in Japan.

[20] Thus, the proceeding that Mr. Nishiyama has commenced in Japan apparently seeks to set aside three separate judgments that RCC obtained a number of years ago. In this jurisdiction, a proceeding to set aside a trial judgment is fundamentally different, in multiple respects, from an appeal of that judgment. Mr. Nishiyama's intended proceeding against RCC does not, at this time, affect the status of the foreign main proceeding in Japan in any way.

ANALYSIS OF THE APPLICATION BEFORE ME

[21] At the outset, it is relevant that counsel for Mr. Nishiyama recognized that his client had limited standing on this application. If the Family Law Agreement is valid, and notwithstanding various apparent difficulties with that agreement I have assumed it is, the beneficial interest in the Barclay Condominium and in other assets that Mr. Nishiyama owned through Sun Moon Management and Rainbow One Investments would now rest with Ms. Kinoshita.

- [22] It is also relevant and important that virtually every connection to this matter is found in Japan. RCC is a Japanese company and its various judgments were obtained in Japan. The Trustee is in Japan. Mr. Nishiyama's criminal proceedings took place in Japan. The documents that are relevant to these various legal proceedings are in Japan and will all be in Japanese. The Family Law Agreement was prepared in Japan and is in Japanese. Both Mr. Nishiyama and Ms. Kinoshita live in Japan and both speak Japanese. Indeed, as I noted in the Disclosure and Examination Reasons, Mr. Nishiyama is not permitted to leave Japan, under court order.
- [23] In addition, the relevant authorities do not support Ms. Kinoshita. The decision in the matter of MtGox Co. Ltd. (Re), 2014 ONSC 5811 ["MtGox"], is of assistance. In MtGox, the Japanese trustee in bankruptcy of MtGox Co. Ltd. applied for:
- 1) an initial recognition order under Part XIII of the Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 ("BIA");
 - 2) for a declaration that the trustee was a foreign representative pursuant to s. 268(1) of the BIA and was thereby entitled to bring the application under s. 269 of the BIA; and
 - 3) an order under s. 271(1) of the BIA staying and enjoining any claims, rights or proceedings against MtGox and its property in Ontario.
- [24] MtGox was a Japanese company that had always been located in Japan. It had operated an online exchange for the purchase and sale of bitcoins. MtGox suspended trading after discovering a theft or disappearance of bitcoins that it held. The Japanese courts had entered a bankruptcy order and appointed the applicant as bankruptcy trustee. At paras. 13 to 18, Justice Newbould explained the provisions of the BIA that pertain to the recognition of foreign bankruptcy proceedings. At paras. 19 to 23, he addressed what constituted a "foreign main proceeding". He then applied these considerations to MtGox, at para. 22, and based on those considerations, he concluded, at para. 23, that the Japanese proceedings were a foreign main proceeding. He also granted the stay being sought, that being at paras. 25 to 28.
- [25] Thus, the Court's decision in MtGox mirrors, in some respects, the status of the bankruptcy proceedings in this Court. Justice Newbould also addressed the competing theories that underlies multinational bankruptcies and then said:
- [11] There is increasingly a move towards what has been called modified universalism. The notion of modified universalism is court recognition of main proceedings in one jurisdiction and non-main proceedings in other jurisdictions, representing some compromise of state sovereignty under domestic proceedings to advance international comity and cooperation. It has been advanced by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency, which Canada largely adopted by 2009 amendments to the CCAA and the BIA. Before this amendment, Canada had gone far down the road in acting on comity principles in international insolvency. See *Babcock & Wilcox Canada Ltd, Re* (2000), 18 C.B.R. (4th) 157 and *Lear Canada, Re* (2009), 55 C.B.R. (5th) 57.

[12] In the BIA, the Model Law was introduced by the enactment of Part XIII. Section 267 sets out the policy objectives of Part XIII as follows:

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

- (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;
- (b) greater legal certainty for trade and investment;
- (c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;
- (d) the protection and the maximization of the value of debtors' property; and
- (e) the rescue of financially troubled businesses to protect investment and preserve employment.

[26] The foregoing considerations and principles are directly relevant. The Japanese bankruptcy proceeding in this case is a foreign main proceeding and virtually all of the factors which underlie and relate to that bankruptcy are found in Japan. It is important, in the interest of comity, that Canadian courts cooperate with competent authorities and with courts in foreign jurisdictions in cross-border insolvencies. This is likely to enhance the fair, consistent and efficient administration of such insolvencies.

[27] The practical manifestation of these salutary objectives is already apparent in this case. Thus, it is relevant that considerable funds and/or assets, that were formerly owned by Mr. Nishiyama, and that RCC uncovered through the proceedings it commenced in Hong Kong and in Singapore, have already been remitted by RCC to the Trustee in Japan.

[28] In similar fashion, it is relevant that the funds and securities Mr. Nishiyama formerly held through Sun Moon Management and Rainbow One Investments at the Royal Bank of Canada and/or RBC Dominion Securities, and that were uncovered by RCC through its investigations in British Columbia, have also been remitted to the Trustee in Japan.

[29] Indeed, this is particularly relevant because those assets are, under the Family Law Agreement, also purportedly beneficially owned by Ms. Kinoshita. Thus, one significant component of the assets that Ms. Kinoshita asserts an interest in are already held by the Trustee in Japan. If Ms. Kinoshita were to advance her interest in those assets in Japan, it would be both inefficient and inconsistent with the cross-border insolvency regime that exists under the BIA and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency, that both Canada and Japan have adopted, to have similar parallel proceedings in British Columbia.

[30] Accordingly, I do not consider that there is any basis to grant Ms. Kinoshita the further adjournment she seeks. She has not explained on a principled basis how the legal opinion she hopes to obtain would prevent the Receiver from obtaining the relief he seeks on this application. Conversely, I am satisfied, both as a matter of principle and on the basis of the pragmatic considerations that I have described, that the Receiver is entitled to remit the balance of the proceeds from the sale of the Barclay Condominium to the Trustee in Japan. To be precise, I make the order that is described in para. 3(c)(iv) of the Receiver's Notice of Application.

[31] Does anything arise from that, counsel?

[DISCUSSION BETWEEN COUNSEL AND THE COURT]

[32] THE COURT: I will include a term, then, that the funds not be remitted to the Trustee in Japan until 4 p.m. on Monday, March 30.

"Voith J."

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