

Delivering expert knowledge to global counsel



Insolvency & Restructuring - Canada

Stays of Proceedings under the Bankruptcy and Insolvency Act

Contributed by ThorntonGroutFinnigan LLP

January 12 2007

A party seeking to enforce a restrictive covenant or claim for injunctive relief against an insolvent company seeking to reorganize will often rely on the proposition that injunctive relief is not stayed by the automatic stay provisions set forth in Section 69(1)(a) of the Bankruptcy and Insolvency Act (Canada). In relying on this proposition, it may be argued that injunctive relief is not a 'remedy' for the recovery of a claim provable in bankruptcy.

Section 69(1)(a) of the act provides that, on commencement of a reorganization proceeding, no creditor (i) has any remedy against the insolvent person or the insolvent person's property, or (ii) shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy, until the filing of a proposal in respect of the insolvent person or the bankruptcy of the insolvent person.

However, in *Golden Griddle Corporation v Fort Erie Truck & Travel Plaza Inc* it was held that the word 'remedy' in Section 69(1)(a) should be given a broad interpretation that is purposive and in accordance with the objectives of the act in general. Specifically, a reorganizing debtor should be given breathing space during which to negotiate with its creditors and, if possible, put together a prospective financial restructuring that would meet their requirements. The court held that a purposive definition of the word 'remedy' in Section 69(1)(a) of the act would suggest that remedies that in any way hinder or could impair that process are caught by that section and stayed.

The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forward a proposal, it should be stayed. However, if the nature of the injunction sought would have no effect on that ability, it would not be caught by the stay of proceedings. Therefore, it is the impact rather than the generic nature of the relief sought that should govern.

As a result of this case, it may also be argued that the same rationale applies to the word 'remedy' in Section 69.3(1) of the act, which provides that, in a liquidating bankruptcy of a debtor, no creditor (i) has any remedy against the debtor or the debtor's property, or (ii) may commence or continue any action, execution or other proceeding for the recovery of a claim provable in bankruptcy, until the trustee has been discharged.

Although injunctive relief may be caught by the wording of Section 69(1)(a) of the act due to its potential impact on the restructuring process, a party seeking to claim for injunctive relief against a bankrupt company may apply to the court to lift the stay. The test for lifting the stay is set out in Section 69.4 of the act as follows:

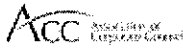
"A creditor who is affected by the operation of Section 69 to 69.3(1) or any other person affected by the operation of Section 69.3(1) may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied:

(a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

(b) that it is equitable on other grounds to make such a declaration."

For further information on this topic please contact Rachelle F Moncur at ThorntonGroutFinnigan LLP by telephone (+1 416 304 1616) or by fax (+1 416 304 1313) or by email (rmoncur@tgflegal.com).

The materials contained on this website are for general information purposes only and are subject to the disclaimer.



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2009 Globe Business Publishing Ltd