LexisNexis® Agricultural Law *NetLetter*

A twice-monthly current awareness service reviewing recent cases on land use, marketing boards, environmental issues, creditor rights, animals, grain, import/export and other matters in an agricultural context.

Thursday, April 7, 2016

Issue 345

HIGHLIGHTS

* A Justice of the Ontario Superior Court of Justice dismissed a farmer's application to set aside a Settlement Agreement and an Order discharging a Receiver. The farmer alleged a series of misrepresentations by the Receiver which induced the farmer to enter into the Settlement Agreement and consent to the discharge Order. The Justice concluded that the detailed and complete disclosure by the Receiver and all relevant facts in reports submitted to the Court and the farmer's lawyer when the discharge Order was granted was a complete answer to the farmer's allegations of misrepresentation. The Court also granted summary judgment to a Bank and the Receiver dismissing the farmer's $30 million claim against them. The Court relied on a series of standard terms in several Forbearance Agreements (entered into following a Farm Debt Mediation), including an entire agreement clause, acknowledgements of no claims or set offs and broadly worded releases. [Editor's note: This carefully reasoned decision is recommended reading for both lenders and Receivers. For lenders, it illustrates the importance of obtaining adequately worded Forbearance Agreements and ensuring borrowers have independent legal advice. For Receivers, it illustrates the importance of full and accurate disclosure to borrowers and the Courts.]. (Bank of Montreal v. Cardinal, CALN/2016-008, [2016] O.J. No. 1455, Ontario Superior Court of Justice)

NEW CASE LAW

Bank of Montreal v. Cardinal;

CALN/2016-008,

Full text: [2016] O.J. No. 1455;

2016 ONSC 1980,

Ontario Superior Courtof Justice,

R. Beaudoin, J.,

March 21, 2016.

Farm Debt Mediation -- Forbearance Agreements -- Alleged Misrepresentation by Receivers .

The Bank of Montreal (the "Bank") and a receiver, Surgerson Carson Associates, Inc. (the "Receiver") brought an application for summary judgment dismissing the claims of farmers, Jean-Luc Cardinal and the Estate of Raymond Cardinal, operating as Ferme Lani Drac (collectively "Cardinal").

Cardinal brought an application against the Bank and the Receiver to set aside a consent judgment granted in favour of the Bank to seek retroactive leave to bring the action against the Receiver.

Cardinal had commenced the action on October 3, 2013 seeking $30 million in damages against the Bank and the Receiver, alleging that the Bank breached a Forbearance Agreement by improperly obtaining a Consent Order appointing the Receiver which was provided pursuant to the Settlement Agreement. Cardinal also alleged negligence against the Receiver with respect to the Receiver's 7 week operation of the farm during the receivership period. Cardinal claimed this negligence caused the ultimate loss of his farm which had been in Cardinal's family for over 100 years.

The Bank had granted a series of loans to Cardinal. By early 2011, the Cardinal's loans totaled over $4.2 million and were in default.

On March 31, 2011, the Bank and Cardinal entered into a Forbearance Agreement following a mediation conducted pursuant to the Farm Debt Mediation Act. In this Forbearance Agreement Cardinal expressly admitted his debt to the Bank and his default, and acknowledged he had no claims or right of set off against the Bank and agreed that such claims were released, if they existed.

Seven days after entering into this Forbearance Agreement, Cardinal, through his lawyer, informed the Bank that he would not be able to honour the terms of the Forbearance Agreement. As a result, a second Forbearance Agreement dated April 11, 2011 was negotiated pursuant to which the Bank agreed to advance further funds to Cardinal.

In August of 2011, Cardinal advised the Bank through his lawyer that he could not honour the terms of the second Forbearance Agreement.

Following further negotiations, the Bank and Cardinal entered into a third Forbearance Agreement on September 7, 2011. In this Forbearance Agreement, Cardinal expressly acknowledged numerous breaches of the credit facilities, security and the previous Forbearance Agreements, as well as his indebtedness which was by then in excess of $4.3 million. The Bank disclosed legal and professional fees then outstanding in the amount of approximately $160,000.00. Cardinal consented to the appointment without notice of a Receiver by the Bank in the third Forbearance Agreement. The provisions of the Forbearance Agreement expressly provided that in the event of a default thereunder, the Bank would be at liberty to apply for an Order appointing a Receiver in the form attached to the Agreement and authorized the Bank's solicitors to sign, on Cardinal's behalf, any consent documents as may be required to obtain this Order.

The third Forbearance Agreement also contained a release in favour of the Bank.

Within less than a month following the conclusion of the third Forbearance Agreement, the Bank determined that Cardinal had breached several terms of this Agreement. These breaches were confirmed in correspondence from the Bank's solicitors to Cardinal's solicitors.

The Bank applied for and obtained a Receivership Order without notice on October 7, 2011.

On October 11, 2011, Cardinal retained new legal counsel who brought an application to set aside the Receivership Order. Extensive Affidavits were filed by Cardinal which set out his disputes with the Bank.

On November 23, 2011, the Bank, the Receiver and Cardinal met with their lawyers to discuss settlement. They entered into a Memorandum of Understanding ("MOU") which provided that an Order removing the Receiver would be granted on November 28, 2011 whereby:

> "The Receiver will be removed, and all claims will be released except claims by the Bank under its security."

On November 24, 2011, Cardinal's lawyers wrote the Receiver expressing concerns that the Bank would receive funds in excess of its indebtedness (estimated at $385,000.00). Cardinal's lawyers proposed that this sum be paid to a Trustee in Bankruptcy for the benefit of Cardinal's unsecured creditors. Cardinal's lawyers also wanted to ensure that legal fees of $200,000.00 payable to them would be transferred to them before Cardinal filed a Notice of Intention to File a Proposal under the Bankruptcy and Insolvency Act.

On November 24, 2011, the Bank, the Receiver and Cardinal met again with their lawyers to formalize a Settlement Agreement pursuant to the MOU. The agreement provided that Cardinal would sell all of his assets by March, 2012 in order to repay their indebtedness to the Bank. They also filed a Notice of Intention under the Bankruptcy and Insolvency Act and a proposal to deal with their other creditors. This Settlement Agreement included an "entire agreement clause" whereby Cardinal acknowledged that no representations were made to induce him to enter into the agreement as well as a full and final release in favour of the Bank and the Receiver.

On November 28, 2011, in accordance with the terms of this Settlement Agreement, the parties' lawyers appeared in Court and obtained an Order terminating the receivership. The termination Order confirmed and approved the Settlement Agreement and the Receiver's report and a supplementary report which were accepted by the Court. The report included the Receiver's Statement of Receipts and Disbursements to November 28, 2011.

By April, 2012, Cardinal was unable to comply with some of the terms of this Settlement Agreement and requested further amendments. On April 3, 2012, the Bank agreed to an amended Settlement Agreement with Cardinal pursuant to which Cardinal executed another full and final release. Cardinal also acknowledged being in breach of the November 24, 2011 Settlement Agreement. This Amending Agreement also contained an "entire agreement clause" and an acknowledgement that Cardinal had no claims against the Bank, and released any claims which might have existed.

In accordance with the terms of this amended Settlement Agreement, Cardinal sold the remaining farm assets on May 8, 2012.

Through all of these negotiations, agreements and Court applications, Cardinal was represented by legal counsel. When the Bank and the Receiver brought a motion for summary judgment on March 24, 2015, Cardinal alleged that the Bank and/or the Receiver made misrepresentations at the November 23 and 24, 2011 settlement meetings regarding the financial affairs of the farm, which induced him to enter into the Settlement Agreement.

Cardinal filed a motion on May 29, 2015 to set aside the November 28, 2011 Settlement Agreement and the Order terminating the receivership and approving the Receiver's reports and accounts.

Cardinal alleged a number of misrepresentations as the basis to set aside the Order and the Agreements: He alleged misrepresentations:

1. Concerning the total amount of legal and professional fees owing to the Bank and the Receiver.

2. Concerning additional expenses claimed by the Receiver.

3. That the fall harvest would generate income of $1 million.

4. With respect to an unexpected cash flow shortfall of approximately $43,000.00.

Decision: Beaudoin, J. dismissed Cardinal's motion to set aside the Settlement Agreement and the termination Order and granted the application of the Bank and the Receiver for summary judgment dismissing the claim against the Bank and the Receiver [at para. 51].

Beaudoin, J. agreed that a receiver owes a duty to make full disclosure to borrowers and that a misrepresentation by a Receiver may be sufficient to set aside a consent Order, but held that the evidence of any alleged misrepresentations must be clear and that it will be difficult to establish misrepresentation in the face of clear agreements to the contrary

where a borrower has been represented by legal counsel. Beaudoin, J. stated, at para. 40 to 42:

> [40] I agree that a Receiver owes a duty to make full disclosure of all documents in its possession which are relevant to the issues in the Receivership. I also agree that a misrepresentation may be sufficient to set aside an order made on consent, but the evidence of any such misrepresentations must meet a strict test.
>
> [41] Since the Borrowers now wish to pursue a claim in damages against the Receiver, there is no issue that they need retroactive leave to commence their action against the Receiver. When the actions of a Receiver form the basis of intended proceedings have been approved by the Court, as they have in this case, a Plaintiff must demonstrate a strong prima facie case to obtain that leave. In Bank of America Canada v. Williann Investment Ltd. [1993] O.J. No. 3039, the Court concluded that a strict test is required as there would be little point in a Receiver seeking an order approving its conduct since the purpose of that order is to provide the Receiver a measure of judicial protection. This strong prima facie test was applied by the Court of Appeal in 1117387 Ontario Inc. v. National Trust Co., 2010 ONCA 340 (CanLII). This test is applicable here. Although the Borrowers allege misrepresentations by both the Bank and the Receiver, their Factum targets the Receiver only.
>
> [42] Moreover, as the Supreme Court of Canada held in the case of Roland Elwyn Lister Ltd. v. Dunlop Canada Ltd., [1982] 1 S.C.R. at paras. 52-54, it will be very difficult to find a legal principle to vitiate an agreement where parties experienced in business with full knowledge of the facts enter into a settlement agreement, negotiated and drafted by their respective solicitors. This is particularly so when the Agreement has been fully acted upon and executed by the parties and approved by the Court. Here we have parties who executed three Forbearance Agreements and two Settlement Agreements and who consented to a Termination Order. The last Full and Final Release was executed after the Termination Order that the Borrowers sought to set aside and it contains clear language that the Releasors release the Bank and the Receiver for all matters arising since the "Release executed by the Releasors on November 28, 2012, including all damages not known but which may arise in the future.

Beaudoin, J. observed that there was no independent corroboration in Cardinal's evidence of misrepresentation [at para. 43], and no indication of any misrepresentations in the many documents which were filed [at para. 44 to 46].

Beaudoin, J. commented, at para. 47 that there was no reason for the Receiver to assess the viability of the farm as an ongoing concern, stating:

> [47] There was no reason for the Receiver to assess the viability of the Farm as an ongoing concern or to provide any information regarding the Farm's continued operations beyond the Statement of Receipts and Disbursements

> that it provided. The Borrowers went on to sell the remaining parcels of land with the assistance of the same counsel who helped negotiate the Settlement Agreements.

Beaudoin, J. found no evidence that Cardinal had been induced to sign releases or any alleged misrepresentations and that the detailed information provided in the Receiver's first and final report were a complete answer to Cardinal's claims of misrepresentation, stating, at para. 49:

> [49] More importantly, I find that the Receiver fulfilled its obligations to disclose relevant information, and the Borrowers and their counsel consented to an order that approved the First and Final Report that contained detailed information. As noted in my review of the alleged misrepresentations, the First and Final Report is a complete answer to the Borrower's claims of misrepresentation. The Borrowers' counsel submits that it was not reasonable to expect that Borrowers would have reviewed that Statement of Receipts and Disbursements given the volume of material that was filed with the Court on November 28, 2011, the same date that they signed the Full and Final Releases. I reject that argument.

After refusing to set aside the agreement and the termination Order, summary judgment dismissing the claims against the Bank and the Receiver were granted, relying on the doctrine of res judicata.

CREDITS

This NetLetter is prepared by Brian P. Kaliel, Q.C. of Miller Thomson LLP, Edmonton, Alberta.