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Ontario Court of Appeal finds stalking horse agreement's lower purchase price gives debtor company automatic right of appeal in receivership

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Appeals under the *Bankruptcy and Insolvency Act* (BIA) generally result in an automatic stay of the order under appeal —a potentially costly and disruptive outcome. Accordingly, the BIA requires by default that an interested party first seek leave to appeal a lower court decision unless its appeal meets a set of prescribed circumstances that appears broad but, in practice, has been construed very narrowly by the courts (i.e., making it difficult to obtain leave to appeal). In *Peakhill Capital Inc. v. 1000093910 Ontario Inc.*, 2024 ONCA 59, the Ontario Court of Appeal (the Court) opened up a new avenue where those circumstances are met. It held that a debtor had an automatic right to appeal an order approving a sale process and a stalking horse agreement in its receivership because that agreement provided an approximately $6.5 million lower purchase price than a pre-filing agreement the debtor was seeking to enforce.

What you need to know

- **Appeals as of right under the BIA**. The BIA provides a limited set of circumstances in which an interested party has an appeal as of right of an order or decision made under the BIA. An appeal as of right can trigger an automatic stay, slowing the course of the proceedings. One such circumstance is where the property involved in the appeal exceeds in value $10,000. Courts have historically interpreted these circumstances narrowly and have limited the scope of appeals as of right; for example, procedural decisions do not give rise to a right of appeal. *Peakhill* presents the opposite: a broader interpretation of a right to appeal and an automatic stay of the order under appeal.
- **Lower purchase price meets appeal criteria**. In *Peakhill*, the Court found a right of appeal because there was a likelihood of loss exceeding $10,000. That loss was occasioned by the lower court's decision to approve a sale and investment solicitation process (SISP) and stalking horse purchase agreement in the face of an alternative pre-filing purchase agreement. This resulted in an "inevitable" likelihood of loss in excess of $10,000 because the pre-filing agreement provided a significantly higher purchase price than the stalking horse agreement. As a result, the debtor had an automatic right of appeal, and the receivership was effectively stayed pending that outcome.

- **Looking ahead**. It appears that *Peakhill*'s reasoning could apply to a pre-filing purchase agreement that provided for a better purchase price than an agreement entered into in a receivership or in a bankruptcy. To reduce this appeal risk, receivers and trustees should consider taking steps to ensure that pre-filing purchase agreements are terminated, or their validity is determined before seeking approval of a sale process. Otherwise, counterparties might seek to delay the restructuring through an appeal.

The details

Background

The Debtor ('910 Ontario Inc.) owned and managed industrial real property in Vaughan, Ontario. Days before its receivership proceedings started, it had entered into an agreement of purchase and sale for that real property. However, following the appointment of the Receiver over the Debtor's assets, that same purchaser and the Receiver entered into a new purchase agreement with an approximately $6.5 million lower purchaser price than the pre-filing agreement. The purchaser took the position that the original agreement was null and void.

The Receiver brought a motion in the court below to 1) approve the SISP and the new agreement to act as a stalking horse bid, and 2) terminate the original agreement. In response, the Debtor brought a cross-motion seeking an order to approve the original agreement and direct the Receiver to complete that transaction. The motion judge granted the Receiver's SISP order, but she refused to terminate the original agreement or to hear the Debtor's cross-motion.

Key issue

The Debtor brought a motion to the Court of Appeal seeking directions on its appeal rights. The key issue was whether the Debtor had an automatic right under the BIA to appeal—and a corresponding stay of—an order approving a stalking horse agreement with an approximately $6.5 million lower purchase price than a pre-filing agreement that the Debtor sought to enforce in its receivership.

The Court's decision

The Court found that the Debtor did have an automatic right of appeal because the stalking horse agreement's significantly lower purchase price triggered a potential loss on the debtor's property in excess of $10,000. The Court, therefore, stayed the order—including the SISP—pending the appeal.

The Court found that this criterion was triggered in these circumstances for three reasons:

- **The original agreement was potentially still in play**. The motion judge declined to order that the original agreement be terminated, meaning it was still potentially enforceable. The Court also found that the Receiver had effectively acknowledged, through its dealings with the Debtor, that the original agreement had not been terminated.

- **The motion judge's decision deprived the Debtor of an opportunity to be heard**. By declining to hear the Debtor's cross-motion, the motion judge's decision deprived the Debtor of any ability to complete or enforce the original agreement.

- **Loss was "inevitable"**. Although no loss was crystallized by the motion judge's decision or order, the delta between the floor price established by the stalking horse agreement and the original agreement was approximately $6.5 million. A likelihood of loss in excess of $10,000, therefore, appeared "inevitable".

Interestingly, although the Court characterized the likelihood of loss as "inevitable", the Court also noted that it remained to be seen whether the Debtor or the Receiver could actually enforce the original agreement against the purchaser. This is an issue that the Court may need to resolve during the Debtor's appeal.

Because of the appeal's resulting stay of a sale process, the Court ordered that the appeal be expedited.

Implications

The Court's decision in *Peakhill* represents a new avenue for parties to establish an automatic right of appeal, and corresponding stay of proceedings, under the BIA. However, *Peakhill* leaves many unanswered questions as to when an unterminated pre-filing purchase agreement might trigger this right. It is unclear, for example, whether an appeal would be triggered where the pre-filing agreement has a high degree of closing risk, where the pre-filing agreement amounts to an alleged preference, where the purchaser is a related party to the debtor or where the added cost and delay caused by the appeal would potentially jeopardize the insolvency process. Going forward, receivers and trustees should consider taking steps to ensure that pre-filing contracts are terminated early where there is a chance that counterparties might impede or delay the restructuring.

To discuss these issues, please contact the author(s).