



District of British Columbia
Division No. 03 – Vancouver
Court No. 11-2741708
Estate No. 11-2741708

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF

Hayer Demolition Ltd.

NOTICE OF APPLICATION

Name of applicant: Seacliff Holdings Ltd. and Whitewater Developments Ltd.

TO: Hayer Group Recycling Ltd. and Hayer Demolition Ltd.
c/o Bennett Jones LLP
666 Burrard St #2500
Vancouver, BC V6C 2X8
Attention: David Gruber

TO: The Trustee, Crowe Mackay & Company Ltd.
1177 W Hastings St #1100
Vancouver, BC V6E 4T5
Attention: Derek Lai

The Applicants have a mailing address of Whitelaw Twining Law Corporation, 2400 – 200 Granville Street, Vancouver, BC, V6C 1S4, and their counsel John Fiddick can be reached at 604-891-7259 and by email at jfiddick@wt.ca.

TAKE NOTICE that an Application will be made by the Applicants to the presiding Judge at the Courthouse at 800 Smithe Street, Vancouver, B.C., by telephone or MS Teams on June 3, 2021 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order that this application be heard together with a parallel application brought in a related proceeding: Court No. 11-2741709.
2. A declaration pursuant to section 69.4 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "BIA") that the stay of proceedings against the bankrupts Hayer Group Recycling Ltd. ("Hayer Recycling") and Hayer Demolition Ltd. ("Hayer Demolition") be and is hereby lifted and sections 69 to 69.31 of the BIA shall no longer apply in respect of Seacliff Holdings

Ltd. ("**Seacliff**") and Whitewater Developments Ltd. ("**Whitewater**") and British Columbia Supreme Court Action No. S-215193, Vancouver Registry (the "**Petition**").

3. A Declaration that the lease between the Petitioners as "**Landlord**" and the Respondents as "**Tenant**" for commercial property located at 11571 Michell Road, Richmond, BC (the "**Property**"), dated May 2, 2019, as amended (the "**Lease**"), terminated effective May 31, 2021 in accordance with the terms of the Lease;
4. An order that if the Tenant does not remove its equipment, vehicles, leasehold improvements, trade fixtures and other personal property (collectively, the "**Remaining Items**") from the Property by a time specified by the Court, the Landlord may remove the Remaining Items and store them pending further directions of the Court, or Agreement among the parties; and
5. Such further and other relief or directions as this Honourable Court may deem just and appropriate.

Part 2: FACTUAL BASIS

The Parties

1. Seacliff is a company incorporated pursuant to the laws of British Columbia with an address for service c/o 2400 -200 Granville Street, Vancouver BC.

Affidavit #1 of J. Luccock at para. 6, Ex. C

2. Whitewater is a company incorporated pursuant to the laws of British Columbia with an address for service c/o 2400 -200 Granville Street, Vancouver BC.

Affidavit #1 of J. Luccock at para. 6, Ex. C

3. Hayer Recycling is a company incorporated pursuant to the laws of British Columbia with a registered and records office at 300 – 10991 Shellbridge Way, Richmond BC.

Affidavit #1 of J. Luccock at para. 7, Ex. D

4. Hayer Demolition is a company incorporated pursuant to the laws of British Columbia with a registered and records office at 300 – 10991 Shellbridge Way, Richmond BC.

Affidavit #1 of J. Luccock at para. 7, Ex. D

Background

5. By agreement dated May 2, 2019, Seacliff and Whitewater as landlord (the "**Landlord**") agreed to lease the Property to Hayer Recycling and Hayer Demolition as tenant (the "**Tenant**"), as amended (the "**Lease**").

Affidavit #1 of J. Luccock at para. 3, Ex. A

6. The Property is an industrial property. It is an approximately 6,000 square foot pre-engineered building on 1.31 acres of land. The Property is used as a recycling facility.

Affidavit #1 of J. Luccock at para. 4

7. Legal title to the Property is registered jointly in the name of the Landlord/Applicants.

Affidavit #1 of J. Luccock at para. 5, Ex. B

8. Seacliff is a Vancouver based, privately owned real estate company with experience in development, acquisition and management of large-scale real estate projects and income properties throughout Western Canada.

Affidavit #1 of J. Luccock at para. 6

9. Whitewater is a Vancouver based company in the business of offering, among other things, complete construction services for commercial properties and developers.

Affidavit #1 of J. Luccock at para. 6

10. The Tenant is in the business of demolition and recycling.

Affidavit #1 of J. Luccock at para. 7

The Lease

11. The Lease is for a term of 2 years commencing on June 1, 2019 and expired on May 31, 2021 (the "Term"). The original Lease contained an option to renew the Lease for a further 3 year term.

Affidavit #1 of J. Luccock at para. 8

12. There were several instances where the Tenant failed to pay the Landlord rent as required, summarized briefly as follows:

- (a) The Tenant failed to pay Basic Rent (as that term is defined in the Lease) for the month of April 2020 on the first of the month. By letter dated April 9, 2020, the Landlord wrote to the Tenant to demand that it rectify the situation immediately or else the Landlord would exercise its remedies set out in the Lease.

Affidavit #1 of J. Luccock at para. 9(a), Ex. E

- (b) The Tenant again failed to pay Basic Rent for the month of August 2020 on time, as well as Additional Rent (as defined by the Lease), comprised of property taxes and yard/building maintenance fees. By letter dated August 10, 2020, the Landlord

demanded that the Tenant rectify these issues. The Tenant then paid the Basic Rent for August 2020 and the yard/building maintenance fees, but not the property taxes.

Affidavit #1 of J. Luccock at paras. 9(b) and 9(c), Exs. F and G

- (c) At no time did the Landlord agree to extend the payment for the property taxes owing as Additional Rent.

Affidavit #1 of J. Luccock at para. 9(c)

- (d) By September 14, 2020, Additional Rent (i.e. the property taxes) remained outstanding, so the Landlord wrote to the Tenant to demand full payment of the outstanding Additional Rent.

Affidavit #1 of J. Luccock at para. 9(d), Ex. H

- (e) By September 28, 2020, the Tenant failed to remedy its breach and pay the outstanding Additional rent, so the Landlord gave the Tenant written notice of the Landlord's election to terminate the Lease.

Affidavit #1 of J. Luccock at para. 9(e), Ex. I

- 13. In response, the Tenant's legal counsel wrote to the Landlord by email on September 30, 2020 and October 1, 2020 and asked the Landlord to reinstate the Lease or the Tenant would seek relief from forfeiture. The Tenant suggested that the City of Richmond had extended the deadline for payment of property taxes to the end of September due to the pandemic. The Landlord's counsel responded by email on October 1, 2020 and noted that property taxes were due on July 2, 2020 as specified in the property tax notice.

Affidavit #1 of J. Luccock at para. 10, Ex. J

- 14. The Landlord and the Tenant ultimately came to an agreement on October 2, 2020 to reinstate the Lease expressly on the understanding that:
 - (a) Monthly Basic Rent would be reduced from \$17,083.33 to \$13,125.00; and
 - (b) The term of the Lease would expire on May 31, 2021 with no option to renew or extend the Lease.

Affidavit #1 of J. Luccock at para. 11

- 15. The Landlord and the Tenant then entered into a written Lease Reinstating and Amending Agreement dated October 1, 2020 (the "Reinstating Agreement"). The Tenant's principal,

Paul Hayer, signed the Reinstating Agreement and the Tenant's counsel delivered a copy of the same to the Landlord on October 9, 2020.

Affidavit #1 of J. Luccock at para. 12, Ex. K

16. Material terms of the Reinstating Agreement include:

2. **Lease Reinstatement.** Notwithstanding the Tenant's defaults under the Lease, effective as of the date of the Notice, provided all parties execute and deliver this Agreement, the Lease is hereby revived and reinstated and the parties hereby ratify the Lease, as amended by this Agreement, and confirm that the Lease, as amended by this Agreement, will be treated as not having previously terminated and is and will continue to be binding on each of the parties hereto, and all covenants, representations, warranties, terms, conditions and other provisions of the Lease, as amended by this Agreement, are in full force and effect.

3. **Lease Amendment.** Effective as of the date of this Agreement, the Lease is hereby amended as follows:

(a) Monthly Basic Rent payable on and after the date of this Agreement is reduced from \$17,500 to \$13,125; and

(b) Schedule "F" to the Lease, the schedule entitled "Special Provisions", is deleted in its entirety.

4. **No Option.** Notwithstanding anything contained herein or in the Lease to the contrary, the parties hereby acknowledge and agree that the Tenant has no option to renew or extend the Term of the Lease and that the Term will expire and end on May 31, 2021.

5. **Ratification.** The parties confirm and ratify the terms and conditions contained in the Lease, as amended by this Agreement. This Agreement is expressly made a part of the Lease to same extent as if incorporated in the Lease, and the parties agree that all agreements, covenants, conditions and provisos contained in the Lease, except as amended in this Agreement, will be and remain unamended and in full force and effect during the Term, as the same may be extended or renewed. The Landlord and the Tenant acknowledge and agree to perform and observe, respectively, the obligations of the Landlord and the Tenant under the Lease.

17. At no time prior to the Reinstating Agreement did the Tenant exercise the option to renew. Further, at no time subsequent to the Reinstating Agreement did the Tenant purport to exercise the option to renew under the original Lease.

Affidavit #1 of J. Luccock at para. 13

18. From and after the Reinstating Agreement, the Tenant has paid the Landlord the new reduced rent provided for in the Reinstating Agreement.

Affidavit #1 of J. Luccock at para. 14

The Lease: Fixtures & Delivering Possession

19. Pursuant to the Lease, any leasehold improvements and Tenant trade fixtures not removed by the expiration of the Lease become the property of the Landlord and the Landlord may sell or otherwise dispose of them at its sole discretion. In particular, the Lease provides as follows:

6.06 Removal of Fixtures and Improvements

Leasehold Improvements shall immediately become the property of the Landlord upon affixation or installation without compensation therefor to the Tenant but the Landlord is under no obligation to repair, maintain or insure Leasehold Improvements. Leasehold Improvements shall not be removed from the Leased Premises either during or at the expiration or earlier termination of the Term, except that the Tenant shall, at the end of the Term, remove such Leasehold Improvements installed or constructed by or on behalf of the Tenant as the Landlord may require to be removed. The Tenant may, during the Term, remove its trade fixtures provided that the Tenant is not in default under this Lease. The Tenant shall at the expiration or earlier termination of the Term remove its trade fixtures as the Landlord may require. Any removal of Leasehold Improvements and/or the Tenant's trade fixtures shall be done at the Tenant's sole cost and expense and the Tenant shall forthwith repair at its own cost any damage caused to the Leased Premises or the Building or any part thereof by the installation or removal of Leasehold Improvements and/or trade fixtures. If the Tenant does not remove its trade fixtures at the expiration or earlier termination of the Term, then the trade fixtures shall, at the option of the Landlord, become the property of the Landlord and may be removed from the Leased Premises and/or sold or otherwise disposed of by the Landlord in such manner as it deems advisable. For greater certainty, the Tenant's trade fixtures shall not include any heating, ventilating or air-conditioning equipment or other building services or floor covering affixed to the floor of the Leased Premises. The obligations of the Tenant set forth in this Section shall survive the expiry or other termination of the Term.

Notwithstanding anything else herein contained, the Tenant shall be entitled to remove the industrial scale (the "Scale") installed on or affixed to the Leased Premises at the expiration or earlier termination of the Term, provided that the Tenant shall forthwith repair any damage caused to the Leased Premises caused by the removal of the Scale.

[Emphasis added.]

20. Further, under the Lease the Tenant is to deliver up possession of the Leased Premises to the Landlord in the same condition in which the Tenant is required under the Lease to repair and maintain the Property and Leasehold Improvements, as defined in the Lease. In particular, Article 6.07 provides:

6.07 Repair on Termination

At the expiration or sooner termination of the Term the Tenant shall, at its own expense:

- (a) deliver up possession of the Leased Premises to the Landlord in the same condition in which the Tenant is required under this Lease to repair and maintain the Leased Premises together with all Leasehold Improvements which the Tenant is required or permitted to leave therein or thereon free and clear of all encumbrances and in a clean and tidy condition and free of all rubbish and to deliver to the Landlord all keys and security devices; and

(b) remove any and all materials which may be deemed by any applicable legislation as contaminated or hazardous (and which have been brought onto the Project by or on behalf of the Tenant or which are a result of the Tenant's use or occupation of the Leased Premises), and clean up and/or remediate any and all resultant contamination in compliance with all applicable laws and regulations and comply with all requirements of Section 15.13.

The covenants contained in this Section shall survive the expiry of other termination of the Term.

21. With respect to the Tenant's repair and maintenance obligations, Article 6.01 of the Lease provides:

6.01 Tenant to Maintain and Repair

The Tenant shall at its own cost repair, replace, maintain and keep the Leased Premises and every part thereof, including without limitation the Leasehold Improvements, fixtures and furnishings in good and substantial repair as a prudent owner would do, damage by fire and any other perils against which the Landlord is required under this Lease to insure, only excepted. The Tenant agrees that the Landlord may enter and view the state of repair and condition and that the Tenant shall repair in accordance with notice in writing from the Landlord; provided that if the Tenant neglects to so maintain or to make such repairs or replacements promptly after notice, the Landlord may, at its option, do such maintenance or make such repairs or replacements at the expense of the Tenant, and in any and every such case the Tenant covenants with the Landlord to pay to the Landlord forthwith as Additional Rent all sums which the Landlord may have expended in doing such maintenance and making such repairs and/or replacements; provided further that the doing of such maintenance or the making of any such repairs or replacements by the Landlord shall not relieve the Tenant from its obligation to maintain, repair and replace.

Sale of the Property

22. The Landlord entered into a contract of purchase and sale to sell the Property to an arms' length third party (the "**Purchaser**") in January 2021, as amended (the "**Sale Agreement**"). The Purchaser removed subject conditions in February 2021.

Affidavit #1 of J. Luccock at para. 15, Ex. L

23. Further to the Sale Agreement, the Sale Agreement transaction was initially set to close on May 31, 2021 and the Landlord was required to deliver the Purchaser vacant possession on June 1, 2021.

Affidavit #1 of J. Luccock at para. 16

24. On March 25, 2021 the Landlord gave the Tenant notice of the Sale Agreement and that the transaction would close on May 31, 2021. The Tenant responded on March 29, 2021 and asked whether the Purchaser would be willing to lease the Property to the Tenant. The Landlord responded on the same day and advised the Tenant that the Purchaser declined and would require vacant possession of the Property upon termination of the Lease on May 31, 2021.

Affidavit #1 of J. Luccock at para. 17, Ex. M

25. On April 8, 2021, the Landlord wrote to the Tenant via email again advising it had sold the Property, and requesting that the Tenant ensure the Property is vacated and all Tenant belongings removed by May 31, 2021.

Affidavit #1 of J. Luccock at para. 18, Ex. N

The Tenant's Refusal to Vacate the Property and Breaches

26. However, on May 26, 2021, the Landlord received a letter from the Tenant's counsel suggesting that Reinstating Agreement was not enforceable and that the Tenant was not required to vacate the Property on May 31, 2021.

Affidavit #1 of J. Luccock at para. 19, Ex. O

27. The Landlord's counsel responded by letter dated May 27, 2021 which was expressly not written on a without prejudice basis. The Landlord confirmed that the Reinstating Agreement is an enforceable agreement, that the Lease will terminate upon the expiry of the Term and the Tenant is required to vacate the Property by May 31, 2021.

Affidavit #1 of J. Luccock at para. 20, Ex. P

28. Also on May 27, 2021, the Landlord wrote to the Tenant advising among other things that the 2021 Property Tax invoice and Operating Expenses invoice are still outstanding.

Affidavit #1 of J. Luccock at para. 22, Ex. Q

29. On May 27, 2021 the Landlord carried out an inspection of the Property and noted, *inter alia* the following damage to the Property :

- (a) Most of the dry wall along the western wall of the steel clad structure has been removed;
- (b) Multiple piles of demolished drywall removed from the premises; and
- (c) A portion of the SW wall of the steel clad structure has been manually cut out and the heating system removed and disconnected.

(the "Damage")

Affidavit #1 of J. Luccock at para. 23, Ex. R

30. The Landlord's counsel wrote to the Tenant's counsel regarding the Damage by letter dated May 28, 2021.

Affidavit #1 of J. Luccock at para. 24, Ex. S

31. The Tenant did not take any steps to vacate the Property.

Affidavit #1 of J. Luccock at para. 25, Ex. T

32. On May 31, 2021, Seacliff and Whitewater filed the Petition and Notice of Application seeking *inter alia*:
- (a) A Declaration that the Lease terminated effective May 31, 2021 in accordance with the terms of the Lease;
 - (b) A Declaration that the Tenant abandoned trade fixtures and Leasehold Improvements (as defined in the Lease), as well as any equipment, vehicles, chattels and other property or items remaining at the Property after 11:59 pm on May 31, 2021, including the industrial scale referenced in the Lease (collectively, the "**Remaining Items**") and that ownership of the Remaining Items passes to the Landlord; and
 - (c) Further, and in the alternative, an order that as 12:00 am on June 1, 2021 the Landlord may remove the Remaining Items and store them at the Tenant's cost pending determination of any dispute between the parties concerning the Remaining Items, and if the Tenant does not deliver notice within 2 weeks of the date of this Order of its intention to dispute ownership of the Remaining Items, then the Landlord is at liberty to sell or dispose of the Remaining Items;

Affidavit #1 Affidavit #1 of J. Luccock at para. 26, Ex. U

33. On the afternoon of May 31, 2021, the above noted application was heard before the Court on short notice. However, prior to the application being heard, each of Hayer Demolition and Hayer Recycling filed Notices of Intentions to make a proposal pursuant to the BIA.

Affidavit #1 Affidavit #1 of J. Luccock at para. 27, Ex. V

34. As a result of the foregoing, on May 31, 2021, the Landlord secured an extension to close the Sale Agreement until June 7, 2021 but was required to agree to, *inter alia*, a reduction of the purchase price of the Sale Agreement.

Affidavit #1 Affidavit #1 of J. Luccock at para. 28, Ex. W

35. On or about June 2, 2021, the Landlord filed an Amended Petition to restrict the relief sought to declaratory relief.

Affidavit #1 Affidavit #1 of J. Luccock at para. 29, Ex. X

36. The Tenant currently owns or has an interest in, and/or has access to several other industrial properties in the same area as the Property, including 12131 Mitchell Road, 11971 Mitchell Road, 11991 Mitchell Road, 12011 Mitchell Road, 12031 Mitchell Road, 12031 Mitchell Road, 12071 Mitchell Roach and 12111 Mitchell Road. Indeed, Hayer Demolition's address in the Lease is listed as 12011 Mitchell Road and it carries on a demolition business at that location.

Affidavit #1 Affidavit #1 of J. Luccock at para. 30, Ex. Y

Prejudice

37. Under the Lease the Tenant is to deliver up possession of the Leased Premises on termination to the Landlord in the same condition in which the Tenant is required under the Lease to repair and maintain the Property and Leasehold Improvements, as defined in the Lease.

Affidavit #1 of J. Luccock at para. 31

38. The Tenant has caused extensive damage to the Property and has not vacated the Property. The Landlord is accordingly not in a position to effect repairs prior to delivering possession of the Property to the purchaser.

Affidavit #1 of J. Luccock at para. 32

39. If the Landlord is unable to deliver vacant possession of the Property to the Purchaser as required by the Sale Agreement, the Landlord will be in breach of the Sale Agreement and exposed to claims by the Purchaser.

Affidavit #1 of J. Luccock at para. 33

Part 3: LEGAL BASIS

The Stay does Not Apply to the Petition

1. Section 69(1) provides for an exceptionally broad stay of measures against the debtor. As a general matter, whenever enforcement of a right against the debtor would impact the "breathing space" within which the debtor can formulate a proposal to its creditors, the enforcement measure will be precluded by the stay.

***Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CanLII 81263 (ON SC) at 11; *Emergency Door Service Inc., Re*, 2016 ONSC 5284 at 23**

2. However, section 69(1) is not controlling where the remedy a party seeks to enforce against a debtor is the termination of a contract or lease. Rather, the termination of a contract with a debtor is governed by section 65.1(1) and, in the case of a lease, 65.1(2). Section 65.1(1) provides as follows:

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

“(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.”

3. In *Cosgrove-Moore Bindery Services Ltd (Re)*, 2000 CanLII 22377 (ON SC) at para. 2, Justice Ground explained in:

[section 65.1 of the BIA] is a self-contained code dealing with a situation where a party is obligated to provide goods or services or the use of leased property under a contract or lease on a continuing basis to a person who files a notice of intention or proposal.

4. In *853571 BC Ltd v. Spruceland Shopping Centre Inc.*, 2009 BCSC 1187, the Court noted that the purpose of s. 65.1 related to, among other things, allowing a company to be in a position to permit assets including the unexpired terms of leases:

31 The purpose of s. 65.1 of the BIA is to permit a company to avoid being dismantled in a bankruptcy, to allow a company to survive, and to allow a company to be in a position to permit assets including the unexpired terms of leases either to be used by the company or to be available to be assigned and sold so that the sale proceeds can then be distributed for the benefit of the creditors of the company. If the underlying purposes of s. 65.1 of the BIA are to be effective, it can hardly be said that the landlord's rights against an insolvent tenant are not "suspended" or that the rights of a tenant are voided by the insolvency of the Tenant. [Emphasis added.]

5. Section 65.1 of the BIA permits the termination of a contract with a debtor so long as the reason for termination is not solely because of: (a) the debtor's insolvency; (b) the NOI filing; or in the case of a lease, (c) the non-payment of rent in the period preceding the NOI

filing. If the termination is for any other reason, the enforcement measure is not barred by any provision of the BIA. Indeed, if the stay of proceedings provided for in section 69(1) prevented termination of contracts irrespective of the reason, section 65.1 would serve no purpose.

6. In this case, there is no “termination”, as the Lease has expired pursuant to its terms and the Tenant has no right to occupy or otherwise remain on the Property. The Tenant is not an overholding Tenant. However to the extent this Court finds that the Petition involves a lease termination, whether the Landlord can pursue said Petition is governed by s. 65.1 as it is a complete code.
7. In this regard the British Columbia Court of Appeal’s comments in *Canadian Petcetera Ltd Partnership v. 2876 R Holdings Ltd.* (2010), 2010 BCCA 469 are apt. In *Petcetera*, the tenant on appeal argued that section 69(1) of the BIA prevented the landlord from terminating the lease without first having the stay lifted upon application under section 69.4. Justice of Appeal Tysoe disagreed, writing as follows:

[20] In my opinion, s. 69(1) does not stay the termination of leases because the phrase “for the recovery of a claim provable in bankruptcy” at the end of clause (a) modifies each of the earlier phrases in clause (a). I agree with counsel for the Landlord that this is confirmed by the placement of a comma after the word “proceedings” because there would be no comma if it was intended that the last phrase was to modify only the immediately preceding phrase. Thus, while the termination of a lease is an exercise of a remedy, it is not the exercise of a remedy for the recovery of a claim provable in bankruptcy.

8. Accordingly, in *Petcetera* the Court held that no provision of the BIA served to prevent the landlord’s termination of a lease where the sole reason for the termination was not one of the reasons enumerated in section 65.1. The same is true here.

***Petcetera* at paras. 27 and 29**

9. In *Re Emergency Door Service Inc.*, 2016 ONSC 5284, Justice Newbould was critical of *Petcetera* insofar as, based on the analysis in *Petcetera*, section 69(1) would not stay injunctive proceedings against a debtor. However, the facts in *Emergency Door* are distinguishable from the case at bar. First, *Emergency Door* was not dealing with the termination of a lease, but with a contract for the supply of goods. Second, here the issue concerns whether termination of a contract is stayed by s. 69(1), not whether an injunction proceeding is stayed by s. 69(1).
10. Further, in *Societe de recherche et developpement Cortech inc. (Porposition de)*, 2010 QCCS 2808, the Court found that a stay was inapplicable to an action to terminate a lease as the owner of the building is not the debtor’s business partner.
11. Additionally in *Hutchingame Growth Capital Corp v Independent Electricity System Operator*, 2019 ONSC 259, aff’d 2021 ONCA 430, leave to appeal ref’d [2020] SCCA No.

312), which involved a breach of contract and s. 69.3 of the BIA (which section has identical wording to 69(1) but relates to bankruptcy rather than filing an NOI), the Court held:

105 I do not agree with the plaintiff's arguments that the statutory stay resulting from section 69 of the Bankruptcy and Insolvency Act prevented the automatic termination of the RESOP Contract because the effect of such a stay is to prevent creditors of an insolvent person from pursuing claims provable in bankruptcy against the insolvent person. The termination of the RESOP Contract under section 7.2 (2) was not for the recovery of a claim provable in bankruptcy (see sections 69 (1) and 69.3 (1) of the Bankruptcy and Insolvency Act). [Emphasis added.]

12. On appeal in *Hutchingame*, the Court of Appeal further explained:

35 Professor Roderick J. Wood explains: "the automatic stay of proceedings in bankruptcy has never been interpreted as preventing the exercise of [the] right" of "a contracting party [to] terminat[e] an agreement between it and the debtor": Bankruptcy and Insolvency Law, 2nd ed. (Toronto: Irwin Law Inc., 2015) at p. 167. He notes that the presence of express provisions having that effect in proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 and in the restructuring provisions of the Bankruptcy and Insolvency Act "supports the view that the automatic stay of proceedings was not intended to extend to the termination of executory contracts, since the provision would not be needed otherwise": at p. 167.

36 Professor Wood's logic is persuasive, especially in the absence of any contrary authority. I agree with the trial judge that s. 69.3 of the Bankruptcy and Insolvency Act did not invalidate the termination provision in the RESOP Contract.

Also see: *Edward v Niagara Neighbourhood Housing Co-operative Inc*, [2006] OJ No 1984 (ON SC) and *Canada 3000 Inc (Re)*, [2002] OJ No 1775, *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5

13. In the circumstances of this case, s. 65.1 of the BIA permits the termination of Lease as the termination is not solely because of: (a) the Tenant's insolvency; (b) the NOI filing; or (c) the non-payment of rent in the period preceding the NOI filing.

In any Event, The Stay Ought to be Lifted

14. The Landlord says that, in any event, for the reasons described below, if there is a stay, the stay ought to be lifted.

15. The Landlord relies on, *inter alia*, s. 69 of the BIA.

16. Section 69.4 of the BIA sets out two conditions that must be satisfied if a stay is to be lifted:

- (a) The creditor is likely to be materially prejudiced by the continuance of the stay; or
- (b) It is equitable on other grounds that the stay be lifted.

17. As set out in *Re Maple Homes Canada Ltd*, 2000 BCSC 1443, the burden of proof on behalf of the Landlord in this application is a low one. It only requires the existence of some evidence of a fair issue to be tried to satisfy the court that there are "sound reasons for lifting the stay".

See also: *Ma (Re)* (2001), 2001 CanLII 24076 (ONCA)

18. In the case of *Re Advocate Mines Limited*, [1984] O.J. No. 2330 (O.S.C., in Bankruptcy), the Court lists five circumstances that might be "appropriate cases" for lifting a stay, however this is not an exhaustive list. As discussed further below, this case is a circumstance where there is considerable prejudice to the Landlord, and it would be just and equitable to lift the stay. To do otherwise would bring about an absurd result where a party with no contractual right to occupy the property obtains better protection than a party who does have an extant lease under s. 65.1.

***Re Francisco*, 1995 CanLII 7371 (ON SC), *Karaoglu (Re)*, 2014 ONSC 4496 at para. 20**

19. In *Great North Data Ltd.(Re)*, 2020 NLSC 105 at para. 11, Justice Handrigan provided a useful summary relevant for determining whether a court ought to exercise its discretionary power to lift a stay of proceedings under section 69.4:
- A creditor applying under section 69.4 of the BIA must meet at least one of the two criteria stated in the section, not both;
 - A creditor applying under section 69.4 of the BIA does not have to show it has a *prima facie* case in its action against the bankrupt: *Re Ma*, 2001 CanLII 24076 (ONCA);
 - The bankruptcy court need only consider the merits of the proposed action to see whether there are 'sound reasons' for lifting the stay: *Re Ma*;
 - A bankruptcy court on a leave application must ensure that sound reasons exist for relieving against the automatic stay of proceedings: *Re Francisco*;
 - It is an error of law to accept the five circumstances enumerated in *Re Advocate Mines Limited* as "a limiting or exhaustive instrument": *Re Francisco*;
 - If the creditor satisfies the court that one or more of the grounds referred to in *Re Advocate Mines Limited* is present and that the creditor is likely to be materially prejudiced or that it is equitable on other grounds to make such a declaration then a court will lift the stay of proceedings: *Re Panorama Parkview Homes Ltd.*, 2017 BCSC 2071 (BCSC); and,

- Fraud alleged by a creditor to have been committed by the bankrupt is a complex matter which should not ordinarily be dealt with on a summary basis and without a full hearing; *Re Taylor Ventures Ltd.*, 2002 BCSC 82 (BCSC).
20. Further, in *Re Maple Homes* at paras 33-34, Justice L. Smith also addressed the proper approach to be taken to consideration of whether a stay ought to be lifted:

[33] The principles that emerge from the jurisprudence may be summarized:

(1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the Bankruptcy and Insolvency Act, which is to permit the rehabilitation of the bankrupt unfettered by past debts.

(2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.

(3) The existence of one or more of the factors listed in *Re Advocate Mines* will be an important consideration, but is not determinative.

(4) The court is not to attempt to determine the proposed claim on its merits.

(5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

Material Prejudice

21. Material prejudice arises when the bankruptcy would treat a creditor unfairly, differently or in some way worse than other creditors.

Fiorito v. Wiggins, 2017 ONCA 765 at para. 30

22. Material prejudice can arise from the size of the debt and the expected loss. It is an objective prejudice as opposed to a subjective one — i.e., it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor qua person, organization or entity.

Fiorito at para. 31

23. As to what amounts to material prejudice depends on the circumstances in each case. In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, Lederman J., explained:

[18] As to subsection (a), what amounts to material prejudice depends on the circumstances in each case. By its nature, a stay creates prejudice for all secured creditors while a reorganization is being contemplated.

[19] What Golden Griddle and Nicholby's must establish is material prejudice to them in the sense that they will be treated differently or some way unfairly, or they would suffer worse harm than other creditors.

...

[21] Nothing is put forth by the plaintiffs to suggest what the magnitude of that loss may be or how it differs qualitatively from the harm suffered by other creditors.

[22] As stated by Farley J. in *Re Cumberland Trading Inc.* (1994), 1994 CanLII 7458 (ON SC), 23 C.B.R. (3d) 225 (Ont. Ct. (Gen. Div.)):

[There is an obligation to provide some] quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of the materiality. [para. 11]

24. Examples of material prejudice may include hardship caused by the stay or necessity of payment or a situation where it is in the interests of justice to allow the stay to be lifted. This was explained in *Wabush Iron Co. Ltd.*, [2016] Q.J. No. 18011 in the context of CCAA proceedings, relying on *Re Canwest Global Communications Corp.*, (2009), 61 CBR (5th) 200 (Ont S.C.J.), as follows:

30 Various cases set out the test for lifting the stay. The Court adopts the following statements from the decision of Justice Pepall in *Canwest*:

...

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*, [2000] A.J. No. 1692, and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).

3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).

4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

7. There is a real risk that a creditor's loan will become unsecured during the stay period.

8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

[Emphasis added]

25. The Landlord submits that the principles in *Wabush* apply equally to lifting a stay under the BIA as it was the intention of Parliament for the CCAA to operate in tandem with other insolvency legislation such as the BIA.

***Century Services Inc. V. Canada (Attorney General)* [2010] 3. S.C.R. 379**

26. The Landlord and Tenant entered into a binding and enforceable agreements – i.e., the Lease and Reinstating Agreement.
27. Pursuant to the Reinstating Agreement the Lease expired on May 31, 2021 in accordance with its terms.
28. The Tenant was required to vacate the Property on May 31, 2021. It did not do so. The Landlord has not agreed to permit the Tenant to remain on the Property, and the Tenant is trespassing.
29. The Landlord was able to negotiate a brief extension with the Purchaser, which the closing date to June 7, 2021 and the possession date to June 8, 2021. However, in exchange for this extension the Landlord had to agree to, *inter alia*, reduce the purchase price by \$30,000, and is also exposed for a claim related to the Tenant's extensive damage to the Property noted above
30. The Landlord is already is prejudiced and will continue to suffer prejudice unless it obtains the relief sought on this Application. In particular, if the Landlord is unable to deliver vacant possession of the Property to the new Purchaser by June 8 the Landlord will be in breach of the Sale Agreement and exposed to claims by the Purchaser, the financial and other consequences would likely be significant.
31. While the Landlord would be significantly prejudiced by the refusal to lift the stay, there would be little, if any, resulting prejudice to the Tenant or the positions of creditors, as the Tenant has other properties on which it can run its operations.

Equitable Grounds

32. As set out in *Fiorito* at para. 35, with respect to equitable grounds, under s. 69.4 courts have “a wide discretion” based on the “particular facts of the particular case”.
33. The Landlord also submits that, for the reasons described above, it is equitable to lift the stay.

Conclusion

34. Based on the foregoing, the Landlord submits that by virtue of s. 65.1 the stay does to apply to the Petition but, in any event, there are clear, compelling and sound reasons for lifting the stay as the Landlord will be materially prejudice by its continuance.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Jeff Luccock, Affirmed on June 2, 2021.
2. The pleadings filed herein.
3. Such further and other material as counsel may advise and this Honourable Court may permit.

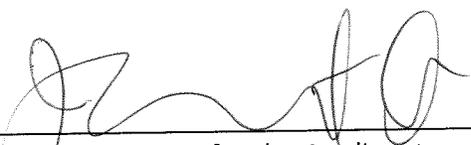
The applicant estimates that the application will take two hours.

This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: 02/June/2021



Signature of lawyer for the Applicants
Jordanna Cytrynbaum

To be completed by the court only:

Order made

- in the terms requested in paragraph _____ of Part 1 of this notice of application
- with the following variations and additional terms:

Dated: _____/June/2021

Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matters concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other

- experts
- other: lifting of stay pursuant to the *Bankruptcy and Insolvency Act*