



District of British Columbia
Division No. 3 – Vancouver
Court File No. S-215193
No. 11-2741709

**IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY**

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF

Hayer Recycling Group Ltd.

NOTICE OF APPLICATION

[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]

Name of applicant: Hayer Recycling Group Ltd.

To: Seaclyff Holdings Ltd. and Whitewater Developments Ltd.
c/o Whitelaw Twining
Attention: Jordanna Cytrynbaum
2400 – 200 Granville Street
Vancouver, BC V6C 1S4

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

TAKE NOTICE that an application will be made by the applicant to the presiding judge at the courthouse at 800 Smithe Street, Vancouver B.C. by telephone or MS Teams on June 15, 2021 at 9:00 a.m. for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. An Order extending the time for Hayer to remove the Remaining Items from the Premises from June 15, 2021, to June 29, 2021.

Part 2: FACTUAL BASIS

Background

1. Hayer has been the tenant at the Premises since June 1, 2019 pursuant to the commercial lease agreement (the "Original Lease") between Seacliff Holdings Ltd. ("Seacliff"), Whitewater Developments Ltd. ("Whitewater", and collectively with Seacliff, the "Landlords") and Hayer Recycling, dated May 2, 2019. Hayer is the guarantor under the Original Lease.
2. The Original Lease provided an option to renew the lease for an additional three-year period (the "Renewal Option"). As detailed further in the Affidavit of Palwinder Hayer sworn June 3, 2021 (the "Hayer Affidavit"), as a result of the failure to pay outstanding property taxes, the Landlords purported to terminate the Original Lease, and Hayer subsequently entered into a lease reinstating agreement which did not contain the Renewal Option.
3. As the Hayer affidavit explains in more detail, the removal of the Renewal Option was done without the knowledge of Mr. Hayer, as he relied entirely on Hayer Recycling's then business manager due to Mr. Hayer's limited English skills. It was only in May 2021 that Mr. Hayer learned that the Renewal Option was removed by the lease reinstating agreement. Mr. Albert joined Hayer in November 2020 and was not aware of any lease issue until March 2021. Mr. Albert learned about the absence of the Renewal Option at the same time as Mr. Hayer.

Proceedings from May 31 to June 8

4. On May 31, 2021, the day the lease expired, the Landlords filed a Petition, and sought and received short notice leave seeking an order declaring the lease terminated and that the trade fixtures, leasehold improvements, equipment, vehicles, chattels and other property (collectively, the "Remaining Items") had been abandoned and were now owned by the Landlords. In the alternative to the declaration of abandonment of the Remaining Items, the Landlords sought an order permitting them to remove the Remaining Items and store them at Hayer's expense.
5. On the same day, Hayer filed a notice of intention to make a proposal pursuant to s. 50.4(1) of the Bankruptcy and Insolvency Act. Madam Justice MacNaughton determined that as a result of this filing, Hayer was stayed from pursuing its relief.
6. Two days later, on June 2, the Landlords amended their Petition, seeking only the declaration that the lease had expired and an order that if Hayer did not remove the Remaining items by a time specified by the court, the Landlords could remove the Remaining Items and store

them. The Landlords sought and received short notice leave for a hearing on June 4, with Hayer required to file its responding materials, including any evidence, on June 3.

7. The June 4 hearing was adjourned by order of Madam Justice Jackson to June 7, as the Landlords had not served Hayer's Proposal Trustee. Madam Justice Winteringham presided over the hearing on June 7, which was extended into the next day. At the conclusion of the hearing on June 8, Madam Justice Winteringham granted the relief sought by the Landlords, namely a declaration that the lease had expired, and an order that Hayer remove the Remaining Items within seven days, and that, if Hayer did not do so, the Landlords could remove the Remaining Items and store them, pending agreement with Hayer or a further order of the Court (the "Removal Order").

Developments Following the Removal Order

8. Hayer has made every effort to comply with the Removal Order, and pulled its employees working at various demolition sites off of those sites to accelerate the removal process.

9. After the removal Order was made six days ago, I immediately began working with Hayer's primary consultant to determine the steps that needed to be taken on the Premises. To date, Hayer has, among other things:

- (a) Cleared its entire storage yard, including its 40 yard bins, its compactor, several 100-foot shelves, scaffolding, machine parts, and various other fixtures;
- (b) Removed two 1000-liter diesel tanks;
- (c) Removed all of its shredders, an industrial compactor and dozer, several demolition trailers, and various excavators and other heavy machinery from the site;
- (d) Removed dozens of lock blocks (large, concrete blocks) that were being used as reinforcement and as barriers;
- (e) Removed its power and regular tools;
- (f) Removed all of its inventory, which includes, for example, significant amounts of lubricant and engine oil pails, air filters, grease tubes, PPE equipment, power tool

parts, and hundreds of varieties of screws, washers, bolts, and other small items which were stored in bulk; and

- (g) Removed the industrial scale house and base of the industrial scale. As discussed below, the full removal of the industrial scale requires specialized equipment which Hayer has procured and which is expected to arrive on the Premises shortly.

10. However, despite Hayer's best efforts, it is simply not possible to complete some of the tasks required to comply with the Removal Order in the seven-day period contemplated by the Removal Order.

11. There are three buried, large, industrial oil water-tanks on site, each weighing between 10,000 and 16,000 pounds. Removing these tanks is a complicated and delicate process, because the tanks are adjacent to other buried infrastructure that cannot be disturbed.

12. Since shortly after the Removal Order was made, Hayer has been in contact with Rapid Pipe Site Services Ltd. ("Rapid Pipe"), the contractor that originally installed the tanks, and which is best positioned to undertake the more sensitive removal work given its familiarity with the tanks and the surrounding area. Hayer expects that Rapid Pipe can begin work tomorrow, and intends to do preliminary work itself today so as to shorten the amount of time it will take Rapid Pipe to complete the more sensitive work.

13. The tank removal is particularly challenging because once work removing the tanks begins, the surrounding area has to be closed off, which will put a halt to other removal activities, such as work on the industrial scale. As a result, starting work earlier on removing the oil tanks would have been counterproductive, since it would have prevented the other progress that Hayer made in complying with the Removal Order. Hayer estimates that it will take approximately 5 days for the tanks to be removed.

14. Another challenging Remaining Item to remove is the 40-foot industrial scale. As mentioned above, certain components of the scale have already been removed by Hayer's own employees using equipment Hayer already had on hand. However, the scale itself requires a large crane to remove, which Hayer expects to arrive today. There is also a need for specialized drills to cut through the concrete which was housing the ramps and rewash station. Hayer began reaching

out on June 9 to find a suitable crane, and in any event could not have begun work earlier in any event because the storage yard had to be cleared first.

15. Another outstanding task is the removal of waste material that Hayer needs to dispose of. Recycling waste material was part of Hayer's business, and there is a significant amount remaining on the Premises from before the Removal Order. Hayer needs to break this material down and coordinate its removal and disposal at other sites. The waste material is a particular concern for Hayer because, if Hayer does not remove it, it could make it difficult for Hayer to receive a new permit on a different premises in order to continue operating.

16. Finally, Hayer can only begin remediating the Premises following the completion of the tasks described above and other remaining work.

17. Based on Mr. Albert's knowledge of the Premises and his conversations with Hayer's primary consultant, contractors, and others, it will take at least two more weeks for Hayer to comply with the Removal Order. This would still be faster than a third-party estimate made in March 2020, which estimated that it would take Hayer 30 days to vacate the Premises, and did not take into account the time to remove the storage tanks, as they had not yet been installed. Attached as Exhibit "A" to this Affidavit is a copy of Envirochem Services Inc.'s closure plan for the Premises. Attached as Exhibit "B" to this Affidavit is Hayer's material recovery facility license.

18. Furthermore, in Mr. Albert's opinion, it would not be possible for any other entity, including the Landlords or any person they employ, to complete the work needed any faster. In Mr. Albert's view, the loss of Hayer's knowledge of the Premises and the use of Hayer's employees would be an impediment to completing the work as quickly as possible.

Part 3: LEGAL BASIS

1. This Court has jurisdiction to revise the Removal Order under both the *Bankruptcy and Insolvency Act* and the *Supreme Court Civil Rules*.

2. Under the *Bankruptcy and Insolvency Act*, s. 187(5) provides as follows:

Authority of the Courts

187

...

(5) Court may review, etc – Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

3. The principles pertaining to the operation of s. 187(5) of the *BLA* were set out in *Re Garritty (Proposal)*, 2006 ABQB 238 at para. 46 as follows:

The principles governing an application under s. 187(5) are that:

- i. The issue on the application is whether the order should remain in force because of changed circumstances or fresh evidence and not, as on appeal, whether it ought to have been made.
- ii. Fresh evidence in this context means that it is material, substantial in nature, and something that, with reasonable diligence, could not have been known at the time of the original application.
- iii. The application must be made promptly, within a reasonable time of acquiring knowledge of the order.
- iv. Review jurisdiction is exercised sparingly; it is a matter of indulgence that must be carefully guarded.
- v. In exercising its discretion, the court must consider the rights not only of the debtor and of the creditors but also of the public.
- vi. The court should resort to its s. 187(5) jurisdiction if it is just and expedient in the control of its own process.
- vii. Trustee conduct is a factor where statutory non-compliance results in lack of notice, particularly if it negatively affects the integrity of the bankruptcy system.
- viii. The applicant bears the onus of establishing that exercise of the review jurisdiction is warranted.

4. Further guidance with respect to variations extending time is provided by R. 22-4(2) of the *Supreme Court Civil Rules*, which provides as follows:

Rule 22-4 Time

...

(2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

[Emphasis added].

5. In describing the operation of R. 22-4(2), Seckel & Macinnes, *British Columbia Supreme Court Rules Annotated 2020*, explained as follows:

It is a general rule with respect to varying the terms of an order that has been perfected that the court is *functus officio* (no longer has jurisdiction) and the court may only vary such terms pursuant to a slip rule. However, the former rule identical

to Rule 22-4(2) has been interpreted to constitute an exception to this general rule with respect to time periods.

6. Rule 22-4(2) (R. 3(2) under the former *Rules*) has often been used to extend time limits imposed by prior entered orders, including in bankruptcy proceedings. For example, in *Canadian Plywood Corp., Re*, 1985 CarswellBC 481 (S.C), the former Rule was applied to extend the amount of time a party had to post security for costs, failing which their action would be dismissed with costs.

7. In *Mussell v. Cronhelm*, 1994 CanLII 1714 (BC CA) at para. 23, our Court of Appeal stated that the Rule "is permissive in nature and broad in scope".

8. An extension of the Removal Order is warranted under either s. 187(5) of the *BLA* or R. 22-4(2), because:

- a. Not extending the Removal Order will do nothing to achieve vacant possession for the Landlords any faster in order to close the sale of Premises, because the Remaining Items will still need to be removed by the Landlords;
- b. Hayer has in good faith complied with the Removal Order and taken every available step to remove the Remaining Items, but it has become apparent that it was impossible to comply with the Removal Order in the permitted time period;
- c. There is a significant risk of serious prejudice to Hayer and its creditors if the Removal Order is not extended; and
- d. At the time Her Ladyship made the initial Removal Order, and due to the very condensed timeline in which this litigation has proceeded, there was limited evidence before the Court as to the tasks required to provide the Landlords with vacant possession.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Emmanuel Albert made 14/JUN/2021.

The applicants estimate that the application will take 60 minutes.

This matter is within the jurisdiction of a master.

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: June 14, 2021



Signature of Benjamin Reedijk

Applicant Lawyer for applicant

THIS NOTICE OF APPLICATION is prepared and delivered by David E. Gruber of the firm Bennett Jones LLP, Barristers & Solicitors, counsel for Hayer Receycling Group Ltd., File No. 91811.00001, whose place of business and address for delivery is 2500 – 666 Burrard Street, Vancouver, British Columbia, V6C 2X8. Telephone: (604) 891-7500. Facsimile: (604) 891-5100. [reedijkb@bennettjones.com]

To be completed by the court only:

Order made

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

Dated: _____

Signature of Judge Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter 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