



Court File No.: S230255
Court Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

WAYGAR CAPITAL INC., as agent for
NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.

PETITIONER

AND:

THE VERY GOOD FOOD COMPANY INC., 1218158 B.C. LTD., 1218169 B.C. LTD.,
THE CULTURED NUT INC., THE VERY GOOD BUTCHERS INC., LLOYD-JAMES
MARKETING GROUP INC., and VGFC HOLDINGS LLC

RESPONDENTS

NOTICE OF APPLICATION

Name of applicants: Modern Forklift Services Ltd.

TO: The Petitioner, Waygar Capital Inc.
c/o their counsel MLT Aikins LLP
Attn: William J. Skelly

AND TO: The Receiver
c/o their counsel Nathanson, Schachter & Thompson LLP
Attn: Peter Reardon

TAKE NOTICE that an application will be made by the applicant to Mr. Justice Walker at the courthouse at 800 Smithe Street, Vancouver, BC, by telephone, on February 13, 2023 at 2:00 pm for the orders set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

1. Leave of the court to bring this application;
2. Lifting the stays of proceedings in paragraphs 11, 12 and 13 of the Receivership Order pronounced by Mr. Justice Walker January 16, 2023 to permit the Applicant to recover seven Forklifts, as follows:
 - a. Caterpillar Counterbalance forklift 5000lbs capacity

- b. Crown RC5500 Quad Mast 400lbs capacity
 - c. Crown RC5500 TT Mast 3000lbs capacity
 - d. Crown RR5700 Reach Truck 3500lbs capacity
 - e. JLG Scissor Jack
 - f. 2 x Hester W40 Electric Pallet Jacks 4000lbs capacity (“the Forklifts”)
3. The Respondents deliver to the Applicant, Modern Forklift Services Ltd., within 1 business day of the date of this order, the Forklifts, namely
- a. Caterpillar Counterbalance forklift 5000lbs capacity
 - b. Crown RC5500 Quad Mast 400lbs capacity
 - c. Crown RC5500 TT Mast 3000lbs capacity
 - d. Crown RR5700 Reach Truck 3500lbs capacity
 - e. JLG Scissor Jack
 - f. 2 x Hester W40 Electric Pallet Jacks 4000lbs capacity
4. Alternatively, the Respondents grant the Applicant, Modern Forklift Services Ltd., immediate access to their premises to allow the Applicant, Modern Forklift Services Ltd., to recover the Forklifts; and,
5. The Applicant will have their costs of this application payable by the Receiver in any event of the cause.

Part 2: FACTUAL BASIS

1. On or about January 16, 2023, the Petitioner obtained a receivership order over The Very Good Food Company Inc. and related companies before The Honourable Mr. Justice Paul Walker (the “Receivership Order”). The Receivership Order was obtained on short notice.
2. At that time the applicant, Modern Forklift Services Ltd., was leasing a total of seven Forklifts to The Very Good Food Company Inc., as follows:
- a. Caterpillar Counterbalance forklift 5000lbs capacity
 - b. Crown RC5500 Quad Mast 400lbs capacity
 - c. Crown RC5500 TT Mast 3000lbs capacity
 - d. Crown RR5700 Reach Truck 3500lbs capacity
 - e. JLG Scissor Jack
 - f. 2 x Hester W40 Electric Pallet Jacks 4000lbs capacity (“the Forklifts”)
3. At all material times the applicant had registered their interest in the Personal Property Security Registry.
4. Lease payments were due on the 11th of the month for five of the Forklifts, and the 18th of the month for the remaining two Forklifts.

5. Amongst other things, the Receivership Order permits the Receiver to take possession and control of all assets, undertakings, and properties of the various Debtors, including The Very Good Food Company Inc. [paragraph 3(a)]
6. The receiver is also authorized to purchase or lease machinery and equipment to continue the business of the Debtors the various Debtors, including The Very Good Food Company Inc. [paragraph 3(e)]
7. The Receivership Order stays proceedings and constrains exercising rights or remedies, or discontinuing services against the various Debtors, including The Very Good Food Company Inc., absent leave of the court. [paragraphs 11-13 etc.]
8. At the time the Receivership Order was granted, The Very Good Food Company Inc. was in default of lease payments with respect to five of the seven Forklifts; within days The Very Good Food Company Inc. was in default of lease payments on the remaining two Forklifts.
9. The lease agreement between the applicant and The Very Good Food Company Inc. provided that failure to pay rent in accordance with any of the leases was a default of that lease and any other leases between Modern Forklift Services Ltd. and The Very Good Food Company Inc., and further provided any receivership order against The Very Good Food Company Inc. was a default of the lease. [Lease agreement paragraph 26 (e)]
10. The lease agreement permits the applicant to take possession of the Forklifts on default and to terminate the lease agreement upon default. [Lease agreement paragraph 26 (c) and (e)] In other words, the lease effectively defines these defaults as fundamental breaches.
11. The receiver has not paid rent on the Forklifts since the Receivership Order.
12. The applicant has alternate customers interested in the Forklifts.

Part 3: LEGAL BASIS

1. This application is unique as there is no underlying action by the Applicant. The Applicant simply wants leave of this court to collect its secured property pursuant to the contractual terms agreed upon between the Applicant and the Debtors, and specifically the Debtor, The Very Good Food Company Inc. Paragraph 11 of the Receivership Order specifically constrains the Applicant from exercising any of the rights or remedies it may have, including the contractual right to demand return of the Applicant's property; while paragraph 13 may compel the Applicant to continue providing services (the Applicant submits the services it provides, leasing of forklifts, are not the kind of transportation services contemplated by this order).
2. The Applicant primarily relies upon s. 69.4 of the *Bankruptcy and Insolvency Act*, which reads,

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 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

3. In *Burke v. Red Barn at Mattick's Ltd.* 2000 BSCS 69, the court referred to *In the Matter of the Proposal of Maple Homes Canada Ltd.* 2000 BCSC 1443 for the proposition that in addition to these two factors, the applicant must show "compelling reasons" to depart from the stay.
4. The key principles have been reiterated in *Abbotsford Chrysler Dodge Jeep Ram Ltd. et al. v. Kamloops Chrysler Dodge Jeep Ram Ltd. et al.* 2021 BCSC 2225, where Justice Gomery wrote,

[8] *In the Matter of the Proposal of Maple Homes Canada Ltd.*, 2000 BCSC 1443 at para. 33, Justice Lynn Smith helpfully outlined the approach to be taken in deciding this kind of application. She stated:

[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.
5. The portions of the Receivership Order which constrain the Applicant from exercising its right to reclaim its property from the Debtors including The Very Good Food Company Inc. materially prejudice the Applicant. The Forklifts are currently not generating revenue for the Applicant to its prejudice. The Debtors, including The Very Good Food Company Inc., have already been declared insolvent which implies there's little likelihood of the Debtors, including The Very Good Food Company Inc., being able to satisfy a monetary judgment. The only way to make the Applicant anywhere near "whole" as a result of the breaches of the Debtors including The Very Good Food Company Inc. is to return the Forklifts to the Applicant.
 6. The applicant submits the financial harm to be done to the applicant if the Forklifts are not returned is a compelling reason and material prejudice.
 7. The applicant further submits the fact the Forklifts are not owned by The Very Good Food Company Inc., and that the terms of the fundamentally breached lease both permit early return of the Forklifts and require return of the Forklifts at the end of the lease, is a very compelling reason to allow the Applicant to have the Forklifts returned.
 8. There is no compelling reason why The Very Good Food Company Inc., through the Receiver, should be entitled use of the Forklifts without rent.
 9. The Applicant further pleads and relies upon Rules 10-1(4) and 14-1 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, and s. 57 of the *Law and Equity Act* R.S.B.C 1996 c. 253. The applicants acknowledge the test for applications under these sections is as set out in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 as applied in *Package Apparel Inc. v Ellis* 2014 BCSC 884:
 - a. Is there a serious question to be tried,
 - b. Will there be irreparable harm, and
 - c. What is the balance of convenience.
 10. By operation of the lease agreement between the applicant and The Very Good Food Company Inc., The Very Good Food Company Inc. and hence the Receiver are in default of the lease.
 11. In fact, The Very Good Food Company Inc. was in default of the lease agreement concerning five of the forklifts prior to the Receivership Order, entitling the applicant to assume possession at that time.
 12. It's very clear there's more than a serious question to be tried, as it's very clear the applicants have a strong ownership interest in the forklifts.

13. The Very Good Food Company Inc. remains in possession of the Forklifts to the prejudice of the applicant. Given the evident precarious financial situation of The Very Good Food Company Inc., damages are not likely to be paid, and as such a damages award is not likely to be sufficient remedy and hence there will be irreparable harm if the Forklifts are not returned.
14. As such, the balance of convenience favours return of the forklifts to the Applicant.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Jason Evans, sworn February 2, 2023.
2. The pleadings and proceedings filed herein.
3. Such further and other material as counsel may request and this Honourable Court allows.

The applicant estimates 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 as Justice Walker is seized.

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: February 10, 2023



Signature of lawyer for the applicants
Kenneth Armstrong KC

To be completed by the court only:

Order made

in the terms requested in paragraphs *[specify]* of Part 1 of this notice of application

with the following variations and additional terms:

Dated: *[month, day, year]*.

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