



No. S-230255  
Vancouver Registry

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

APPLICATION RESPONSE

**Application response of:** BDO Canada Limited (the “Receiver”)

THIS IS A RESPONSE TO the Notice of Application of:

Modern Forklift Services Ltd. (the “Applicant”) filed 10/FEB/2023, which application is scheduled for hearing at the courthouse at 800 Smithe Street, Vancouver, BC V6Z 2E1, on 13/Feb/2023, at 2:00 pm by Mr. Justice Walker.

**Part 1: ORDER(S) CONSENTED TO**

1. The Receiver consents to the granting of none of the orders set out in Part 1 of the Notice of Application.

**Part 2: ORDER(S) OPPOSED**

1. The Receiver opposes the granting of all of the orders set out in Part 1 of the Notice of Application.

**Part 3: ORDER(S) ON WHICH NO POSITION IS TAKEN**

1. The Receiver takes no position on the granting of the following orders set out in Part 1 of the Notice of Application: Nil.

#### **Part 4: FACTUAL BASIS**

1. BDO Canada Limited (the “Receiver”) was appointed on the application of the petitioner by order of Mr. Justice Walker on October 16, 2022 (the “**Order**”) as Receiver of the Property of the respondents as defined in the Order.
2. Counsel for the petitioner served the application material on a number of parties including the Applicant by email on January 12, 2023.
3. On January 13, 2023, a representative of the Applicant contacted a representative of the respondents advising that lease payments for January had been due on January 11 and that those payments had not yet been made. Further payments were due on January 18, 2023.
4. Counsel for the petitioner served the Order on a number of parties, including the Applicant, by email on January 16, 2023.
5. On January 17, 2023, an individual from the Applicant attended at the premises of the respondent, The Very Good Food Company (“**TVGFC**”), and, without permission, disabled each piece of the equipment leased by TVGFC from the Applicant.
6. The disabling of the equipment has significantly slowed production by TVGFC. Some of the equipment has been unlocked and is in use. The balance remains disabled.
7. The Receiver has advised the Applicant that it will pay the rent pursuant to the existing leases from the date of the receivership order, January 16, 2023. The Applicant has refused such payment.
8. The leases provide that a failure to make rental payments or any other amounts due under the lease within 10 days after the same is due and payable is a default. As at the date of the Order, the leases were not in default.

#### **PART 5: LEGAL BASIS**

1. An applicant for an order lifting a stay of proceedings in a receivership bears the onus of demonstrating that, in all circumstances, relief from the stay should be granted. The court should consider the relative prejudice to both sides.

*Peoples Trust Company v. Rose of Sharon (Ontario) Retirement Community*, 2012 ONSC 7319  
(at para. 5)

*Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2010 ABQB 199  
(at paras. 13 & 14)

2. The court may be guided by authorities relating to Section 69.4(1) of the *Bankruptcy and Insolvency Act* (“BIA”).

*Peoples Trust Company v. Rose of Sharon (Ontario) Retirement Community*, 2012 ONSC 7319  
(at para. 5)

3. On applications to lift the stay in bankruptcy proceedings, the court often refers to the decision of the Ontario Supreme Court in *Re Advocate Mines Ltd.* (1984), 52 C.B.R. (N.S.) 277 at page 278 in which the court listed appropriate circumstances in which the stay might be lifted (see para. 2).

*Abbotsford Chrysler Dodge Jeep Ram Ltd. v. Kamloops Chrysler Dodge Jeep Ram Ltd.*  
2021 BCSC 2225 (at para. 9)

4. The basis upon which, at least in part, the Applicant says that the stay should be lifted is the material prejudice to the Applicant. The Applicant claims that the forklifts are currently not generating revenue for the Applicant to its prejudice (see para. 4 – Notice of Application).
5. The reason why revenue is not being generated for the Applicant is that the Applicant has refused to accept payment pursuant to the existing leases from the Receiver. The Receiver remains ready to make the required payments from the date of the receivership order, January 16, 2023. The only financial “harm” to the Applicant is that pre-receivership payments, from January 11 to January 16, will not be made by the Receiver, a circumstance not unusual in receiverships.
6. What is clear from the Affidavit of Jason Evans made in support of Modern Forklifts application to lift the stay is that Modern Forklift seeks to benefit from the receivership by being able to lease the equipment to others at twice the rent (see paragraphs 10 and 11 of the Evans affidavit). Having to abide by the agreements made with TVGFC rather than being able to rent for more money is not the material prejudice that has to be shown for an order lifting the stay to be made.
7. The Receiver has reported that not having the use of the equipment in issue materially affects the ability to continue the operation of the business. That prejudice far outweighs the loss to the Applicant of approximately one week’s rental payments on five of the seven pieces of equipment.
8. In addition, the Order contains a Sale and Investment Solicitation Process (“SISP”) to be run by the Receiver in an attempt to sell TVGFC’s business as a going concern. Allowing equipment that is necessary for the ongoing operation of the business to be removed will potentially interfere with the SISP.
9. There is no compelling reason to lift the stay.

**Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Rick Pearson, made February 9, 2023;
2. First Report of the Receiver made February 9, 2023; and
3. Such further and other material which this Honourable Court may permit.

The Receiver estimates that the application will take 60 minutes.

- The Receiver has filed in this proceeding a document that contains the Receiver's address for service.

Date: 10/FEB/2023

 "Rick Pearson"  
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Counsel for BDO Canada Limited,  
PETER J. REARDON

THIS APPLICATION RESPONSE is prepared by Peter J. Reardon, of the firm of Nathanson, Schachter & Thompson LLP, whose place of business and address for service is 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4, telephone (604) 662-8840 and whose email address for service is [preardon@nst.ca](mailto:preardon@nst.ca).