Receiver gets Rapped A Case Comment on Jaycap Financial Ltd v Snowdon Block

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In *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 [*Jaycap*], the Alberta Court of Appeal recently reminded Receivers that they have a duty to be transparent and provide the Court with evidence to meet the burden of proof to the requisite standard for each application it brings. The Court also went to great lengths to reiterate that a Receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking – not simply to the first secured creditor. Lastly, the granting of a sealing order is not merely a rubber stamping process and parties must discharge their burden pursuant to the *Sierra Club* test.

In *Jaycap*, the Receiver obtained a sale approval and vesting order approving the sale of property to the secured creditor for a credit bid, and vacating an earlier vesting order which approved a first purchase and sale agreement between the Receiver and secured creditor on the basis of mutual mistake as to the purchase price. The debtor's obligations had been guaranteed by individual guarantors. While under the first purchase and sale agreement the guarantors had no liability, as a result of the termination of the first agreement and subsequent agreement and vesting order the guarantors faced a $1.3 million liability. The guarantors appealed the granting of the second vesting order.

The Court of Appeal granted the appeal, set aside the second vesting order and directed that the matter be reheard before a different judge. In particular, the Court found that the trial judge had committed a palpable and overriding error by finding mutual mistake on the evidence before her. Before the Court of Appeal, the secured creditor was unable to explain the difference between the calculations in purchase price nor how the deficiency of $1.3 million was calculated. The Court of Appeal stated that "as the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference *cried out for an explanation* before this Court and the court below."

The Court of Appeal also found that it was an error to conclude that the Receiver had satisfied the *Soundair* principles with respect to its sales process. Given the lack of evidence put forth by the Receiver and lack of transparency in the process, the Court had "serious concerns about the efficacy, fairness and integrity of the process". The Court noted that the perception of the Receiver's independence was further compromised by the fact that both the secured creditor and the Receiver were jointly represented before it.

Lastly, the Court of Appeal criticized the approach taken to sealing orders in the proceedings below, noting that "the parties failed to file a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the

requirements to release the bans and restore public access to the proceedings…" The Court cautioned that sealing orders are not merely a rubber stamping process and parties should be mindful of discharging their onus as established by the *Sierra Club* test, meaning parties must demonstrate that there is commercially sensitive information requiring protection and the proposed sealing is the least restrictive means of such protection.

Jaycap is a cautionary tale for Receivers regarding the duties they owe both to the Court as a Court officer, as well as to all of a debtor's interested stakeholders. In applications before the Court, a Receiver should present all relevant and material evidence to the Court, and not simply conclusions of law based on advice of its legal counsel. Further, the time sensitive nature of insolvency proceedings does not relieve a Receiver from "its basic obligations to the parties and the Court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application it brings." Lastly, a Receiver must always remain independent and remember that it is a fiduciary to all of a debtor's interested stakeholders – not simply the secured creditor.

By

Jessica Cameron, Josef Krüger, Robyn Gurofsky, Miles F. Pittman

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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