**IN THE SUPREME COURT OF BRITISH COLUMBIA**

Citation: *Solid Holdings Ltd. (Re),* 2019 BCSC 126

Date: 20190201
Docket: B180514
Registry: Vancouver

**In Bankruptcy and Insolvency**

**In the Matter of the Bankruptcy of Solid Holdings Ltd.**

Before: The Honourable Madam Justice Jackson

**Reasons for Judgment**

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| Counsel for Solid Holdings Ltd.: | J. R. Pollard |
| Counsel for Grant Thornton Limited: | W.E.J. Skelly |
| Place and Date of Hearing: | Vancouver, B.C.<br>December 14, 2018 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 1, 2019 |

## INTRODUCTION

[1] On August 13, 2018, Grant Thornton Limited ("Grant Thornton"), receiver of Crystal Wealth Enlightened Factoring Strategy ("Crystal Wealth"), formerly Crystal Enlightened Income Fund, filed an application in this Court pursuant to s. 43(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*Act*") seeking a declaration that Solid Holdings Ltd. ("Solid Holdings") is bankrupt and a bankruptcy order with respect to Solid Holdings' property (the "Bankruptcy Application"). Solid Holdings is a British Columbia company with registered offices at 305 – 2692 Clearbrook Road in Abbotsford.

[2] The Bankruptcy Application was prompted by the failure of Solid Holdings to respond to payment demands for money Grant Thornton asserts is owed by Solid Holdings to Crystal Wealth. Solid Holdings opposes the Bankruptcy Application.

## BACKGROUND

[3] On February 13, 2017, Solid Holdings and Crystal Wealth entered into a sale/purchase agreement for gold, with Solid Holdings as the seller and Crystal Wealth as the buyer (the "Agreement"). The Agreement included the following terms:

a) the parties were to enter into monthly gold purchase/sale transactions renewing on the 13th day of every month for a period of one year;

b) the initial purchase was estimated to be $300,000 CAD (the "Initial Amount");

c) the monthly sequential purchases were to be based on the Initial Amount;

d) the settlement for each of the monthly transactions was to be in cash, not gold;

e) on settlement of each of the first and subsequent purchases, the settlement date was to be the next purchase date;

f) the final gold purchase/sale transaction was to occur on February 13, 2018;

g) each gold purchase and settlement was to be based on the London Fixed close price; and

h) either party could terminate the Agreement by giving 15 days written notice, notwithstanding that each party had to fulfil their respective obligations under the Agreement for purchase and sale transactions entered into prior to the termination notice date.

[4] On or about February 15, 2017, Crystal Wealth advanced the Initial Amount pursuant to the Agreement. Over the life of the Agreement, Crystal Wealth did not provide additional money, and no money was returned to Crystal Wealth by Solid Holdings.

[5] On April 26, 2017, the Ontario Superior Court of Justice appointed Grant Thornton as receiver of Crystal Wealth pursuant to s. 129 of Ontario's *Securities Act*, R.S.O. 1990, c. S.5. On June 30, 2017, that Court issued a procedural order establishing a Claims Bar Date of August 3, 2017. At the hearing before me, I was advised Solid Holdings did not make a claim before the Claims Bar Date and has made no application to lift the bar in order to pursue a claim against Crystal Wealth.

[6] On December 27, 2017, Solid Holdings provided Grant Thornton with written notice terminating the Agreement (the "Termination Notice"). According to the termination clause, termination of the Agreement was effective 15 days later, which meant the Agreement was terminated before the scheduled January purchase date. Accordingly, the last gold sale/purchase transaction under the Agreement would have occurred on December 13, 2017 (the "December 13th Transaction").

[7] By letter dated January 8, 2018, Grant Thornton wrote to Solid Holdings demanding payment for the December 13th Transaction amount owed under the Agreement, which exceeded $1,000 (the "Debt"). On April 16, 2018, counsel for Grant Thornton again wrote to Solid Holdings making a further demand for the Debt.

[8] It is not disputed that Solid Holdings has not paid Crystal Wealth or Grant Thornton for the December 13th Transaction. The dispute between the parties involves the reasons Solid Holdings has not paid and whether its failure to pay constitutes an act of bankruptcy as defined under the *Act*.

**Applicable Legislation**

[9] The *Act* allows one or more creditors to file a court application seeking a bankruptcy order against the debtor if the application alleges that the debt or debts owing to the creditor or creditors exceed $1,000, and that the debtor has committed an "act of bankruptcy" within the six months preceding the filing of the application: *Act*, s. 43(1). "Acts of bankruptcy" are set out in s. 42(1) of the *Act* and, relevant to this case, include the creditor ceasing to meet its liabilities generally as they become due: *Act*, s. 42(1)(j).

**Overview of the Parties' Positions**

[10] Grant Thornton says the Debt arises from the Agreement based on Solid Holdings' failure to repay the amount owing following the December 13th Transaction. By failing to pay the Debt, Grant Thornton asserts Solid Holdings committed an act of bankruptcy pursuant to s. 42(1)(j) of the *Act* within the six months preceding the filing of the Bankruptcy Application by ceasing to meet its liabilities generally as they became due. Grant Thornton

submits it made repeated demands for payment of the Debt during the six months preceding the Bankruptcy Application which it argues satisfies the requirement for "special circumstances" where a bankruptcy application is made by a single creditor. It says the evidence proves Solid Holdings committed an act of bankruptcy and that once this is established, Solid Holdings has the onus of satisfying this Court it can meet its liabilities generally as they become due.

[11] Solid Holdings opposes the Bankruptcy Application for three reasons. First, it submits Grant Thornton has not proven the Debt arising from the December 13th Transaction because the Agreement does not provide sound and convincing evidence that the Debt is owing. Second, it argues that even if the Debt exists, there is a *bona fide* dispute between the parties that calls into question whether the Debt exceeds $1,000, the financial threshold for a bankruptcy order under the *Act*. Third, Solid Holdings submits Grant Thornton has failed to establish the prerequisite special circumstances because, in its view, repeated demands for payment of the Debt were not made.

**ISSUES**

[12] The issues in this case are straightforward:

1. Has Grant Thornton proven the Debt alleged in its Bankruptcy Application?

2. Has Grant Thornton proven that Solid Holdings has ceased to meet its liabilities generally as they become due?

**General Applicable Principles**

[13] On a bankruptcy application, the onus is on the applicant to establish both the debt and the act of bankruptcy: *0757376 B.C. Ltd. (Re)*, 2011 BCSC 1268 (CanLII) at para. 12. Bankruptcy orders are for clear-cut situations where both the debt and the act of bankruptcy are established by sound and convincing evidence: *Obie International Inc. v. Aquasure Technologies Inc.* [2008], 168 A.C.W.S. (3d) 252 (Ont. S.C.J.) at para. 6. The applicable standard of proof is the balance of probabilities standard, but as noted by Justice Rowles in *Avalanche Holdings Corp. v. Ball*, 2004 BCCA 647 (CanLII) at para. 5:

> … the authorities are clear that the evidence must be scrutinized with particular care, and that the allegations of fact in the petition and the act of bankruptcy must be fully and strictly proven, due to the serious consequences that flow from a bankruptcy.

[14] The relevant date for determining whether the debtor has ceased to meet its liabilities generally as they become due is the date the bankruptcy application was filed: *Toronto-Dominion Bank v. Langille* [1983], 45 C.B.R. (N.S.) 49 (N.S.C.A.). It is not necessary that the cessation of meeting liabilities began during the six months preceding the filing of the bankruptcy application; it is sufficient that the cessation occurred and has continued during that six-month period: *Joyce, Re* [1984], 51 C.B.R. (N.S.) 152 (Ont. S.C.).

[15] There is a presumption that a bankruptcy order is not available to a single petitioning creditor, however a debt to a single creditor can be sufficient to constitute an act of bankruptcy where there are "special circumstances": *Bankruptcy of Real Time Fibre Supply Ltd.,*, 2007 BCSC 371 (CanLII) at paras. 44-45. In *Valente, Re*, 2004 CanLII 8018 (ON CA), [2004] O.J. No. 635 (C.A.) at para. 8, Justice Feldman set out the three categories of special circumstances which the law has recognized:

a) repeated demands for payment have been made within the six-month period;

b) the debt is significantly large and there is fraud or suspicious circumstances in the way the debtor has handled its assets which required that the processes of the bankruptcy of the Act be set in motion; and

c) prior to the filing of the petition, the debtor has admitted its inability to pay creditors generally without identifying the creditors.

[16] Grant Thornton relies on the first category of special circumstances, namely that repeated demands to Solid Holdings for payment of the Debt were made within the six months preceding the filing of the Bankruptcy Application.

[17] Bankruptcy proceedings, which are summary in nature, are not to be used as a means of collecting a disputed debt*: Radovich, Re*, [1982] O.J. No. 2435 (S.C.) at para. 5. As noted by Justice Saunders in *Western Builders Capital Limited v. Lee*, 2000 BCCA 82 (CanLII) at para. 6:

> The role of the court in a case of a single petitioning creditor was described by Mr. Justice Taylor in *Stancroft Trust Ltd. v. Asiaamerica Capital Ltd.* (1992), 1992 CanLII 1091 (BC CA), 72 B.C.L.R. (2d) 353 (C.A.) at 357:
>
> > Section 43(1) specifically contemplates that a petition may be brought by a single creditor. Where there is only one petitioning creditor, which may be said effectively to be the case here, the court has, no doubt, to be vigilant to ensure that the process is not being used for "collection" purposes - for instance, to compel payment of a debt where the debtor is solvent, or to prevent the debtor from defending itself against a disputed claim.

[18] Where a debtor can establish it has not ceased being able to satisfy its liabilities generally as they become due, but instead has chosen not to pay a particular debt for a justifiable reason (i.e. there is a *bona fide* dispute), a bankruptcy order will not be made. The court hearing the bankruptcy application is not to determine the validity of the debtor's dispute, but only whether the dispute is *bona fide*. As noted in *Re Bearcat Exploration Ltd. (Bankrupt),* 2003 ABCA 365 (CanLII) at para. 15:

> Therefore, when there is a *bona fide* dispute between the petitioner and debtor with respect to the debt, the matter must be decided in proceedings in the ordinary courts, rather than in the bankruptcy court: *Concept Marketing Ltd., Re* (1975), 20 C.B.R. (N.S.) 27 (Ont. S.C.); *Central Coast Carriers Ltd., Re* (2002), 2002 BCSC 312 (CanLII), 32 C.B.R. (4th) 200 (B.C.S.C.) (Chambers). A bankruptcy court's jurisdiction to issue declaratory judgments is limited to the matters allowed for in the *BIA*, *supra*: *Re Holley* (1986), 1986 CanLII 2586 (ON CA), 54 O.R. (2d) 225 (C.A.); *Reynolds, Re* (1928), 1928 CanLII 422 (ON SC), 10 C.B.R. 127 (Ont. S.C.), aff'd (1982), 10 C.B.R. 127 at 131 (Ont. C.A.). It is not the judge's function in bankruptcy proceedings to determine whether the respondent has a good defense to the petitioner's claim: *Tawe International Fairs Inc. (Re)*, [1992] B.C.J. No. 2064 (B.C.S.C.) (Chambers) (QL). Accordingly, final decisions or declarations about illegality, severance, principal amounts owing, interest rates and validity of security are beyond the jurisdiction of a bankruptcy court hearing a bankruptcy petition.

[19] The standing of Grant Thornton to seek a bankruptcy order in this case was not challenged. I note that an application for a bankruptcy order by a receiver is not without precedent: *Terrace Sporting Goods Ltd., Re*, [1979] 31 C.B.R. (N.S.) 68 (Ont. S.C.).

## ANALYSIS

### Has Grant Thornton proven the Debt?

[20] The first argument advanced by Solid Holdings is that the Agreement does not provide sound and convincing evidence of the Debt arising from the December 13thTransaction, which is the basis of Grant Thornton's Bankruptcy Application. Counsel for Solid Holdings argues the Agreement required Crystal Wealth to make additional cash advances each month, in addition to the Initial Amount, to fund the additional purchases of gold. According to Solid Holdings, and it is not disputed, the only money provided by Crystal Wealth under the Agreement was the Initial Amount. Solid Holdings says there was no December 13th Transaction because Crystal Wealth did not make the required additional monthly advances of cash. It argues if there was no December 13th Transaction, there can be no Debt arising from it.

[21] Grant Thornton describes the Agreement as a term loan by Crystal Wealth to Solid Holdings. It submits the loan was to be repaid at maturity in an amount calculated after making 12 monthly adjustments based on 12 notional monthly purchases of gold at the prevailing stock price and corresponding notional monthly settlements. On the 13th day of each month, a "settlement" and "purchase" calculation would occur and the loan would "roll" over without any money changing hands, based on the price of gold at the time. An increase in the price of gold over the life of the Agreement would increase Solid Holdings' indebtedness to Crystal Wealth; a decline in the price of gold would result in a corresponding decrease in the amount Solid Holdings would be obliged to repay. Each month, the Initial Amount, net of the increase or decrease settlement amount for that month, would roll over and be used for the subsequent notional purchase.

[22] Solid Holdings' second argument is that the failure by Crystal Wealth to advance additional monies was a breach of the Agreement that caused Solid Holdings to suffer damages, giving rise to a counterclaim against Crystal Wealth. Solid Holdings argues a potential damages award could be set off against the Debt, if any Debt is owed. Solid Holdings argues these circumstances constitute *a bona fide* dispute between the parties that calls into question whether the Debt exceeds $1,000, which is a prerequisite under the *Act* for a bankruptcy order. Solid Holdings says if it can satisfy me that it is "quite possible" its claim would result in judgment in its favour, a bankruptcy order should not be made: *Bankruptcy of Central Coast Carriers Ltd.* 2002 BCSC 312 (CanLII) at para. 45.

[23] Grant Thornton denies there is any *bona fide* dispute. Grant Thornton disputes Crystal Wealth was in default of its obligations under the Agreement, but in any event, says the Ontario Superior Court's procedural order includes a Claims Bar Date and that because Solid Holdings did not file a proof of claim before that date, it is now precluded from doing so. Further, even if Solid Holdings had submitted a proof of claim, Grant Thornton submits under the proof of claim process, Solid Holdings would rank as an unsecured creditor and would only share in the estate of Crystal Wealth along with all other creditors.

[24] Both arguments put forward by Solid Holdings involve an interpretation of the Agreement and I will address them together. In my view, the words of the Agreement, considered in light of the factual matrix in this case, provide sound and convincing evidence of the Debt owing by Solid Holdings to Crystal Wealth for the December 13thTransaction. The terms of the Agreement only required payment of what I (and the Agreement) defined as the "Initial Amount". The Agreement stated that "based on the Initial Amount", there were to be monthly sequential purchases. A chart which formed part of the Agreement indicated the "reinvestment" nature of the arrangement involving the Initial Amount and the "renewing" monthly purchases under the Agreement. Bruce Bando, a vice-president of Grant Thornton, deposed that "Crystal Wealth did not purchase gold in its physical form under the Agreement". His evidence on that point was undisputed. Even the affidavits of Jorge Lopehandia and Stan Spletzer, directors of Solid Holdings, acknowledge the Agreement was a financing arrangement, with Mr. Spletzer referring to it as the "Crystal Wealth loan" in the amount "of 300,000 dollars on Feb 13, 2017" in the Termination Notice.

[25] Solid Holdings relied on *Central Coast*, as well as *Debsco Construction & Development Ltd. (Re) (1984), 6 C.B.R. (3d) 128 (A.B.Q.B.)* (referred to in *Central Coast*) and *Atlantic Ova Pro Ltd., Re*, 2006 NSSC 61 (CanLII) as support for the proposition that a bankruptcy order should not be made where there is a *bona fide* dispute involving the debt. Solid Holdings says it has a "plausible argument" with respect to the existence and amount of the Debt, and that nothing more is required. Solid Holdings argues it is not my role on this Bankruptcy Application to consider the merits of the breach of contract claim it may have against Crystal Wealth, but instead submits I am only to consider whether there is a *bona fide* dispute.

[26] In the cases relied on by Solid Holdings, the debtors had initiated civil claims against the petitioning creditor. In other relevant cases, claims had also been initiated: see *Canned Heat Marketing Inc., Re*, [1995] B.C.J. No. 2410 (S.C.); *Steintron International Electronics Ltd., Re*, 1986 CanLII 781 (BC SC), [1986] B.C.J. No. 918 (S.C.); and *Peter Hughes Ltd., Re*, 2001 CanLII 28265 (ON SC), [2001], 28 C.B.R. (4th) 72 (Ont. S.C.J.). All of those cases can be distinguished from this case, as Solid Holdings has not initiated any claim against Crystal Wealth and the procedural order of the Ontario Superior Court now precludes it from doing so.

[27] I agree that it would be inappropriate for me to rule on the merits of a civil action pending before the Court in the course of hearing a bankruptcy application or to comment unnecessarily on the merits of a claim in certain contexts: *Boivin (Syndic de)*, 2011 QCCA 1310 (CanLII) at para. 28 and *Thermo Tech et al. v. Branconnier et al.*, 2003 BCSC 1141 (CanLII) at para. 5. However, consideration of the *bona fides* of Solid Holdings' asserted

breach of contract claim requires me to consider the underlying contractual interpretation in order to assess whether it is "quite possible" that claim could succeed.

[28] The factual matrix in this case includes the absence of any timely demand by Solid Holdings to Crystal Wealth for additional cash payments it asserts Crystal Wealth was obligated to make under the Agreement. The first reference to such a demand was in an email dated April 30, 2018, from Ms. Spletzer to counsel for Grant Thornton. Based on Solid Holdings' interpretation of the Agreement, this would mean Solid Holdings sat passively by, watching as its business was damaged, as Crystal Wealth defaulted in its payment obligations for 11 consecutive months, and then waited an additional two months before raising any concern. I find that position to be incredible and implausible. I note also that in his affidavit, Mr. Lopehandia acknowledged the Debt owed to Crystal Wealth and indicated an intention to pay, but the payment did not materialize.

[29] While Solid Holdings submits it is quite possible its claim could succeed, I disagree. There is no *bona fide* claim made by Solid Holdings against Crystal Wealth; there is no claim at all, nor can there be one without a further order of the Ontario Superior Court. Even if a claim were possible, the nebulous allegations made by Solid Holdings of wrongdoing by Crystal Wealth and its inexplicit assertions of damage are not even as developed as those rejected by Justice Farley in *Kenwood Hills Development Inc., Re*, [1995] O.J. No. 161 at para. 4 as being vague and uncertain:

> …As for the Orsi lawsuit – it is a draft statement of claim dated May 1994 which indicates a claim which was alleged to be alive in the spring of 1992. Clearly it has not been pursued with any vigor. I do not think that this claim falls within the fundamental aspects of *Re Concept Marketing Ltd. (*1975), 20 C.B.R. (N.S.) 27 (Ont. S.C.), at p. 29, since there was no evidence given as to its *bona fides*; it remains a vague and uncertain claim. If it is worthwhile and the trustee can pursue it for the benefit of the creditors, or if the trustee does not see that that is realistic, then Kennedy could, if he wished, bring a s. 38 motion…

[30] All of this leads me to conclude Grant Thornton has proven the Debt arising from the December 13th Transaction. In my role as a bankruptcy judge, it is not necessary for me to determine the precise amount of the Debt; I need only be satisfied that the Debt exceeds $1,000, and I am satisfied it does.

**Has Grant Thornton proven Solid Holdings has ceased to meet its liabilities generally as they become due?**

[31] If it is shown the debtor has failed to pay the debts owing, either to multiple creditors or to a single creditor where repeated demands for payment have been made, there is a presumption the debtor is not meeting its liabilities generally as they become due: *Real Time Fibre Supply*, paras. 41-44; *Servus Credit Union Ltd. v. Smith*, 2013 ABQB 151 (CanLII) at para. 59. Once this presumption is triggered, the onus shifts to the debtor to prove their ability to pay the debt: *Hayes, Re*, 1938 CanLII 342 (ON SC), [1938] 3 D.L.R. 757 (Ont. H.C.) at para. 2.

[32] I have found the Debt arising from the December 13th Transaction has been proven. I find the first demand for payment was made by Grant Thornton on January 8, 2018 which referenced the Debt arising from the December 13th Transaction (the "January Demand"). I find the second demand for payment was made by Grant Thornton's lawyers via their April 16, 2018 letter (the "April Demand"), which attached and referred to January Demand. Accordingly, I find that repeated demands were made for the Debt within the six months preceding the Bankruptcy Application. As a result, there is a presumption that Solid Holdings was not meeting its liabilities generally as they became due: *Servus Credit Union Ltd. v. Smith*, 2013 ABQB 415 (CanLII) at para. 59. As set out in *Hayes*, the onus now shifts to Solid Holdings to prove its liabilities are being paid.

[33] In order to satisfy this Court it is able to meet its liabilities generally as they become due, Solid Holdings is required to provide "clear and independent evidence" of that fact, using evidence detailing its financial position, such as financial accounts or statements: *Bankruptcy of Ken Kin Man Chung*, 2004 BCSC 1669 (CanLII) at para. 19. It is insufficient for a debtor to put forward "unsupported generalizations" or a "self-serving general averment" of financial health and stability: *Chung, Re*, citing with approval *Moody v. Ashton*, [1997] S.J. No. 544 (S.K.Q.B.) at p. 41 and *484030 Ontario Ltd., Re* (1992), 1992 CanLII 7417 (ON SC), 12 C.B.R. (3d) 302 (Ont. C.J.) at pp. 313-314.

[34] In this case, not only did Solid Holdings fail to submit clear and independent evidence of its detailed financial stability, the evidence it did put forward, including its assertions about its damaged business model and cancellation by the Royal Bank of Canada of its credit facilities with Solid Holdings, supports the opposite conclusion. Solid Holdings did not provide evidence that it had any other creditors, paid or unpaid. In fact, it provided no evidence that it continued to be an active business.

[35] Based on all the evidence, I conclude that repeated demands for the Debt were made within the six months preceding the Bankruptcy Application which satisfies the requirement for special circumstances. I further conclude that in the six months preceding the Bankruptcy Application, Solid Holdings committed an act of bankruptcy by ceasing to meet its liabilities generally as they became due.

**CONCLUSION**

[36] For all of these reasons, I make the following orders:

1. Pursuant to s. 43 of the *Act*, Solid Holdings is adjudged bankrupt and a bankruptcy order is made with respect to Solid Holdings;

2. The Bowra Group Inc. of Vancouver, British Columbia, a licenced trustee under the *Act*, is appointed trustee of the property of Solid Holdings, on the usual terms; and

3. Grant Thornton's costs of this proceeding are to be taxed and paid out of Solid Holdings' estate.

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"The Honourable Madam Justice Jackson"