

HSBC BANK CANADA
Applicant

-and- MAHVASH LECHCIER-KIMEL
Respondent

Apr 3/17

Court File No. CV-13-9989-00CL

CV-14-10443-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION
(Returnable April 3, 2017)

MILLER THOMSON LLP
Scotia Plaza
40 King Street West
Suite 5800, P.O. Box 1011
Toronto, ON M5H 3S1

Greg Azeff (LSUC #45324C)
gazeff@millerthomson.com
Tel: (416) 864-9700
Fax: (416) 941-8852

Lawyers for the Court-Appointed Receiver,
Zeifman Partners Inc.

APR. 3/17
THERE IS INSUFFICIENT BACK-UP FOR ME TO ASSESS THE REASONABLENESS OF THE RECEIVER'S DISBURSEMENTS FOR HEAT, UTILITIES, AND BANK CHARGES. HOWEVER, MERIDIAN SUPPORTS THE APPROVAL OF FEES AND ACTIVITIES AS SOUGHT. MERIDIAN IS DEEPLY UNDERWRITTEN ON ITS 1ST PRIORITY CHARGE. ONLY IF STAND TO BENEFIT FROM AN ASSESSMENT IN LIGHT OF THE QUANTITIES INVOLVED. ON THAT BASIS ALONE, I APPROVE THE RECEIVER'S FEES AND DISBURSEMENTS AS SOUGHT.

THERE IS LITIGATION OUTSTANDING AGAINST THE RECEIVER BY THE NORMAL FARM PRACTICES & PROTECTION BOARDS. THE APPLICANTS EXPECT TO CLAIM COSTS AGAINST THE RECEIVER IN THAT PROCEEDING. THE BOARD'S JURISDICTION TO AWARD COSTS IS SUFFICIENTLY LIMITED THAT I WOULD GENERALLY BE INCLINED TO ORDER THE RELEASE TO MERIDIAN OF THE FUNDS REMAINING IN THE RECEIVER'S HANDS ON THE BASIS THAT MERIDIAN IS A SUBSTANTIAL INSTITUTION THAT CAN BE TRUSTED TO BE AVAILABLE IF THE FUNDS NEED TO BE DRAWN BACK. BUT MERIDIAN ARGUES THAT THE ONLY BASIS THAT THE BOARD CAN ORDER COSTS AGAINST THE RECEIVER IS IF THE RECEIVER COMMITTED MISCONDUCT IN THE ADMINISTRATIVE PROCEEDINGS

23526841.1

So that the costs award would not be a "REASONABLE" distribution ^{of} ~~the~~ ~~assets~~ ~~of~~ ~~the~~ ~~company~~ ~~as~~ ~~written~~ ~~in~~ ~~the~~ ~~order~~ ~~of~~ ~~the~~ ~~Receiver~~ is entitled to indemnify under para 17 of its appointment order. That is, Meridian will not confirm ~~that~~ ~~if~~ ~~a~~ ~~costs~~ ~~award~~ is made against the Receiver that Meridian will be properly required to return any distributions that it has received. Rather Meridian agrees that such costs will be for the Receiver personally.

I have no information as to the financial status of the corporation through which Zeeman Partners operates ~~or~~ its Receiver's business. ~~There~~ ~~is~~ ~~no~~ ~~evidence~~ ~~of~~ ~~a~~ ~~credible~~ ~~undertaking~~ ~~to~~ ~~pay~~, the funds currently in the Receiver's hands may be the only funds available to pay and reverse costs award if one is made by the Board.

I have no finding as to the priority of Meridian and the Applicant's claims to the Board if they win a costs award one way or the other. The question of who should bear the risk that Zeeman Partners Inc. will not pay if required to ~~do~~ ~~so~~ ~~and~~ ~~the~~ ~~Board~~ ~~is~~ ~~not~~ ~~a~~ ~~question~~ ~~to~~ ~~be~~ ~~resolved~~ ~~without~~ ~~the~~ ~~Real~~ ~~Facts~~ ~~being~~ ~~before~~ ~~the~~ ~~court~~. Unless or until there is an acceptable form of indemnity or claw-back agreement, in my view, it would not be fair to allow the release to Meridian of the funds in the Receiver's hands. Nor would I approve \$1 million in distributions which there is no way near that amount available.

104

A1

Resp
Act, I
1990

d Recei

15

The Receiver is to continue to hold all funds in its possession on behalf of this estate. No further fees, disbursements, including without limitation, interest and bank charges, are to be paid by the Receiver to itself or to Meridian pending further order of the Court.

The Applicants report the Board are trying to a significant amount of cash pending: (a) a ~~discovery~~ low likelihood event; and (b) a priority contest with Meridian. If they fail, they can expect compensation to be sought. On the other hand Meridian says the Receiver want to use cash without a clear clawback if it turns out that they were not entitled to it. The way out of this conundrum is obvious.

Order to go on as set out in paras (a), (b) & (c) of the Receiver's Notice of Motion dated March 28/17. Costs reserved to the Judge who decides the motion that ultimately releases the cash on hand either subject to a clawback or on a final basis.

