

CITATION: Maple Bank GmbH (Re), 2017 ONSC 2536
COURT FILE NO.: CV-16-11290-00CL
DATE: 2017-04-27

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF MAPLE BANK GmbH

AND IN THE MATTER OF THE *WINDING-UP AND RESTRUCTURING ACT*,
R.S.C. 1985, C.W-11, AS AMENDED

AND IN THE MATTER OF THE *BANK ACT*, S.C. 1991, C.46, AS AMENDED

BEFORE: Regional Senior Justice Geoffrey B. Morawetz

COUNSEL: *Alex MacFarlane, Robert Weir, Rachel Belanger*, for KPMG Inc., in its capacity
as the Liquidator of the Business in Canada of Maple Bank GmbH and its Assets
as defined under s. 618 of the *Bank Act*

David Byers, for the German Insolvency Administrator

Jonathan Wigley, Court Appointed Costs Counsel

Jane Milburn, Executive Employee Counsel for Paul Lishman, Jeff Campbell and
Cyrus Sekhia

Kimberley Boara Alexander, Executive Employee Counsel for Don Scott

Maurice Fleming, for Radius Financial

Kyla Maher and Erin Pleet, Counsel for Paul Lishman

Massimo Starnino and Megan Shortreed, for Employees' Representative Counsel

HEARD: March 10, 2017

RELEASED: April 27, 2017

ENDORSEMENT

[1] On March 10, 2017, this motion was granted with reasons to follow.

[2] These are the reasons.

[3] On March 16, 2016 (the "Winding-Up Date") upon the application of the Attorney General of Canada, the court granted an order (the "Winding-Up Order") pursuant to s. 10.1 of the *Winding-Up and Restructuring Act*, R.S.C. ("WURA"):

- (i) winding-up the business (the “Business”) in Canada of Maple Bank GmbH (“Maple Bank”); and
- (ii) appointing KPMG Inc. (the “Liquidator”) as the Liquidator of the Business and the assets (as defined in section 618 of the *Bank Act*) of Maple Bank (the “Toronto Branch Assets”).

[4] The Liquidator brought this motion for an order (the “Interim Distribution Order”) authorizing and directing the Liquidator to make a partial distribution to the German Insolvency Administration (the “GIA”) of a portion of the estimated surplus of funds, which have been realized by the Liquidator from the liquidation and/or sale of the Toronto Branch Assets and the Business (the “Interim Distribution”) on, or after March 10, 2017 (the “Interim Distribution Date”).

[5] Maple Bank is a Canadian owned German Bank, and an authorized foreign bank in Canada under s. 2 and Part XII.I of the *Bank Act* (an “Authorized Foreign Bank”). In Germany, Maple Bank is subject to regulation by the Federal Financial Supervisory Authority Service. As an Authorized Foreign Bank, Maple Bank was regulated with respect to its Business in Canada (the “Toronto Branch”) by the Office of the Superintendent of Financial Institutions (“OSFI”).

[6] In February 2016, the emergence of significant German tax claims led to the appointment of the GIA over Maple Bank, which appointment led OSFI to request that the Attorney General of Canada obtain the Winding-Up Order in respect of the Business of the Toronto Branch Assets (the “Winding-Up Proceedings”).

[7] Since the Winding-Up Date, the Liquidator has worked to liquidate the Toronto Branch Assets and wind-up the Toronto Branch.

[8] The realization process for all of the Toronto Branch assets is essentially complete and the Liquidator has approximately \$820.1 million available to satisfy outstanding claims.

[9] On June 8, 2016, the court issued a claims procedure order (the “Claims Procedure Order”), in order to facilitate a determination of the existence and amount of any claims against the Toronto Branch. Creditors were requested to file their claims by September 19, 2016 (the “Claims Submission Date”)

[10] The Claims Procedure Order resulted in Liquidator receiving 56 proofs of claim totaling \$1.57 billion, including a proof of claim submitted by the GIA on behalf of Maple Bank totalling \$791.33 million (the “GIA Claim”) in respect of certain term loans, as well as other operational funding that was provided to the Toronto Branch by Maple Bank from Germany.

[11] On November 25, 2016, the court issued a distribution order (the “Distribution Order”), authorizing the Liquidator to make a distribution to creditors of the Toronto Branch with proven claims. In accordance with the Distribution Order, on December 9, 2016, the Liquidator paid proven claims in the total value on account of principal and statutory interest under WURA of approximately \$686.8 million.

[12] The Liquidator has reached an agreement with respect to the GIA Claim, whereby the GIA Claim, to the extent that it is valid, will be reduced to the extent of any distributions made to the GIA. The GIA has further agreed that such corresponding portion of the GIA Claim shall be extinguished and released by such distribution. In addition, the remaining portion of the GIA Claim, to the extent that it is valid, after taking into account any interim distribution, shall be capped at an amount (which amount may, from time to time, increase or decrease) that results in the Toronto Branch having assets in excess of its liabilities, so that creditors with proven claims will receive 100% of their claim plus interest in accordance with the WURA.

[13] There remain 24 unproven claims with an aggregate value of \$82.4 million.

[14] On January 27, 2014, the court issued a principal officers additional claims order (the "Principal Officers Additional Claims Order"), with the aim of facilitating the determination of the existence and amount of any claims that may exist against certain Principal Officers of the Toronto Branch and in order to determine the corresponding quantum of any potential indemnity claims by such Principal Officer against the Toronto Branch. Pursuant to the Principal Officer's Additional Claims Order, creditors were required to file their claims with the Liquidator prior to February 28, 2017 (the "Principal Officers Claims Bar Date"). The Liquidator is not aware of any valid claims against Principal Officers having been filed.

[15] The Claims Procedure Order has been implemented in excess of 150 days and the Principal Officers Claim Bar Date has passed.

[16] In its Eleventh Report, the Liquidator advises that it can now predict, with a high degree of certainty, both:

- (i) the universe of Claims that will be proven under the Winding-Up Proceedings; and
- (ii) that the Toronto Branch will have an estimated surplus of at least \$660.6 million.

[17] The Liquidator has worked with the GIA in order to implement a distribution process in Canada that will ensure that appropriate reserves will be maintained in order to pay, in full, proven claims of creditors of the Toronto Branch, while effecting a prompt distribution to the GIA, after the establishment of the estimated reserve. The Liquidator has, in consultation with the GIA, developed a proposed Interim Distribution.

[18] The Liquidator reports that, in order to facilitate the Interim Distribution, the Liquidator has established a reserve (the "Estimated Reserve") to provide for:

- (i) the Unproven Claims;
- (ii) the Future Potential Claims;
- (iii) interest on Unproven Claims and Future Potential Claims at 5% per annum up to and including March 31, 2018; and

- (iv) estimated costs to administer the Toronto Branch Liquidation through March 31, 2018.

[19] The Estimated Reserve is in the approximate amount of \$157.1 million.

[20] The GIA supports the establishment of the Estimated Reserve.

[21] The Liquidator is of the view that the Interim Distribution is appropriate in the context of the Winding-Up Proceedings.

[22] The motion was not opposed.

[23] The sole issue to be determined is whether it is appropriate for the court to approve the Interim Distribution.

[24] In general terms, the underlying purpose of the WURA is to provide a mechanism for the orderly gathering of and realization on the assets of a debtor (including, an Authorized Foreign Bank) as inexpensively and expeditiously as possible and the corresponding distribution of the proceeds by the Liquidator under the supervision of the court to the creditors and, where applicable, the equity holders of a debtor (see: *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900 at paras. 36-37 and *Canada (Attorney General) v. Reliance Insurance Co.*, 2015 ONSC 7489 (Ont. S.C.J. [Commercial List]), at para. 10).

[25] Sections 75 and 77 of the WURA provide a skeletal framework for the distribution of the assets of the debtor by the Liquidator.

[26] Counsel to the Liquidator submits that the case law has developed which confirms that it is not a precondition to a distribution to creditors of a debtor under the WURA that:

- (i) all claims filed in the WURA proceeding at the date of the intended distribution be allowed or disallowed by the Liquidator; nor
- (ii) that there be complete certainty that all potential creditors have submitted proofs of claim at the date of the intended distribution.

[27] Counsel further submits that orders granting interim distribution in the context of a WURA proceeding are neither unusual nor unheard of (see: *Canada Deposit Insurance Corp. v. Columbia Trust Co.* 1987 CarswellBC 11; *Reliance, supra*; *Canada (Attorney General) v. Reliance Insurance Co.* 2009 CarswellOnt 4250 (Ont. S.C.J. [Commercial List]); and *Canada (Attorney General) v. Confederation Life Insurance Co.* [2002] O.J. No. 4360 (Ont. S.C.J. [Commercial List])). It is noted, however, that in all of these proceedings, the proposed interim distributions were not opposed and the issue before me was not the subject of comment.

[28] Section 158.1(2) of the WURA provides for a distribution scheme pursuant to which an Authorized Foreign Bank, in liquidation in Canada may, with the approval of the court, receive the surplus from the Winding-Up after all creditors with proven claim have received payment of the full value of their proven claim and statutory interest (the "Priority Amount"):

Distribution of Property

158.1 (1) Where a winding-up order is made in respect of an authorized foreign bank, claims shall be paid in the following order of priority:

- (a) charges, costs and expenses, including the remuneration of the liquidator, incurred in the winding-up of the business in Canada of the authorized foreign bank and of the liquidation of its assets;
- (b) claims of preferred creditors, specified in section 72; and
- (c) debts and liabilities of the authorized foreign bank in respect of its business in Canada in order of priority as set out in sections 625 and 627 of the *Bank Act*.

Distribution and Release of Surplus Assets

- (2) Any assets that remain after payment of the claims referred to in paragraphs (1)(a) to (c) are to be applied firstly in payment of interest from the commencement of the winding-up at the rate of five per cent per annum on all claims proved in the winding-up and according to their priority. The liquidator may, with the approval of the court, release to the authorized foreign bank any assets remaining after payment of the interest.

[29] The Liquidator submits that section 158.1 is not a bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves are established to ensure that all priority amounts will be paid in due course.

[30] Counsel to the Liquidator submits that federal insolvency law statutes are complementary and operate in tandem and further, that the court has long recognized that in dealing with insolvency legislation, a technical interpretation should not be applied. Rather, insolvency legislation needs to be given a broad, flexible and purposive interpretation. In support of these propositions, counsel cites: *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60; *Union of Canada Life Insurance (Re)*, 2012 ONSC 957 (S.C.J. [Commercial List]); *Kansa General International Insurance Co. (liquidator of) v. Maska U.S. Inc.* [2002] Q.J. No. 1732 (S.C.); and *Kitchener Frame Ltd., Re* 2012 ONSC 234 (S.C.J. [Commercial List]).

[31] Counsel then submitted that an interpretation of section 158.1(2) that would serve as a temporal bar to an interim distribution of surplus to an Authorized Foreign Bank where sufficient reserves have been established to satisfy the Priority Amounts, solely on the basis that the Priority Amounts have not yet been paid out, would be: (i) overly technical and strict; and (ii) where an Authorized Foreign Bank is in liquidation in the jurisdiction of its head office, contrary to the recognized policy of this court to, where possible, assist with and accommodate insolvency proceedings in a foreign jurisdiction, in order to maximize value for the benefit of all creditors.

[32] Counsel to the Liquidator further submits that in determining whether or not to approve the Interim Distribution, the Court should focus on whether or not the creditors of the Toronto

Branch would be prejudiced by the Interim Distribution. The Liquidator proposes to maintain the Estimated Reserve to cover Unproven Claims, Future Potential Claims, interest on Unproven Claims and Future Claims at five percent per annum, as well as costs to administer the Toronto Branch Liquidation.

[33] The Liquidator is of the view that the Interim Distribution will not prejudice the Toronto Branch's creditors, but the failure to approve the Interim Distribution would expose creditors in Germany to delay and to considerable foreign exchange risks on the amounts that would eventually be distributed to them.

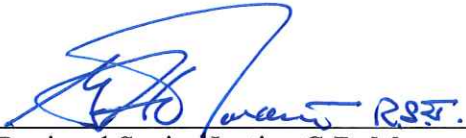
[34] I am satisfied that the Interim Distribution is appropriate in the context of these proceedings. I am satisfied that no creditors of the Toronto Branch will suffer prejudice as a result of the Interim Distribution, as the Toronto Branch has a significant surplus and the Liquidator has calculated that it will be able to maintain adequate reserves which will ultimately pay all Proven Claims and Future Potential Claims.

[35] In these circumstances, there is no principled basis on which to delay the distribution of the surplus to the GIA, until such time as the Liquidator resolves all outstanding claims against the Toronto Branch. Indeed, it would be inequitable to the GIA to delay the distribution.

[36] As a Superior Court of general jurisdiction, the Superior Court of Justice has all the powers that are necessary to do justice between the parties. Except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law and civil matters (see: *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, (1972), [1972] O.J. No. 1713 (Ont. C.A.) and *Re Intertan Canada Ltd.* (2009), [2009] O.J. No. 293, 174 A.C.W.S. (3d) 617 (Ont. S.C.J.)).

[37] In this case, the Estimated Reserve being maintained by the Liquidator provides adequate security to ensure that all claims proved in the Winding-Up can be paid. The Liquidator has established the reserve for the benefit of those who have Unproven Claims and Future Potential Claims. In this respect, it is reasonable in the circumstances to deem that these claims have been paid for the purposes of section 158.1(2), which thus enables the Liquidator to make the Interim Distribution.

[38] I do not read section 158.1 as prohibiting a distribution in these circumstances.


Regional Senior Justice G.B. Morawetz

Date: April 27, 2017