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CCAA PROTECTION NO GUARANTEE: ONTARIO COURT REFUSES TO GRANT CCAA PROTECTION SOUGHT FOR ULTERIOR MOTIVE

In *Re: Realtysellers (Ontario Ltd.)* [2008] O.J. No. 340 (Ont. S.C.J.), the applicant, Realtysellers (Ontario) Limited ("Realty") sought protection under the *Companies' Creditors Arrangement Act*. Realty argued that it required CCAA protection in order to enable it to acquire additional financing which would enable it to carry on business.

The Court found that Realty established that it satisfied the technical requirements of the CCAA and, in particular, that it was insolvent. However, Realty was not carrying on any active operations and there was no evidence that any creditors were seeking to enforce payment of any of Realty's liabilities to them. Furthermore, the Court determined that the principal purpose of Realty's application was to obtain, through the stay of proceedings, a stay of a pending licensing hearing before the License Appeal Tribunal as Realty had indicated that it did not wish to pursue CCAA proceedings if the Court would not extend the stay of proceedings to the pending license hearing.

The licensing hearing - pursuant to which Realty might lose its real estate broker's licence - had been initiated on the basis that Realty was undercapitalized to such an extent that Realty could "not reasonably be expected to be financially responsible in the conduct of its business" and that the past conduct of both Realty and its principal afforded grounds for belief that Realty and its principal could not carry on business "in accordance with the law and with integrity and honesty".

The Court refused to extend the stay of proceedings to the licence hearing based on the following five factors:

1. The Court found it was clear that the sole purpose of Realty in seeking protection under the CCAA was to obtain a stay of proceedings that was directed at preventing the licensing hearing from proceeding. Furthermore, given that no creditors were pursuing Realty for the indebtedness owed to them and the absence of ongoing operations, the Court found there was no purpose in invoking the CCAA to stay enforcement action or protect the integrity of an operating business pending a restructuring or sale.

2. The Court found that Realty could not provide any evidence that an order granting relief under the CCAA would have any practical significance apart from delaying the licensing hearing.
3. The Court noted that Realty had had an opportunity over the previous eleven months to obtain financing which would have removed the necessity of having the licensing hearing and that it either took no steps to do so or was unsuccessful. The Court found that, in either case, there was no reason to believe that a further extension of time to obtain financing would be fruitful.
4. The Court noted that the licensing hearing had been initiated not only because of Realty's undercapitalization, but due to past conduct leading to grounds for believing that Realty and its principal would "not carry on business in accordance with the law and with integrity and honesty".
5. The Court rejected Realty's argument that, without obtaining financing, it would not receive a fair hearing at the Tribunal. The Court found that whether or not Realty obtained financing, it was irrelevant to the past conduct of Realty and its principal, which conduct, in addition to undercapitalization, led to the licensing hearing.

The Court concluded by noting that it was not appropriate to utilize the provisions of the CCAA for the sole purpose of pre-empting proceedings by a statutory tribunal not only vested with responsibility in licensing matters but also with a much fuller understanding of the relevant facts.

Furthermore, the Court stated that it was not satisfied that it had the authority to order a stay of the licensing hearing in the absence of express authority in the *Real Estate and Brokers Act*. The Court also stated that even if it had authority to do so under its inherent jurisdiction, it felt that such discretion could only be exercised on the basis of principles applicable to injunctive proceedings.

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