

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A
PROPOSAL OF 33 LAIRD INC. AND 33 LAIRD GP INC.,
CORPORATIONS INCORPORATED UNDER THE *ONTARIO
BUSINESS CORPORATIONS ACT*, AND 33 LAIRD LIMITED
PARTNERSHIP, A LIMITED PARTNERSHIP FORMED UNDER *THE
ONTARIO LIMITED PARTNERSHIPS ACT***

BETWEEN: SCHINDLER ELEVATOR CORPORATION, Moving Party

AND:

33 LAIRD INC., 33 LAIRD GP INC. AND 33 LAIRD
LIMITED PARTNERSHIP, Respondents

BEFORE: L. A. Pattillo J.

COUNSEL: V. Arman for Schindler
J. Turgeon for Respondents
C. Prophet for the Purchaser
S. Kour for the Proposal Trustee

HEARD: July 6, 2021

ENDORSEMENT

1. The Moving Party, Schindler Elevator Corporation (“Schindler”), brings this motion for an order declaring that it retains all right, title,

interest and ownership in an elevator and related equipment (the “Elevator Equipment”) situate at 33 Laird Drive, in Toronto (the “Property”), formerly owned by the Respondents, 33 Laird Inc., 33 Laird GP Inc. and 33 Laird Limited Partnership (collectively the “Laird Group”) and permitting Schindler to retrieve the Elevator Equipment from the Property.

2. For the reasons that follow, I allow Schindler’s motion, grant the requested declaration and order that it be permitted to attend at the Property and take possession of its Elevator Equipment.
3. Schindler is the designer, manufacturer and installer of elevators.
4. The Laird Group was set up with for the purpose of developing a retail/commercial development at 33 Laird Drive in Toronto (the “Property”).
5. On May 28, 2019, Schindler entered into a contract with Aztec Structural Restoration Inc., the Laird Group’s general contractor for the development, for the manufacture, supply and installation of a three stop Schindler 3100 passenger elevator (the “Elevator Agreement”). The contract price was \$101,000 and provided for a deposit of 30% for engineering and administrative costs.
6. Paragraph 21 of the Terms and Conditions of the Elevator Agreement provides:

Risk of loss of materials and equipment shall pass to purchaser upon delivery of materials to the site. Title to materials and equipment shall pass to purchaser upon payment by purchaser to Schindler.
7. In February 2020, Schindler received the 30 % deposit of \$30,815, including HST.
8. In August 2020, Schindler delivered the Elevator Equipment to the Property. On August 25, 2020, Schindler invoiced Aztec for the balance owing on the Elevator Agreement, after credit for the deposit, in the amount of \$51,358.50 including HST. Schindler has not been paid by Aztec. As of May 18, 2021, the Elevator Equipment remained at the Property.
9. On November 28, 2020, the three members of the Laird Group each filed Notices of Intention to make a Proposal under the *Bankruptcy and Insolvency Act*. The purpose of the filing was to restructure the Group by either obtaining alternate financing or selling the Property.
10. After a number of extensions of the date to file the proposal, during which the court supervised a sale process, 33 Laird Inc., on behalf of

the Laird Group, entered into an Agreement of Purchase and Sale dated May 11, 2021 to sell all of its “right, title, interest in the Purchased Assets” to the Purchaser (the “Sale Agreement”). Purchased Assets included Chattels which were listed in a schedule to the Sale Agreement and included “elevators and elevator parts”.

11. On May 25, 2021, the Laird Group filed their Proposal which provided, among other things, that the preferred creditors would be paid in full; the related creditors under the second mortgage would be paid in full from the proceeds of sale of the Property pursuant to the Sale Agreement and the unsecured creditors would receive funds *pro rata* from a cash pool funded from the sale proceeds.
12. On June 11, 2021, the Laird Group brought a motion for approval of the Sale Agreement and a Vesting Order. At the same time Schindler brought its cross-motion for possession of the Elevator Equipment which remained at the Property. On June 15, 2021, McEwen J. granted the Laird Group’s motion and issued an Approval and Vesting Order. In his endorsement, McEwen J. expressly noted:

The order is, however, being made on a without prejudice basis to Schindler Elevator Corporation’s right to pursue its cross motion and the approval of the order does not, in any way, determine its rights to the equipment in dispute and Schindler reserves all rights in that regard.
13. Schindler submits that the Elevator Equipment remains its property. Title did not pass to Aztec under the Agreement and pursuant to s. 18 and Rules 2 and 3 of s. 19 in the *Sales of Goods Act*. It submits therefore it is entitled to possession of the Elevator Equipment. It also relies in its factum on Rule 44, Interim Recovery of Personal Property but withdrew that argument before me.
14. In response, the Laird Group submits that the relief sought by Schindler is not available because of the stay issued in their proposal proceedings pursuant to s. 69.1 of the BIA. In the alternative they submit the title reservation clause in the Elevator Agreement is uncertain and unenforceable, Schindler has not registered its interest under the *Personal Property Security Act* and the proposal proceedings are not the appropriate forum to decide contractual matters between third parties.
15. Section 18 of the *Sales of Goods Act* provides that where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
16. In my view, the intention in the Elevator Agreement as to when the property in the Elevator Equipment is transferred is clear.

Notwithstanding the Elevator Agreement contains other provisions concerning payment requirements, the plain wording of paragraph 21 of the Terms and Conditions make it clear that title to the Elevator Equipment remains with Schindler until it is paid by Aztec. Further, the evidence establishes that Schindler has not been paid for the balance owing under the Elevator Agreement. In my view, the fact that Aztec is not a party is not an impediment to such a finding.

17. Accordingly, the Laird Group has no “right, title or interest” in the Elevator Equipment. Before me it did not submit that it did. Rather it submitted that Schindler’s motion was stayed pursuant to s. 69.1 of the BIA.
18. Section 69.1 of the BIA provides, in part, that, on the filing of a proposal, no creditor has a remedy against the insolvent person or the insolvent person’s property. Creditor is defined by the BIA as “a person having a claim or liability provable as a claim under this Act.
19. The remedy for persons claiming any property, or an interest therein, in the possession of a bankrupt at the time of bankruptcy is provided in s. 81 of the BIA. That section, however, has been held not to apply in respect of a proposal if the assets of the insolvent person are not vested in the trustee: *Re Bertone Construction Co.*, 2 C.B.R. (N.S.) 30 (Que. SC); *Re Malenfant* (1992) 19 C.B.R. (3d) 269 (C.S. Qué).
20. The Proposal sets out the basis upon which the Secured Creditors, the Preferred Creditors and the Unsecured Creditors will be paid from the proceeds of the Laird Group’s property. Nowhere does it purport to vest the Laird Group’s assets in the Trustee.
21. As Schindler does not have a remedy under the BIA for possession of its property, it is therefore not a creditor under the BIA and its motion is not subject to the stay. That Schindler is not a creditor is further supported by the fact that it received no notice of the Laird Group’s NOI and the Proposal Trustee, although represented, has filed no material and made no submissions in respect of the motion.
22. In the event I am wrong in my conclusion that the stay does not apply to Schindler’s motion, in the circumstances, I would grant leave to lift the stay, *nunc pro tunc*, in respect of Schindler’s motion.
23. I also do not consider that the PPSA, which establishes priorities between secured creditors, has any application to the dispute between Schindler and the Laird Group. No secured creditor is asserting any right over the Elevator Equipment in priority to Schindler’s ownership interest. Nor is there any evidence or submissions from the Purchaser that it is a purchaser without notice of Schindler’s interest.
24. Schindler is therefore entitled to the return of its Elevator Equipment. The Laird Group had no right, title or interest in it and accordingly

could not pass title to its purchaser under the Sales Agreement. The Approval and Vesting Order does not operate to extinguish Schindler's interest in the Elevator Equipment.

25. Schindler's motion is allowed, and the relief requested in the form of a declaration and the right to retrieve the Elevator Equipment from the Property is allowed.
26. Schindler is entitled to its partial indemnity costs, which are set out in its Costs Outline at \$5,940. In my view, that amount is fair and reasonable.
27. Costs payable to Schindler by the Respondents, fixed at \$5,940 in total. Payable forthwith.



L. A. Pattillo J.

Released: July 15, 2021