CITATION: *1719108 Ontario Inc. c.o.b. as Zoren Industries*, 2024 ONSC 909
COURT FILE NO.: BK-19-OR208392-OT31
DATE: 20240209

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
COMMERCIAL LIST

IN THE MATTER OF THE BANKRUPTCY OF 17119108 ONTARIO INC.
c.o.b. as ZOREN INDUSTRIES, of the City of Vaughan,
in the Regional Municipality of York, in the Province of Ontario

BETWEEN:	)	
	)	
NINGBO YAMAO OPTOELECTRONICS CO. LTD.	)	*Colby Linthwaite*, for the Applicant/Creditor
	)	
Applicant/Creditor	)	
	)	
– **and** –	)	
	)	
1719108 ONTARIO INC., c.o.b. as ZOREN INDUSTRIES	)	*Catherine Francis*, for the Respondent/Debtor
	)	
Respondent/Debtor	)	
	)	**HEARD:** June 19 and 22, 2023

REASONS FOR DECISION

OSBORNE J.

1. The Applicant, Ningbo Yamao Optoelectronics Co., Ltd. ("Ningbo" or "the Applicant") seeks a Bankruptcy Order in respect of 1719108 Ontario Inc. c.o.b. as Zoren Industries ("Zoren" or "the Respondent") pursuant to s. 43 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

2. The Respondent, Zoren, disputes that the Applicant has met the test for a Bankruptcy Order and seeks the dismissal of this Application, or, in the alternative, seeks a stay of the Application pending the determination of civil proceedings between Ningbo and Zoren.

3. The trial of this bankruptcy Application proceeded over two days, at the conclusion of which the parties made submissions with respect to both the Application itself and the motion to stay, all in accordance with the earlier order of Pattillo, J. dated December 13, 2019 (and the

authorities referred to in the Court's Endorsement of that date) to the effect that a motion to stay a bankruptcy proceeding should be brought at the conclusion of the hearing, after all of the evidence has been heard.

Chronology of this Proceeding

4. The Application was issued on July 16, 2019. The Respondents served a Notice of Dispute on August 15, 2019 and moved to stay the Application.

5. On December 13, 2019, Pattillo, J. adjourned the Respondent's stay motion as being premature, and directed that it should be determined at the same time as the Bankruptcy Application.

6. Cross-examinations were conducted, and written interrogatories and requests to admit were demanded and answered. Trial dates were fixed and adjourned. Ultimately, the trial proceeded over two days in June, 2023.

7. I conducted a trial management conference on June 14, 2023, at which time I made various procedural and trial management directions, including the following made on the consent of the parties:

    a. Ningbo would call as its witness its corporate secretary, Ms. Zinong Cao, also known as Izzy Zinong Cao ("Cao"), who would give her evidence in the English language, but a Mandarin interpreter would be present to assist with comprehension if and as necessary;

    b. the Bankruptcy Application, including the Affidavit of Verification required by s.43(3) of the *BIA*, transcripts of cross-examinations, requests to admit and responses thereto, and the written interrogatories and the responses thereto, would be filed as evidence of the truth of their contents and form part of the record in both the Bankruptcy Application and the motion to stay; and

    c. the corporate representative of the Respondent, Mr. Jimmy Halioua, also known as James Hal ("Halioua"), would give evidence since the consent of the Applicant to the filing of the written interrogatories was conditional upon its right to cross-examine Halioua. On consent, both parties were permitted to cross-examine him if necessary.

Background and Context: The Relationship between the Parties and the Claims

8. Many of the background facts are not in dispute.

9. Zoren was founded on December 11, 2006. Halioua was appointed President and elected sole director in October, 2017. Zoren maintained premises in Vaughan, Ontario and carried on business principally as a distributor.

10. Ningbo is a manufacturer of, among other things, LED-based light bulbs. It maintains offices at Xikou Town, Ningbo, Zhejiang, China.

11. The dispute arises out of a supply and distribution agreement dated as of May 1, 2015 between Zoren and Ningbo (the "Distribution Agreement") pursuant to which Ningbo appointed Zoren as is its exclusive distributor in North America for products manufactured by Ningbo and selected by Zoren. The Distribution Agreement was signed on behalf of Zoren by its then President, Mr. Dan Mayer, and on behalf of Ningbo by its Corporate Secretary, Cao.

12. Among the reasons that Zoren was looking for a manufacturer of products was the fact that, on or about October 15, 2014, Zoren had entered into a supply agreement with Lowe's Companies, Inc. ("Lowe's") (or an affiliate thereof, LG Sourcing Inc).

13. Lowe's (often operating under the name Lowe's Home Improvement) was (and is) a major retailer of home renovation and construction products.

14. The intent was that Zoren would distribute such products (i.e., LED light bulbs) to Lowe's pursuant to this supply agreement (the "Lowe's Agreement") for sale at Lowe's stores across North America.

15. Zoren, armed with the significant opportunity presented by the Lowe's Agreement, then set about to find a supplier for LED light bulbs.

16. A representative of Zoren at the time it entered into the Lowe's Agreement, Stanley Afriat ("Afriat"), was introduced to Ningbo as a possible supplier of LED light bulbs during a trip to China in 2014.

17. Ningbo provided various samples for quality control testing, but numerous rounds of samples failed the testing and required reworking to meet the required specifications. As a result of these challenges, Zoren initially lost the opportunity to sell to Lowe's A-series LED light bulbs, but Zoren requested, and Lowe's granted, a second chance.

18. Following quality control testing of sample light bulbs which included some modifications to the products to meet the required specifications, the samples were ultimately approved by Lowe's with the result that Zoren started ordering products from Ningbo for distribution to Lowe's in or about March, 2016. The light bulbs shipped by Ningbo were not, however, delivered to Zoren. Instead, they were shipped at the direction of Zoren directly to Lowe's for sale to its customers through its stores.

19. As emphasized by Zoren, the Distribution Agreement included representations and warranties from Ningbo that the light bulbs were merchantable, did not infringe any third-party intellectual property rights and were free from defects.

20. On October 31, 2016, counsel for Lowe's wrote to Zoren advising that Lowe's had been named as a defendant in two patent infringement actions in the United States brought by Nichia Corporation. Apparently, Nichia alleged that the patent infringements related to the sale of certain lightbulbs by Lowe's. Zoren advised Ningbo of the US actions, and Ningbo took the position that there were no infringements of any patent or other intellectual property rights in its products.

21. Discussions between Lowe's and Zoren about the patent infringement allegation actions against Lowe's continued.

22. On or about December 4, 2017, Lowe's advised Zoren that it would not be ordering further light bulbs from Zoren. Zoren so advised its supplier, Ningbo, and the Distribution Agreement came to an end.

23. Between August 1, 2017 and January, 2018, Zoren paid Ningbo USD $11,179,203.37 (net of bank charges) for light bulbs supplied. However, a significant debt for light bulbs already shipped remained owing by Zoren to Ningbo: USD $7,944,975.80. That entire amount was due and owing by the end of November, 2017.

24. On March 11, 2019, an action was commenced in Ningbo's name against Zoren, Halioua and others claiming damages for breach of contract and other causes of action and seeking damages in the outstanding amount of USD $7,944,975.80[1].

25. On April 17, 2019, a second action was commenced in Ningbo's name against Zoren, Halioua, Mayer, Stanley, Afriat and others in which many of the same allegations were made, to support a claim for additional relief including a constructive trust and other equitable relief. Zoren and the individual defendants delivered a Statement of Defence and Counterclaim in June, 2019.[2] Ningbo then delivered a Reply and Defence to Counterclaim.

26. In its Counterclaim, Zoren alleged various breaches of the Distribution Agreement by Ningbo, in addition to the breach of the representation and warranty regarding intellectual property referred to above. Other allegations advanced were: that Ningbo was in fact selling light bulbs to other distributors within the exclusive territory of Zoren in breach of the Distribution Agreement; and that Ningbo was selling light bulbs directly to Lowe's during the period within which Zoren was the exclusive distributor.

27. Shortly after the delivery of the Statement of Defence and Counterclaim by Zoren, Ningbo issued this Bankruptcy Application.

28. Ningbo relies on all of the materials referenced above that form part of the record on the Application but relies principally on the Affidavit of Verification of Cao, sworn July 9, 2019 together with exhibits thereto, as well as the evidence of Cao given at trial.

29. Ningbo alleges in the Application that Zoren is indebted to it in the amount of USD $7,944,976.92 owing in respect of the delivery of lighting products, that Zoren has admitted in writing that it is indebted to Ningbo, and that it has repeatedly promised to repay the debt, yet failed to do so.

30. Ningbo also alleges in the Application that, within six months next preceding the date of the filing of the Application, Zoren has committed the following acts of bankruptcy, in that it has:

    a. ceased to meet its liabilities generally as they became due;

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[1] The action was a subrogated claim brought by Ningbo's insurer.
[2] This action was also a subrogated claim brought by Ningbo's insurer.

b. given notice to its creditors that it has suspended, or that it is about to suspend, payment of debts;

c. made a fraudulent gift, delivery or transfer of its property, or any part thereof;

d. has assigned, removed, secreted or disposed of its property with intent to defraud, defeat or delay its creditors or any of them; and

e. made a transfer of part of its property that would be void under the *BIA*.

31. Ningbo seeks the appointment of Zeifman Partners Inc. to act as Trustee in Bankruptcy. Zeifman has agreed to act in such capacity.

32. Zoren filed a Notice of Dispute, in which it alleges that it is not indebted to Ningbo as claimed in the Application, and specifically relies on the fact that Ningbo had claimed the same debt in the actions referred to above, which actions remained outstanding.

33. In addition, the Notice of Dispute specifically references the Counterclaim, in which Zoren seeks damages against Ningbo in the amount of USD $30 million (or an equivalent in Canadian funds) which amount, Zoren asserts, is more than sufficient to set off the indebtedness claimed by Ningbo even if Zoren were determined to be liable for it (which it denies).

34. Further in the Notice of Dispute, Zoren asserts that it discovered that the light bulbs had infringed on patents of third parties and were therefore unfit for their intended purpose (i.e., the resale by Zoren to Lowe's) as a result of which Zoren lost Lowe's as its major customer and suffered significant damages.

35. Finally, Zoren asserts in the Notice of Dispute that this Application was commenced for an improper purpose in an attempt to undermine the action and in particular Zoren's Counterclaim, or to circumvent the action by having Zoren adjudged bankrupt before having to prove its claim in the action.

36. Zoren denies that it is indebted to any party or that it has liabilities greater than $1000, and denies having committed any act of bankruptcy, including as alleged in this Application.

37. Finally, Zoren still pursues, in the alternative, its motion to stay this Application pending a determination of the actions and in particular, its Counterclaim.

The Test for a Bankruptcy Order

38. The test on an Application for a Bankruptcy Order is set out in s. 43 of the *BIA*:

> 43(1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against the debtor if it is alleged in the application that:
>
> a) the debt or debts owing to the applicant creditor or creditors amount to $1000; and
>
> b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

39. The Court shall require proof of the facts alleged in the application, and, if satisfied with the proof, may make a bankruptcy order (s. 43(6)). If, however, the court is not satisfied with the proof of the facts alleged in the Application, or is satisfied that the debtor is able to pay their debts, or that for other sufficient cause an order ought to be made, it shall dismiss the application (s. 43(7)).

40. The burden of proof on an applicant in a bankruptcy application is the civil standard. Every allegation must be strictly proved by "sound and convincing evidence": *Re 0757376 B.C. Ltd*., (2011), 2011 CarswellBC 2500, 2011 CarswellBC 1268 (B.C.S.C.), quoted with approval in *The 2023 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Jeffrey B. Morawetz & Janis P. Sarra, Thomson Reuters, ("Houlden & Morawetz") at §347, p. 150.

Analysis

41. Since the basis for the Application for the Bankruptcy Order is the alleged debt owing to Ningbo[3], and since that debt and the alleged dispute regarding it is also the basis for the stay motion, I will address first the Application and then consider whether the proceeding ought to be stayed.

The First Element of the Test: A Debt Owing to the Applicant or Other Creditors of $1000

42. Ningbo submits that Zoren has clearly admitted that it remains indebted to Ningbo in the amount of USD $7,944,976.92 plus interest. I agree.

43. The record before me includes an electronic mail message from Cao to Halioua dated January 5, 2018[4] (when the Distribution Agreement was terminated) in which Cao states: "after your four payments, the current balance should be as attached, in total, USD $7,944,976.92. Please confirm it is same as yours." It is clear on the face of the email that Halioua is writing in his capacity as Board Secretary of Ningbo.

44. On the same date, Halioua responds to state: "Yes, I confirm the unpaid balance is $7,944,976.92 USD."[5]

45. These electronic mail communications were put to Halioua in cross-examination. He agreed that:

    a. he received the January 25, 2018 email from Cao;

    b. that the unpaid balance was correct; and

    c. that there have been no payments since then.[6]

[3] For clarity, the Applicant relies upon the debt, together with the alleged act of bankruptcy committed by Zoren within the six months preceding the filing of the Application, to satisfy the requirements of s. 43(1) of the *BIA*.
[4] Ex. A to Cao Affidavit.
[5] Exhibit Book, Tab B.
[6] Questions 440 442.

46. The record also includes an exchange of SMS text messages between Cao and Halioua over a period of approximately four weeks between December 19, 2017 and January 13, 2018, in the course of which Halioua states (in summary) that:

    a. he is doing his best to pay the outstanding debt;

    b. he hopes to be able to wire at least a portion of the amount (i.e., the message of December 20, 2017 states that he hopes to be able to wire "a little over $750,000 by Thursday afternoon or latest Friday morning");

    c. he could not make it to the bank as he was waiting for some funds;

    d. a partial amount was in fact wired;

    e. another payment could be made on January 9 [2018] but that it was difficult to wire funds due to the holidays;

    f. he [Halioua] was doing "more than my best"; and

    g. "it may take me 6 – 9 months to pay it all assuming all goes well".

47. Later in his cross-examination, Halioua also confirmed those messages and in particular his representations in the chain of messages to the effect that: he would be sending money; and he did in fact send some money on account but that it still left "to this day" 7.9 million unpaid.[7]

48. Cao testified at trial about the key relevant facts. She was forthright, direct and straightforward. While English was not her first language, and as noted above a Mandarin interpreter was available (on the consent of the parties), Cao was clear in her evidence and her memory of the key events.

49. Cao gave evidence to explain the origin of the basis for the debt (the delivery of LED light bulbs) and the fact that the debt remained outstanding and unpaid. Trial exhibits, including the electronic communications referred to above, the purchase orders and the invoices, among others. Her evidence was clear that all purchase orders were filled, the products were shipped as instructed and Ningbo requested payment from Zoren. Payment was made in 2016 but Zoren did not pay from approximately October to November 2017 onwards. The electronic mail exchanges with Halioua described above in December 2017 and January 2018 were proved.

50. Cao's evidence was clear that she requested payment from Zoren and that Halioua agreed to make those payments, but then failed to do so. Cao further explained how the sum outstanding of approximately USD $7.9 million was extremely significant to Ningbo, which was not a huge company. It had total sales revenues of only approximately USD $20 million-$30 million.

51. She was not challenged on this evidence on cross-examination.

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[7] Questions 450 – 451.

52. I am satisfied that this alone proves that Zoren owes a debt to the Applicant in the amount of $1000. I pause to observe that the existence of this debt and the fact that it is unpaid is not seriously contested by Zoren. The emphasis of its position and submissions was to the effect that the counterclaim, if proven, would justify a set-off to negate this debt.

53. While perhaps not necessary given this conclusion, the record also includes evidence (in admissions from Halioua on his cross-examination) of a second unrelated debt owing to creditors in excess of $1000, in that Zoren has owed its counsel in the US litigation (the law firm of Sills, Cummins and Gross) the sum of $235,855 and this amount has also been outstanding since 2018[8].

54. Accordingly, I am satisfied that the first element of the test under s. 43(1) (a debt or debts owing to the Applicant or creditors that amount $1000) is satisfied.

The Second Element of the Test: An Act of Bankruptcy within Six Months of the Application

55. As to the second element of the test, whether the debtor has committed an act of bankruptcy within the six months preceding the filing of the Application, s. 42(1) provides that a debtor commits an act of bankruptcy in each of [the ten] cases set out in the subsections that follow.

56. Ningbo relies primarily upon s. 42(1)(j), which provides that a debtor commits an act of bankruptcy if he ceases to meet his liabilities generally as they become due.

57. Ningbo submits that this act of bankruptcy can be established on any of three possibly applicable tests.

58. Ningbo submits, and I agree, that the jurisprudence is not consistent as to whether the test includes as an element, evidence demonstrating that a demand for payment must be made within the six month period next preceding the date of the application. Houlden & Morawetz expresses it as follows:

> If a debtor ceases to meet his or her liabilities generally more than six months prior to the filing of the application and continues in this condition up to the date of the filing of the application, there are cases that have held that there is no necessity to make a demand for payment in the six-month period to establish the act of bankruptcy: *Re The Pas Foundation & Excavation Ltd.,* (1975), 21 C.B.R. (N.S.) 154 (Man. Q.B.); *Re Aarvi Const. Co.,* (1978), 29 C.B.R. (N.S.) 265 (Ont. S.C.).
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> The Ontario Superior Court held that there is sufficient evidence of an act of bankruptcy having been committed within six months of the filing date where a judgment or order is entered against a debtor, even if entered more than six months prior to the filing date*: Re Appleyard*, (2006), 2006 CarswellOnt 2706, 21 C.B.R. (5th) 192 (Ont. S.C.J.). On the other hand, there are cases that have held that a demand for payment in the six-month period is necessary to

[8] Questions 195 – 204.

> establish the act of bankruptcy: *Solloway v. McLaughlin,* (1924), 24 C.B.R. 90 (Que. C.A.); *Re Harrop of Milton Inc.,* (1979), 22 O.R. (2d) 239, 29 C.B.R. (N.S.) 289, 92 D.L.R. (3d) 535 (S.C.); *F.B.D.B. v. Poznekoff*, [1983] 3 W.W.R. 1, 41 B.C.L.R. 273, (sub nom. *Re Poznekoff*, 143 D.L.R. (3d) 370 (B.C. C.A.); Re 307309 B.C. Ltd. (1991), 11 C.B.R. (3d) 187 (B.C. S.C.).
>
> In view of the split in the decided cases, the more prudent course is for the applicant creditor to make a demand for payment in the six-month period before filing the application: *Re Barrie Sound Concepts Ltd.*, (1995), 30 C.B.R. (3d) 140 (Ont. Gen. Div.)[9]

59. In my view, I need not determine which line of cases ought to be preferred since I am satisfied on the evidence here that an act of bankruptcy occurred in either case.

60. If a demand is not necessary, the act of bankruptcy is established on the record here by the admissions of Halioua on behalf of Zoren summarized above to the effect that the debts owed to Ningbo and to the US law firm were outstanding from 2018, through and following the issuance of the Bankruptcy Application, and remained outstanding as of the date of Halioua's cross-examination in November, 2019.

61. If, on the other hand, a demand is necessary (and I agree with the above excerpt from Houlden & Morawetz to the effect that, in view of the split in the decided cases, the more prudent course is for the applicant creditor to make a demand within the six-month period), the evidence shows that such a demand was made here by way of each of the two statements of claim commencing the actions by Ningbo against Zoren within the six-month period preceding the Application.

62. Each seeks judgment on the very debt at issue here in my view constitutes a demand for payment. The statement of claim can serve as a demand for payment of a present debt: *Skuy v. Greenough Harbour Corp*., 2012 ONSC 6998 at paras. 38 – 39 and *Business Development Bank of Canada v. Almadi*, 2015 ONSC 6912 at para. 27; aff'd 2016 ONCA 428.

63. Moreover, even if the debt owing since 2018 to its counsel in the US litigation and other debts of Zoren were ignored, there are three "special circumstances" in which the courts have granted an order under s. 43 on the basis of a debt owed to one creditor:

    a. the creditor is the only creditor of the debtor; and the debtor has failed to meet repeated demands of the creditor; in the circumstances he should not be denied the benefits of the BIA by reason only of his unique character; or

    b. the creditor is a significant creditor and there are special circumstances such as fraud on the part of the debtor which make it imperative that the processes of the BIA be set in motion immediately for the protection of the whole class of creditors; or

[9] Houlden & Morawetz, at §349, p. 152

c. the debtor admits that he is unable to pay his creditors generally, although they and the obligations are not identified.

See: *Blancco Oy Ltd. v. Inside The Box Inc*., 2015 ONSC 277, ("*Blancco Oy*") quoting with approval from *Re Holmes and Sinclair*, 1975 CarswellOnt 83 (S.C.J.) at paras. 5 – 8; and *Re Okoakih*, 2013 ONSC 7492 at paras. 13 - 14.

64. Ningbo submits that all three special circumstances are made out here. For the reasons that follow, I accept that at least each of the first two of the three special circumstances are established.

65. With respect to the first special circumstance, Zoren has failed to meet multiple demands for payment from Ningbo as set out above.

66. With respect to the second special circumstance, the facts here are such that I am satisfied that the processes of the *BIA* should be set in motion immediately for the protection of creditors generally through an investigation by a trustee in bankruptcy.

67. In short, Zoren does not assert (let alone demonstrate) that it paid Ningbo. Nor does it assert that it (Zoren) was never paid by its customer (i.e., Lowe's) for the goods delivered by Ningbo. Rather, it alleges that it could not pay Ningbo because it lacks the necessary funds, having received very significant revenues (i.e., of at least $5.8 million) but having transferred those funds to an offshore entity with which it was hoping to do unrelated business and having been defrauded by that entity, all with the result that it lacked the funds to pay the debt admittedly owing to Ningbo.

68. Zoren maintains that it was attempting to enter into a new business in plastics manufacturing and distribution, and in pursuit of what it perceived to be a new business opportunity in the fall of 2017, it transferred the funds to a Hong Kong entity, Sunny Alley Trading (or Sunny Ally Trading), as consideration for the supply of certain plastic film, but received nothing in return.

69. The evidence of Halioua was that Zoren ordered $10 million worth of plastic film from Sunny Alley Trading, and it sent USD $3,875,000 to Sunny Alley in Kowloon, Hong Kong as an initial payment for these products. The plastic film was to be shipped by December 1, 2017, but it never arrived. Notwithstanding the failure of Sunny Alley to ship the product, Halioua authorized Zoren to send, and Zoren did send, an additional USD $1,615,000 to Sunny Alley by way of three wire transfers dated December 13, 21 and 28, 2017. Still, however, the promised products never arrived.

70. Halioua gave evidence that he personally travelled to Hong Kong in 2018 to investigate. However, the evidence was clear that he was shown around an office, but never saw any manufacturing facility. In any event, the plastic film was never shipped. The result, according to Halioua, was that all of this placed Zoren "on the verge of bankruptcy".

71. Yet the only documentary evidence about this entire transaction produced by Zoren consists of the purchase order and the evidence about the wire transfers. An obvious document not produced is the agreement between Zoren and Sunny Alley itself, which would, one would expect, be in the possession, control or power of Zoren and Halioua. The absence of the key

agreement for a transaction that was so significant to Zoren, is unexplained, if indeed it exists at all.

72. Zoren has not, however, pursued any claim against this entity to recover the funds it sent. Halioua stated that this was because he received a threatening phone call telling him that Zoren should "walk away" from any claim against Sunny Alley and "otherwise you're going to see what's going to happen". Halioua does not know the identity of the individual from whom he received this phone call. However, he was sufficiently concerned and frightened that he abandoned all efforts to recover the funds he had sent or to pursue any claim.

73. The facts as demonstrated by the evidence in the record are expressed as follows in the submissions of Ningbo:

> Halioua's evidence was that, rather than pay Ningbo, Zoren sent $5.8 million of the proceeds from the sale of Ningbo's goods offshore, received nothing in return, and then casually abandoned recovery of those funds. Specifically, Halioua testified that:
>
> i. Zoren had not previously had a plastic business. Nevertheless, Zoren ordered $10,165,000 in plastic film from Sunny Ally (Alley) Trading of Kowloon, Hong Kong ("Sunny") in August of 2017;
>
> ii. in October and November 2017, Zoren sent Sunny eight wire transfers in an amount totaling US $3,875,000.15;
>
> iii. the plastic was to be shipped by Sunny from Hong Kong on December 1, 2017.16 It was not. Nevertheless, Zoren wired Sunny a further US $1,615,000 in three wire transfers dated December 13, 21, and 28, 2017;
>
> iv. the $5.8 million sent by Zoren to Sunny were proceeds from the sale of Ningbo's goods to Lowe's;
>
> v. Halioua went to Hong Kong to visit Sunny in January, 2018. He was showed around Sunny's offices (not a manufacturing facility) and assured that everything was okay; and
>
> vi. the plastic never arrived. Zoren concluded that "Sunny absconded with Zoren's payments and left Zoren on the verge of bankruptcy." Yet Zoren did not sue Sunny, or report it to the police. Halioua said he "*didn't give a shit*" about the loss.24 This is because someone telephoned Halioua and "*said stop pressing them. When we're ready, we're ready, and otherwise you're going to see what's going to hap*pen."

> Halioua allegedly felt threatened, so he "*walked away from $5.8 million*."[10]

74. I accept the submission of Ningbo that this narrative strains credulity and, to put it plainly, raises more questions than it answers. To accept this version of events from Zoren, I would need to be satisfied that Zoren paid USD $5.8 million before receiving any goods from, or being invoiced by, an offshore supplier with whom Zoren had never transacted before (as opposed to posting a letter of credit or paying after receipt of goods).

75. It would also require me to accept that Zoren paid USD $1.6 million (in three separate instalments) even after the supplier had failed to ship the plastic film product as promised. Finally, it would require me to accept that Zoren would simply abandon any efforts to recover USD $5.8 million following a telephone call to Halioua from "someone" who is not identified.

76. Whether these facts are true, I cannot determine. However, I need not make any determination for the purposes of the disposition of this Application. Even if these facts were true, and I am not satisfied that they are, they would not constitute a defence to this Bankruptcy Application. Simply put, I agree that the second special circumstance is made out given what Zoren alleges occurred with respect to its plastic film business: Zoren's creditors are entitled to an explanation of the disposition of the assets of the company in such unusual and odd circumstances.

77. Finally, and with respect to the third special circumstance, Ningbo relies, as evidence of the fact that Zoren admitted that it is unable to pay its creditors generally, on the evidence of Halioua to the effect that he told Ningbo that "I didn't have the money to pay them"; that he didn't pay the US law firm referred to above "because I lost the business"; and that Zoren had not sold anything since at least June 1, 2018, giving rise to the inference that it had ceased operations entirely.

78. In the circumstances of this case and on the record before me, I am not satisfied that those statements are clear admissions that Zoren is (or was at the relevant time) unable to pay its creditors generally. However, nothing turns on this conclusion since only one of the special circumstances would be required in any event, and I am satisfied that either or both of the first two are met.

79. In sum, I am satisfied that the debt or debts owing by Zoren to the Applicant (or creditors generally) amount to $1000; and that Zoren has committed an act of bankruptcy within the six months preceding the filing of the application and accordingly, Zoren has met the test for a Bankruptcy Order in s. 43(1) of the *BIA*.

Should Discretion be Exercised to Dismiss the Application pursuant to s. 43(7) of the *BIA*

80. I am also satisfied that there is no other sufficient cause present here that would justify the exercise of my discretion pursuant to s. 43(7) to nonetheless dismiss the Application.

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[10] Submissions, with references to the evidence in the record, at para. 14

81. The Court of Appeal has been clear that notwithstanding the mandatory language in this subsection, the power to dismiss the Application is discretionary. Moreover, the onus is on the debtor who is required to lead evidence sufficient to establish what all of its debts are, and also of its ability to pay them - in other words, that it is solvent. To be sufficient, such evidence would have to indicate the financial position of the debtor and this would require that financial accounts or statements be submitted: *Medcap Real Estate Holdings Inc. (Re)*, 2022 ONCA 318 at para. 14, quoting with approval from *484030 Ontario Ltd. (Re)* (1992), 1992 CanLII 7417 (ON SC), 8 O.R. (3d) 243 (Gen. Div.), at p. 254.

82. Zoren has led no such evidence. There is no sufficient cause present here to justify a dismissal of the Application pursuant to s. 43(7).

83. Given my conclusions above, it is unnecessary for me to consider the other acts of bankruptcy asserted by Ningbo.

Alleged Improper Purpose of the Bankruptcy Application

84. As stated above, Zoren asserts that this Application was brought to circumvent the outstanding civil actions and that Ningbo should be required to prove its claim in those actions, with the result that this Application should be dismissed on that basis also.

85. I do not agree.

86. An applicant creditor does not have to prove that he or she has exhausted all other remedies available to him or her before presenting an application: Houlden & Morawetz, at §347, p. 150, quoting with approval from *Re Cappe,* (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List.]); and *Re Mastronardi,* (2000), 21 C.B.R. (4th) 107, 2000 CarswellOnt 4792 (C.A.) ("*Mastronardi*").

87. In *Mastronardi,* the Court of Appeal expressed it as follows:

> **27** ***In my view, the bankruptcy judge erred in dismissing the petition for a receiving order on the basis that the appellant should have pursued other routes to collect on the debt*** **owed by Mastronardi. I reach this conclusion for several reasons.**
>
> **28** ***First, if a petitioner can satisfy the requirements of the BIA, I see no reason for denying him access to the process and*** **remedies** ***of the Act because there may be other civil routes open to him. The BIA is not a second-rate or fallback statute that can only be invoked if other avenues fail. I agree with Ground J. who said in Re Cappe (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List]), at 235:***
>
> ***I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order. In fact, the jurisprudence would seem to be to the contrary.***
>
> See also: *Re Chu* (1995), 30 C.B.R. (3d) 78 (Ont. Gen. Div.), at 82.
>
> 29 Second, Mastronardi appears from the record to have made suspect transfers of property at suspect times. Mastronardi was examined in April 1997 in the Ohio civil action. John Brabander and Thomas Schrader testified at the bankruptcy

hearing. From these sources the following picture emerges. Mastronardi's principal corporate enterprise, MOS Enterprises, was a multi-million dollar corporation. In Leamington, Ontario, Mastronardi owned or operated a large greenhouse complex with outbuildings and houses, a trucking terminal and employees' quarters. He had a large private residence in Leamington and an oceanfront condominium in Florida. He owned the 38 foot cigarette boat that was involved in the accident. In addition, one of his numbered companies owned a 63 foot Searay valued at approximately $1,000,000.

30 I do not say that all of the above facts have been conclusively proven. However, they were all in evidence before the bankruptcy judge and Mastronardi introduced no evidence to contradict them. The *prima facie* conclusion I draw is that Mastronardi is a man with substantial personal and business assets.

31 Did the accident cause him to do anything with these assets? It appears - I put it no higher - that it did. Thomas Schrader testified that in September or October 1995, Mastronardi transferred his entire 51 per cent interest in MOS Enterprises, his central business, to his wife for no consideration. He also testified that at the same time Mastronardi transferred his half interest in the family residence to his wife, again for no consideration. Both of these transactions took place after the accident in June 1995 and after the Brabanders had commenced their civil action in Ohio, but before the Ohio court had made a decision. In his examination in the Ohio action, Mastronardi said that he made the transfers because he could not obtain insurance in Canada after the boat accident. That may or may not be the case (Mastronardi introduced no supporting evidence on this issue at the bankruptcy hearing). However, on the state of the record before the bankruptcy judge, these are highly suspicious transfers of property: see *Bombardier Credit Ltd. v. Find* (1998), 2 C.B.R. (4th) 1 (Ont. C.A.) at 10.

32 Moreover, when he was examined in the Ohio civil action in April 1997 (ten months before the judgment in the civil action), Mastronardi admitted that he intended, within weeks, to transfer his half interest in his oceanfront Florida condominium to his wife for $50,000.

33 All three of these transactions are precisely the kind of transactions that are particularly well-suited to investigation and review by a trustee in bankruptcy. They look vulnerable - again, I put it no higher - to an attack by a trustee as being settlements and, depending on when the Florida transfer was completed, reviewable transactions. To my mind, they constitute a compelling reason why a receiving order should have been granted. If a receiving order were made, time would start running backward from January 1998, when the petition was issued, and the three transactions might fall within the trustee's net under the BIA.

34 Third, Mastronardi owes three creditors more than $3.5 million pursuant to a valid Ohio court order. He appealed the trial court's order but did not pursue the appeal. The Ohio court order is truly a final order. Mastronardi is a man with substantial assets. For four months in 1998, his Ohio creditors made demands for payment of the money they were owed. Mastronardi made no response and, importantly, he did not pay a penny on the judgments. In these circumstances, namely a lawful multi-million dollar debt, a person with substantial assets, and no payment at all, the bankruptcy route strikes me as entirely appropriate. There is no need for the petitioning creditor to spend time and money continuing on the ordinary civil track when Mastronardi has not complied with his responsibilities on that track and when the petitioning creditor has established prima facie compliance with the statutory conditions of the BIA.

> 35 Fourth, the bankruptcy judge's concern "that the Bankruptcy Court would become in this case a collection agency for a single creditor" is, in my view, misplaced. As discussed previously, this is not a single creditor case; there are at least three substantial creditors. Moreover, there is nothing in the record to suggest that the appellant has invoked the BIA for any ulterior purpose, such as trying to force a creditor to deal with him to the exclusion of, or in priority to, other creditors.
>
> 36 The fact that the petitioning creditor desires, as he candidly admitted when he was cross-examined on his Affidavit of Verification in support of the petition, to collect on the debt owing to him, is not an impermissible or disqualifying feature. Virtually every creditor who initiates a bankruptcy petition would have this as an objective. On this point I agree with Catzman J. who said in *Re Four Twenty-Seven Investments Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.) at 188, aff'd (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.):
>
> > ***I also reject the debtor's submission based upon the alleged improper or ulterior motive of the petitioning creditor. It is not an abuse of process or an improper purpose to commence a petition for the collection of a debt. It is not improper to petition to gain remedies not available outside of bankruptcy, including a thoroughgoing investigation of the bankrupt's affairs. Indeed, on the evidence, I consider this to be a prototypal case where the full arsenal of investigatory mechanisms and remedies available to a trustee in bankruptcy would be useful, appropriate and desirable.***
>
> 37 I agree with that passage and regard it as equally applicable to the present appeal. Mastronardi owes substantial debts to several creditors, he has made several suspicious transfers of assets and he has not demonstrated any intention or inclination to pay even a penny of the debts he owes. In these circumstances, the petition for a receiving order brought by John Brabander, as administrator of his son's estate, complies with the requirements of the BIA and a receiving order would be "useful, appropriate and desirable".
>
> [Emphasis added].

88. In my view, the same analysis applies to the present case. Ningbo has met the test for a Bankruptcy Order. I see no reason why it should be required to exhaust other avenues (i.e., obtain a final determination in the civil actions commenced as subrogated claims by its insurer) before it is entitled to a Bankruptcy Order and with it, among other things, the ability of a trustee in bankruptcy to investigate matters as set out above.

The Stay Motion

89. Given my conclusion above that Ningbo is entitled to Bankruptcy Order against Zoren, I must now consider Zoren's motion to stay the proceeding.

90. The *BIA* includes two subsections of s. 43 that give the Court the power to grant a stay: s. 43(10) permits the court to impose a stay while a trial of an issue is held on the disputed facts and if there is another sufficient reason; and s. 43(11) permits the court to impose a stay on a permanent basis or for a limited period of time. In either case, the court may impose terms.

91. If the debtor denies the truth of the facts alleged in the Application, the court may, instead of dismissing the application, stay all proceedings on the Application on any terms that it may see fit to impose on the Applicant as to costs or on the debtor to prevent alienation of

the debtor's property and for any period of time that may be required for a trial of the issue relating to the disputed facts. The court may for other sufficient reason make an order staying the proceedings, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just (s. 43(10) and (11)).

92. A stay can be absolute or for a limited time: Houlden & Morawetz, at §394.

93. Here, Zoren seeks a stay for a limited period of time - pending the determination of the ongoing civil proceedings referred to above between Ningbo and Zoren.

94. In the main, Zoren submits that the bankruptcy court ought not to be used for the determination of disputed civil claims between the parties (i.e., the party who is the subject of the bankruptcy Application and petitioning creditor).

95. Zoren's position is that Ningbo commenced two actions in this Court seeking judgment for damages for breach of contract (and other claims) in respect of the very same USD $7,944,975.80 that is the principal basis for the alleged act of bankruptcy, and those claims are disputed by Zoren and the individual defendants, who have also asserted a counterclaim.

96. Zoren further submits, and I agree, that the one witness called by Ningbo in this Bankruptcy Application trial, Cao, admitted these facts in cross-examination.

97. In short, Zoren's position is that the disputes are indeed *bona fide*, with the result that the Bankruptcy Application should be stayed.

98. In *Re Goldlund Mines Ltd*., (1986) 58 C.B.R. (N.S.) 255 (ONSC), the Court considered a situation where the debtor had asserted a large claim against the applicants, and notwithstanding that all of the facts had been proved to justify a bankruptcy order, the Court stayed the application to give the debtor an opportunity to prosecute its claim. The court concluded that a *bona fide* claim of the substantial nature would disappear if a bankruptcy order was granted and that there was no prejudice to creditors by granting a stay.

99. In *Re Axler*, (1985), 56 C.B.R. (N.S.) 255 (Ont. S.C.), however, the court declined to grant a stay in circumstances where the debtor was engaged in a number of lawsuits and alleges that if he succeeded, he would be able to pay his creditors. The court concluded that the lawsuits were complex and there was no assessment of the time required to have them determined. The Court further concluded that an application ought to be stayed only in clear cases and in that particular case, in view of the clearly established act of bankruptcy, and the delay and uncertainty involved in the pending action, it would be inappropriate for the court to exercise its discretion to stay the application, and that it would be preferable to leave the matter up to the creditors and the trustee as to whether they wish to pursue the claims. (para. 10).

100. Before deciding to adjourn or stay an application because proceedings have been commenced in the ordinary civil courts, the court with carriage of the bankruptcy matter must hear all of the evidence: *Re Dominion Gainesville Co*., (1976), 21 C.B.R. (N.S.) 280 (Ont. C.A.).

101. As stated in Houlden & Morawetz at §389 however, s. 43(10), which permits the court to stay the application while an issue is being tried relating to the disputed facts as an alternative to dismissing the application under s. 43(7), does not mean that any time a defendant denies a claim, that the bankruptcy application must be stayed until there has been a full trial in the ordinary civil courts to resolve the issue. If there is a dispute that may not be *bona fide*, it is appropriate for the court to proceed with the hearing of the bankruptcy matter to ascertain:

    a. whether there is a *bona fide* dispute between the parties;

    b. whether there are any grounds established for dismissing or staying the application; and

    c. whether the applicant has proved the facts alleged in the bankruptcy application.

    See: *Cargill Ltd. v. Compton Agro Inc*. (1993), 23 C.B.R. (3d) 285, 91 Man. R. (2d) 81 (Q.B.).

102. If the court finds that the dispute is not *bona fide*, it will not stay the application: *Re Chauvco Resources International Ltd*. (1999), 9 C.B.R. (4th) 235, 1999 CarswellAlta 61, (sub nom. *Chauvco Resources International Ltd. (Bankrupt), Re*, 239 A.R. 116 (Alta. Q.B.).

103. To be clear, a stay may be refused even though the debt of the applicant creditor is disputed. If the court is satisfied that the applicant creditor has an undisputed indebtedness of at least $1000, and the other facts in the application, such as the act of bankruptcy, have been proved, it will make a bankruptcy order: Houlden & Morawetz at §391, quoting with approval from *Re Vermillion Placers Inc.*, (1982), 41 C.B.R. (N.S.) 173 (Ont. S.C.); *Re Steintron Int. Electronics Ltd*., (1986), 62 C.B.R. (N.S.) 78, 7 B.C.L.R. (2d) 267 (S.C.); and *Re Maple City Ford Sales (1986) Ltd.,* (1992), 14 C.B.R. (3d) 188 (Ont. Gen. Div.).

104. Accordingly, I must determine whether the dispute between the debtor, Zoren, and the Applicant, Ningbo, with respect to the existence and nature of debt claimed, is *bona fide*.

105. Zoren's claim (i.e., the counterclaim) is effectively that Ningbo supplied Zoren with patent-infringing goods with the result that Zoren lost its contract with Lowe's, and that Ningbo was selling to other North American distributors during the currency of the Distribution Agreement of which it was therefore in breach.

106. I am not persuaded that the counterclaim is *bona fide* such that this Application should be stayed.

107. I observe that, as submitted by Ningbo, the complaints articulated in the counterclaim were articulated for the first time in that counterclaim, as Cao stated in her evidence at trial. They had not been asserted or alleged previously. One obvious period of time in which those complaints might have been asserted was in and around January, 2018, when Halioua admitted that the debt remained due and owing, and that he was making efforts to pay it, although that would take some time. All of his communications were completely inconsistent with the position asserted much later that Zoren was not obligated to pay the debt and had no intention of doing so since it was entitled to set off that debt as against the counterclaim.

In January, 2018, Nichia had already brought the patent infringement actions almost two years earlier.

108. In *Blancco Oy*, Penny, J. concluded that a stay was not appropriate where claims had been found to be badly documented, vague or uncertain, or unsupported by the evidence such that the court may consider that the debtor's chances of success in the civil action are remote, and that is a relevant factor in the exercise of the court's discretion to grant a stay: "This is because the evident weakness in the purported claim has some bearing on the *bona fides* of the debtor purporting to make the claim". (at para. 31).

109. The original demand letter received by Zoren from Lowe's dated October 31, 2016 states that Lowe's had been sued by the Nichia Corporation in respect of patent infringement respecting the sale of certain light bulbs. The letter does not reference the bulbs shipped from Ningbo nor does it expressly assert that the patent-infringing light bulbs were sourced from Ningbo.

110. Cao conceded in cross-examination at trial that Lowe's did not allege, and never has alleged, to Ningbo that it provided patent-infringing goods. Zoren did not call evidence from a representative of Lowe's.

111. Tellingly, Cao's evidence was also clear that Ningbo has never been sued for patent infringement in respect of goods supplied to Zoren, (aside, obviously, from the counterclaim asserted by Zoren). Prior to asserting the counterclaim, as Cao testified, Zoren had never alleged that Ningbo had supplied it with patent-infringing goods, either at the time that Zoren now says Lowe's asserted that Ningbo had supplied it with patent-infringing goods (which would have been the obvious time), or indeed at any other time.

112. Moreover, the US actions against Lowe's to which it made reference in its October 2016 demand letter to Zoren, were resolved consensually and settled in 2018. The evidence of Halioua was that Lowe's never requested (let alone received) a contribution toward those settlements from Zoren. It follows that any claim by Zoren against Ningbo in that regard would not succeed: there were no damages.

113. That leaves only the claim by Zoren that the supply of patent-infringing goods by Ningbo caused Lowe's to terminate its agreement with Zoren, with the result that Zoren suffered significant damages as a result.

114. One significant challenge for Zoren with respect to such a claim is the evidence of Halioua, and of Cao at trial, to the effect that Zoren ordered light bulbs from Ningbo subsequent to his learning of them being aware of the allegation that the infringed patent rights of others. Halioua's evidence was clear to the effect that:

    a. Zoren had ongoing business with Lowe's, with corresponding obligations to supply;

    b. the debt of $7.9 million relates to goods ordered by Zoren after it learned of the alleged infringement; and

c. Zoren ordered those goods "because Lowe's said it was alright to order those goods".

115. On that basis, Ningbo shipped LED light bulbs to Zoren between September 8 and November 16, 2017, together with invoices totaling USD $9,358,389. Zoren then supplied those very same goods to Lowe's. In fact, as stated above, Ningbo shipped the light bulbs directly to Lowe's on the instructions of Zoren. Finally, the evidence of Halioua was that Zoren was paid in full for those light bulbs.

116. I cannot reconcile this conduct with Zoren's submission that it has a *bona fide* counterclaim against Ningbo for patent infringement.

117. Nor can I reconcile that submission with the contemporaneous evidence by way of communications at the relevant time with respect to the termination by Lowe's of the Lowe's Agreement. On December 11, 2017, Halioua wrote to Cao, in the context of explaining why the invoices had not been paid, and stated that: "since the changes that Lowe's and them talking about the GE [General Electric] deal, we decided not to put 100% of our faith in them".

118. Cao's evidence at trial was to the effect that the "GE deal" was a purchase agreement between Lowe's and GE pursuant to which Lowe's would purchase all of its light bulb requirements from GE. In other words, Lowe's wanted to switch suppliers.

119. As stated above, Zoren did not call evidence at trial from anyone at Lowe's. The only evidence from or on behalf of Lowe's in the record is in a December 4, 2017 SMS text message from Connor Allgood to Stan Afriat to the effect that "Lowe's wanted someone that was already certified". Afriat was not called by Zoren either.

120. I am unable to conclude that the counterclaim is *bona fide* or has a reasonable chance of success. On the contrary, it has "evident weakness" in the sense described by Penny, J. in *Blancco Oy*.

121. Similarly, there are significant challenges for Zoren to prove that it suffered the damages it claims, even if it could make out the causes of action asserted.

122. Zoren seeks damages in the counterclaim of $30 million. Halioua asserts in his affidavit that just prior to Lowe's terminating orders from Zoren, Zoren had forecasted sales to Lowe's to exceed USD $100 million for the fiscal year ending November 30, 2018, which, according to Halioua, would result in a gross profit of USD $7 million for that year. This was based on: projected growth from fiscal 2016 to fiscal 2017; the size of the product category in Lowe's; and representations from Lowe's that supply from Zoren would extend beyond the LED light bulb private label business to include additional, branded items, and that segment represented much greater sales than private-label supply alone.

123. There are two difficulties with this. First, no evidence was led by Zoren at trial to prove any of these aspirations expressed by Halioua. There is no evidence from which I can assess the reasonableness of the projected growth assumption. There is no evidence from Lowe's that it was going to expand the range of products supplied by Zoren to include branded (as opposed to white label) products.

124. Moreover, and in the absence of any such evidence, I think it is a reasonable inference that such seems inconsistent with the limited evidence that is in the record, which is to the effect that Lowe's was transferring its supply requirements to GE.

125. With respect to the allegation by Zoren that Ningbo also breached the distribution agreement by selling LED light bulbs directly to other North American distributors notwithstanding that North America was the exclusive territory of Zoren, there was equally no evidence led at trial by Zoren with respect to the particulars of these sales (i.e., the obvious basic facts of such a claim: what LED light bulbs were sold; how many were sold; when; to whom; and, in what amount).

126. The evidence of Halioua on cross-examination was that he had no personal knowledge that this had in fact occurred. Zoren led no evidence to establish that it had in fact occurred, with or without the missing particulars described above.

127. Zoren also alleged (through Halioua, in his affidavit) that Ningbo further breached the Distribution Agreement by making sales directly to Lowe's. Cao directly denied this in her evidence at trial (as well as in her answers to written interrogatories, which form part of the record on the consent of the parties).

128. Zoren led no evidence to challenge Cao on her evidence and, again, led no evidence from Lowe's with respect to this allegation either.

129. In the circumstances, I am unable to conclude that there is any merit to these allegations.

130. In addition, Zoren asserts in its Notice of Dispute filed in the Bankruptcy Application that in its counterclaim, it seeks damages against Ningbo in the amount of USD $30 million, which amount is "more than sufficient to ***set off*** the indebtedness claimed by the Applicant even if Zoren were determined to be liable for such indebtedness" [emphasis added].

131. I accept the submission of Ningbo to the effect that even if the Distribution Agreement asserted by Zoren is relevant (which Ningbo denies), the provisions of that Distribution Agreement explicitly provide that set-off is available only if written notice of the deduction or set-off - and the reasons therefor - are provided by Zoren to Ningbo within five days prior to any deduction or set-off. The evidence is clear that there was no such notice delivered within five days or indeed at any time such that these allegations in the counterclaim are problematic as well.

132. Whether that failure to give notice on time would be fatal to the claim is not an issue that I need to determine, and I do not determine. However, in my view it is another factor relevant to the prospects of success and therefore the *bona fides* of the counterclaim.

133. Finally, in this regard, no steps have been taken by any party in the civil actions, or in particular by Zoren with respect to the counterclaim, since November, 2019. It has simply not been advanced at all. One would have expected more diligence from Zoren in prosecuting that counterclaim in the circumstances, and particularly as this Bankruptcy Application was pending.

134. This is particularly so since the two actions were commenced in the name of Ningbo, but prosecuted by its commercial insurer. The evidence was to the effect that Ningbo had export insurance, arranged through or by the government of the People's Republic of China. The insurer paid out policy limits of approximately USD $3.6 million, and it is the insurer that brought the two civil actions as subrogated claims.

135. Cao readily conceded in cross-examination that notwithstanding the claims were brought in Ningbo's name by the insurer, she was aware of the existence of the claims and had provided documents. She also testified that she believed she had advised the insurer that Ningbo was issuing this Bankruptcy Application, and she agreed that it is for the same amount as is claimed in the civil actions.

136. In my view however, and contrary to the submission of Zoren, this does not change the analysis or militate in favour of the stay being granted. There is no issue that the actions were commenced and remained outstanding. Neither, however, is there any issue that Zoren has not taken any steps to prosecute the counterclaim, which is the fundamental basis for the stay motion, since 2019.

137. Finally, Zoren asserts that a stay ought to be granted since, if a Bankruptcy Order is made, a trustee in bankruptcy will be appointed but will take its instructions from Ningbo with the practical result that the counterclaim will be extinguished or otherwise disappear.

138. I do not agree. I accept the submission of Ningbo to the effect that if the counterclaim is indeed a viable asset (which it denies), then the existence of that counterclaim is not a basis for the exercise of discretion to grant a stay, since the claim will not be extinguished or otherwise disappear by bankruptcy, but rather can be realized upon by the trustee, failing which it could be the subject of an order made pursuant to s. 38 of the *BIA*. That section provides that where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to do so, the creditor may obtain an order authorizing him to take the proceeding in his own name and at his own expense and risk, on such terms and conditions as the court may direct.

139. For all of the above reasons, I decline to exercise my discretion to stay the Application. Zoren's motion is dismissed.

Result and Disposition

140. The Bankruptcy Application is allowed, and an order will go adjudging Zoren to be bankrupt. Zeifman Partners Inc. is qualified and is appointed to act as Trustee in Bankruptcy.

141. The stay motion is dismissed.

142. Order to go in accordance with these reasons.

Osborne J.