2008 S. H. No. 305549

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: ScoZinc Ltd. (Re) 2009 NSSC 162

IN THE MATTER OF :	The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended.
	-and-
IN THE MATTER OF:	A Plan of Compromise of Arrangement of ScoZinc Limited

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DECISION OF THE CLAIMS OFFICER

Claims Officer:	Richard. W. Cregan, Q.C.
Heard :	May 7, 2009
Counsel:	Michael J. Wood, Q.C. and R. Paul Thorne representing Q-Drilling & Remediation Incorporated,
	John Kulik, Q.C. and Owen Thomas representing ScoZinc Limited, and
	Gavin D. F. MacDonald, representing Grant Thornton Limited, the Monitor

[1] On December 22, 2008, ScoZinc Limited (the "Company") made an application to the Court under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA"), at which time the Initial Order was granted.

[2] Paragraph 3 of this order provides a stay of almost every conceivable proceeding which could be brought against the company, including liens under the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended.

[3] The Claims Procedure Order was granted on February 18, 2009. It sets the procedure for creditors to assert their claims against the Company. Specifically paragraphs 13 to 17 provide the method for resolving disputed claims. For this purpose I am appointed, acting in my personal capacity, as the Claims Officer and directed to hear the parties to any unresolved disputed claims and determine their value and character.

[4] Q-Drilling & Remediation Inc. ("Q-Drilling") pursuant to the Claims Procedure Order submitted a Proof of Claim, dated March 5, 2009, in the amount of $54,883.42 in respect of geotechnical drilling at the Company's

premises at Cooks Brook, Halifax County. The Proof of Claim is based on a Claim for Lien for Registration under the *Builders' Lien Act,* dated December 19, 2008, in respect of work provided up to and including October 22, 2008. It was recorded on December 19, 2008, pursuant to the *Land Registration Act,* S.N.S. 2001. C.6, as amended. No action was commenced against the Company nor certificate thereof registered, as is required by Section 26 of the *Builders' Lien Act.* This failure was the basis for the Monitor's Notice of Revision or Disallowance in which it rejected Q-Drilling's claimed status as a secured creditor, but allowed the amount as an unsecured claim.

[5] The Monitor and the Company say that the security of the lien was lost when Q-Drilling failed to commence an action and register a certificate thereof within the time required by that Section. Q-Drilling, in response, says that it can rely on Paragraph 7 of the Initial Order, the material part of which is:

> *To the extent any rights or obligations, or time or limitation periods relating to the Applicant or the Property may expire or terminate with the passage of time, the term of such rights, obligations or periods shall hereby be deemed to be extended by a period of time equal to the duration of the stay of proceedings effected by this Order and any further Order of this Court....*

[6] It says this paragraph has the effect of suspending the requirements of Section 26 during the stay provided in the Initial Order, with the result that

the secured status effected by registering the Claim for Lien stands without the commencement of an action, notwithstanding the running of time. To put the matter more specifically, time stopped running on December 22, 2008, and will not resume until the stay is lifted, whenever that happens. Which position is correct is for me to determine.

[7] I note parenthetically that this problem is usually avoided by a well established practice of holders of builders' liens seeking orders lifting the stay to the extent necessary for the perfection of their liens. This procedure was followed by seven holders of liens against the Company.

[8] I agree with the submission of counsel for Q-Drilling that my authority is limited to that granted in the Claim Procedure Order which simply is to determine the value and character of the disputed claims put before me. It is not for me to question the appropriateness of any provisions of the orders. Thus it is not for me to consider the constitutional issues, particularly those that arise from the interaction between federal and provincial legislation or the paramountcy doctrine. I am to take Paragraph 7 as it is and give meaning and effect to it as best I can.

[9] Counsel for Q-Drilling refers me to a series of Alberta cases which I shall briefly review. First is *Re: Smokey River Coal Limited*, 1999 CarswellAlta 743. The order in that case did not contain a provision similar to Paragraph 7. The time for registering a woodsmen's lien expired after the issuance of a CCAA order. No proceedings had been made to have the stay lifted to enable registration. The holder of the lien was found to have lost its security.

[10] Paragraph 471 of the *Canadian Encyclopedic Digest* refers to this case. I quote the relevant part of it:

> *The right of a claimant to file a claim for lien for services rendered to the debtor company may expire if the lien is not filed within the proper time period unless either an order under the CCAA freezes the running of the limitation period or the lien claimant obtains an order lifting the stay to permit the filing of the lien.*

[11] In *Re: Scaffold Connection Corp.*, 2000 CarswellAlta 60 the order contained a provision equivalent to Paragraph 7. The court refused a motion to lift a stay to enable liens to be filed. It was satisfied that the provisions of the Paragraph 7 equivalent should be sufficient to preserve the lien claims. This position was recently confirmed in *Re: Kerr Interior Systems Limited*, 2008 CarswellAlta 661.

[12] Most of the other cases cited to me to the extent that they address the present issue cover either situations where there is no Paragraph 7 equivalent, or there is such equivalent but the lien holders' problem is solved by lifting the stay. The effect of Paragraph 7 equivalents is not helpfully considered, rather the arguments centre on whether the lifting of the stay would result in prejudice to certain parties.

[13] A good example is *Cansugar Inc, (Re)* (2003), 48 C.B.R. (4th) 225 (N.B.Q.B., Glennie J.). The Initial Order contained a Paragraph 7 equivalent. However, Glennie J. avoided analysis of it. Instead he simply quoted two paragraphs from *Houlden & Morawetz* which simply affirm that the proper procedure to preserve a lien claim is to apply to have the stay lifted to allow perfection of the lien. He ordered such stay be given, having found that it would not prejudice anyone.

[14] Counsel for Q-Drilling says that the Company is estopped from arguing that Paragraph7 does not apply. One cannot approbate and then reprobate; that is, one cannot ask for a remedy and then, when its existence becomes inconvenient, ask that it not be applied. He cites the discussion in paragraph

18 of *Iron v Saskatchewan* (1993),103 D.L.R. (4th) 585 (Sask., C.A.). In effect, he is saying that the Company asked the Court in the *ex parte* application for the Initial Order to include the paragraph and is now asking that its full effect not be recognized. This it should not be allowed to do. Paragraph 7 is in the Initial order and the Company must live with what meaning and effect may properly be given it, whether it likes it or not.

[15] There is little clear guidance in the cases when taken as a whole. *Scaffold* says that the paragraph will by itself preserve a lien. Other cases leave open that this might be possible, but avoid any useful analysis, being able to solve the immediate problem by lifting the stay. Where there is no Paragraph 7 equivalent, the matter in not addressed.

[16] This is an appeal of a disallowance of the Monitor, not an appeal of the Orders by which I am bound. As mentioned earlier, it follows that I am not to look into questions of their constitutional validity or to address conflicts between the CCAA and other legislation, particularly provincial legislation, and especially the *Builders' Lien Act.*

[17] Much of the discussion before me addressed issues quite beyond my authority. It is only for me to give meaning to and apply Paragraph 7. However, it was urged that as a matter of interpretation I should consider that the strict requirements of the *Builders' Lien Act* should limit the meaning I can give. It was suggested that those requirements are so clear that they should override any attempt under another statute to compromise them.

[18] However, paragraph 7 says that *"any rights or obligations, or time or limitation periods"* are deemed to be extended through the duration of the stay. This is very clear language and effect must be given to it in proceedings under these orders.

[19] This paragraph I take to be a proper provision for carrying out the objects of the CCAA . It implies that all parties subject to these proceedings are governed by this paragraph. Each must comply with its restrictions and each is entitled to its benefits. The orders are to be treated as a comprehensive code governing all the parties involved.

[20] The Initial Order tells Q-Drilling and all the other claimants that all legal

proceedings they may have against the Company are stayed. Paragraph 7 then tells them they need not be concerned with such things as time limits for perfecting their claims. Time is standing still until the stay is lifted. This affects everyone who is subject to these proceedings..

[21] Thus during the stay the status of Q-Drilling's lien remains the same as it was December 22, 2008. The lien is not otherwise contested. Therefore, it remains a good lien so long as these CCAA proceedings are in place. Q-Drilling remains a secured creditor. I have found the authorities submitted by Q-Drilling's counsel, to the extent they address the problem, persuasive in coming to this conclusion.

[22] The status of the lien, should the CCAA proceedings fail, may be another matter, but this is not for me to consider. As the law in this regard appears unsettled, it is understandable that the received wisdom has been to seek a stay to enable perfection of liens, but this is only an article of prudent practice.

[23] I therefore find that for the purposes of these present CCAA proceedings Q-

Drilling's claim for $54,883.42 is to be treated throughout as a secured claim.

I shall hear the parties, if they cannot agree to costs.

Richard W. Cregan, Q.C.
Claims Officer

May 19, 2009