SUPREME COURT OF NOVA SCOTIA
Citation: Scanwood Canada Ltd. (Re), 2011 NSSC 187

Date: 20110225
Docket: Hfx. No. 342377
Registry: Halifax

IN THE MATTER OF: The *Companies' Creditors Arrangement Act*, 1985, c. C-36, as amended

IN THE MATTER OF: A Plan of Compromise or Arrangement of Scanwood Canada Limited, a body corporate under the laws of the Province of Nova Scotia

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D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 24, 2011 in Halifax, Nova Scotia

Written Decision: July 27, 2011 *(Written release of oral decision of Feb. 25, 2011)*

Counsel:
D. Bruce Clarke, Q.C. for the Appellant
Thomas Boyne, Q.C. for Royal Bank of Canada
Joseph Pettigrew and **Sheldon Shoo** for the Prov. of Nova Scotia
Stephen Kingston, Q.C. and **John Stringer, Q.C.** for Business Development Bank of Canada
Carol Holm, Q.C. for Svedplan
Tim Hill for Uniboard Canada Inc.
Brian Stilwell and **Brett Harrison** for IKEA
Robert G. MacKeigan and **Ms. Boehner** (AC) for Green Hunt Wedlake

By the Court:

[1] First of all, I want to thank Mr. Clarke for promptly advising that an agreement had been reached with respect to what I will call Issue No. 5 in your Notice of Motion.

[2] I will give my decision and you know the result. I advised you last evening but I will give quick reasons for the conclusions at which I have arrived.

EFFECTIVE DATE OF INITIAL ORDER

[3] I will deal first of all with the interpretation of the initial Order with respect to the goods supplied on February 2 and 3. Scanwood has said that nothing was done with respect to the initial Order having Uniboard in mind. There was a February 4 letter to the suppliers which said the protection had been given as of February 2.

[4] In the Supplementary Affidavit of Mr. Thorn, the letter to the suppliers and a printout from the CBC Website are attachments. They refer to protection as of

February 2. Mr. Hill says there are three potential options for the effective date of the Order: the date the application was made, the hearing date of February 2 or the date of the Order.

[5] *Rule 78.07 (1)* of the *Civil Procedure Rules* with respect to Orders provides:

> **78.07 - When and how order becomes effective**
>
> (1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise.

[6] Also, *Rule 78.03* provides:

> **78.03 - Orders made in writing or orally**
>
> (1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders may be given orally if the order is to be enforced before a written order can be made.

[7] The purpose of the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36 is to maintain the status quo. Mr. Hill provided a case authority and an excerpt from the Canadian Encyclopaedic Digest. The case is *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce,* 2005 SKQB 24, a January 13, 2005 decision of Justice Lyle. There a creditor had heard of a possible CCAA application and cancelled a contract which was favourable to the debtor. Justice

Kyle concluded that the Order in that case should be effective on the date of the application for the initial Order to prevent what he called a “foot race” by creditors to avoid the provisions of the CCAA. He said that creditors should not be able to “sidestep the CCAA.”

[8] I have listened to the oral decision given by Justice Robertson when the matter was heard on February 2. I have also had the last portion of it transcribed and she said:

> Well then for the purposes of this initial order then I do make the finding that the CCAA applies in the circumstances and the applicant is deemed to be insolvent and I will be prepared to sign the initial order when it is drafted and presented to the court as per the recorded agreements that you have achieved.

[9] She also, in that decision, referred to the return date as being March 3 and to it being 29 days later. Therefore, I conclude that, in this case, the CCAA is applicable as of February 2 at 12:01 a.m. as per clause 48 of the Order.

[10] The oral decision, in my view, granted CCAA protection on February 2 and referred to the agreements that were made and the intent was that the Order would

be effective then. If I conclude otherwise, it could result in what Justice Kyle referred to as a "foot race."

[11] That may not always be the case. In this case, I refer to the oral decision and to the fact that the changes to the draft Order that had been submitted, were referred to in court and had been agreed to and were put on the record. To me, that is a significant factor. It is on that basis that I make the conclusion that I have.

Heitz Deliveries

[12] The second matter is what I will refer to as the Heitz deliveries. There are two invoices. The order date on the first one is December 16, 2010 and the invoice date and delivery date are both January 31, 2011. The terms of delivery are stated to be FCA and the due date for payment is stated to be March 17, 2011. The second invoice has an order date of December 16, 2010 and the invoice and delivery date are January 21, 2011. Again, the delivery terms are FCA and the payment due date was March 7, 2011. The delivery address for both is Kuehne & Nagel. The question is: When were the goods delivered to Scanwood? The invoices indicate

the delivery dates were January 31 and January 21 respectively. Payment was not due on February 2, nor is it in fact yet due, so the invoices were not past due.

[13] Tab 2 to Scanwood's Book of Authorities sets out what are called the INCOTERMS 2000 and the subtitle is Chart of Responsibility. In that, FCA is defined as "Free Carrier, unloaded at the seller's dock OR a named place where shipment is available to the international carrier or agent, not loaded." In the Chart, the change from seller's to buyer's cost is at or after the stage of "Inland Freight." The delivery was made to Scanwood's agent, Kuehne & Nagel. Group F of those INCOTERMS provides, with respect to FCA, "The seller hands over the goods, cleared for export, into the custody of the first carrier (named by the buyer) at the named place.

[14] Also included in Tab 2 are what are referred to as OBLIGATIONS OF THE BUYER. Chapter IV of that is entitled "PASSING OF RISK." Article 67 provides:

> (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmissions to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over

> to a carrier at a particular place, th risk does not pass to the buyer until the goods are handed over t the carrier at that place.
>
> Article 69 provides:
>
> (1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes ver the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach f contract by failing to take delivery.

[15] The Initial Order provides in para. 14 that there is to be no stoppage in transit. Heitz was not represented at this hearing. What I have is an email, at Exhibit D to Mr. Thorn's Second Supplementary Affidavit, where Mr. Heitz refers to Clause 5.1 of their terms and conditions. He says it provides that they retain title in the material until they are paid in full. However, that clause is written in German. No translation was made except for the title which says "retention of title." Although the email was in English and it was sent to Mr. Sutherland at Scanwood in Nova Scotia (a bilingual country where the two official languages do not include German), Heitz did not appear at the hearing and did not translate that phrase which it said it was relying on.

[16] In my view, they took the risk that, without a translation of that clause, it

could not be confirmed that what they were alleging was correct. In fact, the opposite is referred to in Mr. Thorn's Second Supplementary Affidavit where he says in para. 15 (d):

> v. Such goods, on arrival, are intermingled with other inventories of Scanwood and reported t the Royal Bank of Canada as inventories to which the RBC security attaches;
>
> vi. Such goods, on arrival, are used by Scanwood and integrated with other components into its product and sold to IKEA;
>
> vii. In the normal course of production, goods released by Heitz to our broker will be received in Nova Scotia and integrated into finished goods by us prior to the Heitz invoice for those goods becoming due;
>
> viii. Heitz is aware of each of the elements set out in this subparagraph (except perhaps our reporting to RBC) and has never objected to any such element. Moreover, each such element is consistent with our agreement with Heitz and inconsistent with any retention of title by them until the goods are paid for.

[17] Therefore, I conclude that title to the goods passed on the delivery dates of January 21 and 31 when the goods were delivered to Kuehne & Nagel, Scanwood's agent. That was, of course, before the Initial Order.

IComp Deliveries

[18] With respect to what are referred to as the IComp deliveries, I will deal with the FCA and the DDU separately.

[19] Invoices 1 and 3 are as follows:

1) The first invoice was dated January 28, 2011, the delivery date was stated to be the same date and the terms were FCA Malacky. The delivery method was stated to be: picked up.

2) Invoice #3 was dated January 3, 2011 and the delivery date was the same as the invoice date.

[20] I dealt with the FCA with respect to the Heitz matter. Counsel for IComp has been present and submitted that the delivery dates are not the dates on the invoices. I conclude with respect to these invoices that it is the same result as with respect to Heitz. There is a named place for the goods to be handed over to the buyer's agent, Kuehne & Nagel. I therefore conclude, without any evidence to the

contrary, that what IComp put on its invoice as the delivery date is the delivery date.

[21] Invoice #2 has an invoice date and delivery date of January 28, 2011. The terms were DDU Dartmouth and the delivery method was stated to be Sea Transport. In the INCOTERMS (Tab 2 in Scanwood's Book of Authorities), that phrase is defined. DDU is:

> Delivery Duty Unpaid (named destination place). This term means that the seller delivers the goods to the buyer to the named place of destination in the contract of sale. The goods are not cleared for import or unloaded from any form of transport at the place is destination. The buyer is responsible for the costs and risks of the unloading. ...

The definition is delivered duty unpaid, named place of destination, not unloaded, not cleared.

[22] In that document, the seller continues to have responsibility for services for a much longer period than is the case with FCA, and including during transportation to the destination. The destination is Kuehne & Nagel, Scanwood's agent, listed as being in "Dartmouth (Halifax)." The goods did not arrive in Nova Scotia until February 14, according to para. 16 of the Second Thorn Affidavit. Therefore, I

conclude that delivery to Scanwood was not until that date, which was after the initial Order.

Hood, J.