

SUPREME COURT OF NOVA SCOTIA

Citation: Scanwood Canada Ltd. (Re), 2011 NSSC 188

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

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 25, 2011 in Halifax, Nova Scotia

Written Decision: July 27, 2011 (*Written release of Oral Decision of February 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, for Business Development Bank of Canada
Gavin MacDonald for Green Hunt Wedlake
Tim Hill for Uniboard Canada Inc.
Brian Stilwell and **Brett Harrison** for IKEA
Susan Taylor for ACOA

By the Court:

[1] Scanwood seeks debtor in possession financing. It has today provided a Terms Letter from TCE dated February 24 offering to lend a maximum of \$1 million on a Demand Revolving Loan with a number of conditions. Two of Scanwood's secured creditors oppose the DIP financing. Others are in favour, including at least one unsecured creditor.

[2] The authority to grant an Order approving DIP financing is set out in s. 11.2 of the *Act*. There must be a specific amount, the lender must be named and the financing must be required by the company having regard to a cash flow statement. The court, if it grants it, may give what has been called super priority.

[3] The new subsection 4 to that section, which is new as of 2009, sets out a list of non-exhaustive factors. *Federal Gypsum Co., (Re)* 2007 NSSC 347, quoted from *Juniper Lumber Co., Re*, [2000] N.B.J. No. 144 (N.B.C.A.) at para. 1 where Turnbull, J.A. said:

The CCAA has a remedial purpose and, therefore, must be interpreted in a broad and liberal fashion.

[4] Scanwood says the \$1 million is required next week to keep production going. The Monitor recommends it. Scanwood says it has met all the requirements of s. 11.4. It acknowledges that additional funding may be required in April but granting the \$1 million in funding now, they say, is for the immediate needs of the company in the upcoming week.

[5] Scanwood says there is no material prejudice to RBD and BDC because they will be paid even if there ultimately is a liquidation. Scanwood says this financing is designed to prevent that. That is in accordance with the purpose of the *Act*. Scanwood says it hopes to have a restructuring plan within the one month extension that they say they will seek if the financing is approved. The monitor has expressed no concerns with respect to the company's present management of Scanwood's business and financial affairs.

[6] It seems clear to me that, without the DIP financing, there is no prospect of a plan of arrangement. There are no appraisals of the company's assets but the company's sole shareholder has sworn an affidavit setting out his opinion of the value of the company's assets. He has acknowledged that he is not an appraiser. He says the assets are valued at \$24 million including inventory of \$3.8 million.

The monitor says that the management is acting in good faith and with due diligence and the Province says part of the reason for its support is because of the quality of the management of the company.

[7] IKEA is supportive of Scanwood, at least to a point. They will continue to buy its product. There is some concern with respect to the setoff issue and that issue was also referred to by TCE in their Terms Letter.

[8] The major issue is the question of material prejudice to a creditor. There is obviously some prejudice if a new lender is given priority to the extent of as much as \$1 million. The question is whether it is material prejudice.

[9] RBC and BDC are secured creditors: RBC for \$1.78 million and BDC for approximately \$3.9 million. They will, with the approval of this funding, rank behind a \$1 million loan plus the administration fees, statutory charges and the \$175,000.00 owed to the Province.

[10] It seems to me to be clear that objection by one or two creditors does not, in and of itself, prevent approval. The Province is a major creditor but it is in favour

of the financing. \$1.7 million is owed to Uniboard and Uniboard is not objecting and is in favour. Svedplan is in favour of the financing as well. IKEA is a secured creditor and it acknowledges the effect it will have upon it but it supports the DIP financing.

[11] I must weigh the prejudice and the benefit. I acknowledge that appraisals would have been preferable but the *Act* does not mandate, in the new section, that there be appraisals. Mr. Thorne says the real estate is worth \$11.4 million and equipment \$8 million. Even if that is not totally accurate, I do not accept that the values would be less than the DIP financing amount plus what BDC and RBC are owed on their secured debts. The *Act* does not require a liquidation value appraisal. I agree that the granting of the approval for the financing does have an effect on BDC and RBC that is a prejudice but, in my view, it does not materially prejudice them.

[12] The cash flow projections, to which reference has been made and which I have looked at, are affected, of course, by the recent decisions I have given and by the fact that the \$284,000.00 is not being repaid by IKEA because of the agreement between Scanwood and IKEA. That is a concern. It would be ideal if there was

time for a revised set of cash flow projects. As was said in *Canwest Publishing Inc. (Re)*, 2010 ONSC 222, in another context, “ ... insolvency proceedings typically involve what is feasible, not what is flawless.” In a perfect world, we would have revised cash flow projections.

[13] The Monitor, in his first report, said that \$1.45 million would be required by June 25. In the context of a CCAA application, in my view, that is a long time from now. Even after considering the more recent events, the Monitor still recommends the \$1 million financing be granted, although that was done in anticipation of the repayment by IKEA of \$284,000.00. In my view, there is a fine balance to be struck by Scanwood in its dealings with its sole customer. I cannot say that the agreement made is not overall an unreasonable one in the context of the CCAA protection, although, of course, it does have an effect on the cash flow projections.

[14] Of significance to me is the imminent operation of three pieces of new equipment. Efficiency savings are anticipated but have not yet been realized.

[15] Mr. Thorne said in his Second Supplemental Affidavit sworn on February 21 at para. 51:

(d) The benefits of recently acquired equipment (from Svedplan AB, Homag Canada and HMF) have not yet been achieved, since some of these transitions are still in progress;

(e) The benefits of our Business Plan will increase productivity, decrease operating expenses, reduce material costs, reduce rejections due to quality deficiencies and reduce scrap.

[16] I am satisfied that there is a reasonable likelihood that Scanwood can be successfully restructured. I think the \$1 million in financing was, of course, an important part of that and, without the new equipment up and running, there would be an increase in productivity and lowering of production costs leading to more efficient production. The fact that additional financing may be required in future is not, in my view, a good reason to deny the present request. On the other hand, granting this request does not necessarily mean that a second request will be looked upon favourably.

[17] I would express some concern, as was expressed in some of the material before me, about the fact that there was an injection of equity which went in and

came right back out. Having weighed the benefits and the prejudices, I conclude that, overall, the prejudice alleged by BDC and RBC are outweighed by the benefit to approval for the \$1 million in DIP financing.

[18] I cannot say this was a clear and easy decision because of some of the concerns that have been expressed about the equity injection, the loss of the \$284,000.00 which was projected to be returned from IKEA and the lack of the best evidence of evaluation. Overall, I do not believe the approval puts the financial well being of the majority of creditors at risk.

[19] I am, therefore, satisfied on the evidence before me that Scanwood has met the onus. I have had some reservations but that does not mean that the evidence falls below the level of cogent evidence which is required nevertheless. Therefore, the DIP financing is approved and it will have priority, as is proposed

in the Order, over the administrative charges set out in the initial order, the statutory charges and the security to the Province for \$175,000.00 which was contemplated in the initial Order.

Hood, J.