SUPREME COURT OF NOVA SCOTIA
Citation: Scanwood Canada Ltd. (Re), 2011 NSSC 189

Date: 20110602
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: June 1, 2011 in Halifax, Nova Scotia

Written Decision: July 27, 2011 *(Written release of oral decision of June 2, 2011)*

Counsel:
Carl Holm, Q.C. for Homag Canada Inc.
James MacNeil and **Tracy Smith (AC)** for Royal Bank of Canada
Stephen Kingston, Q.C. and John Stringer, Q.C. for Green Hunt Wedlake
Joseph Pettigrew for the Province of Nova Scotia
Tim Hill for TCE Capital Corp.

By the Court:

[1] The motion is dismissed. My reasons are as follows.

[2] Homag Canada Inc. (“Homag”) seeks to have the stay ordered in the Receivership Order lifted against certain assets. Its debt is approximately $611,000.00 secured by a Purchase Money Security Interest. In the Notice of Motion filed, Homag asks, among other things, for a Declaration that the applicant “has a first ranking Purchase Money Security Interest pursuant to the provisions of the *Personal Property Security Act*, S.N.S., 1995-96, c. 13" and lists specific goods. It also requests an order “Notwithstanding the provisions of a Receivership Order issued herein on the 18th day of April, 2011, giving leave to the applicant, Homag Canada Inc., to exercise its enforcement rights as a holder of a Purchase Money Security Interest in the Goods pursuant to the provisions of the PPSA without any interference by the Receiver or any other secured creditor of or person claiming an interest in the assets of Scanwood Canada Ltd.”

[3] Homag’s request is opposed by the Receiver, the Province (the Minister of Economic and Rural Development and Tourism), the DIP lender, TCE Captial Corp., and the Royal Bank of Canada.

[4] For the purposes of its submissions, Homag agreed that the burden is on it to show that it will suffer prejudice if the stay is not lifted. The other parties say that there must be evidence of material prejudice to Homag for Homag to meet its burden.

[5] The Receivership Order of April 18, 2011 says in part in paragraph 9:

> 9. All rights and remedies against Scanwood, the Receiver or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this court. ...

[6] The February 23, 2011 order providing for the DIP financing provides for priorities as follows in para. 28:

> 28. The DIP charge, the Administration Charge and the Director's Charge have relative priority as follows:
>
> a) Firstly, the Administration Charge
>
> b) Secondly, the DIP Charge; and
>
> c) Thirdly, the Director's Charge.

[7] When the Receiver was the monitor pursuant to the CCAA, he filed a Schedule of Relative Order of Priority based upon independent legal advice.

[8] The affidavit of Christian Vollmers was filed in support of Homag's motion. Mr. Vollmers is the President of Homag Canada Inc. The critical parts of his affidavit, in my view, are paras. 22-24 where he says:

> 22. If Homag is not permitted to act on its security, its ability to maximize its recovery and minimize its costs will be prejudiced.
>
> 23. Homag as manufacturer and worldwide distributor of woodworking equipment of the nature and kind on which it has a first ranking PMSI security charge believes it is best able, through its networks, to maximize, whether in the short or longer term realization on the Goods against which it holds security.
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> 24. Homag does not believe it will maximize its realization on the Goods if they are included in an en bloc package and Homag is required to accept a portion of the purchase price bid by an en bloc bidder, if in fact such a bidder, materializes.

[9] The Receiver has filed his first Receiver's Report dated May 30. He also provided some additional information to the court when he took the witness stand as an officer of the court. One of the things he said was that the reason why he refused Homag's offer to leave the equipment but have Homag not subject to a

costs allocation was because it would be unfair to the other creditors to have one creditor exempted from those costs.

[10] In his report, the Receiver gives his opinion that the best realization of the assets of Scanwood would come from a sale of the assets en bloc. He says in para. 5.9:

> 5.9 The Receiver's experience is that an en bloc tender will typically result in greater realizations to the creditors than a breakup of the assets. The Receiver and the secured creditors (other than Homag) believe this would likely be the case with Scanwood's Fixed Assets, although only a market test will determine whether this is the case.

[11] He continued:

> 6.9 The Receiver has received a verbal indication from one interested party that it intends to submit a tender to acquire the Fixed Assets en bloc with a view to operating the facility as a going concern.
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> 6.10 The Receiver has received an email from another interested party indicating that it is interested in the complete factory.
>
> 6.11 These parties now are awaiting the information package and Conditions of Sale. Additionally, we have received requests for the information package from other parties including liquidation/auction firms. While some parties have expressed an interest in certain assets, others have been silent on the extent of their interest.

[12] He put his proposal to try to sell the assets en bloc to a meeting to which all secured creditors were invited. All those who participated except Homag agreed. Those creditors also requested that there be an opportunity to bid on individual parcels. A tender package has been prepared and Conditions of Sale (Exhibits 2 and 3 to the Receiver's Report) and plans have been made to advertise as set out in Exhibit 4 to the report.

[13] The report in paras. 6.6, 6.7 and 6.8 refer to these advertising plans. In addition, the Receiver proposes to ask for individual bids on various parcels including the subject assets. The tenders will close on July 22 and the sale of any assets is subject to court approval. At that court hearing, all creditors will have an opportunity to make submissions about the recommendation of the Receiver and about the costs allocation.

[14] The Receiver has specifically addressed Mr. Vollmer's comments on the fifth Monitor's Report with respect to Scanwood's unsuccessful efforts to sell on a going-concern basis. He says in paras. 7.3 and 7.4:

> 7.3 The Receiver notes that the Monitor was not directly involved in any efforts by Mr. Thorn or others to market Scanwood's assets during the

> CCAA process, and that the Monitor's comments were based solely on information provided to it by representatives of Scanwood.
>
> 7.4 The Monitor's comments in the Fifth Report were made in the context of a possible sale by Scanwood during the course of the CCAA proceedings. This is distinct from the orderly administration of a sale process by a Court-Appointed Receiver for the benefit of the general body of creditors.

He then concludes in para. 7.5:

> 7.5 It is the opinion of the Receiver that any buyer interested in operating the Facility will require all of the Fixed Assets that Scanwood had been using until it discontinued operations on April 15, 2011.

[15] He then goes on in para. 7.14 to refer to feedback he received from Scanwood's former Director of Operations, Mr. Robert Moore, in which Mr. Moore said in part:

> 7.14 ... In my opinion, the removal of the 330 line or pieces of the line would seriously impede the chance of receiving a viable en bloc offer. These items make the 330 line unique in its function and therefore more desirable. It would cost approximately 1.2m to replace, perhaps even more after installation costs.

[16] The Receiver concludes in paras. 7.15 and 7.16:

> 7.15 It is the Receiver's opinion that selling the Fixed Assets without the New Machinery will seriously impair and impede the Receiver's ability to attract an en bloc buyer.

> 7.16 The Receiver accordingly opposes the Homag Motion and has declined to consent to Homag's request to remove the New Machinery, as it believes this would impair the Receiver's ability to maximize recovery for the general benefit of creditors

[17] Homag says there is only a faint hope that the assets will be sold en bloc. Homag also says that the price attributed in such a bid to the subject assets may be less than Homag could achieve if it were to market them pursuant to its security. Homag also says that, if there are individual bids on parcels, the bid on the subject assets may be less than it could achieve if Homag sold them. The bid could also be lower than the amount attributed to those assets in an en bloc bid. In these cases, Homag says it would suffer prejudice, although the other secured creditors might benefit from an en bloc sale. Homag says it is unfair to it to require it to leave the equipment in place with the result that Homag will be required to contribute to the costs of the receivership and the other priority costs.

[18] The powers of the Receiver are set out in para. 3 of the Receivership Order and include the following: "to receive, preserve, protect and maintain control of the Property or any part or parts thereof ...; to market any or all of the Property... ." The Receiver submits that the intent of the receivership was to prevent a "free for

all" by the secured creditors and, instead, provide for an orderly realization of the assets of Scanwood so as to benefit the general body of creditors.

[19] In *Ford Credit Canada Ltd. v. Welcome Ford Sales Limited,* 2010 ABQB 199, the Court said in para. 14:

> 14. In deciding whether the stays contained in the Receivership Order ought to be lifted, I note that the Courts in Canada have considered the totality of the circumstances and the relative prejudice to both sides. ...

[20] In *Village Green Lifestyle Community Corp.*, Re, 2007 CarswellOnt 654 (Ont. S.C.J.), the Court referred in para. 13 to s. 69.4 of the Bankruptcy and Insolvency Act, R.S.. 1985, c. B-3 saying:

> 13. ... I also note that, although not strictly applicable, guidance may be drawn from the provisions of section 69.4 of the Bankruptcy and Insolvency Act wherein a person affected by the operation of a statutory stay may apply to the court to request that the stay be inoperative. The court may make such a declaration if it is satisfied that the person is likely to be materially prejudiced by the stay or if the court is satisfied that it is equitable on other grounds. ...

[21] Furthermore, in *Cumberland Trading Inc.*, Re, 1994 Carswell Ont. 255 (Ont. C.J.), Justice Farley referred to the type of evidence which would satisfy the test of material prejudice. He said in para. 11:

> 11. Is Skyview entitled to the benefit of s. 69.4 (a) of the BIA? I am of the view that the material prejudice referred to therein is an objective prejudice as opposed to a subjective one, i.e., it refers to the degree of prejudice suffered *vis-a-vis* the indebtedness and the attendant security and not to the extent that such prejudice may affect the creditor, qua person, organization or entity.

He continued in that para.:

> ... However, Skyview does not go the additional step of making any quantitative (or possibly qualitative) analysis as to the extent of such prejudice so that the court has an idea of the magnitude of materiality. ...

[22] The Province and the Royal Bank support the position of the Receiver. TCE does as well. It says that, if the Order were granted, it would put Homag ahead of TCE, contrary to the DIP financing Order as well as exempting it from the priority given to the Administration and Director's charges. The allocation of those charges will be the subject of a subsequent hearing and it is unknown now what the proposal for allocation will be. The Receiver said there are so many possibilities that it is impossible to speculate at this time. In addition, there will be the Receiver's costs to be allocated in the future.

[23] During his oral submissions, Mr. Holm made two alternate proposals. He proposed that the equipment be left so an en bloc sale could occur but with no cost allocation against Homag or that cash collateral be posted towards a future costs allocation. In my view, these issues are not encompassed in the Notice of Motion and are not properly before the Court.

[24] The Affidavit of Mr. Vollmers does not contain evidence of material prejudice to Homag if the stay is not lifted. Mr. Vollmers says that, in his opinion, a greater realization can be achieved if Homag sells the subject assets. The Receiver has a different opinion.

[25] There is nothing in Mr. Vollmers Affidavit to establish that it has offers or what efforts have been made to market the assets. As Mr. MacNeil put it, it is a bald assertion of prejudice.

[26] The case law, in my view, makes it clear that mere supposition or speculation is not sufficient to warrant lifting of the stay. The Receiver's duty is to act in the interests of the general body of creditors. This does not, in my view, necessarily mean that the majority rules. The Receiver must consider the interests

of all creditors and then act for the benefit of the general body of creditors. The Court must weigh the benefits and disadvantages to each against the general good and consider the totality of the circumstances.

[27] The scheme of the receivership is to allow for the orderly disposition of the assets of the company in receivership. To allow one secured creditor to have the stay lifted would be unfair to the remaining creditors. If the assets were removed, it would make it virtually impossible to have a sale en bloc. In my view, the situation is not dissimilar to that in the *Ford Credit, supra,* case where Justice Thomas, said in para. 28:

> That evidence of prejudice must be weighed against the interest of all of the other parties and creditors who assert that an en bloc sale should be conducted to maximize recovery. Clearly, that opportunity would be gone if the inventory claimed by Ford Credit is removed from the en bloc sale.

[28] The opinion of Mr. Vollmers with respect to maximizing the realization on the equipment is an opinion only and is not proof. When I consider the benefit of an en bloc sale against the removal of an integral part of the production capability, I cannot conclude that any possible prejudice to Homag outweighs the benefit to the general body of creditors of an en bloc sale.

[29] Considering all the circumstances as set out in the Receiver's Report and the Affidavit of Mr. Vollmers, I cannot conclude that I should exercise my discretion to lift the stay.

[30] On the issue of costs, TCE says it is important that Homag pay its costs of the unsuccessful motion. This is so because all TCE's expenses have priority according to the DIP financing Order. If TCE's costs are not paid, there will be an adverse effect upon the remaining creditors who must bear that cost. The Province and RBC also seek their costs as does the Receiver.

[31] I conclude these parties are entitled to their costs. I can hear from counsel now or leave it to counsel to try to agree, failing which written submissions can be made to me within 30 days.

Hood, J.