

SUPREME COURT OF NOVA SCOTIA

Citation: Scanwood Canada Ltd. (Re), 2011 NSSC 306

Date: 20110418

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

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: April 18, 2011 in Halifax, Nova Scotia

Written Decision: July 27, 2011 (*Written release of Oral Decision of April 18, 2011*)

Counsel: **D. Bruce Clarke, Q.C.** for the Appellant
Thomas Boyne, Q.C. for Royal Bank of Canada
Stephen Kingston, Q.C. & Joe McNally for Business Development
Bank of Canada
Gavin MacDonald for Green Hunt Wedlake
Tim Hill for Uniboard Canada Inc.
Brian Stilwell and **Thomas Khattar (AC)** for IKEA
Joseph Pettigrew and **Sheldon Shoo** for the Province of Nova Scotia
Susan Taylor, for ACOA

By the Court:

[1] Scanwood seeks a further extension of the CCAA protection. It is supported in this application by Uniboard, an unsecured creditor. IKEA does not oppose the extension. The Province of Nova Scotia and the Federal Government take no position on it. It is opposed by BDC and RBC. The Monitor, in his fifth report dated April 15, says on page 11:

Despite our belief that Scanwood has been acting in good faith and with due diligence, unless further evidence to support an extension of the Stay of Proceedings is presented and appropriately justified, it is the Monitor's opinion that the extension requested is not appropriate in these circumstances.

[2] Since the date of that report, an Eighth Affidavit has been filed by Mr. Thorn. He attaches to it a revised manufacturing model which he says will "increase productivity and profitability." It says it "will allow Scanwood to attract equity investment which will then allow us to return to the development of a viable Plan of Arrangement."

[3] He says in para. 10:

Ikea has expressed great interest in our re-development plan and has advised me that it does not oppose our extension application.

[4] The Monitor says that he has not had sufficient opportunity to review this model and can offer no comments on it. He reiterates his position taken in the fifth report that he does not support an extension.

[5] Scanwood says there are three options available to me today: 1) I can grant the extension; 2) I can grant the extension and give additional powers to the Monitor pursuant to s. 23(1) (k) and s. 36(1) of the *Act* or 3) I could grant the receivership which has been proposed by BDC, which application I note has not yet been heard.

[6] The *Act* provides in s. 11.02(2) that I may grant an extension. Section 11.02(3) provides that:

11.0.2(3) the court shall not make the order unless:

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[7] No one has expressed any concern with respect to item b) and no one has said that that has not been satisfied. I conclude that the applicant has acted and is acting in good faith and with due diligence.

[8] The real question for me is whether the order is appropriate. BDC and RBC say it is not. They refer to decisions where “appropriate circumstances” have been considered.

[9] In *Starcom International Optics Corp., Re*, [1998 B.C.J. No. 506 (S.C.)], the court said an important consideration is whether the attempt to restructure is “doomed to failure.” (para. 23) In *Re: Federal Gypsum Company*, 2007 NSSC 347, the same phrase was used. In *Hunters Trailer & Marine Ltd., Re* 2000 ABQB 952, Wachowich, A.C.J.Q.B. said in para. 18:

18. A stay of proceedings should not be granted under the CCAA where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized: ... The B.C. Court of Appeal said that CCAA orders should only be made if there is a reasonable prospect of a successful restructuring. ... Given my conclusion that further DIP financing should not be permitted, it is clear that Hunters will be unable to finance its

operating costs, and therefore the business is doomed to failure. But even if DIP financing continued, the problems with cashflow, discussed above, suggest that Hunters has no reasonable prospect of becoming viable again.

[10] Both Mr. Kingston and Mr. Boyne referred to Mr. Thorn's Seventh Affidavit. They say that a restructuring is doomed to fail and that granting an extension would merely prolong the inevitable. The factors to which they refer are (paraphrasing from Mr. Thorn's Affidavit): that Scanwood has acknowledged it not longer believes it is possible for it to file a viable Plan of Arrangement; its own draft projections indicate that it could at best produce a seven percent rate of return prior to principal repayments and dividends to unsecured creditors; that BDC has lost confidence in Scanwood; that the RBC requires Scanwood's operating line of credit be paid out; that Scanwood would be obliged to find a new operating lender; that IKEA has refused to waive its setoff; that IKEA's sales of products such as those Scanwood manufactures is showing a decreasing trend; that IDEA is Scanwood's sole customer and it has refused to allow its Supply Agreement with Scanwood to be assigned to a new owner or new control group; and that Scanwood had asked its employees to agreed to certain concessions and the request was overwhelmingly rejected; the Federal Government proposes to apply to seek to have GST credits go to the payment of CRA and ACOA debt; Scanwood's attempts to sell its assets to a third party failed; a substantial equity investment is

required and the problems with respect to that are set out in Mr. Thorn's Affidavit at para. 23.

23. Scanwood has spoken with several potential equity investors in an attempt to create a viable Plan. We have not been able to find anyone willing to invest in Scanwood because:
 - (a) Scanwood may not have a term lender if BDC wishes to be paid out;
 - (b) Scanwood must pay out the RBC line of credit;
 - (c) Scanwood can not readily arrange for a replacement operating lender due to IKEA's right of set-off unless the IKEA loan can be paid out in full;
 - (d) Projections do not reliably support sufficient cash flows back to investors after payment of operating costs, principal debt repayment and CCAA dividend payments;
 - (e) Our employees are not prepared to make any concessions that would assist us in achieving reliable profitability.

[11] Boyne's written submissions as well refer to that Affidavit. He also expressed concern about the jeopardy to creditors, including his client, RBC, of a further extension devaluing its security.

[12] Scanwood says that Option No. 2 is the best option. It would allow Scanwood the opportunity to find investors willing to invest based upon the model attached to the Eighth Affidavit. At the same time, if additional powers are granted to the Monitor, it would allow the Monitor to have the same powers as a receiver. If no plan was then forthcoming, the work done by the Monitor with expanded powers would be useful in a receivership.

[13] Mr. Hill for Uniboard says this option does not merely delay the inevitable. He points out that the purpose of the *Act* is to allow for the rehabilitation of companies in financial distress. He says there is potential with the revised business plan for equity investment. He says the position of creditors is not jeopardized because the assets are still there, the building and equipment, and no additional financing is being requested.

[14] .Mr. Clarke for Scanwood says the court should be careful not to take the liquidated values as fair market values. He says there is still \$20 million in assets.

[15] .The onus is on Scanwood to satisfy me that the extension is appropriate in the circumstances. A new manufacturing model has been put before the court this

morning. The Monitor has not had an opportunity to consider it. It is so recent that there is no indication of its ability to attract equity investors. BDC has characterized it as a “last gasp” referring to the decision cited by Mr. Boyne *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) where the court said the CCAA:

... is not, however, designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throes.

[16] Of particular importance to me is the position of the Monitor. The Monitor is independent not only of Scanwood but also of the creditors. His position should carry some considerable weight with the court. The Monitor has reviewed the company’s financial position and prospects. In this case, the Monitor does not support the extension. That in itself does not mean I must do as the Monitor says, but it is a factor in determining if an extension is appropriate and whether Scanwood has satisfied me that it is so.

[17] I have reviewed the Affidavits of Mr. Thorn and, in particular, the Seventh and Eighth Supplemental Affidavits. I conclude that a further extension of thirty days is not appropriate in the circumstances. The circumstances of Scanwood are

set out in the Seventh Affidavit, which I have paraphrased above. The need for additional DIP financing in early May is a factor in this conclusion. It is not now being sought but, in Mr. Thorn's Seventh Affidavit, he says in para. 37:

37. Scanwood can remain operational on a reduced basis for at least 2 weeks without further DIP financing.

[18] In my view, the recent revised manufacturing model is too late to satisfy me that, within 30 days, there could be a plan of arrangement. Having so concluded, it is not necessary for me to consider Option 2 which includes greater powers to a Monitor. I do, however, have some reservations about the applicability of that section to be used as proposed.

[19] The request for an extension of CCAA protections is denied.

Hood, J.