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Wandlyn Inns Ltd., Re

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re WANDLYN INNS LTD.

New Brunswick Court of Queen's Bench (Trial Division)

Dickson J.

Judgment: December 8, 1992
Docket: Doc. Fredericton

Counsel: *Charles A. Sargeant, Q.C.*, and *Lorraine D. King, Q.C.*, for Wandlyn Inns Ltd.

Thomas L. McGloan, Q.C. and *G. Dwight Hubley*, for Bank of Montreal.

R. Leslie Jackson, Q.C., for Howie Bird Water and Sewerage Supplies Ltd.

Walter Vail, for RoyNat Inc.

R. Gary Faloon, for Maritime Life Assurance Company.

John McNair, for Royal Trust.

David W. Clark, for Multi-Ventures Ltd.

Peter J. Adams, for ADI Limited and Mutual Life Insurance Company.

Nancy J. Wilson, for Wilson Concrete Pipe (1982) Ltd.

David Young, for Central Guaranty Trust Company.

Charles LeBlanc, for Gerling Global.

Britt Dysart, for G.E. Capital Co.

George Kalinowski, for Irving Oil Limited.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable".

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Sanction hearing — Court considering whether proposed plan of arrangement fair and reasonable — Order sanctioning plan being granted.

A company under the protection of the *Companies' Creditors Arrangement Act* ("CCAA") applied for an order approving its proposed plan. Five objections were filed seeking either rejection or modification of the plan.

Held:

The plan was approved.

Section 11(*c*) of the CCAA does not allow the court at a sanction hearing to go beyond making technical amendments to the plan. When it appears to the court that further amendments are proper because the plan does not appear to be fair and reasonable to all concerned, it can adjourn the hearing in order to give a particular class or classes of creditors the opportunity to renegotiate or reconsider how the plan might be amended. In this case, such an adjournment was not necessary.

In deciding whether to approve a plan, the court must consider whether (1) the plan complies with the statutory requirements, (2) all material filed and procedures carried out are in compliance with and authorized by the CCAA, and (3) the plan is fair and reasonable.

The application fulfilled the first two requirements. With regard to the third, "fair and reasonable" does not mean equal; it means equitable. No plan is going to be perfect. It cannot look after every eventuality, but it must be inherently fair, reasonable and equitable. The plan as proposed was fair and reasonable.

Cases considered:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (C.A.) [leave to appeal to S.C.C. refused (1992), 94 D.L.R. (4th) vii (note) (S.C.C.)] — *not followed*

Dairy Corp. of Canada Ltd., Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.) — *referred to*

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) [affirmed 73 C.B.R. (N.S.) 195, *(* sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.)] — *applied*

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11(c)

Application for order sanctioning plan of arrangement.

Dickson J. **(orally):**

1 I think I should review some of the steps taken in connection with this application before getting right down to the crunch of the judgment, although I don't propose to take any longer than is necessary for it, but this is what hopefully is the last in a fairly extensive series of hearings dealing with the application of Wandlyn Inns Ltd. for approval of a plan of reorganization under the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36].

2 In May the application was launched and on May 20 an order was made declaring the company to be a company within the meaning of the *Companies' Creditors Arrangement Act.* Essentially, that order put a prohibition on any actions being brought against the company until it had an opportunity to put a plan of reorganization, or a plan of arrangement, before its creditors and to call the necessary creditors' meetings and so on.

3 In July, I believe it was, a classification hearing was held and the various creditors were then grouped into different classes, I believe they were seven in number, or something to that order. Those classifications were largely agreed upon; I don't think there was very much objection. There may have been some objection, as Mr. Young noted this morning, but essentially they were accepted.

4 It's not an easy thing to group all creditors. Usually unsecured creditors can be put into one classification without too much difficulty, but it is essential, of course, in some cases to put creditors who haven't got absolutely like interests in some particular class. That, of course, was true here, and undoubtedly usually is, of any class comprising secured creditors, because here we put in mortgage-holders and debenture-holders with lien claimants, who have security or have the potential for having security, and also we put in a creditor holding a floating lien, in this case the company's bank, over a great number of the company's assets. These people aren't equal. They are similar in some respects but they do have a like interest and it's practical, of course, in an application of this sort to stick them in the same class. You can't take every creditor whose position is totally different or somewhat different from any other creditor and say that creditor is going in a class of its own. That, of course, as has been pointed out in the literature, would lead to that creditor having an absolute veto over any application for reorganization under the Act and it would defeat the whole purpose of the Act.

5 In September, I believe it was September 19 or thereabouts, a plan of arrangement was filed by the company and was distributed among creditors.

6 I'm not referring to all of the hearings that have been held here. They have been quite numerous and it seems to me that it's not essential to refer to them all.

7 On October 31 the meetings of the creditors in their various classifications were held. A first amendment to the plan of organization was distributed to shareholders before that and was included in the plan and voted upon by the groups of creditors, the classes of creditors who did vote on that day. The secured creditors did not vote on that date. Obviously, it was felt by someone or other that they couldn't agree in sufficient numbers to obtain approval of the plan and therefore their meeting was adjourned over, like the meetings of the other classes, to November 13.

8 Certainly the Act envisages adjournments of meetings of creditors and negotiations continuing between those adjourned hearings and even at the adjourned hearings and right up until the time the final votes are taken. I

don't doubt in the case of all applications under the C.C.A.A. there are negotiations of that nature, and a company must file amendments right up to the last moment because there's no point in an applicant under the C.C.A.A. going to meetings of creditors unless there is a reasonable hope that the plan is going to be approved in the proportions required by the Act.

9 On November 13 the adjourned meetings of the creditors were held. Two more amendments to the plan had been filed by that time, one I believe a few days before and another one the day before, and those were voted upon and the plan as amended by the three successive amendments was overwhelmingly approved by all groups of creditors both as to numbers and as to values at the meetings of creditors, and secured creditors on November 13 when they voted and the other classes of creditors when they voted on October 31. Of course, the percentage of the vote and percentage in numbers and percentage as to value are something that a court has to have very strong regard for in determining whether sanction should be given or not.

10 Now the applicant comes before the court seeking approval of its plan. Five objections have been filed seeking either rejection or modification of the plan, and counsel representing the objectors have been heard. Other counsel have been heard representing creditors who support the plan and they have spoken in favour of its being sanctioned here today. Two of the objections have largely dissolved, I might say, those of Irving Oil and of Gerling Global, but I will deal with those presently.

11 The objection of ADI is not an objection to approval of the plan but instead seeks what the proponent describes as a technical amendment of the plan by the court. I don't question the authority of the court to make technical amendments to the plan; in fact, a couple of them have been ordered here today at this hearing just before lunchtime. But the amendment sought here amounts, in my view, to a substantive change in the plan.

12 It has been suggested that the *Algoma Steel* case, the Court of Appeal decision in the *Algoma Steel* case in Ontario [*Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303], supports the notion that a court at a sanction hearing can even go beyond making technical amendments to the plan but I am unable to find, as I indicated earlier today, that the section of the Act cited by the Court of Appeal, namely subs. 11(*c*), supports that contention.

13 That doesn't mean that I wouldn't be prepared, as I indicated earlier, to even adjourn a sanction hearing in a proper circumstance and give a particular class or classes of creditors the opportunity to renegotiate or reconsider how a plan might be amended if it appeared on the face of it that it were not fair and reasonable to all concerned, or to anybody concerned. I think in doing that one would have to weigh very carefully what might be attained by such a course and the dangers inherent in it, the dangers namely of upsetting the whole apple-cart and having some class or classes of creditors throw up their hands and say look, that's the end of it. If this thing is being opened up again it gives me the chance I want to pull out of it.

14 I don't feel that this is a situation here, having regard to the amounts involved and so on, and without acknowledging that there is anything unfair or unreasonable about the plan inherently, I don't think it's a case where there should be an adjournment for further negotiation.

15 What this hearing really boils down to is that there are two alternatives for the court, as I see it, today. One is to reject the plan and the other is to sanction the plan.

16 The other three objectors, I might say, are two lien claimants and a present mortgage-holder. All three seek rejection of the plan, although it would appear that the lien claimants would be satisfied if other lands were to be

substituted for certain lands constituting security under the plan of arrangement. Similarly, Maritime Life, the mortgage-holder, presumably would be satisfied if changes in the plan were made to provide them with a second mortgage for the full amount of any deficiency on the sale of the property on which they presently hold the first mortgage. All of those changes would amount to substantive changes and they would require the consent of other creditors, most essentially the consent of the bank, and for that reason I don't feel that it would warrant sending the matter back to further meetings of the secured creditors to try to have any changes effected there.

17 So what we really come down to is whether the plan as it stands should be rejected or approved. The general principles governing the question of sanction or otherwise have been referred to several times already today and they have been described by Trainor J. in *Re Northland Properties Ltd.* [(1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.)], the 1989 British Columbia case, at pp. 182-183:

In the exercise of its discretion the Court should consider three criteria, which are:

1. There must be strict compliance with all statutory requirements.

2. All material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the Companies' Creditors Arrangement Act.

3. The plan must be fair and reasonable.

18 Those same principles, of course, were stated in, as I recall, essentially the same terms in an earlier judgment in a case in 1934, I believe it was, by Middleton J.A. in Ontario, and I can't remember the name of the case and I may be wrong about the name of the judge, but in any event it was the year 1934 and it was only two years after the *Companies' Creditors Arrangement Act* had been initially passed or enacted, and he did so there in terms which were essentially what Trainor J. says today [*Re Dairy Corp. of Canada Ltd.*, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.)].

19 In the instant case, I have followed closely this application from the beginning and through the various stages of hearings, all of which I have presided over. I have tried to be meticulous in ensuring that the Act was followed and that the various steps prescribed in the literature and by other court precedents have been followed, and I am satisfied that there has been strict compliance with the statutory requirements throughout. Similarly, I am satisfied that the material filed and the procedures carried out suggest that nothing has been done which is not authorized by the Act. I am unaware that there has been any deviation from the Act at all. There may have been very minor departures, but they have not amounted to anything of substance. I don't take all the credit for that surveillance over the case myself, because I have had the cooperation of not only the solicitors for the applicant but also the solicitors for all parties represented throughout, and if I forget to say so later I acknowledge that now and I do thank counsel for their assistance.

20 Now, the third point is, of course, the question of whether the plan is fair and reasonable. I don't intend to go into all of the ramifications of what is fair and reasonable. It's been pointed out that fair and reasonable doesn't mean equal; it means equitable in essence, and I adopt that interpretation. For instance, in the case of Maritime Life, the position of that company has been compared to that of Central Guaranty. While their positions are in some respects similar, they're certainly not identical. Maritime Life was a company which was much more undersecured in its original position than was Central Guaranty, at least as far as dollar values were concerned, and the two companies can't be treated as being totally equal. I don't feel here that any injustice would result to Maritime Life through the sanctioning of this plan.

21 No plan is going to be perfect. It is not going to look after every eventuality, but one has to decide is it inherently fair, is it inherently reasonable, is it inherently equitable, and I feel that the plan here is, and I feel that it's equally fair and equitable, even to those two remaining lienholders who have objected to it.

22 A great deal of thought has gone into the plan. If the proposition put forward by Mr. Bogart in the affidavit filed this morning is correct, or is given effect to, then Maritime Life will perhaps come out of it far better than Central Guaranty may. It's not possible to say that that will happen; they may come out of it a great deal worse, but I don't think in any sense it can be said that anyone has been treated unduly harshly here under this plan. Certainly all of the creditors, it seems to me, with the possible exception of one of the secured creditors, whom I mentioned this morning, seem to be coming out of it better than they would have done had the other course of the company going into bankruptcy occurred, and even for that one creditor there are probably advantages which far outweigh any disadvantages here.

23 In the case of Maritime Life, that company I would say is probably going to be substantially better off than it would have been had there been no reorganization effected, and I would say the same about the other companies which have objected. I respect their right to object and to have these matters raised, but I can only say that I have looked carefully at the matter, I have read practically all of the material put before me at the various stages of the application and particularly the very voluminous amount of material that has been filed with me re this hearing, and I think I have a reasonably good grasp of what it's all about and I'm not concerned when I come to the finding that it is fair, equitable and reasonable.

24 I don't think really it's necessary for me to say anything more than that. It follows quite naturally from what I have said that I do intend to make an order sanctioning the plan of arrangement. I will at the same time extend the prohibition against bringing actions against the company until the settlement date has arrived. That will give a short breathing period here and give an opportunity for giving effect to the plan of arrangement and getting its implementation underway.

25 As to the Irving Oil application for leave to file its mechanics' lien, I will only say that it may do that, if it so desires, at any time commencing now. In doing that I am not saying that it's a valid lien claim; I simply say you have the right to a certain lien claim by filing and commencing your action.

26 Re Gerling Global, I don't think there's any problem there. I am going to remove the restriction as of now and imposed earlier by my order against you as far as taking any action to collect on your judgment against Wandlyn Consolidated Ltd. I do urge on Gerling Global the use of some discretion in moving in that regard, not to do so unduly so as to prejudice the chance to get this plan of arrangement on its feet and get it going, but I'm not placing any restriction on that at the present time. I indicated earlier that on reflection I had some misgivings as to my authority perhaps to impose that restriction, although I did it in good faith at the time and I would follow the same course of action again.

27 I don't think it's necessary for me to deal with any other points except, Mr. Sargeant, you presumably will want to get a formal order drawn. If you would draw one incorporating my rulings on the matter, these brief rulings just at the end. You don't have to cover all the points. Are there any salient points that I should be dealing with that I haven't?

28 MR. SARGEANT: My Lord, the various prayers in the notice of motion, if you are saying that they are to be addressed in the draft order, then I have nothing else.

29 THE COURT: Well, have I addressed them all?

30 MR. SARGEANT: Not directly, My Lord, no.

31 THE COURT: What haven't I addressed?

32 MR. SARGEANT: Item number two with respect to funds on deposit at the Bank of Montreal, funds that are required for both the settlement and for working capital purposes. Those are funds that were set up in that special account authorized by your order back in July.

33 THE COURT: That's right, and you are asking what be done with that?

34 MR. SARGEANT: That the company be allowed access to those funds.

35 THE COURT: As of now.

36 MR. SARGEANT: As of now.

37 THE COURT: I could see no objection to that being ordered.

38 MR. SARGEANT: The third item really ties in with the first, that is, both sanction and implementation if we proceed with implementing the plan.

39 THE COURT: I think that speaks for itself.

40 MR. SARGEANT: The fourth item deals with the further directions vis-à-vis mechanic lien settlements.

41 THE COURT: You can put that in the order, but I'm not giving encouragement to your coming back to the court for further instructions. Hopefully, implementation of the plan will proceed without that being necessary. If there are any further matters that have to be referred to the court, I'm available, or somebody else is, to deal with it.

42 MR. SARGEANT: It is our intention to try and facilitate a resolution of it without involving the court. And then I think as a safety net there should be some opportunity to revisit the court as problems might arise, which is the fifth item. Maybe it isn't necessary per se.

43 THE COURT: Again, you can put that, too, in your order if you wish.

44 The only other thing I wish to do before we conclude is to thank the monitor for his assistance through the matter. His part in this whole thing perhaps hasn't ended right here because he still — When I say he, I don't mean just Mr. O'Neil, but his colleagues in Price Waterhouse as well. Mr. O'Neil particularly, perhaps, has been a great help to the court and you still have some functions, I believe, under the plan of arrangement, so good luck to you in that regard.

45 I want to thank again all counsel involved, even though I did earlier. They have all been of great assistance here and I must say that I think the whole application and its consideration, quite apart from the outcome, has gone very, very smoothly. Applications of this type are complicated. I find that counsel have been a great help. Mrs. King's brief was an excellent specimen of what a legal brief should be on this subject and I hope other counsel will keep it as a model to go by in future similar cases. But all the briefs were excellent and I thank

counsel for their assistance.

Order accordingly.

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