

CITATION: Mobilicity Group (Re) 2014 ONSC 5776
COURT FILE NO.: 13-CV-16274-OOCL
DATE: 20141006

**SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST**

IN MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985, c.C-36
AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
8440522 CANADA INC., DATA & AUDIO-VISUAL ENTERPRISES WIRELESS
INC., AND DATA & AUDIO-VISUAL ENTERPRISES HOLDINGS
INCORPORATION

Applicants

BEFORE: Newbould J.

COUNSEL: *Ari Y. Sorek and Roger P. Simard*, for Amdocs Canadian Managed Services, Inc.
and Amdocs Software Systems Limited
Orestes Pasparakis and Evan Cobb, for the Applicants
Leanne Williams, for the Monitor
Caroline Descours, for the Ad Hoc Committee of Noteholders and the DIP
Lenders

HEARD: October 2, 2014

ENDORSEMENT

[1] Amdocs Canadian Managed Services, Inc. and Amdocs Software Systems Limited (“Amdocs”) have applied for specific performance of a Master Services Agreement (“MSA”) between Amdocs and the applicant Mobilicity. The essential argument of Amdocs is that post-filing services are being provided by Amdocs to Mobilicity and therefore should be paid for in

spite of the stay ordered in the Initial Order under section 11 of the CCAA on September 30, 2013.

[2] Amdocs seeks to avail itself of the exception to the stay of proceedings provided by section 11.01(a) of the CCAA which provides for payment to suppliers for the provision of post-filing goods, services or licensed property.

[3] Pursuant to the MSA, Amdocs provides certain outsourced services related to Mobilicity's subscriber activities. Before these services could be provided, a software system customized to Mobilicity's specifications (as defined in the MSA, the Amdocs System) had to be constructed.

[4] The business purpose of the MSA is two-fold:

- (a) To set out the terms by which Amdocs would design, develop and implement the Amdocs System, defined in the MSA as the Implementation Services.
- (b) To set out the terms for the provision of ongoing services, including billing, payment processing, data centre operation, network control and application support, defined in the MSA as the Outsourcing Services.

[5] To reflect the dual purpose of the MSA, the agreement provides for two categories of payments by Mobilicity to Amdocs. The parties agreed that:

- (a) an implementation fee of \$11,855,000 would be paid for the implementation services; and
- (b) ongoing monthly fees, totalling \$54,119,920, are to be paid throughout the term of the MSA for the Outsourcing Services. The term was originally from September 2009 to May 2016 but was later extended to December 2018.

[6] The ongoing monthly fees are being paid. The contention of Amdocs is that the implementation fee covers the use of licences provided to Mobilicity under the MSA and that

Mobilicity is required to pay these fees so long as the balance of the outstanding implementation fee has not yet been paid.

[7] Amdocs in its material also contended that other payments referred to as a reconciliation fee payment and a work order payment should be paid. However these claims were not raised in oral argument and I take it that these claims are not being pursued.

[8] As stated, Amdocs relies on the exception to a section 11 stay provided for in section 11.01(a) of the CCAA which provides:

11.01 – **Rights of suppliers** – No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made;

[9] Section 11.01(a) was enacted to alleviate the unfairness that would result if a person was forced to provide valuable consideration to a company under CCAA protection without compensation. It has been held that section 11.01 of the CCAA is to be narrowly construed. In *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 68, aff'd (2009), 59 C.B.R. (5th) 23 (C.A.), Morawetz J. stated:

In my view, section 11.01 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.01 should be narrowly construed....On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

[10] The MSA, like most agreements seen these days, is unfortunately full of defined terms and many schedules that require the flipping of many pages to understand what is provided. Mr. Sorek likens the MSA to a Russian doll. He may be right, but on my reading of the MSA, when one gets down to the bare bones of this particular doll, what Amdocs is seeking is payment for services provided before the Initial Order of September 30, 2013 and thus not permitted.

[11] Amdocs relies on the definition of implementation fee to argue that it covers the use of the licences provided by Amdocs to Mobilicity for the duration of the agreement. Schedule 5, section 1.1 of the MSA provides that an implementation fee of \$11,855,000 would be paid for the implementation services:

1.1 As provided in Sections 12.1.2 and 12.1.3. of the Agreement, Amdocs shall charge Wireless [Mobilicity], and Wireless shall pay Amdocs, for the Implementation Services for the license and implementation of the customized Amdocs System at Wireless, as specified in Schedule 7, the sum of CAD \$11,855,000 ("Implementation Fee") of which the initial term license fee of the modified software is CAD \$10,000,000. This software will be used in the outsourcing services provided by Amdocs to Wireless. ... (Underlining added).

[12] Amdocs relies on the underlined portion of section 1.1 to contend that the implementation fee covers the use of the license during the term of the MSA to 2018. However, taken the agreement as a whole, I do not think this is a reasonable interpretation of the MSA.

[13] Mr. Pasparakis contends, and I agree, that the implementation services in the MSA are the historical services to set up the system. Under section 2.2.1 Amdocs was to provide services for the implementation of the customized Amdocs Systems as specified in a schedule 7. Schedule 7 provided for the implementation services to be completed by the date scheduled in Schedule 11, which was April 30, 2010. The Amdocs Systems, being all of the systems covered by the MSA, were implemented before the section 11 stay, and thus Amdocs is not entitled to now be paid during the stay period for anything covered by the implementation services provided prior to the stay period.

[14] By its own term, an implementation fee is a charge for implementing something, in this case for setting up the Amdocs computer systems under contract with Mobilicity. An ongoing licence would in ordinary parlance not be considered to be part of the implementation of the Amdocs system.

[15] The MSA provides in section 2.1 of schedule 5 that ongoing monthly fees, totalling \$54,119,920 by the end of the agreement, are to be paid throughout the term of the MSA for the outsourcing services. The outsourcing services include everything that is being provided by

Amdocs to Mobilicity. Amdocs contended that the implementation fee was to cover payment for maintenance work during the term of the agreement, and thus for work carried out after the stay provided for in the Initial Order. That is not the case. Article 5 of schedule 8 specifically contemplates that the outsourcing services for which monthly fees are paid includes all ongoing support services related to the Amdocs system, including any activities required to maintain, update or service the Amdocs System:

5.1.1 Amdocs' ongoing support Services ("OGS") included in the Outsourcing Services encompasses the activities required to maintain, update and service the Managed Systems.

[16] Further, section 8.1 of the MSA provides for the grant of the licence to Mobilicity by Amdocs in return for the payment of the fees for the outstanding services. It provides:

8.1.1 Subject to the terms and conditions of this Agreement and payment of fees and amounts for the Outsourcing Services which are or may become due pursuant to this Agreement or Orders hereunder, Amdocs hereby grants to Wireless [Mobilicity] a non-transferable right and license during the Initial Term, to use the Amdocs System and Product Documentation in conjunction with the Outsourcing Services solely for Wireless' telecommunication business purposes in the Territory and in order to receive Amdocs' services. This software, as modified for Wireless' specific requirements, is intended for Wireless' sole use. (Underlining added).

[17] The licence is therefore being paid for on an ongoing basis by the payment of the monthly outsourcing services fees. It is not being paid for by the implementation fee. The implementation fee of \$11,855,000, including the \$10 million for the initial term licence fee, was not to pay for the ongoing licence being used by Mobilicity. The fact that the implementation fee was partly deferred over several months beyond the end of the implementation period of April 30, 2010 to December 2014 does not change that. The reason for the delay of the implementation fee was that Mobilicity did not have sufficient resources to pay the implementation fee in full at the time those services were provided. Therefore, the parties agreed on a deferred payment plan in which the implementation fee would be paid over a period of several years as a deferred liability in accordance with a payment schedule set out in section 12 of Schedule 5. That schedule called for the balance of the implementation fees to be paid at irregular dates ending in October 2015.

[18] I do not read section 12.1.3 of the MSA as changing the conclusion that the licence from Amdocs is being paid for by the fees for the outsourcing services. That section provides that in consideration for the granting of the licence, Mobilicity shall pay Amdocs the initial term licence fee (included in the implementation fees). The granting of the licence is not the use of the licence, and it is consistent with the entire agreement that the implementation fee for implementing the agreement includes a fee for the granting of the licence. It is consistent with a harmonious reading of all of the terms of the agreement, including section 8.1.1 of MSA which provides for the payment of monthly outsourcing fees as a condition of the licence during the term of the agreement.

[19] Mobilicity is hardly using the licence for nothing. The service fees to be paid during the term of the agreement total \$54,119,920. The total implementation fees under the agreement were \$11,855,000, and were partly deferred past the implementation date to be paid at different times in accordance with the schedule in the agreement. Implementation fees paid to the time of the Initial Order totalled \$8,167,495, leaving only \$3,687,505 in deferred implementation fees unpaid for the term of the agreement running to December 2018, or roughly 5.6% of all payments to be made under the agreement.

[20] In the result, the motion by Amdocs to be paid further implementation fees is dismissed, as is the motion to be paid a reconciliation fee payment and an amount for additional services under a work order. Mobilicity is entitled to its costs. If these cannot be agreed, Mobilicity may file brief written reasons along with a proper cost outline within 10 days and Amdocs shall have 10 further days to file brief written reasons in reply.



Newbould J.

Date: October 6, 2014