COURT FILE NO.: 03-CL-5145
DATE: 20071120

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a Plan of Compromise or Arrangement of Ivaco Inc. and the Applicants Listed in Schedule "A"

BEFORE: Justice Cumming

COUNSEL: ***Peter Howard*** and ***Ashley Taylor***, for the Monitor Ernst & Young Inc. and for the Applicants

Derek J. Bell and ***Raj Sahni***, for the Informal Committee of Noteholders

Carole* Hunter** and ***Graham Phoenix, for National Bank of Canada

Dan MacDonald, for Bank of Nova Scotia

D. Ward, for Heico Companies

Geoff R. Hall, for QIT -Fer et Titane Inc.

DATE HEARD: November 19, 2007

ENDORSEMENT

The Motion

[1] In its capacity as the Court–appointed Monitor pursuant to the *Companies' Creditors Arrangement Act* ("*CCAA*"), Ernst & Young Inc., in respect of the Applicants (Ivaco Rolling Mills Inc., Ifastgroupe Inc., IFC (Fasteners) Inc., Ifastgroupe Realty Inc., Decap (1985) Corporation, Florida Sub One Holdings, Inc., and 3632610- collectively referred to as "Ivaco"), moves for orders sanctioning and approving (collectively, the "Sanction Order") the so-called IRM Plan, Ifast Plan and IFC Plan, being plans of compromise or arrangement (collectively, the "Plan") to the "Affected Creditors" of the Applicants filed with this Court October 23, 2007.

[2] Major unsecured creditors of Ivaco include III Canada Acquisitions Company, Sivaco Wire Group 2004 L.P., Ifastgroupe 2004 L.P., Ivaco Rolling Mills 2004 P., Heico Holding Inc. and the Heico Companies, L.C. (collectively "Heico").

[3] Heico entered into asset purchase agreements ("APA"s) with Ivaco dated August, 2004, with Court approval being given August 18, 2004 and the closing of the asset purchases taking place December 1, 2004. On the closing of the acquisition of the Ivaco businesses Heico paid some $275 million to the Monitor.

[4] Heico raises a novel issue in objecting to the proposed Sanction Order, challenging the statutory authority for jurisdiction under the *CCAA*.

[5] In my view, and I so find, the Plan meets the requirements of fairness and reasonableness and is to be approved. The Motion is granted. My reasons follow.

Background

[6] There have been a considerable number of Orders made in these proceedings: Reasons of Farley, J. heard August 4, 2005, Reasons of Ground , J. dated December 15, 2006, Orders of Ground, J. dated November 7, 2006 and April 20, 2007, and Reasons of Ground, J. released July 25, 2007 with two Orders by Ground, J. dated July 25, 2007.

[7] The Applicants were granted protection from their creditors under the *CCAA* September 16, 2003. This matter was case-managed by Mr. Justice Ground until his recent retirement.

[8] Meetings of Affected Creditors were held November 13, 2007 in Toronto. The three plans were approved by almost all the Affected Creditors representing almost all the aggregate value of Proven Voting Claims.

[9] No Affected Creditor objects to any provision of the draft sanction orders other than the putative "Affected Creditor" Heico. Heico objects by way of oral submissions to the wording of a provision (section 28 of the Sanction Order in respect of the IRM Plan, section 25 of each of the other two plans) as proposed by the Monitor.

[10] Heico claims it is not properly an "Affected Creditor" as set forth in the plans of compromise and arrangement. I disagree.

[11] Section 1.1 (4) of the Plan defines "Affected Claims" as meaning "all Claims" other than certain "Unaffected Claims" (irrelevant to the matters at hand) as defined in s.3.1. Heico filed a Proof of Claim albeit for an unspecified amount.

[12] Section 1.1(11) defines "Claim" expansively to include, *inter alia*, a "Post-Filing Claim" and "Subsequent Claim" and any other claim that would have been provable if the Applicant had become bankrupt on the Valuation Date, being February 28, 2007.

"Post Filing Claim" is defined by s.1.1 (46) as meaning

> …a Claim that arises from or is caused by, directly or indirectly, any action taken by [an Applicant] from and after the filing Date including the repudiation or termination by [the Applicant] after the Filing without limitation, any lease, customer contract or employment agreement);

[13] A "Subsequent Claim" is defined by s. 1.1 as meaning a "Post–Filing Claim that arises from and after June 18, 2004.

[14] Section 6 addresses the "Treatment of Affected Creditors".

[15] Sections 9 and 10 of the Sanction Order speak to the effect of Plan implementation with the result that holders of Affected Claims are left only with the right to receive distributions in accordance with the Plan.

[16] Section 28 of the IRM Sanction Order (with the identical wording in s. 25 of the Orders relating to the Ifast Plan and the IFC Plan) provides as follows:

> 28. THIS COURT ORDERS that any Claim of III Canada Acquisition Company, Sivaco Wire Group 2004 L.P., Ifastgroupe 2004 L.P., Ivaco Rolling Mills 2004 L.P., Heico Holding, Inc. and The Heico Companies, L.C.C. (collectively, "Heico") against IRM, if any, is limited to claims determined to be a valid reduction or set-off of the amounts that Heico owes IRM and any such claim for reduction or set-off is not compromised by the Plan:
>
> (a) with respect to the Applicants' claim for approximately $53 million plus interest pending final determination of the matters in Court of Appeal for Ontario Docket No. M35582/C47542; and
>
> (b) with respect to the Applicants' claim for approximately $6.7 million plus interest pending a final determination of the trial of an issue ordered by Justice Ground in Court File No. 03-CL-5145

[17] In his Reasons for Decision released December 15, 2006 Ground, J. dealt *inter alia* with a motion of Heico seeking an order lifting the stay in these proceedings and granting leave for Heico to commence an action against Ivaco seeking damages for negligent and/or fraudulent misrepresentation, breach of contract and breach of duty to act in good faith and seeking certain declaratory relief.

[18] Ground, J. authoritatively dismissed Heico's motion to lift the stay, finding that Heico's Statement of Claim for its proposed action did not set forth a reasonable or even tenable cause of

action. (See paragraphs 22 to 31 of Reasons for Decision. Ground, J. reiterated these reasons in his later Reasons dated July 25, 2007.) Heico unsuccessfully sought leave from the Court of Appeal to appeal the "Dismissal Order" of Ground J. (the terms of which had been settled by him at a hearing January 5, 2007.)

[19] Farley, J. in his Reasons pursuant to a hearing August 4, 2005, in respect of the issue of interpreting Article 2.12 of the APAs, had held that the determination as to Adjustments by the Expert appointed under the APAs becomes the "final Adjustments".

[20] In his December 15, 2006 Reasons, Ground, J. also dealt with the cross-motion of the Monitor for an order directing KPMG as the Expert to calculate the Adjustments. Ground, J. directed KPMG, as a first step, to do a calculation of the working capital adjustments "to determine the extent of the differences between the calculations based upon the Ivaco approach and the Heico approach."

[21] After an exhaustive review of the issues in his July 25, 2007 Reasons, Ground, J. concluded (at paragraphs 34 and 35) that KPMG had properly prepared its Report as Expert in terms of the accounting principles and process employed, and ordered (Order dated July 25, 2007) Heico to pay the Monitor $52,887,000." being KPMG's calculation of the working capital adjustment", plus interest. On October 26, 2007, Heico unsuccessfully sought leave to appeal the July 25, 2007 Order of Ground, J. implementing his July 25, 2007 Reasons.

[22] In his Reasons dated December 15, 2006, Ground, J. left open one matter (paragraph 21 of his Reasons) to be determined by way of a trial of an issue (see s. 2 of the Order dated November 7, 2006), being the Applicants' claim for a further approximate $6.7 million plus interest with respect to the calculation of the net working capital adjustments. This outstanding matter is now reflected in s. 28 (b) of the above-referenced Sanction Order.

[23] If Heico seeks and obtains leave from the Supreme Court of Canada to appeal, and then successfully appeals, the dismissal of its appeal by the Court of Appeal of the July 25, 2007 Order of Ground J. ordering Heico to pay the Monitor $52, 887,000. plus interest, then Heico may be able to establish a reduction or set-off as against part or all of whatever monies Heico may be obliged to pay the Monitor. This possibility is the reason underlying s. 28 (a) of the above-referenced Sanction Order.

[24] In my view, Heico's oral submissions at the sanction order hearing, in disagreeing with s. 28 of the above-referenced Sanction Order, are founded in its refusal to acquiesce in the findings of Ground, J. (the Dismissal Order) that there should not be a lifting of the stay in respect of Heico's seeking to bring a claim against Ivaco and the findings of Ground, J. (July 25,2007Order) that Heico is obliged to pay the Monitor at least $52,887,000. by reason of the KPMG calculations.

[25] Heico now takes the position it is not an ``Affected Creditor`` within the meaning of the Plan. For the reasons given above, I find Heico is an "Affected Creditor" within the defined terms and meaning of the Plan.

[26] Heico also takes the position that it cannot be made an Affected Creditor because, Heico asserts, there is not jurisdiction under the *CCAA* to embrace a Post-Filing Creditor. Moreover, Heico claims it is unreasonable and unfair for any post-filing creditor to have its claim as a creditor subject to a plan of compromise or arrangement. I disagree.

[27] First, the *CCAA* does not limit its embrace in respect of creditors to pre-filing creditors. Section 2 of the *CCAA* provides that an "unsecured creditor" [like Heico] means any creditor who is not a secured creditor without any suggestion of a temporal limitation. Likewise, section 4 speaks to a compromise between a debtor company and its unsecured creditors or any class of them without any suggestion of temporal limitation. In providing for compromises to be sanctioned by the Court section 6 refers to approval by " a majority in number representing two-thirds in value of the creditors, or class of creditors…present and voting…" without qualification by way of a temporal limitation as to when the person became a creditor.

[28] Second, I infer from a public policy standpoint that there is not any *a priori* reason for excluding post-filing creditors from the reach of the *CCAA*.

[29] Heico submits it is unfair to include a post-filing creditor's claim as subject to a restructuring compromise. However, Heico knew full well that it was dealing with Ivaco while it was under *CCAA* protection. Heico, a sophisticated enterprise, with legal advisors, chose in its perceived self-interest to enter into a contractual arrangement to purchase assets of Ivaco. Heico could have sought to bargain for protective contractual provisions seen to be appropriate and sought Court approval for those provisions. Why would public policy restrict the forming of a commercial relationship between a debtor subject to the *CCAA* and a party seeking to contractually bargain with that debtor with knowledge that the debtor is under *CCAA* protection? The purpose of the *CCAA* is to facilitate restructuring of debtor businesses with the support of the requisite number of creditors.

[30] Heico further submits there is no precedent for including a post-filing creditor within the reach of the *CCAA* and a plan of arrangement or compromise approved by the requisite number of creditors.

[31] The situation at hand is relatively novel in terms of the case law. It is noted in *Stelco Inc. Re* (2005), 15 C.B.R. (15^{th}) 283 (Ont. S.C.J.) a creditor brought an application for an order that the claims procedure did not bind a creditor who had entered into a contractual relationship after the debtor, Stelco, obtained protection under the *CCAA*.

[32] However, Farley, J. did not find it necessary to grant the creditor the requested order because he found on the factual record that the debtor had already in effect opted not to compromise the creditor's claim. The claim was not a "restructuring claim" under the language of the Claims Order but rather continued to be stayed and was to be dealt with in the ordinary course of litigation after Stelco's *CCAA* protection was terminated.

[33] It is also noted in the case at hand that should it be established by Heico through the appellate process Heico is entitled to a set-off, s. 28 of the above-referenced Sanction Order provides that there is not any compromise through the Plan in respect of the quantitative set-off.

[34] In my view, Heico's oral submission in the hearing at hand to approve the Sanction Order is an indirect collateral attack upon the previous decisions of Ground, J. Heico's real and continuing complaint is that it cannot bring a claim for damages against Ivaco. As noted above, this issue has been disposed of with finality by Ground J. December 15, 2006 whose decision has been upheld on appeal by the Ontario Court of Appeal. Subject to a successful further appeal to the Supreme Court of Canada, this issue has been concluded.

Disposition

[35] As stated at the outset, the Motion is granted, and the three Sanction Orders are signed and to be issued, for the reasons given.

Peter A. Cumming J.

CUMMING J.

DATE: November 20, 2007