COURT FILE NO.: 03-CL-5145
DATE: 20070725

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended	) *Peter Howard*) *Alex Rose*) for the Applicants/Monitor
AND IN THE MATTER OF a Plan or Plans of Compromise or Arrangement of Ivaco Inc. and Related Entities	) *Bill Burden*) *David Ward*) for Heico Companies
	) *Dan MacDonald*) for Bank of Nova Scotia
	) *Graham Phoenix*) for National Bank of Canada
	) *Derek J. Bell*) for the Noteholders Committee
	) *Geoff R. Hall*) for QIT
	) *Jason Wadden*) Superintendent of Financial Services
	) **MOTION HEARD:** June 4 and 5, 2007

GROUND J.

REASONS

[1] Due to the nature of this proceeding, this motion brought by Ivaco Inc. and related entities ("Ivaco" or the "Applicants") through the Monitor, Ernst & Young Inc. (the "Monitor") has gone through several incarnations and the relief sought in this motion which is now before the court is for:

(a) an order that, as a condition precedent to 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. (collectively "Heico"), filing a Statement of Defence in the trial of issues directed by this court:

(i) Sivaco Wire Group 2004 L.P. and/or Heico Holding, Inc. and The Heico Companies, L.L.C. are directed to pay to the Monitor on behalf of the Applicants $7,853.00, plus interest to the date of payment at prime less 1.5%, compounded monthly;

(ii) Ifastgroupe 2004 L.P. and/or Heico Holding, Inc., and The Heico Companies, L.L.C. are directed to pay to the Monitor on behalf of the Applicants $24,542,000, plus interest to the date of payment at prime less 1.8%, compounded monthly;

(iii) Ivaco Rolling Mills 2004 L.P. and/or Heico Holdings, Inc. and The Heico Companies, L.L.C. are directed to pay to the Monitor on behalf of the Applicants $20,929,000, plus interest to the date of payment at prime rate less 1.8%, compounded monthly; and

such amounts to be received by the Monitor within five business days of the date of the Order and to be available for immediate distribution by the Monitor to the creditors of the applicable estates.

or in the alternative, an order directing Heico to pay the amounts described in subparagraphs (a)(i) to (a)(iii), above, to the Monitor and ancillary directions and advice as to how to address the failure by Heico to pay the amounts provided for in the APAs and the KPMG final report.

Background

[2] Pursuant to three separate Amended and Restated Asset Purchase Agreements (the "APAs"), Heico purchased the businesses formerly owned by Ivaco. Section 2.11 of the APAs provided that the purchase price to be paid by Heico under each of the APAs was subject to adjustment based on a number of factors, including the difference between the Working Capital (as defined therein) of the businesses as of the closing of the transaction which was to be set forth at Exhibit "C" to the APAs compared to "Estimated Working Capital" as of September 30, 2004 which was set forth at Exhibit "B" to the APAs.

[3] As the Exhibit "C"s were prepared and delivered by Ivaco, Section 2.12 of the APAs provided Heico with a means of disputing the calculation of the adjustment to the purchase price by having KPMG review those items in dispute between the parties for the purpose of calculating the Adjustments (as defined in the APAs).

[4] The relevant provisions of Sections 2.11 and 2.12 of the APAs are as follows:

2.11 <u>Delivery of Exhibit C</u>

As promptly as practicable following the Closing Date, and in any event within 23 days from the Closing Date, the Seller will cause to be prepared and delivered to the Purchaser (i) Exhibit C reflecting the Assumed Liabilities, Working Capital and Capex Expenditures and other line items on the form of

Exhibit C annexed hereto as at the Effective Time of Closing, prepared in accordance with Canadian GAAP and, to the extent consistent with Canadian GAAP, applied on a basis consistent with the past practice of the Seller and each other Selling Party and prepared, to the extent Section 2.10 applies, in accordance with Section 2.10 and, in the case of inventory, based on a physical count of Inventory performed on the Closing Date jointly by the Seller and the Purchaser in accordance with the Selling parties' past practices (except that with respect to the Seller's finished goods Inventory, the physical inventory count shall be conducted over one or more days not more than 10 Business Days prior to Closing, in a manner that least disrupts the operations of the Selling Parties and such physical counts will be updated to the Effective Time of Closing using rolling inventory count methods) and a calculation of the Adjustments based thereon and (ii) a copy of the valuation prepared in support thereof. The amount (each an "Adjustment" and collectively the "Adjustments") by which:

(i) the Working Capital as shown on Exhibit C exceeds the Estimated Working Capital shown on Exhibit B will be a positive Adjustment (and any shortfall a negative Adjustment); and

(ii) the Cash Amount as shown on Exhibit C exceeds the Estimated Cash Amount reflected on Exhibit A will be a positive Adjustment (and any shortfall a negative Adjustment).

If as a result of the process specified in this Section 2.11 or in Section 2.12, the basis for calculation and preparation of Exhibit C differs from the basin on which Exhibits A and B were calculated and prepared, then Exhibits A and B shall be deemed to be amended so as to reflect an identical basis for calculation as Exhibit C. Notwithstanding any change to Exhibit A made in accordance with the foregoing sentence, the Purchaser shall receive credit for all amounts actually paid as the Estimated Cash Amount as shown on the original version of Exhib9it A prepared and delivered hereunder; which amounts will be taken into consideration when calculating an amount to be paid to or by the Purchaser in connection with Section 2.14.

2.12 Determination of Working Capital and Adjustments

The Purchaser may dispute the calculation of the Adjustments, as reflected on Exhibit C by notice (the "Objection Notice") in writing given to the Seller within 10 Business Days following the delivery of such exhibit to the Purchaser. Such Objection Notice shall specify, in detail, the basis for the dispute of the Adjustments to Exhibit C. If the Purchaser does not deliver the Objection Notice within the aforementioned 10 Business Day period, then the calculations of the Seller set out in Exhibit C shall be deemed to be conclusive and binding on the parties. If the dispute is not resolved promptly by agreement, and in any event within 20 days of the delivery of the Objection Notice, either party may request KPMG LLP or its success firm (the "Expert")

> to designate a senior partner in its Hamilton office, with unrestricted access to KPMG LLP's professional practice department located in its Toronto office, to promptly review this Agreement and the disputed items or amounts for the purpose of calculating the Adjustments, acting as an expert and not as an arbitrator. In accepting such appointment, the Expert shall be deemed to have been instructed to deliver to the Seller and the Purchaser, as promptly as practicable and in any event within 15 Business Days of being appointed, a report setting forth any required calculations, including the Adjustments as determined by the Expert. Such report shall be final and binding upon the Seller and the Purchaser. The cost of such review and report shall be borne equally by the Seller and the Purchaser. Upon agreement with respect to the matters in dispute, if any, or upon a decision of the Expert with respect to the matters in dispute, such amendments shall promptly be made to Exhibit C as may be necessary to reflect such agreement or such decision, as the case may be. In such event, reference in this Agreement to Exhibit C shall mean Exhibit C, as so agreed or decided, as the case may be and the Adjustments as decided by the Expert or as agreed by the parties shall be deemed to be the final Adjustments for all purposes of this Agreement.

[5] KPMG was not able to begin its work immediately. Heico applied to Farley J. seeking a declaration that KPMG was in law performing a "judicial, adjudicative and/or arbitral function". Farley J. dismissed the application, concluding that KPMG is acting as an "expert" in a "non-arbitrary" [sic] role. In Reasons dated June 2, 2005 and August 4, 2005, Farley J. held that an expert's report (with the expert acting *qua* expert) may be, and in this case is, "final and binding". Indeed, he held that the timelines included in Article 2.12 indicated that KPMG was acting as an expert as "it appears that both parties wished to have a sooner, rather than later, report from KPMG".

[6] On November 16, 2005, a protocol and timeline governing the Expert's work (the "Protocol") was approved by Farley J. Pursuant to the Protocol, the parties submitted their initial written submission to KPMG on February 17, 2006. The Protocol provided that the Expert could conduct interviews and submit written questions and requests for information and relevant documents to the parties, but that the Expert would have only 15 days from the end of the parties' written submissions to deliver its Final Report. The interviews referenced in the Protocol and described at Appendix C to the KPMG Final Report began in February 2006, but the interview process was halted a number of times and was not concluded until late 2006.

[7] Heico bought a motion, returnable November 7, 2006, seeking leave to lift the stay to allow it to bring a $75 million action for misrepresentation, breach of contract and breach of duty to act in good faith as set forth in a proposed statement of claim. In my December 15, 2006 Reasons for Judgment, I stated at paragraphs 24 to 29 as follows:

> To the extent that the New Claim encompasses the torts of negligent misrepresentation and fraudulent misrepresentation, I fail to see how Heico could establish any damages flowing from the commission of such torts which

would be different from the compensation to which Heico would be entitled as a result of adjustments to the estimated working capital to determine the actual working capital as at the closing date. In addition, it appears to be acknowledged by Heico that there are no representations in the APAs other than those contained in Article 3, none of which relates to the estimated working capital.

To the extent that the New Claim is based upon breach of contract, I am uncertain as to the contract provision which is alleged to have been breached. The New Claim alleges that misleading or inaccurate information was provided or used in the preparation of the estimated net working capital. There is not, so far as I can determine, any provision in the APAs specifying how the estimated working capital is to be determined, but simply a reference to Exhibit B setting out the components of the estimated working capital and the total estimated working capital. Again, even if misleading or inadequate information was used for the purposes of the estimated working capital, it would appear to me that any damages resulting from the use of such misleading or inadequate information would be incorporated into the compensation to which Heico would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as of the closing date.

To the extent that the New Claim is based upon a breach of a duty to act in good faith, I am not satisfied that the law of this province recognizes any duty of good faith owed between parties negotiating a commercial contract beyond what is contained in the contract. Once again, however, it would appear to me that if such duty could be found to exist, and has been breached, any damages which Heico might have incurred as a result of such breach, would be incorporated into the compensation to which it would be entitled as a result of the adjustment of the estimated working capital to the actual working capital as at the closing date.

I must, accordingly, conclude that Heico would be unable to establish any damages as a result of the misrepresentation, breach of contract and breach of duty to act in good faith constituting the New Claim in the proposed action.

The balance of the claims and the relief sought in the Statement of Claim for the proposed action appear to me to relate solely to issues surrounding the manner of calculating the working capital adjustment and the interpretation of the contractual provisions and the Reasons of Farley J. relevant thereto and will either be resolved as between the parties upon the receipt of the KPMG report or resolved pursuant to a directed trial of issues as outlined above.

Accordingly, in my view, the Statement of Claim for the proposed action does not set forth a reasonable, or even tenable, cause of action and I am not prepared to lift the stay in order to permit such action to proceed.

[8] Also, on November 7, 2006, the Monitor, on behalf of the Applicants, brought a cross-motion for an order directing KPMG to calculate the Adjustments pursuant to the approach specified in each of the initial written submissions of Ivaco and Heico. In disposing of such cross-motion, I stated at paragraphs 13, 14, 17 and 18 of my December 15, 2006 Reasons as follows:

> Pursuant to the Protocol, the parties made their Initial Written Submissions to KPMG on February 17, 2006. A major disagreement between the parties relates to the correct interpretation of Sections 2.11 and 2.12 of the APAs as well as the interpretation of the Reasons for the August 4, 2005 decision of Farley, J. The issue may be broadly described as whether the Expert is to do a free-standing review of both Exhibits B and C and revise and prepare final Exhibits B and C (as Heico contends) or whether the Expert is to finalize Exhibit C and then, to the extent Exhibit C is changed and the accounting policies used in Exhibit C are different, the Expert may consider whether a concomitant change to Exhibit B is warranted (as Ivaco contends).
>
> This dispute remains unresolved and the cross-motion now brought by Ivaco before this court seeks in part to work toward a resolution of this issue by directing KPMG to prepare in its report calculations of the working capital adjustment determined pursuant to the approaches specified in each of the Initial Written Submissions of Ivaco and Heico.
>
> ...
>
> In my view, the issue of the directions to KPMG with respect to the calculation of the working capital adjustments must be kept separate and distinct from the issues relating to a lifting of the CCAA stay to permit Heico to bring the proposed action against Ivaco based upon negligent and/or fraudulent misrepresentations, breach of contract and breach of duty to act in good faith. There is clearly a live dispute between the parties as to the method of calculating the working capital adjustments and as to the interpretation of sections 2.11 and 2.12 of the APAs and of the Reasons of Farley J. for his order of August 4, 2005, which are relevant to the method of calculation.
>
> It appears to me that, for practical purposes, the first step to get over this impasse is to direct KPMG to do a calculation of the working capital adjustments pursuant to the approaches set out in the Initial Written Submissions of Ivaco and Heico to determine the extent of the differences between the calculations based upon the Ivaco approach and upon the Heico approach. It may well be that the issues relating to the calculation of the working capital adjustments could be settled or resolved once the extent of the discrepancies between the calculations based on the two approaches is determined.

[9] On January 5, 2007, the parties appeared before me to settle the terms of two orders: an Order dismissing the Heico motion to lift the stay (the "Dismissal Order") and an Order

directing KPMG to calculate the Adjustments pursuant to the approach specified in each of the initial written submissions of Ivaco and Heico (the "January 2007 Order"). Heico proposed that the January 2007 Order contain language requiring KPMG to "take into account the Heico position that misleading and inadequate information was used for the purposes of estimating working capital". Furthermore, Heico sought to direct KPMG as follows:

> For greater certainty,
>
> for the purposes of preparing a calculation of the Working Capital Adjustments in accordance with the Heico approach the Expert shall assume:
>
> 1. The Exhibit B Working Capital forecasts were to be prepared:
>
>   a. using accounting policies or principles that are in accordance with Canadian GAAP and, to the extent consistent with Canadian GAAP, consistent with past practice in the Ivaco Business;
>
>   b. using assumptions that at the time the forecasts were prepared were reasonable in the circumstances and supported by the past performance of the Ivaco Business or other objectively corroborative sources; and
>
>   c. using the most current internally prepared financial information available as at August 6, 2004.

Heico's proposed amendments to the January 2007 Order were not accepted. As issued and entered, the January 2007 Order included in the preamble a description of the Ivaco and Heico approaches that mirrored the language from the Applicants' counsel's September 5, 2006 letter and my December 15, 2006 Reasons:

> THIS MOTION made by Ernst & Young Inc., the Court-appointed Monitor of Ivaco Inc. and the Applicants listed in Schedule "A" (the "Monitor") for, *inter alia*, an order directing KPMG LLP ("KPMG"), as Expert, to include in its report on the working capital adjustment referred to in the Protocol approved by Mr. Justice Farley on November 16, 2005 (the "Protocol") a calculation of the working capital adjustment determined pursuant to the approach specified in each of the initial written submissions of Ivaco Inc. and other of the Applicants listed in Schedule "A" (collectively, "Ivaco") and 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.L.C. (collectively, "Heico") to KPMG, namely whether KPMG is to do a free-standing review of both Exhibits B and C to the three asset purchase agreements entered into between Ivaco and Heico (the "APAs") and revise and prepared final

Exhibits B and C (Heico's position) or whether KPMG is to finalize Exhibit C and then, to the extent Exhibit C is changed and the accounting policies used in Exhibit C are different, KPMG may consider whether a concomitant change to Exhibit B is warranted (Ivaco's position), was heard this day at 361 University Avenue, Toronto, Ontario

At a second case conference convened on January 19, 2007, I referred to KPMG preparing its Report on the two approaches as broadly described in the preamble to the January 2007 Order. KPMG indicated that it had not sought further submissions or direction and did not perceive any difficulty in proceeding on that basis.

Heico sought leave from the Court of Appeal to appeal the Dismissal Order and the January 2007 Order. Leave to appeal was refused with costs by Order of the Court of Appeal dated March 26, 2007.

KPMG completed the last of the interviews contemplated by the Protocol on December 5, 2006. Final written submissions were exchanged on March 23, 2007. KPMG's final report (the "Report") was delivered on April 24, 2007. KPMG calculated that, under the Heico approach, Heico would owe the Applicants approximately $53 million and, under the Ivaco approach, Heico would owe the Applicants approximately $60 million (both before interest and an adjustment for Exhibit A of the APAs).

Issues

[10] In its responding motion record, Heico has, in effect, brought a cross-motion for:

(a) an order, if necessary, abridging the time for, validating the manner of, and/or dispensing with service of this notice of cross-motion;

(b) if necessary, an order lifting the CCAA stay and/or granting leave to bring this cross-motion;

(c) a declaration that the Final Report of KPMG in the Ivaco Working Capital Proceedings dated April 24, 2007 (the "Report") has not been prepared within the mandate or authority given to KPMG as expert under:

(i) the reasons for decision of the Honourable Mr. Justice Farley dated August 4, 2005, the reasons for decision of the Honourable Mr. Justice Ground released December 15, 2006 ("Reasons") and the corresponding order of the Honourable Mr. Justice Ground dated November 7, 2006 which was issued January 5, 2007 ("Order"); and/or

(ii) the APAs

and, in particular, a declaration that KPMG exceeded its jurisdiction and that the Report is of no force or effect;

(d) an order directing KPMG to revise the Report forthwith so that it conforms to its mandate and authority;

(e) in the alternative to subparagraph (d), an order requiring KPMG to revise its Report following the conclusion of the trial of issue ordered by Justice Ground, with such revised report being in accordance with the legal determinations and directions of the Court in the trial of issue; and

(f) an order, if necessary, providing further directions to KPMG in respect of the proper preparation of the Report.

[11] On the hearing of this motion, I advised counsel that I was not satisfied that it was necessary to lift the stay or grant leave for the cross-motion to be brought but that, in order to have all issues before the court, I would order that, if necessary, the stay be lifted or leave granted to bring the cross-motion before this court.

[12] I also advised counsel, on the hearing of this motion, that I was not prepared to impose conditions upon the right of a party to deliver a statement of defence in a trial of issues directed by this court.

[13] Accordingly, the following issues remain to be determined on the motion and cross-motion:

1. whether Heico should be directed to pay to the Monitor the sum of approximately $53,000,000 being the amount calculated by KPMG in the Report as the Working Capital Adjustment under The Heico Approach as defined below;

2. whether further directions should be issued by this court with respect to the failure of Heico to pay such amount by May 1, 2007;

3. whether the Report was prepared in accordance with the mandate and instructions given to KPMG under the Reasons for Decision and Order of Farley J. dated August 4, 2005 (the "Farley Order"), the Reasons for Decision and my Order of January 5, 2007 (the "Ground Order") and Sections 2.11 and 2.12 of the APAs;

4. whether KPMG has exceeded its jurisdiction in preparing the Report; and

> 5. whether this court should direct KPMG to revise the Report to conform with its mandate and instructions or, in the alternative, that such Order should issue following the conclusion of the trial of issues ordered by this court.

Positions of the Parties

[14] In my Reasons dated December 15, 2006 I stated that a major disagreement between the parties relates to the correct interpretation of Sections 2.11 and 2.12 of the APAs as well as the interpretation of the Reasons for the Farley Order and that the issue may be broadly described as whether KPMG is to do a free-standing review of both Exhibits B and C and revise and prepare final Exhibits B and C (the "Heico Approach") or whether KPMG is to finalize Exhibit C and then to the extent Exhibit C is changed and the accounting policies used in Exhibit C are different from the accounting policies initially used in the preparation of Exhibit C, KPMG shall consider whether concomitant changes to Exhibit B are warranted (the "Ivaco Approach"), in each case as contended by the parties in their initial written submissions to KPMG.

[15] Accordingly, the January 2007 Order provides as follows:

> THIS COURT ORDERS that KPMG is directed to prepare and deliver to the parties its report on the working capital adjustment in accordance with the timetable set forth in Sections 4 and 5 of the Protocol and include in the report a calculation of the working capital adjustment determined pursuant to the approached specified in each of the parties' initial written submissions, provided always that KPMG is to indicate in its report the approach it accepts and the reasons on an accounting basis for such acceptance and the reasons, on an accounting basis, as to why the other approach is not accepted or is unsuitable.

[16] Pursuant to my Order dated November 7, 2006 the trial of issues was directed on the following terms:

> 1. KPMG include in its report a calculation of working capital adjustments under each of the APAs pursuant to the approaches specified in the initial written submissions of Ivaco and in the initial written submissions of Heico; and
>
> 2. If the parties do not, within 60 days after receipt o the report of KPMG, resolve `the issues with respect to the calculations of the net working capital adjustments, a trial of issues proceed limited to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for this order of August 4, 2005 are *res judicata* in this regard and, if so, to what extent.

[17] In short, the trial of issues will only determine whether the Heico Approach or the Ivaco Approach was the correct approach for KPMG to use in calculating the Working Capital Adjustment. The determination of whether the Ivaco Approach or the Heico Approach is the appropriate approach for the review and recalculation of Exhibit B will accordingly be determined by the trial judge on the trial of issues which has been directed. This is clearly a legal issue, which has not been determined by KPMG in the Report.

[18] The issues remaining before this court on these motions centre around whether KPMG correctly applied the Heico Approach in calculating the Working Capital Adjustment. To the extent it did not, certain of the relief sought by Heico in its cross-motion may be appropriate. To the extent that it did, the cross-motion should be dismissed and an order made pursuant to Ivaco motion, for Heico to pay to the Monitor forthwith the sum of approximately $53,000,000 being KPMG's calculation of the Working Capital Adjustment using the Heico Approach, being the lesser of the two amounts calculated by KPMG using the Heico Approach and the Ivaco Approach respectively.

[19] It is Heico's position that KPMG, in preparing the Report, exceeded its jurisdiction and failed to follow its mandate and instructions in several respects.

[20] Firstly, Heico maintains that KPMG exceeded its mandate and ventured into the sphere of legal issues in determining that Exhibit B was not a forecast in the sense of Section 4250 of the CICA Handbook. KPMG in the Report did conclude that Exhibit B is "factually, from a GAAP perspective, not a CICA 4250 forecast or projection." At pages 9 and 10 of the Report, it is stated:

> Accounting standards for the measurement, presentation and disclosure of future oriental financial information ("FOFI), including projections and forecasts, are addressed in Section 4250 of the CICA Handbook. The objective of the FOFI standards is to assist users of such information with their evaluation of an entity. CICA 4250 provides guidance regarding the circumstances in which general purpose FOFI (as defined by CICA 4250.65) or special purpose FOFI (as defined by CICA distinction between a forecast (as defined by CICA 4250.04) and a projection (as defined by CICA 4250.05) and in the circumstances of this matter a projection would not likely have been relevant to the parties.
>
> However, if Exhibit B had been prepared in compliance with CICA 4250, it would have specifically incorporated the following required disclosures of CICA 4250:
>
> - *Future-oriented financial information should include a cautionary note to the effect that actual results achieved for the period covered will vary from the information presented and that the variations may be material. [OCT. 1989]*
>
> - *Future-oriented financial information should be clearly labeled as ether a forecast or a projection. [OCT. 1989]*

- *An entity presenting future-oriented financial information should disclose:*
    - *the effective date of the underlying assumptions.*
    - *the extent to which actual financial results are incorporated and the period covered by those results, and*
    - *whether or not the entity intends to update the future-oriented financial information subsequent to issue. [OCT. 1989]*
- *Significant assumptions underlying future-oriented financial information should be disclosed. Hypotheses should be separately disclosed and identified as such. [OCT. 1989]*
- *When a forecast is presented, the entity should disclose that the forecast has been prepared using assumptions all of which reflect the entity's planned courses of action of the period covered given management's judgment as to the most probable set of economic conditions. [OCT, 1989]*
- *When a projection is presented, the entity should disclose that the projection has been prepared using assumptions that reflect the entity's planned courses of action for the period covered given management's judgment as to the most probable set of economic conditions, together with the purpose of the information but are not necessarily the most probable in management's judgment. [OCT. 1989]*
- *When the future-oriented financial information incorporates a change in accounting policy the change should be described and its effect disclosed. [OCT. 1989]*
- *When special purpose future-oriented financial information is presented the entity should disclose the identity of the intended users, the purpose for which the information has been prepared and a caution that the information may not be appropriate for purpose other than described. [OCT. 1989]*
- *When a projection is presented, the entity should disclose the purpose for which it has been prepared and should caution that the projection may not be appropriate for purposes other than that described. [OCT. 1989]*

Exhibit B does not include any of the foregoing required disclosures and as such is factually, from a GAAP perspective, not a CICA 4250 forecast or projection.

[21] In my view, it is abundantly clear from the above excerpt that the determination made by KPMG was that Exhibit B was not, from an accounting perspective a document which complied with Section 4250 of the CICA Handbook. This is a determination made by KPMG exercising its accounting expertise and does not amount to a legal interpretation of "Exhibit B". In any event, I am not certain how there could be a legal interpretation of Exhibit B. Exhibit B is simply a list of balance sheet items adding a number of asset items, deducting a number of liability items and stating the balance as estimated Working Capital.

[22] Heico also appears to submit that, because KPMG determined that Exhibit B was not a 4250 forecast or projection, it was not a "GAAP document" and that Section 2.11 of the APAs required that it be a GAAP document. I have some difficulty with this submission. It is clear from the Report that, in reviewing Exhibit B from both the Ivaco Approach and the Heico Approach, KPMG applied certain accounting principles applicable to special purpose future orientated financial information. At pages 14 and 15 of the Report, KPMG stated the following with respect to its conclusions:

> The following basic considerations guided our conclusions:
>
> - What does the language of the APA indicate was agreed to by the parties in terms of the components of working capital presented in Exhibit C and B. This has been referred to as "what's in and what's out" by certain participants in this process.
>
> - What specific Canadian GAAP guidance applies to the foregoing components of working capital?
>
> - What general accounting guidance or financial concepts apply to the preparations of Exhibit C and B working capital calculations?

[23] Clearly, in reviewing and recalculating Exhibit B, KPMG applied certain GAAP principles in compliance with Section 2.11 of the APAs. I am not certain what Heico means when it submits that Section 2.11 of the APAs was not complied with. The fact that a determination has been made that Exhibit B is not a document which complies with Section 4250 of the CICA Handbook does not mean that KPMG did not apply certain GAAP principles in reviewing and and recalculating working capital.

[24] In *Canderel Limited v. Canada* (1998) 1 S.C.R. 147, in dealing with the definition of "profit" for the purposes of subsection 9 (1) of the *Income Tax Act*, S.C., 1970– 71-72 Ch. 63, Iacobucci J. after stating at page 146 that "the starting proposition, of course, must be that the determination of profit under Section 9(1) is a question of law not of fact," went on to state:

> Beyond these parameters, any further tools of analysis which may provide assistance in reaching a determination of profit are just that: interpretive aids, and no more. Into this category fall the "well-accepted

> principles of business (or accounting) practice" which were mentioned in *Symes*, also referred to as "ordinary commercial principles" or "well-accepted principles of commercial trading", among other terms. A formal codification of these principles is to be found in the "generally accepted of these principles is to be found in the "generally accepted accounting principles" ("GAAP") developed by the accounting profession for use in the preparation of financial statements. These principles are accepted by the accounting profession as yielding accurate financial information about the subject of the statements, and become "generally accepted" either by actually being followed in a number of cases by funding support in pronouncements of professional bodies, by finding support in the writing of academics and others, or by more than one of these methods: see Peter W. Hogg and Joanne E., Magee, *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 180-81. What must be remembered, however, is that these are non-legal tools and as such are external to the legal determination of profit, whereas the provisions of the Act and other established rules of law form its very foundation.

[25] Heico also appears to submit that KPMG erred in carrying out its mandate and instructions in that it did not properly apply the Heico Approach. Heico points to instances where KPMG did not adopt certain accounting principles or assumptions as set out in Heico's submissions. I am unable to accept this submission. Clearly the mandate of KPMG was to review and recalculate Exhibit B and in doing so to exercise its accounting expertise to determine which accounting principles were applicable and to exercise its independent judgment in that regard. KPMG was clearly not required to adopt all accounting principles and assumptions included in the initial submissions of Ivaco or Heico but to apply its own expertise to review and recalculate Exhibit B on a free-standing basis as Heico contends, and on the basis of the review of Exhibit C, to make concomitant changes to Exhibit B as Heico contends.

[26] Heico also appears to take the position that KPMG erred in making certain specific findings of fact in determining what Exhibit B was. At page 12 of the Final Report, KPMG stated:

> c) In the Context of the APAs
>
> Each of the three APAs was originally executed on August 6, 2004 and provided for a working capital adjustment to the Base Sale Price for the change in working capital between the estimated working capital at September 30, 2004 (the baseline) and the working capital at the Closing Date, which was November 30, 2004. The APAs defined working capital, its components and exclusions. Thee was no documentation to indicate that either party request or agreed to any wording or terminology changes with respect to Working Capital and its determination in accordance with Section 2.11 between the originally executed

> set of APAs on August 6, 2004 and the Amended and Restated APAs dated November 30, 2004.
>
> The APAs do not specify that Exhibit B be prepared in accordance with CICA 4250. Exhibit B in each APA is titled "Estimated Working Capital -- Company Name, Projected Working Capital as at September 30, 2004". The word "forecast" is not used in either Exhibit B or elsewhere in the three APAs.
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> ...
>
> In the context of the APAs, therefore, the lack of specific reference to CICA 4250 forecast standards to bring greater certainty to the measurement methodology that might have been expected by either party for purposes of the Determination of Working Capital, and, in fact, the specific description of Exhibit B in the APAs as both an estimate and a projection, indicates that GAAP guidance, and specifically CICA 4250, was neither considered nor bargained for.
>
> ...
>
> While Exhibit B is neither a forecast nor a projection in accordance with GAAP, it is clearly a financial summary of working capital subject to general as well as specific GAAP recommendations for the recognition and measurement of the balances required to be included therein in accordance with the definitions and terms of the APAs. Exhibit B is not general purpose in nature, as that term is defined and understood in the context of the CICA Handbook, but, rather, special purpose in nature in that its preparations was specifically for the purposes of the transactions to acquire each of IRM, Sivaco and Ifastgroup.

[27] It appears to me to be abundantly clear that this classification of Exhibit B was made from an accounting perspective based upon the application or non-application of certain provisions of the CICA Handbook and, to the extent that these and other similar provisions in the Final Report constitute findings of fact, it was, in my view, necessary for KPMG to made such findings of fact to carry out its mandate and such findings of fact were made by it applying its accounting expertise. To the extent that, in carrying out its mandate, the Protocol required KPMG to consider the terms of the APAs and information obtained in the course of interviews of persons involved in the negotiation of the APAs and the preparation of the schedules to the APAs, in my view, this is a situation where, in order to carry out its mandate, KPMG was required to consider issues capable of being described as issues of law or mixed fact and law. The comments of Dillon L.J. of the English Court of Appeal in *Jones v. Sherwood Computer Services PLC* (1992) 1 W.L.R. 277 at page 287 are particularly apt:

> Any number of issues could arise under the various sub-paragraphs of paragraph 2 of appendix 1 as to the application of the wording of those sub-paragraphs o particular facts. All these issues are capable of being described as issues of law or mixed fact and law, in that they all involve issues as to the true meaning or application of wording in paragraph 2.

> I cannot read the categorical wording of paragraph 7 as meaning that the determination of the accountants or the expert shall be conclusive, final and binding for all purposes "unless it involves a determination of an issue of law or mixed fact and law in which case it shall only be binding if the court agrees with it."

[28] This is not a situation analogous to that in *Shinkaruk Enterprises Ltd. v. Commonwealth Insurance Co.* (1990) 71 D.L.R. (4^{th}) (Sask. C.A.) and other authorities cited by Heico where the appraiser or umpire was found to have misconstrued or gone beyond its statutory jurisdiction.

[29] Heico also challenges the determination of certain specific disputed items referred to KPMG for determination. For example, Heico appears to dispute the determination by KPMG of July 18 or 19, 2004 as the cutoff date for the financial information on which Exhibit B was based. Exhibit B did not therefore take into account a purchase of $10.4 million worth of inventory from QIT at the end of July and Heico challenges the determination of the cutoff date on the basis that the parties continued to negotiate and make changes to the APAs subsequent to July 19, 2004 and prior to the execution of the APAs on August 6, 2004. It is my understanding that the selection of July 18 or 19, 2004 that the cutoff the cutoff date is based on an accounting principle enunciated in the CICA Handbook that the cutoff date is the date as of which substantially all of the required information was available. This is not, in my view, a situation where the parties should be second guessing a determination made by KPMG exercising its accounting expertise and based on GAAP principles in arriving at a determination which is expressed to be final and binding upon the parties.

[30] Heico also contests certain determinations made by KPMG with respect what are described as "top level adjustments" to trade payables, inventories and accounts receivable in respect of three items in dispute between the parties specifically referred to KPMG for its determination. In each case, it is clear from the Report that KPMG concluded that the adjustments were operationally driven, based on actual circumstances confirmed by management and were estimates not subject to specific GAAP guidance and that there was no basis in GAAP to make any changes to the top level adjustments. Again it appears to me that all of such determinations were based upon KPMG exercising its accounting expertise and determining the applicability or non-applicability of GAAP principles and are determinations final and binding upon the parties.

[31] Heico, in its submissions, appears to place considerable reliance upon the decision of the Aukland High Court in *Glaister v. Almagamated Dairies Ltd.* (2002) NZLR Lexus 84 (Auk. H.C.) where, after a review of the authorities, Heath J. stated at paragraphs 43-49:

> On principle, the first step must be to see what the parties have agreed to remit to the expert, this being, as Lord Denning MR said in Campbell v. Edwards, a matter of contract. The next step must be to see what the nature of the mistake was, if there is evidence to show that. If the mistake made was that the expert departed from the instructions in a material respect, eg if he valued

the wrong number of shares, or valued shares in the wrong company, or if, as in Jones ((M) v. Jones (RR) [1971] 2 All ER 676, [1971] 1 WLR 840, [*35} the expert had valued machinery himself whereas his instructions were to employ an expert valuer of his choice to do that, either party would be able to say that the certificate was not binding because the expert had not done what he was appointed to do.

I am satisfied, on the authorities cited to me, that it is appropriate for a Court to intervene where there has been an error in interpretation of the valuation instruction. Put simply, the interpretation of the valuation instruction is a question of law, not an issue to be resolved by valuation principles: cf Re Arbitration, Fletcher, Humphreys and Co. Ltd. [1944] NZLR 502 at p. 506, the relevant portion of which I have set out in para. [75] below. In this particular case, the interpretation of cl 4.7 put to me by Mr. Grant, based on Mr. Frankham's evidence, results in the application of an arithmetic formula rather than the exercise of judgment by a valuer. If Mr. Grant is right in his interpretation, then this Court should enforce the parties' bargain. The valuer cannot be permitted, by mistakenly interpreting the valuation instruction, to formulate a new contract for the parties.

I have also considered [*36] the policy reasons advanced by Mr. Land as reasons why this Court should not intervene. I am not persuaded that any of those policy reasons can override the need for the parties' bargain to be enforced. My reasons for taking that view are summarized in paras [46] – [48] below.

First, while valuers may be called upon to interpret imperfectly drafted valuation instructions, the interpretation of the valuation instruction is a question of law, not a question depended upon the expert judgment of a valuer. It is open to contracting parties to agree upon any valuation methodology they like. The valuer cannot change the methodology because he or she regards the result as unfair. The role of the valuer is to implement the parties' bargain.

Secondly, the approach which I adopt does not interfere with the exercise of judgment of a valuer where judgment is authorized by the parties. For example, on Mr. Grant's interpretation, while an arithmetical calculation is required to provide the "fair value" at which the shares are to be acquired, the exercise of valuation judgment is, nevertheless, necessary to assess the value of assets and contingent liabilities for the purpose of establishing [*37] the sum of the surplus assets to be multiplied by the proportion of shares held by the trustees: see cl 4.7 (a)(ii) and (iv) of the constitution. Those elements of judgment cannot be questioned in this proceeding.

Thirdly, I do not accept that uncertainty is created by permitting parties to challenge a valuation on the basis that the construction applied by the valuer was wrong. While Mr. Land submitted that it would be inappropriate to permit

> parties to challenge a valuation on the basis that the party may have a different arguable interpretation of the valuation instructions, it will be a matter for the Court to determine, ultimately, which interpretation should prevail. That will determine whether the valuer has, in law, applied the right test. That is a pure issue of contractual interpretation with which the Courts deal every day.
>
> For those reasons I conclude that it is open to the trustee to challenge the valuation on the basis that the auditors failed to follow the valuation instructions.

[32] It is difficult to argue with the proposition that the interpretation of valuation instructions in a contract is a question of law and that the court may intervene if there has been a mistake in the interpretation or application of valuation instructions. In the case at bar, however, counsel for Heico have failed, in my view, to cite any example where KPMG has failed to follow instructions in Sections 2.11 and 2.12 of the APAs or in the Farley Order and Reasons or in the Ground Order.

[33] It is also clear from the record before this court and from the Report that, in making its determination of the various specific items referred to by counsel for Heico which were in dispute between the parties and referred to KPMG for determination, KPMG took into account the positions of both parties as set forth in their initial and subsequent submissions.

[34] Accordingly, with respect to the issues before this court, I find that KPMG has prepared its Report in accordance with instructions contained in Sections 2.11 and 2.12 of the APAs, the Farley Reasons and Order and the Ground Order. I further find that KPMG did not exceed its jurisdiction or err in making its determinations with respect to the nature of Exhibit B or any of the other determinations specifically referred to by counsel for Heico. I also find that no further directions are required to be given to KPMG with respect to the preparation of the Report to comply with the mandate and instructions given to it.

[35] Accordingly, an order will issue that Heico forthwith pay to the Monitor the sum of $52,887,000 being its calculation of the working capital adjustment pursuant to the Heico Approach, together with applicable interest.

[36] Counsel may make brief written submissions to me with respect to the costs of these motions on or before August 24, 2007.

Ground J.

Released: July 25, 2007

COURT FILE NO.: 03-CL-5145
DATE: 20070725

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

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 OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND RELATED ENTITIES

REASONS FOR JUDGMENT

Ground J.

Released: July 25, 2007