COURT FILE NO.: 03-CL-5145
DATE: 20061215

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	*Peter F.C. Howard* *Alexander D. Rose* *Marie Isabelle Palacios-Hardy* for the Applicants/Monitor
AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A" HERETO	*William J. Burden* *John N. Birch* *David S. Ward* for Heico Companies
	Fred Myers for Superintendent of Financial Services
	Dan MacDonald for Bank of Nova Scotia
	Robert Staley *Evangelia Krians* for the Informal Committee of Noteholders
	Richard B.Swan for National Bank of Canada
	Andrew Hatway for Pension Committee
	Geoff R. Hall for QIT
	MOTION HEARD: November 7 and 10, 2006

GROUND J.

REASONS

[1] There are two motions before this court in the above proceeding. The first is a motion brought by 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") raising a number of issues with respect to privilege claimed by Ivaco relating to specific documents (the "Heico Documents") and the appointment of an Examiner to examine such documents, which issues have been substantially resolved by a consent order issued November 10, 2006.

[2] The Supplementary Notice of Motion of Heico seeks an order lifting the stay in these proceedings and granting leave for Heico to commence an action against Ivaco seeking $75,000,000 in damages for negligent and/or fraudulent misrepresentation, breach of contract and breach of duty to act in good faith and seeking certain declaratory relief with respect to the interpretation of the three asset purchase agreements dated August 6, 2004 (the "APAs") entered into between Ivaco and Heico and the Reasons of Farley, J. for his order dated August 4, 2005 or, in the alternative, directing a trial of an issue with respect to the interpretation of the APAs and giving directions for the completion of the working capital adjustment process in accordance with the APAs.

[3] Ivaco Inc. and the other Applicants (collectively "Ivaco") have brought a cross-motion, in the event that this court lifts the stay and grants leave for Heico to commence the proposed action, for orders:

(i) directing KPMG LLP ("KPMG") as expert to include in its report on the working capital adjustment, a calculation of such adjustment determined pursuant to the approach specified in each of the initial written submissions of Ivaco and Heico and to indicate in its report which approach it accepts and the reasons on an accounting basis for such acceptance and the reasons on accounting basis as to why the other approach is not accepted;

(ii) directing Heico to provide to the Monitor on a confidential basis financial information with respect to transfers of assets, if any, since December 1, 2004 and to permit the Monitor to determine whether Heico has the ability to pay any amount determined to be owing as a working capital adjustment;

(iii) directing Heico to pay into court the amount of the working capital adjustment;

(iv) in the alternative, directing Heico to pay into court $65,258,000.08 plus interest calculated from December 23, 2004;

(v) directing Heico to pay into court $2,000,000 as security for costs;

(vi) fixing a timetable for the proposed action; and

(vii) precluding Cassels Brock and Blackwell LLP from acting as solicitors of record in respect of the Proposed Action.

[4] The court was advised that Ivaco is not proceeding with the relief sought in clause (vii) above.

Background

[5] Ivaco and Heico entered into the APAs dated August 2004, and subsequently amended and restated in November 2004, subject to court approval. Court approval was obtained on or about August 18, 2004 and the closing of the asset purchases took place on December 1, 2004.

[6] The purchase price to be paid by Heico under each of the APAs was subject to an adjustment based on a number of factors, including the difference between the Working Capital (as defined therein) of the businesses as of the date of closing of the transaction (to be set forth at Exhibit "C" to the APAs) compared to "Estimated Working Capital" as of September 30, 2004 (set forth at Exhibit "B" to the APAs).

[7] On January 11, 2005, Heico purported to dispute not only the Exhibit Cs prepared by Ivaco but also the preparation of the Exhibit Bs. It became clear that, totalling the three APAs, the parties were some $50,000,000 apart. Heico conceded at that time that it owed IRM $3,305,000 and Ifastgroupe $14,719,000 for a total of more than $18,000,000 and claimed that Ivaco Inc. owed it $1,541,000.

[8] After further discussion failed to resolve matters, KPMG was appointed as the "Expert" to calculate the Adjustments within the meaning of the APAs and provide its report. KPMG did not begin work because Heico had taken the position, disputed by Ivaco, that KPMG was performing an arbitral role.

[9] Heico applied to Farley, J. for a declaration that KPMG was performing a judicial, adjudicative and/or arbitral function. Heico's application was dismissed on June 2, 2005 by Farley, J. who concluded that KPMG was performing a non-arbitral role.

[10] In addition, Ivaco and Heico did not agree on the process to be followed under the APAs for resolving the working capital dispute. The Monitor made a parallel application to Farley, J. seeking guidance on the scope of KPMG's authority and sought a declaration that, pursuant to the APAs, the Expert is neither authorized nor directed to make adjustments to Exhibit B. The Monitor proposed that KPMG would adjust Exhibit C and then section 2.11 of the APAs would apply to make any corresponding adjustments to Exhibit B.

[11] The Monitor's application was dismissed on August 4, 2005. Farley, J's Reasons contained certain directions to KPMG as Expert as follows:

> In my view therefore the Expert "acting as an expert and not as an arbitrator" would consider the APAs, as a whole. In that regard the KPMG Partner would consider the financial records of the Sellers with the appropriate provisions of Canadian GAAP in a professional manner (including the views of the CICA). Since either party can invoke the Expert dispute resolution process, then it would appear that both sides would be able to make known to the Expert the value of the dispute(s) and their positions in respect thereof. The Expert then would decide those matters in dispute and provide a final and binding report thereon. That report would also provide any revisions to the Adjustments.
>
> The Adjustments as defined in Article 2.11 require a comparison of Exhibits C and B. To the extent that the Expert determines that Exhibit C is to be changed, then similarly Exhibit B "shall be deemed to be amended so as to reflect an identical basis for calculation as Exhibit C". Thus is (sic) appears reasonable that the Expert must deal with Exhibit B so that methodology is consistent. In that regard apples are to be compared with apples (although perhaps a better analogy would be that like colours be compared with each other – namely "green" to "green" while recognizing that "green" may be the result of a mixture of "blue" and "yellow").
>
> In the end results as set out in Article 2.12, the Expert is to decide what the Adjustments are to be – and this determination becomes the "final Adjustments". Therefore it would not in my view be a sensible interpretation that the Expert only consider revisions to Exhibit C, leaving revisions to Exhibit B to be worked out mechanically employing the deeming provision. Certainly, the Expert is in the best position to ensure consistency.

[12] The parties were thereafter unable to agree on a protocol and timeline governing the Expert's work without the intervention of Farley, J. The parties returned to Farley, J. on three occasions to resolve a Protocol, which was not approved by Farley, J. until November 6, 2005.

[13] 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).

[14] 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.

[15] With respect to the balance of Ivaco's motion, I have indicated that I will not deal with motion for security for costs as, in my view, that is an issue to be determined if leave is granted for the action to proceed and to be determined on the basis of the usual criteria applied to a motion for security for costs in an ongoing action. The parties have advised the court that they will work out the details of the financial information relating to Heico to be provided to the Monitor.

Issues

[16] Accordingly, it appears to me that the following issues are before this court.

1. Whether KPMG should be directed to prepare a calculation of the working capital adjustments determined pursuant to the approach specified in each of the Initial Written Submissions of Ivaco and Heico or whether a trial of an issue should be directed in this proceeding with respect to the interpretation of the APAs and the Reasons of Farley, J. for his order of August 4, 2005.

2. Whether the stay should be lifted and leave granted to Heico to commence the proposed action.

3. The terms upon which such leave should be granted.

[17] 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.

[18] 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.

[19] If the issues relating to the proper approach to the calculations are not settled or resolved at that time, I accept the submission of counsel for Heico that the stay should be lifted and a trial of issues directed limited strictly to the interpretation of sections 2.11 and 2.12 of the APAs and whether the Reasons of Farley J. for his order dated August 4, 2005 are *res judicata* in this regard and if so, to what extent.

[20] It appears to me that the criteria which the court must consider in determining whether to lift a stay, being whether the proposed cause of action is tenable, the balancing of interests as between the parties, the relative prejudice to the parties, and whether the proposed action would be oppressive or vexatious or an abuse of the court process, would all be met with respect to a trial of issues to resolve interpretation of the APAs with respect to the calculation of the working capital adjustments.

[21] Accordingly, an order will issue that:

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 of the report of KPMG, resolve the issues with respect to the calculation 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 his order of August 4, 2005 are *res judicata* in this regard and, if so, to what extent.

Lifting of Stay

[22] The lifting of the CCAA stay to permit the proposed action by Heico against Ivaco to proceed is considerably more problematic. The Statement of Claim for the proposed action is, aside from relief sought with respect to the working capital adjustments, essentially a claim for damages in the amount of $75 million for "misrepresentation including negligent, reckless or alternatively deliberate misrepresentation, breach of contract and breach of the duty to act in good faith". There are entirely new causes of action distinct from the claims relating to the correct method of calculating the net working capital adjustments based upon the terms of the APAs and the information available to the Expert for purposes of such calculations.

[23] A number of submissions were made by counsel for the various parties with respect to factors to be considered by this court in determining whether the stay should be lifted and as to any conditions to be attached to the lifting of the stay. More significantly, in my view, were the submissions made by counsel, and in particular, counsel for QIT-Fer et Titane Inc. ("QIT"), to the effect that the Statement of Claim does not disclose a reasonable cause of action with respect to misrepresentation, breach of contract or breach of the duty to act in good faith (collectively the "New Claim").

[24] 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 relate to the estimated working capital.

[25] 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.

[26] 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.

[27] 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.

[28] 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.

[29] 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.

[30] Even if the Statement of Claim did disclose a tenable or reasonable cause of action, there are a number of other factors which this court must consider which militate against the lifting of

the stay in the circumstances of this case. The institution of the Proposed Action, even if a tight timetable is imposed, would inevitably result in considerable delay and complication with respect to the full distribution of the estate to the detriment of many small trade creditors and individual creditors as well as to pension claimants. In addition, it would appear from the evidence before this court that Heico has been aware of most of the matters alleged in the Statement of Claim for approximately 2 years and there does not appear to be any valid reason given for the delay in commencing the application to lift the stay.

[31] The motion of Heico for an order lifting the stay and granting leave to commence the proposed action against Ivaco is dismissed.

[32] Although the question is now moot in view of the dismissal of the motion to lift the stay, I do accept the submissions of counsel for Ivaco that this court does have jurisdiction to impose conditions on the lifting of the stay in a CCAA proceeding. With respect to the specific conditions sought to be imposed by Ivaco, I have indicated above that I would not have imposed a condition of the payment of security for costs at this time. In view of the rather tortuous history of this proceeding, the further delay that would be encountered if the proposed action were allowed to proceed and the impact of such delay upon the distribution of the estate, I would have imposed a condition of payment into court by Heico of an amount equal to the lowest amount determined by KPMG for the total net working capital adjustments. I would also have imposed a condition fixing a very tight timetable for the action to proceed and limitations on document and oral discovery.

[33] Counsel may make brief written submissions to me with respect to the costs of these motions on or before January 15, 2007.

Ground J.

Released: December 15, 2006

SCHEDULE "A"

Applicants Filing for CCAA

1. Ivaco Inc.
2. Ivaco Rolling Mills Inc.
3. lfastgroupe Inc.
4. IFC (Fasteners) Inc.
5. Ifastgroupe Realty Inc.
6. Docap (1985) Corporation
7. Florida Sub One Holdings Inc.
8. 3632610 Canada Inc.

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AND IN THE MATT3R OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

REASONS FOR JUDGMENT

Ground J.

Released: December 15, 2006