Court File No. CV-20-00638930-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOOS) INC., ELMCLIFFE INVESTMENTS INC. and ELMCLIFFE INVESTMENTS [NO. 2] INC.

Applicants

CONTINUED CROSS-EXAMINATION OF GREG GUYATT

on his affidavit sworn April 9, 2021,
held via Arbitration Place Virtual,
on Tuesday, April 13, 2021, at 2:32 p.m.

APPEARANCES:

Paul Steep Shane D'Souza Trevor Courtis	on behalf of the Applicant CannTrust Holdings Inc.
Peter Howard Eliot Kolers Brian Pukier Ashley Taylor	on behalf of Mark Litwin, Fred Litwin and Stanley Abramowitz
Ryan Morris	on behalf of KPMG LLP

ALSO PRESENT:

Jocelyn Kemp	Law clerk

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INDEX

LIST OF UNDERTAKINGS, REFUSALS,

& UNDER ADVISEMENTS

LIST OF EXHIBITS

No.	Description	Page
6	Answers to undertakings, under advisements and refusals	144

Arbitration Place Virtual

--- Upon resuming on Tuesday, April 13, 2021, at 2:32 p.m.

MR. HOWARD: I got frozen for a minute.

PREVIOUSLY AFFIRMED: GREG GUYATT

CONTINUED CROSS-EXAMINATION BY MR. HOWARD:

451 Q. Do you have your affidavit of April 9 before you, Mr. Guyatt?

A. Yes, I do.

MR. KOLERS: Peter, just when you dropped off, the question that Paul was suggesting, was just to treat this as continued cross-examination and not bother re-swearing the witness, but treat him as if he's still under oath.

MR. HOWARD: I thought I had agreed to that. I was frozen before that. Okay.

BY MR. HOWARD:

452 Q. Mr. Guyatt, the first question is, do you want to make any changes to that affidavit or are there any errors that you identified?

A. Nothing that I'm aware of.

453 Q. And yesterday - I was going to say evening, but that would be wrong, it was

night - we received the answers to undertakings and some under advisements and refusals. Do you have that in front of you?

A. Yes, I do.

MR. HOWARD: Can we mark that as the next exhibit? I forget what number we got to, Mr. Steep.

MR. STEEP: We can mark it as an exhibit. I can't help you on the numbering either.

EXHIBIT NO. 6: Answers to undertakings, under advisements and refusals.

BY MR. HOWARD:

454 Q. I'm going to go be asking you some questions about that, Mr. Guyatt. Some of them will maybe be for Mr. Steep as well, or somebody else. In respect of the first question, you say that the Securities Claimant Trust funds are confidential. Can you tell me the basis of the assertion of confidentiality? It's probably for Mr. Steep.

A. Paul, are you going to take that question?

MR. STEEP: Just a second. I'm just reading the context of the answer.

THE WITNESS: Okay.

MR. STEEP: I don't know how to reframe this, other than the way that it's stated, Mr. Howard. There is a confidential agreement governing the terms of the trust insofar as it relates to the question that was asked concerning under what circumstances the 50 million stays in the trust. That's by agreement with the coalition.

MR. HOWARD: And the company. Am I correct, Mr. Steep, that that is not before the Court?

MR. STEEP: No. Everything is before the Court. There is a portion that is not before some of the parties.

MR. HOWARD: So the portion that you're -- can you help me with that? The portion that you've said we can't see because it's confidential, that's before the Court?

MR. STEEP: Yes. Everything is before the Court.

MR. HOWARD: And the portion you say we can't see, is it going to be provided to the parties who are going to be making opt-out decisions?

MR. STEEP: I can't recall off the top of my head the terms, but take it that the answer is no.

MR. HOWARD: And, again, I don't --

MR. STEEP: The only party who I understand is going to see this, at the present time, is the judge presiding over the CCAA.

MR. HOWARD: All right. And apart from the fact that you and the plaintiffs have agreed that we shouldn't see it, is there any other basis for the assertion of confidentiality?

MR. STEEP: No, except that I would liken it to what you would see in a class proceeding, where there is a limit to the number of opt-outs that the parties would accept before the settlement is blown up. That is typically kept confidential.

MR. HOWARD: I understand the opt-out percentage, but that's actually not analogous, but we can argue that somewhere else. With respect, I'm repeating and asking again for all the salient terms of the litigation trust to be produced, including the ones you've claimed are confidential.

REF MR. STEEP: All right. Well, for obvious reasons I can't give that undertaking, because the company is bound by that agreement.

MR. HOWARD: I understand, but it would be one thing -- will the company ask the plaintiffs to agree that it be produced, and if the consent is provided, give us the information?

U/T MR. STEEP: If they consent, we'll provide it to you.

MR. HOWARD: Will you ask for the consent?

U/T MR. STEEP: Sure. Sure.

MR. HOWARD: Okay. That goes to the next question as well is, to advise -- the question was to advise whether -- what plaintiff's counsel is getting, and you say the company has no knowledge of this information. Has the company requested it?

MR. STEEP: You know, I don't know whether a specific request has been made in the many discussions that have been had with the coalition. I can't answer that.

MR. HOWARD: So will the company ask for it, and ask for it to be put before the Court, because given to your analogy to Securities class action settlement approvals, that number is always before the Court, and I would expect that you would want that before the Court and before the people making opt-out decisions. But will you ask for it and produce it?

U/T MR. STEEP: Now that you've stripped away the long preamble about what I would want, I will ask.

BY MR. HOWARD:

455 Q. Over the page on this document into number 3, and you -- the answer talks about in (ii) "negotiated certain provisions in the CCAA Plan." Am I correct that at least two of those conditions were not in the plan prior to the April 9 draft of this plan?

A. I believe that's accurate.

MR. HOWARD: Okay. And, Mr. Steep, the answer to number 4, I think, trammels on a little bit of delicacy. Am I correct that in the -- with respect to the last sentence, that the information imparted was that the company wanted to find a way to protect Mr. Litwin, but was taking the position because of Mr. Paul's knowledge and position?

MR. STEEP: I'm not going to say that, because I've seen an email from Mr. Guyatt which says that the claim that was submitted -- sorry, the expenses of which were submitted pursuant to that was not an indemnified claim.

MR. HOWARD: Well, I understand that, but you're making references to communications between counsel, and if you check with Mr. D'Souza as to what I just said, I would like the answer, then, to complete the last sentence, which was in relation to wanted to assist Mr. Litwin, but were taking the position because of Mr. Paul's involvement.

MR. STEEP: You're saying that there was an on-the-record discussion to that effect?

MR. HOWARD: Well, I'm saying either there was an on-the-record discussion, or that last sentence should be deleted.

MR. STEEP: All right. Well, I'll make that inquiry. I'm not going to agree with you.

MR. HOWARD: All right. Well, having raised --

MR. STEEP: You're giving me a version of events, I understand that --

MR. HOWARD: Yes.

U/T MR. STEEP: -- that differs from what we've said in answer to the undertaking. I'll make an inquiry about that.

MR. HOWARD: Okay. Super. And with respect to question 5, you've answered that, and for some reason focused on Mark Litwin. There was, I take it from this answer, no written consent from either Mr. Abramowitz -- Mr. Stan Abramowitz or Mr. Litwin?

MR. STEEP: Not that I'm aware of.

BY MR. HOWARD:

456 Q. Okay. And over the page, and here in the next two questions we get into some of the issues with respect to insurance. And in your affidavit you make reference to that at paragraph I believe it's -- I'll have it here in a moment. Sorry. 11(c) on page 5. And you make reference in quotes, that something will be "channelled." Do you see that?

A. Yes.

457 Q. Can you just explain to me, because I'm bovinely obtuse, what you mean by "channelled"?

MR. STEEP: I'm not going to attempt to do it, because I would make the same mistake you would make. I will get one of the insolvency lawyers to define that for you. But the basic concept, subject to their correcting me, is that the claim will be released, but any recovery will be channelled to a particular source.

MR. HOWARD: So a couple of things arising from that. Will you produce the relevant insurance policies so we can have them on the record?

U/T MR. STEEP: Yeah. Subject to any objections that the insurers may have. I think they have been produced to some of the parties. They've been asked for before, so I don't know if they're in the record or not, at this stage, but we'll give them to you.

MR. HOWARD: All right. And am I correct that part of this arises because you focused on the fact that the insurance policies weren't assignable?

MR. STEEP: I'm not going to agree with that.

BY MR. HOWARD:

458 Q. Mr. Guyatt, I want to focus on your understanding of the effect of this. Am I right that in terms of what happens is, is that the actions may continue against you, and that any recovery that is made, if the policies apply, will be limited to the insurance proceeds, if applicable?

A. I believe that's accurate. Paul, any, any further sort of --

MR. STEEP: No, that's the basic

concept.

THE WITNESS: Yeah.

U/T MR. STEEP: And as I said, if there's any technical refinement to that, I will have the insolvency lawyers describe it by way of undertaking.

BY MR. HOWARD:

459 Q. Okay. And let me continue a little bit. So, Mr. Guyatt, you understand that you'll stay in as a party, and you'll be subject to discovery, and there could be findings made?

A. Yes.

460 Q. And that's the same for other settling parties?

A. That's my understanding.

461 Q. All right. And if, in broad terms, the finding is negligence, you still have coverage; but if there's finding of knowledge or intentional misrepresentation, you wouldn't have coverage, so there wouldn't be a recovery, but you still would have received a release?

A. Yes.

462 Q. And that's the same, for example, if you reached an accommodation with Eric Paul, that would be the same for him?

A. I believe so. Is my understanding correct on that, Mr. Steep?

MR. STEEP: Yes.

THE WITNESS: Yes.

BY MR. HOWARD:

463 Q. So in the sense of the contributions that the original settling parties were making to the -- you personally weren't making any dollar contribution, right?

A. I am not.

464 Q. And what you were contributing was -- you talked about assignment of insurance proceeds. But if it turns out there's no cover and you had no right to insurance, you're still getting a release?

A. Yes.

465 Q. And that's the same for all the other settling parties?

A. Yes.

466 Q. Okay. So not to draw too fine a point on this, if you, as the CFO at the time, you're still in the litigation, you go through trial, there's a finding that you had knowledge, and so that supports intentional misrepresentation, you're out of it, you've got a release, you have no liability?

A. I'm not sure I could have knowledge of something that happened before I joined the company.

467 Q. I understand. But you certified financials -- it was ongoing from the time February through May when you certified the financials. I don't want to argue with you but --

MR. STEEP: Let's answer your hypothetical, which I think he has answered. In those circumstances, the plan would provide that he still gets a release, and you can make your argument that he was not ever entitled to coverage under the policy because of the particular findings you're putting forward in your hypothesis.

MR. HOWARD: Yeah. Okay. But, Paul, in that hypothetical, you're getting a release for fraud with no contribution.

MR. STEEP: In that hypothetical, if you say there is a finding of fraud, that might be one of the outcomes.

MR. HOWARD: Yeah. Intentional misrepresentation, I don't want to split hairs, is fraud. Okay. All right.

MR. STEEP: Your hypothetical assumes that the plaintiffs would proceed on the fraud allegation.

MR. HOWARD: Well, no. I don't know that they will, because that takes away the insurance policy, but it could be a finding, especially if there are others involved in the litigation still, right?

MR. STEEP: Well, it could be. It could be. It depends on what's pleaded and what goes to trial.

MR. HOWARD: Right. I understand that. But we're all dealing with an action that is apparently going to proceed, if this plan proceeds, and that's an outcome, especially with respect to some of the other people that you've maybe done a deal with, and I'll come to that in a moment. I didn't mean to pick on you, Mr. Guyatt. I know you only got there in February.

THE WITNESS: Thank you.

BY MR. HOWARD:

468 Q. In paragraph 8 of your affidavit.

A. I'm just getting to that.

469 Q. It says:

"The CannTrust Group will update the Court if

settlements are reached
before the hearing of its
motion."

Do you see that?

A. Yes.

470 Q. And just to be clear, that's the motion that's returnable this Friday, I take it?

A. I believe so.

471 Q. All right. Can you provide to us at present -- you do say in your affidavit that you've added one additional settling defendant, Brady Green?

A. Yes.

472 Q. What dollar contribution, if any, is he making?

A. I don't believe he's making any dollar contribution, but I don't know that for sure.

473 Q. All right. And I understand the difference between somebody becoming an ASD, or additional settling defendant. Can you advise us before Friday as to the identity of any such people, and the contribution they're making, and the terms of the agreement?

U/T MR. STEEP: Yes, to the extent

they're known to the company, yes.

MR. HOWARD: All right. And if there is, similarly, an agreement with them to withdraw or not proceed with objections previously made, I would like the terms of those agreements.

MR. STEEP: I'm just hesitating, because I would assume that any settlement would only be achieved on a basis where they were not objecting to the plan, which they've just agreed to, so I think the two will be hand in hand.

MR. HOWARD: All right. Paul, what I'm looking for is, I don't want to be met with -- sorry, if there's an agreement in principle, but it isn't documented, we want the term.

U/A MR. STEEP: All right. I have to take that under advisement, because I'm not quite sure I understand you. I think what you're saying is if someone who has previously objected to the plan in principle has reached a settlement, but doesn't have a final settlement, and, therefore, does not proceed with their objection, you want to be advised of that?

MR. HOWARD: Yeah. And the terms under which that happened.

MR. STEEP: Right. To the extent that I'm able to advise you of those terms, if that situation arises, I'll advise you.

MR. HOWARD: And has it reached an arrangement with the underwriters?

MR. STEEP: Today?

MR. HOWARD: As of today, any arrangement in that regard as to the underwriters not proceeding with their objection?

MR. STEEP: No arrangement with the company, in that regard, has been finalized. There are discussions ongoing.

MR. HOWARD: Okay. And the same question with respect to Eric Paul?

MR. STEEP: Same answer.

MR. HOWARD: Peter Aceto?

MR. STEEP: I have to turn to one of my colleagues for the status of Mr. Aceto. I believe it is the same answer.

MR. D'SOUZA: Same answer.

MR. HOWARD: And Ian Abramowitz?

MR. D'SOUZA: Same answer.

MR. HOWARD: All right. So both -- assuming we get to Friday and there is attained, will you let us know as soon as you can before Friday?

U/T MR. STEEP: Absolutely. And I'm

not crossing the Litwins off my list either.

MR. HOWARD: You shouldn't. We're the most reasonable folks.

BY MR. HOWARD:

474 Q. Another area that I want to touch on, and that is in the last answer, number 11, that Mr. Fabello got an undertaking before he deserted us. It says:

> "The Company does not disagree with this assertion. The Company notes that the CCAA Plan does not contain any such condition either."

It's a cute answer. You agree with me that it did up until April 9th?

MR. STEEP: Yes. It must be a matter of record. Yes, it did.

MR. HOWARD: Yeah. Okay.

BY MR. HOWARD:

475 Q. Let me press on that a little bit. You're aware, Mr. Guyatt -- you remember the last time we did this, you said that you're going to continue reimbursement of defence costs to at least to the Litwins until the plan was approved, unless

you were instructed otherwise? Do you remember using that phrase?

A. I don't remember the exact phrase, but, yes, something similar to that.

476 Q. And has there been a meeting of the -- was this issue as to whether the Litwins should continue to get paid, reimburse their defence costs, addressed at the board level?

A. It was not discussed at the board level, to my knowledge.

477 Q. Okay. So you didn't get any instructions from the board on that subject?

A. No, I did not.

478 Q. All right. I sometimes take instructions from Mr. Steep too. So your instructions came from Mr. Steep? Don't tell me that.

MR. STEEP: You're not getting into the instructions --

MR. HOWARD: That's humour.

MR. STEEP: -- with the lawyers.

MR. HOWARD: That's humour.

BY MR. HOWARD:

479 Q. Mr. Guyatt, you were aware that the company took the positions on Friday that it

wouldn't be reimbursing the Litwins going forward?
A. Correct, although they continue to be indemnified.
480 Q. I get that. And you're taking that position with other people as well?
A. Yes, we are.
481 Q. For example, the underwriters have been making submissions as to their costs. Do you have the quantum of that?
A. I do not.
MR. HOWARD: Mr. Steep, I would like the quantum of all the amounts that have been submitted that the company says are part of the indemnity. Because as I understand it, what you're saying is, they'll get stayed until the plan is approved, but then they are unaffected claims?
MR. STEEP: Yes, that's what we're saying.
MR. HOWARD: All right. And the quantum of all of that. And next that the quantum of the anticipated contingent liabilities of the emerging entity, and the pro forma of the entity that emerges in terms of a balance sheet that's expected in and around June.
MR. STEEP: Let's take those one

at a time.

MR. HOWARD: Sure.

U/T REF MR. STEEP: To the extent that we can quickly advise you of the amounts that have been submitted that are indemnified claims, but which are not being paid during the currency of this CCAA, we'll advise you of that. The balance I'm not prepared to undertake.

MR. HOWARD: All right.

BY MR. HOWARD:

482 Q. And equally, Mr. Guyatt, has this existing, and then contingent liability, been included in financial statements and pro forma analysis?

A. We've not issued any financial statements since, since we've been in CCAA, so not.

483 Q. I don't mean audited financials, Mr. Guyatt. You may have other financials. I'm sure you do have other financial statements. I'm not talking about audited.

A. And, sorry, just to be clear. When you're talking about the contingent liability, are you referring to the amount that's being contributed to the settlement trust?

484 Q. No, I'm talking -- let's say -- I'll try to make the question clearer. Let's say, for example, that two or three people with indemnity claims, like the Litwin and the auditors, and, for example, the underwriters, have indemnity claims, and you're saying they are unaffected. If there are 3 million at present, and likely to be 10 million over the next two years, I would like to know how that's accounted for. And in the current financial statements, that information, does it make the emerging entity solvent/insolvent or questionable solvency?

MR. STEEP: Mr. Howard, could we just break that down into two questions? His first question, Mr. Guyatt, is: Are you accounting for the indemnified claims which are not being paid as a liability in your internal financial statements?

THE WITNESS: They are not at the moment.

BY MR. HOWARD:

485 Q. But they're proceeding as if they are unaffected claims, are they --

A. Our internal financial statements right now are not being used for external financial reporting; they're being used for internal management purposes as to the state of the current operations. Now, typically when it comes to contingent liabilities, that would be something that would be done on a quarterly basis, kind of at the time we would be reporting externally. So for internal purposes, you know, that has not been considered at the moment.

486 Q. I get that. I understand the answer. But we discussed last time, and in your affidavits, you're also seeking financing from third parties, and I'm assuming you're putting together packages for those third parties?

A. Well, we provided them our forecast, if that's what you mean.

487 Q. That might be one thing. And how is that being accounted? Is this liability being accounted for in those forecasts that are provided to lenders?

A. No, it's not. The lenders are aware of the 50 million that's going to be going into trust. They're also aware of, you know, the general unsecured creditor claims. But in terms of other contingent liabilities, there has not been any specific amount for those included in our financial forecast.

488 Q. Okay. And on a confidential basis, can you produce the forecasts that were provided to the lenders? And I'll sharpen that. I will give you the reason why, Mr. Steep. If you're purporting to call these unaffected claims, it has a great impact on -- the solvency of the emerging entity has a great impact on whether they are unaffected as a matter -- as a practical matter or not, or whether the company is financeable.

U/A MR. STEEP: I'm not going to agree, but I'll consider it. I'll take it under advisement. I haven't seen the forecasts.

MR. HOWARD: Okay. So given the time frames, you'll let me know as soon as you can, because this is, this is kind of a key point for us.

MR. STEEP: It sounds to me, again, a point that goes to the fairness hearing, and I don't think it's critical for Friday, but I hear you that you want it, and I'll consider my position between now and Friday.

MR. HOWARD: Okay.

BY MR. HOWARD:

489 Q. Am I correct, Mr. Guyatt, in terms of the changes that were made to the plan that ended up on April 9th, there were, as far as you're

aware, no discussions about those changes with either the Litwins or the auditor's counsel?

A. Not that I'm aware of.

MR. HOWARD: Okay. And Mr. Steep, if you have information to the contrary, you'll let us know?

MR. STEEP: No, I think that's accurate.

MR. HOWARD: Okay. Subject to the refusals and the undertakings, and my friends from Stikemans telling me by chat that I should add something else. If you can give me a couple of minutes.

MR. STEEP: That's fine. You check with your colleagues. That's fine.

MR. HOWARD: Colleagues, chat.

MR. PUKIER: Nothing from me, Peter, but thank you. That's the chat, right?

MR. KOLERS: The same.

MR. HOWARD: Okay.

--- Off-the-record discussion

--- Whereupon the cross-examination concluded at 3:07 p.m.