Court File No. CV-23-00693595-00CL

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 15177561 CANADA INC. and 15177570 CANADA INC.

Applicants

BOOK OF AUTHORITIES OF THE APPLICANTS
(Re: Termination of CCAA Proceedings)

July 21, 2023

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)
Tel: (416) 869-5623
Email: lpillon@stikeman.com

Lee Nicholson (LSO #66412I)
Tel : (416) 869-5604
Email: leenicholson@stikeman.com

Philip Yang (LSO #82084O)
Tel: (416) 869-5593
Email: pyang@stikeman.com

Lawyers for the Applicants

TO: THE SERVICE LIST

INDEX

See paras. 14-15

2006 CarswellOnt 9983
Ontario Superior Court of Justice [Commercial List]

Tiger Brand Knitting Co., Re

2006 CarswellOnt 9983

In the Matter of an Application under: The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of: Tiger Brand Knitting Company Limited

C. Campbell J.

Heard: August 18, 2005
Judgment: September 1, 2006
Docket: 04-CL-5532

Counsel: Scott A. Bomhof, for Monitor, RSM Richter Inc.
Christopher Besant, for Joan Fisk
Fred Myers, for 3098578 Nova Scotia Company (the "Purchaser")
Mario J. Forte, for GMAC Commercial Finance Corporation-Canada

***C. Campbell J.*:**

1 On the return of a motion by the Monitor for approval of its activities, including fees, discharge and release of a "holdback" to the Purchaser, counsel for Joan Fisk opposed the payment of the holdback funds until determination of the claim on behalf of his client for damages for wrongful termination of her employment.

2 All counsel are agreed that if it were necessary to determine whether or not Joan Fisk was terminated prior to the assignment into bankruptcy of the Company, the issue would require a trial as the facts are very much contested.

3 A more fundamental issue arises and that is whether, reasonably construed, should the Initial CCAA Order of August 2005 or the Sale Approval Order of April 11, 2006 permit a claim of the kind advanced by Joan Fisk to be applied against the holdback before it is paid to the Purchaser?

4 Mr. Myers for the Purchaser urges that both the Initial Order and the Sale Approval Order contemplated very limited matters that would be applied to the holdback, which was in effect a financing by his client to enable an orderly sale and purchase of assets immediately followed by an assignment in bankruptcy:

Excerpted from the Order of August 30, 2004:

> 14. THIS COURT ORDERS that the Applicant shall remit, with the prior approval of the Monitor, in accordance with legal requirements, or pay the following:
>
> > (a) amounts owing for goods or services actually supplied to the Applicant from the date of this Order and thereafter;
> >
> > . . . . .
> >
> > (c) amounts accruing and payable by the Applicant in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees;

. . . . .

16. THIS COURT ORDERS that the Applicant shall, with the Monitor's prior approval (or in the Monitor's discretion, the Court's approval), have the right to:

(c) terminate the employment or temporarily lay off such of its employees as it may deem necessary or appropriate and, to the extent any amounts owing in respect thereof are not paid in the ordinary course as the Applicant may in its discretion determine...

Excerpted from the Order of April 11, 2005:

13. THIS COURT ORDERS that, upon « losing of the sale of the Purchased Assets to the Purchaser in accordance with the terms of this Order and subject to obtaining the Reimbursement Agreement (as such term is defined in the Eighth Report), the Monitor shall hold the Sale Proceeds in a separate interest-bearing account and the Monitor is authorized to release and/or arrange to remit the Sale Proceeds to GMACFC for application against the indebtedness of the Applicant to GMACFC, subject to the requirement that the Monitor withhold such amount (the "Holdback") as necessary to pay (i) any obligations validly secured by the Directors' Charge, which holdback amount shall be $500,000; (ii) any obligations validly secured by the Administration Charge, which may arise after the date of this Order); and (iii) all accrued post-filing obligations to the extent such obligations are not secured by the Directors' Charge or the Administration Charge.

. . . . .

16. THIS COURT ORDERS that after the closing of the Transactions, the Applicant or the Monitor On behalf of the Applicant may make an assignment of all of the property of the Applicant for the general benefit of die Applicant's creditors pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (the "BIA") and that Richter is authorized to act as trustee in bankruptcy of the Applicant.

5 Mr. Besant for Ms. Fisk submitted that the word 'accrued' in 14.(c) in the Initial Order was broad enough to include the claim of his client.

6 Briefly put, the position of Ms. Fisk is that her brothers terminated her employment actually or constructively before the closing in the sale transaction and assignment into bankruptcy, entitling her to a claim for damages for wrongful dismissal, which claim crystallized or accrued as at the time of her termination.

7 In effect, Mr. Besant submits the brothers didn't do it properly and thereby exposed the Holdback to the claim of their sister. Mr. Besant concedes that the original intention of the parties at the time the Orders were made was that employment would terminate at the time of assignment into bankruptcy, leaving all the rest of the employees with claims as unsecured creditors.

8 It would be quite astounding that the former CEO, by claiming wrongful termination, could have in effect a preference with resort to a specific fund if successful, while all the other employees had claims merely as unsecured creditors.

9 I am satisfied that it was not within the contemplation of any party at the time of the Orders in issue that a claim for damages of the type alleged would be a charge on the Holdback. The Purchaser was entitled to and in my view did obtain the kind of assurance that would limit the nature and quantity of the claims that could reduce the amount it was entitled to recover.

10 The Asset Purchase Agreement contained a definition of "Holdback" as against a budget of enumerated items. There is no mention of any claim for damages for wrongful dismissal. In my view, the wording referred to above, both in the Orders and the Asset Purchase Agreement, is simply not capable in the context of the proceeding before the Court of providing for a damage claim of the kind advanced by Ms. Fisk. It would have required much more specific language to permit a claim for wrongful dismissal to survive before what all parties knew was going to be an imminent bankruptcy.

11 For the above reasons, the direction sought on behalf of Joan Fisk to restrain payment of the Holdback funds at this time is denied.

12 The Purchaser takes issue with the quantum of fees sought by the Monitor/trustee. Mr. Myers candidly admitted that it would not be cost or time effective to send the accounts for assessment. Rather, he sought the exercise of discretion by the Court to reduce the fees by some amount to reflect simply that they were too high for what was accomplished, particularly in the time period from the Sale Approval Order onward.

13 Mr. Bomhof did supply some elaboration of the details of the efforts undertaken by the Monitor/trustee and by counsel. He also noted that the total of $2 million included the fees of GMAC and those of the Monitor were $1.2 million of that sum.

14 The cost of legal and Monitor service is of significant concern to the Court. This is particularly the case when hourly rates in excess of $600 are charged.

15 While I have some sympathy for the position advanced by Mr. Myers, I find that without some specific principled objection, it would be inappropriate to reduce the fees of Court officers based on the suggestion that they are too high.

16 The approval of fees in this context is to be distinguished from the broader discretion that can be exercised by the Court when awarding costs following a motion or trial under the provisions of Rule 57.

17 It may be in the future that approval beforehand of hourly rates as against a budget should form part of the fee approval process.

18 In these circumstances I conclude, in the absence of specific items, that the fees of the Monitor/trustee are hereby approved as set out in the final report as filed.

19 The Order for approval will otherwise issue in the form forwarded to me for signature.

Court File No. CV-23-00693595-00CL

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

AND IN THE MATTER OF PLAN OF COMPROMISE OR ARRANGEMENT OF 15177561 CANADA INC. and 15177570 CANADA INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORIES OF THE APPLICANTS
(TERMINATION OF CCAA PROCEEDINGS)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Elizabeth Pillon (LSO #35638M)
Tel: (416) 869-5623
Email: lpillon@stikeman.com

Lee Nicholson (LSO #66412I)
Tel : (416) 869-5604
Email: leenicholson@stikeman.com

Philip Yang (LSO #82084O)
Tel: (416) 869-5593
Email: pyang@stikeman.com

Lawyers for the Applicants