Court of Appeal File No. C58636
Court File No.: CV-09-824700CL

COURT OF APPEAL FOR ONTARIO

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCT SALES INC., and GRANT U.S. HOLDINGS G.P.

Applicants

– and –

THE TORONTO-DOMINION BANK, in its capacity as agent for the secured lenders holding first lien security and THE BANK OF NEW YORK MELLON, in its capacity as agent for secured lenders holding second lien security

Respondents

FACTUM OF MERCER (CANADA) LIMITED

July 9, 2014

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FACTUM OF MERCER (CANADA) LIMITED

1. Mercer (Canada) Limited ("Mercer") is the administrator of two defined benefit pension plans sponsored by Grant Forest Products Inc. ("GFPI"). With the approval of the Superintendent of Financial Services (the "Superintendent"), Mercer replaced PricewaterhouseCoopers Inc. ("PwC") as administrator of the two pension plans.[1] PwC had been appointed by the Superintendent to replace GFPI as administrator of both plans on October 3, 2011. PwC participated in the motions below.

2. Mercer supports the Superintendent's position that the appeal should be allowed, and adopts the submissions made and defined terms used in the Superintendent's factum. In addition, Mercer supports the position of the Superintendent for the following reasons.

A) Timing of the Deemed Trusts – The Deemed Trusts Arose after the Initial Order

3. GFPI brought a motion for an order that, pending the Supreme Court's decision in *Indalex*, no further payments would be made to the two pension plans (the "Pension Motion"). PwC opposed the Pension Motion because the test for relief from making special payments, which has been established in several CCAA cases, was not met. In particular, GFPI was able to make the required payments without jeopardizing the restructuring. For more detailed submissions on why the test for relief from making special payments was not met, see paragraphs 65 to 68 of the Superintendent's factum, paragraphs 37 to 39 of the Joint Statement of Facts and Law,[2] and paragraph 5 of the PwC *Indalex* Submissions.[3]

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1 Mercer was appointed to replace PwC as part of a larger transaction between them in August 2013

2 Joint Statement of Facts and Law, paras 37-39, Appeal Book and Compendium, V2, Tab 29

3 Submissions of PricewaterhouseCoopers Inc. Regarding *Indalex* ["PwC *Indalex* Submissions"], paras 36-32, Appeal Book and Compendium, V3, Tab 38

4. Rather than considering the Pension Motion as framed, the CCAA Judge recast the question and considered "whether a deemed trust can be created during the pendency of a stay of proceedings". The CCAA Judge erred in recasting the Pension Motion in this way and in failing to consider the test for relief from making special payments. The creation of a deemed trust and the obligation to make special payments are two separate concepts. Mercer submits that the existence of a deemed trust has no bearing on whether a CCAA Court should grant a debtor relief from the obligation to make special payments.

5. In addition, Mercer supports the Superintendent's position that the CCAA Judge erred in his answer to the recast question. Contrary to the CCAA Judge's holding, where a wind up deemed trust arises before and has an effective date before the date of a Court-approved distribution to creditors, the priority of such a deemed trust must be considered before the distribution is approved.

6. In *Indalex*, the Supreme Court confirmed that if a plan is wound up and the effective date of the wind up is set before CCAA proceedings begin, then a deemed trust exists and the priority of that deemed trust must be considered before the Court approves a distribution.[4]

7. In *Indalex*, the Supreme Court also confirmed that if the plan has not been wound up as of the date of proposed distribution,[5] then a deemed trust has not arisen and the priority of

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[4] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 ["*Indalex*"], Appellant's Book of Authorities, Tab 1

[5] Mercer submits that the CCAA Judge misinterpreted *Indalex*. The CCAA Judge said "All of the justices agreed that the deemed trust provision contained in s. 57(4) of the *PBA* does not apply to the windup deficit of a pension plan that has not been wound up (the Indalex Executive Plan) at the time of the CCAA proceedings" (para 25) and that "The decision of the Supreme Court of Canada in *Indalex* assists in the execution of this task. The deemed trust that arises upon wind up prevails when the windup occurs before insolvency as opposed to the position that arises when wind up arises after the granting of an Initial Order" (para 71). These statements

10. For the reasons set out in paragraphs 55 to 56 and 81 to 87 of the Superintendent's factum, there is no provision in or order issued pursuant to the CCAA that conflicts with the *Pension Benefits Act* deemed trusts arising in this case. None of the orders crystallize the priorities or preclude the operation of the deemed trusts that arose before the date of the proposed distribution.

11. The *Pension Benefits Act* deemed trusts therefore existed and the CCAA Judge therefore erred by failing to consider the priority of the deemed trusts. The priority of the deemed trusts is established by section 30(7) of the *Personal Property Security Act* ("PPSA"). Section 30(7) creates a limited exception to the first-in-time rule that would ordinarily apply to determining priority between a security interest and a subsequent *Pension Benefits Act* deemed trust. Section 30(7) of the PPSA states:

> 30(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

This provision makes it clear that the first-in-time principle is reversed for certain assets: the beneficiaries of a deemed trust have priority over "an account or inventory and its proceeds".

12. The Court has held that section 30(7) of the PPSA permits a *Pension Benefits Act* deemed trust to prime a pre-existing security interest in account or inventory but not in other property. In *Toronto-Dominion Bank v Usarco Ltd*, the plan administrator acknowledged that the Receiver was only required to reserve the proceeds of accounts receivable and inventories even though the Receiver had collected proceeds for other assets.[8] Justice Farley applied section 30(7)

[8] [1991] OJ No 1314, Appellant's Book of Authorities, Tab 11

of the PPSA and held that the security granted in a general security agreement was subordinate to the *Pension Benefits Act* deemed trust with respect to the accounts and inventory.

13. Based on the plain reading of section 30(7) of the PPSA and the holding in *Usarco*, the *Pension Benefits Act* deemed trusts in this case have priority over the Second Lien Lenders in GFPI's accounts and inventory. The CCAA Judge erred in failing to consider and apply section 30(7) of the PPSA.

14. As PwC explained in its PwC *Indalex* Submissions, the funds held by GFPI are the proceeds of accounts and inventory and are therefore subject to section 30(7) of the PPSA.[9] This submission was not seriously challenged by the Second Lien Lenders.

15. However, after multiple adjournments of the Pension Motion, one of the Second Lien Lenders – West Face – sought to reverse the priority granted by the PPSA to the deemed trusts by bringing a motion for leave to lift the stay to proceed with a bankruptcy application (the "Bankruptcy Motion"). For the reasons set out in paragraphs 58 to 64 and 72 to 73 of the Superintendent's factum, the CCAA Judge erred in granting the Bankruptcy Motion.

16. Bankruptcy is not the inevitable result of a liquidating CCAA, as Justice Deschamps' decision in *Indalex* makes clear. She said:

> Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlement remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA* ... This was not a case in which a failed arrangement forced a company into

9 PwC *Indalex* Submissions, paras 36-32, Appeal Book and Compendium, V3, Tab 38

until the date it brought the Pension Motion. The Initial Order did not affect the potential for a deemed trust to arise nor the priority of that deemed trust;

(b) the Approval and Vesting Orders preserved the *Pension Benefits Act* deemed trusts, stating that "for the purposes of determining the nature and priority of any Claims and Encumbrances" – including "deemed trusts (whether contractual, statutory or otherwise)...whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise" – the proceeds of the sale "shall stand in the place and stead" of the assets sold;[13] and

(c) the Distribution Orders approved distributions in amounts that did not impact GFPI's ability to satisfy its deemed trust or other pension obligations because the Monitor was holding amounts in reserve sufficient to meet the anticipated pension obligations at the time the Distribution Orders were made. These reserves were established and increased by Court order.[14]

At the time the Initial Order, the Approval and Vesting Orders, and the Distribution Orders were made, the plans were protected. There was nothing for the plan administrator to challenge.

19. Mercer also notes that GFPI was the plan administrator at the time the Initial Order was granted as well as when all but one of the Approval and Vesting Orders were granted.[15] Neither PwC nor Mercer had any standing at the time these orders were granted. Under

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[13] Approval and Vesting Orders. See Appeal Book and Compendium, V1, Tab 10, pp 147-149

[14] Order dated August 26, 2011, Appeal Book and Compendium, V2, Tab 19; Order dated September 21, 2011, Appeal Book and Compendium, V2, Tab 20; Order dated June 25, 2012, Appeal Book and Compendium, V2, Tab 25

[15] Chronology, Schedule C to the Superintendent's factum

the CCAA Judge's reasoning, to the extent that the plan administrator was obliged to oppose relief sought in the Initial Order or in the Approval and Vesting Orders, that obligation lay with GFPI. It is problematic for the CCAA Judge to rely on the absence of an objection by GFPI to the Initial Order and Approval and Vesting Orders that GFPI itself was seeking.

20. The CCAA Judge also appears to suggest that the Superintendent and PwC (now Mercer) ought to have requested that the stay of proceedings be lifted.[16] In addition to the reasons set out in paragraphs 77 to 80 of the Superintendent's factum and in paragraphs 11 to 18 of the PwC *Indalex* Submissions, Mercer notes that the stay does not preclude the Superintendent from making an order winding up pension plans. The stay in paragraph 21 of the Initial Order states:

> THIS COURT ORDERS that until and including July 24, 2009 or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding")...shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting any Business or the Property, except with the written consent of the Applicants and the Monitor, ***or with leave of this Court...***[17]

If paragraph 21 applies – which need not be decided – this Court granted leave for the administrator to take steps to wind up the plans.[18]

21. Paragraph 22 of the Initial Order states:

> THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, government body or agency, or any other entities...against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property...are hereby stayed and suspended...

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16 CCAA Judge's Reasons, Appeal Book and Compendium, V1, Tab 3, paras 94-95

17 Initial Order, para 21, Appeal Book and Compendium, V1, Tab 8, p 102

18 Order dated August 26, 2011, Appeal Book and Compendium, V2, Tab 19; Order dated September 21, 2011, Appeal Book and Compendium, V2, Tab 20

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Applicants

Ontario
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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