Court File No. CV -09-8247-00CL

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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

FACTUM

OF THE TORONTO-DOMINION BANK AS AGENT FOR THE FIRST LIEN LENDERS

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PART I—OVERVIEW

1. In this Motion, Mr. Grant asks this Court to override express provisions of the very agreement on which he relies and this Motion must therefore fail.

2. In March 2008, Grant Forest Products Inc. ("GFPI") needed $20 million of additional cash in order to avoid breaching the liquidity covenants of the First Lien Credit Agreement (the "First Lien Credit Agreement") and the Second Lien Credit Agreements (together the "Credit Agreements").

3. To avoid defaulting under the Credit Agreements, GFPI proposed selling portions of its expected 2008 and 2009 tax refunds to Mr. Grant for $20 million. However, the sale had to be carefully structured to avoid breaching other provisions of the Credit Agreements or requiring Lender consent.

4. Providing GFPI with enough liquidity to comply with the Credit Agreements as of March 31, 2008, without breaching other provisions of the Credit Agreements or requiring Lender consent was the core purpose and intent of the parties to the proposed sale.

5. GFPI and its counsel carefully drafted a Tax Refund Purchase and Sale Agreement (the "Agreement") to achieve this core purpose and intent. For that reason, under the Agreement, GFPI obtained the $20 million in proceeds it needed to comply with the Credit Agreement prior to March 31, 2008 but only disposed of a $10 million interest in the Tax Refunds in 2008.

6. Further, in order to achieve the core purpose and intent of the Agreement, both GFPI and Mr. Grant agreed that Mr. Grant would receive **no interest** in the 2009 Tax Refund until GFPI delivered a transfer of the 2009 Refund.

7. Further, in order to achieve this core purpose and intent, the Agreement expressly provided that Mr. Grant would have no security for the promise of GFPI to transfer a $10 million interest in the 2009 Refund in 2009. After completion of the 2008 Closing, Mr. Grant had only unsecured contractual rights against GFPI in respect of the 2009 Refund.

8. Because of these and other provisions of the Agreement, all parties acknowledged that the Agreement did not breach the Credit Agreements and did not require Lender consent.

9. GFPI did not transfer the 2009 Refund to Mr. Grant and is in breach of its obligations under the Agreement. That breach was not accidental or inadvertent. GFPI anticipates that it will need the 2009 Refund when it becomes available.

10. In this Motion, Mr. Grant is asking this Court to ignore the core purpose and intent of the Agreement. He is asking this Court to trample on the terms of the Agreement in the guise of enforcing it. This Motion must be dismissed.

PART II—FACTS

11. The Toronto-Dominion Bank ("TD Bank"), on behalf of the First Lien Lenders disagrees with the facts stated in paragraphs 2, 3, 4, 5, 6, 7, 20, 22, 23, 28, 34, 35, 37, 38, 40, 41 and 44 of Mr. Grant's factum.

12. In respect of paragraphs 2, 4, 5 and 6, Mr. Grant's factum misstates the evidence. The Agreement expressly provides is section 5.02 "**that the Purchaser does not acquire any right title or interest in the Sold 2009 Refund**, and the Vendor does not sell, assign or transfer any right title or interest in the Sold 2009 Refund **until the Vendor delivers to the Purchaser at the 2009 Closing, the transfer referred to in Section 7.04(a)**." (emphasis added) The Agreement goes on to provide in section 5.06 that "The Vendor shall hold in trust for the Purchaser, keep segregated from any other funds, accounts or assets of the Vendor and pay to the Purchaser any amount of the Sold 2009 Refund received by the Vendor **after the completion of the 2009 Closing**." (emphasis added) Any fiduciary obligations of GFPI in respect of the Sold 2009 Refund arose only **after** the 2009 Closing, which has not occurred.

13. No evidence supports the statement made in paragraph 23 and elsewhere in Mr. Grant's factum that the Agents or the Lenders "approved" of the sales of the 2008 and 2009 Refunds. However, all parties accept that the Agent and its counsel commented on the outline of the proposed transaction, commented on drafts of the Agreement and acknowledged that the Agreement did not breach the Credit Agreements.

14. No evidence supports the statement in paragraph 28 "Significantly, this [structuring the 2009 sale such that it could not be considered a disposition in 2008] was done to avoid the time-consuming task of seeking the consent of all lenders under the Lien Credit Agreements (to either approve or amend). It had nothing to do with Peter Sr. or GFPI." Instead, Mr. Montgomery testified that because the Agreement complied with the Credit Agreements, no Lender consents were necessary. He did not comment on whether seeking consent would be time consuming or whether such consents would have been forthcoming if sought.[1] Mr.

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[1] Montgomery Cross-Examination, p. 54, ll. 5-25, p. 55, ll.1-10

Montgomery also testified that the Lenders were not necessarily pleased with the transactions contemplated by the Agreement and "might have been happier if the loan had simply been repaid".[2]

15. The statements in paragraphs 34 though 38 mischaracterize the admissible evidence. The evidence indicates that any discussions with GFPI concerning the 2009 Refund were in the context of GFPI's request that the First Lien Lenders consider a **restructuring** of the rights of the Lenders under the Credit Agreements at a time that GFPI was already in default of its obligations under the Agreement.[3]

16. Further, the "straw man" term sheet, from its first draft, included a covenant that, in the context of the proposed amendments of the Credit Agreements and the restructuring of GFPI, the 2009 Refund would be retained by GFPI because GFPI needed the liquidity it would provide.[4]

17. The statements in paragraph 44 of Mr. Grant's factum appear to refer to the hearsay statement of Mr. Peter Lynch apparently made on June 19, 2009 referring to discussions with TD Bank in the first quarter of 2009. Mr. Lynch has given no evidence in these proceedings notwithstanding that Mr. Grant, as CEO of GFPI, is his boss. In any event, taking the hearsay statement at face value, it and no other evidence supports the statements in paragraph 44.

18. Firstly, contrary to the first line of paragraph 44, nothing in Mr. Lynch's e-mail shows that it was an "explanation offered by GFPI for its failure to perform its obligation to deliver the 2009 Transfer on January 2, 2009".[5] We do not know from the e-mail what question was asked of Mr. Lynch.

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[2] Montgomery Cross-Examination, p. 54, ll. 5-25, p. 55, ll.1-10
[3] Montgomery Cross-Examination, p.p. 60 -61 and pp. 65 - 69
[4] Montgomery Cross-Examination, p.p. 67-68.
[5] Grant September 8th Affidavit, Exhibit "E"

19. In fact the evidence indicates that the discussions described in the e-mail, if they occurred at all, occurred after January 2, 2009.[6]

20. Secondly, Mr. Lynch's hearsay statement clearly states that GFPI was "headed for default" and that "the Company did not provide a written request…for partial discharges".

21. Thirdly, the last sentence of paragraph 44 omits the key fact, which is repeated frequently in the evidence, that TD Bank sought the retention by GFPI of the 2009 Refund "in the context of restructuring".[7]

22. The First Lien Lenders rely on the following facts.

23. Until May, 2009, TD Bank was both the First Lien Agent and the Second Lien Agent. When TD Bank resigned as the Second Lien Agent, it was replaced by Bank of New York. TD Bank continues as the First Lien Agent. [8]

24. GFPI and its affiliates used, among other sources of funding, the proceeds of the loans made under the Credit Agreements to fund the construction of the two operating facilities owned by Grant Claredon LP and Grant Allendale LP, both indirect subsidiaries of GFPI (the "Carolina Mills"). [9]

25. The development and construction costs of the Carolina Mills substantially exceeded the budgets provided to the Agents pursuant to the Credit Agreements. Additionally, substantial capital spending on non core assets, including a private golf course, a 65ft yacht and an elaborate renovation of the head office in Haileyberry, Ontario, also absorbed significant cash resources. These cost overruns and non-core capital asset expenditures contributed to GFPI'S liquidity issues that ultimately resulted in these proceedings. [10]

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[6] Montgomery Cross-Examination, p.61, ll. 8-22.
[7] Montgomery Cross-Examination, p. 65, ll. 4-21; p. 67, ll. 4-21; p. 67 ll. 22 to p. 68, ll. 17; p. 69, ll.12-14.
[8] The Montgomery Affidavit at para. 4.
[9] The Montgomery Affidavit at para.6.
[10] The Montgomery Affidavit at para.7, Montgomery Cross-Examination, p. 86, ll. 5-24; p. 87, ll. 7-25.

26. The Agreement was "devised and structured" by Mr. Lynch and Ross Walker of Fraser Milner to permit Mr. Grant to assist GFPI by providing it with additional cash in a way that complied with the Credit Agreements.[11]

27. Accordingly, the Agreement was drafted so as to comply with, among others, the following provisions of the Credit Agreements:

(a) The Credit Agreements prohibit financing by way of issuance of securities by GFPI without consent of the lenders (see section 9.04(4) of each of the Credit Agreements);

(b) The Credit Agreements permit dispositions of assets up to the aggregate annual amount of $10 million (see section 9.04(1)(c) of each of the Credit Agreements);

(c) The Credit Agreements did not require the proceeds of any such permitted sales to be paid on account of the loans because only proceeds of assets sales exceeding $25 million were required to be repaid on the loans (see section 6.03(1)(a) of each of the Credit Agreements); and

(d) The Credit Agreements prohibited GFPI from granting security except Permitted Encumbrances (see section 9.04(9) of each of the Credit Agreements).[12]

28. Because of these provisions and the business purpose of the Agreement it was carefully drafted to contain the following express provisions:

(a) The transactions contemplated by the Agreement are not an injection of equity but, instead are structured as dispositions of portions of 2008 and 2009 tax refunds (the "2008 Refund" and the "2009 Refund" respectively)

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[11] The Montgomery Affidavit at para.8.
[12] The Montgomery Affidavit at para.9, Pieterson e-mail dated March 24, 2008, Supplementary Motion Record, p. 102.

so that the proceeds paid could be retained and used by GFPI in its business;

(b) The value of interests sold in the 2008 Refund and the 2009 Refund is each limited to $10 million;

(c) The sale of the 2008 Refund was completed immediately on closing in 2008 but the sale of the 2009 Refund was expressly deferred until the 2009 Closing scheduled to occur on January 2, 2009;

(d) The sale of the 2009 Refund would be triggered only by the delivery of a transfer of the 2009 Refund and was not effective until then;

(e) The payment of $10 million on account of the 2008 Refund was a payment of purchase price paid on the 2008 Closing;

(f) The payment of $10 million on account of the 2009 Refund was expressly a deposit to be applied on the purchase price only on the 2009 Closing;

(g) In order to ensure that GFPI met its liquidity tests at the end of March, 2008, the deposit paid by Mr. Grant was expressly made available under the Agreement for immediate use by GFPI in its business;

(h) The obligation of GFPI under the Agreement, including the obligation to deliver a transfer of the 2009 Refund at the 2009 Closing was not secured such that any loss suffered by Mr. Grant resulting from GFPI'S obligation to complete the 2009 Closing was an unsecured claim against GFPI; and

(i) Mr. Grant had no interest in the 2009 Refund until the delivery of the 2009 Transfer and, if received by GFPI prior to the 2009 Closing and/or the transfer of the 2009 Refund, the 2009 Refund was to be held in trust for Mr. Grant.[13]

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[13] The Montgomery Affidavit at para. 10.

29. Neither the lenders nor the Agents were requested to approve the Agreement and they did not approve the Agreement or the proposed transactions.[14]

30. Rather, the First Lien Agent was advised by GFPI that it intended to enter into the Agreement and obtained advice from its counsel that the transactions set out in the Agreement did not breach the Credit Agreements and did not require Lender consent.[15]

31. Neither the Agents nor the lenders agreed to give a partial discharge of the First or Second Lien security in respect of the 2009 Refund and neither Agent was ever requested to give such a partial discharge.[16]

32. The 2009 Closing did not occur and GFPI never delivered the transfer of the 2009 Refund. Therefore, by the express terms of the Agreement, Mr. Grant has no rights, beneficial or legal in the 2009 Refund.[17]

33. Additionally, as expressly stated in the Agreement, Mr. Grant has no security for any breach by GFPI of its obligation to complete the transactions contemplated by the Agreement. [18]

34. For the reasons stated by Mr. Lynch in his affidavit supporting the Applicants' application for an Initial Order in these proceedings and because of the cost overruns and non-capital expenses described above, the Applicants and their subsidiaries came under severe financial strain in late 2007 that continued through 2008 and 2009.[19]

35. By the end of 2008, GFPI was on the verge of defaulting under the Credit Agreements.[20]

36. In anticipation of these pending defaults and the financial difficulties facing the Applicants and their subsidiaries, GFPI began to plan its restructuring in late 2008 by taking

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[14] The Montgomery Affidavit at para. 11.
[15] The Montgomery Affidavit at para. 12.
[16] The Montgomery Affidavit at para. 13.
[17] The Montgomery Affidavit at para. 14.
[18] The Montgomery Affidavit at para. 15, September 9th Grant Affidavit, Exhibit B.
[19] The Montgomery Affidavit at para. 16.
[20] The Montgomery Affidavit at para. 17.

three important steps. First, GFPI hired Stonecrest Capital Inc. as a restructuring advisor on December 12, 2008. Second, GFPI hired Goldman Sachs as a financial advisor to run a process to attract new investment in its business. Third, and as part of the Goldman Sachs process, GFPI approached TD Bank in January, 2009 seeking terms under which the First Lien Credit Agreement could be restructured to encourage new investment.[21]

37. By mid January, when the Applicants approached the First Lien Agent seeking modifications of the First Lien Credit Agreement to accommodate new investment, GFPI was already in default of its obligations under the Agreement in that the 2009 Closing had not taken place on January 2, 2009.[22]

38. In response to GFPI'S request, TD Bank considered modifications to the Credit Agreement that it would be prepared to present to the First Lien Lenders for consideration. A first draft of a term sheet was sent to GFPI on or about February 20, 2009. Among the express terms of the term sheet was a requirement that the 2009 Refund would not be transferred to Mr. Grant but would be retained by GFPI. Still, at that time, GFPI had not delivered the transfer of the 2009 Refund.[23]

39. TD Bank and GFPI conducted negotiations in respect of the term sheet for a number of weeks. At no time did GFPI object to the requirement proposed by TD Bank that, in the context of a restructuring of the Credit Agreements, GFPI would retain the 2009 Refund. The discussion of the 2009 Refund between GFPI and TD Bank only occurred in the context of the "straw man" restructuring term sheet and not otherwise.

40. In March, GFPI settled a "straw man" term sheet with TD Bank. TD Bank was advised that the "straw man" term sheet would be provided by Goldman Sachs to prospective investors with the authority of GFPI. The "straw man" term sheet expressly required that the 2009 Refund would be retained by GFPI. That "straw man" term sheet was also provided to the

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[21] The Montgomery Affidavit at para. 18.
[22] The Montgomery Affidavit at para. 19, Montgomery Cross-Examination p. 61, ll.17-23
[23] The Montgomery Affidavit at para. 20.

First Lien Lenders on March 16, 2009 as a discussion paper setting out the basis on which the First Lien Lenders would consider restructuring of the First Lien Facility.[24]

41. As a further demonstration that GFPI did not intend to complete the 2009 Closing, the cash flow information that it provided to the Agents expressly contemplated the receipt by GFPI of the entire 2009 Refund by GFPI in the fourth quarter of 2009 and the use of such funds in its business. [25]

42. The Agreement was executed in March 2008 contemplating a transfer of the 2009 Refund to Mr. Grant only on the delivery of transfer to him in 2009. Mr. Grant expressly obtained no legal or beneficial interest in the 2009 Refund until the transfer was delivered. [26]

43. No transfer of the 2009 Refund has been delivered to date and consequently Mr. Grant has no interest in the 2009 Refund. [27]

44. The fact that no transfer had been delivered was not inadvertent or accidental. It was deliberate and a necessary step to preserve cash as the business of GFPI struggled with tight liquidity. [28]

PART III—ISSUES

45. The issue in this Motion is whether Mr. Grant has a beneficial interest in the 2009 Refund despite the fact that the 2009 Closing did not take place and his express agreement "notwithstanding any other provision of [the] Agreement or any other right or purported right of the Purchaser (Mr. Grant), that the Purchaser does not acquire any right, title or interest in the Sold 2009 Refund…until the Vendor delivers to the Purchaser at the 2009 Closing, the transfer referred to in Section 7.04(a)".

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[24] The Montgomery Affidavit at para. 21.
[25] The Montgomery Affidavit at para. 22.
[26] The Montgomery Affidavit at para. 23.
[27] The Montgomery Affidavit at para. 24.
[28] The Montgomery Affidavit at para. 25.

PART IV—LAW AND ARGUMENT

No intention to create a trust prior to the 2009 Closing

46. The evidence does not support any finding that GFPI is a fiduciary to Mr. Grant in respect of the 2009 Refund. The Agreement is clear on this point that any such fiduciary obligations only arise **after** the 2009 Closing. Before the 2009 Closing, the overriding and paramount provisions of section 5.02 apply. Under section 5.02 of the Agreement, Mr. Grant has no, "right, title or interest" in the 2009 Refund.

47. The paramountcy, scope and breadth of section 5.02 are determinative of this motion. Mr. Grant cannot have a beneficial interest in the 2009 Refund if he has no interest and he has no interest on the facts of this case.

48. Because the parties to the Agreement agreed that Mr. Grant has no interest in the 2009 Refund, there can have been no "intent" to create a trust in his favour and the requirement of "intent" to create a trust, one of the three certainties, is not factually present in this case. Without a clear intention to create a trust - a "certainty of intent" - no trust is created.

Reference: *Howitt v. Howden Group Canada Ltd.*, [1999] O.J. No. 706, at para. 8 (Ont. C.A.)

Neither the Agent or the Lenders have wronged Mr. Grant

49. The evidence does not support the underlying theme of Mr. Grant's factum that the Lenders are seeking to be unjustly enriched by GFPI retaining the 2009 Refund. In fact, the evidence is to the contrary.

(a) Neither the Lenders nor the Agents proposed the Agreement. GFPI and its lawyers devised and structured the transactions described in the Agreement and proposed it to the Lenders.

(b) Neither the Lenders nor the Agents approved the Agreement or the transactions contemplated by it. The Agent reviewed the proposal and the

Agreement, considered it, commented on it and concluded, with the advice of counsel, that it did not breach the Credit Agreements.

(c) The core purpose and intention of the parties to the Agreement was to avoid breaching the Credit Agreements, both in the provision of liquidity to GFPI and in the method of doing so.

(d) The overriding provisions of section 5.02 are clear and comprehensive because they are the mechanism of the Agreement that ensures that GFPI did not breach the Credit Agreements by disposing of the 2009 Refund in 2008.

(e) The Agents and the Lenders are entitled to require GFPI to comply with the Credit Agreements and should not be criticized for doing so.

(f) The Agreement was for the benefit of GFPI and not necessarily for the benefit of the Lenders. Through the Agreement, GFPI avoided going into default under hundreds of millions of secured financing in March, 2008.

(g) The Lenders did not refuse any request for a partial discharge of the 2009 Refund and only indicated that they would require GFPI to retain the 2009 Refund as part of the consideration for the restructuring of GFPI and the amendment of the Credit Agreements.

(h) The Lenders are not seeking to enforce any security rights against the 2009 Refund (or "scoop" any money). Rather, they, like all other creditors of GFPI, are stayed from enforcing their security rights and are objecting to Mr. Grant scooping out $10 million in liquidity from GFPI in these CCAA proceedings when GFPI's projections show that it needs that money in its business.

50. Consequently, the facts and evidence do not support the argument set out in paragraph 62 of Mr. Grant's factum that the Agent or Lenders are seeking to benefit from their own default.

51. In fact, the equities favour the Lenders. It would be unfair to the Lenders if the Court were to declare, contrary to the Agreement itself, that because he paid the $10 million Deposit required by the Agreement in 2008, Mr. Grant acquired beneficial interest in the 2009 Refund. All parties have governed their affairs since March 31, 2008 on the basis that there was no breach of the Credit Agreements and GFPI was not in default because of the very terms of the Agreement that Mr. Grant now seeks to over turn or ask the Court to override in the name of equity.

52. The principles of equity and unjust enrichment cannot benefit Mr. Grant. The Supreme Court of Canada has outlined three requirements before an action can be maintained for unjust enrichment: (1) an enrichment; (2) a corresponding deprivation; and (3) no juristic reason for the enrichment.

Reference: *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.)

53. In this case, there is a clear juristic reason not to interfere with the terms of the Agreement; namely, the parties reached a clear contractual understanding on the very matter in concern. Equity cannot now redraw the terms of the Agreement, especially given the reliance of all parties on the common understanding that it complied with the Credit Agreement because Mr. Grant obtained no right, title or interest in the 2009 Refund until GFPI delivered a transfer of that asset to him.

Reference: *Docksteader v. Coopers and Lybrand Ltd.*, [1990] CanLII 2089 (BC S.C.)

PART V—ORDER SOUGHT

54. TD Bank, as Agent for and on behalf of the First Lien Lenders submits that this Motion should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of October, 2009.

Kevin P. McElcheran
(McCarthy Tétrault LLP)
Counsel for TD Bank, in its capacity as Lender and as Agent for the First Lien Lenders

Schedule A

1. *Howitt v. Howden Group Canada Ltd.*, [1999] O.J. No. 706 (Ont. C.A.)

2. *Pettkus v. Becker* (1980), 117 D.L.R. (3d) 257 (S.C.C.)

3. *Docksteader v. Coopers and Lybrand Ltd.*, [1990] CanLII 2089 (BC S.C.)

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