Court File No.: CV-09-824700CL

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT FOREST PRODUCTS SALES INC., GRANT ALBERTA INC., GRANT U.S. HOLDINGS GP, SOUTHEAST PROPERTIES LLC, GRANT CLARENDON LP, GRANT ALLENDALE LP, GRANT US SALES INC., GRANT NEWCO LLC, AND GRANT EXCLUDED GP.

Applicants

and

THE TORONTO-DOMINION BANK, in its capacity as agent for 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

STATEMENT OF THE MONITOR, ERNST & YOUNG INC. (Pension Motion and Bankruptcy Motion)

July 22, 2013

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

Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866

Lawyers for the Monitor

TO: SERVICE LIST

Summary of the Issues

1. The Monitor submits this summary of the issues to be addressed at the hearing on July 23, 2013 providing further submissions on the impact of the Supreme Court of Canada's decision in *Indalex* on the motions heard November 27, 2012.

2. The Monitor supported the relief sought by GFPI at the initial hearing and did not take a position with respect to the motion by West Face (a second lien lender) for an order lifting the stay of proceedings to continue a bankruptcy application against GFPI. The Supreme Court's decision in *Indalex* has provided some clarity in respect of these issues and there are a few points that the Monitor intends to raise in light of this decision and the written submissions that have been made by the other parties.

A. Are any funds held by the Monitor and/or GFPI deemed to be held in trust pursuant to subsections 57(3) or 57(4) of the PBA for the beneficiaries of each of the Pension Plans as a result of the wind-up of the Pension Plans, and if so, what amounts of the funds held by the Monitor and/or GFPI are deemed to be held in trust?

3. A key distinction between *Indalex* and the present situation is that one of the two defined benefit pension plans at issue in *Indalex* was wound up prior to the commencement of the CCAA proceeding, and the other pension plan was wound up after the filing and the sale of Indalex's assets. The Supreme Court of Canada in *Indalex* did not find a deemed trust in respect of the latter pension plan. In considering this first issue, therefore, it is necessary to address the threshold issue of whether a deemed trust can be created during the pendency of a stay of proceedings.

B. Pursuant to s. 30(7) of the PPSA, what portion of the amounts held by GFPI and the Monitor have priority over the Second Lien Lenders?

4. GFPI presently holds cash of approximately US\$1.4 million and approximately CDN\$203,000. The Monitor presently holds the Pension Escrow of approximately CDN\$3.1 million and cash in trust for GFPI of approximately CDN\$3.4 million and approximately US\$284,000. There does not appear to be a serious dispute that the funds held by GFPI constitute "accounts" under the PPSA.

5. In its Twenty-Ninth Report, the Monitor provides information to assist in any consideration as to whether some or all of the proceeds held by the Monitor constitute accounts or inventory under the PPSA.

6. One subsequent argument raised in the factum of the administrator, PwC, is that because GFPI owed fiduciary duties to the pension plan beneficiaries, this Court should find that GFPI first distributed proceeds that were not subject to the (retroactively established) deemed trust. The Monitor notes that all distributions of sales proceeds were made by the Monitor pursuant to Court Order and that no

consideration was given to the asset allocation in advance of any distribution nor is the asset allocation referenced in the relevant Court Orders.

C. Should the stay of proceedings be lifted in order to permit West Face to bring a bankruptcy application against GFPI, and if so, should a bankruptcy order be made against GFPI.

7. As the Monitor advised this Court at the hearing on November 27, 2012, absent the *Indalex* decision by the Court of Appeal, GFPI would have assigned itself into bankruptcy on completion of the asset sales. In *Indalex*, the Supreme Court advised that it is not a breach of an employer-administrator's fiduciary duties to pension beneficiaries to seek to voluntarily assign itself into bankruptcy. The Monitor is of the view that, without regard to how such a step would impact the relative priorities of the pension beneficiaries and the second lien lenders, the most efficient procedure for addressing the remaining issues in the estate is through a bankruptcy. The Monitor does have concerns that a decision limiting the ability of companies or creditors to assign a company into bankruptcy after commencing CCAA proceedings has the potential to affect lending and limit the willingness of interested parties to engage in CCAA restructurings in favour of proceedings under the BIA.

D. If the answer to C is yes, what terms, if any, should apply to the lifting of the Stay of Proceedings or the granting of the bankruptcy order?

8. In the event that the stay is lifted to permit a bankruptcy application by West Face, the Monitor expects to be able to resolve any issues to ensure an orderly transition. The parties have already discussed a proposed form of order.

9. With respect to the request for terms that impose a requirement on GFPI to pay certain amounts to the pensions in advance of a bankruptcy, these issues have been extensively addressed by the parties, but the Monitor is of the view that any decision in respect of such terms should be mindful of how the potential for such terms could impact lending and future restructurings.

E. If the answer to C is yes, is the effect of the bankruptcy to render the deemed trusts created by s. 57(3) and s. 57(4) inoperative?

10. The Monitor is of the view that this issue should be addressed, as was previously agreed among the parties. Any decision in respect of a bankruptcy and the imposition of terms is necessarily informed by the expectation that any such deemed trusts are inoperative in a bankruptcy.

F. If the answer to 1(c) is no, should GFPI or the Monitor make any distributions to the Pension Plans, and if so, in what amount.

11. The Monitor submits that if this Court's decision renders it necessary to consider such a distribution, GFPI and/or the Monitor will bring a separate distribution motion reflecting that decision.

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

Court File No: CV-09-824700CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

STATEMENT OF THE COURT-APPOINTED MONITOR, ERNST & YOUNG INC.
(Pension Motion and Bankruptcy Motion)

DATED JULY 22, 2013

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

Daniel S. Murdoch LSUC#: 53123L
Tel: (416) 869-5529
Fax: (416) 947-0866

Lawyers for the Monitor