

CITATION: Silver Streams Homes Inc. (Re), 2017 ONSC 314

COURT FILE NO.: 13-10362-00CL

DATE: 20170113

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *S. Schwartz* and *M. Poliak*, for the Applicants

A. Slavens, for Tarion Warranty Corporation

J. Klein, for MediGroup Incorporated and certain other lien claimants

E. Bisceglia, for Argo Lumber Inc. and Newmar Window Manufacturing Inc.

I. Aversa, for the Monitor

HEARD: In Writing

COSTS ENDORSEMENT

[1] The applicants in these proceedings brought a motion under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for approval of an agreement (the "Settlement Agreement") among the applicants, Tarion Warranty Corporation ("Tarion") and Imran Jinnah ("Jinnah"), the shareholder of the applicants. Certain lien claimants successfully challenged the motion (collectively the "Lien Claimants"). These lien claimants are: (1) Argo Lumber Inc. ("Argo") and Newmar Window Manufacturing Inc. ("Newmar"); and (2) Medi Group Incorporated ("Medi") and a number of other lien claimants associated with it (collectively, the "Trades"). The Lien Claimants have submitted costs submissions seeking costs of the motion against any or all of the applicants, Tarion, and Jinnah. In this endorsement, capitalized terms that are not defined have the meanings ascribed to them in the Court's endorsement dated September 25, 2015 which was reported at 2015 ONSC 5938 (the "Endorsement").

[2] The circumstances in this proceeding are novel. The Settlement Agreement was intended to rectify an apparently inadvertent failure to register the applicant Silver Streams Homes (Puccini) Inc. ("Puccini") that resulted in Tarion being unable to draw under certain letters of credit. The letters of credit had been posted by certain of the other applicants in these CCAA

proceedings, all of whom are affiliates of Puccini, to secure obligations in respect of homes being sold by Puccini. None of the applicants would have benefitted from enforcement of the Settlement Agreement. The only beneficiaries would have been Tarion and Jinnah. The Court denied approval of the Settlement Agreement for the reasons set out in the Endorsement.

[3] I will address the appropriateness of costs in respect of Tarion and Jinnah first and then in respect of the applicants and, by extension, the Private Mortgagees (as defined below).

Costs in Respect of Tarion

[4] Neither Tarion nor Jinnah brought this motion notwithstanding the fact that, as noted, they would have been the beneficiaries of the Settlement Agreement if approved. Instead, the motion was brought by the applicants. Upon receipt of the applicants' motion materials, however, Tarion chose to participate in the litigation in support of the motion. It filed a factum and made oral submissions in support of the motion at the hearing. Jinnah did not appear or otherwise make submissions in respect of the motion and has since filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). It appears that the Lien Claimants no longer seek a costs award against him for this reason.

[5] Regarding Tarion, I see no reason in principle why Tarion should not be responsible for the Lien Claimants' costs given that it participated in the motion with a view to improving the priority of its position over its status at the commencement of these CCAA proceedings. The fact that Tarion is a statutory creation that performs a regulatory function, which it inflates for present purposes, is not a sufficient basis for insulating it from a costs award. Tarion also argues that the nature of its participation on the motion should exclude costs consequences because it did not cause the Lien Claimants to bear any incremental costs. I do not think that this is, on its own, a basis for refraining from awarding costs against an interested party, such as Tarion, in respect of a motion to approve an agreement for the benefit of such party. Its actions can affect whether the motion is brought or, alternatively, whether the motion will have any economic consequences for the creditors of the debtor company.

[6] In circumstances such as are presented in this case, I think that if a party having an interest in a settlement agreement for which court approval is required has notice, in advance of the hearing, that the objecting party will seek costs if successful, the interested party should bear the risk of payment of costs. In such circumstances, the interested party has a choice. If it wishes to avoid the risk of paying costs, it can either require the debtor company to withdraw the motion, or renounce any benefit it would otherwise receive from the agreement. If, instead, it acquiesces in the bringing of the motion, the interested party should bear the risk of an adverse costs award, particularly if it actively supports approval of the motion.

[7] However, as mentioned, an important precondition to any such costs award is that the interested parties had adequate prior notice of the objecting parties' intention to seek costs against them if they are successful in having court approval denied. Such notice is necessary to provide an interested party with sufficient time to enable it to decide whether to take steps to cause an approval motion to be withdrawn or to otherwise divest itself of the benefit of the proposed agreement if court approval were granted.

[8] In the present circumstances, the Lien Claimants did not give such notice to Tarion. The Lien Claimants' Notice of Objection does not mention an intention to seek costs. The only written mention of such an intention appears in the factum of Argo and Newmar, which does not constitute prior adequate notice for two reasons. First, being set out in the factum, rather than in a Notice of Objection, such statement did not provide adequate time for Tarion to make its election. Second, any such notice should specifically refer to an intention to seek costs against the interested party. In this case, the notice referred only to an intention to seek costs, which could easily have been understood to mean in respect of the applicants only.

[9] The Lien Claimants say that the issue of costs was raised in settlement discussions prior to the motion. They say that, by proposing a settlement on a no-costs basis, it was clear to the other parties that the Lien Claimants would seek costs against the applicants and Tarion if the motion were not resolved. I do not think this is sufficient to constitute adequate prior notice of an intention to seek costs against Tarion. If objecting parties intend to pursue other creditors or other stakeholders in proceedings under the CCAA, express notice in writing should be required.

[10] Accordingly, I conclude that it is not appropriate to award costs against Tarion because there was no prior adequate notice of the Lien Claimants' intention to seek costs against it.

Costs in Respect of the Applicants and the Private Mortgagees

[11] The applicants submit that no costs should be awarded against them. They submit that, although they were required to bring the motion for approval of the Settlement Agreement, being a party to proceedings under the CCAA, they would not have received any economic benefit if it had been approved.

[12] In addition, the second mortgage lenders to the applicants also submit that no costs should be awarded against the applicants. These lenders comprise Puccini Mortgage Corporation, Depaul Management Limited, 388242 Ontario Limited, 53 Puccini Mortgage Corporation, Castle Lane Design Group Inc. and Nastell Investments Limited (collectively the "Private Mortgagees"). As the second secured creditors against the estate of the applicants, and given the assets of the estate, any costs award would be paid out of funds that would otherwise be available to satisfy the claims of the Private Mortgagees.

[13] The Monitor supports the position of the applicants, noting that costs awards under the CCAA are rarely made and only against unsuccessful parties rather than against a passive estate. The Monitor notes that the underlying rationale for this approach has been expressed by Romaine J. in *Re Calpine Canada Energy Limited*, 2008 ABQB 537, 46 C.B.R. (5th) 243 as follows, at para. 1: "generally, stakeholders in CCAA proceedings are involuntary parties in the process, compelled to participate by reason of the CCAA debtor seeking the protection of the Act." However, Romaine J. further reasoned that, where the parties are sophisticated commercial entities that commence litigation in an attempt to better their positions, the policy reasons that underlie the no-costs convention are not operative. In such circumstances, there is no reason to depart from the general rule of awarding costs to the successful parties, not as a punishment, but as recognition of the usual risks of litigation.

[14] I propose to first discuss the merits of the Lien Claimants' claim for costs in respect of the applicants without regard to the position of the Private Mortgagees, and then to address the merits of the position of the Private Mortgagees.

The Issue of Costs Against the Applicants

[15] The Lien Claimants were not parties to the Settlement Agreement, nor did they stand to benefit from their opposition except in the same manner as all other creditors of the applicants' estate, subject to the ranking of the claims of such creditors. As a result of the Lien Claimants' successful objection, the Security deposited with Bank of Montreal ("BMO") to secure the obligations of the applicants who posted the letters of credit issued in favour of Tarion is available to the estate of the applicants. Accordingly, the applicants have potentially benefitted from the successful objections of the Lien Claimants, as have the creditors of the applicants, including in particular the Private Mortgagees, notwithstanding the fact that they were passive participants. Given the foregoing, payment of the costs of the Lien Claimants would not constitute a preference in their favour, nor would it offend the principle that has informed the practice of refraining from awarding costs in the ordinary course.

[16] In my view, therefore, this is an appropriate circumstance in which to award costs against the applicants, subject to consideration of the equities in respect of the Private Mortgagees who would effectively be paying any such costs award.

The Issue of Costs as Between the Lien Claimants and the Private Mortgagees

[17] The position of the Private Mortgagees raises an additional complication.

[18] After the hearing of the motion, the Lien Claimants' claims were resolved in the context of a court-ordered reference. The minutes of settlement pertaining to Argo and Newmar provided that they were entitled to any costs that the Court may award in respect of this motion. The minutes of settlement pertaining to the Trades had a similar reservation regarding costs of this motion.

[19] I agree with the Lien Claimants that it would reasonably have been expected that the claim for costs that they reserved in the minutes of settlement were their respective claims against the applicants, rather than their claims against Tarion and Jinnah. These latter parties were not parties to the settlement discussions or to the documentation referred to above. As such, it was neither necessary to refer to a claim for costs against them, nor would any such reference have had any legal significance except if the parties intended to limit claims for costs to such parties, which was not the case in this proceeding. Accordingly, as between the Lien Claimants and the Private Mortgagees, the Lien Claimants are not prevented from asserting a claim for costs of this motion by virtue of the documentation discussed above.

[20] Turning to the relevant considerations, there is no suggestion that the Lien Claimants indicated to the Private Mortgagees that they would seek costs against the estate of the applicants. Moreover, the Private Mortgagees did not participate in the motion or in the settlement discussions regarding the motion in which the Lien Claimants say that their position should have become obvious. On the other hand, the Private Mortgagees benefitted from the Lien Claimants' opposition to the motion. At the present time, however, the quantum of the

Security to be released by Bank of Montreal remains an issue to be resolved between Tarion and the applicants.

[21] The justification for any costs award in favour of the Lien Claimants is their expenditure of funds for the benefit of all of the creditors. Balancing the foregoing considerations, I conclude that it would be appropriate to order that the reasonable costs of the Lien Claimants shall be payable by the applicants but only to the extent that the applicants actually receive the Security or the benefit thereof.

Quantum of Fair and Reasonable Costs

[22] Turning to quantum, Argo and Newmar seek costs of \$20,458.89 while Medi seeks costs of \$30,162.50, in each case on a partial indemnity basis. The Court is required to exercise its discretion to fix costs that are fair and reasonable in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.).

[23] I would observe that, in each case, the rates charged appear reasonable for counsel who were experienced in this area. However, I have adjusted the partial indemnity calculation of Argo and Newmar to reflect 60% of the actual rate charged. Further, some allowance should also be made for the duplication of effort of these two groups of Lien Claimants, as they essentially argued the same position.

[24] Turning to the factors in Rule 57.01, I note that the matter was important to the Lien Claimants and was also of benefit to the other creditors who share in the Security. Further, the matter was novel and relatively complex, both factually and legally. I have also taken into consideration the amount at issue, being approximately \$1 million, as well as the duplication of effort referred to above.

[25] Based on the foregoing, I find fair and reasonable costs to be \$17,500 payable to Newmar and Argo, collectively, and \$17,500 payable to the Trades, collectively, provided, however, that such costs are payable by the applicants only to the extent that the applicants actually receive the Security, or the benefit thereof, it being understood that any lesser amount received should be shared between the Lien Claimants on a pro-rata basis.



Wilton-Siegel J.

Date: January 13, 2017