Court File No.: CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

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 OF ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

FACTUM OF THE MOVING PARTIES, ARGO LUMBER INC. and NEWMAR WINDOW MANUFACTURING INC.

PART I - OVERVIEW RELIEF SOUGHT

1. The moving parties, Argo Lumber Inc. and Newmar Window Manufacturing Inc., seek an Order extending the Claims Deadline set under the Order of the Honourable Mr. Justice Wilton-Siegel dated January 16, 2014 to permit them to file all documentation relating to their claims in respect of the within proceedings.

PART II - FACTS

2. Argo Lumber Inc. ("Argo") supplied lumber, trusses and related building materials to an improvement on the Lands described on the attached Schedule "B" ("Project"). Argo Lumber Inc. delivered the materials and services requested with the sum of $135,060.11, including H.S.T., remaining unpaid and owing to Argo.

> **Motion Record, Tab 2, Affidavit of Sonja Turajlich sworn on September 26, 2014 ("Turajlich Affidavit") para. 2**

3. On October 18, 2013, Argo caused to be registered a Claim for Lien against title to the Lands in the Land Registry Office for the Land Titles Division of York Region in Newmarket, (No. 65), as Instrument No. YR2048904.

Turajlich Affidavit para. 3

4. On November 27, 2013, Argo caused a Statement of Claim to be issued to perfect its Claim for Lien as against the Defendants, 2147681 Ontario Inc., 2148990 Ontario Inc., 2147650 Ontario Inc., 2148993 Ontario Inc., Dapaul Management Limited, Silver Streams Homes (Puccini) Inc., Silver Streams Homes Inc., Puccini Mortgage Corp., Dapaul Management Limited, 388242 Ontario Limited, Foremost Mortgage Holding Corporation, Bank of Montreal, 53 Puccini Mortgage Corp., Nastell Investments Limited, Castle Lane Design Group Inc. and Home Trust Company.

Turajlich Affidavit para. 4

5. Newmar Window Manufacturing Inc. ("Newmar") supplied windows, doors and related building materials to the Project. Newmar delivered the materials and services requested with the sum of $67,793.32, including H.S.T., remaining unpaid and owing to Newmar.

Turajlich Affidavit para. 5

6. On October 22, 2013, Newmar caused to be registered a Claim for Lien against title to the Lands in the Land Registry Office for the Land Titles Division of York Region in Newmarket, (No. 65), as Instrument No. YR2050277.

Turajlich Affidavit para. 6

7. On November 27, 2013, Newmar caused a Statement of Claim to be issued to perfect its Claim for Lien as against the Defendants, 2147681 Ontario Inc., 2148990 Ontario Inc., 2147650 Ontario Inc., 2148993 Ontario Inc., Dapaul Management Limited, Silver Streams Homes (Puccini) Inc., Silver Streams Homes Inc., Puccini Mortgage Corp.,

Dapaul Management Limited, 388242 Ontario Limited, Foremost Mortgage Holding Corporation, Bank of Montreal, 53 Puccini Mortgage Corp., Nastell Investments Limited, Castle Lane Design Group Inc. and Home Trust Company.

Turajlich Affidavit para. 7

8. On or about December 17, 2013, an order under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C.-36 ("CCAA"), as amended, was granted by the Honourable Mr. Justice Newbould.

Turajlich Affidavit para. 8

9. Under paragraph 11 of the order of December 17, 2013, the Court granted a stay of all proceedings as against Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2148990 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.

Turajlich Affidavit para. 9

10. The stay of proceedings was thereafter extended by the following orders:

a. The Order of the Honourable Mr. Justice Wilton-Siegel dated January 16, 2014.

b. The Order of the Honourable Mr. Justice Newbould dated April 17, 2014.

c. The Order of the Honourable Mr. Justice D. Brown dated June 26, 2014.

Turajlich Affidavit para. 10

11. On or about January 16, 2014, the Honourable Mr. Justice Wilton-Siegel made an Order which, *inter alia*, set out a Claims process.

Turajlich Affidavit para. 11

12. Sonja Turajlich was present as counsel for Argo Lumber Inc. and Newmar Window Manufacturing Inc. in Court on January 16, 2014 when the order was made establishing the Claims process.

Turajlich Affidavit para. 12

13. Paragraphs 8 and 9 of the Order of the Honourable Mr. Justice Wilton-Siegel sets out the requirements with respect to the filing of Secured Claims. Under paragraph 1(q) of the Order, "Secured Claims" includes, *inter alia*, construction lien claimants.

Turajlich Affidavit para. 13

14. Under paragraph 8 of the January 16, 2014 Order, the Court ordered that all lien claimants deliver to the Monitor their written submissions together with all supporting documentation respecting the validity, quantum and priority of their Secured Claims by the Claims Deadline or such later date as the Monitor may agree or the Court may order prior to the Claims Deadline, failing which, the secured claim of such claimant against the Property shall be extinguished and forever barred.

Turajlich Affidavit para. 14

15. With respect to information and documentation, paragraph 9 of the Order provides that, in the case of lien claimants, information and documentation includes "a complete copy of the contract or subcontract, change orders, evidence of the date of last supply of work or services, a copy of all invoices, time sheets and a detailed statement of account including all payments received".

Turajlich Affidavit para 15

16. Paragraph 1(e) of the January 16, 2014 Order, establishes the Claims Deadline as 5 p.m. (E.S.T.) on February 14, 2014.

Turajlich Affidavit para. 16

17. Under paragraph 4 of the January 16, 2014 Order, the Court ordered that the Monitor shall cause a Notice of Creditors to be sent to each Known Creditor by facsimile transmission, electronic communication or regular prepaid mail on or before January 21, 2014.

Turajlich Affidavit para. 17

18. On January 17, 2014, counsel for Argo and Newmar received an email from Ian Aversa, counsel for the Monitor, attaching the Notice to Creditors in compliance with the Order of the Honourable Mr. Justice Wilton-Siegel.

Turajlich Affidavit para. 18

19. Through oversight, counsel for Argo and Newmar failed to diarize the Claims Deadline in the firm calendar and, as a result, Argo and Newmar failed to file their information and documentation in accordance with the Order of the Honourable Mr. Justice Wilton-Siegel by the Claims Deadline.

Turajlich Affidavit para. 19

20. On or about July 25, 2014, motion materials were served by a number of mortgagees referred to as private lenders in respect of a dispute concerning the fees of counsel for the Monitor, as well as issues concerning whether or not the Claims Process should be abandoned or revised. At the time the motion materials were delivered. Counsel for Argo and Newmar was involved on a full time basis in the preparation of lengthy written closing submissions for a 10-week trial and, thereafter, away on vacation.

Turajlich Affidavit para. 20

21. Upon return from vacation, counsel reviewed the Responding Motion Record and noted, for the first time, that the Claims of neither Argo nor Newmar were included on a Claims Summary prepared as an attachment to an email sent by counsel for the Monitor.

Turajlich Affidavit para. 21

22. At that point, and upon further inquiries being made, it was determined by counsel for Argo and Newmar that the Claims Deadline set out in the Order of the Honourable Mr. Justice Wilton-Siegel had not been diarized by counsel for Argo Lumber Inc. and Newmar Window Manufacturing Inc., and therefore, the information and documentation in respect of the moving parties' claims had not been submitted to the Monitor through oversight.

Turajlich Affidavit para. 22

23. As a result, on August 14, 2014, Emilio Bisceglia wrote to the Monitor and submitted the required material on behalf of Argo Lumber Inc. and Newmar Window Manufacturing Inc.

Turajlich Affidavit para. 23

24. In response, on August 19, 2014, Ian Aversa, counsel for the Monitor, wrote to counsel for the moving parties, acknowledging receipt of the documentation and advising that the documentation was to have been submitted to the Monitor by February 14, 2014. In his letter, Mr. Aversa further advises that the Monitor intends to raise the issue of the moving parties' claims with the Vetting Committee and will keep the moving parties abreast of any recent developments.

Turajlich Affidavit para. 24

25. Mr. Aversa advised counsel for Argo and Newmar at or about mid August 2014 that only one meeting has been held by the Vetting Committee with a second meeting anticipated to take place in September 2014.

Turajlich Affidavit para. 25

26. A number of the mortgagees, referred to as "private lenders", have filed materials in response to a motion for an order approving the fourth report of the Monitor, alleging that the Monitor has not followed the Claims Process set out in the Order of the Honourable Mr. Justice Wilton-Siegel in that the Monitor has failed to deliver Notices of Disallowance to the Secured Claims in accordance with the deadlines set out in the Order.

Turajlich Affidavit para. 26

27. Further, it appears from the statement made in paragraph 22 of the Affidavit sworn by Imran Jinnah on September 16, 2014 (in support of a motion by the Applicants returnable September 23, 2014, to, inter alia, extend the stay and approved the fourth and fifth reports of the Monitor) that the lien claims will be referred for determination to an arbitrator and, therefore, the Claims Process will be abandoned.

Turajlich Affidavit para. 27

28. Therefore, it appears that no Notices of Disallowance have been delivered by the Monitor as required by the Order of the Honourable Mr. Justice Wilton-Siegel. Therefore, it appears that the Claims Process has not proceeded as ordered, nor has it been completed.

Turajlich Affidavit para. 28

29. Accordingly, it is respectfully submitted, based on the above, that:

a. the delay was caused by oversight and inadvertence;
b. the moving parties acted in good faith; and
c. no prejudice will result to any party should the relief sought be granted.

PART III - STATEMENT OF ISSUES AND THE LAW

30. The test and criteria for determining how to address claims filed or amended after a claims barr date in a claims bar order was set out by the Court in *Blue Range Resources Corp. (Re)* [2000] ABCA 285 as follows:

> *"In concerning claims filed or amended after a claims bar date in a claims bar order, a CCAA supervising judge should proceed as follows:*
>
> *1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?*
>
> *2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?*
>
> *3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an Order permitting late filing?*
>
> *4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an Order permitting late filing?"*

Blue Range Resources Corp. (Re) [2000] A.J. No. 1232, para 41 to 42

31. Whether to permit late filing of a claim is a matter of discretion, to be exercised on appropriate principals.

Polywheels Inc. (Re) [2009] O.J. No. 2086, para. 46

32. The test and criteria in the case of *Blue Range Resources Corp. (Re)* has been adopted by the Ontario Superior Court of Justice.

Polywheels Inc. (Re) [2009] O.J. No. 2086, para. 47

33. Relevant prejudice to other creditors cannot be simply due to the fact that if the moving party creditor is permitted to file its claims, there will be greater claims made against whatever funds are available.

Polywheels Inc. (Re) [2009] O.J. No. 2086, para. 53

34. It is respectfully submitted that the moving parties have met the test and criteria. The delay in filing was caused by inadvertence of counsel and, at all times, the moving parties acted in good faith. Further, no prejudice will result if the moving parties are permitted to file their claims at this time as:

a. no Notices of Disallowance have been delivered;
b. no distributions have been made to the lien claimants;
c. it appears that the Claims Process has been abandoned;
d. the lien claims will be referred for determination to an arbitrator and/or referree.

<u>PART IV - RELIEF REQUESTED</u>

35. Accordingly, based on the above, the moving parties seek an Order extending the Claims Deadline set under the Order of the Honourable Mr. Justice Wilton-Siegel

dated January 16, 2014 to permit them to file all documentation relating to their claims in respect of the within proceedings.

October 10, 2014

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Bisceglia & Associates, P.C.
Per: Emilio Bisceglia/Sonja Turajlich
Lawyers for Argo Lumber Inc. and Newmar Window Manufacturing Inc.

SCHEDULE A

1. *Blue Range Resources Corp. (Re) [2000] A.J. No. 1232, para 41 to 42*
2. *Polywheels Inc. (Re) [2009] O.J. No. 2086, para. 53*

IN THE MATTER OF A PLAN OF COMPROMISE OF ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

Court File No. CV-13-10362-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE MOVING PARTIES, ARGO LUMBER INC. and NEWMAR WINDOW MANUFACTURING INC.

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Indexed as:

Blue Range Resources Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF Blue Range Resources Corporation
Between
Enron Canada Corp. and the Creditor's Committee, appellants (appellants), and
National Oil-Well Canada Ltd. et al., respondents (respondents)

[2000] A.J. No. 1232

2000 ABCA 285

193 D.L.R. (4th) 314

[2001] 2 W.W.R. 477

87 Alta. L.R. (3d) 352

271 A.R. 138

100 A.C.W.S. (3d) 956

Dockets: 99-18564, 18565, 18566, 18567, 18568, 18569,

18570, 18571 and 18802

Alberta Court of Appeal
Calgary, Alberta

Russell, Sulatycky and Wittmann JJ.A.

Heard: June 15, 2000.
Judgment: filed October 24, 2000.

(42 paras.)

On appeal from the decision of LoVecchio J. Dated the 9th day of November, 1999.

Counsel:

A. Robert Anderson and Scott J. Burrell, for Enron Canada Corp. and the Creditors' Committee.
S. Collins, for TransAlta Utilities Corporation.
D.W. Dear, for Rigel Oil & Gas Ltd.
D. Mann, for Barrington Petroleum Ltd. and PetroCanada Oil & Gas.
K.E. Staroszik, for Founders Energy Ltd.
J.N. Thom, for National-Oilwell Canada Ltd. and Campbell's Industrial Supply Ltd.

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by

WITTMANN J.A.:--

Introduction

1 The Companies' Creditors Arrangement Act, R.S.A. 1985, c. C-36, as amended ("CCAA"), permits the compromise and resolution of claims of creditors against an insolvent corporation. In this appeal, as part of the ongoing resolution of the insolvency of Blue Range Resources Corporation ("Blue Range"), this Court has been asked to state the applicable criteria in considering whether to allow late claimants to file claims after a stipulated date in an order ("claims bar order").

2 In his decision below, the chambers judge determined that in the circumstances of this case it was appropriate to allow the respondents ("late claimants") to file their claims thus entitling them to participate in the CCAA distribution.

Facts

3 Blue Range sought and received court protection from its creditors under the CCAA on March 2, 1999. The claims procedure established by PriceWaterhouse Coopers Inc. ("the Monitor"), and approved by the court in a claims bar order, fixed a date of May 7, 1999 at 5:00 p.m. by which all claims were to be filed. Due to difficulties in obtaining the appropriate records, the date was extended in a second order to June 15, 1999 at 5:00 p.m., for the joint venture partners. The relevant orders stated that claims not proven in accordance with the set procedures "shall be deemed forever barred" (A.B.P. 01, A.B.P. 06). Under this procedure $270,000,000 in claims were filed.

4 The respondent creditors in this appeal fall into two categories: first, those who did not file their Notices of Claim before the relevant dates in the claims bar orders, and second, those who filed their initial claims in time but sought to amend their claims after the relevant dates. All of these creditors applied to the chambers judge for relief from the restriction of the date in the claims bar orders and to have their late or amended claims accepted for consideration by the Monitor.

5 The chambers judge allowed the late and amended claims to be filed. The appellants, Enron Capital Corp. ("Enron") and the Creditor's Committee, seek to have that decision overturned. I granted leave to appeal on January 14, 2000 on the following question:

> What criteria in the circumstances of these cases should the Court use to exercise its discretion in deciding whether to allow late claimants to file claims which, if proven, may be recognized,

> notwithstanding a previous claims bar order containing a claims bar date which would otherwise bar the claim of the late claimants, and applying the criteria to each case, what is the result? (A.B.928).

Judgment Below

6 The chambers judge found that the applicable section of the CCAA, s. 12(2)(iii) did not mandate a claims procedure. He stated that preserving certainty in the CCAA process was not a sufficient reason to deny the late claimants a second chance. In his view, taking a strict reading of the claims bar orders would have the effect of denying creditors, who have a logical explanation for their non- compliance with the order, any recovery. While the chambers judge noted that compromise is required by creditors in a CCAA proceeding, he did not think it fair that these late claimants be required to compromise 100 per cent of their legitimate claims. In addition, the chambers judge was of the view that process required flexibility and should avoid pitting creditors against one another.

7 Having decided that flexibility in the process was required, the chambers judge then considered an appropriate test for allowing the filing of late claims. Although encouraged by the appellants to adopt an approach similar to that contained in the United States Bankruptcy Code, Federal Rules of Bankruptcy Procedure, for Chapter 11 Reorganization Cases, ("U.S. Bankruptcy Rules") the chambers judge chose to incorporate the test in place under the Bankruptcy and Insolvency Act R.S.C. 1985 c. B-3 ("BIA"). Specifically, he found that because the situation of Blue Range was essentially a liquidation, the approach used in the BIA was appropriate. Under the BIA, late claims are permitted under almost any circumstance provided no injustice is done to other creditors. A late filing creditor under the BIA may only share in undistributed assets. Therefore, the chambers judge found that the creditors should be allowed to file late claims, or to amend existing claims late.

Standard of Review

8 It has been recently held by this court that decisions of a CCAA supervising judge should only be interfered with in clear cases. Deference to a CCAA supervising judge is generally appropriate where the questions before the court deal with management issues and are of necessity matters which must be decided quickly. This issue was addressed by Macfarlane, J.A. in Pacific National Lease Holding Corp. (1992), 15 C.B.R. (3d) 265 (B.C.C.A.) (cited with approval by Hunt, J.A. in Luscar Ltd. v. Smoky River Coal Ltd., [1999] A.J. No. 676 (C.A.)) as follows at 272:

> ...I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the CCAA. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made...
>
> ...
>
> Orders depend on a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the CCAA.

The chambers judge was exercising his discretion under the CCAA in granting an extension of the claims bar dates. However, the criteria upon which that discretion is to be exercised is a matter of legal principle, and therefore on that issue, the standard of review is correctness.

Analysis

9 As a preliminary matter I wish to comment on the nature of the order granted and the notices sent out to the individual creditors. The order dated April 6, 1999 stated in paragraph 2:

> Claims not proven in accordance with the procedures set out in Schedules "A" and "B" shall be deemed forever barred and may not thereafter be advanced as against Blue Range in Canada or elsewhere. (A.B.P. 01)

The first page of Schedule "A" stated in part:

> A Claims' Bar Date of 5:00 p.m. Calgary time on May 7, 1999 has been set by the Alberta Court of Queen's Bench. All claims received by the monitor or postmarked after the Claims' Bar Date will be forever extinguished, barred and will not participate in any voting or distributions in the CCAA proceedings..
> [Emphasis added] (A.B.P. 03).

The language used in Schedule "A" goes beyond the text of the order. Although it may not be of practical significance, barring the right of a claimant to a remedy is fundamentally different from erasing the debt. The court under the CCAA has powers to compromise and determine, but only in accordance with the process prescribed in the statute.

10 It was urged before the court in oral argument by counsel for the appellants that the purpose of the wording of the claims bar orders was to "smoke out" the creditors. I am dubious that the severe wording of the claims bar orders is effective to "smoke out" the creditor who may otherwise lie dormant. The objective of making certain that all legitimate creditors come forward on a timely basis has to be balanced against the integrity and respect for the court process and its orders. Courts should not make orders that are not intended to be enforced in accordance with their terms. All counsel conceded that the court had authority to allow late filing of claims, and that it was merely a matter of what criteria the court should use in exercising that power. It necessarily follows that a claims bar order and its schedule should not purport to "forever bar" a claim without a saving provision. That saving provision could be simply worded with a proviso such as "without leave of the court", which appears to be not only what was contemplated, but what in fact occurred here.

The Appropriate Criteria

11 The appellants advocated the adoption of the criteria under the U.S. Bankruptcy Rules, Chapter 11, while the respondents favoured either the application of the tests under the BIA or some blending of the two standards.

12 Rule 9006 of the U.S. Bankruptcy Rules deals with the extension of time in these circumstances. The relevant portion of the Rule states:

> 9006 (b)(1) ... when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The key phrase in this section is "excusable neglect". In Pioneer Investment Services Company v. Brunswick Associates v. Brunswick Associates Limited Partnership et al. (1993), 507 U.S. 380, 113 S. Ct. 1489, the U.S. Supreme Court dealt with the interpretation of this phrase. In Pioneer, the creditor's attorney, due to disruptions in his legal practice and confusion over the form of notice, failed to file a Notice of Claim in time. The U.S. Supreme Court noted that excusable neglect may extend to "inadvertent delays" (at pg 391) and went on to identify the relevant considerations when determining whether or not a delay is excusable. The Court said at 395:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable", we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

The American authorities also seem to reflect that the burden of meeting all of these elements, including showing the absence of prejudice, lies with the party seeking to file the late claim: e.g. In re Specialty Equipment Companies Inc., [1993] CA7-QL 1429, 159 B.R. 236.

13 The Canadian approach under the BIA has been somewhat different. Canadian courts have been willing to allow the filing of late or amended claims under the BIA when the claims are delayed due to inadvertence, (which would include negligence or neglect), or incomplete information being available to the creditors, see: Re Mount Jamie Mines (Quebec) Ltd. (1980), 110 D.L.R. (3d) 80 (Ont. S.C.). The Canadian standard under the BIA is, therefore, less arduous than that applied under the U.S. Bankruptcy Rules.

14 I accept that some guidance can be gained from the BIA approach to these types of cases but I find that some concerns remain. An inadvertence standard by itself might imply that there need be almost no explanation whatever for the failure to file a claim in time. In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in CCAA proceedings. But I also take some guidance from the U.S. Bankruptcy Rules standard because I agree that the length of delay and the potential prejudice to other parties must be considered. To this extent, I accept a blended approach, taking into consideration both the BIA and U.S. Bankruptcy Rules approaches, bolstered by the application of some of the concepts included in other areas, such as late reporting in insurance claims, and delay in the prosecution of a civil action.

15 In Lindsay v. Transtec Canada Ltd. (1994), 28 C.B.R. (3d) 110 (B.C.S.C.), the applicant was an unsecured creditor of Alberta Pacific Terminals Ltd. ("APCL"). Transtec Canada Ltd. was indebted to the applicant and APCL had guaranteed the obligation. APCL sought protection under the CCAA. Through oversight, the applicant Lindsay was not sent the relevant CCAA materials by APCL and was not included in the CCAA proceedings. He did not, therefore, have the opportunity to vote on the plan of arrangement. It is clear, however, that Lindsay at some point during the CCAA proceedings became aware of them, and at various stages had his lawyers contact APCL's lawyers to inquire about the process. Despite this knowledge he did not pursue the matter. Lindsay then came to the court seeking permission to sue APCL as a guarantor, potentially recovering considerably more than those creditors who participated in the CCAA process.

16 After reviewing all of the facts, Huddart, J. found that "Lindsay (or solicitors on his behalf) made considered, deliberate, decisions not to notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement" (para. 19). She then went on to conclude that Lindsay preferred not to participate in the CCAA process and chose to take his chances later on.

17 In deciding how to exercise her discretion, Huddart, J. applied the following factors: "the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and debtor company; fairness to other creditors; the scheme and purpose of the CCAA and the terms of the plan" (para. 56). On these criteria, Huddart, J. found that it would not be equitable to allow Lindsay to pursue a claim as he was well aware of what was going on in the CCAA proceedings, chose not to participate, and his late action would cause serious prejudice both to the debtor company and to the other creditors.

18 While Lindsay is clearly distinguishable on its facts from the within appeal, the case does highlight the issues of the conduct of the late claimants and the potential prejudice to other creditors and the debtor. Lindsay was the classic creditor "lying in the weeds", waiting for the appropriate moment to pounce. He did not act in good faith and his conduct was potentially prejudicial to other creditors and the debtor company. By avoiding the CCAA proceedings, Lindsay was attempting to gain an advantage not available to other creditors.

19 There is further support for a blended approach in several other areas of the law where courts have had to deal with the impact of delays and late filings. In particular, I have considered the courts' treatment of delays in the prosecution of actions and the late filing of notices of claim to insurers.

20 In Lethbridge Motors Co. v. American Motors (Can.) Ltd. (1987), 53 Alta. L.R. (2d) 326 (C.A.) the court had to decide whether or not to allow an action to continue where no steps had been taken by the plaintiff for five years. In deciding that the action could continue, Laycraft, C.J.A. relied on the following test from the English Court of Appeal in Allen v. Sir Alfred McAlpine & Sons Ltd., [1968] 1 All E.R. 543 where Salmon L.J. said at 561:

> In order for the application to succeed the defendant must show:
>
> (i) that there has been inordinate delay. It would be highly undesirable and indeed impossible to attempt to lay down a tariff - so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case, but it should not be too difficult to recognise inordinate delay when it occurs.
>
> (ii) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
>
> (iii) that the defendants are likely to be seriously prejudiced by the delay. This may be prejudice at the trial of issues between themselves and the plaintiff, or between each other, or between themselves and the third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay, the greater the likelihood of serious prejudice at the trial.

Relying on this test, as well as additional refinements, the Court found that the fundamental rule was that it was "necessary for a defendant to show serious prejudice before the court will exercise its jurisdiction to strike out an action for want of prosecution" (at pg. 331). The onus of showing serious prejudice has now been substantially altered as the result of amendments to the Alberta Rules of Court in 1994. Rule 244(4) now states that proof of inordinate and inexcusable delay constitutes prima facie evidence of serious prejudice: Kuziw v. Kucheran Estate, [2000] A.J. No. 944, 2000 ABCA 226 (Online: Alberta Courts).

21 Similar questions can arise in an insurance context where an insured is required to file a proof of loss or other notice of claim within a certain time period under a contract of insurance. For example, s. 205 of the Insurance Act R.S.A. 1980, c. I-5 states:

> 205 [w]here there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to by done or omitted by the insured with respect to the loss and the consequent forfeiture or avoidance of the insurance in whole or in part and the Court considers it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against forfeiture or avoidance on such terms as it considers just.

22 Similar wording is also found in ss. 211 and 385 of the Insurance Act and similar legislation exists throughout the common law provinces.

23 When deciding whether to grant relief from forfeiture in an insurance context the Alberta courts have generally adopted a two part test, see: Hogan v. Kolisnyk (1983), 25 Alta L.R. (2d) 17 (Q.B.). In Hogan the court found it appropriate to look first at the conduct of the insured to determine whether the insured is guilty of fraud or wilful misconduct. Second, the court considered whether the insurer had been seriously prejudiced by the imperfect compliance with the statutory provision (at 35). The "noncomplying" party can show that there was no prejudice by showing that the innocent party had actual knowledge of the events in question and was thereby able to investigate the situation.

24 Considering whether the insurer has suffered any prejudice, the court in Hogan quoted from a decision of Stevenson, D.C.J. in Schoeler (W.) Trucking Ltd. v. Market Ins. Co. of Can. (1980), 9 Alta L.R. (2d) 232 at 237 where Stevenson, D.C.J. said "[t]he root of the question is whether or not it (the insurer) would have acted any differently if it had been given notice of the loss when it should have been given notice". In 312630 British Columbia Ltd. v. Alta. Surety Co. (1995), 10 B.C.L.R. (3d) 84 (C.A.) the B.C. Court of Appeal set out a more recent formulation of the test, namely whether the insurer by reason of the late notice had lost a realistic opportunity to do anything that it might otherwise have done.

25 These authorities arise in a clearly different context from that which I am dealing with in this case, but they demonstrate that there is a somewhat consistent approach in a variety of areas of the law when dealing with the impact of late notice or delays in particular processes.

26 Therefore, the appropriate criteria to apply to the late claimants is as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional. I will deal with the conduct of each of the respondents in turn below and then turn to a discussion of potential prejudice suffered by the appellants.

National-Oilwell Canada Ltd. ("National")

28 National, and National as the successor in interest to Dosco Supply, a division of Westburne Industrial Enterprises Ltd. ("Dosco") indicate that their claims were filed late due to the unexpected illness and resulting lengthy absence of their credit manager who was in charge of the Blue Range accounts receivable. National submitted the National and Dosco notices of claims on June 7, 1999 (AB V, pgs 538 and 542). National's claim is $58,211.00 and Dosco's claim is $390,369.13. National and Dosco clearly acted in good faith and provided the Notices of Claim as soon as the relevant personnel became aware of the situation.

Campbell's Industrial Supply Ltd. ("Campbell's")

29 Campbell's initial claim in the amount of $14,595.22 was filed prior to the date in the relevant claims bar order. Campbell's then amended its claim on June 25, 1999 and again on July 8, 1999 to $23,318.88. The claim was amended after the relevant date as a result of a representative from Blue Range informing Campbell's that its claim should include invoices sent to Trans Canada Midstream, Berkley Petroleum, Big Bear Exploration and Blue Range Resources Corporation (A.B. 495-496). In addition, there appears to have been some delay due to the Notices of Claim not being sent to the correct Campbell's office. Campbell's acted in good faith throughout and it is in fact arguable that any delay in the proper filing of its claims was actually due to errors on the part of Blue Range rather than its own doing.

TransAlta Utilities Corporation ("TransAlta")

30 TransAlta did not comply with the dates in the claims bar orders. It contends that it did not receive the claims package prior to the relevant dates. It is apparent from the evidence that the claims package was sent to TransAlta at its accounts receivable office, rather than the registered office for service (A.B. 432-434). TransAlta was permitted to file its total claim of $120,731.00 by order of the chambers judge dated September 7, 1999. There is no evidence that TransAlta was attempting to circumvent the CCAA process. On the contrary, as soon as the appropriate personnel became aware of the situation, TransAlta took the necessary steps to have its Notice of Claim filed.

Petro-Canada Oil and Gas ("PCOG")

31 PCOG filed extensive claims material with the Monitor prior to the relevant dates showing several unsecured claims. The Monitor's draft third interim report indicated that four of PCOG's claims should properly have been classified as secured. The mistake by PCOG was the result of a misapprehension of how operator's liens functioned under the CAPL Operating Procedures incorporated into the contracts giving rise to the claims. PCOG then sought to amend its claims and have them changed from unsecured to secured status (A.B. 554), on July 7, 1999. The change in status would result in claims of $137,981.30 being amended from unsecured to secured. There was no lack of good faith.

Barrington Petroleum Ltd. ("Barrington")

32 Barrington was acquired by Sunoma Energy Corp ("Sunoma") in about September, 1998. An affidavit filed by Sunoma's controller indicates that the financial records of Barrington were found to have been in complete disarray. Barrington's initial Notice of Claim in the amount of $223,940.06 was submitted prior to the relevant date. Barrington received a Notice of Dispute of Claim which approved the claim to the extent of $57,809.37, but disputed the remainder. On reviewing the issue, Barrington's controller determined that Blue Range was correct, but at the same time she identified additional invoices of which she had been unaware (A.B. 549-551). On discovering the additional invoices, Barrington then submitted an amended Notice of Claim on July 22, 1999 and an objection to the Notice of Dispute of Claim. Barrington acted in good faith.

Rigel Oil & Gas Ltd. ("Rigel")

33 The full amount of Rigel's Notice of Claim was $146,429.68. This Claim was filed prior to the relevant date and the amount was approved by Blue Range. After the relevant date, on August 12, 1999, Rigel moved to amend and to allege that, despite Blue Range's claims to the contrary, its claim was secured, rather than unsecured. The only issue for Rigel on appeal is if their claim is properly secured can it be accepted because it was not claimed as secured until August 12, 1999.

Halliburton Group Canada Inc. ("Haliburton")

34 Halliburton was in the process of attempting to collect on accounts receivable owed by Big Bear Exploration Ltd. through May and June, 1999. They subsequently became aware, after the relevant date, that a claim in the amount of $11,309.90 was in fact against Blue Range, and should properly have been filed as a Notice of Claim in the CCAA proceedings (A.B. 497-499). On making this discovery, Halliburton wrote to the Monitor on July 14, and July 26, 1999 requesting that its claim be included in the CCAA proceeding. The Monitor disputed this claim as having been filed too late (A.B. 498). It appears that Halliburton acted in good faith.

Founders Energy Ltd. ("Founders")

35 Founders filed its claim prior to the relevant date, but, due to an oversight, claimed as an unsecured rather than a secured creditor. After filing its initial Notice of Claim, Founders received a Notice of Dispute from Blue Range. Within the 15 day appeal period, but outside the claims bar date, Founders then filed an amended Notice of Claim claiming a secured interest in the sum of $365,472.39, on July 26, 1999.

Prejudice

36 The timing of these proceedings is a key element in determining whether any prejudice will be suffered by either the debtor corporation or other creditors if the late and late amended claims are allowed. The total of all late and amended claims of the late claimants, secured and unsecured, is approximately $1,175,000. As set out above, in the initial claims bar order, the relevant date was 5:00 p.m. May 7, 1999. This date was extended for joint venture partners to 5:00 p.m. on June 15, 1999. The Plan of Arrangement, sponsored by Canadian Natural Resources Ltd. ("CNRL"), was voted on and passed on July 23, 1999. Status as a creditor, the classification as secured or unsecured, and the amount of a creditor's claim, are relevant to voting: s. 6 CCAA.

37 Enron and the Creditor's Committee claim that they would be prejudiced if the late claims were allowed because, had they known late claims might be permitted without rigorous criteria for allowance, they might have voted differently on the Plan of Arrangement. Enron in particular submits that it would have voted against the CNRL Plan of Arrangement, thus effectively vetoing the plan, if it had known that late claims would be allowed. This bald assertion after the fact was not sufficient to compel the chambers judge to find this would in fact have been Enron's response. Nowhere else in the evidence is there any indication that late claimants being allowed would have impacted the voting on the different proposed Plans of Arrangement. In addition, materiality is relevant to the issue of prejudice. The relationship of $1,175,000 (which is the total of late claims) to $270,000,000 (which is the total of claims filed within time) is .435 per cent.

38 Also, the contrary is indicated in the Third Interim Report of the Monitor where it is shown in Schedule D-1 (A.B. 269) that $2 million was held as an estimate of unsecured disputed claims. Therefore, when considering which Plan of Arrangement to vote for, Enron, and all of the creditors, would have been aware that $2 million could still be legitimately allowed as unsecured claims, and would have been able to assess that potential effect on the amount available for distribution.

39 Further, the late claimants were well known to the Monitor and all of the other creditors. The evidence discloses that officials at Enron received an e-mail from the Monitor on May 18, 1999 indicating that there were several creditors who had filed late, after the first deadline of May 7, and the Monitor thought that even though they were late the court would likely allow them (A.B. 1040). Finally, all of the late claimants were on the distribution list as having potential claims. (A.B. 9-148). It cannot be said that these late claimants were lying in the weeds waiting to pounce. On the contrary, all parties were fully aware of who had potential claims, especially Enron and the Creditors Committee.

40 In a CCAA context, as in a BIA context, the fact that Enron and the other Creditors will receive less money if late and late amended claims are allowed is not prejudice relevant to this criterion. Re-organization under the CCAA involves compromise. Allowing all legitimate creditors to share in the available proceeds is an integral part of the process. A reduction in that share can not be characterized as prejudice: Re Cohen (1956), 36 C.B.R. 21 (Alta. C.A.) at 30-31. Further, I am in agreement with the test for prejudice used by the British Columbia Court of Appeal in 312630 British Columbia Ltd. It is: did the creditor(s) by reason of the late filings lose a realistic opportunity to do anything that they otherwise might have done? Enron and the other creditors were fully informed about the potential for late claims being permitted, and were specifically aware of the existence of the late claimants as creditors. I find, therefore, that Enron and the Creditors will not suffer any relevant prejudice should the late claims be permitted.

Summary of Criteria

41 In considering claims filed or amended after a claims bar date in a claims bar order, a CCAA supervising judge should proceed as follows:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

Conclusion

42 Applying the criteria established, I find that the conclusion reached by the chambers judge ought not to be disturbed, and the late claims filed by the respondents should be permitted under the CCAA proceedings. The appeal is dismissed.

WITTMANN J.A.
RUSSELL J.A.:-- I concur.
SULATYCKY J.A.:-- I concur.

Case Name:

Polywheels Inc. (Re)

RE: 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 Polywheels Inc., Polywheels Manufacturing Ltd. and Cavu Enterprises Ltd., Applicants

[2009] O.J. No. 2086

53 C.B.R. (5th) 109

2009 CarswellOnt 2875

Court File No. CV-08-7624-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: May 19, 2009.
Judgment: May 21, 2009.

(57 paras.)

Creditors and debtors law -- Proceedings -- Practice and procedure -- Motion by Romspen for an order lifting a claims bar date allowed -- Cavu borrowed $2 million from Romspen secured by a mortgage -- A claims bar date was set but Romspen did not file a proof of claim before that date -- There was no evidence that any party had acted to its detriment as a result of Romspen's failure to file its proof of claims -- Furthermore, it could not be said that Romspen had not acted in good faith and none of the interested parties could assert that they were unaware of Romspen's claims.

Motion by Romspen for an order lifting a claims bar date. Polywheels and Cavu were sister companies. Cavu borrowed $2 million from Romspen secured by a mortgage. In August 2008, a claims procedure order was made to determine the claims against the two sister companies and a claims bar date of October 9, 2008 was set. Romspen did not file a proof of claim before that date. The lifting of the bar date would permit Romspen to deliver proofs of claim against Polywheels and Cavu. Although the request was not opposed by the Monitor, it was opposed by Polywheels and Cavu.

HELD: Motion allowed. There was no evidence that any party had acted to its detriment as a result of Romspen's failure to file its proof of claims. Furthermore, it could not be said that Romspen had not acted in good faith and none of the interested parties could assert that they were unaware of Romspen's claims. Therefore, it was appropriate to grant the requested relief.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36,

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 111(1), s. 111(2)

Counsel:

David P. Preger and Kevin P. McElcheran, for Romspen Investment Corporation.

David Hager, for Polywheels Manufacturing Ltd.

Peter I. Waldmann, for Cavu Enterprises Ltd.

Craig J. Hill, for the Monitor of Polywheels Manufacturing Ltd. and Cavu Enterprises Ltd.

Catherine Powell, for Sun Life Assurance Company of Canada.

ENDORSEMENT

1 **F.J.C. NEWBOULD J.**:-- Polywheels Manufacturing Ltd. ("Polywheels") and Cavu Enterprises ("Cavu") are both under CCAA protection pursuant to an Initial Order made June 27, 2008. Polywheels and Cavu are sister companies, both being fully owned subsidiaries of Polywheels Inc. Mr. Frank Milligan was the president of these companies and the controlling shareholder.

2 Polywheels carried on business as a tier one supplier to the automotive industry. Cavu owns the plant in Oakville that was used by Polywheels under a lease from Cavu to Polywheels.

3 In July 2006 Cavu replaced its financing from J.P. Morgan Chase with new financing from Sun Life Assurance Company of Canada ("Sun Life") and Romspen Investment Corporation ("Romspen"). Cavu borrowed $8.4 million from Sun Life secured by a first mortgage and $2 million from Romspen secured by a second mortgage. Romspen also obtained other security, including a General Security Agreement, an Assignment of Lease and a Guarantee and Postponement of Claim. Cavu paid off J.P. Morgan Chase from the funds borrowed from Sun Life and Romspen and loaned the balance, approximately $7 million, to Polywheels on a non-interest bearing basis with no set terms of repayment.

4 The CCAA process has been a liquidating process for both Polywheels and Cavu. Other than brokering a deal immediately after the filing in June of 2008 to collect receivables from GM and Ford in exchange for releasing moulds, the only realization achieved has been from the sale of equipment used in the Polywheels business. Cavu has no business to restructure and its property has been for sale throughout the CCAA process. Polywheels disclaimed its lease of the building from Cavu and left the property on March 31, 2009.

5 Romspen has brought a motion with respect to rent payable to Cavu for the property up to March 31, 2009. Polywheels objects to the payment of rent and claims to be entitled to offset against the rent payable to Cavu amounts that have been incurred by the Monitor of Polywheels and Cavu which are said to have been spent on behalf of Cavu and therefore owing by Cavu to Polywheels. At the heart of this debate is the effect of an order of June 22, 2008.

6 Cavu has an unsecured claim against Polywheels of approximately $7.3 million, which represents approximately one-third of the unsecured claims against Polywheels. It is anticipated that a dividend will be paid by Polywheels to Cavu. Romspen claims that this dividend is covered by its GSA. Polywheels disputes that the dividend to be paid by Polywheels to Cavu is the subject of Romspen's GSA security.

7 Romspen did not deliver a proof of claim pursuant to a bar claims process and now seeks an order lifting the claims bar date to permit Romspen to deliver proofs of claim against Polywheels and Cavu.

July 22, 2008 Order

8 Romspen was not notified of these proceedings under the CCAA at the time the Initial Order was sought. Rompsen found out that Cavu was in CCAA proceedings in the press and later received formal notice of the Initial Order.

9 On becoming aware of the CCAA proceedings affecting Cavu, Romspen brought a motion to dismiss the CCAA proceedings in respect to Cavu on the grounds that Cavu had no business to restructure but only assets to realize. Rompsen's motion was adjourned to July 22, 2008.

10 Romspen asserts that it became apparent in the context of discussions leading up to the return date of the motion that the principle purpose of Cavu's CCAA proceeding was to permit Cavu's equity holder some time to attempt to sell the real property and realize a surplus over the mortgage debt.

11 Romspen was prepared to permit the Monitor and Cavu a first opportunity to sell the Property provided that Polywheels paid rent under its lease and provided that the costs that would rank in priority to its mortgage and other security interests were limited to $50,000.

12 Accordingly, a consent order was made on July 22, 2008 in Romspen's motion to dismiss the CCAA proceedings of Cavu with the following principle terms:

(a) The Monitor was authorized and directed to carry out a sales process for the property in consultation with Cavu;
(b) Cavu was authorized to assist the Monitor in the sales process;
(c) Cavu retained the sole and exclusive right to sign a sale agreement for the property, subject to court approval;
(d) Polywheels was ordered to pay rent in the amount required by the lease and the obligation to pay rent would be satisfied by:

    (i) Cash payments payable monthly in an amount sufficient to pay interest payments on the Romspen and Sun Life mortgages; and
    (ii) A charge (the "Post Filing Rent Charge") on all of the assets of Polywheels ranking second only to the Administration Charge for the balance of monthly rent payable which was deferred until expiry of the Stay or further order of the Court;

(e) Cavu was directed to pay monthly interest payments to Sun Life and Romspen during the Stay and until a sale of the Property was completed; and
(f) The Administration Charge as set out in the Initial Order was allocated $200,000 as against Polywheels and $50,000 as against Cavu. The Initial Order provided for the Administration Charge on the property of Polywheels and Cavu to secure the professional fees and disbursements of the Monitor and its counsel and of the counsel for Polywheels and Cavu, not to exceed $250,000. The Administration Charge was a first charge.

13 The monthly interest charges on the Romspen and Sun Life mortgages that Polywheels was required to pay under the July 22, 2008 order were $59,000 per month. Under the lease from Cavu to Polywheels, the monthly rent to be paid was approximately $120,000 per month. The result of the order of July 22, 2008 was that Polywheels was given a cash flow benefit of $61,000 per month which it did not have to immediately pay. That amount was secured by the Post-Filing Rent Charge. The amount outstanding secured by the Post-Filing Rent Charge in favour of Cavu is approximately $541,000. It is this amount that Romspen moves to have paid to it and Sun Life as they direct.

14 The sale process for Cavu's property directed by the order of July 22, 2008 was not successful. Cavu entered into an agreement to sell the property dated August 13, 2008 and an order was made approving that sale on August 28, 2008. However, the purchaser terminated the agreement.

15 As a result of the failure of Cavu and the Monitor to sell the property, Romspen opposed any further extension of the stay in respect of Cavu. By order dated November 14, 2008, Romspen and Sun Life were granted leave to issue notices of sale under their mortgage security from Cavu and by further order dated December 5, 2008, the stay with respect to the claims of Romspen and Sun Life against Cavu were lifted.

16 On January 29, 2009, the Monitor's solicitor notified Romspen's solicitor that Polywheels was taking the position that the rent secured by the Post-Filing Rent Charge was subject to a set-off by Polywheels in respect of amounts owing by Cavu for payments said to have been made by Polywheels on Cavu's behalf during the CCAA proceedings. An attached summary indicated the amounts to be set off totaled approximately $777,000. In its Ninth Report to the Court, the Monitor stated that payments that had been made by Polywheels on Cavu's behalf totaled $394,369.63 and that further costs of Cavu incurred but not yet paid were $63,434.89. None of these amounts have been proven as being owed by Cavu to Polywheels.

17 Polywheels contends that it has a legal and equitable right to set off the rent obligations owed by Polywheels to Cavu under the Post-Filing Rent Charge against the obligation of Cavu to reimburse Polywheels for expenses made on its behalf. Polywheels asserts that the set-off can occur even though the July 22, 2008 order created a charge in favour of Cavu for the rent owing by Polywheels to Cavu. It is thus necessary to consider both legal and equitable set-off.

Legal Set-off

18 Set-off at law arises from statute. In Ontario is provided for in section 111 of the *Courts of Justice Act* as follows:

> 111.(1) In an action for payment of a debt, the defendant may, by way of defence, claim the right to set off against the plaintiff's claim a debt owed by the plaintiff to the defendant.
>
> (2) Mutual debts may be set off against each other even if they are of a different nature.

19 Statutory or legal set-off requires that both obligations be debts and that they be mutual debts. Mutual debts mean debts due from either party to the other for liquidated sums or money demands which can be ascertained with certainty. An assignment of a debt destroys mutuality and the possibility of set-off at law. See *Holt v. Telford*, [1987] 2 S.C.R. 193.

20 Included in the security obtained from Cavu by Romspen for its mortgage loan was a Guarantee and Postponement of Claims ("Guarantee") executed by Polywheels which included an assignment to Romspen of amounts that might become due from Cavu to Polywheels. It provided:

> 24. As security for all amounts owing under this Guarantee to the Lender [Romspen] by the Guarantor, the Guarantor [Polywheels] assigns and transfers to the Lender, and postpones in favour of the Lender, all present and future debts and liabilities of whatever nature or kind due or accruing due to the Guarantor from the Borrower [Cavu] and all

> choses-in-action and other claims of whatsoever nature or kind, present and future, which the Guarantor may now or hereafter have against the Borrower (all of the foregoing being hereinafter collectively referred to as the "Assigned Debts"). All moneys received by or on behalf of the Guarantor on account of any of the Assigned Debts shall be received and held by the Guarantor in trust for the Lender and forthwith remitted by the Guarantor to the Lender.

21 Romspen takes the position that any amounts that might become debts or liabilities owing by Cavu to Polywheels have been assigned by Polywheels to Romspen under the Guarantee. That is, assuming that Cavu is obliged to pay Polywheels amounts said to have been paid by Polywheels on its behalf, those amounts have been assigned by Polywheels to Romspen. Thus assuming that those amounts could be said to be a debt owing to Polywheels, Romspen takes the position that the rents to be paid to Cavu under the Post-Filing Rent Charge are not mutual debts because of the assignment from Cavu to Romspen contained in the Guarantee. Therefore, it says, the mutuality requirement for a legal set-off is not present.

22 Section 3 of the Guarantee provides that Polywheels liability to make payment under the Guarantee arises forthwith after demand for payment has been made. Polywheels asserts that no demand for payment was made by Romspen under the Guarantee and therefore nothing is owed under it. It asserts that the set-off is therefore not precluded by the Guarantee. I do not agree with this assertion.

23 The assignment contained in paragraph 24 of the Guarantee set out above is expressly made an independent provision of the guarantee contained in the document. Section 25 of the Guarantee provides:

> 25. This Assignment and Postponement is independent of this the Guarantee and it shall remain in full force and effect until repayment in full to the Lender of the Liabilities and the payment of any amounts owing to the Lender hereunder, notwithstanding that the liabilities of the Guarantor under this Guarantee may have been discharged or terminated.

24 Whether or not a demand for payment under the Guarantee was made does not affect the validity and enforceability of the assignment by Polywheels to Romspen of amounts that may become due from Cavu to Polywheels.

25 I accept the position of Romspen that the assignment contained in the Guarantee destroys the mutuality requirement for legal set-off and that Polywheels has no right to legally set off the rent they are to pay to Cavu under the Post-Filing Rent Charge against amounts which Polywheels claims Cavu owes it for expenses incurred on its behalf.

Equitable set-off

26 Polywheels asserts that if legal set-off is not available to it, the requirements for an equitable set-off have been met.

27 Equitable set-off does not require mutual obligations. The principles for equitable set-off were discussed in *Holt v. Telford* and summarized in *Re Algoma Steel Inc.* (2003), 63 O.R. (3d) 78 (Ont. C.A.). Rosenberg J.A. summarized the principles as follows:

> 1. The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
> 2. The equitable ground must go to the very root of the plaintiff's claim.
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
> 5. Unliquidated claims are on the same footing as liquidated claims.

28 Rosenberg J.A. also stated:

> It seems to me that a very helpful test is set out in a passage from the reasons of Lord Denning in Federal Commerce, [1978] 3 All E.R. 1066, at p. 1078 and which was quoted with apparent approval by Wilson J. in Telford at p. 400:
>
> > "*We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties?* ... This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. *It is only cross-claims that arise out of the same transaction or are closely connected with it.* And it is only cross-claims which go directly to impeach the plaintiff's demands, *that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.* [emphasis added]"

29 In my view there is no basis for Polywheels to equitably set off the rent to be paid by it to Cavu under the Post-Filing Rent Charge against amounts claimed to be owed by Cavu to it for expenses incurred by it on behalf of Cavu.

30 The rental obligation of Polywheels to Cavu arises from the lease of Cavu's premises made in 1994 and from the continuation of the lease after the July 22, 2008 order. That order did not change the nature of that obligation, although it did allow Polywheels to pay less than what was to be paid under the lease and it secured the balance owing to Cavu by means of the Post-Filing Rent Charge. The cross-claim, being the obligation of Cavu to Polywheels (assuming it exists and ignoring the assignment of it by Polywheels to Romspen) has arisen since July 22, 2008 by expenditures having been made in connection with efforts by Cavu to sell the property. These cross-claims have a temporal similarity although the legal basis for them is quite different. They do not arise out of the same transaction, nor are the transactions closely connected.

31 Romspen contends that rather than it being manifestly unjust not to allow the set-off, it would be manifestly unjust and inequitable to permit it. It contends that the July 22, 2008 consent order was a deal that it made as a compromise after it had brought its motion to dismiss the CCAA proceedings in respect to Cavu on the grounds that Cavu had no business to restructure but only assets to realize. The compromise reached permitted the Monitor and Cavu to attempt to sell the property in the hopes that there was sufficient equity to pay off the Sun Life and Romspen mortgages and have a balance left over for its shareholder Polywheels Inc. Romspen agreed not to pursue its motion to set aside the CCAA process regarding Cavu and Sun Life agreed to defer part of the rent payment as an accommodation to Polywheels to ease its cash flow pressures. However, to protect themselves, they negotiated a provision whereby only $50,000 of expenses would rank ahead of their security from Cavu, including the right to the balance of the rent payments. That was accomplished by the order that the Post-Filing Rent Charge was to rank second only to the Administration Charge set out in the Initial Order and the order that the Administration Charge was allocated as to $200,000 to the assets of Polywheels and as to $50,000 to Cavu's real property that was charged to Sun Life and Romspen.

32 I accept Romspen's contention that the effect of the set-off requested by Polywheels would be contrary to the intent of the July 22, 2008 consent order. The Post-Filing Rent Charge and the limit of administration charges to $50,000 against the Cavu property were provisions to protect Romspen and Sun Life as mortgagees while the Monitor and Cavu were attempting to sell the property. Expenses during a CCAA process, including all the professional fees involved, are invariably high and it would have made little sense for Sun Life or Romspen to have given up their right under their security to sell the property on their own without obtaining some assurance that the costs would not run away and eat into their interest in the property. To now permit the agreed charges of $50,000 that would rank ahead of the Post-Filing Rent Charge to be increased by $400,000 or more would be contrary to what was intended by the July 22, 2008 order and be inequitable to Romspen and Sun Life.

33 One of the amounts included in the amounts claimed to have been spent by Polywheels on Cavu's behalf is approximately $124,000 for employee expenses allocated by the Monitor to the Cavu estate. Employee expenses were the subject of a motion and on August 28, 2008 an order was made creating a charge in favour of Polywheels over the assets of Cavu to secure Cavu's obligation to reimburse Polywheels for certain salaries paid to employees. This charge, the Reimbursement Charge, was made subordinate to the security granted to Sun Life and Romspen in respect of the real property security given by Cavu. The Reimbursement Charge was set at a maximum of $100,000, and later changed by further order to $150,000.

34 Romspen contends that allowing the set-off for Cavu employee expenses paid by Polywheels would see these employee expenses reimbursed to Polywheels ahead of the security of Romspen and Sun Life, contrary to the August 28, 2008 order that provided for the Reimbursement Charge to rank behind their security. Polywheels agrees that the Reimbursement Charge is subordinate to the Post-Filing Rent Charge and that the employee expenses therefore cannot be set off against the rent secured by the Post-Filing Rent Charge. The position of Romspen on this is clearly correct. Romspen also asserts that if Polywheels had a right to set off expenses that it incurred on behalf of Cavu against the rental payments owing to Cavu and secured by the Post-Filing Rent Charge, Polywheels would not have needed to go to court in August to obtain a Reimbursement Charge for the employee expenses incurred on behalf of Cavu. Thus Romspen says that Polywheels' motion to obtain the Reimbursement Charge was inconsistent with the right of the set-off that it now asserts and was recognition that there was no such right. That may be the case although whether equitable set-off is available to Polywheels should not be determined by such prior actions of Polywheels.

Order re Rental Payments

35 In the result Romspen is entitled to orders in accordance with subparagraphs (d) and (f) of its amended afresh as amended notice of motion dated May 15, 2009.

General Security Agreement

36 As stated, it is anticipated that Polywheels will pay a dividend to Cavu for the unsecured claim of Cavu for approximately $7.5 million. Romspen takes the position that under its General Security Agreement ("GSA") the money to be received by Cavu is secured to Romspen and that Polywheels is not entitled to set off against the dividend any amounts which it may have paid on behalf of Cavu in which he now claims is owed by Cavu to Polywheels.

37 The collateral which has been assigned to Romspen by Cavu is defined as follows:

> "Collateral" means all Personal Property (including, without limitation, each Account, Chattel Paper, Document of Title, Equipment, Instrument, Intangible, Inventory, Money, Security and Goods) that is now or hereafter owned or acquired by or on behalf of the Debtor [Cavu] or in respect of which the Debtor now or hereafter has any rights and which is now or hereunder may become located on, affixed or attached to, placed upon, situate in or on, or which may arise out of, from or in connection with the ownership, use or disposition of the Lands or the Buildings or any part thereof including, without limitation, all increases, additions, substitutions, repairs, renewals, replacements, Accessions, accretions and improvements to any such Personal Property and all Proceeds and other amounts derived directly or indirectly from any dealings with any such Personal Property;

38 The balance of the money loaned by Sun Life and Romspen to Cavu, after repayment by Cavu of what was owed to J.P. Morgan Chase, was advanced by Cavu to Polywheels and recorded in their books as a loan for $7,077,884.47. The loan to Polywheels was on a non-interest-bearing basis with no set terms of repayment. Cavu has made a claim for this amount against Polywheels as well as for an additional claim of $260,369.51 with respect to utility arrears, the total claim of Cavu against Polywheels thus being $7,338,253.68.

39 The position of Romspen is that the claim of Cavu is for the most part for repayment of a loan made by Cavu to

Polywheels from money obtained by Cavu by mortgaging its property to Sun Life and Romspen. It asserts that the repayment of that loan by Polywheels is collateral as defined in the GSA and therefore an asset of Romspen against which there can be no set-off for amounts that may be owed by Cavu to Polywheels.

40 Romspen puts the obligation of Polywheels to repay the loan to Cavu in the definition of Collateral as follows. It says that that obligation to repay the loan to Cavu is an "Account" ... "owned or acquired by" Cavu which "arose out of, from or in connection with the ownership ... or disposition of" the Cavu property, including ... "all Proceeds and other amounts derived directly or indirectly from any dealings with" the Cavu property. What Romspen asserts is that the loan by Cavu to Polywheels arose from dealings by Cavu with its property, namely the borrowing of money from Sun Life and Romspen on the strength of a mortgage which was a use or disposition of the property.

41 I do not agree with the interpretation put on the GSA by Romspen. The loan to Cavu from Sun Life and Romspen did arise from a mortgage, or disposition, of the property but the loan by Cavu to Polywheels did not. What Cavu decided to do with that money cannot be said to arise from a disposition of the property but rather was a business decision to lend money to its sister company. Nor can the repayment of the loan by Polywheels be said to be proceeds derived directly or indirectly from any dealings with the property. I agree with the submission of Mr. Waldmann on behalf of Cavu that it makes no sense that mortgage lenders such as Romspen would have security over both the land which is the subject of the mortgage and the money being lent on the security of that mortgage. Absent a covenant in the mortgage loan documentation, a mortgagor is free to use the money that it borrows as it wishes and the mortgagee holds no security over that money. If Cavu bought BMWs for all the executives of Polywheels from the money borrowed from Romspen, could it be said that those cars were derived from the mortgage of the land and thus subject to the GSA? I think not.

42 In my view the GSA does not prevent a set-off against a dividend to be paid to Cavu of any amount that Cavu may owe to Polywheels for expenses incurred on behalf of Cavu. Whether any amount is owed by Cavu to Polywheels is a matter that needs to be determined.

Romspen Proof of Claim

43 On August 28, 2008 a claims procedure order was made to determine claims against Polywheels and Cavu. A claims bar date of October 9, 2008 was set. The order provided that the Monitor was to send a claims package to each known or potential creditor by September 3, 2008.

44 Neither Sun Life nor Romspen filed a proof of claim before the claims bar date. Sun Life obtained an order on April 7, 2009 lifting the claims bar date to permit it to file a proof of claim against Cavu. Romspen now moves for a similar order to permit it to file proofs of claim against Cavu and Polywheels. The Monitor does not oppose Romspen's request. The request is opposed, however, by Polywheels, Cavu and Mr. David France on behalf of former senior officers of Polywheels.

45 The Monitor advises that a copy of the order of August 28, 2008 which set the claims procedure was sent to Romspen. However, the Monitor for some reason failed to send a claims package to Romspen as required by the order. Mr. Roitman of Romspen in his affidavit stated that to some extent it was understandable that the Monitor failed to send Romspen a claims package as the Monitor and Cavu knew that the mortgages in favour of Sun Life and Romspen were outstanding and what the outstanding balances were. He also said that the Monitor never told him of the impending bar date or that Romspen must file a claim. The Monitor states that Romspen (who at Romspen is not said) was told twice that it had not filed a proof of claim. Mr. Roitman did not expressly state why Romspen did not file proofs of claim against Cavu or Polywheels.

46 Whether to permit late filing of a claim is a matter of discretion, to be exercised on appropriate principles.

47 In *Re Noma Co*. [2004] O.J. No. 4914, Cameron J. referred with approval to the case of *Re Blue Range Resource Corp*. (2000), 193 D.L.R. (4th) 314 (Alta. C.A.). In that case involving late filing of a claim in a CCAA proceeding, Wittman J.A. stated:

> 26 Therefore, the appropriate criteria to apply to the late claimants is as follows:
>
> 1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
> 2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
> 3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
> 4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?
>
> 27 In the context of the criteria, "inadvertent" includes carelessness, negligence, accident, and is unintentional.

48 Wittman J.A. also stated in his consideration of the issues:

> In my view inadvertence could be an appropriate element of the standard if parties are able to show, in addition, that they acted in good faith and were not simply trying to delay or avoid participation in CCAA proceedings.

49 In my view relevant prejudice to other creditors cannot be simply due to the fact that if Romspen is permitted to file its claims against Polywheels and Cavu there will be greater claims made against whatever funds are available. If there were clear evidence that a party had acted to its detriment on the failure of Romspen to file its proof of claims, that would be legitimate prejudice to take into account. There is no such evidence however.

50 Mr. France represents a Senior Officer Group of former Polywheels employees. That group originally brought a motion returnable July 24, 2008 in which it sought an order declaring that their employment agreements constituted valid security interests under the PPSA. There was vigorous opposition from two creditors, including the CAW. An agreement was eventually reached in November 2008 to resolve the claims which were permitted to go forward as unsecured claims at 1.2 times the value of the claims with a cap of $450,000. Mr. France stated in his affidavit that the compromise was made in light of the large claims having been filed against Polywheels, totaling approximately $22.5 million, and the dwindling sale proceeds arising from the realization of Polywheel's assets. It is clear that Mr. France and his group were aware of Romspen's involvement in CCAA process as he noted that the preamble to the order that they obtained confirming the settlement stated that Romspen did not oppose the order. Mr. France does not state that the settlement was made in reliance on Romspen not filing a claim against Polywheels. The implication in his affidavit is to the opposite effect, as the Senior Officers Group settled their claims partly on their concern with the large amount of the claims that had been made against Polywheels. Another claim by Romspen would have only increased the amount of the claims and the concerns of the senior officers and would not have changed their position.

51 No interested party can assert that they were unaware of Romspen's claims in this matter. When Romspen learned of the Initial Order in the CCAA process, it immediately took steps to become fully involved in that process. Its rights were protected by the July 22, 2008 order which provided for the servicing of its mortgage and it continued to receive payments on its mortgage by virtue of that order until no further rent was payable when the premises of Cavu were given up by Polywheels on May 31, 2009. Moreover, on November 14, 2008 Romspen was given leave to issue a notice of sale under its mortgage and the Cavu stay was lifted for that purpose. On December 5, 2008 the Cavu stay was lifted as against Romspen.

52 It cannot be said that Romspen has not been acting in good faith in its dealings in the CCAA process. The compromise that it made that was reflected in the July 22, 2008 order is an indication of its good faith. That compromise gave the Monitor and Cavu the chance of selling the property rather than seeing it sold by mortgage lenders.

53 If Romspen is not permitted to file a proof of claim, it would mean that if there were a shortfall from the sale of the Cavu property, Romspen would not be entitled to claim against Polywheels on the guarantee of the mortgage loan made by Polywheels in favour of Romspen. It would also mean that Romspen would not be entitled to participate in the dividend to be paid by Polywheels to Cavu. It cannot be said that Polywheels or Cavu were not aware of the agreements that were all signed by Franklin Milligan or that they are somehow being taken by surprise to their detriment.

54 In the circumstances of what occurred in the CCAA process, it is perhaps understandable why Romspen did not file proofs of claim. Its rights were being protected by the orders made in that process. I do not find any evidence of an intention not to file proofs of claim if required. What the legal basis is for Romspen's request being opposed by Polywheels and Cavu is not apparent. They did not oppose the motion by Sun Life for the same relief.

55 In the circumstances I think the Romspen should be permitted relief by way of a lifting of the bar date in order to permit it to file proofs of claim against Polywheels and Romspen. Romspen is entitled to file such proofs of claim within seven days.

Conclusion

56 I believe that I have dealt with the matters raised in the Romspen motion. However, if there are further matters that I have overlooked that need to be decided, counsel can advise.

57 If the parties cannot agree upon costs, submissions may be made in writing within seven days, such submissions to include a bill of costs and appropriate supporting material if costs are sought.

F.J.C. NEWBOULD J.

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