

CITATION: Receiver GrowthWorks Canadian Fund Ltd., 2015 ONSC 6875
COURT FILE NO.: CV-13-10279-00CL
DATE: 20151109

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT
TO GROWTHWORKS CANADIAN FUND LTD.**

BEFORE: Newbould J.

COUNSEL: *Alan B. Merskey and John M. Picone*, for the Roseway Capital s.à.r.l.

Geoff R. Hall and Atrisha S. Lewis, for GrowthWorks Canadian Fund Ltd.

Caitlin Fell, for the Monitor FTI Consulting Canada Inc.

HEARD: November 4, 2015

ENDORSEMENT

[1] GrowthWorks Canadian Fund Ltd. (“GrowthWorks”) is a labour-sponsored venture capital fund in CCAA liquidation proceedings. GrowthWorks hired Roseway Capital s.à.r.l. (“Roseway”), its only secured creditor, to manage and dispose of its remaining investments. Roseway claims that a fee is owing to it as a result of the sale of one of the GrowthWorks assets, being a minority interest in PerspecSys Inc. (“PerspecSys”) and moves for a declaration to that effect and payment of the fee.

[2] For the reasons that follow, the motion of Roseway is dismissed.

Factual background

[3] GrowthWorks is a labour-sponsored venture capital fund with a diversified portfolio of investments in small and medium-sized Canadian businesses. Its investment portfolio has consisted largely of securities of start-up private companies, many of which were developing bio-medical, information and agricultural technology products that might or might not realize commercial success.

[4] In May 2010, Roseway provided financing to GrowthWorks in the amount of \$20 million. GrowthWorks was unable to repay Roseway, its only secured creditor, when payment was due on May 28, 2015. Several extensions were given.

[5] On October 1, 2013, GrowthWorks filed for protection under the CCAA. Roseway consented to the Initial Order made that day. Eventually GrowthWorks sought and obtained the approval of a Sales and Investment Solicitation Process. GrowthWorks solicited expressions of interest to sell the Portfolio in November and December 2013 in accordance with the SISP. However, despite a comprehensive process, GrowthWorks was unable to locate an investor or buyer for its portfolio on satisfactory terms.

[6] On May 14, 2014 GrowthWorks and Roseway entered into an Investment Advisor Agreement dated May 9, 2014. It provided, among other things, that Roseway was to act as investment advisor to GrowthWorks, and it permitted Roseway to delegate those obligations. Roseway chose to do so and subcontracted to Crimson Capital, whose principal is Donna Parr.

[7] The Investment Advisor Agreement provides for two types of fees payable by GrowthWorks to Roseway: (i) an Annual Fee in the amount of \$350,000, and (ii) an Additional Fee, payable to Roseway once the Investor Advisor Debt had been repaid. Section 7.3.1 of the Investment Advisor Agreement provides as follows:

7.3.1 From and after such time as the Investment Advisor Debt has been paid in full, the Investment Advisor shall be entitled to a fee equal to 15% of the aggregate proceeds of disposition of the remaining Portfolio Securities [...] payable upon the disposition of any Portfolio Securities.

[8] As can be seen, the Additional Fee was payable only after the Investor Advisor Debt was paid off and based on dispositions of the remaining portfolio of investments made after that time.

[9] In late 2014, there was a dispute about the quantum of the debt owed by GrowthWorks to Roseway (the “Investment Advisor Debt”) owing under the 2010 investment of Roseway in GrowthWorks. Following negotiations over many months, GrowthWorks and Roseway entered into a settlement agreement dated May 22, 2015. The Settlement Agreement set the quantum of the outstanding Investment Advisor Debt and defined that quantum as the “Outstanding IAD”.

[10] Section 2.04(1)(c) of the Settlement Agreement sets out when the Investment Advisor Debt must be paid in full by GrowthWorks:

- (c) with the consent of the Monitor, GW Cdn [GrowthWorks] will pay the Outstanding IAD as soon as reasonably practicable, taking into account GW Cdn’s commercially reasonable estimate of the actual and projected (i) liquidity and capital resources of GW Cdn, and (ii) expenditures of GW Cdn.

[11] After the Settlement Agreement had been approved by the Court on June 10, 2015, payment of \$1 million was made to Roseway on account of the Investment Advisor Debt, leaving a balance, or Outstanding IAD, of \$955,404 owing to Roseway.

PerspecSys Inc.

[12] GrowthWorks owned a minority interest in PerspecSys, a private company. In June, 2015, Ms. Parr of Crimson began to discuss the possibility of the sale of GrowthWorks’s interest in PerspecSys with Ian Ross, the chairman and interim CEO of GrowthWorks, and Paul Bishop, a representative of the Monitor.

[13] The PerspecSys deal closed on July 30, 2015 and generated proceeds to GrowthWorks of approximately U.S. \$2.54 million. GrowthWorks received confirmation that it received those proceeds at 10:35 p.m. on Friday, July 31, 2015 (which was the Friday before the August long weekend). The first date that the GrowthWorks board could meet was on August 5, 2015 at which time it authorized the Outstanding IAD to be paid.

[14] Had the Outstanding IAD of \$955,404 been paid prior to the closing of the PerspecSys deal, there would have been an Additional Fee payable by GrowthWorks to Roseway under section 7.3.1 of the Investment Advisor Agreement of 15% of the proceeds of the PerspecSys deal, or approximately \$381,000, plus 15% of further proceeds to be received in the future from the PerspecSys deal.

Issue

[15] Roseway takes the position that the Outstanding IAD should have been paid on July 28, 2015 as it was reasonably practicable to do so on that date within the meaning of section 2.04(1)(c) of the Settlement Agreement. Roseway says that the Settlement Agreement was thus breached and the damages are the amount of the Additional Fee that should have been paid.

[16] GrowthWorks takes the position that it was its commercially reasonable estimate that governs, not what Roseway or Ms. Parr of Crimson Capital thought was commercially reasonable. Again, the section provides:

- (c) with the consent of the Monitor, GW Cdn [GrowthWorks] will pay the Outstanding IAD as soon as reasonably practicable, taking into account GW Cdn's commercially reasonable estimate of the actual and projected (i) liquidity and capital resources of GW Cdn, and (ii) expenditures of GW Cdn.

[17] Roseway says that Mr. Ross, the CEO of GrowthWorks, failed to make a reasonable estimate of the projected liquidity and capital resources of GrowthWorks and its expenditures. It says that even although the PerspecSys deal had not closed by July 28, 2015, it was certain to close and that the funds from the closing that would be received within a few days would give GrowthWorks enough liquidity and capital resources to pay the Outstanding IAD and its other expenditures.

Analysis

[18] According to Ms. Parr, the intent of the negotiations was that the signing of the PerspecSys deal, a merger agreement, was to take place simultaneously with the closing of the

agreement. A target closing date of July 10 was not met, and a further target closing date of July 17 was not met. There were still commercial issues being negotiated.

[19] On Friday, July 24 the agreement was signed but there were conditions to be fulfilled before the agreement could close. Ms. Parr notified Mr. Ross by e-mail and said the best-case for closing was the following mid-week but might take longer to get all agreements with option holders and stockholders into place. She said she would update him as she knew.

[20] On July 27, Ms. Parr sent to Mr. Ross a review of the GrowthWorks fund. The page for the PerspecSys investment contained a heading of Close, but no date was inserted. Ms. Parr's evidence is that on July 27 the requisite 95% of shareholder approval was obtained (GrowthWorks held only a minority position in PerspecSys). She acknowledged that she did not advise Mr. Ross of the shareholder approval on that day, but says that at a 2 pm meeting on July 28 she told him that the buyer would wire the closing funds on July 29. This evidence of Ms. Parr that sufficient consents had been obtained by July 27 is inconsistent with an e-mail from Mr. Kilgour of Dentons on July 28 at 2:35 pm that said "We are making good progress on third party consents and obtaining optionholder and stockholder signatures. Hoping for a Thursday closing."

[21] On July 28 at 2:57 Mr. Ross e-mailed Ms. Parr asking for an update as to the resolution of issues raised by Norton Rose on the documents and said he was particularly interested in the cap on damages. He also said "I would also like to know what if any issues are outstanding which might delay closing and what the expected timing is for distribution of the proceeds as well as what proceeds GW CDN will receive."

[22] It was later on July 28 at 5:50 pm that Mr. Cade of Norton Rose on behalf of Roseway requested payment of the Outstanding IAD by e-mail to Mr. Grant of McCarthys acting for GrowthWorks. On the following day Mr. Grant denied that the Outstanding IAD was yet payable.

[23] This issue is not what Ms. Parr thought was reasonably practical or whether she thought by July 27 that the PerspecSys deal was certain to close, but rather what GrowthWorks thought based on what it knew.

[24] In her affidavit Ms. Parr asserted that Mr. Ross was in no position to have a view of the matter. She stated:

Mr. Ross was not in any position to determine (or even have a view as to) whether or when the PerspecSys Transaction would close. He had not participated in my ongoing discussions with the transaction lawyers, a director of PerspecSys or that company's CEO. Mr. Ross relied on me and Roseway entirely as regards GrowthWorks' activities, prospects and financial position.

[25] I find this an astonishing statement. It cannot be taken that GrowthWorks delegated to Ms. Parr the decision required by section 2.04(1)(c) of the Settlement Agreement. It is an overstatement, to say the least, that Mr. Ross relied entirely on Ms. Parr regards GrowthWorks' activities, prospects and financial position. It is far more argument than evidence and I disregard it.

[26] Mr. Ross' email of July 28 in which he said he would like to know what if any issues were outstanding which might delay closing and what the expected timing was for distribution of the proceeds is an indication that he thought a closing was a matter of delay rather than not occurring. There had been a number of delays in the matter, however, and his query was no indication that he expected the funds to be received imminently.

[27] Mr. Ross gave extensive evidence in his affidavit why in his view the Outstanding IAD was not payable on July 28 before the PerspecSys deal closed. Mr. Ross was not cross-examination on his affidavit and there was no other evidence before me which indicates that statements in his affidavit should not be accepted.

[28] Essentially, Mr. Ross took the view that in the circumstances of GrowthWorks which is under CCAA protection, prudence indicated that with the type of investments GrowthWorks had, it would have been irresponsible to pay the Outstanding IAD until the PerspecSys sale closed and the proceeds were actually received by the Fund. He said:

19. In determining when to pay the Outstanding IAD, the Fund [GrowthWorks] was subject to certain constraints under which the Fund has had to manage its cash in these CCAA proceedings:

- (a) The Fund's cash resources are limited. ...as at July 28, 2015 (prior to the closing of the PerspecSys Disposition) the Fund had only \$122,428 in its expense accounts and \$1,230,248 in a blocked account maintained by the Monitor for the benefit of the Fund ...
 - (b) The Fund's ability to generate additional cash is limited. The Fund's sole source of incoming cash is dispositions from the Fund's holdings of securities, most of which are securities in early stage private companies. The Fund has no ongoing operations other than the management of its Portfolio and ancillary activities and the oversight of the Fund's financial condition, with no other source of incoming cash. Since the Fund does not have DIP financing or any other source of borrowing, the Fund has, for the past several years, also sought to maintain something of a cushion so that some cash is always available in the event of unforeseen needs.
 - (c) Both the timing of dispositions of securities and the receipt of cash proceeds from dispositions have been highly contingent and uncertain until dispositions have been completed. This is for two reasons. The first is the nature of early stage private companies, which are inherently uncertain. The second is the fact that the Fund generally holds minority positions in the companies in which it holds investments. This means that the Fund does not have significant control over the affairs of its investee companies, including a decision to sell the company.
 - (d) At the time the Monitor received the sale proceeds from the PerspecSys Disposition, the Fund had significant unpaid post-filing payables in addition to the Outstanding IAD of \$955,404. Those payables were approximately \$699,000. They included, among other things, directors' fees to members of the Fund's board (which were in arrears by approximately six months), fees to the Fund's legal counsel, and fees and expenses to Roseway (in its capacity as investment advisor to the Fund) and its counsel (which accounted for approximately 30% of the total post-filing payables).
20. As a result of these constraints, the Fund was very cautious about paying the Investment Advisor Debt (and, subsequently, the Outstanding IAD) and only paid it down when (i) cash had actually been received from dispositions; and (ii) it was clear that there would be sufficient cash remaining after a proposed payment to avoid a material risk that the Fund would run out of cash.

[29] Can it be said that Mr. Ross failed to take make a commercially reasonable estimate of the actual and projected liquidity, capital resources and expenditures of GrowthWorks? It is contended that by saying that the funds from the PerspecSys deal had to be in hand before it was reasonably practicable to pay the Outstanding IAD, he failed to make a reasonable estimate of

projected capital that would be on hand, and that had he done so he would have had to have concluded that it was reasonably practicable to pay the Outstanding IAD.

[30] I have difficulty with this argument. It presupposes a reasonable certainty in Mr. Ross's mind that the deal would close, which from his affidavit he did not think was the case. It also presupposes a reasonable certainty in his mind that the funds from the PerspecSys deal would be received before other obligations had to be paid. The deal had been put off more than once and it is clear from Mr. Ross' e-mail of July 28 that further delays and when the funds might be expected was on his mind. In his affidavit he stated "As is common in private sale transactions, the timing of the completion of the PerspecSys Disposition remained uncertain." I cannot find that Mr. Ross failed to consider the projected capital or that he caused GrowthWorks to breach section 2.04(1)(c) of the Settlement Agreement.

[31] Roseway contends that the Monitor, whose consent to pay the Outstanding IAD was required, had concluded that the payment could be made, and that is an indication that GrowthWorks failed to undertake a proper analysis. I do not accept that. First, there is nothing to say that Mr. Ross should have taken the same position as the Monitor.

[32] In any event, I do not think the Monitor said that the Outstanding IAD should be paid before the funds from the PerspecSys sale were received. On June 30 when asked by GrowthWorks's financial advisor if he thought GrowthWorks could pay the Outstanding IAD, he said "Yes, we have enough on hand to payout Roseway but it would clean us out, so the PerspecSys money will enable us to pay out Roseway and have sufficient funds to administer the estate going forward." On July 28 Mr. Bishop said he had advised GrowthWorks that the cash in the GrowthWorks bank accounts "combined with the funds from PerspecSys, should be sufficient to fund activities through the current extension period [of the CCAA] and beyond and that accordingly I would consent to such payment." Mr. Bishop did not say that he would consent to the payment of the Outstanding IAD before the funds from the PerspecSys deal were received.

Conclusion

[33] The motion by Roseway is dismissed. Costs as agreed of \$30,000 are to be paid by Roseway to GrowthWorks.



Newbould J.

Date: November 9, 2015