

2016 ONSC 1047
Ontario Superior Court of Justice

GuestLogix Inc., Re

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Guestlogix Inc.

G.B. Morawetz R.S.J.

Heard: February 9, 2016
Judgment: February 9, 2016
Docket: CV-16-11281-00CL

Counsel: Robert Thornton, Rebecca Kennedy, for Applicant
Robert Kennedy, for Vistara Capital Partners Fund I Limited Partnership, by its General Partner, Vistara Fund I GP Inc.
Sonja Pavic, for Directors
Orestes Pasparakis, for Proposed Monitor, Deloitte Restructuring Inc.
Brett Harrison, Caitlin Fell, for Comerica Bank

Subject: Insolvency

APPLICATION by company for order under *Companies' Creditors Arrangement Act* for order staying proceedings against it, order appointing monitor, and authorization for first and second ranking super-priority charges.

G.B. Morawetz R.S.J.:

1 GuestLogix Inc. (the "Applicant") brings this Application for an Order pursuant to the *Companies' Creditors Arrangement Act* ("Canada"), ("CCA") for an order staying proceedings against the Applicant and its Integrated Subsidiaries, GuestLogix USA Inc. ("GuestLogix US"), GuestLogix Technologies Limited ("GuestLogix UK"), GuestLogix Asia Pacific Limited ("GuestLogix Asian") and GuestLogix Ireland Limited ("GuestLogix Ireland") and, collectively with its Integrated Affiliates, ("GuestLogix"). The Applicant also seeks an order appointing Deloitte Restructuring Inc. ("Deloitte") as Monitor in the CCA proceedings, and authorization for a first ranking super-priority charge in the amount of \$250,000.00 ("Administration Charge"), as security for the fees and disbursements of the Monitor, its counsel, the Applicant's counsel, counsel for the Directors of the Applicant and the Applicant's financial advisor ("Administration Charge Beneficiaries").

2 The Applicant also requests authorization for a second ranking super-priority charge in the amount of \$1,385,000.00 (the "Directors' Charge") over all assets of the Applicant, as security for any post-filing obligations of the directors and officers of the Applicant (the "Directors' Charge Beneficiaries") that they may incur by virtue of so acting.

3 The matter came on for a hearing prior to the opening of trading on the Toronto Stock Exchange on February 9, 2016. At that time, I endorsed the record as follows: "9:20 a.m. CCAA application has been issued. CCAA initial protection granted. Stay of proceedings granted. Form of order to be submitted for signature later today."

4 The initial order was subsequently signed at 2:30 p.m. on February 9, 2016. PricewaterhouseCoopers Inc. was appointed as Monitor.

5 The DIP hearing is scheduled for Thursday for February 11, 2016 at 8:30 a.m. and the comeback hearing is scheduled for Friday, March 4, 2016 at 8:30 a.m..

- 6 The Applicant is a public company listed on the Toronto Stock Exchange and incorporated under the *Business Corporations Act* (Ontario) ("OBCA"). The Applicant carries on the Canadian operations of the GuestLogix Group.
- 7 The Applicant has four wholly owned subsidiaries: GuestLogix US, GuestLogix UK, GuestLogix Asian, and GuestLogix Ireland.
- 8 GuestLogix Ireland has a wholly subsidiary, OpenJaw Technologies Limited ("OpenJaw") which was acquired in 2014.
- 9 GuestLogix and OpenJaw provide both retail and payment technology in business intelligence solutions delivered to the passenger travel industry both on board and off board.
- 10 GuestLogix has forty one customers who operate in the airline and ground transportation industries. GuestLogix customers are based in Asia, Australia, Europe, North America and assist in the transportation of people all over the world.
- 11 The Master Services Agreement ("MSA") is the governing document between GuestLogix and its customers in relation to any Master Statements of Work ("MSOW") or associated Statements of Work ("SOW") for the provision of the Solutions and Services. These agreements contain default provisions but to date, no notices of default have been given to GuestLogix.
- 12 The Affidavit of John Gillberry, Interim Chief Executive Officer of GuestLogix states that in response to financial difficulties that GuestLogix is facing, senior management initiated a reduction-in-force action plan. In October 2015, the Applicant and its subsidiaries (including OpenJaw) had a workforce of 417 people. As of February 5, 2016, this number had been reduced to 334 people worldwide as well as 15 contractors. 288 people are full-time employees and 46 people are part-time/offshore. None of GuestLogix employees are unionized.
- 13 The Applicant provides a standard benefit plan to its employees. GuestLogix also offers defined contribution pension plans to all full-time employees in Canada, USA, United Kingdom and Ireland.
- 14 As of September 30, 2015, GuestLogix, on a consolidated basis, had assets totaling approximately US \$85,000,000 of which approximately US \$23,500,000 consist of current assets. The remaining assets consisted net finance receivables, fixed assets, long term receivables, deferred development costs, intangibles, goodwill and a deferred tax asset.
- 15 As of September 30, 2015, GuestLogix, on a consolidated basis, had liabilities totaling approximately US \$45,800,000 of which approximately US \$29,500,000 consist of current liabilities.
- 16 Comerica Bank ("Comerica") provides GuestLogix with a senior secured credit facility with a maximum borrowing amount of US \$7,500,000 ("Comerica Facility"). As of January 29, 2016, the amount of outstanding on the Comerica Facility was approximately US \$5,200,000. The Comerica Facility, under the terms of an expired forbearance agreement, bears interest at US Prime Referenced Rate plus 3% in respect of advances denominated in US Dollars.
- 17 GuestLogix US, GuestLogix Ireland and OpenJaw are guarantors of the Comerica Facility and each of them has entered into general security agreements in connection with the Comerica Facility.
- 18 Beedie Capital Partners Inc. and Vistara Fund I GP Inc. (collectively the "Second Secured Lenders") have provided GuestLogix with a second secured non revolving term credit facility with a principal amount of Cdn \$9,000,000 ("Second Secured Term Loan").
- 19 GuestLogix US, GuestLogix Ireland and OpenJaw are guarantors of the Second Secured Term Loan.

- 20 GuestLogix has issued unsecured convertible debentures in the amount of \$20,000,000.00 ("Convertible Debentures"). The amount outstanding on Convertible Debentures, as of December 31, 2015 was \$20,700,000.
- 21 GuestLogix has received reassessments from Canada Revenue Agency ("CRA") for the 2011-2014 period, in the amount of \$8,521,237 dollars. GuestLogix intends to appeal these reassessments.
- 22 As of February 5, 2016, GuestLogix has unsecured liabilities to vendors, suppliers and trade creditors in the amount of US \$6,086,315. Some of the suppliers are critical to the operation of GuestLogix.
- 23 GuestLogix has other unsecured liabilities as detailed in Mr. Gillberry's affidavit of paragraph 64-68.
- 24 In the fall of 2015 GuestLogix pursued efforts to bring down its debts and implement cost saving initiatives in order to improve its financial position. GuestLogix engaged Canaccord Genuity Corp. ("Canaccord") as its financial advisor to assist in reviewing and considering potential strategic alternatives.
- 25 Canaccord commenced an informal sale and investment solicitation process to identify potential sale and investment transactions for GuestLogix. Canaccord contacted the total 60 potential buyers.
- 26 Mr. Gillberry at paragraph 75 of his affidavit states that based on the expressions of interested Canaccord received, it would appear that the value of the business operated by GuestLogix and OpenJaw are many times the value of the outstanding amount due under the Comerica Loan.
- 27 Concurrent with the administration of the informal strategic process, the Applicant continued its operational review and Mr. Gillberry states that GuestLogix determined that it may not have been following proper corporate accounting principles regarding revenue recognition.
- 28 The Board of Directors formed an independent committee (the "Special Committee") to supervise a review of the financial statements and the Special Committee retained independent counsel to assist in the investigation. Independent counsel engaged Deloitte LLP to continue its review of the revenue recognition practices of the company.
- 29 Mr. Gillberry states that as a result of a detailed balance sheet analysis, the company took significant reserves against certain account receivables and these charges along with the charge for the restructuring reserve triggered a default on the minimum trailing EBITDA covenant in the Second Secured Term Loan Agreement. The defaults under the Second Secured Term Loan Agreement led to cross defaults under the Comerica Facility as a result of which the Comerica Facility is entirely due and payable.
- 30 Beyond the issues with the secured creditors, Mr. Gillberry advises that Morganti LLP has recently filed a class action law suit against GuestLogix as a result of the revenue recognition issues.
- 31 Mr. Gillberry further states that GuestLogix has been unable to find an out of court solution that would enable it to repay or refinance the amounts owing under the Comerica Facility, the Second Secured Loan Agreement or the Convertible Debentures.
- 32 Mr. Gillberry concludes that the Applicant is therefore insolvent, and the directors have determined that it is in the best interest of the Applicant and its subsidiaries, and their stakeholders to file for protection under the CCAA.
- 33 The company nominated Deloitte Restructuring Inc. as Monitor. At the initial hearing, I raised the question as to whether it was appropriate for Deloitte Restructuring Inc. to act as Monitor, in light of the engagement of Deloitte LLP to conduct a review of revenue recognition practices. Counsel to Comerica Bank submitted that there was a risk that the Proposed Monitor may be required to review the advice given by Deloitte LLP with respect to the Applicant's historical revenue recognition protection. In my view, the potential impact on stakeholders of the investigation could be significant and could lead to the appearance of conflict. It is essential that the Monitor be seen to be completely

independent. The risk raised by Comerica Bank has to be taken into account. In my view, it would be appropriate for Deloitte Restructuring Inc. to withdraw as proposed Monitor.

34 The application was brought on short notice. The Applicant has outlined in its materials that it intends to return to court to seek a DIP loan, but this issue does not have to be addressed today.

35 The Applicant does seek the Administration Charge.

36 I am satisfied that the amount of \$250,000.00 for the Administration Charge is both reasonable and appropriate and it is approved.

37 Likewise, I am satisfied that it is appropriate to grant a Directors' Charge in the amount of \$1,385,000 on the terms set out in the order. It is acknowledged that the benefit of the Directors' Charge is only available to the extent that liabilities are not covered by the D&O Insurance.

38 The priorities of the various charges are set out at paragraph 33 of the draft order.

39 In summary, having reviewed the record, I am satisfied that the Applicant is a "debtor company" within the meaning of CCAA and that the Applicant has unsecured liabilities in excess of the required \$5,000,000.

40 I am also satisfied that the Applicant is insolvent and has defaulted on its obligations. Furthermore, it seems to me that the Applicant requires a stay of proceedings to provide the breathing space necessary to continue normal operations while it solicits parties willing to purchase the assets of the Applicant.

41 The required financial statements have been filed.

42 Accordingly, circumstances exist in this case that make it appropriate to grant the Applicant protection under the CCAA.

43 Prior to the completion of submissions, counsel to the Applicant advised that PricewaterhouseCoopers Inc. had provided its consent to act as Monitor, in place of Deloitte Restructuring Inc.

44 Accordingly, CCAA protection is granted. PricewaterhouseCoopers Inc. is appointed as Monitor. The stay is in effect until March 7, 2016. The comeback hearing has been scheduled for March 4, 2016.

Application granted in part.