1995 CarswellOnt 54, 31 C.B.R. (3d) 106

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Dylex Ltd., Re

RE DYLEX LIMITED and OTHERS

Re Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, for a compromise or arrangement with respect to Dylex Limited and all other companies set out in Schedule "A" hereto and a reorganization of share capital of Dylex Limited under the Canada Business Corporations Act, R.S.C. 1985, c. C-44

Re Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Ontario Court of Justice (General Division), Commercial List

Farley J.

Judgment: February 16, 1995
Docket: Doc. B4/95



Counsel: *R.J. Arcand*, for Cambridge Western Leaseholds Limited, Bramalea Centres Limited, Burnac Corporation, Cambridge Leaseholds Limited, Laing Property Corporation, Markborough Properties Inc., Oxford Development Group Inc. and O & Y Properties Inc.

*Charles F. Scott* and *Jennifer Aitken*, for applicants Dylex Group. *T. O'Sullivan*, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Plan of arrangement — Debtor's pre-plan restructuring program including 200 store closures across Canada — Landlord bringing motion

under CCAA order for determination of right of debtor to close three stores in two of its malls — Court's discretion to be exercised in favour of debtor — Debtor in precarious financial situation whereas landlord in sound financial condition — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Pursuant to an order under the *Companies' Creditors Arrangement Act* (Can.) ("CCAA"), various of the debtor's landlords were advised that where an intended store closure would have a material effect on the viability of the landlord's mall or project, the landlord would have the right to apply to the court for a determination of the right of the debtor to proceed with the closure.

The debtor operated a total of three stores in two of the applicant landlord's malls. The landlord's malls were not fully leased; the closures in one mall would increase the vacancy rate to 34 per cent, and the closure in the other mall would increase the rate to 31 per cent. The landlord brought motions under the CCAA order.

**Held:**

The motions were dismissed.

Section 11 of the CCAA gives the court power to sanction a plan that includes the termination of leases as part of the debtor's plan of arrangement. Between the filing of the plan and its approval, the court has inherent jurisdiction to fill in any gaps in the legislation in order to give effect to the objects of the CCAA. This jurisdiction includes the power to assist in the survival of the debtor until it is able to present the plan.

The proposed store closures were part of a pre-plan restructuring program of 200 store closures. The debtor was in a precarious financial condition; the landlord's financial condition was sound, even though the two malls in question were suffering somewhat. The vacancy problems of the two malls were not caused by the three proposed closings. In the circumstances, the court's discretion should be exercised in favour of the debtor.

**Cases considered:**

*Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.) — *referred to*

*Bramalea Ltd. v. Canada Safeway Ltd.* (1985), 4 C.P.C. (2d) 144, 37 R.P.R. 191 (Ont. H.C.) — *referred to*

*Chatham Centre Mall Ltd. v. New Miracle Food Mart Inc.* (1994), 40 R.P.R. (2d) 124 (Ont. Gen. Div. [Commercial List]) — *referred to*

*Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.) — *referred to*

*Islington Village Inc. v. Citibank Canada* (1992), 27 R.P.R. (2d) 100 (Ont. Gen. Div.), affirmed (November 23, 1992), Doc. CA C13327 (Ont. C.A.) — *referred to*

*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — *referred to*

*Meridian Developments Inc. v. Toronto Dominion Bank*, 52 C.B.R. (N.S.) 109, [1984] 5 W.W.R. 215, 32 Alta. L.R. (2d) 150, 53 A.R. 39, 11 D.L.R. (4th) 576 (Q.B.) — *referred to*

*Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361, 92 A.R. 81 (Q.B.) — *referred to*

*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey)* 41 O.A.C. 282, 1 O.R. (3d) 289 (C.A.) — *referred to*

*Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*

*Triangle Drugs Inc., Re* (1993), 16 C.B.R. (3d) 1, 12 O.R. (3d) 219 (Bktcy.) — *considered*

*Westar Mining Ltd., Re*, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.) — *referred to*

*566719 Ontario Ltd. v. New Miracle Food Mart Inc.* (1994), 41 R.P.R. (2d) 22 (Ont. Gen. Div. [Commercial List]) — *referred to*

**Statutes considered:**

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 65.2

s. 66(2)

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

s. 11

Motions for determination of right of debtor to proceed with intended closure of stores.

***Farley J.*:**

1 Cambridge Western Leaseholds Limited ("Cambridge") moved for a determination of the right of the applicants

("Dylex") to proceed with the intended closure of stores at Mill Woods Town Centre, Edmonton and at Lethbridge Centre, Lethbridge. It was indicated at the hearing that the request was to keep the stores open until the *Companies' Creditors Arrangement Act* ("CCAA") plan is voted on (i.e., for a couple of months). Cambridge is the owner-operator of the two shopping centres, both of which are acknowledged to have some operating difficulties re vacancies. Cambridge's position is that Dylex's announced closure of a Tip Top Tailor store on February 18th and a Bi-Way Store on April 8th (both Mill Woods) and a Tip Top tailor store on February 21st (Lethbridge) would materially affect each shopping centre. These three closures are part of a cross-Canada program of 200 closures including a previous Thrifty's closure on February 26th in Lethbridge.

2 Allow me to observe that Dylex is under the tight scrutiny of the Royal Bank of Canada ("Royal"), which is the special operating lender to Dylex, whose loan has, an an event of default, the failure to meet projected cash flows. Dylex has multiple stores in many of the shopping centres across Canada and in this respect has been a tenant of some magnitude. Cambridge is part of the Cambridge Leaseholds Limited group, which at the present time, has indicated an interest in making an investment in the Cadillac Fairview group of some hundreds of millions of dollars; thus it appears that Cambridge is financially secure at this time. However Dylex has demonstrated that it faces severe financial challenges.

3 In a January 23rd letter following the CCAA order (which allowed store closures) given by Houlden J.A. on January 11th, Dylex advised various landlords (including Cambridge):

> Where any intended store closures or closure in a mall or project has a material effect on the viability of the mall or project, in the view of the applicable landlord, such applicable landlord shall have the right to apply to the court for a determination of the right of [Dylex] to proceed with the intended closure or closures.

Cambridge has availed itself of that opportunity. In essence it is an amplification of or a specific comeback clause. The CCAA order provided as well that landlords' claims for closures would be determined and form part of the claims compromised in the CCAA plan.

4 The Mill Woods Centre is 442,345 sq. ft. of which 193,701 sq. ft. is represented by 109 ancillary stores (including the subject stores). The present vacancy rate is 26 per cent of the ancillary stores; with the proposed closures this would increase to 34 per cent. The Lethbridge Centre has 338,130 sq. ft. of which the 83 ancillary stores represent 146,547 sq. ft. Presently 26 per cent of the ancillary space is vacant and the proposed closure would increase this to 31 per cent. Both centres apparently suffered from an extended recession in the retail business and competition from other centres in each city.

5 With restructuring Dylex will not have any Bi-Way stores west of Ontario after April; thus an isolated Bi-Way store may cause management and stocking problems. The Lethbridge Tip Top lease will expire August 31st; it would be inconceivable that Dylex would attempt to extend this lease beyond its expiry. The subject stores have been a financial drain on Dylex, at a time when it is in a tight financial squeeze. Their closure is projected to bring about variable cost saving and an amelioration of some fixed costs (i.e., the elimination of what would normally be regarded as fixed costs in terms of certain overheads).

6 The two subject centres are experiencing some difficulty; however they were experiencing this difficulty generally before the time of Dylex's troubles. Generally it appears that Cambridge is in a secure financial position although the health of the two centres is less than robust. Of course, vis-à-vis the subject closings, there is always the aspect of the straw which breaks the camel's back. However in many view a compelling case has not been made out by Cambridge in this regard. Rather what we have are some vague generalities such as the following from the Gordon Harris report:

> Competitive regional malls are heavily reliant on anchor stores and high profile national tenants in order to establish the identity and traffic needed to generate sales in the centre. Dylex stores are viewed as highly desirable retail concepts that help shape consumers shopping patterns. The loss of Dylex tenants at Mill Woods Town Centre will alter, possibly on a permanent basis, shopping patterns away from Mill Woods Town Centre to other major malls in Edmonton.
>
> The loss of BiWay and Tip Top at this time is a damaging blow to a centre which has had difficulty achieving the kind of occupancy and sales performance levels needed to achieve dominance in the local market. Recent sales increases point to a stabilization at Mill Woods Town Centre. The revenue lost as a result of the closures will effectively wipe out the gains in overall CRU sales increases achieved in the past two years.
>
> It is therefore our opinion that the Dylex action will have a significant negative impact upon the ability of Mill Woods Town Centre to maintain its market share, to keep its other tenants, and to retain its customers. These factors will certainly affect the long-term economic viability of Mill Woods Town Centre.

7 I am therefore of the view that in weighing the balancing of interests in a CCAA context, the nod should continue to be given to Dylex which is in a precarious position as opposed to Cambridge which is in a sound financial condition although the two subject centres may be less than robust. However this pallor of the two centres is not caused by these three subject closings. I as well note that the one closure in Lethbridge will occur no matter what (barring a complete miracle) on the expiry of that lease on August 31st. Also the Bi-Way closing in Edmonton is not scheduled to take place for almost two months which is the anticipated plan vote time in any event. I am of the view that my discretion should be exercised in favour of Dylex in this situation: see *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), at pp. 113-114; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.), at pp. 12-13; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 318; *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101 (Ont. C.A.), at pp. 119-120; *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31.

8 It is clear that s. 11 of the CCAA gives the power to the court to sanction a plan which includes termination of leases as part of the debtor's plan of arrangement: see *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 86 D.L.R. (4th) 621 (Ont. Gen. Div.), at p. 625; *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.), at p. 84. In the interim between the filing and the approval of a plan, the court has the inherent jurisdiction to fill in gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan: see *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.S. S.C.), at pp. 93-94 and generally *Lehndorff*, supra, at pp. 35-38. While not specifically mentioned in *Re Triangle Drugs Inc.* (1993), 12 O.R. (3d) 219 (Bktcy.), it

was inherent jurisdiction which I was relying on to fill the gap in that legislation, namely the [Bankruptcy and Insolvency Act], R.S.C. 1985, c. B-3 (as amended by S.C. 1992, c. 27) ("BIA").

9 Mr. Arcand freely and voluntarily acknowledged that if he had to meet the test of a mandatory order he would be in difficulty: see *Bramalea Ltd. v. Canada Safeway Ltd.* (1985), 37 R.P.R. 191 (Ont. H.C.); *Islington Village Inc. v. Citibank Canada* (1992), 27 R.P.R. (2d) 100 (Ont. Gen. Div.), affirmed (November 23, 1992), Doc. CA C13327 (Ont. C.A.); *Chatham Centre Mall Ltd. v. New Miracle Food Mart Inc.* (Farley J., released June 23, 1994) [reported at 40 R.P.R. (2d) 124 (Ont. Gen. Div. [Commercial List])]; and *566719 Ontario Ltd. v. New Miracle Food Mart Inc.* (Farley J., released August 11, 1994) [reported at 41 R.P.R. (2d) 22 (Ont. Gen. Div. [Commercial List])].

10 Lastly allow me to deal with Cambridge's point that I should import the principles of s. 65.2 BIA into the CCAA proceedings for the purpose of requiring Dylex to satisfy me that without these three closures it would not be able to make a viable proposal. The authority said for this proposition was *Triangle*, supra at p. 222 where in the Cambridge factum it was stated:

> 25. The philosophy of the CCAA in certain parts has been imported into the *BIA*. The procedure set out in s. 65.2 of the *BIA* should be imported into the *CCAA*.

Firstly let me observe that the 1992 amendments to the BIA regarding reorganizations in particular got into intricate detail, but as pointed out in *Triangle* had an obviously overlooked gap. However the CCAA since its inception has been a skeleton piece of legislation, almost pre-Victorian in style. The history of CCAA law has been an evolution of judicial interpretation. My observation about s. 66(2) BIA in *Triangle* was to the effect that a BIA proposal could be transferred to the CCAA and thus where the BIA was inappropriately silent in the reorganizational regime, it would be appropriate to measure the situation according to the philosophy in the parallel situation under the CCAA. However it should be noted that s. 66(2) BIA is a one way street; there is no similar provision for transferring from the CCAA to the BIA (although I do note that a bankrupt company would be eligible to file under the CCAA).

11 Secondly and just in passing I note that I would not think it would be appropriate to view these three stores in isolation vis-à-vis the question of the viability of Dylex (or its plan of reorganization). It appears that the three stores are part of a pre-plan restructuring program package.

12 I would also observe that given whom Mr. Arcand represents, I would think it more than likely that if Cambridge were successful in these motions, there would be a torrent of other applications.

13 The motions are dismissed. Cambridge is to pay Dylex $3,500 costs forthwith. I note in this respect that Royal's legal fees would be added as a loan charge so that this award of costs may be regarded as joint Dylex/Royal since there is only one pocket.

*Order accordingly.*

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