Court File No. CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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 PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUÉBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., 9845488 CANADA INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

BOOK OF AUTHORITIES
(CDTel Motion)
(returnable April 12, 2021)

March 31, 2021

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TO: **THE SERVICE LIST**

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TAB 1

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

AND IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, C. C-44, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND THOSE SUBSIDIARIES LISTED ON SCHEDULE "A"

APPLICATION UNDER THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: February 19, 2004
Judgment: February 22, 2004
Docket: 03-CL-4932

Counsel: David R. Byers, Sean F. Dunphy, Katherine J. Menear for Air Canada
Joseph M. Steiner, Donald Hanna for Greater Toronto Airport Authority
Peter Griffin, Monique Jilesen for Monitor
James C. Tory for Board of Directors
Howard Gorman for Unsecured Creditors Committee
Robert Thornton, Greg Azeff for GECAS
Dan MacDonald, Q.C. for WestJet

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Public; Contracts

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles

Greater Toronto Airport Authority was ordered to comply with initial order dated April 1, 2003, not to interfere with Air Canada's right to relocate its domestic operations to Terminal 1 New.

Aviation and aeronautics --- Miscellaneous issues

Greater Toronto Airport Authority was ordered to comply with initial order dated April 1, 2003, not to interfere with Air Canada's right to relocate its domestic operations to Terminal 1 New.

MOTION by Air Canada against Greater Toronto Airport Authority to enforce terms of earlier order involving terminal access.

***Farley J.*:**

1 As argued, this was a motion by Air Canada (AC) for an Order enforcing paragraphs 6 and 7 of the Amended and Restated Initial Order dated April 1, 2003 (Initial Order) requiring the Greater Toronto Airports' Authority (Authority) not to discontinue, alter or interfere with the right, contract, arrangement, agreement, license or permit to allow AC to relocate its domestic operations (including baggage handling and gating) to Terminal 1 New (NT) and in doing so to have fixed preferential

use of all 14 contact gates (bridge gates) in the domestic area of NT during the initial development phase of NT, subject to the terms and conditions of the Memorandum of Understanding between AC and Authority made as of the 31 st day of January, 2001 (MOU) and the Terminal Facilities Allocation Protocol (Protocol) as such may evolve from time to time. Apparently the 9 hard stand commuter gates (tarmac gates) are no longer an issue for AC.

2 Paragraphs 6 and 7 of the Initial Order provide:

> 6. **THIS COURT ORDERS** that during the Stay Period, no person, firm, corporation, governmental authority, or other entity shall, without leave, discontinue, fail to renew, alter, interfere with or terminate any right, contract, arrangement, agreement, licence or permit in favour of an Applicant or the Applicants' Property or held by or on behalf of an Applicant, including as a result of any default or non-performance by an Applicant, the making or filing of these proceedings or any allegation contained in these proceedings.
>
> 7. **THIS COURT ORDERS** that, during the Stay Period, (a) all persons, firms, corporations, governmental authorities, airports, airport authority or air navigation authorities or any other entity (including, without limitation, NAV Canada, Office of the Superintendent of Financial Institutions ("OSFI"), IBM Canada Limited and BCE Nexxia Inc.) having written or oral agreements with an Applicant (including, without limitation, leases, pooling or consignment agreements, multilateral interline traffic agreements, codeshare agreements, Tier III Commercial Agreements, gate access agreements, frequent flyer programs or statutory or regulatory mandates) for the supply of goods and/or services (including, without limitation, real property, computer software and hardware, aircraft parts, aircraft maintenance services and related equipment, ground handling services and equipment, catering, office supplies and equipment, reservations, employee uniforms, crew accommodations, meals and commissary, communication and other data services, accounting and payroll servicing, insurance or indemnity, clearing, banking, cash management, credit cards or credit card processing, transportation, utility or other required services), by or to an Applicant or any of the Applicants' Property are hereby restrained until further order of this Court from discontinuing, failing to renew on terms no more onerous than those existing prior to these proceedings, altering, interfering with or terminating the supply of such goods or services so long as the normal prices or charges for such goods and services received after the date of this order are paid in accordance with present payment practices (for greater certainty and notwithstanding the terms of any federal or provincial statute or the terms of any lease or any present payment practices, lessors cannot alter, reconcile or recalculate the amount of any rent, operating, maintenance or other expenses payable by any Applicant so as to recover in whole or in part any amount payable by an Applicant in respect of any period of time prior to April 1, 2003 or to compensate it in whole or in part for not receiving amounts owing to it by any Applicant in respect of any period of time prior to April 1, 2003), or as may be hereafter negotiated from time to time, and (b) subject to Section 11.1 of the CCAA, all persons being party to fuel consortia agreements, or agreements or arrangements for hedging the price of, or forward purchasing of fuel, are hereby restrained from terminating, suspending, modifying, cancelling, or otherwise interfering with such hedging agreements or arrangements, notwithstanding any provisions in such agreements or arrangements to the contrary, provided that nothing herein shall require any bank to accept bankers acceptances issued after April 1, 2003. For greater certainty, any reference to "airport authority" made in this order shall include both authorities and any other types of legal entity operating an airport.

3 I have frequently observed in these CCAA proceedings that what is needed amongst all stakeholders and AC in all their various relationships is trust and respect flowing in every direction. I regret to say that I think it a fair observation here that trust and respect does not flow in either direction between AC and Authority. That is unfortunate and in my view completely unnecessary and inappropriate; especially when one considers that AC traffic made up 60% of the traffic which went through the Authority in 2003, and it recognized that AC is building a hub at the Toronto airport so that both sides should recognize the importance of one to the other and considering that AC is attempting to do significant restructuring in these CCAA proceedings. For whatever reasons, it appears that both sides of this equation were content to try to get an edge, even a little edge, on the other in their dealings. Each wishes its own slant on their relationship, but particularly as to how the written word should be interpreted. Suffice it to say that the agreement between AC and Authority is to be interpreted on a common sense, business

efficacy/avoidance of commercial absurdity basis and is not to be restricted to the terms of any formal written agreement (as is the case of the settlement documentation as to Terminal One (T1) and Terminal Two (T2) executed between AC and Authority which agreements contain "entire agreement" clauses and which also provide that there is to be a separate agreement as to NT). There is no "entire agreement" clause in the subject documentation between AC and the Authority. Indeed there is no requirement that this relationship re NT be reduced to a written agreement as the T1 and T2 agreements provide that they:

> Shall not be construed as an agreement or understanding between [Authority] and [AC] with respect to any matters relating to [NT] which matters will be dealt with in separate arrangements between [Authority] and [A.C.]

4 John Kaldeway, the Vice President, Transition Programs of Authority wrote AC on May 29, 2003, two months into the CCAA proceedings (in dealing with an Initial Order which Authority has not come back on or as to this aspect appealed), stating in a most reasonable way its general concern that the Authority's operations and particularly its transition to NT would not be impacted adversely by AC's CCAA proceedings:

> The [Authority] assigns air carriers to the various terminals at the Airport in such a manner as to ensure the most efficient use of airport resources. It has been and continues to be our intent to have Air Canada, and its alliance and code-share (SA) partners, as the first occupants of the new terminal (NT). This, of course, assumes both that a successful restructuring by Air Canada has occurred or is continuing with an ongoing operational configuration which would warrant a transfer of operations to the new terminal, as well as the negotiation of the appropriate commercial arrangements.
>
> It is important through the process of [AC's] restructuring and the completion of the construction of the first phase of the new terminal that we maintain full and effective communications on how the restructuring and the final completion of the new terminal will impact and shape our mutual plans. In this regard, this letter will discuss important issues relating to the completion of the construction and the transition of air carrier operations into the new terminal.
>
> . . .
>
> AC and the Authority have entered into an Operating Agreement and Lease in respect of [T2] dated January 31, 2001. As you are aware, upon the completion of the first stage of [NT], the [Authority] must proceed immediately with the construction of Pier-F and the new international hammerhead. Until the opening of Pier-F, we expect that [AC's] domestic operations will be conducted from the terminal while international passenger processing will be conducted in the new terminal with boarding and deplaning to occur at the Infield Terminal to the extent these will not yet be able to be accommodated at the new terminal. Transborder [Transborder being interpreted as trans U.S. border] operations will remain at [T2]. In order to ensure the continued development of [NT] as planned, [AC] and the [Authority] will have to establish an operations protocol to provide for the transfer of operations from Gates 202, 203, 204, 205, 206, 208, 210, 212, 214, 216, 218, and 220 to [NT] in November [2003]. These gates serve domestic traffic only.
>
> . . .
>
> Finally, in view of the demands upon [AC's] as it proceeds with its restructuring and the critical phase of our development program, it is imperative that we establish an appropriate and effective line of communication between us that can respond in real time to emerging issues. Please confirm that John Segaert is the individual in Toronto who is able to bind [AC] with respect to these transitional issues. . . .

5 It is interesting to note that this question of the fixed preferential use of the 14 bridge gates being in issue only flared up in January, 2004 although the Authority indicates that there were rumours circulating in December, 2003 as to AC's major domestic competitor WestJet wanting to use NT. I note that apparently there are sufficient facilities in NT to allow for the checking in and baggage handling of SA international flights but that for these flights passengers would have to be bussed to the infield facility. It also appears that similarly domestic non-AC flights could be included at NT although bussing would be either to Terminal Three (T3) or (T2) in that event. Curiously, there seems to be somewhat of a mismatch of resources in that the Authority has built recently more bridge gates at T3 but has not companioned these new gates with check-in and baggage handling facilities.

6 AC filed its motion on February 5, 2004; the Authority responded with its material on February 12th, AC provided a reply affidavit of Monte Brewer (Brewer) on February 17th; the Authority responded with a further affidavit of Howard Bohan (Bohan) the same day; AC then provided a further affidavit of John Segaert (Segaert) on February 18th; and the Authority responded with the last word with a further Bohan affidavit of February 19th, the day of the hearing. The factum of AC is dated February 17, 2004; the factum of the Authority is dated February 18, 2004. There was no cross-examinations on any of the affidavits - either there was not enough time to do so (which is doubtful as to those in the February 5th and responding February 12th motion records or AC and the Authority were both content to live with any statements of the other side (notwithstanding professed disagreement in the latter affidavits), in other words, they were content to live with the ambiguities, as it does not seem that either side had any appetite for cross-examination. It therefore falls to this court to deal with the morass of material and to attempt to determine what is the agreement between AC and the Authority as to the use of the 14 bridge gates in question based on an objective and reasonable view of matters including commercial reasonability and avoidance of absurdity. My conclusion is based upon the foregoing and the balance of probabilities in interpreting the evidence.

7 It is also curious to note that in many instances the affidavits referred to meetings, discussions and other contacts without specifying a precise date. The lack of precise dates for matters such as these would lead me to the reasonable conclusion that the active participants in these situations did not keep a written record of such, but are now only relying upon their memories as to dates. One would have thought that ordinarily matters of this nature would have been either documented in exchanges between the parties or in contemporaneous notes made at the time. That they were not would lead me to the reasonable conclusion that neither AC nor the Authority had the slightest expectation that as to the domestic use of NT during its first phase, the sole user would not be AC, absent unusual circumstances. Certainly AC was the only domestic carrier to be involved in discussions, liaison, planning, co-ordination and trial runs and testing. I would note that WestJet is a very recent new-comer to the NT scene (although it previously had some now existing operations out of T3) as discussions after WestJet's approach to the Authority about moving WestJet's Hamilton based flight operations to NT only happened in December, 2003; one might reasonably question whether WestJet would be able to get up to a co-ordinated speed for operations at NT for an April 18, 2004 start given that it has not been involved in any of this planning and testing over the past several years. WestJet claims that AC's motive in bringing this motion is to avoid the competition; one may similarly question whether WestJet's motives were "innocent".

8 That AC appeared to both AC and to the Authority as the only game in town up to at least December, 2003 would lead one (and it would appear both AC and the Authority as well) to consider that one need not dot all the "i"s and cross all the "t"s as to the 14 bridge gates. Further it is within that context that one must interpret the Authority's advice that AC and its SA partners would be the first occupants of NT as being that in respect of domestic carriers it was expected between AC and the Authority that AC would be the only domestic carrier in NT during phase one, subject to the "use it or lose it" provision of the Protocol and the provision that if other airline carriers could not be reasonably accommodated at T2 or T3 before phase two at NT came into play. It would be unreasonable to interpret the element of first occupant as being satisfied by AC domestic going in on April 6, 2004 and WestJet going in twelve days later on April 18, 2004, as per WestJet's January 14, 2004 press release. Curiously the Authority does not directly advise AC before its January 28, 2004 letter which indicates that AC gets not the 14 expected bridge gates on a fixed preferential basis, but rather only 8, with the requirement to share the other 6 with WestJet on a common usage basis. The Authority in my view is not the only one to play it cosy and coy; AC states that in late December it came up with a flight schedule that would allow it to have all of its domestic flights gated out of NT but it only advised the Authority of this on January 12, 2004, immediately after Calin Rovinescu of AC (second in command and the Chief Restructuring Officer in the CCAA proceedings) confirmed with Lou Turpen, the CEO of the Authority that the Authority was having discussions with WestJet, the nature of such discussions was not revealed.

9 I think it is fair to observe that one is disappointed with the lack of trust and respect flowing both ways as well as the lack of communication, co-operation and common sense. I say this notwithstanding that I appreciate how difficult running a major airline or a major airport is, particularly as to co-ordinating and accommodating ever changing scheduling. However, apparently the Authority is on record as not wishing to be bothered with interim scheduling advice but rather to be informed as to the schedule for the next season (the summer season) on a finalized basis in late January 2004 (January 31, 2004 being

the last IATA date for such schedules). The Authority complains that usually changes made at such late date are only "tweaks", not the types of changes made by AC in mid-January and then as changed on a wholesale basis later in that month. However there does not appear to be any such restriction on magnitude or quality. One should also observe that the Authority during November and even into December 2003 was having meetings with AC at which the Authority was requesting AC to see if it could adjust its domestic schedule so that it would all be gated out of NT with no bussing to T2 (and therefore no bus terminal is to be built there). It may well be that AC was incentivized to re-think its position once it heard rumours of WestJet's interest. I would not find that unusual. I have no doubt that AC thought that it had the luxury of keeping its options open as to having overflow (if any) as to its domestic flights in phase one of the NT accommodated by bussing to T2 (with a new bus terminal to be built by and at the expense of the Authority which would have the extra benefit of accommodating a swing flight plane from domestic to transborder use (or vice versa) at T2; that luxury would not "cost" AC anything so long as its expected position of being the only domestic carrier at NT during phase one was maintained).

10 In Segaert's February 5, 2004 affidavit he states at para. 43:

> 43. In or about September, 2003, I had discussions with Mr. Howard Bohan, General Manager, New Terminal 1 Client Task Force, GTAA, regarding the revisions to version 6 of the TFAP. At the time, we discussed the application of the fixed preferential use gates and common use gates provisions of the TFAP in connection with the opening of phase 1 of T1 New. Our discussions for some time had all been premised on Air Canada moving its domestic operations into T1 New from Terminal 2. Mr. Bohan at that time indicated to me that the 14 domestic contact gates would be designated as fixed preferential use gates including reserved facilities that Air Canada would be in a position to control in the manner prescribed by the TFAP. The 9 hard stand commuter gates in T1 New he indicated would be designated as common use gates with Air Canada Jazz being fully accommodated in these facilities with some potential surplus capacity available. At that time as at all other times up until January 28, 2004, there was never any suggestion or doubt expressed by GTAA in their discussions with me that there would be any other domestic carriers operating out of T1 New from the initial phase until completion of the construction of subsequent phases of the development.

11 Segaert was the liaison decision-maker of AC requested by the Authority in the May 29, 2003 letter.

12 Bohan in his February 12, 2004 affidavit does not deny that but attempts to explain away the impact of same at paragraphs 2-7:

> 2. I have reviewed the affidavit of John Segaert sworn February 5, 2004, and in particular paragraph 43 of that affidavit. Mr. Segaert implies that the GTAA has altered an agreement or arrangement that Air Canada would have the permanent use of all fourteen contact gates at T1New on a fixed preferential basis. This is untrue. The discussions described by Mr. Segaert in paragraph 43 are not accurately described and, taken in conjunction with the balance of Mr. Segaert's affidavit, distort the discussions we had concerning the application of the Terminal Facilities Allocation Protocol ("TFAP") for T1New.
>
> 3. The discussions referred to at paragraph 43 of Mr. Segaert's affidavit took place at a meeting late in May or early June, 2003. At that time, the scheduled opening date for T1New was October 2003. Our discussions centred on the application of the TFAP for the purpose of designating fixed preferential contact gates and common use contact gates, as well as fixed preferential check-in counters and common use counters, at the time of the proposed opening date for T1New.
>
> 4. Our discussions at that time were based on version 5 of the TFAP. A copy of the TFAP version 5 is attached as Exhibit "P" to John Kaldeway's affidavit.
>
> 5. Under the TFAP methodology, the first step is for the GTAA to determine the number of gates or check-in counters available for allocation on a fixed preferential use basis, under section 4.4.1(ii), which provided:.
>
> (ii) Based on the processing standards and the peak gate and Check-in Facility demand analysis, the GTAA will determine the number of Fixed Preferential gates and check-in positions to be allocated from the available gates and

> Check-in Facilities that have been designated by the GTAA as being available for allocation on a Fixed Preferential Use Basis. For greater certainty, such available gate and Check-in Facilities shall not include any gates and check-in positions that have been designated as GTAA Reserved or common Use Terminal Facilities.
>
> 6. Section 8 of the TFAP provides that 10% of the available facilities will be designated GTAA reserve facilities. (Sections 4.4.1(ii) and 8 are unchanged in the current version 7 of the TFAP.)
>
> 7. At that time, in late May or June, 2003, the GTAA anticipated Air Canada to be the only domestic carrier that would be operating from T1New at the time of opening. Accordingly, the GTAA then considered that all contact gates at T1New, including 2 GTAA reserved use gates, could be available for allocation on a fixed preferential basis.

13 One should also have regard to the November 23, 2001 Authority Map showing SA domestic (that is AC domestic) as using all gates - and no other carrier. The drawings presented by the Authority are Feb. 10, 11, 2004 and therefore produced only for the hearing.

14 It seems to me that the understanding between AC and the Authority which would have the status and equivalence of the type of agreement contemplated by the subject paragraphs 6 and 7 of the Initial Order under the CCAA was that in the prevailing circumstances and as these parties saw the Protocol (and MOU) playing out during phase one, AC was to have the fixed preferential use of the 14 bridge gates at NT subject to the use it or lose it proviso and the unable to accommodate elsewhere process.

15 Further given this understanding, then if the Authority wished to change course, it is constrained to do so in accord with the MOU and the Protocol in place from time to time. The Protocol is a work in progress and will continue to be so not only in phase one of the NT but during the complete functional life of the NT, unless otherwise replaced.

16 It does not seem to me that the Protocol (or the MOU) can be reasonably interpreted as advanced by the Authority that the Authority has the right and obligation to determine how many common use bridge gates it needs to accommodate carriers it wishes to place in the NT and that any being left over would be available for fixed preferential use (to a carrier which represented 60% of the traffic in the NT as to any type of flight - domestic, transborder and international collectively which at the present time could only be AC and at anytime could only be one carrier as simple mathematics dictate).

17 Given that Segaert was the AC liaison co-ordinating person as requested by the Authority, I do not see that any advice from anyone even in December, 2003 at the Authority to Rick Leach (Leach) or others at AC would have any legal impact. Given that understanding, I am not so surprised that Leach may not have focussed on what was being suggested to him that AC would only get a certain number of bridge gates on a fixed preferential basis. Further, since these suggestions were made at a time when it was understood that on a practical basis AC was the only domestic carrier for phase one of the NT - understood by both the Authority and AC until the approach to the Authority by WestJet in December and thereafter by AC alone, in permitted ignorance until otherwise advised in January, 2004.

18 I understand that the opening of NT was delayed from the expected date of October, 2003 to April 5, 2004, but that such delay was not occasioned by AC. If matters had progressed without such delay, then it would appear that AC would not only have been allocated all 14 bridge gates on a fixed preferential basis, as indicated and evidenced by the discussion between Bohan and Segaert, but that it would have been functionally operating same. I do not see that the delay or the lack of present functional use gives the Authority any flexibility to change its mind as to AC having these bridge gates on such basis. If the Authority wishes to accommodate WestJet at NT, then it would have to follow the Protocol until either AC loses some or all of the 14 gates on a fixed preferential basis for lack of use or additional gates are built in subsequent phases (it is perhaps curious that phase one of the NT has so few gates relatively speaking although subsequent phases will bring the total to over 100; apparently most of that results from NT being squeezed into a space between T2 and T3 and for the interim having to exist in conjunction with T1 before it is demolished and replaced by runway and new construction of piers at NT).

19 The Authority (and indeed WestJet) stressed that the Authority's mandate was to provide equitable access for all air carriers. However one would observe as has been observed frequently in other CCAA proceedings that equitable treatment

does not necessarily mean equal treatment. In these circumstances I do not see that there is anything truly inequitable about following the Protocol if WestJet wishes to be accommodated at the NT through use of any of the bridge gates. I pause to note that WestJet apparently could be accommodated at the NT for check-in and baggage handling if it were content to have its passengers bussed to either T2 or T3. The Authority downplayed to the maximum the inconvenience of such bussing, indicating that it would only involve the same amount of time as it would take a passenger to otherwise walk to the end of one of the piers of NT. One may be sceptical of that assertion but that is the official position of the Authority. I would also be of the view that the Authority has not in any material respect satisfied its obligations to show that it cannot otherwise accommodate WestJet at either T2 or T3, there were no figures as to usage of the check-in and baggage facilities being overloaded at T3 and there are "surplus" gates there; similarly there was no explanation as to the need to "rewire" the computer system as it would seem that under ordinary circumstances the existing cabling could remain intact and only the peripherals of computers would need to be replaced (with their own compatible software programs) and the baggage handling question was not explained as to why it needed to be replaced (or indeed why WestJet could not contract AC to handle this aspect for it at T2). One would also observe that apparently the Authority might be able to accommodate WestJet at NT by using the tarmac gates on a common use basis.

20 I note that AC was willing to accommodate WestJet as to all or part of the computer facilities at T2. Additionally AC indicated that as opposed to leaving the Protocol (as it now exists in version 7) for review after a year of experience to see what, if any, adjustments should be made, it was content to do this after 6 months.

21 I should also note that the Protocol is written without limiting its effect to AC alone. This is appropriate since AC even at the initial stage was not to be the only user as there were to be other international users. But additionally, the Protocol was being developed for use throughout all phases of the NT to and including the end of its functional life.

22 The Authority does not dispute that the usage by AC for its domestic flights as per the last schedule would give the highest use rate of all the terminals at the airport. Having done what the Authority asked it to do up to and including less than a month before WestJet came on the scene, namely put all its domestic flights gated out of NT without the necessity for bussing, I find it passing strange that the Authority would then do its calculations to bring AC below 60% usage as to certain gates by the device of the Authority - not AC - indicating that certain of AC's domestic flights would be bussed to T2.

23 The Authority submits that if I decide in AC's favour on this issue, it will have an impact beyond AC's proposed emergence from CCAA proceedings. All that is required of the Authority is that it respect the MOU and the Protocol in accordance with the internal processing of these documents at least until emergence (one way or the other) from the CCAA proceedings. What the Authority does after that time is up to it, although it would continue to be governed by those documents (in other words I suppose the Authority could decide to breach their provisions, in which case AC could, if it desired, proceed in the ordinary course with litigation, including going for injunctive relief at that time).

24 Bohan notes that the Authority and WestJet negotiated without disclosing same to the public, including carriers at the airport including AC. He observed that the same confidential arrangements were in place as were for AC moving its Tango operations to T3. However he did not comment on the magnitude of that or its relative impact on the other carriers at T3 which is an acknowledged common use facility - with no exclusive gate, check-in or baggage arrangement or anything "in between" as is the fixed preferential use subject to the various aforesaid provisions in place for NT. I note what Brewer states in his February 17th affidavit at paras. 11 and 2 respectively:

> 11. With respect to paragraph 31, I am advised by Mr. Dave Robinson, Senior Director, Corporate Real Estate, Air Canada, and do verily believe that as part of the Settlement in 2001, Air Canada agreed to give up its exclusive use of Terminal 2 despite the fact that Air Canada had made significant investments therein. While the GTAA would not agree to exclusive use of T1 New, the GTAA and Air Canada came up with a business solution and agreed to the concept of "Fixed Preferential Use" of facilities for domestic and transborder operations at T1 New. I am advised by Mr. Robinson and do verily believe that the concept of Fixed Preferential Use was agreed upon to give Air Canada comfort that it would be able to accommodate its entire domestic and transborder operations in T1 New with Fixed Preferential Use of the domestic and transborder facilities in relation to other carriers during the initial phase of T1 New, subject to the "use it or lose it" principle and subject to the GTAA maximizing facilities throughout Pearson Airport before accommodating another carrier at T1 New.

I am advised by Mr. Robinson and do verily believe that Air Canada believed that it was protected by the provision in the MOU requiring the GTAA prove that Air Canada wasn't using its gates efficiently and therefore ought to "lose" them and that the GTAA was protected because Air Canada would lose its Fixed Preferential gates if not using them efficiently. I am advised by Mr. Robinson and do verily believe that Fixed Preferential Use of the T1 New was one of the critical components of the Settlement.

2. The GTAA Affidavits misconstrue statements and concepts from the First A.C. Affidavits. The GTAA Affidavits suggest that Air Canada's position is that it is entitled to "exclusive" use of all gates at T1 New. This is not the position set out in the First A.C. Affidavits. The position of Air Canada is that it was agreed that Air Canada would be the first tenant of the initial phase of the development of T1 New and that it would have the use of all gates in this first phase on a Fixed Preferential Use basis. As set out in the First A.C. Affidavits, all planning for the development and opening of the initial phase of T1 New was based on and consistent with this agreement. Air Canada's position is that it has always been agreed that the allocation of Fixed Preferential Use gates to Air Canada would ensure that it would have first call on as many gates as would reasonably be required to accommodate its operations in T1 New at a reasonable intensity of use subject only to (a) the "use it or lose it" principle enshrined in the MOU; and (b) the provisions enabling new carriers to be introduced to T1 New only when the use of other terminals have been maximized. It was always understood that at the completion of the development of T1 New, there would be sufficient terminal facilities available to accommodate other carriers.

25 It seems to me reasonable in the circumstances prevailing that the contractual relationship between AC and the Authority as to the fixed preferential use of the 14 bridge gates should be interpreted in the overall context of the above.

26 I find that the Authority has committed the 14 bridge gates to AC on a fixed preferential basis pursuant to the Protocol as established and the MOU and that such commitment should be honoured in regard to paragraphs 6 and 7 of the Initial Order.

27 The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests, recognizing that the interest of most parties will be best served by the survival of the applicant debtor corporation: see *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), at pp. 306-7 (Doherty, J.A. dissenting on unrelated grounds). I see no reason why the Authority should not be held to the understanding and agreement which I have found it had with AC in this regard. Where an affected party is in breach of an initial order (which in this case remains intact as to the paragraphs in question and unappealed or otherwise dealt with on a comeback basis by the Authority in this regard), the court may order the breaching entity to comply with the initial order: see *Skydome Corp., Re*, [1999] O.J. No. 221 (Ont. Gen. Div. [Commercial List]) at paras. 2 and 20. In that regard I order the Authority to live up to its commitment to provide AC with the fixed preferential use of the 14 bridge gates at the NT, subject only to the provisos in the Protocol (and MOU). As offered by AC, the Protocol may be revisited after six months' experience.

28 I note that all concerned (including AC, WestJet and the Authority) wanted me to release this decision as quickly as possible with a view to stabilizing the situation and getting on with implementation.

29 Order accordingly.

Motion granted.

TAB 2

1999 CarswellOnt 208
Ontario Court of Justice (General Division) [Commercial List]

Skydome Corp., Re

1999 CarswellOnt 208, [1999] O.J. No. 221, 85 A.C.W.S. (3d) 493

In the Matter of Skydome Corporation, Skydome Food Services Corporation and Sai Subco Inc.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985 c. C-36, as Amended

In the Matter of the Business Corporations Act, R.S.O. 1990 c. B.16, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and Sai Subco Inc.

Blair J.

Heard: January 21, 1999
Heard: January 22, 1999
Judgment: January 29, 1999
Docket: 98-CL-3179

Counsel: *Michael D. Rotsztain*, for Skydome Corporation.
Ms. Joy Casey, for Controlled Media Communications Inc.
Ms. Aïda Van Wees, for PricewaterhouseCoopers Inc., the Monitor.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General

Preferred supplier was exclusive advertising agent of corporation and was to receive payments for advertising and remit it to corporation under agreement between two parties — Corporation applied under Companies' Creditors Arrangement Act for protection from its creditors and Initial Order included term that everyone who had agreement with corporation for supply of goods and/or services was to continue to perform agreement during CCAA period — Preferred supplier did not comply with Orders as they were concerned about potential termination of agreement under CCAA umbrella — Corporation terminated agreement with preferred supplier arguing that preferred supplier had committed fundamental breach of agreement and brought motion for order declaring supplier in breach of Order and directing it to pay amounts required under contract to corporation — Preferred supplier was required under Order to continue to perform and observe terms and conditions contained in agreement absent successful appeal from or variation of Order — Preferred supplier was obligated to account for any and all monies it had received on behalf of corporation less its commissions by December 18, 1998 - just three days before agreement was terminated — Motion granted — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Practice and procedure in actions involving corporations — Miscellaneous issues

Preferred supplier was exclusive advertising agent of corporation and was to receive payments for advertising and remit it to corporation under agreement between two parties — Corporation applied under Companies' Creditors Arrangement Act for protection from its creditors and Initial Order included term that everyone who had agreement with corporation for supply of goods and/or services was to continue to perform agreement during CCAA period — Preferred supplier did not comply with Orders as they were concerned about potential termination of agreement under CCAA umbrella — Corporation terminated agreement with preferred supplier arguing that preferred supplier had committed fundamental breach of agreement — Preferred supplier brought cross-motion seeking order varying CCAA order to permit it to exercise its rights of set off with respect to

amounts which may be owed by supplier to corporation — There was nothing in situation of preferred supplier which put it in position different from other creditors of corporation who asserted that they had claims of one sort or another against corporation — Claims were stayed under CCAA orders — Unremitted advertising revenues were held by preferred supplier as constructive trustee for corporation and by withholding funds, preferred supplier was enriched to corresponding detriment of corporation — There was no right of set-off — Cross-motion dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

MOTION by corporation during its Companies' Creditors Arrangement Act regime for order that preferred supplier be declared in breach of CCAA order and that it be ordered to pay amounts owing to corporation; CROSS-MOTION by preferred supplier for order permitting it to exercise its rights of set-of with respect to any amount which were owed by it to corporation.

***R.A. Blair J*:**

Overview and Issues

1 This decision deals with a Motion on behalf of SkyDome Corporation and a cross-Motion on behalf of Controlled Media Communications Inc., arising out of a dispute between these two corporations in the context of the CCAA proceedings presently outstanding in relation to SkyDome. I shall deal with the two Motions together, as counsel did, because the factual underpinnings for each are the same. They raise concerns regarding non-compliance with stay Orders granted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), on the part of those affected by such Orders, and unhappy with them, but who do not appeal them or move under the standard "come back" clause to have them varied. It is for this reason, primarily, that I have reserved decision to deliver some written reasons.

2 The real issue is not so much whether Controlled Media Communications Inc. ("CMC") has failed to comply with its obligations pursuant to the Initial Order granted under the CCAA on November 27, 1998 and extended by Order dated December 18, 1998 (together, "the CCAA Orders"). Counsel for CMC candidly acknowledges that it has not, and that it has failed to remit revenues payable to SkyDome under its contract by virtue of the Orders. The evidence amply supports this concession. It also supports the conclusion that CMC declined to make the payments because it feared that SkyDome would terminate its Preferred Supplier contract under the protection of the Act, and it wished to negotiate with SkyDome about that before making any payments. The substantive issue, then, is whether CMC is entitled to refuse to observe the terms of the Orders — directing compliance with the contract — without appealing the Orders successfully or having them varied, while it builds up a hold back of funds to set off against claims it may have against SkyDome, particularly those arising from the feared termination of its contract. The short and obvious answer, of course, is that it is not entitled to do so.

3 CMC has been involved with the SkyDome since its inception. It was one of the original Consortium Members and contributed the sum of $5 million for construction of the stadium. It thus acquired what is known as a "Preferred Supplier" status, which affords certain advantages in such a supplier's contractual dealings with the SkyDome. In the case of CMC, that contractual relationship relates to SkyDome advertising. Pursuant to a Preferred Supplier Rights agreement, CMC is SkyDome's exclusive advertising agent for the sale, licencing and/or leasing of all advertising and all rights to advertising at the SkyDome. This contractual relationship (the "CMC Agreement") was confirmed and continued when ownership of the stadium was transferred from the Province to SkyDome's predecessor in 1994, and the parties continued to operate under its terms until the Initial Order was made on November 27, 1998. On December 21 st last, as a result of events which transpired following SkyDome's CCAA Application and the granting of the Initial Order, SkyDome purported to terminate the CMC agreement.

4 SkyDome argues that it was entitled to terminate the CMC agreement because of CMC's fundamental breach of that agreement in failing to remit monies collected by it for advertising, less commissions earned, as required. It submits that CMC was obliged to remit those monies by reason of its obligation under the Initial Order to continue to honour its contractual obligations to SkyDome, that it has failed to account for monies received by it on SkyDome's behalf prior to and following the Order, and that its failure in this regard justifies termination on fundamental breach principles. It does not take the position that it has terminated the CMC agreement pursuant to its right to terminate contracts under the CCAA Order as part of its restructuring efforts.

5 CMC argues, on the other hand, that SkyDome had determined even prior to its CCAA Application that it was going to terminate the Preferred Suppliers' agreements, including in particular, the CMC Agreement, and that the "fundamental breach" argument is simply a pretext to justify its preconceived strategy. Counsel for CMC quite candidly acknowledged at the outset of her argument, as I have noted, that CMC failed to comply with the CCAA Order by not remitting payments that would otherwise have been payable under the contract. CMC places those amounts at $177,774. If sums which CMC admits would have been payable by January 15th are included, that amount becomes $251,645. SkyDome estimates the amounts owing at between $583,000 and $972,000.

6 CMC has remitted no advertising revenues received by it on SkyDome's behalf, since the date of the Initial Order. It is clear from the communications and correspondence exchanged between the parties after that date that CMC was simply refusing to do so because it and its chairman, G. Montegu Black, were concerned about the potential termination of the CMC Agreement under the CCAA umbrella, and they were not going to pay SkyDome anything until this latter issue was negotiated and as long as they felt that CMC had claims of its own against SkyDome to set-off against the advertising revenues CMC was holding.

7 A fax sent by Mr. Black to SkyDome on December 4, 1998, sums up the concern and upset of CMC, the tenor of its position and the position itself. It followed a number of telephone communications between CMC and SkyDome employees and two letters from SkyDome in which the latter had taken the position — politely, but firmly, in my opinion — that the continuation of revenue remittances was required under the terms of the Initial Order. Mr. Black's fax, which bears reciting in full, states:

> It appears to have escaped your notice that SkyDome has fallen upon the sword conveniently supplied to it by Labatts and the Bank of Commerce by seeking protection from its creditors under CCAA. It has done this because it feels it is necessary to renegotiate a number of long standing contractual obligations that it now considers onerous.
>
> Controlled Media Communications is not seeking protection from anything. It finds your several recent communications with Rae Armstrong not to be in the spirit of negotiation. *It finds them arrogant*. Unless I am missing something, it does not appear to me that SkyDome has anything to be arrogant about.
>
> Last weekend I left a voicemail for Patrick McDougall in which I said that with reluctance we realized that he was going to wish to negotiate with us. Up until this point, we have heard nothing from him. [1] *Until such time as the negotiations with him commence, your arrogant threat notwithstanding, absolutely nothing is going to happen*.
>
> (emphasis added)

8 This communication makes it patently clear that CMC refused to make any payments under the contract, notwithstanding the provisions of the outstanding CCAA Order, until Mr. Black and Mr. McDougall (the President of the SkyDome) had negotiated the termination issue. This stance was confirmed in later correspondence, including in a letter dated December 17, 1990, from Richard Watson, CMC's solicitor, which stated categorically, that "CMC is not at this time making the payment your are requesting".

9 Since cash flow is a matter of acute sensitivity for SkyDome during its CCAA regime, and because its takes umbrage at what Mr. Rotsztain referred to as "CMC taking the law into its own hands", SkyDome moves for an Order,

> a) declaring that CMC is in breach of the CCAA Order and that it has failed to pay and remit to SkyDome the amounts required to be paid under the CMC agreement;
>
> b) directing that CMC comply with the provisions of the CCAA Order by providing forthwith to SkyDome a full and accurate accounting of all unreported monies received on behalf of SkyDome and of all amounts that it is required to pay and remit;
>
> c) directing that CMC pay to SkyDome the amounts so payable — either as agreed after the accounting, or, in the absence of agreement, as determined later by the Court; and, finally,

d) requiring CMC in any event to pay to SkyDome immediately the admitted sum of $177,774 plus a further sum of $74,865 which CMC acknowledges would have been payable by January 15, 1999 had the agreement not been terminated (the total is $252,639).

10 On its cross-Motion, CMC asks for an order varying the CCAA Order to permit it to,

a) exercise its rights of set off with respect to any amounts which may be owing by CMC to SkyDome, including the right to set off amounts claimed by CMC for money now owing or payable in the future and for damages for breach of contract;

b) initiate proceedings against SkyDome to claim for money owing and for damages; and,

c) claim against SkyDome as a creditor within the CCAA proceeding for the amounts payable and for damages.

11 CMC also asks for an accounting and payment.

Analysis

12 Paragraph 9 of the Initial Order requires everyone who had an agreement with SkyDome for the supply of goods and/or services to "continue to perform and observe the terms and conditions" of such agreement during the CCAA period so long as SkyDome pays the normal charges for the goods and services provided after the date of the Order "in accordance with present payment practices or terms". Those with such contracts are not permitted to accelerate, terminate, suspend, modify, determine or cancel their agreements, and they are restrained from doing so and from cutting off the supply of goods or services. Furthermore, under paragraph 4 of the Initial Order — the stay provision — all proceedings against the CCAA Applicants, including extra-judicial remedies, are stayed, and by virtue of paragraph 4(e),

(e) all Persons are restrained from exercising any extra-judicial remedy against the Applicants in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation of any of the Applicants as at the date [of the Order], including, without limitation ... any right of ... set-off, consolidation of accounts ... or application of monies ... or from retaining cheques and/or monies owing to an Applicant or to which the Applicant is entitled...

13 What, then, were the terms and conditions of the CMC Agreement which CMC was obliged to continue to perform after the Initial Order?

14 In terms, and in substance, CMC is granted Preferred Supplier rights as the exclusive advertising agent for the SkyDome: paragraphs 1 and 9. Under paragraph 3 CMC *on behalf of SkyDome is to* invoice and *receive payments* for the advertising, *and is to remit to SkyDome*,

all revenue received therefor less its Base Commission on the fifteenth day following the end of the month to which such revenue applies to the extent received by CMC and any balance as received by it for such month on the Friday of the week of receipt of payments received.

15 To take an example, then, if advertisers are billed, say in the month of June, and payments are received by CMC for that invoice in the same month, the revenues received from that invoice are to be remitted (less commissions) on July 15th. If, however, the revenues pertaining to such an invoice are received by CMC wholly or in part at some time after the end of June, the revenues received (less commissions) are to be remitted on the Friday of the week the revenues are received. Mr. Rotsztain argued that for a period of at least several months before the CCAA filing the parties had adopted a practice whereby CMC would make its remittances on each Friday, thus ignoring the 15th of the month provision, and that that existing practice should be enforced, as it formed the "present payment practice". The practice is supported by the last Advertising Remittance Summary submitted by CMC to SkyDome as at November 6, 1998, and Ms. Casey acknowledged on behalf of CMC that the

practice existed. She pointed out, however, that the CMC agreement contains and "entire agreement" clause, and that by virtue of it any binding alteration to the agreement must be in writing. No such written amendment exists.

16 I agree with Ms. Casey in this respect, and since on a Motion of this nature the factual issue of whether the parties intended to amend the agreement by their relatively short change in practice over a few months — the CMC advertising contract has been in place since the beginning of SkyDome operations — cannot be determined, I intend to approach the problem on the basis that it is the formula in paragraph 3 of the CMC Agreement which governs. In the end, however, I do not think it matters for present purposes, because on any reading of the contract, CMC was and is obligated to account for *any and all monies it had received on behalf of* SkyDome (less its commissions) by Friday December 18, 1998 — just three days before the Agreement was terminated.

17 CMC's position is that it is obliged to remit only those monies received and payable during the period between the date of the Initial Order (November 27 th) and the date of termination of the CMC Agreement (December 21 st). This position is untenable in my view, however. It is based upon a misconception of the effect of the CCAA Orders, which is to require existing contracts to be honoured provided that the CCAA applicant pays the normal prices or charges for the goods and services provided during the stay period in accordance with the payment practices then in effect (or as otherwise negotiated). In this case, CMC was arranging advertising contracts for SkyDome and was collecting *SkyDome's* revenues for that advertising, with the obligation to remit those revenues, after deducting their commissions, to SkyDome. CMC was required under the Initial Order to "continue to perform and observe [those] terms and conditions" contained in the CMC Agreement, absent a successful appeal from or variation of that Order. Any other result — apart from the implications of sanctioning the failure to obey an outstanding order — would deprive SkyDome of an integral part of its revenue base, and potentially cripple its ability to continue to operate during the CCAA period while it attempts to negotiate a restructuring with its creditors as a whole.

18 An additional argument was advanced on behalf of CMC to support the view that it was only obliged to remit monies received and payable during the November 27 th to December 21 st period. This argument was that once the CCAA Application was granted, CMC was not accountable for remitting advertising revenues that had been received by them but which, for one reason or another, had not been remitted as required on the 15 th of a month or on a Friday of the week in which they had been received. These monies, CMC submitted, it was entitled to retain to be set-off against the growing number of claims and counter-claims now accumulating at a rapid pace between the parties. This position is illogical and insupportable. If correct, it would mean that CMC could negligently, recklessly or even deliberately miss a payment, on the one hand, while at the same time succeed in frustrating the clear intent and terms of the Agreement *and* the Orders, on the other hand, by refusing to remit to SkyDome its own monies!

19 Both of these arguments put forward by CMC become even more untenable when it is recognized that the unremitted advertising revenues are held by CMC as constructive trustee for SkyDome. While there is no evidence that CMC was obliged to hold the funds in a segregated account and, therefore, that there was an express or implied trust, CMC was nonetheless obliged to receive the advertising revenues "on behalf of SkyDome" and to remit them to SkyDome, less commissions. By withholding the funds CMC is enriched to the corresponding detriment of SkyDome in that regard, and no juristic reason exists in the circumstances to justify the enrichment. The only possible juristic reason would related to the contractual relationship between CMC and Skydome, and it is clear that in accordance with the terms of that Agreement CMC was only to have its percentage commission and not 100 per cent. See, *Soulos v. Korkontzilas* (1997), 146 D.L.R. (4th) 214 (S.C.C.); *Brown & Collett Ltd., Re* (1996), 11 E.T.R. (2d) 164 (Ont. Gen. Div. [Commercial List]), Winkler J., particularly at pp. 178-18; and, *Sharby v. N.R.S. Elgin Realty Ltd. (Trustee of)* (1991), 3 O.R. (3d) 129 (Ont. Gen. Div.), Killeen J. In such a case, there is no right of set-off against the trust monies for claims of a different nature being asserted by CMC against SkyDome: *McMahon v. Canada Permanent Trust Co.* (1979), 108 D.L.R. (3d) 71 (B.C. C.A.).

Conclusion and Disposition

20 CMC must comply with the terms of the CCAA Orders. The Orders have not been appealed, and CMC did not choon se to move to vary them until after it was faced with this Motion by SkyDome to compel it to comply. Parties affected by a CCAA

Order — as with any other Order — are not entitled to ignore that Order, much less to flout it, simply because they don't like its effect on them or because they wish to use the difficulties caused to the CCAA company by their non-compliance as a lever to enhance their bargaining position with the debtor company. It is patently clear that that is exactly what CMC and Mr. Black were intent on accomplishing here, and it cannot be sanctioned.

21 CMC acknowledges, as I have indicated, that it has failed to comply with the Initial Order to the extent of $177,774.00 (see affidavit of G. Montegu Black, sworn January 20, 1999). In addition, it is admitted that a further $73,961.00 was payable under the CMC Agreement by January 15, 1999, a date which has now passed. For the reasons explained above, it is my view that CMC is obliged to account and to pay over all advertising revenues received by it in relation to the period pre-dating the termination of the Agreement. I therefore order that CMC pay to SkyDome immediately the sum of $251,645.00, being the sum of the foregoing two amounts. In addition, CMC is required to account to SkyDome forthwith as to the balance of the advertising revenues which have been received by it (less commissions) prior to Friday, December 18, 1998, and not remitted to SkyDome. After that accounting has been furnished, if the parties cannot agree, a motion may be made for the establishment of a court procedure to settle the accounting. The balance of the amounts found due on the accounting are to be paid to SkyDome forthwith thereafter.

22 Given its conduct, CMC does not come to court with clean hands. I am not prepared to permit an equitable remedy of set-off to be applied against the sums improperly held back following the granting of the Initial Order. CMC is entitled, of course, to assert its claims to set-off as a claimant/creditor in the CCAA proceedings.

23 The cross-Motion, however, is dismissed. I see nothing in the situation of CMC which puts it in a position different from other creditors of SkyDome who assert that they have claims of one sort or another against the Company. Those claims are stayed under the CCAA Orders, so that SkyDome will have the capacity to concentrate its time and resources, and the energies of its personnel, on attempting to gain the support of its creditors to a restructuring. If the stay were to be lifted to permit CMC to pursue its claims, it would be difficult to argue that others should not be accorded the same relief. The whole purpose of the proceeding would be nullified.

24 Order accordingly.

Motion granted. Cross-motion dismissed.

Footnotes

1 There is a conflict in the evidence as to the respective efforts made by Messrs. McDougall and Black to speak with each other.

TAB 3

1991 CarswellBC 503
British Columbia Supreme Court

Philip's Manufacturing Ltd., Re

1991 CarswellBC 503, [1992] B.C.W.L.D. 519, 31 A.C.W.S. (3d) 246, 4 B.L.R. (2d) 134, 9 C.B.R. (3d) 17

Re COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36; Re PHILIP'S MANUFACTURING LTD.

Scarth J. [in Chambers]

Judgment: December 9, 1991
Docket: Doc. Vancouver A913228

Counsel: *D. Tysoe*, for Philip's Manufacturing Ltd.
C. Emslie, for Hongkong Bank of Canada.
W.E.J. Skelly, for monitor.
D. Hyndman, for certain creditors.

Scarth J. **[In Chambers] (orally):**

1 On September 3, 1991, upon the ex parte application of Philip's Manufacturing Ltd., this court made an order pursuant to s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, staying all proceedings against Philip's Manufacturing Ltd. for a period of six months.

2 The order provided, inter alia:

3 1. That within the six-month period the company had leave to file a formal plan of compromise or arrangement between the company and its creditors, referred to as the "re-organization plan".

4 2. That Campbell, Saunders Ltd., licensed trustee, be appointed as monitor of the company.

5 3. That all creditors of the company be enjoined from making demand for payment upon the company or upon any guarantor of obligations of the company.

6 4. That both Her Majesty the Queen in Right of Canada and Her Majesty in Right of the Province of British Columbia are bound by the order of September 3, 1991 and other orders made herein.

7 5. Specifically with respect to the Hongkong Bank of Canada that:

> Irrespective of any other breaches of the terms and conditions applicable to the Petitioner's credit facilities with Hongkong Bank of Canada, unless and until the indebtedness owing by the Petitioner to Hongkong Bank of Canada under its operating of credit (sic) (but not including its term loan) as at a month end exceeds the aggregate of (i) 75% of the Petitioner's accounts receivable outstanding for 60 days or less as at such month end (whether or not other accounts receivable owing to the Petitioner by its debtors may be outstanding for more than 60 days) and such other accounts receivable that are part of a regular booking program of the Petitioner as are not overdue and (ii) 50% of the Petitioner's inventories of raw materials and finished goods at cost as at such month end, all as shown on the accountant reviewed financial statements of the Petitioner, and such excess as at the 15th day of the following month is continuing, Hongkong Bank of Canada shall not be entitled to realize upon any security held by it on any of the undertaking, property or assets of the Petitioner (including, without limitation, the debenture, the assignment of book accounts and section 178 security held by Hongkong Bank of

Canada), that Hongkong Bank of Canada shall not apply against the indebtedness owed to it by the Petitioner any monies deposited to any of the Petitioner's accounts with Hongkong Bank of Canada or other monies received by Hongkong Bank of Canada in connection with the Petitioner (whether the cheques or other instruments are payable to the Petitioner or Hongkong Bank of Canada) in the absence of a written direction from the Petitioner notwithstanding the assignment of book accounts, the section 178 security and any other security held by Hongkong Bank of Canada and that the Petitioner shall be entitled to draw cheques on or withdraw monies from any of its accounts with Hongkong Bank of Canada and to retain and utilize its collected accouns (sic) receivable as long as the outstanding principal balance owing under the Petitioner's operating line of credit does not exceed $1,700,000 (U.S.);

8 6. That liberty be reserved to any and all persons interested to apply to the court to set aside or vary the order or for such further or other order as they may advise upon 48 hours' notice.

9 In reasons for judgment delivered October 17, 1991 [reported ante, p. 1], Mr. Justice B.D. Macdonald dealt with a number of applications brought by various creditors to set aside the order made on September 3, 1991; alternatively, to remove any prohibition against suing directors or officers of the company, to reduce the time available, that is, the six-month period, to the company to file its reorganization plan, to expand the monitor's duties and to exclude particular claims from the stay of proceedings in order to permit certain actions against the company to proceed.

10 Mr. Justice Macdonald dismissed the applications to set aside the order, deleted from the order the prohibition against taking proceedings against directors and officers of the company, maintained the six-month period, granted leave to certain firms to file petitions against the company for a receiving order under the *Bankruptcy Act*, R.S.C. 1985, c. B-3, and directed no further proceedings be taken in respect of those petitions during the continuance of the order of September 3, and expanded the duties of the monitor.

11 By notice of motion filed October 18, 1991, the Hongkong Bank of Canada seeks an order setting aside the stay of proceedings with respect to the company and any guarantors of the company; alternatively, deleting that part of the stay order which allegedly requires the bank to lend money to the company pursuant to an operating line of credit, restricts the application of funds received by the bank to the company's outstanding indebtedness, and allows the company to draw cheques and withdraw moneys from any of its accounts with the bank, and to retain and utilize its collected accounts receivable. In the further alternative, the bank seeks an order declaring that the bank constitutes a class by itself, directing the holding of a meeting of that class immediately, requiring the company to put forward its reorganization plan at that meeting, directing the class to vote on the plan at that meeting, and directing the company to report the outcome of the vote to the court.

12 As well as the bank's application, the Crown Provincial, by notice of motion filed October 9, 1991, and the Crown Federal, by notice of motion filed October 16, 1991, seek declarations that Her Majesty in Right of the Province and in Right of Canada is not bound by the *Companies' Creditors Arrangement Act*, and an order varying the order made September 3, 1991, so as to delete the term of the order stipulating the Crown is bound thereby.

13 Apart from what are referred to as statutory secured creditors, which are owed approximately $100,000, the bank is the company's only secured creditor. As at October 17, 1991, the company owed the bank approximately $2.4 million. The debt is secured by a fixed and floating charge debenture, general assignment of book accounts and s. 178 (*Bank Act*, R.S.C. 1985, c. B-1) security, covering all assets of the company.

14 The bank, in June 1990, extended certain credit facilities to the company, including a revolving line of credit of $1.7 million Canadian or the equivalent in U.S. dollars. The evidence establishes that during the summer of 1991, the bank lost confidence in the ability of the company to repay the debt owing the bank. Under date of August 14, 1991, the bank alleged certain breaches of the company's debenture, and gave notice they required correction. This was followed by a demand for payment on September 3, 1991, the same day this court granted the company an order staying proceedings against it under s. 11 of the *Companies' Creditors Arrangement Act*.

15 There are in excess of 300 creditors of this company. Of a total indebtedness of $5.7 million, the unsecured and trade creditors are owed approximately $3.15 million. The monitor, in his report to the court dated October 8, 1991, states:

> It is our view that on a liquidation or forced sale basis there will be insufficient funds to satisfy the secured debt to the Hongkong Bank of Canada. Accordingly there would be no funds available for distribution to the unsecured creditors.

The result, if the stay order is vacated, in all probability will be that these unsecured and trade creditors will not recover any amount on the dollar. Moreover, the company's 50 employees will be out of work, and firms who do business with the company, such as Triangle Transport and Warehousing Systems Inc. and Express Exterior Products Ltd., will suffer a substantial reduction in their own incomes.

16 On behalf of the bank, Mr. Emslie submits that the bank is, by virtue of its position as a secured creditor and the amount of its debt in relation to that of other creditors, in a class by itself, or so significant a creditor as to control a class of creditors. Section 6 of the Act requires each class of creditor to approve the reorganization plan, it is said. In his affidavit sworn to October 18, 1991 and filed that day, David Reid, an assistant vice-president, special credit, with the bank, deposes:

> 16. After careful consideration, the Bank is not prepared and will not agree, to any reorganization plan put forward by the Company regardless of its content.

Thus, it is argued, no plan can succeed and hence the court ought not to exercise its discretion in favour of the company by maintaining the stay order: *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 at p. 302 [O.R.]; *Diemaster Tool Inc. v. Svortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.) at p. 149.

17 In *Nova Metal Products Inc. v. Comiskey (Trustee of)*, supra, Mr. Justice Finlayson stated at p. 302 [O.R.]:

> My assessment of the secured creditors is that the Bank should be in its own class. This being so, it is obvious that no plan of arrangement can succeed without its approval. There is no useful purpose to be served in putting a plan of arrangement to a meeting of creditors if it is known in advance that it cannot succeed. This is another cogent reason for the court declining to exercise its discretion in favour of the debtor companies.

Moreover, the bank submits, since June 30, 1991, there has been a decline in the company's assets of over $1 million. This is prejudicial to the bank's interests, it is said, and thus creditors should be allowed their own remedies: *Chef Ready Foods Ltd.* (November 15, 1990), Doc. Vancouver A902447 (B.C. S.C.).

18 On behalf of the company it is submitted by Mr. Tysoe that the objectives of the *Companies' Creditors Arrangement Act* are to facilitate the reorganization of a company's financial affairs as much as possible for the benefit of a broad constituency, including employees, creditors and shareholders, and if necessary, by impinging on the rights of some. The statement of principle by Mr. Justice Gibbs, writing for the Court of Appeal in *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, at p. 88 [B.C.L.R.], is relied upon:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business.
>
> . . . . .
>
> When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

19 It is premature, at this stage, for the bank to commit itself to reject any reorganization plan which the company might file within the six-month period provided for by the order made September 3, Mr. Tysoe argues. In that time the company may

refinance, in which event the bank would be paid out; or, if another financial institution is not prepared to refinance the debt, the company may be sold as a going concern to pay off its creditors, which is to be preferred to a forced liquidation; or the Job Protection Commission might assist. Finally, the company may be able to raise capital as part of a financial restructuring programme. The court, it is submitted, should keep the creditors at bay while these options are explored.

20 Moreover, the monitor's reports to the court dated October 8, 1991 and October 28, 1991 demonstrate that the bank's concern with respect to a deterioration of assets is not well founded, Mr. Tysoe submits. The monitor indicates operating losses can be expected in November and December based on the company's past performance, but the sales have historically improved in January and February, and more particularly in the spring and summer. The monitor, in his report of October 28, points to a gross profit margin on sales of 25 per cent, to a reduction of the expenditures for salaries and overhead of $20,000 per month, and to steps taken to improve control over inventory and the cost of production.

21 The bank, it is submitted, has violated the terms of the order made September 3, by applying 25 per cent of each deposit against the company's indebtedness, and accordingly ought not to be heard by the court until it has purged itself of its contempt: *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567 (C.A.) at p. 569. It is clear from the transcripts of tape recordings of the discussion between Murray Feist, senior manager, special credit, of the bank and representatives of the company, on September 24, October 1 and October 4, 1991, that Mr. Feist was aware the bank was contravening the order. Mr. Breivik, who appeared with Mr. Emslie for the bank on November 27, 1991, argues the bank has purged its contempt by making available the full amount of credit ordered by the court, but, in any event, equitable doctrines do not apply to the interpretation and application of the *Companies' Creditors Arrangement Act*, and thus no legal result flows from the bank's conduct.

22 In the circumstances here, it is clear the bank is overwhelmingly the largest secured creditor. It is not supportive of the company and says it will defeat any proposed plan the company files. It has the ability to do that by virtue of the dollar value of its secured claims.

23 Although I do not find the company is hopelessly insolvent — in fact the monitor suggests a ray of hope for its survival — it is clear, in view of the bank's position, that in the remaining three months of the stay, if the order remains, the company would have to find other capital to pay off the bank or sell its assets as a going concern. I do not, on the material before me, consider that realistic.

24 Moreover, the company has had since mid-August, when the bank pointed out its concerns, to attempt to restructure its affairs, but has not done so. The transcripts to which I have referred indicate the company consistently sought more time from the bank to obtain financial data or analyze information.

25 The bank's wilful disregard of this court's order respecting maintenance of the line of credit and use of deposits is a matter of concern to the court, and militates strongly against the bank's position. I am satisfied on the material that the bank has substantially purged its contempt, albeit only after becoming aware of the existence of the transcripts. Had it been necessary for the bank to reply on the court's equitable jurisdiction alone, I think it could not be heard. I am of the view, however, that the factors relevant to the disposition of the matters in issue here are broader than simply the bank's position.

26 The material before me indicates that the order made September 3, 1991 must be vacated, and it is so ordered.

27 This disposition of the bank's application makes it unnecessary to deal with the able arguments of Ms. Acheson, for the Provincial Crown, and Mr. Louie, for the Federal Crown, as to whether or not the Crown is bound by the Act.

Order vacated.

1992 CarswellBC 542
British Columbia Court of Appeal

Philip's Manufacturing Ltd., Re

1992 CarswellBC 542, [1992] B.C.W.L.D. 977, 32 A.C.W.S. (3d) 932, 4 B.L.R. (2d) 142, 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25

PHILIP'S MANUFACTURING LTD. v. HONGKONG BANK OF CANADA and PACIFIC LEAD & METAL INC., NORTHERN WAREHOUSE EQUIPMENT LTD. and CAMPBELL SAUNDERS LTD.

Carrothers, Cumming and Gibbs JJ.A.

Judgment: March 18, 1992
Docket: Doc. Vancouver CA014859

Counsel: *W.S. Berardino, Q.C.*, and *A.J. Bensler*, for appellants.
R.E. Breivik and *C.M. Emslie*, for respondent, Hongkong Bank of Canada.
W.E.J. Skelly, for receiver-manager, Coopers & Lybrand Ltd.
D.B. Hyndman and *P.S. Boles*, for unsecured creditors, A.B.L. Metals, Thyssen Canada, Pacific Lead & Metal, A.M.I. Metals.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Order granting debtor protection under Companies' Creditors Arrangement Act vacated — Debtor appealing — Creditor not proving debtor's compromise being "doomed to failure" — Appeal allowed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

On September 3, 1991, P. Ltd. obtained an order granting it protection under the *Companies' Creditors Arrangement Act*. Pursuant to the order, P Ltd. had six months to bring forward a formal plan. On December 9, 1991, the bank, as secured creditor applied to set aside the order. The order was vacated. A receiver-manager was put in control of the day-to-day management of P Ltd.'s enterprise. On January 29, 1992, the activities of the receiver-manager were limited by terms of a stay order. P Ltd. appealed the setting aside of the *Companies' Creditors Arrangement Act* order.

Held:

The appeal was allowed.

The burden on an applicant seeking to set aside a *Companies' Creditors Arrangement Act* order is to prove that the debtor's attempt at making a compromise or arrangement is "doomed to failure". The bank showed that it would not facilitate a compromise or arrangement but did not address P Ltd.'s prospects for obtaining alternative financing such that the compromise or arrangement would provide for the retirement of the creditor's debt in full. The bank therefore failed to meet the evidentiary burden.

The appeal was made effective on March 20, 1992 to allow for the orderly transfer of custody, management and control of P Ltd. from the receiver-manager back to its executive officers.

Appeal from the setting aside of *Companies' Creditors Arrangement Act* order [reported at p.17, ante].

The judgment of the court was delivered by *Gibbs J.A.* (orally):

1 This is an appeal from an order made by a chambers judge (the second chambers judge) on December 9, 1991 [reported ante, p.17 (B.C. S.C.)], setting aside an order made by another chambers judge (the first chambers judge) on September 3, 1991.

The history of the proceedings discloses an unfortunate proliferation of applications, hearings and orders. There is, however, no need to recite that history. It is well known to the parties and unlikely to be of interest to anyone else. The appeal can be disposed of on the merits by having regard only to the orders made on September 3, 1991 and December 9, 1991, respectively.

2 On September 3, 1991, on the application of Philip's Manufacturing, the first chambers judge made an order granting the company protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."). The company was given six months within which to bring forward "a formal plan of compromise or arrangement between the Petitioner and its creditors". There were subsequent applications before the same chambers judge by various of the creditors, but not including the Hongkong Bank, to have the order set aside or, in the alternative, varied. In reasons delivered on October 17, 1991 [reported ante, p.1], the setting-aside relief was refused. In respect of the six-month period, in those reasons the first chambers judge said [at pp. 9-10, ante]:

> **The Six-Month Stay**
>
> Six months is the usual period for the initial stay. In complicated cases, it has been extended, sometimes more than once, to enable the company to arrive at agreement with a majority of the creditors in each class. After hearing argument on these motions, and in light of the expansion of the monitor's duties on which I have decided, I am satisfied that the length of the stay originally ordered is appropriate. One and one-half months of that six have already gone by. The first report of the monitor, filed October 8, 1991, makes it clear that much remains to be done before a reorganization plan can be presented to the creditors and the court.

3 In view of the concerns expressed to us about the possible disposition or dissipation of assets during the reorganization period, it is worth noting that in the October 17, 1991 reasons the first chambers judge also gave leave for bankruptcy-crystallization proceedings.

4 Although it was not one of the applicants, the Hongkong Bank was represented during the proceedings which culminated in the October 17, 1991 reasons. On the very next day, October 18, the bank as a creditor filed a notice of motion seeking by way of relief to have the original September 3, 1991 order set aside or varied. Ultimately the application came on before the second chambers judge and was heard over the course of several days in late October and in November of 1991. The second chambers judge delivered reasons on December 9, 1991 setting aside the original September 3, 1991 C.C.A.A. order. It is this setting-aside order that is the subject of this appeal. It is of significance that only a little over half of the six-month reorganization period had elapsed when the setting-aside order was made. It is also of significance that less than two months had gone by since the first chambers judge had observed that "much remains to be done before a reorganization plan can be presented to the creditors and the court".

5 It is apparent that the second chambers judge reached his setting-aside decision primarily on three submissions advanced by the bank: that as a secured creditor it was in a class by itself or was, in any event, so significant as to control a class of creditors on a compromise or arrangement vote; that the bank, on the affidavit of a bank employee, "is not prepared and will not agree, to any reorganization plan put forward by the company regardless of its content"; and that the judgment of the Ontario Court of Appeal in *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 applied.

6 If what Mr. Justice Finlayson said at p. 302 of *Nova Metal Products Inc.* was intended as a test, and it is not clear that it was so intended, it is not the test to be applied in this province. In *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, this court said, at p.88 [B.C.L.R.]:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point

where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

7 The burden on an applicant in this province and in these circumstances is therefore to lead evidence to the effect that the C.C.A.A.-protected company's attempt at making a compromise or arrangement is "doomed to failure". The evidence before the second chamber judge fell short of meeting that test. It went no further than demonstrating that the bank would not facilitate a compromise or arrangement. But it did not address the prospects of Philip's Manufacturing obtaining financing or making arrangements with some other source to the end that the compromise or arrangement would provide for the retirement of the bank debt in full. The possibility or probability of the company's officers achieving that goal was unknown to the chambers judge and is unknown to us. Whether it was or was not likely could not be more than speculation, and speculation cannot be accepted in lieu of evidence.

8 It follows that, as the bank did not meet the evidentiary burden of showing that the company's attempts to make a compromise or arrangement were doomed to failure, the trial judge erred in setting aside the original order of the first chambers judge.

9 That is not to say that a creditor can never succeed in an application to set aside a C.C.A.A. order. By a curious irony, that is what ultimately happened to *Chef Ready Foods*. Within about two weeks of the date this court handed down its judgment, a Supreme Court chambers judge set aside the C.C.A.A. order. He said that: "the situation has reached the point where for some days the company has not been doing any business. It is not so much at the point of collapsed as it is having collapsed". The obvious difference between that case and this is that there there was evidence that the attempt at compromise or arrangement was doomed to failure, whereas here there was not.

10 At the outset of this appeal the court, of its own volition, raised the question of the jurisdiction of the second chambers judge to set aside the order of the first chambers judge. As the appeal is being disposed of on the merits, it is not necessary to deal with jurisdiction. However, even apart from the question of jurisdiction, this is a circumstance where the second chambers judge would have been justified to conforming to the convention that, as a general rule and in the absence of other overriding considerations, an application to set aside or vary an order should be referred to the judge who made the order in the first instance.

11 It will be obvious from what I have said so far that in my opinion the appeal should be allowed, but there remains the question of a transition period. By reason of other orders made by other chambers judges, after the second chambers judge set aside the order of the first chambers judge, Coopers & Lybrand Ltd. have been in control of the day-to-day management of the Philip's Manufacturing enterprise. The activities of Coopers & Lybrand and the scope of their powers were limited by the terms of a stay order granted by Lambert J.A. of this court on January 29, 1992. We have been urged to impose a transition period for the orderly transfer of custody, management and control of the enterprise back to the executive officers of Philip's Manufacturing and for the reinstallation of the monitor appointed by the first chambers judge. I am persuaded that that would be a sensible and prudent thing to do.

12 Accordingly, I would allow the appeal and direct that the order of the second chambers judge be set aside, both to take effect at 4:00 p.m. on Friday, March 20, 1992. I would further order that the stay order granted by Lambert J.A. on January 29, 1992 be continued in effect also until 4:00 p.m. on Friday, March 20, 1992.

***Carrothers J.A.*:**

13 I agree.

***Cumming J.A.*:**

14 I agree.

***Carrothers J.A.*:**

15 The appeal is allowed effective at the close of the Court of Appeal Registry at 4:00 p.m. on March 20, 1992, to allow the parties the opportunity to arrange the orderly transition with respect to the receiver-manager, the trustee in bankruptcy, and the monitor. The order of Scarth J. is set aside and the order of Macdonald J. of September 3, 1991 pursuant to the *Companies' Creditors Arrangement Act* is restored. The stay order of Lambert J.A. is to continue until the effective time of this judgment.

Appeal allowed.

End of Document

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 SEARS CANADA INC., et al.

Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES
(CDTel Motion)
(returnable April 12, 2021)

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