Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

REPLY FACTUM OF THE RETIREES

a) Sun Indalex's res judicata argument, and
b) U.S. Trustee's claim for interest and costs
(Returnable July 24, 2013)

July 19, 2013

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TO: ATTACHED SERVICE LIST

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ONTARIO
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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
INDALEX LIMITED
INDALEX HOLDINGS (B.C.) LTD.
6326765 CANADA INC. and
NOVAR INC.

SERVICE LIST
(July 11, 2013)

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PART A – REPLY TO THE U.S. TRUSTEE

The right to subrogation can be limited and in this case is limited to only the amount paid out by Indalex U.S. to the DIP Lender

1. There is no dispute that Indalex U.S. as guarantor was subrogated to the DIP Lender's Priority and on that basis, following the Supreme Court's decision that the DIP Lender had priority over the PBA deemed trust, the estate of Indalex U.S. was paid $10,751,247.22.

2. However, just because Indalex U.S. was subrogated to the DIP Priority does not mean that it acquired all the rights as if it became the DIP Lender, as the U.S. Trustee contends. Rather, Indalex U.S.'s right to subrogation was limited by further agreement of the parties as reflected in the Approval and Vesting Order.

3. A subrogee's right to subrogation can be limited. [1] At paragraph 32 of its factum, the U.S. Trustee cites a passage from *The Law of Guarantee*:

> [...] It is an ancient principle, founded upon the equitable doctrine of marshalling, that ***unless otherwise agreed*** on payment or performance by the surety of the guaranteed obligation, the surety has the right to the benefit of all securities that the creditor has received from the principle debtor in respect of the debt in order to enable the surety to obtain satisfaction for what he has paid.
>
> ...
>
> ***A surety for a limited amount has in respect of that amount the same rights as the creditor.*** [emphasis added]
>
> Kevin McGuiness, *The Law of Guarantee*, 2nd ed. (Scarborough: Carswell, 1996) 7.14.

[1] *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.* (1999), [1999] 3 S.C.R. 108 at para. 45; *Re Empire Paper Ltd (In Liquidation)*, [1999] B.C.C.C 406 (Ch. D.); *Commonwealth Construction Co. v. Imperial Oil Ltd.* (1976), [1978] 1 S.C.R. 317 at paras. 28 and 32.

4. In this case, Indalex U.S. agreed, whether explicitly or implicitly, to a restriction on its right to subrogation that limited its recovery "up to" the amount that it paid under the guarantee and did not provide for any recovery for interest and costs. Paragraph 14 of the Approval and Vesting Order reflects Indalex U.S.'s agreement and therefore modifies the subrogation arrangement to exclude recovery for Indalex U.S. (now the U.S. Trustee) for interest and costs.

Section 2 of the Mercantile Law Amendment Act has no application

5. At paragraph 35-36 of its factum, the U.S. Trustee argues that section 2 of the provincial *Mercantile Law Amendment Act* ("MLAA") is authority for the proposition that it has full rights of subrogation. This is not correct for at least two reasons. First, section 2 of the MLAA does not grant a subrogee to "full" subrogation rights that override any limiting language agreed to by the subrogee or directed by court order.

6. Second, the Approval and Vesting Order was issued under the federal CCAA. The MLAA is provincial legislation. As the Supreme Court held in *Re Indalex*,[2] the doctrine of paramountcy applies in CCAA proceedings to render conflicting provincial legislation of no force or effect. Even if section 2 of the MLAA authorizes full subrogation that overrides an agreement limiting subrogation by the subrogee or by court order – which it does not – section 2 is rendered of no force or effect by the Approval and Vesting Order issued under the federal CCAA. The MLAA has no application.

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[2] *Sun Indalex Finance, LLC v. United Steelworkers* 2013 S.C.C. 6 at paras. 56-57, 60, 242 and 265.

The U.S. Trustee cannot reserve rights for more argument and litigation for interest and costs

7. At paragraph 40 of its factum, the U.S. Trustee seeks to reserve rights to argue again in the subsequent motion contemplated by the May 31 Order for the same interest and costs that it is arguing for in this motion. The U.S. Trustee is saying that if it is unsuccessful in this motion based on the DIP Charge Priority, it wants to argue later based on the DIP security documents.

8. The U.S. Trustee's approach is similar to the situation in *Heather's House of Fashion Inc.*, where Henry, J. rejected the notion that the Trustee could "attack a transaction successively on the grounds that it was firstly a fraudulent preference, secondly it was a fraudulent conveyance, thirdly, it was a fraudulent settlement, and further to attack it under the applicable provincial statutes". The court found that such conduct constitutes an abuse of process.[3]

9. The second motion pursuant to this court's order of May 31, 2013, which the U.S. Trustee agreed to, will address other issues, none of which have to do with the U.S. Trustee's claim for interest and costs. By purporting to reserve rights to litigate the same interest and costs claim in the future if it is unsuccessful in this motion, the U.S. Trustee is impermissibly attempting to amend the May 31, 2013 order of this Court. This is an abuse of process. The U.S. Trustee should not be permitted reserve such rights.

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[3] *Re Heather's House of Fashion Inc* (No. 2) (1977) 24 C.B.R. (N.S.) 193 (Ont. S.C.) at para. 16.

PART B – REPLY TO SUN INDALEX

Sun Indalex is an insider who never loaned any money to Indalex Canada

10. At paragraphs 4-5 of its factum, Sun discusses its alleged claim against Indalex Canada. Sun's explanation of itself and its claim is incomplete and misleading. Sun is part of the U.S.-based Indalex group of companies that were found by the Supreme Court of Canada to have breached their fiduciary duty to retirees in Canada. Sun Indalex, LLC, is a wholly owned subsidiary of Sun Capital Partners III QP, a private equity firm. Sun Indalex, LLC, along with Sun Capital Partners III, L.P., Sun Capital Partners, III QP, LP, Sun Capital Partners IV, LP and certain management co-investors were the beneficial owners of Indalex Holding Finance Inc., which in turn wholly owns Indalex Holding, which is the owner of Indalex Limited.[4]

11. As found by the Ontario Court of Appeal, and not disputed by the Supreme Court:

> [44] Keith Cooper, the Senior Managing Director of FTI Consulting Inc., was a key advisor to the Indalex group of companies prior to and during the CCAA proceedings. On March 19, 2009, he was appointed the Chief Restructuring Officer for all of the Indalex U.S. based companies. However, he was responsible not only for Indalex U.S. but for the entire Indalex group of companies and subsidiaries, including the Applicants. Mr. Cooper described his role as being to maximize recovery for Indalex as a whole.

12. Throughout Indalex's CCAA proceeding, Sun has been inconsistent in describing the nature of its alleged secured claim in Canada. In its factum filed before the Ontario Court of Appeal, it represented to the Court that it was a "lender" to Indalex Canada, stating at paragraph 19 that "Sun is also a lender to the Canadian Debtors and has filed a proof of claim against the Canadian Debtors advancing a secured claim in the amount of $38,049,926.54 that remains due and owing to Sun under the terms of its loans to the Canadian Debtors." In its factum to the

[4] Affidavit of Stubbs, USW's Motion Record, at para. 10 and 11.

Supreme Court, it changed the description of its claim to a "pre-CCAA secured creditor of both Indalex and the U.S. Debtors."

13. There is no evidence that Sun Indalex loaned any money to Canada. Rather, the evidence indicates that on the eve of Indalex's insolvency Sun used its position as owner of Indalex U.S. and Indalex Ltd. to force Indalex Canada to grant "security" to Sun Indalex for amounts that Sun Indalex had provided to Indalex U.S., but not to Canada.

14. At the time of the Applicants' CCAA filing, on April 3, 2009, Indalex Canada was a party to an Amended and Restated Credit Agreement (dated May 21, 2008), among the Canadian Debtors, Indalex U.S., certain revolving lenders, Sun Indalex and JP Morgan as Administrative Agent (the "Credit Agreement").[5] Pursuant to the Credit Agreement, Indalex U.S. received two separate $15 million term loans from Sun.[6] According to the affidavit of Timothy J. Stubbs filed in support of the initial CCAA application, none of the Canadian companies "are borrowers under the Term Loans and neither of the Term Loans are guaranteed" by any of the Canadian Companies.[7]

15. On March 6, 2009, two weeks prior to Indalex U.S.'s Chapter 7 filing and four weeks prior to the CCAA Filing, the obligations of Indalex U.S. to Sun Indalex purportedly became guaranteed by the Canadian Debtors.[8] The alleged security was granted due to pressure by the revolving lenders, who agreed not to exercise certain rights under the Credit Agreement (the

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5 Monitor's 12th Report, para. 24.

6 Supra note 4, para 49.

7 Ibid., at para. 50.

8 Ibid., paras. 27 and 28.

"Forbearance Agreement").[9] The Forbearance Agreement was signed between the Canadian Debtors, Indalex U.S., Sun Indalex and the Revolving Lenders.[10]

16. Sun now alleges that it has a secured claim in the Canadian Indalex estate on the basis of a guarantee that it was provided by Indalex Canada on March 6, 2009 to secure Indalex U.S.'s "debt" to Sun. The U.S. Trustee has filed a lawsuit against Sun and other parties in the United States courts contesting, *inter alia*, Sun's status as a secured creditor. The U.S. Trustee has asserted that Sun was the recipient of an unlawful dividend in the amount of $69.3 million when the Indalex companies were in financial distress. It is further asserted by the U.S. Trustee that the "secured" claim of Sun Indalex should be characterized as an equity infusion to Indalex U.S. and not as debt.[11] Finally, with respect to paragraph 5 of Sun's factum, although the Monitor has reported that Sun's claim is secured but "in an amount to be determined", the Monitor has confirmed to counsel to the USW and counsel to the Retirees that it has not obtained a formal legal opinion on the validity of Sun's security against Indalex Canada.

a) Sun misstates the facts of the July 30, 2009 motion

17. At paragraph 7, Sun states that at the July 30, 2009 sale and distribution motion hearing, the Retirees did not simply "reserve their rights to assert a deemed trust claim". In fact, the Retirees first notified all stakeholders of their reliance on the PBA deemed trust in correspondence dated June 26, 2009. There was no response to that correspondence from any party.[12]

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[9] Ibid., at para. 27.

[10] Ibid.

[11] Complaint brought by George L. Miller against Sun Capital Partners Inc., USW's Motion Record, paras 19-24.

[12] Monitor's 21st Report, para. 42.

18. When the Retirees became aware of the motion by the company to approve the sale of all of Indalex's assets *and* the distribution of the sale proceeds to the DIP Lender with no provision being made for the Retirees' previously asserted deemed trust claim, the Retirees attended at the hearing to raise the deemed trust *again,* and to submit that a portion of the sale proceeds should be paid to the Executive Plan. The company opposed the Retirees' requested relief. Given the conflict between the Retirees' deemed trust claim and the company's motion to distribute all of the sale proceeds to the DIP Lenders, this Court approved the sale to SAPA and distribution of the sale proceeds that were available at the time but established a Reserve Fund holding an amount pending the determination of entitlement between the Retirees' deemed trust claim and the DIP Priority. The subsequently scheduled August 30, 2009 motion proceeded to decide which party had priority over the Reserve Fund – the DIP Lender or the Retirees. That was the issue in the proceedings that was dealt with by this Court, the Ontario Court of Appeal, and the Supreme Court of Canada (the "Prior Proceeding").

b) Sun misstates the issue in the Prior Proceeding

19. The current priority contest over the Estate Funds between Sun Indalex and the Retirees is not an issue that was "necessarily bound up with the determination of the 'issue'" in the Prior Proceeding, that was "distinctly put in issue" and "directly determined", as per *Danyluk.*[13]

20. At paragraph 7, 13 and 28 of its factum, Sun mischaracterizes the Prior Proceeding as concerning all sale proceeds, both current and future, and references paragraph 46 of the Monitor's 21st Report in apparent support of its argument. Paragraph 46 of the Monitor's Report does not support Sun's statement. The Prior Proceeding dealt with specific amounts held in

[13] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at para. 24

Reserve and did not extend to possible future funds that were not even known to the Court at the time:

> [46] The Approval and Vesting Order provided that the Monitor make a distribution to the DIP Lenders, from the Canadian sale proceeds, in satisfaction of the Applicants' obligations to the DIP Lenders, subject to a reserve that the Monitor considered to be appropriate in the circumstances. As stated in the Reasons of Justice Campbell dated February 18, 2010 (the "February 18 Decision"):
>
> > "As a result of the Former Executives and USW's reservation of rights, the Monitor has retained the amount of $6.75 million as Undistributed Proceeds, in addition to other amounts reserved by the Monitor."

21. At paragraph 13 of its factum, Sun further attempts to obfuscate the issue of the priority dispute between the DIP Lender and the Retirees in the Prior Proceeding by pointing to the irrelevant fact that the U.S. Trustee was appointed after the July 31, 2009 sale of assets. This is a red herring. The contest before this Court that culminated in the Supreme Court's decision was between the DIP Priority and the Retirees' deemed trust. The fact that Indalex U.S. entered Chapter 7 proceedings after the sale and that the U.S. Trustee took over Indalex U.S.'s position was irrelevant to the determination of the parties' dispute.

c) Sun overstates its involvement in the Prior Proceedings - it was never a contender to the Reserve Fund

22. At paragraphs 13, 32, 33, 37 and 42 of its factum, Sun claims that the dispute in the Prior Proceeding was between the Retirees and all other creditors, including, specifically, Sun. This is wrong.

23. Sun had no entitlement to the Reserve Fund. This Court's decision in the Prior Proceeding correctly does not mention Sun at all because regardless of the outcome of the priority contest in the Prior Proceeding, Sun would have received nothing. If the DIP Lender

(by that time, the DIP guarantor) won, the Reserve Fund would be paid to the DIP Lender. If the Retirees won, then they would have received the Reserve Fund. Sun was never a contender for the Reserve Fund. Although Sun attempts to now manufacture that it had a prominent role in the Prior Proceeding, in substance it was nothing more than a "me too" party, supporting the DIP Lender's priority "on the basis that the $10.75 million paid by the guarantors would otherwise have been available to Sun Indalex as a secured creditor of the U.S. Debtors in the U.S. bankruptcy proceedings.[14]

24. The last sentence in paragraph 33 of Sun's factum attempts to exploit an oversight in the judgment of Justice Cromwell to the point of misrepresentation (who is in the minority on this point in any event). At paragraph 96 of the Supreme Court decision, Justice Cromwell states: "The reserve fund is not sufficient to pay back both Sun Indalex and the pension plans and so the main question on the main appeals is which of the creditors is entitled to priority for their respective claims." The reference to "Sun Indalex" in this sentence is an obvious oversight. The dispute over the Reserve Fund was between the DIP Lender (not Sun Indalex) and the Retirees.

25. No Justice of the Supreme Court addressed the issue of whether a PBA deemed trust in favour of the Retirees Plan would apply to different proceeds other than the Reserve Fund, that may be received by Indalex at a different time in the future, in circumstances where the DIP subrogee had already been paid. *This was simply not an issue before the Supreme Court. Res judicata* does not apply to the Retirees' deemed trust claim against Sun Indalex's alleged secured claim.

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[14] Per Cromwell J., para. 95.

26. At paragraph 45 of its factum, Sun misstates the doctrine of issue estoppel as applying to all matters relating to the issue which "might have been put forward". That is not the test for issue estoppel. As stated by the Supreme Court in *Danyluk*[15] the test is whether a question was distinctly put in issue and directly determined. The priority of the Retirees' deemed trust claim versus Sun's alleged secured claim was never put in issue and was not determined in the Prior Proceeding.

d) By Sun's own argument, Sun's claim would be res judicata

27. Sun's argument on issue estoppel is flawed. Moreover, it would also mean that Sun has no claim to the Estate Funds because according to Sun, its claim and all matters related thereto that "might" have been brought forward and determined by the Supreme Court are now barred. The Supreme Court certainly did not direct that any funds be paid to Sun. Since Sun now argues that the issue before the Supreme Court included its own claim for priority, then Sun's claim has been dealt with by the Supreme Court in its decision that did not direct any funds to be paid to Sun. Sun's claim is therefore *res judicata* and they cannot now re-litigate their claim. Sun cannot avoid that the consequence of its flawed interpretation of *res judicata* would equally apply to bar its own alleged claim.

e) The Sale Approval Date is not relevant to the applicability of the PBA deemed trust to the current priority dispute

28. The Sale Approval Date was the relevant date for determining the priority contest in the Prior Proceeding because that was the date on which this Court authorized distribution of all sale proceeds to the DIP Lenders to which the Retirees objected.

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[15] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, at para. 24.

29. At paragraphs 39 and 42 of its factum, Sun states that the Supreme Court determined that the relevant date for determining deemed trusts in respect of any funds or at least, all present and future proceeds of sale is the date of the sale. This is wrong. The Supreme Court did not make such a determination. Instead, the Supreme Court used the sale date for determining the priority contest over the *Reserve Fund* between the DIP Lender and the Retirees because that was the date the competing claims of the Retirees and the DIP Lender collided. The SCC did not address the issue of whether that date should also apply to any dispute between the Retirees and other creditors over the *Estate Funds*. The only funds at issue before the Supreme Court were the Reserve Fund. The Supreme Court was not even aware that the Estate Funds existed, nor that such funds would ever exist in the future.

30. At paragraph 37, Sun claims that for the Retirees' deemed trust priority to be valid against all creditors and all assets, the Executive Plan had to be wound up at the time of the sale of Indalex's assets on July 30, 2009. This an incorrect interpretation of paragraph 11 of the Sale Approval and Vesting Order. The objective of paragraph 11 is to ensure that creditors' claims against a debtor are not prejudiced by the fact that a debtor is selling its assets. This is sensible to make clear that the event of a sale of assets is *disconnected* from the determination of creditors' priorities. This is the reason for the language in paragraph 11 that states "as if the Canadian Acquired Assets had not been sold". Further, if paragraph 11 was intended to determine creditors' priority ranking immediately prior to a sale, then specific language for that result is required. There is no such language. Finally, the Ontario Court of Appeal has held that priority contests are to be determined as of the date that competing claims come into conflict. See paragraphs 30-37 of the Retirees' main factum.

f) There is no need to adduce fresh evidence of the fact that the Executive Plan has been wound up as of August 30, 2009

31. At paragraphs 44-50 of its factum, Sun claims that the Retirees should have to adduce fresh evidence that the Executive Plan had been wound up, that the Retirees should be barred from adducing such evidence, and therefore this Court should not consider that the Retirees have a deemed trust claim. Essentially, Sun is attempting to have the court ignore the established fact that the Executive Plan has been wound up. This Court should reject Sun's attempt.

32. First, the Court of Appeal found the Executive Plan was wound up, and the fact that the Executive Plan had been wound, with an effective date of September 30, 2009, is also referenced in the Monitor's 21st Report.[16] This finding was not disputed by the Supreme Court. Sun appeared at the Court of Appeal and Supreme Court and never questioned whether the Executive Plan had been wound up or argued that "fresh evidence" was needed to prove this fact. Sun cannot raise this argument now in an attempt, ironically, to re-litigate this issue after the Court of Appeal already found the Executive Plan was wound up.

33. Furthermore, the law is clear that Courts can take judicial notice of an administrative order (such as the order issued by the Superintendent of Financial Services winding up the Executive Plan) and should do so in these circumstances. The Supreme Court held *R. v. Find:* "[j]udicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute."[17] The doctrine applies to "facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of

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[16] *Indalex Limited (Re)*, 2011 ONCA 265 at para. 43; Monitor's 21st Report, at para. 39.
[17] *R. v. Find* (2001), [2001] 1 S.C.R. 863.

immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy".[18]

34. This Court is now faced with determining the issue of entitlement to the Estate Funds among the remaining creditors of Indalex. The Estate Funds are different funds, arriving in Indalex almost a year after the sale of assets to SAPA, which are being fought over by creditors with different priority rights. The Supreme Court did not determine the issues for the current priority dispute. Despite Sun's attempts to embellish and distort the issue in the Prior Proceeding as having decided the issue now between the Retirees and Sun, there is no re-litigation of that issue from the Prior Proceeding. Sun's *res judicata* argument against the Retirees should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of July, 2013

ANDREW HATNAY

DEMETRIOS YIOKARIS

[18] *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Commonwealth Construction Co. v. Imperial Oil Ltd.* (1976), [1978] 1 S.C.R. 317
2. *Fraser River Pile Dredge Ltd. v. Can-Dive Services Ltd.,* [1999] 3 S.C.R. 108
3. *Re Empire Paper Ltd (In Liquidation)*, [1999] B.C.C.C 406 (Ch. D.)
4. *R. v. Find*, [2001] 1 S.C.R. 863
5. *R. v. Potts* (1982), 36 O.R. (2d) 195

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36 AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED et al. the Applicants

Court File No: CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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