Court File No. CV-13-10279-00CL

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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

RESPONDING MOTION RECORD OF ALLEN-VANGUARD CORPORATION

(Motion re: Allen-Vanguard Mini-Trial, Returnable February 11, 2014)

December 10, 2013

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TO: **THE SERVICE LIST**

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AFFIDAVIT OF DAVID E. LUXTON

I, DAVID E. LUXTON, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chairman of the Board of Directors of Allen-Vanguard Corporation. I am also the former President and Chief Executive Officer of Allen-Vanguard Corporation. As such, I have personal knowledge of the matters to which I hereinafter depose, save and except where my knowledge is based on information and belief in which case I believe such information to be true.

2. Capitalized terms not defined in this affidavit are defined in my previous affidavit sworn October 28, 2013.

3. I was the principal negotiator and executive in charge of the Transaction in 2007 on behalf of Allen-Vanguard. I have been deeply involved in this case since its commencement. I have been Allen-Vanguard's representative at discoveries and, to date, I have been examined for 21 days in the actions involving the Offeree Shareholders.

The Proposed Mini-Trial Will Not Save Expense or Time

4. I have reviewed the affidavits of C. Ian Ross and Paul Echenberg which have been filed in support of the Offeree Shareholders' cross-motion for a mini-trial of certain issues which are in dispute in the litigation.

5. It is not clear to me from their affidavits what specific issues or provisions the Offeree Shareholders actually propose to be adjudicated by way of mini-trial or how questions relating to the meaning and effect of the Share Purchase Agreement and related documents could possibly be separated from the circumstances surrounding the negotiation and drafting of those documents and the business arrangements to be reflected in them.

6. In addition, even if the Offeree Shareholders were to succeed on the contractual interpretation question proposed for the mini-trial, a second trial will still be required to adjudicate this dispute.

7. It would be unfair to Allen-Vanguard to have to incur the legal costs to conduct two trials, which will inevitably involve overlapping evidence, many of the same witnesses, and a determination of the same or similar factual and legal issues, in order to get this action finally resolved.

8. I understand the Offeree Shareholders have retained an additional law firm to represent them at this stage. I do appreciate that this is a large claim and parties are entitled to full representation, but from our perspective Allen-Vanguard does not have limitless resources, and I believe we should be able to present our case as a whole and with all the facts and law, at one time.

9. I have significant doubt that the proposed mini-trial could be completed in one week. My own experience in this litigation is that counsel frequently underestimate the amount of time required to prepare and advance the litigation. Indeed, I have been examined for 21 days in the actions involving the Offeree Shareholders and counsel for the Offeree Shareholders have indicated that they still will be seeking an additional 15 days to discover me simply on the damages issues in this case.

10. I have been advised by counsel and do verily believe that the proposed mini-trial will take considerably longer than one week to adjudicate. I have been advised that the mini-trial will likely take at least 3 weeks, while a trial on all of the liability issues (including the issues to be determined on the proposed mini-trial) would take approximately 6-7 weeks.

11. I have been advised by counsel and do verily believe that the cost to Allen-Vanguard to prepare for and conduct the mini-trial alone would be in the hundreds of thousands of dollars.

12. Much of that cost will then have to be duplicated to prepare for and conduct the subsequent trial.

13. I believe that it would be far more efficient to proceed to trial on at least all of the liability issues now and if something has to be left off, leave off the damages.

The Issue of the Offeree Shareholders' Liability for Fraud Can Not be Separated from Other Liability Issues

14. The Offeree Shareholders have not delivered the sworn affidavits containing evidence they intend to rely upon at the proposed mini-trial.

15. As a result, it is not possible to know with precision what specific issues the Offeree Shareholders say should be adjudicated by way of a mini-trial. However, they appear to be suggesting that they are entitled to summary judgment based on the interpretation of specific but unidentified provisions of the Share Purchase Agreement.

16. The "expected" evidence of the Offeree Shareholders appears to be that the Share Purchase Agreement precludes Allen-Vanguard from seeking damages against the Offeree Shareholders for an amount in excess of the Indemnification Escrow Amount even in the case of a fraud.

17. Allen-Vanguard's claims are against the Offeree Shareholders (the vendors), who received the benefit of an alleged fraud committed by MES. It is from them that Allen-Vanguard has sought indemnification and/or damages under the terms of the Share Purchase Agreement.

18. Quite apart from the legal maneuvering that the Offeree Shareholders are now attempting through the proposed mini-trial, I do not see how specific provisions of the Share Purchase Agreement can be interpreted without considering the surrounding factual circumstances, which include the fraud that Allen-Vanguard says was being perpetrated against it at the very same time that it was negotiating and executing the Share Purchase Agreement with the Offeree Shareholders.

19. Indeed, while the Share Purchase Agreement was being negotiated, I believe the former management of MES were misrepresenting the strength of the company's position to Allen-Vanguard and withholding vital information with respect to MES' most important product and its largest customer.

20. The former management of MES knew that MES' largest customer was intending to conduct a head-to-head test of MES' Electronic Counter Measure Chameleon unit (which is an electronic device also referred to as a "jammer") against units produced by MES' competitors. This intention to test on a head-to-head basis was known by MES management to have material implications for its existing arrangements with the customer and the future supply of units to this customer.

21. Allen-Vanguard alleges the former management of MES intentionally or recklessly withheld this critical information from Allen-Vanguard. In fact, while the Share Purchase Agreement was being negotiated, they represented that there was a significantly increased probability of securing further orders from this customer. I can see no basis for any such representation.

22. Allen-Vanguard never agreed (and would never agree) to contract out of making a claim for fraud. On the contrary, while Allen-Vanguard was prepared to limit its claims to the Indemnification Escrow Amount for MES' breaches of specified representations and warranties contained in the Share Purchase Agreement, it did not, and would never, limit its claim against the Offeree Shareholders in the event of a fraud.

23. I do not completely understand all the legal issues that are involved in either the mini-trial or the full trial. I understand from counsel there may be issues of ambiguity, and arguments about admissibility of evidence, and whether lawyers can give evidence about drafting issues, negotiations and intentions.

24. I can say, however, that I think it only fair and it has always been my expectation, that a judge when deciding what the Share Purchase Agreement means, would have the benefit of my

evidence and that of the other witnesses to understand what we and I were being told at the very time I now understand the Offeree Shareholders were trying to limit their potential liabilities under our agreement.

25. Based on my experience as a business person and my involvement with this Transaction, I do not understand how specific provisions of the Share Purchase Agreement could be interpreted without looking at the complete contract. Indeed, the pleadings of Allen-Vanguard and the Offeree Shareholders in Court File Nos. 08-CV-43544 and 08-CV-43188 specifically refer to many interrelated provisions of the Share Purchase Agreement:

(a) Section 1.01;

(b) Section 2.03(2);

(c) Section 2.04;

(d) Section 2.04(c);

(e) Section 3.01;

(f) Section 3.01(2)(a);

(g) Section 3.01(2)(b);

(h) Section 3.01(2)(c);

(i) Section 3.01(2)(d);

(j) Section 3.01(2)(f);

(k) Section 3.01(3)(d);

(l) Section 3.01(3)(g);

(m) Section 3.01(4)(b);

(n) Section 3.01(12)(k);

(o) Section 3.01(6)(b);

(p) Section 3.01(6)(i);

(q) Section 3.01(8)(d);

(r) Section 3.01(8)(e);

(s) Section 3.01(12)(a);

(t) Section 3.01(12)(c);

(u) Section 3.01(12)(m);

(v) Section 3.04;

(w) Section 4.01;

(x) Section 5.01(a);

(y) Section 7.02;

(z) Section 7.05;

(aa) Section 7.06;

(bb) Section 7.07;

(cc) Section 8.06; and

(dd) Section 8.10.

The "Expected" Evidence of the Offeree Shareholders on the Proposed Mini-Trial

26. I have reviewed Mr. Echenberg's affidavit sworn November 24, 2013 and note that the Offeree Shareholders expect to tender affidavits from Robert Chapman, Cécile Ducharme and Paul Echenberg on the proposed mini-trial.

27. I have reviewed Mr. Echenberg's statements as to the "expected" affidavit evidence which the Offeree Shareholders propose to file in support of their proposed mini-trial.

28. It is noteworthy that the Offeree Shareholders do not propose to tender affidavits from either:

(a) the other Offeree Shareholders; or

(b) the former management of MES whose actual knowledge is defined as the knowledge of MES for the purposes of the Share Purchase Agreement, particularly given that MES was itself a party to the Share Purchase Agreement.

29. The mini-trial proposal also attempts to limit the available evidence by specifically excluding evidence from any individuals who have not filed an affidavit and by precluding any expert evidence from being called. I have been advised by counsel and do verily believe that such additional evidence may be necessary for the trier of fact to adjudicate the issues proposed for the mini-trial.

30. I do not see why this should be ordered by a court. I want to be in a position on behalf of Allen-Vanguard to testify to the judge about the facts and why we say on the facts there should be no limitations on the liability of the Offeree Shareholders in this case. I do not see why I should have to put this evidence into an affidavit after all this time, at this stage. I want to come to court and give my evidence to the court. I do not see why, after all the discovery I have been through, I should have to make an affidavit, as is proposed.

Conducting a Mini-Trial Within the CCAA Proceedings Would Restrict the Parties' Rights of Appeal

31. I have been advised by counsel and do verily believe that Allen-Vanguard would be prejudiced if a mini-trial were ordered within the *Companies' Creditors Arrangement Act*, R.S.C.

1985, c. C-36 (the "CCAA") proceedings because the parties' rights of appeal would be significantly restricted.

Bifurcation of Damages

32. I have been advised by counsel and do verily believe that the most efficient way of adjudicating this dispute would not be to proceed with a mini-trial on the issues identified in the Offeree Shareholders' cross-motion. Rather, I have been advised by counsel and do verily believe that the most efficient way of resolving this dispute and which would enable Growthworks to emerge from the CCAA proceedings in a timely fashion, would be to separate damages from the liability issues in this case, and secure an early date for the liability trial.

33. In particular, the only outstanding interlocutory steps to be taken in these actions are in respect of damages. The liability issues are ready to proceed to trial.

34. As a result, it would be in all parties' interests to proceed to a trial on all of the liability issues, which would include the proposed issues described by the Offeree Shareholders in their cross-motion.

35. Of course, only if Allen-Vanguard were successful on the liability issues, would it likely be necessary to proceed to try the damages issues.

36. If the Court were to order a bifurcated trial in this manner, no further Examinations for Discovery would be required at this time, the Offeree Shareholders would not be required at this point to respond to Allen-Vanguard's damages report, and there should be no further disputes over documentary production.

37. The bottom line is that this case is ready to proceed to trial on all of the liability issues and there is no practical reason why it should not proceed.

38. I swear this affidavit in response to the Offeree Shareholders' cross-motion for an Order directing the trial of certain issues to be heard by way of a mini-trial within these CCAA proceedings.

SWORN BEFORE ME at the City of Ottawa, in the Province of Ontario this 10th day of December, 2013.

Commissioner for Taking Affidavits
(or as may be)

Amanda Erin Vanderlee, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires March 27, 2016.

DAVID E. LUXTON

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PROCEEDING COMMENCED AT TORONTO

AFFIDAVIT OF DAVID E. LUXTON
(SWORN DECEMBER 10, 2013)

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