

CITATION: Indalex Limited (Re), 2013 ONSC 7932
COURT FILE NO.: CV-09-8122-00CL
DATE: 20131221

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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

BEFORE: D. M. Brown J.

COUNSEL: A. Taylor and Y. Katirai, for the Monitor, FTI Consulting Canada ULC

B. Empey, for Sun Indalex Finance, LLC

H. O'Reilly, for Morneau Shepell Ltd., Administrator of the Salaried and Executive Plans

D. Brown, for the United Steelworkers

D. McPhail, for the Financial Services Commission of Ontario

H. Chaiton, for the Chapter 7 Trustee of the Bankruptcy Estates of the US Indalex Debtors

A. Hatney, for Keith Carruthers et al.

HEARD: December 19, 2013

REASONS FOR DECISION

I. Motions to approve a settlement and to amend a pension plan to implement the settlement

[1] This appears to be the final chapter in the Indalex saga.

[2] The Monitor, FTI Consulting, moved for the approval of a settlement agreement. Morneau Shepell Ltd., in its capacity as administrator of the Retirement Plan for Salaried Employees of Indalex Limited and Associated Companies and the Retirement Plan for Executive Employees of Indalex Limited and Associated Companies, moved for an order amending the Salaried Plan to give effect to the Settlement Agreement. On December 19, 2013, I granted both motions with reasons to follow.

II. The Monitor's Settlement Motion

[3] After the Supreme Court of Canada released its decision in *Sun Indalex Finance, LLC v. United Steelworkers*¹ on February 1, 2013, the Monitor paid the US Trustee approximately U.S. \$10.751 pursuant to an approval and vesting order. As of late November, the Monitor was holding \$4.06 million and US \$918,055 available for distribution to the creditors of the estate, subject to administration costs.

[4] In March counsel for the USW and Retired Executives requested that the Monitor distribute those funds to the Salaried Plan and the Executive Plan. The Monitor was faced with a number of parties asserting priority claims: (i) US Trustee – US \$5.4 million; (ii) Salaried Plan - \$5.008 million; (iii) Executive Plan - \$3.305 million; and, (iv) Sun Indalex Finance, LLC - \$38.049 million. Priority for the claims by the Salaried Plan and the Executive Plan rested on the deemed trust, lien and charge provisions of the Ontario *Pension Benefits Act*. In addition, 347 creditors had filed claims of approximately \$33.8 million. Although the US Trustee did not file a proof of claim, it informed the Monitor that there were payments of about \$12.355 million made by US debtors to the applicants which could potentially constitute preferential payments under the US Code.

[5] In June, 2013, the Monitor secured a litigation timetable order to determine threshold issues relating to the distribution of estate funds. Some of the issues related to the claims advanced by the two pension plans, including: (i) whether the deemed trust claimed by the Executive Plan was enforceable against Indalex's accounts or inventory; (ii) the effect of a bankruptcy order on the existence, enforceability and priority of both Plans' deemed trust claims; and (iii) whether the beneficiaries of the Plans were "secured creditors" of Indalex for purposes of the *Bankruptcy and Insolvency Act*.

[6] In the result, on September 13, 2013, Sun, the US Trustee, the Pension Administrators, the Superintendent, the Retired Executives and the USW reached a Settlement Agreement under which the funds in the hands of the Monitor would be distributed, in general terms, as follows:

- (i) The distribution of \$1.405 million to (i) the Pensions Administrator for deposit to the Salaried Plan (\$650,000), (ii) \$105,000 to the USW for seven members of the Salaried Plan, (iii) \$15,000 to four members of the Executive Plan, (iv) \$350,000 to counsel in trust for the Retired Executives, and (v) \$285,000 to counsel as partial reimbursement of the legal fees of the Retired Executives; and,
- (ii) The balance of the funds would be paid to the US Trustee on behalf of the bankruptcy estates of the US Debtors without prejudice to the claims of Sun in those proceedings.

Other provisions of the Settlement Agreement dealt with releases and the lack of need to indemnify certain D&O claims.

¹ 2013 SCC 6

[7] The US Trustee received US court approval to enter into the Settlement Agreement on October 10, 2013.

[8] The Monitor recommended approval of the Settlement Agreement because costly and lengthy litigation would be required to determine the outstanding competing claims against estate funds.

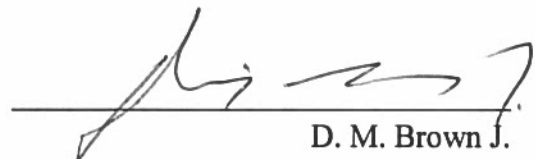
[9] I accepted the Monitor's recommendation, especially given that no interested party voiced any opposition to the approval order sought. The Settlement Agreement is a reasonable, proportionate resolution of the outstanding claims. Accordingly, I granted the approval order, together with orders discharging the D&O Charge, authorizing the distribution of funds, and approving the fees and disbursements of the Monitor (\$1.038 million for the period April 3, 2009 to November 17, 2013) and Monitor's counsel (\$1.734 million for the same period of time).

III. Motion by the Salaried Plan Administrator

[10] Implementation of the Settlement Agreement requires an amendment to the Salaried Plan, specifically the addition of a paragraph excluding the Salaried Plan members represented by the USW from the \$650,000 to be deposited into the Plan. Notice of the proposed amendment was sent to all Salaried Plan members.

[11] No party opposed the proposed amendment. However, the applicant, Indalex Limited, is the employer under the Salaried Plan and, as such, the only party entitled to amend the Salaried Plan. The Administrator reported that neither Indalex Limited nor the US Trustee was willing or able to take the corporate steps necessary to enact the proposed amendment.

[12] I granted an order amending the Salaried Plan as proposed by the Administrator. Although no clear explanation was given about why Indalex Limited, as employer, would not or could not amend the Salaried Plan, the need for the amendment in order to implement the Settlement Agreement was established. Indalex Limited, by filing an application under the *Companies' Creditors Arrangement Act* invoked the jurisdiction of this Court, including the general power of this Court under *CCAA* s. 11 to "make any order that it considers appropriate in the circumstances". That power includes the ability of the Court to amend a pension plan of an applicant where the amendment is necessary to give effect to a reasonable compromise of claims against the estate of the applicant, where notice of the proposed amendment is given to all affected persons, and where no affected person objects to the amendment sought. Consequently, I granted the Plan amending order requested by the Administrator.


D. M. Brown J.

Date: December 21, 2013