CITATION: Banro Corporation (Re), 2018 ONSC 2064
COURT FILE NO.: CV-17-589016-00CL
DATE: 20180329

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: 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 BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED and KAMITUGA (BARBADOS) LIMITED

Applicants

BEFORE: HAINEY J.

COUNSEL: *Jane O. Dietrich, Ryan C. Jacobs*, and *Sophie Moher*, for the Applicants

Wael Rostom, for the Monitor

Robert Staley, Sean Zweig and *Preet Bell*, for VR Global Partners, L.P.

Junior Sirivar, for Baiyin International Investment Ltd./Baiyin Nonferrous Group Company, Limited

Brendan O'Neill and *Ryan Baulke*, for Gramercy Funds Management LLC

HEARD: March 27, 2018

ENDORSEMENT

[1] The Applicants move for an order pursuant to s. 6 of the CCAA for sanction and approval of their Amended Consolidated Plan of Compromise and Reorganization dated March 9, 2018 ("Plan").

[2] These CCAA proceedings were commenced on December 22, 2017. Despite conducting a court-approved sale and investment solicitation process, no successful bid was identified. As a result, the Applicants sought creditor approval of the Plan in accordance with my order dated February 1, 2018.

[3] At the Creditors' Meeting held on March 9, 2018 both classes of affected creditors voted to approve the Plan with 96.15% of the Eligible Voting Creditors in the Affected Secured Class and 96.3% of the Eligible Voting Creditors in the Affected Banro Unsecured Class voting in favour of the Plan.

[4] VR Global Partners, L.P. ("VR") was the only creditor to vote against the approval of the Plan. VR is the holder of approximately $19 million of secured notes (the total principal amount of secured notes outstanding is $197.5 million). VR's objection is that the Plan is not fair and reasonable because Baiyin Nonferrous Group Company ("Baiyin") and Gramercy Funds Management LLC ("Gramercy"), who are by far the Applicants largest creditors, are to receive Class A common shares in Newco ("Class A Shares") and all other holders of secured notes are to receive Class B common shares with voting restrictions in Newco ("Class B Shares").

[5] VR through its counsel, Mr. Staley, submits that it is not fair and reasonable for the Plan to provide different consideration for the compromise of identical debt. According to VR, the Class A and Class B Shares have distinct economic and legal rights because of the differences in voting rights, and "they are likely to have different economic values as a result."

[6] VR further submits that for the Plan to be fair and reasonable, creditor treatment must be equitable. According to VR, it is inequitable for creditors with the same debt and security to receive different consideration.

[7] Despite Mr. Staley's able argument, I do not accept VR's position for the following reasons.

The two classes of shares have equivalent economic rights

[8] The Class A Shares and the Class B Shares have equivalent economic rights because the difference between the consideration that VR is receiving for its compromised debt and what Baiyin and Gramercy are receiving is minimal. This is because of the following:

(a) Baiyin and Gramercy, as the most significant creditors of the Applicants, are anticipated to collectively hold over 74% of Newco's equity. Because Baiyin and Gramercy will have effective control of Newco, the voting restriction on the Class B Shares is intended to reduce unnecessary delay, cost and expense going forward by reducing the need to call and hold shareholder meetings for all shareholders;

(b) The Class B Shares will have the same economic rights as the Class A Shares in respect of all dividends, distributions and other payments made by Newco;

(c) The following provisions have been put in place to minimize any impact that the voting restrictions of the Class B Shares may have to ensure the same economic treatment in the event of any future transaction involving Newco:

    (i) All shareholders will participate in any Exit Transaction and/or buyout by Gramercy or Baiyin;

    (ii) The holders of the Class B Shares will be entitled to vote as a separate class on any amendments to Newco's articles that are materially adverse to holders of the Class B shares; and

    (iii) The Class B Shares will become voting shares upon the earlier of (i) 42 months after implementation of the Plan; or (ii) the occurrence of an Exit Transaction (i.e.

> sale of Newco's equity, a sale of all or substantially all of Newco's assets or a public offering of Newco's equity).

Applicable legal principles

[9] The established legal principles that apply to a determination of whether a plan of arrangement in CCAA proceedings is fair and reasonable include the following:

(a) Equitable treatment is not necessarily equal treatment so that the fact that VR's consideration is slightly different than the consideration received by Baiyin and Gramercy does not mean the Plan is not equitable. Farley J. made this clear in *Sammi Atlas Inc., Re,* 1998 CarswellOnt 1145 at para. 4 as follows:

> ...Is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared). (emphasis added)

(b) The question of whether a plan of arrangement is fair and reasonable must be determined in the context of the plan as a whole (see *Keddy Motor Inn Ltd., Re*, 1992 CarswellNS 46 at para. 37). In my view, the Plan as a whole is fair and reasonable.

(c) An important measure of whether a plan of arrangement is fair and reasonable is the extent of the approval by the creditors. In this case the Plan was overwhelmingly approved by both classes of affected creditors. In fact, 23 other holders of secured notes identical to VR's notes who are unrelated to Baiyin or Grammercy voted to approve the Plan. Newbould J. stressed the importance of this in *4519922 Canada Inc., Re*, 2015 ONSC 4648 at para. 29 as follows:

> One important measure of whether a plan is fair and reasonable is the parties' approval of a plan, and the degree to which approval has been given.

(d) There is a very heavy burden on a party to demonstrate that a plan of arrangement is not fair and reasonable. In this case VR has failed to meet that burden as the difference between the Class A Shares and Class B Shares is minimal. Blair J. (as he then was) described the burden on a party challenging a plan on the grounds that it is not fair and reasonable as follows at para. 39 in *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 182:

> In *Re Keddy Motors Inns Ltd., supra*, the Nova Scotia Court of Appeal spoke of "a very heavy burden" on parties seeking to show that a Plan is not fair and reasonable, involving "matters of substance", when the Plan has been approved by the requisite majority of creditors (see pp. 257-258). Freeman J.A. stated at p. 258:

> The Act clearly contemplates rough-and-tumble negotiations between debtor companies desperately seeking a chance to survive and creditors willing to keep them afloat, but on the best terms they can get. What the creditors and the company must live with is a plan of their own design, not the creation of a court. The court's role is to ensure that creditors who are bound unwillingly under the Act are not made victims of the majority and forced to accept terms that are unconscionable.

(e) Where certain creditors, such as Baiyin and Gramercy, have contributed to the success of a Plan, they may be entitled to different treatment than other creditors. In this case Baiyin and Gramercy:

(i) have provided $20 million of DIP financing that is not being repaid but being converted to exit financing on the implementation of the Plan;

(ii) have provided material consensual waivers of obligations owing under the Gold Streams and Forward Agreements; and

(iii) are necessary for the restructuring to proceed.

In my view for these reasons they are entitled to different treatment than VR. Support for my conclusion can be found in the decision of Tingley J.C.S. in *Uniforêt inc., Re*, 2003 CarswellQue 3404 at para. 21 as follows:

> For a plan of arrangement to succeed, an insolvent company must secure the approval of all classes of its creditors, even those who have subordinated their claims to all other creditors, as is the case with the debentureholders (Class 6). It does not necessarily follow that a plan generous to some creditors must therefore be unfair to others. A plan can be more generous to some creditors and still fair to all creditors. A creditor like Jolina that has stepped into the breach on several occasions to keep Uniforêt afloat in the 4 years preceding the filing of the First Plan warrants special treatment.

The same can be said about Baiyin and Gramercy who have "stepped into the breach on several occasions" to keep the Applicants afloat.

(f) Finally, the applicable jurisprudence makes it clear that the court should not interfere with the business judgment of the parties. This is exactly what VR is asking the court to do. Justice Blair made this clear in *Olympia & York* at para. 37 as follows:

> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas.

[10] For all of these reasons VR's objection to the Plan is dismissed.

The Sanction Order should be granted

[11] I have concluded that it is appropriate for me to grant the Sanction Order in the form requested for the following reasons:

(a) The "double majority" test under s. 6(1) of the CCAA has been met because of the overwhelming support of the creditors achieved at the Creditors' Meeting.

(b) The test outlined by Paperny J. in *Re Canadian Airlines Corp.*, 2000 ABQB 442, has also been met because:

(1) There has been strict compliance with all of the statutory requirements;

(2) There have been no unauthorized steps taken by the Applicants. This is confirmed in the Monitor's Fourth Report; and

(3) The Plan is fair and reasonable because it represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available.

(c) The classification of creditors was approved and the Plan was approved by the requisite majority of creditors (96% in number and 91% in dollar value of creditors who voted in favour of the Plan).

(d) The Plan represents the best available alternative for the Applicants under the circumstances.

(e) The Plan is in the public interest as it will allow the Applicants to operate as a going concern and provide ongoing work for 1,450 employees.

The Releases are fair and reasonable

(f) I have also concluded that the releases provided for in the Plan are fair and reasonable. In arriving at this conclusion I have taken into consideration the following:

(1) The releases were critical components of the decision-making process for the Directors', Officers' and Requisite Consenting Parties' participation in the CCAA Proceedings and support for the Plan;

(2) The Applicants would not have brought forward the Plan and the Requisite Consenting Parties would not have supported the Plan absent the inclusion of the Releases;

(3) The support of the Requisite Consenting Parties in terms of (a) voting in support of the Plan; (b) consensually agreeing to amend the Gold Streams and the Forwards; and (c) providing Interim Financing that will be converted to exit financing on Plan Implementation is essential to the Plan's viability. Without such support, the Plan would not succeed and the Applicants would likely have had no option but to proceeding with a liquidation which would not have provided the same benefits to the Applicants' stakeholders;

(4) The Released Parties made significant contributions to the recapitalization of the Banro Group, both prior to and throughout the CCAA Proceedings. The efforts of the Special Committee and the other Directors and Officers of the Banro Group along with the Requisite Consenting Parties resulted in the negotiation of the Support Agreement, the SISP, the DIP Term Sheet and the Plan, all of which formed the foundation for the Recapitalization through these CCAA Proceedings;

(5) The actions of the Released Parties, including the Directors and Officers as well as the Requisite Consenting Parties were and are critical to the recoveries of all Affected Creditors and stakeholders largely, including the Applicants' employees by negotiating for their continued employment in Canada and the Democratic Republic of the Congo upon implementation of the Plan; and

(6) The Releases apply to the extent permitted by law. The release in favour of the Directors and Officers is compliant with section 5.1(2) of the CCAA, which mandates certain exceptions to the compromise of claims against directors set out under section 5.1(1) of the CCAA.

The declarations regarding the Lepard Action

(g) I am also satisfied that the declarations requested in the Sanction Order in respect of the claims and causes of action raised in the Lepard Action are appropriate because the claims and causes of action are all Affected Equity Claims and are also barred as against the officers and directors because of non-compliance with the Claims Procedure Order.

Sealing Order

(h) It is appropriate that there be a sealing order with respect to the Confidential Affidavit in accordance with para. 35 of the Sanction Order.

Conclusion

[12] In conclusion, the Sanction Order is granted. I thank all counsel for their helpful submissions.

HAINEY J.

Date: March 29, 2018