Court File No. CV-10-8533-00CL

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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS

July 5, 2010

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APPLICANTS

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TAB # CASELAW

TAB 1

Court File No. 10-8699-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 4th
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2010

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 PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

APPLICANTS

APPROVAL AND VESTING ORDER

THIS MOTION, made by Planet Organic Health Corp. and Darwen Holdings Ltd., (collectively, the "Applicants") for an order approving the acquisition (the "Acquisition") contemplated by an acquisition agreement among the Applicants and the Creditor (as that term is defined in the Acquisition Agreement) made as of May 19, 2010 and appended to the Affidavit of Darren Krissie sworn May 20, 2010 and as amended pursuant to the First Amendment to Acquisition Agreement dated June 1, 2010 and appended to the Affidavit of Darren Krissie sworn on June 3, 2010, together with such non-material amendments as may be consented to by the Monitor (defined below) (collectively, the "Acquisition Agreement"), and vesting in the Creditor all right, title and interest in and to the assets described in the Acquisition Agreement (the "Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the material filed, including the Motion Record of the Applicants, the Third Report of the court-appointed monitor, Deloitte & Touche Inc. (the "Monitor"), the Responding Motion Record of 8000 Bathurst Street Realty Inc. and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Creditor, counsel for 8000

Bathurst Street Realty Inc., and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

1. THIS COURT ORDERS that, if necessary, the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. THIS COURT ORDERS AND DECLARES that capitalized terms used herein that are not otherwise defined shall have the meanings set out in the Acquisition Agreement.

Approval and Vesting

3. THIS COURT ORDERS AND DECLARES that the Acquisition including, without limitation, the payment and acquisition contemplated in section 2.1 of the Acquisition Agreement is hereby approved, and that the Acquisition Agreement is in the best interests of the Applicants and their stakeholders. The execution of the Acquisition Agreement by the Applicants is hereby authorized and approved, and the Applicants are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of, or to further evidence or document, the Acquisition and for the conveyance of the Assets to the Creditor.

4. THIS COURT ORDERS that, upon satisfaction (or, where applicable, waiver) of the conditions set out in Article 6 of the Acquisition Agreement, the Monitor shall file with this Court a certificate substantially in the form attached as Schedule A hereto stating that all conditions precedent set out in Article 6 of the Acquisition Agreement have been satisfied (or, where applicable, waived by the Applicants or the Creditor in accordance with the terms of the Acquisition Agreement) (the "Monitor's Certificate"). For the purposes of the preparation of the Monitor's Certificate, the Monitor shall be entitled to rely upon information provided by the Applicants with respect to the satisfaction or waiver of the conditions set out in Article 6 of the Acquisition Agreement.

5. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's Certificate to the Creditor, all right, title and interest in and to the Assets described in the Acquisition Agreement shall vest absolutely in the Creditor, free and clear of and from any and

all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims"), whether such Claims came into existence prior to, subsequent to, or as a result of any previous orders of this Court, contractually, by operation of law or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Mr. Justice Morawetz dated April 29, 2010; and (ii) all charges, security interests or claims evidenced by registrations including without limitation pursuant to the *Personal Property Security Act* (Ontario), the *Personal Property Security Act* (Alberta), *Personal Property Security Act* (British Columbia), *Personal Property Security Act* (Nova Scotia), *Personal Property Security Act* (Saskatchewan) or any other personal property registry system (all of which are collectively referred to as the "Encumbrances") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon the delivery of the Monitor's Certificate to the Creditor, be and are hereby expunged and discharged as against the Assets.

6. THIS COURT ORDERS that, subject to and in accordance with the restrictions in section 11.3 of the *Companies' Creditors Arrangement Act* (Canada) ("CCAA"), the Applicants are authorized and directed to assign the contracts, leases, agreements and other arrangements of which the Creditor takes an assignment on closing pursuant to and in accordance with the terms of the Acquisition Agreement (the "Contracts") and that such assignments are hereby approved and are valid and binding upon the counterparties notwithstanding any restriction or prohibition on assignment contained in any such Contracts.

7. THIS COURT ORDERS that from and after the Closing Date, subject to the CCAA, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Applicants under, or caused by the Applicants under, and the non-compliance by the Applicants with, any of the Contracts arising solely by reason of the insolvency of the Applicants or as a result of any actions taken pursuant to the Acquisition Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or non-compliance with, the Contracts shall be deemed to have been rescinded and shall be of no further force or effect.

8. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), and pursuant to any other similar provincial legislation, the Applicants are authorized and permitted to disclose and transfer to the Creditor all human resources and payroll information in the Applicants' records pertaining to the Applicants' past and current employees. The Creditor shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects in compliance with PIPEDA and other similar provincial legislation.

Cash Reserve

9. THIS COURT ORDERS that the Monitor shall establish a cash reserve in the amount of $2,031,281, as required under the Acquisition Agreement, on the Closing Date, using funds from the Cash and Cash Equivalents (the "Cash Reserve"), which Cash Reserve shall be held by the Monitor in a segregated account ("Cash Reserve Account") in trust for the benefit of Persons entitled to be paid the Cash Reserve Costs and the Creditor for the purpose of paying the Cash Reserve Costs in accordance with this Order.

10. THIS COURT ORDERS that the Cash Reserve Costs shall consist of the following obligations of the Applicants outstanding on the Closing Date:

(a) obligations secured by the Administration Charge to the extent required for the completion of the CCAA Proceeding in an amount not to exceed $300,000;

(b) obligations secured by the Directors' Charge including, legal fees and costs incurred by the directors and officers of the Applicants in connection with the conduct of the directors' and officers' claims process contemplated by the D&O Claims Procedure Order, that arose prior to the Closing Date, in an aggregate amount not to exceed $500,000;

(c) claims under subsections 6(5)(a) of the CCAA to the extent not paid by the Applicants on or before the Closing Date or assumed by the Creditor on the Closing Date, which amounts are expected not to exceed $75,000; and

(d) the obligation of the Applicants to pay the PCG Transaction Fee as defined in the Acquisition Agreement;

11. THIS COURT ORDERS that, as soon as reasonably possible following and in any event within fifteen (15) days of, the Closing Date, or by such later date as may be ordered by the

Court, the Monitor shall quantify, based on the books and records of the Creditor, the precise amount of each of the Cash Reserve Costs under paragraph 10(c) hereof. For such purpose, the Monitor shall be given access to the books and records of the Applicants and shall be entitled to rely exclusively thereon and, in particular, shall not be responsible for any errors therein or the impact of such errors on the Monitor's quantification of any such Cash Reserve Cost. Upon being provided with the Monitor's quantification of each such Cash Reserve Cost, the Creditor shall have ten (10) days to decide whether to agree to the Monitor's quantification of such Cash Reserve Cost, failing which agreement the amount of any such Cash Reserve Cost still in dispute shall be determined, on application of the Monitor, on notice to the Creditor, any affected directors and officers of the Applicants and any affected beneficiary of the Administration Charge, by Order of the Court. Once the amount of any such Cash Reserve Cost has either been agreed to or determined by the Court, as set forth above, the Monitor shall pay such claim from the Cash Reserve Account.

12. THIS COURT FURTHER ORDERS that, from time to time after the Closing Date, the Monitor shall reduce the amount of the Cash Reserve as and to the extent that the Monitor, the Creditor, any affected directors and officers of the Applicants and any affected beneficiary of the Administration Charge agree, or a Court determines, that it, or portions of it, are no longer required to satisfy Cash Reserve Costs by distributing to the Creditor the amount of such reductions. All right, title and interest in and to any amounts in the Cash Reserve Account that are not used to pay Cash Reserve Costs in accordance with this Order shall vest absolutely in the Creditor as at the Closing Date and shall be distributed to the Creditor in accordance with this paragraph.

13. THIS COURT FURTHER ORDERS that nothing in this Order shall affect the rights of counsel to the Applicants, the Monitor and counsel to the Monitor to use and apply the retainers received by them from the Applicants.

General

14. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Applicants;

the vesting of the Assets in the Creditor and the payment of any amounts contemplated by the Acquisition Agreement pursuant to this Order including, without limitation, the payment and acquisition contemplated in section 2.1(1) of the Acquisition Agreement, shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of the applicable Applicant, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance or other transfer at undervalue under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

15. THIS COURT ORDERS AND DECLARES that the Acquisition is exempt from the application of the *Bulk Sales Act* (Ontario).

16. THIS COURT ORDERS that the Exhibit "A" to the Affidavit of Tripp Baird sworn May 20, 2010 shall be segregated from other documents filed in connection with this motion and shall be sealed until the filing with the Court of the Monitor's Certificate in relation to the Acquisition or upon further Order of the Court.

17. THIS COURT ORDERS that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to permanently or temporarily cease, downsize or shut down any of its business or operations in accordance with Acquisition Agreement.

18. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicants and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, as may be

necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

19. THIS COURT ORDERS AND DECLARES that the actions and conduct of the Monitor in the CCAA proceedings from April 29, 2010 to the date of the Third Report, as more particularly set out in the First, Second and Third Reports, and the First, Second and Third Reports, be and are hereby approved and that the Monitor has satisfied all of its obligations from April 29, 2010 up to and including the date of the Third Report.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 0 4 2010

PER / PAR: DS

Schedule A – Form of Monitor's Certificate

Court File No. 10-8699-00CL

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 PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "Court") dated April 29, 2010, Deloitte & Touche Inc. was appointed as the monitor of the Applicants (the "Monitor").

B. Pursuant to an Order of the Court dated June 4, 2010, the Court approved the acquisition agreement among Planet Organic Health Corp. and Darwen Holdings Ltd. (collectively, the "Applicants") and 7562578 Canada Inc. (the "Creditor") made as of May 19, 2010 and as amended pursuant to the First Amendment to Acquisition Agreement dated June 1, 2010, together with such non-material amendments as may be consented to by the Monitor (collectively, the "Acquisition Agreement") and provided for the vesting in the Creditor of all right, title and interest in and to the Assets, which vesting is to be effective with respect to the Assets upon the delivery by the Monitor to the Creditor of a certificate with this Court confirming that (i) the conditions to Closing as set out in Article 6 of the Acquisition Agreement have been satisfied or waived by the Applicants and the Creditor, (ii) the Applicants have been released from the guarantee agreement dated as of July 3, 2007 (the "Guarantee") in respect of

the amended and restated term loan agreement dated as of November 30, 2007 (as amended) (the "Term B Credit Agreement"), and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Acquisition Agreement.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing as set out in Article 6 of the Acquisition Agreement have been satisfied or waived by the Applicants and the Creditor.

2. The Applicants have been released from the Guarantee in respect of the Term B Credit Agreement.

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at ● [TIME] on ● [DATE].

Deloitte & Touche Inc., in its capacity as Monitor of the Applicants, and not in its personal capacity

Per: _____

Name:

Title:

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

AND IN THE MATTER OF PLANET ORGANIC HEALTH CORP. and DARWEN HOLDINGS LTD.

Court File No. 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

MONITOR'S CERTIFICATE

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Lawyers for the Monitor

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

AND IN THE MATTER OF PLANET ORGANIC HEALTH CORP. and DARWEN HOLDINGS LTD.

Court File No. 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Applicants

TAB 2

Indexed as:

Playdium Entertainment Corp. (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 Playdium Entertainment Corporation et al

[2001] O.J. No. 4252

[2001] O.T.C. 828

18 B.L.R. (3d) 298

31 C.B.R. (4th) 302

109 A.C.W.S. (3d) 207

2001 CarswellOnt 3893

Court File No. 01-CL-4037

Ontario Superior Court of Justice
Commercial List

Spence J.

Heard: October 29-30, 2001.
Judgment: November 2, 2001.

(34 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Arrangement, judicial approval.

Motion by secured creditors of Playdium Entertainment Corporation to transfer its assets to a new corporation to continue to operate the business as a going concern, to implement assignment of the material contracts of the business, to extend a stay, and to appoint an interim receiver. The motion followed unsuccessful restructuring efforts under the Companies' Creditors Arrangement Act. One

of the parties to one of the contracts subject to assignment objected to the assignment and as such withheld its consent.

HELD: Motion allowed. The consent was not unreasonably withheld. However, by allowing the proposed transactions to proceed, there was the possibility for any disputes to be pursued in litigation. The proposal to continue the business operations had potential benefits for trade creditors, employees and members of the public.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act.

[Quicklaw note: Supplementary reasons for judgment were released November 15, 2001. See [2001] O.J. No. 4459.]

Counsel:

Paul G. Macdonald and Alexander L. MacFarlane, for Covington Fund I Inc.
Gary C. Grierson and J. Anthony Caldwell, for Famous Players Inc.
Craig J. Hill, for the Pricewaterhouse Coopers Inc.
Roger Jaipargas, for Monitor.
Gavin J. Tighe, for Toronto-Dominion Bank.
Michael B. Rosztain, for Canadian Imperial Bank of Commerce.
Geoff R. Hall, for Ontario Municipal Employees Retirement Board.
David B. Bish, for Playdium Entertainment Corporation.
Julian Binavince, for Cambridge Shopping Centres Limited.

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1 **SPENCE J.**:-- These reasons are provided in brief form to accommodate the exigencies of this matter.

2 The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the Companies' Creditors Arrangement Act (the "CCAA"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

3 The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

4 This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

5 The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

6 Playdium Group is not currently in compliance with the equipment supply provisions of s. 9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s. 9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

7 Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

8 Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s. 35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

9 Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para. 9(e) of the Agreement.

10 The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

11 Based on the cases cited, including Re Lehndorff General Partner Limited (1993) 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), Re Canadian Red Cross Society (1998) 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and Re T. Eaton Co. (1999) 14 C.B.R. (4th) 298 (Ont. Gen. Div. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in Ministry of Indian Affairs and Northern Development v. Curragh Inc. (1994), 114 D.L.R. (4th) 176, supports the appointment of an interim receiver to do what "justice dictates" and "practicality demands".

12 Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

13 The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

14 Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it

would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

15 Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in GATX v. Hawker Siddley Canada Inc. (1996), 27 B.L.R. (2d) 251.

16 Under s. 35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

17 The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit. Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

18 Reference was made to the decision in Dominion Stores v. Bramalea, [1985] O.J. No. 1784, that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

19 On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

20 The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

21 This is the pivotal issue in respect of the motion.

22 Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s. 35 of the Agreement, and without reference to considerations relating to CCAA (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s. 35 does not provide any right of assignment.

23 If there were no CCAA order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The CCAA order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by CCAA: see the Red Cross decision.

The factors to be considered

24 The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under CCAA and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

25 Famous Players submits that, on the basis of the Red Cross decision, the court should approve the appointment of an interim receiver with power to vest assets, in a CCAA situation, where there is no plan, only where certain appropriate circumstances exist as set out in Red Cross, and those circumstances do not exist here.

26 In this regard, the first factor mentioned in Red Cross is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

27 The second factor mentioned in the Red Cross decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

28 The other two criteria in Red Cross are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s. 9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

29 Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the CCAA stay will be lifted - which would happen at the end of November, on the present proposal - and the prospect would be that Famous Players would then issue notices of default in respect of s. 9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

30 If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s. 9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

31 The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s. 35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

32 Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

33 If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

34 For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

SPENCE J.

cp/d/qlsar/qlhcs/qlmjb

TAB 3

Ontario Supreme Court
Playdium Entertainment Corp., Re
Date: 2001-11-15

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Ontario Superior Court of Justice [Commercial List] Spence J.

Heard: November 9, 2001

Judgment: November 15, 2001

Docket: 01-CL-4037

Paul G. Macdonald, for Covington Fund I Inc.

Gary C. Grierson, for Famous Players Inc.

Gavin J. Tighe, B. Skolnik, for Toronto-Dominion Bank

David B. Bish, for Playdium Entertainment Corporation

Spence J.:

[1] These reasons are supplemental to the reasons for decision which I released November 2, 2001. Reference is made to those reasons. The defined terms employed in those reasons are also used below.

[2] Covington and TD Bank propose that the order appointing the interim receiver should contain, as regards the assignment of the Material Agreements (including the Techtown Agreement), the provisions set out in Part V, paragraphs 10 through 13, of the draft order now before the court.

[3] This draft order is different from the form of order in the motion record but apparently not different in respect of the matter now in issue between Covington, TD Bank and Playdium on the one side and Famous Players on the other. The hearing on October 29 and 30 did not address the specific terms of the order but it did address the intended effect of the

assignment of the Techtown Agreement. It was submitted that the assignment was intended to result in New Playdium, as assignee, becoming bound to perform the Playdium obligations under the agreement from and after the transfer date and becoming entitled to obtain performance by Famous Players of its obligations under the agreement from and after that date. Special provision has been made in respect of s.9(e) defaults, as referred to in the reasons for decision of November 2, 2001. The insolvency defaults of Playdium which led to the CCAA order are in effec[???] stayed, which is not an issue.

The Issue

[4] Famous Players now submits that the form of order should be revised to provide that the transfer of assets should, in effect, be made subject to "any and all claims of Famous Payers arising from its contractual entitlements under the Techtown Agreement".

[5] Famous Players submits that a provision to that effect is necessary because otherwise it will suffer the loss of certain of those claims and that it ought not to be deprived of those claims by the order of the court and that the court has [???] jurisdiction to make such an order.

The Terms of the Assignment

[6] Famous Players will continue to have any rights of action it now has [???] which may subsequently arise in its favour against Playdium (subject to any sub sequent court determination to the contrary), because nothing in the proposed transaction purports to alter those rights. It is not indicated whether Playdium is to have liability in respect of events occurring after the transfer. In any event, the continuing liability of Playdium is of no practical consequence to Famous Players' concerns, given Playdium's insolvency.

[7] As against New Playdium, by reason of paragraph 13 of the draft order, Famous Players would be able to exercise a contractual right to terminate as a result of a default that arises or continue to exist after the transfer, except for an insolvency default.

[8] Counsel for Covington said that if there is an existing misrepresentation as to the state of the equipment, that would be brought forward, which I take to mean that the rights of Famous Players in that respect would be preserved for purposes of Famous Players being able to assert those rights against New Playdium.

[9] It was submitted that the proposed terms in the draft order would assign the benefit of the agreement without the burden. However, on the basis of the material and the submissions for Covington and TD Bank, the intention is that New Playdium would assume the burden of the agreement as of and from the transfer date in respect of the obligations of performance then in effect or arising subsequently.

[10] What New Playdium would not assume or be liable for would be any claims that may arise in the future in favour of Famous Players against Playdium in respect of matters which occurred prior to the transfer and do not constitute a continuing default on the part of Playdium at the time of the transfer.

[11] An example of such a contingent claim might be a claim for indemnity by Famous Players against Playdium in respect of damages payable by Famous Players for injury suffered resulting from Playdium's equipment in an occurrence prior to the transfer to New Playdium but not asserted by the claimant until a time subsequent to the transfer. It was submitted that such a claim cannot properly be viewed as part of the continuing burden of the agreement as regards New Playdium because the event giving rise to it antedates New Playdium's involvement. It was also submitted that such a claim is nothing other than a contingent unsecured claim of a person who, in respect of the claim, is a creditor or prospective creditor of Playdium and the claim should not be entitled to any different recognition than other unsecured contingent claims of Playdium. These submissions have merit.

[12] For Famous Players it was submitted that New Playdium is seeking to take an assignment of the agreement without being subject to the equities. However, it appears that Famous Players' rights of termination are preserved (except for the insolvency default), in respect of defaults under the agreement existing at or subsequently arising after the transfer date.

[13] It was not suggested that New Playdium seeks to take an assignment from Playdium of rights against Famous Players in respect of matters that have occurred previously under the agreement and which might be the subject of a claim of set-off or counterclaim. If that were intended, that might well constitute a case of assignment without being subject to the equities. For that reason, it would be appropriate that New Playdium should not be able to assert such rights against Famous Players without being subject to any such claims (i.e. set-offs and counterclaims) of Famous Players relating to such rights. A provision to that effect ought to be

included in the order and it should state that the provision is subject to any further order of the court based on CCAA consideration.

Jurisdiction of the Court Under CCAA

[14] As for the jurisdiction of the court to order the assignment on the terms proposed, Famous Players submits that the authority of the court must derive from the CCAA and there is no provision in the CCAA sufficient for this purpose. This raises an issue of fundamental importance about the scope of the CCAA.

[15] Section 11(4) of CCAA provides as follows:

> Other than initial application court orders—a court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

[16] Famous Players now submits that s. 11(4) of the CCAA is not sufficient to give the court authority to make an order which has a permanent effect against a third party and that no other provision of the CCAA assists and neither does the inherent jurisdiction of the court.

[17] As the parties presumably realize, the submission of Famous Players goe not just to the terms proposed but to the jurisdiction of the court to order the assignment itself, a matter that was dealt with in the reasons of November 2, 2001. Since the order has not yet been taken out, the matter is still before me. Because of the importance of the issue, it is appropriate to consider the further submissions made at the present hearing.

The Case Law

[18] The following excerpts from decisions in cases under the CCAA provide assistance in assessing the extent of the jurisdiction of the court.

[19] From *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at pages 33 and 34, by Farley J.; with reference to s. 11 of the Act as it was at that time:

> The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affected the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.,* supra, at pp. 12-17 (C.B.R.) and *Quintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 296-298 (B.C.S.C.) and pp. 312-314 (B.C.C.A.) and *Meridan Developments Inc. v. Toronto Dominion Bank,* supra, pp. 219 ff.
>
> The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from
>
> doing so: see *Gaz Metropolitain v. Wynden* and *Qintette Coal Ltd. v. Nippon Steel Corp.,* supra, at pp. 311-312 (B.C.C.A.).

[20] From Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, *Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at page 315, by Blair J:

> The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex Ltd.,* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation.

[21] From the endorsement in *American Eco Corp., Re* (October 24, 2000), Doc. 00-CL-3841 (Ont. S.C.J.), unreported Endorsement of Farley J.:

> The only fly in the ointment as I was advised was that BFC was not agreeable to giving its consent, which consent is not to be unreasonably withheld as to the transfer of the j.v. contract participation from Industra to members of the Lockerbie Group...
>
> Thus it appears to me that in relative terms, the financial aspects of this transfer vis a vis the joint venture is covered off by the asset/equity substance of the consolidated Lockerbie group and the provision of the completion bond. As well from a work performance aspect, one should note that if Lockerbie was not allowed the transfer, then BFC would be looking at an insolvent j.v. venturer Industra—with the result that as opposed to the Industra team being kept together (as assumed by Lockerbie

purchasers), the team would be "let go" and BFC would not have this likely package but would have to go after the disintegrated team on a one by one basis.

But perhaps more telling is the BFC October 12/2000 letter that "Therefore, we would only be prepared to seventy five (75) percent". Thus it appears that there is no financial or operational reason to refuse the assignment—but merely, a bonus which in my view is not related to any true risk—but merely a "bare consideration" bonus. See paragraph 194 of *Welch Foods v. Cadbury Beverages Canada Inc.* I find that BFC would be unreasonable to withhold its consent if the Lockerbie group provided the aforesaid guarantees and bond.

While it is true that the assignment provision is there irrespective of it being in an insolvency setting or not, it would seem to me that in the fact circumstances prevailing of the insolvency that BFC is attempting to confiscate value which should otherwise be attributable to the creditors.

[22] Famous Players is not seeking a bonus for its consent. But its only apparent remaining reason for withholding consent, vis a vis the prospect now afforded of a solvent Playdium business under the new owners, is that it has a better prospective deal with Starburst, which is not dissimilar to the Industra situation.

[23] From *Smoky River Coal Ltd, Re,* [1999] A.J. No. 676 (Alta. C.A.) at pages 10 and 13 by Hunt J.A.

47 The Appellants do not dispute that the rights of non-creditor third parties can be affected by the s. 11 power to order a stay. They agree this is the clear implication of cases such as Norcen, supra, a decision that has been followed widely and cited with approval by many Canadian courts. But they say in no case has a court altered permanently the contractual rights of a non-creditor and doing so is beyond the scope of the CCAA...

49 ...Although there are no previous decisions on all fours with the present situation, I read the existing jurisprudence as supportive of my interpretation of s. 11(4).

50 The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empowers the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceedings" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.

72 ...I do not consider that the order under appeal permanently affects the substantive contractual rights of the parties. It merely affects the forum in which those contractual rights will be assessed. This is a relatively minor incursion compared to the large benefit that may result from the CCAA proceedings. I assume that, in setting the details of the CCAA procedure, the chambers judge will take account of the Appellants' arguments and ensure that their substantive contractual rights are protected.

[24] Paragraph 72 of the *Luscar* decision appears to me not to intend a limitation on the scope of the authority of the court as characterized in paragraph 50, but rather as an expression of the need for caution as to the manner in which that jurisdiction is exercised.

[25] It appears to me that the approach taken by courts to the CCAA in the decided cases to which I have been referred is consistent, in terms of the views expressed about the proper application of the Act and the decisions taken in the particular cases, with the approval that is sought here for the assignment of the Techtown Agreement.

Analysis

[26] Section 11(4) of the CCAA, in subsections (a) (b) and (c), provides only f[???] orders of a negative injunctive effect until otherwise ordered by the court, respect of proceedings against the company, i.e. in this case, Playdium. H[???] ever, the order sought is in effect to require Famous Players to be bound by assignment of their agreement to New Playdium. It is not readily apparent how such an order could be made under s. 11(4) (a)(b) or (c) of the CCAA and no other section of the Act has been mentioned as relevant.

[27] Section 11(4)(c) warrants further consideration in this regard. Section 11(4) (c) does not require that an order be made only for a limited period, as s. 11(4)(a) appears to do. By its terms it would seem to permit an order to prohibit the commencement of any action, suit or proceeding against Playdium on the basis of the Techtown Agreement including the purported assignment of the agreement to New Playdium. Such an order would seem to be legitimate in its formal compliance with s. 11(4)(c) but it would leave the matter of the status of the Techtown Agreement unresolved with respect to all concerned, unless it could go on, through an ancillary order, to give effective approval to the assignment.

[28] Consideration must also be given to the words, in the opening part of s. 11(4) which provide that the court may make an order *on such terms as it may impose* (emphasis added).

[29] It is instructive to compare s. 11(4) of the CCAA with s. 11 (3). Section 11 (3), relating to initial application court orders also provides that the order may be made on such terms as the court may impose, but the provision adds the qualification "effective for such period as the court deems necessary not exceeding thirty days".

[30] It is relevant to the analysis of this issue that Famous Players is not a mere "third party" but is, as counsel said, a significant stakeholder. Under the proposed transaction, Famous Players will retain its rights against Playdium in respect of claims relating to the pre-transfer period and will be entitled to assert, in respect of the period from and after transfer, the same rights against New Playdium as it had against Playdium, including rights to terminate for default, except the insolvency default which occasioned and was the subject of the CCAA stay. So it is difficult to see how the circumstances of Famous Players in respect of the Techtown Agreement could be said to have changed to the detriment of Famous Players in any material way.

[31] In substance, what will have happened, to put the matter in terms of s. 11(4), is that Famous Players will have been prohibited from taking proceedings in respect of the Techtown Agreement except on and subject to the terms of the assignment to New Playdium and to make that order effective terms will have been imposed by the court which provide for the Techtown Agreement to be assigned by the required date to New Playdium on terms that assure to Famous Players the same rights against New Playdium as it had against Playdium for the post-transfer period and leave Famous Players with its rights against Playdium in respect of the pre-transfer period.

[32] In interpreting s. 11(4), including the "such terms" clause, the remedial nature of the CCAA must be taken into account. If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the CCAA order could not he asserted by Famous Players after the stay period. If such an order could not be made, the CCAA regime would prospectively be of little or no value because even though a compromise of creditor claims might be worked out in the stay period, Famous Players (or for that matter, any similar third party) could then assert the insolvency default and terminate, so that the stay would not provide any protection for the continuing prospects of the business. In view of the remedial nature of the CCAA, the court should not take such a restrictive view of the s. 11(4) jurisdiction.

[33] Famous Players objects that the order is not only permanent but positive, i.e. rather than simply restraining Famous Players, the order places it under new obligations. It would be more precisely correct to say that the order places Famous Players under the same obligations as it had before but in favour of the new owners of the business. Moreover, the

new owners are not third parties but rather the persons who have the remaining economic interests in Playdium.

[34] In view of the remedial nature of the CCAA, it does not seem that in principle, a change of this kind, which is a change occasioned only by the ownership changes effected by the compromise itself and one that does not involve any materially greater or different obligations, should be regarded as beyond the jurisdiction created by the CCAA. This view is examined further below with respect to the issue of positive obligations.

The Imposition of Positive Obligations

[35] The requested approval of the assignment can be analyzed conceptually as follows in terms of s. 11(4)(c). The court prohibits any proceedings by Famous Players against Playdium (and therefore against its assignees) except on the following terms, i.e., that any such proceeding must be consistent with any assignment of the Agreement approved by the court. It is a further term, or an order to give effect to the stated terms, that the court approves the assignment to New Playdium for this purpose. An order on these terms conforms to the requirements of s. 11(4)(c).

[36] Famous Players objects that the order is also to have positive effect: i.e. it imposes obligations on Famous Players as distinct from merely staying proceedings by it. However, the order as analyzed above could not be effective unless the assignment binds all parties, i.e. Famous Players as well as New Playdium and Playdium.

[37] Also, if the order could not bind Famous Players in a positive manner, the result would be that Famous Players could assert rights under the Agreement as assigned but would not be subject to the corresponding obligations under it. This would not be fair.

[38] So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute.

[39] Reference has been made in CCAA decisions to the inherent jurisdiction of the court in CCAA matters. The following excerpt from the decision of Farley J in *Canada (Minister of Indian Affairs & Northern Development)* v. *Curragh Inc* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List])at pp 184 and 185 is instructive:

> Certainly the non-bankruptcy courts of this country have exercised their inherent jurisdiction to bar claims against specified assets and receivers: see *Ultracare Management Inc. v. Gammon,* order of Austin J. dated October 19, 1993; *Liquidators of Wallace Smith Trust Co. Ltd. v. Dundalk Investment Corp. Ltd.,* order of Blair J. dated September 22, 1993. As MacDonald J. said in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 at p. 93, [1992] 6 W.W.R. 331, 70 B.C.L.R. (2d) 6 (S.C.):
>
> > I have concluded that "justice dictates" they should, and that the circumstances call for the exercise of this court's inherent jurisdiction to achieve that end: see *Winnipeg Supply & Fuel Co.* v. *Genevieve Mortgage Corp.,* [1972] 1 W.W.R. 651, 23 D.L.R. (3d) 160 (Man. C.A.), at p. 657 [W.W.R.].
> >
> > The circumstances in which this court will exercise its inherent jurisdiction are not the subject of an exhaustive list. The power is defined by *Halsbury's* (4th ed., vol. 37, para. 14) as:
> >
> > > ...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so...
> >
> > Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.
>
> In commenting on this decision and discussing the stay provisions of the *Companies' Creditors Arrangement* Act, R.S.C. 1985, c. C-36 ("CCAA") and the *U.S. Bankruptcy* Code, Tysoe J. observed in *Re Woodward's Ltd.* (1993), 17 C.B.R. at pp. 247-8, [1993] B.C.J. No. 42:
>
> > Hence it is my view that the inherent jurisdiction of the Court can be invoked for the purpose of imposing stays of proceedings against third parties. However, it is a power that should be used cautiously. In *Westar* Macdonald J. relied upon the Court's inherent jurisdiction to create a charge against Westar's assets because he was of the view that Westar would have no chance of completing a successful reorganization if he did not create the charge. I do not think that it is a prerequisitive to the Court exer-
> >
> > rising its inherent jurisdiction that the insolvent company will not be able to complete a reorganization unless the inherent jurisdiction is exercised. But I do think that the exercise of the inherent jurisdiction must be shown to be important to the reorganization process.
> >
> > In deciding whether to exercise its inherent jurisdiction the Court should weigh the interests of the insolvent company against the interests of the parties who will be affected by the exercise of the inherent jurisdiction. If, in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to exercise its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to

> persuade the Court that it should not exercise its discretion under s. 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[40] It should be noted that orders made under s. 11(4)(*c*) are to be made "until otherwise ordered by the court". A proviso to this effect (e.g. "subject to an further order of the court pursuant to s. 11(4)(c) of the CCAA") should be included in any vesting order to be made in favour of New Playdium with respect to the assignment of the Techtown Agreement.

Whether the Order is Appropriate

[41] The circumstances that are relevant in the present case are dealt with in the earlier reasons at paragraphs 24 through 33 and in the preceding paragraphs of the present reasons.

Conclusion

[42] Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

[43] Provided that terms are added to the assignment and to the vesting order to the effect directed above, Famous Players will not be subjected to an inappropriate imposition or to an inappropriate loss of claims, having regard to the purpose and spirit of the regime created by CCAA and my reasons for decision of November 2, 2001.

[44] Accordingly, it is appropriate for the assignment to be approved and it is not necessary to add the clause requested by Famous Players to the form of order now before the court.

[45] Counsel may consult me about costs.

Order accordingly.

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 CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

APPLICANTS

Court File No: CV-10-8533-00CL

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS

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