Court File No. CV-09-8396-00 CL

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 GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS
LISTED ON SCHEDULE "A" (collectively the "APPLICANTS" or "Canwest")

FACTUM OF GS CAPITAL PARTNERS VI FUND L.P., GSCP VI AA ONE HOLDING S.ar.l AND GS VI AA ONE PARALLEL HOLDING S.ar.l (the "GS Parties")

THE FACTS

1. On October 5, 2009, Canwest caused its ***solvent*** subsidiary, 4414616 Canada Inc. ("**441**") to transfer 352,986 Class A Common Shares and 666 Class A Preferred Shares (the "**Shares**") of CW Investments Co. ("**CWI**"), the ***solvent*** company that holds the Specialty TV Business controlled by Canwest, to ***insolvent*** Canwest Media Inc. ("**CMI**") (the "**Transfer**").

2. On the same day, October 5, 2009, CMI agreed to assume all of the obligations of 441 as part of the consideration for the Transfer. The only material obligations of 441 were its obligations under a Shareholders Agreement between each of CMI, 441, the GS Parties and CWI (the "**Shareholders Agreement**").

3. On that same day, pursuant to a shareholder resolution of CMI, 441 was dissolved.

4. On the morning of the next day, Canwest, including CMI, admitted their insolvency and applied for a stay of proceedings by their creditors in these proceedings under the CCAA.

5. All of the foregoing actions of Canwest were taken without notice to, or prior consultation with, the GS Parties. Canwest has since admitted that it caused 441 to transfer its shares in CWI and CMI assumed 441's obligations under the Shareholders Agreement specifically in order (a) to stay the GS Parties' rights under the Shareholders Agreement and (b) to be able to seek to disclaim or resiliate the 441 obligations under the Shareholders Agreement.

6. 441, not being insolvent, was not entitled to apply for relief under the CCAA and clearly was not entitled to disclaim or resiliate its obligations under the Shareholders Agreement.

7. Canwest caused the Transfer with the intention to use the CCAA proceedings (i) to defeat, hinder and delay the GS Parties rights under the Shareholders Agreement, which they could have enforced against ***solvent*** 441, (ii) to oppress the rights of the GS Parties and (iii) to abuse the court process and to abuse these proceedings under the CCAA, in each case by assuming the obligations of 441 under the Shareholders Agreement only to stay the corresponding rights of the GS Parties and later to disclaim such assumed obligations.

8. The GS Parties served a notice of motion in these proceedings dated November 2, 2009, as amended by an amended notice of motion dated November 19, 2009 (the "Motion"), the GS sought an order, *inter alia*:

a) Setting aside and declaring void the transfer of the Shares from 441 to CMI;

b) Declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholder Agreement are not affected by these CCAA proceedings in any way whatsoever;

c) [Setting aside or amending paragraph 59 of the initial order of the Honourable Madam Justice Pepall, dated Tuesday, October 6, 2009 (the "**Initial Order**") to the extent that it purports to declare that certain pre-filing transactions entered into by the Applicants do not constitute fraudulent preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law;] Now settled.

d) In the alternative to (a) and (b), directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer described in (a) above;

e) In the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer described in (a) above, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise.

9. In this motion, Canwest seeks a declaration that the Motion is stayed by the Initial Order and that proceeding with the Motion would be disruptive to the restructuring process.

10. The GS Parties submit that the opposite is true. Unless the transfers of the Shares from 441 to CMI are unwound or, alternatively, CMI confirms that it will perform the obligations that it assumed on behalf of 441 the day before it filed for the Initial Order without disclaiming such obligations, the Motion must proceed as the first order of business in this restructuring.

THE ISSUES

11. The issues raised in this motion are the following:

(a) Does the stay of proceedings in the Initial Order operate to stay parties from bringing motions in the CCAA proceedings themselves

(i) for relief that affects the exercise of powers of the Applicants under the CCAA including *inter alia* the very validity of the procurement of the stay itself as to the assets of 441,

(ii) for relief that would facilitate negotiation between key parties to the restructuring and progress in the development of a plan of arrangement,

(iii) that resolves issues of importance in this case and of interest to the profession arising under untested legislation, and

(iv) that avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to disclaim agreements when asked to approve a disclaimer.

(b) If the stay applies to the Motion, should the stay be lifted.

THE LAW

The Motion is not stayed

12. The stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves.

Reference: *Campeau v Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 at paras. 24-5

13. That is especially true in the present case, where the motion directly pertains to relief that may be sought by CMI in the CCAA proceedings and pursuant to statutory rights in the CCAA itself and whether solvent entities directly or indirectly should be permitted to be de facto applicants by manipulation of shares immediately prior to the application thereby avoiding the insolvency condition threshold test.

14. The Applicants have expressly conceded that the transactions in question were undertaken for the avowed purpose of placing the assets of 441, a solvent entity, within the ambit of the stay and other protections of the CCAA to frustrate the rights of the GS Parties.

15. The Applicants nonetheless contend that the Initial Order's stay provision operates to prevent any challenge to the Applicants' manipulative actions as part of invoking CCAA jurisdiction -- even within the CCAA proceedings itself, and even if such actions effectively absorbed within the insolvent entity the assets of a solvent affiliate contrary to the basic purpose of the CCAA.

16. By asserting that the Initial Order's stay prevents any challenge as to the proper scope of the stay and other CCAA relief, which is the core of the Motion, the Applicants adopt circular reasoning. The scope of the stay provided in the Initial Order, and whether it even applies to ***the Motion by the GS Parties***, is entirely a proper question for the Court ***charged with supervising the CCAA process***. Surely this Court has discretion to modify its own stay in all events, as well as to entertain any motion that contests the proper application of its powers, such as those exercised in the Initial Order and otherwise under the CCAA. The Motion is just such a motion and should be entertained.

17. Moreover, the Motion raises the important preliminary issue of the proper scope and application of section 32 of the CCAA in this case.

18. The power to disclaim or resiliate agreements under section 32 of the CCAA came into force on September 18, 2009. The appropriate application of section 32 – including whether it is proper and appropriate for insolvent parties to orchestrate the absorption of contractual obligations of solvent affiliates on the eve of CCAA filing for the purpose of disclaiming or resiliating those very obligations to the prejudice of investors and creditors of the solvent affiliates – is of great interest to the practice of insolvency law in Canada. No case has considered the issues raised in the Motion.

19. Uncertainty as to the scope of any CMI disclaimer powers is impeding the negotiations between critical parties in this restructuring. Such negotiations may proceed only when the legal positions of the parties to the Shareholders Agreement concerning the scope of the disclaimer or resiliation powers of CMI are determined.

20. Further, because the Motion seeks an order preventing the purported exercise of disclaimer powers, if stayed, the remedy sought would be permanently lost if CMI sought to and was allowed to disclaim the obligations CMI assumed from 441.

21. Finally, under section 32 of the CCAA, the Applicant must seek the approval of the Monitor for any disclaimer or resiliation it seeks to make. Until the Motion is heard, the question of what contractual rights CMI may seek to disclaim and what disclaimer the Monitor may approve will remain in issue and unanswered.

22. The Monitor does not determine legal issues, such as the scope of an Applicant's right to disclaim agreements under s. 32 of the CCAA. The role of the Monitor is to assess the relative ***financial impact*** of the disclaimer or resiliation on the other parties to the agreement and the debtor, but it is submitted that the Monitor is required to do that in a reasonable, fair and legal way. It is for the Court to determine when and how section 32 applies and it should do so before the Monitor is asked to approve any disclaimer or resiliation.

Leave Should be Granted

23. Even if the stay order otherwise applied to a motion in the CCAA proceeding, it is in the discretion of the Court under ss. 11(4) and 11(6) of the CCAA to determine whether a proposed action should be allowed to proceed in the face of a stay order. Specifically, the court should consider whether there are sound reasons for lifting the stay, consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action.

Reference: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

24. The Court should also consider whether the debtor company has acted and is acting in good faith, as referenced in s. 11(6).

Reference: ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

25. An implication of the "balance of convenience" test is that a stay may be lifted despite real prejudice to the debtor company if the prejudice to the other party out-weighs the prejudice to the debtor company.

Reference: *Re. Humber Valley Resort Corp.*, 2008 NLTD 174 at para. 18.

26. There are sound reasons to allow the Motion to continue. First, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings caused by the improper wind up of 441. The reversal of the Transaction is necessary to re-establishment a fair basis from which a successful restructuring can be achieved. The Motion does not seek damages or any remedy that could prefer one creditor over another. The GS Parties merely seek to address threshold issues that are a prerequisite for the restructuring to proceed fairly and successfully.

27. Second, there is evidence there will be ***serious, material, and irreparable prejudice*** to the GS Parties if they are not allowed to proceed with their motion. In *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora: Canada Law Book, looseleaf), R.H. McLaren describes at s. 3.3450 situations in which the court will lift a stay, including when "It is necessary to permit the applicant to take steps ***to protect a right which could be lost by the passage of time***." (emphasis added)

28. McLaren perfectly describes the scenario facing the GS Parties. The GS Parties' rights and remedies under the Shareholders Agreement provide for relief against 441 *in the case of Canwest's insolvency*. It is necessary to take steps to protect these rights and remedies ***now***, or

they may become irrelevant and would certainly impact the dynamic of any restructuring. Being prohibited from pursuing the Motion would cause irreparable harm to the GS Parties.

29. Third, the transfer of the 441 shares to CMI exhibited bad faith on the part of Canwest in that it swept up the Shares and assumed the obligations that were intrinsically linked to the Shares with the intention of disclaiming and resiliating the obligations, not performing them.

30. As a solvent party to the Shareholders Agreement, at the time of the Transfer, 441 was insulating CWI and the Specialty TV Business from the insolvency of Canwest and thereby protected the contractual rights of the GS Parties.

31. The Transfer was intended by Canwest to collapse this insulator for the very purpose of improperly creating a position of leverage in negotiations with the GS Parties, hoping that the Goldman Sachs would be forced to renegotiate with one or both hands tied behind its back. The manifest harm to the GS Parties which invited the Motion and made it necessary should be given weight in the Court's balancing of prejudices.

32. Finally, the Motion is not complex, and should not have an adverse impact on restructuring efforts. Canwest can hardly be seen to complain about the expense or distraction of responding to a motion that it invited through its conduct - tactically designed for the sole purpose of disadvantaging the GS Parties in the CCAA proceedings. The remedies sought in the Motion will not affect the viability of any plan, nor impair the principles underlying the CCAA.

33. Any concerns of the Applicants regarding disruption to the restructuring process can be met by the Court's jurisdiction to impose conditions on the lifting of a stay. For example, the Court could set a reasonable timetable for the Motion to proceed.

ORDER SOUGHT

34. The GS Parties therefore submit that the Canwest Motion be dismissed, with costs or in the alternative, that the GS Parties be granted leave to proceed with the Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

December 5, 2009

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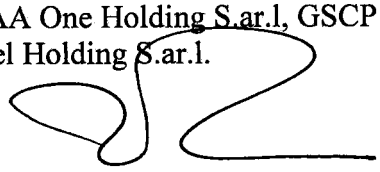

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Proceeding Commenced at Toronto

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