

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-060613-227

DATE : MAY 9, 2022

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

IN THE MATTER OF THE ARRANGEMENT OR COMPROMISE OF:

RISING PHOENIX INTERNATIONAL INC.

and

10864285 CANADA INC.

and

11753436 CANADA INC.

and

CDSQ IMMOBILIER INC.

and

COLLEGE DE L'ESTRIE INC.

and

ÉCOLE D'ADMINISTRATION ET DE SECRÉTARIAT DE LA RIVE SUD INC.

and

9437-6845 QUÉBEC INC.

and

9437-6852 QUÉBEC INC.

Debtors

and

RICHTER ADVISORY GROUP INC.

Monitor

and
LES CONSULTANTS 3 L M INC. (ISI)
and
GESTION LÉVY INC.

Applicants

and
FIRM CAPITAL MORTGAGE
and
6815464 CANADA INC.
and
13901823 CANADA INC.

and
PROCUREUR GÉNÉRAL DU CANADA

and
PROCUREUR GÉNÉRAL DU QUÉBEC
Impleaded parties

JUDGMENT
PROPOSED HOMOLOGATION PROCEEDINGS

I. OVERVIEW

[1] Les Consultants 3 L M Inc., carrying on business as Institut supérieur d'informatique ("ISI"), is a creditor of the debtor company, Rising Phoenix International Inc. ("RPI"). On January 5, 2022, RPI and seven other applicants filed for protection under the *Companies' Creditors Arrangement Act* ("CCAA").¹ The following day, on January 6, 2022 this Court issued a *First Day Initial Order* which suspended all proceedings against the applicants. The Court has subsequently renewed the stay of proceedings, most recently until June 30, 2022.

[2] Despite the broad terms of the stay, on January 17, 2022, the Court issued an *Amended and Restated Initial Order* which provided at section 12 that the stay did not operate to prevent Mtre Gordon Kugler from rendering an arbitral award in a matter involving ISI, RPI and its directors, Caroline, Christina and Joseph Mastantuono. An arbitration proceeding had commenced in November 2020 and the parties were awaiting a decision in January 2022 when the CCAA proceedings were filed. The

¹ R.S.C. 1985, c. C-36.

exception of section 12 stated that it applied to the rendering of the arbitral award, not to its eventual homologation or enforcement.

[3] Mtre Kugler rendered his award on February 17, 2022. He ordered RPI and the Mastantuonos, *in solidum*, to pay \$2,774,888.33 to ISI, with interest and the legal indemnity since November 27, 2020.

[4] ISI now seeks to homologate and enforce the award against the Mastantuonos. ISI argues that the stay of proceedings under section 11 of the *Amended and Restated Initial Order*,² which applies to RPI, does not prevent the homologation of the arbitral award against the Mastantuonos, because the arbitrator held them to be personally liable for the debt. ISI argues that the award against the Mastantuonos does not concern an obligation incurred by them in their capacity as directors of RPI.

[5] ISI therefore asks for the Court's authorization to homologate and enforce the arbitral award against the Mastantuonos. Alternatively, if section 11 of the *Amended and Restated Initial Order* suspends the claim against the Mastantuonos, ISI asks the Court to lift the stay of proceedings and permit it to homologate and enforce the award against them personally.

[6] ISI's application is opposed by the debtors, and by the Monitor, who argue that the arbitral award against the Mastantuonos is covered by section 11, and that a lifting of the stay would jeopardize the current restructuring process.

[7] ISI's application requires the Court to decide whether the stay of proceedings applies to claims against the Mastantuonos personally. If it does, the Court must decide whether it is appropriate to lift the stay. If it does not, the Court must decide whether it is appropriate to authorize ISI to proceed with the homologation and enforcement of the arbitral award.

II. ANALYSIS

A) DOES SECTION 11 SUSPEND THE HOMOLOGATION PROCEEDINGS?

[8] In the Court's view, section 11 of the *Amended and Restated Initial Order* does not suspend the arbitral proceedings against the Mastantuonos. The Court does not agree with RPI's submission that section 11 applies because the damage award against the Mastantuonos arises from their activities as directors of RPI. In this regard, a distinction must be made between directors' legal liabilities arising from their status as a director, (*qua* director) and directors' liabilities arising from their wrongful acts committed while they were a director.

² As continued by the *Re-Amended and Restated Initial Order* dated March 14, 2022.

[9] This distinction flows from section 11 of the *Amended and Restated Order* and from the CCAA provisions on which it is based.

[10] Section 11 suspends proceedings against RPI's directors which relate to their legal obligations arising from their capacity as a director. The operative words of section 11 read as follows:

11. ORDERS that [...] no Proceeding may be commenced or continued against [...] any present director [...] in respect of any claim against such Director [...] which relates to any obligation of the Applicants where it is alleged that any of the Directors is under any law liable in such capacity for the payment of such obligation. [our underlining]

[11] Section 11 is based on sections 11.02 and 11.03 of the CCAA, which allow the Court to stay legal proceedings against the company and its directors during CCAA restructuring proceedings. Section 11.03 allows for a stay of claims against directors that relate to the "obligations of the company if directors are under any law liable for the payment of those obligations [...]". Section 11.03(2) provides that a stay does not include claims against a director based on a guarantee given by the director relating to the company's obligations.

[12] Section 11 of the *Amended and Restated Initial Order* also mirrors section 5.1(1) CCAA, which provides that a compromise or arrangement under the Act may include a compromise of claims against directors of the company "that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations." An example of a claim that may be compromised under section 5.1 (1) CCAA is one against directors for certain employee benefits accrued before the commencement of proceedings under the CCAA.

[13] Section 5.1 (2) creates an exception to section 5.1 (1). By doing so, it allows for a better understanding of the type of claims – when the directors "are in law liable in their capacity as directors" – that can be compromised by section 5.1 (1). Section 5.1 (2) (b) states that a provision for the compromise of claims against directors may not include claims that "are based on allegations of misrepresentation made by directors to creditors or of wrongful conduct or oppressive conduct by directors." Section 5.1 (2) (b) therefore clearly distinguishes between claims against directors by reason of their status as directors – claims that may be compromised – and claims against directors arising from their personal wrongdoing that may not be compromised.

[14] This distinction has been noted previously by CCAA courts.³ The jurisprudence stands for the proposition that a director's liability for personal wrongdoing is not

³ *Bear Creek Contracting Ltd. v Pretium Exploration Inc.*, 2020 BCSC 1523, para 127; *Magasin Laura (PV) inc./ Laura's Shoppe (PV) Inc. (Arrangement relative à)*, 2015 QCCS 4716, paras 25, 30; *Liberty Oil & Gas Ltd. (Re)*, 2002 ABQB 949, para 5.

covered by sections 5 and 11 of the CCAA, and that it is irrelevant to consider whether the director's wrongful acts giving rise to personal liability were committed when the person was a director of the company.

[15] The terms of ISI's arbitral award are confidential. Suffice it to say that paragraphs 131 to 143 of the arbitral decision leave no doubt that the Mastantuonos are liable towards ISI by reason of their personal wrongdoing, not in their capacity as directors of RPI.

[16] Since the Mastantuonos' obligations to ISI are personal in nature they are not covered by the section 11 stay which applies to "obligations of the Applicants".

B) IS IT APPROPRIATE TO AUTHORIZE ISI TO HOMOLOGATE THE ARBITRAL AWARD?

[17] Since section 11 of the *Amended and Restated Initial Order* does not stay the arbitral proceedings against the Mastantuonos, the only question that remains is whether ISI should be authorized to homologate the award.

[18] Section 11 CCAA grants broad discretionary power to the Court to render orders that it "considers appropriate in the circumstances" and that are consistent with the remedial objectives of the Act.⁴ This includes the power to lift a stay of proceedings when there are "sound reasons" for doing so,⁵ and the power to extend a stay of proceedings to third parties where it is just and reasonable and in the interest of the restructuring process.⁶

[19] In the present case, there are good reasons to extend the stay of proceedings to ISI's proposed homologation. The Mastantuonos have given personal guarantees to the interim lender, First Capital Mortgage Fund ("First Capital"), whose support for the restructuring process could be jeopardized if ISI enforces its substantial award against the Mastantuonos' personal assets. It is in no one's interest to see the current restructuring abandoned for a lack of interim funding.

[20] Prior to their insolvency, the debtors operated three private colleges offering post-secondary technical training to several hundred students. Another group of foreign student applicants had prepaid their first-year tuition fees in the hope of obtaining Canadian study visas. In November 2021, the colleges ceased operating and many

⁴ *Canada v Canada North Group Inc*, 2021 SCC 30, paras 20, 21, 31, 176 and 178; *9354-9186 Québec inc v Callidus Capital Corp*, 2020 SCC 10, paras 49, 50, 65 and 70; *Century Services Inc v Canada (AG)*, 2010 SCC 60, paras 59, 61, 69 and 70.

⁵ *Re Puratone et al*, 2013 MBQB 171, para 13, citing *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*, 2007 SKCA 72, 9 W.W.R. 79; *Timminco Limited (Re)*, 2014 ONSC 3393, para 50.

⁶ *Pacific Exploration & Production Corp, (Re)*, 2016 ONSC 5429, para 26; *Tamerlane Ventures Inc, (Re)*, 2013 ONSC 5461 para 21; *Cinram International Inc, (Re)*, 2012 ONSC 3767, paras 64, 65; *JTI-Macdonald Corp, (Re)*, ONSC 1625, para 15.

tuition advances were not returned. In March, the Court authorized the sale of the colleges and RPI's business to a third-party in the context of the CCAA restructuring. The sale is subject to the transfer of the debtors' education permits to the purchaser by June 30. With interim funding provided by First Capital, the colleges began offering courses again in March, allowing many students to continue their studies and graduate.

[21] As an interim lender, First Capital's interest is to maintain its financing until a plan of arrangement is agreed to. It is not in First Capital's interest to exercise its guarantees against the Mastantuonos, and First Capital would be disadvantaged if ISI were to execute its claim on the Mastantuonos' assets.

[22] Other creditors, including the foreign student applicants, may have claims against the Mastantuonos arising from the collapse of the colleges. Legal proceedings against the Mastantuonos could be precipitated, and the restructuring compromised, if ISI acts first, before the others.

[23] According to the Monitor, the Mastantuonos are assisting with the interim operations of the colleges with a view to their eventual transfer. The Monitor fears that the Mastantuonos' assistance could be impaired during this critical period if they are forced to devote their energies to defending homologation and other legal proceedings.

[24] According to the debtors' attorney, the Mastantuonos intend to make a financial contribution to the proposed plan of arrangement. In the meantime, they have undertaken not to dispose of their personal assets.⁷ A plan of arrangement should be proposed by the debtors sometime this summer, if and when the sale is finalized. Until then, ISI's position can be protected by identifying and freezing the Mastantuonos' assets and providing for a suspension of the legal delays pertaining to any legal actions against them.

[25] Weighing all of these factors, the Court concludes that it is reasonable and in the interest of the CCAA restructuring process to suspend ISI's homologation of the arbitral award until after a plan of arrangement has been presented to creditors and voted upon.

FOR THESE REASONS, THE COURT :

[26] **DECLARES** that the homologation and enforcement of ISI's arbitral award against the Mastantuonos is not suspended by operation of section 11 of the *Amended and Restated Initial Order* dated January 17, 2022, as amended;

[27] **SUSPENDS** ISI's homologation of the February 17, 2022 arbitral award until after a plan of arrangement has been presented to creditors and voted upon;

⁷ Amended Memorandum of Argument of the Applicants, April 19, 2022, paras 58 and 64.

[28] **ORDERS** Caroline, Christina and Joseph Mastantuono to each prepare and submit to the Monitor and to the applicant Les Consultants 3 L M Inc., on or before May 23, 2022, a sworn declaration identifying all of the assets they own, directly or indirectly control, or are beneficially entitled to receive;

[29] **ORDERS** Caroline, Christina and Joseph Mastantuono not to dispose of or transfer these assets until further order of the Court;

[30] **AUTHORIZES** the applicant Les Consultants 3 L M Inc. to examine Caroline, Christina and Joseph Mastantuono on their sworn declarations;

[31] **DECLARES** that the provisions of section 17 of the *Amended and Restated Initial Order* dated January 17, 2022, as amended, suspending legal delays, applies to claims against Caroline, Christina or Joseph Mastantuono arising from the operation of the debtors' businesses prior to January 6, 2022;

[32] **THE WHOLE**, without costs given the mitigated result.



DAVID R. COLLIER, J.S.C.

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Hearing date : April 20, 2022.