SUPERIOR COURT OF JUSTICE

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No of Pages Including Cover Sheet: Eight

Date: May 2, 2017

RE: GRAFTON-FRASER INC. v. CADILLAC FAIRVIEW CORPORATION LIMITED, ET AL.
COURT FILE NO.: CV-17-11677-00CL

Please contact Gladys Gabbidon at (416) 327-5052 if you do not receive all pages.
Thank you.

CITATION: Grafton-Fraser v. Cadillac, 2017 ONSC 2496
DIVISIONAL COURT FILE NO.: CV-17-11677-OOCL
DATE: 20170502

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRAFTON-FRASER INC.

BETWEEN:	
GRAFTON-FRASER INC. Applicant	*Stuart Brotman* and *Dylan Chochla*, for the Applicant
– and –	
CADILLAC FAIRVIEW CORPORATION LIMITED, ET AL. Respondents	*Lily Coodin*, for Cadillac Fairview Corporation Limited *J. Dietrich* and *M. Sassi*, for the Monitor *Gordon Meiklejohn*, for Trade & Global Inc. *N. Renner*, for the Purchaser and DIP Lender *Linda Galessiere*, for Various Landlords *Evan Cobb*, for CIBC
	HEARD: April 20, 2017

L. A. PATTILLO J.

Introduction

[1] This is an application by Grafton-Fraser Inc. ("Grafton") for, among other things, an order approving the sale of its assets as set out in an asset purchase agreement dated January 24, 2017 with 1104307 B.C. Ltd. (now GSO GF Acquisition B.C. Ltd.) (the "Purchaser") pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") (the "Transaction").

[2] The application is supported by the Third Report of Richter Advisory Group Inc in its capacity as monitor for Grafton (the "Monitor").

[3] The application is either agreed to or unopposed by all of the stakeholders with notice save and except for Tradex Global Inc. ("Tradex") who is an unsecured creditor and who objects to the Transaction as it affects the unsecured creditors.

[4] For the reasons that follow, I approve the Transaction and grant the relief requested by Grafton. Notwithstanding that the Transaction does not treat all of Grafton's unsecured creditors equally, in my view, it meets the principles set out in *Royal Bank of Canada v. Soundair Corp.*, [1991] O.J. No. 1137; 7 C.B.R. (3d) 1 (Ont. C.A.) and s. 36 of the CCAA.

Background

[5] On January 25, 2017, Grafton obtained an order from this court granting it protection pursuant to the CCAA (the "Order"). Among other things, the Order appointed the Monitor and granted Grafton the authority to enter into amended and restated forbearance agreements with its two primary and secured lenders, Canadian Imperial Bank of Commerce ("CIBC") and GSO Capital Partners LP ("GSO") as agent for the GSO Lenders.

[6] Grafton is a leading retailer of men's clothing which, prior to the Order operated 158 stores in Canada under various names including "Tip Top Tailors" and "George Richards Big and Tall".

[7] On January 30, 2017, the court issued a further order approving, among other things, the proposed sale and investment solicitation process for Grafton's business and assets to be carried out with the Monitor's assistance (the "SISP") and authorizing Grafton to enter into the Agreement which was to serve as the minimum bid under the SISP (the "Stalking Horse APA"). The Purchaser is a party related to GSO.

[8] To protect confidential information, the SISP contemplated a two stage bidding process. During the first stage, potential bidders were given certain coded information. Bidders who submitted a qualified bid in the first stage would be invited to participate in the second stage with access to confidential information.

[9] The Monitor, in consultation with Grafton, complied a list of 174 potential interested parties who were invited to participate in the SISP. Eight potential interested parties responded. Four signed non-disclosure agreements and were provided access to the data room. With the

exception of the stalking horse bid, no other bids were submitted prior to the stage one bid deadline. The Purchaser was therefore the "successful bidder" under the SISP.

[10] The Transaction is a credit-bid transaction. The Purchaser is acquiring, as a going concern, on an "as is, where is" basis substantially all of Grafton's business and assets (the "Purchased Assets"). The Purchaser will acquire 139 retail stores operated by Grafton as well as its head office. Seven days prior to the closing of the Agreement, the Purchaser will offer employment to no fewer than 1,100 Grafton employees on substantially similar terms and conditions to their existing employment with Grafton. The proposed closing date for the Transaction is on or before May 31, 2017.

[11] The consideration for the Transaction includes, among other things:

a) The assumption by the Purchaser of the principal, plus accrued interest and fees owing by Grafton to its operating lender, CIBC;

b) The assumption by the Purchaser of Grafton's secured indebtedness under the DIP Facility (as defined in the Agreement);

c) The release by GSO and certain of its affiliates of certain of the secured indebtedness owing by Grafton under the GSO Facility (as defined in the Agreement); and

d) The assumption by the Purchaser of certain of Grafton's obligations, including Supplier Liabilities (as defined in the Agreement, which are pre-filing amounts owed by Grafton to certain suppliers of goods/services to the extent agreements with such suppliers have been entered into with the Purchaser, on terms acceptable to CIBC and the Purchaser, establishing, among other things, the terms of continued supply).

[12] The Purchaser has determined that certain suppliers are critical to the ongoing value and operations of the business and has agreed to assume Grafton's indebtedness to these creditors on terms satisfactory to the Purchaser. At full value, these claims total approximately $5.2 million.

[13] At the date of the Order, Grafton had aggregate known unsecured liabilities of approximately $8 million together with contingent claims in excess of $2 million. In addition, Grafton has or will shortly disclaim a number of lease agreements and terminate the employment of a number of employees which it expects will give rise to significant unsecured claims.

Tradex

[14] Tradex and its affiliated companies provided procurement and quality control services for Grafton's overseas purchases for a number of years pursuant to written agreements. The most recent agreements were mutually terminated on May 5, 2016. Tradex's evidence is that there was an oral agreement with Tradex that it would continue to supply services at the previously agreed prices, that it did so and it received payment for its services as late as October 7, 2016. It has since not been paid and alleges that to the date of the Order it is owed US $856,660.00 and Cdn. $383,316.00.

[15] In correspondence between counsel, Grafton has denied that any amounts are owing to Tradex and advised that since the termination of the agreements, it has not engaged Tradex or any of its related parties.

[16] Tradex is not among the suppliers and other creditors whose claims the Purchaser has agreed to assume upon closing of the Transaction.

Position of the Parties

[17] Tradex submits that the Transaction, as structured, should not be approved. Rather, in order to ensure that all unsecured creditors are treated equally, the Purchaser must be required to make the $5.2 million and any other amounts it has committed to pay to Grafton's unsecured creditors, not just to a select group of unsecured creditors, but *pari passu* to all unsecured creditors.

[18] Grafton has agreed, for the purposes of this motion only, and without admitting any liability, to accept that Tradex has an unsecured claim against it. It submits that the Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of its business and should be approved. Further, there is no requirement under the CCAA that creditors be treated equally.

Analysis

[19] Section 36 of the CCAA provides that the court may authorize the disposition of assets of a debtor company outside the ordinary course of business. The factors to be considered by the court in approving such a disposition were first set out by our Court of Appeal in *Soundair* and are now largely set out in s. 36(3) of the CCAA which provides:

> s.36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> b) whether the monitor approved the process leading to the proposed sale or distribution;
>
> c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> d) the extent to which the creditors were consulted;
>
> e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[20] Considering the above factors in respect of the Transaction and the events leading up to it, I find the evidence establishes:

a) the SISP was reasonable in the circumstances and was approved by the court;

b) the Monitor approved the SISP and assisted Grafton in carrying out its terms;

c) the Monitor has confirmed in its Third Report that the Transaction would be substantially more beneficial to Grafton's creditors, as compared to the alternatives, which may result in the liquidation of Grafton's assets;

d) the Monitor and Grafton's two primary secured creditors, CIBC and GSO, are each supportive of the Transaction;

e) the Monitor is of the view that the Transaction represents the best opportunity to maximize recoveries for creditors of Grafton and provides the greatest benefit to all stakeholders (including landlords, employees, customers, go-forward suppliers, etc.), as it results in the continuation of Grafton's business;

f) that further marketing of Grafton's assets would not likely result in greater realizations as the market has been fully canvassed and all likely bidders have already been provided the opportunity to bid on the assets;

g) the Transaction represents the highest and best offer for the Purchased Assets and the short time-frame to closing will eliminate ongoing costs of the CCAA proceeding; and

h) Grafton's limited liquidity substantially eliminates the opportunity to further market the Purchased Assets for sale without putting the Transaction at risk and impairing recoveries.

[21] There is no question that certain of Grafton's liabilities, including some of its unsecured creditors will not be paid, as a result of the Transaction as it is structured. In support of its submission that in the absence of all the unsecured creditors being treated equally, the Transaction should not be approved, Tradex relies on the decision of Newbould J. in *Re Nortel Networks Corp.*, 2015 ONSC 2987; 27 C.B.R. (6th) 175 (Ont. S.C.J.) and specifically the statement at para. 209 that "It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment."

[22] There can be no issue that Newbould J.'s statement is a correct statement of the law. It was made, however, in the context of the issue of how to determine the allocation of liquidation

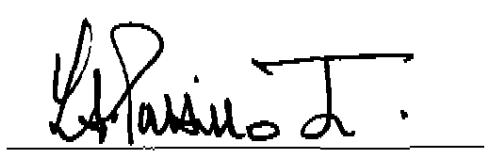
proceeds from *Nortel's* business among its various creditors in multiple jurisdictions. The reasoning in *Nortel* does not apply in this case where the Transaction is a credit bid which gives rise to no proceeds of sale being available for distribution.

[23] I am in agreement with Grafton's submission that, in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.

[24] The above principle was applied in *Re Nelson Education Ltd.*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J.) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors.

[25] The Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of Grafton's business, thereby assuring a customer for go-forward suppliers, a tenant for the landlords of 139 retail stores, employment for a majority of Grafton's employees and an ongoing business for many of its customers. While the Transaction will result in some of the unsecured creditors, including Tradex, not being paid, when weighted against all the other relevant factors, that provision should not prevent approval of the Transaction, particularly when the likely alternative is liquidation which would result in no recovery for the unsecured creditors generally.

[26] For the above reasons, therefore, the Transaction is approved. The relief requested in the Notice of Motion is approved and the draft Approval and Vesting Order at tab 2 of the Motion Record shall issue.



L. A. Pattillo J.

Released: May 2, 2017

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REASONS FOR JUDGMENT

L. A. PATILLO J.

Released: May 2, 2017