SUPERIOR COURT OF JUSTICE

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FAX COVER SHEET

Date: May 6, 2011

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FROM: Justice Morawetz

TOTAL PAGES (INCLUDING COVER PAGE): 7

MESSAGE: Endorsement: Nelson Financial.

CITATION: Nelson Financial Group Ltd. (Re), 2011 ONSC 2750
COURT FILE NO.: 10-8630-00CL
DATE: 20110506

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND:

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON FINANCIAL GROUP LTD., Applicant

BEFORE: MORAWETZ J.

COUNSEL: Richard B. Jones and Douglas Turner, Q.C., Special Counsel to the Interim Operating Officer and to the Representative Counsel for Noteholders

James H. Grout and Seema Aggarwal, for A. John Page & Associates Inc., Monitor

Jane Waechter and Swapna Chandra, for the Ontario Securities Commission

HEARD: April 20, 2011

DECISION RELEASED: April 21, 2011

REASONS: May 6, 2011

ENDORSEMENT

[1] The motion to sanction the Plan of Arrangement of Nelson Financial Group Ltd. ("Nelson") was heard on April 20, 2011.

[2] On April 21, 2011, following consideration of the supplementary affidavit of Richard B. Jones, sworn April 20, 2011, the record was endorsed as follows:

> "Motion granted. The Plan is sanctioned. An order has been signed in the form presented, as amended, which includes sealing provision relating to Exhibit B to the Thirteenth Report of the Monitor. Reasons will follow."

[3] These are the reasons.

[4] At the outset, I note that this *Companies' Creditors Arrangement Act* ("CCAA") application proceeded in a somewhat unconventional manner. These reasons reflect the very specific facts of the application.

[5] Nelson filed its application under the CCAA on March 22, 2010. Nelson had sold to members of the public some $80 million of term promissory notes and preferred shares. As of the date of filing, over $37 million of the promissory notes were outstanding. The sole director, voting shareholder and president of Nelson was Mr. Marc Boutet.

[6] Under the Initial Order of March 23, 2010, A. John Page & Associates Inc. was appointed as Monitor of the Applicant (the "Monitor").

[7] By order of Pepall J., made on consent of the Applicant and the Monitor on June 15, 2010, Douglas Turner, Q.C. was appointed as Representative Counsel for the holders of the notes issued by Nelson and Richard B. Jones was appointed as his Special Counsel.

[8] The restructuring was commenced as an application made by Nelson under the direction and control of incumbent management and ownership.

[9] Commencing in September 2010, Representative Counsel sought the replacement of management, as issues had been raised questioning the competency and *bona fides* of management.

[10] In October 2010, the Representative Counsel's Noteholder Advisory Committee canvassed noteholders and obtained confirmation from more than two-thirds in claim amount that they would not support any plan of arrangement that continued the incumbency of Mr. Boutet.

[11] On November 11, 2010, Mr. Boutet resigned all of his positions with Nelson, surrendered his shares for cancellation and released all claims against Nelson held by him or any of his associated corporations. In exchange, he was provided with a limited release. The arrangements in respect of his departure were approved by order of Pepall J. made November 22, 2010. In that same decision, Pepall J. appointed a substantial shareholder, Ms. Sherri Townsend, as the Interim Operating Officer ("IOO"). Under the terms of her appointment, the IOO was granted full powers as the Chief Executive Officer and was given particular authority to review the circumstances of the debtor company and its assets and, if practicable, to develop a plan for its restructuring.

[12] Under the direction of the IOO, a business plan was developed and a Plan of Compromise and Arrangement was devised.

[13] Counsel for the IOO takes the position that since the business of Nelson came under the authority and direction of the IOO, Nelson has conducted itself in full compliance with the requirements of the CCAA and of the court orders made in these proceedings. Specifically, counsel submits that the IOO has performed all of the duties and responsibilities placed upon her by the order of November 22, 2010 and by subsequent orders of the court.

[14] Under the Plan, creditors have the following options:

(a) creditors with claims for $1,000 or less will receive a cash payment for the full amount of their claims (the "Convenience Class");

(b) creditors may elect to receive a cash payment of 25% of their claims in full satisfaction of their claims and all of their rights against the Applicant or any other person in respect of their claims (the "Cash Exit Option"); and

(c) creditors who are not in the Convenience Class and who do not elect the Cash Exit Option will receive:

(i) capital recovery debentures for 25% of their claim;

(ii) new special shares with a redemption price of 25% of their claim; and

(iii) one common share of the Applicant for each $100 of their claims (the "General Plan Option").

[15] The Plan was substantially finalized on February 11, 2011.

[16] The Plan Filing and Meeting Order was granted on March 4, 2011.

[17] From and after the appointment of the IOO, the relationship as between the Monitor, the IOO and their respective counsel became strained, if not dysfunctional. Further details in respect of this relationship are set out in the materials served by the parties in the period leading up to the granting of the Plan Filing and Meeting Order on March 4, 2011.

[18] Subsequent to the granting of the Plan Filing and Meeting Order, issues were raised by Ms. Brenda Bissell, in her capacity as power of attorney for Gloria Bissell, who holds promissory notes of Nelson in her own name and also in her capacity as the owner of Globis Administrators Inc. The concerns of Ms. Bissell are set out in her affidavit of April 12, 2011.

[19] Ms. Bissell, through counsel, attended before Mesbur J. on April 13, 2011 in respect of a request for scheduling of a motion seeking to adjourn the meeting of creditors scheduled by the Plan Filing and Meeting Order for April 16, 2011.

[20] The endorsement of Mesbur J. reads as follows:

> Brenda Bissell P.A. [Power of Attorney] for a noteholder wishes to move urgently to postpone the vote on the proposed Plan of Arrangement, etc. scheduled for Saturday, April 16, 2011. Essentially, she wishes the opportunity to communicate her position and information to the other Noteholders. A solution has emerged at this 9:30 that will avoid both an urgent motion and any necessity to delay the vote.
>
> On consent:
>
> 1. Special Counsel, Mr. Jones, will forthwith (i.e. today, as soon as possible) email all the Noteholders directing them to Ms. Bissell's motion materials

posted on the Monitor's website, and suggesting they review the material before the meeting.

2. Mr. Page will provide Mr. Yellin today with a copy of the unredacted claims procedure memorandum: (done)

3. Mr. Yellin will provide Mr. Jones with an electronic copy of the communication his client wishes to send to the Noteholders and Mr. Jones will immediately email it to all the Noteholders, subject to the communication not containing defamatory, libellous or illegal statements.

4. If the plan is approved, Ms. Bissell's motion materials may be filed for the purposes of the sanction hearing and considered as a dissenting creditor's responding materials on the sanction hearing.

"Mesbur J."

[21] Counsel to the IOO stated that all required steps, directed by the court in the Plan Filing and Meeting Order, have been taken by the IOO and the Monitor.

[22] About 93% of the creditor claims were voted and the Plan of Compromise and Arrangement including its technical amendments to April 12, 2011, was approved by over 96% of the creditors voting representing 94.9% of the claim value voted.

[23] For a plan to be sanctioned, the application must meet the following three tests:

(i) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the plan is fair and reasonable.

Re Sammi Atlas Inc. (1998) 3 C.B.R. (4th) 171.

[24] Counsel to the IOO submits that the circumstances of this case are atypical. Until late 2010, the Applicant was under the direction of Mr. Boutet who, counsel submits, appears to have committed a number of wrongful and fraudulent acts. The IOO, in her First Report dated February 18, 2011, set out some of those acts that had come to her attention. Counsel advised that there can be no assurance provided by the IOO or the Monitor that there was strict compliance with the court orders or the CCAA by the Applicant prior to the appointment of the IOO. Counsel submitted that in a case where the control of the debtor company is changed in the course of the CCAA proceedings, the tests of compliance must be applied with reference to the conduct of the persons who are directing the debtor company and the persons who will benefit from the exercise of the court's discretion at the time of the application for sanctioning.

[25] In the circumstances of this case, I accept this submission and consider it appropriate to apply the test as set out in *Sammi Atlas*, in respect of compliance with statutory requirements and orders of the court, for the period subsequent to the appointment of the IOO.

[26] Based on what was disclosed in the Motion Record filed April 19, 2011, the test as set out in *Sammi Atlas* would appear to have been satisfied.

[27] However, it is also necessary to consider the Motion Record submitted by counsel on behalf of Ms. Bissell. In the hearing, I inquired as to whether counsel had any comment in respect of the materials filed by Ms. Bissell, as it was apparent that neither Ms. Bissell nor her counsel were in attendance.

[28] In response to my inquiries, counsel advised that there had been the aforementioned attendance before Mesbur J. on April 13, 2011.

[29] I find it surprising that the directions ordered by Mesbur J. were not placed in the materials put before the court. In submissions, Mr. Jones advised that there had been full compliance with respect to the directions issued by Mesbur J. He subsequently filed, in response to my request, his affidavit setting forth complete details of the steps taken to comply with the directions of Mesbur J.

[30] Having had the opportunity to review the affidavit of Mr. Jones, I am satisfied that, in the period following the application of the IOO, there has been compliance with all statutory requirements and adherence to all previous orders of the court. Further, I am satisfied that it appears that there has been nothing done or purported to be done that has not been authorized by the CCAA.

[31] With respect to the third part of the test, namely, whether the plan is fair and reasonable, the Plan does extinguish the equity interests of shareholders. Counsel to the IOO submits that this is just and equitable as the liquidation analysis of the Monitor, as set out in the Thirteenth Report as of April 6, 2011, confirms that there is no reasonable basis on which there is any economic value or interest in any shareholding of the Applicant at this time.

[32] Further, the Monitor, in its Thirteenth Report, finds that the Plan is "fair and reasonable".

[33] In addition, counsel to the IOO points out that the IOO and Representative Counsel provided an information circular to the creditors including specific information as to the business plan, financial projections and management of Nelson if the plan should be approved. Further, the circular was reviewed by the Ontario Securities Commission and was found to be unobjectionable.

[34] Counsel also submits that the Plan proposed and approved by the creditors is fair and reasonable on its face and the only persons who receive any benefit under the Plan are the creditors and those benefits are strictly proportionate to the proven claim interests of each creditor.

[35] In its Report, the Monitor makes a recommendation to the creditors and the court. The Monitor clearly states that the creditors of Nelson are faced with a choice. They could choose to

approve the Plan which has both upsides and downsides. The upside is that if the new board of directors and new management can successfully carry on the business, then, in time, the creditors may recover the full amount of their claim and perhaps make a profit. However, the downside is that, if not successful, then the corporation may end up being wound up and creditors may recover less than the approximately 42% recovery over five years that is estimated by the Monitor in a bankruptcy or other form of liquidation at this time.

[36] In this case, creditors had the benefit of the information circular and the supplementary materials posted on the website and voted overwhelmingly in favour of the Plan.

[37] In determining whether a plan is fair and reasonable, the following are relevant considerations:

1. The claims must have been properly classified; there must be no secret arrangements to give an advantage to a creditor or creditors; the approval of the plan by the requisite majority of creditors is most important.

2. It is helpful if the monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy.

3. If other options or alternatives have been explored and rejected as workable, this will be significant.

4. Consideration of the oppression of rights of certain creditors.

5. Unfairness to shareholders.

6. The court will consider the public interest.

(See N§45, The 2011 Annotated Bankruptcy and Insolvency Act (Houlden, Morawetz and Sarra)

[38] I am satisfied that the foregoing considerations have been taken into account and, I am satisfied that, in these circumstances, the Plan can be considered fair and reasonable.

[39] Accordingly, the motion is granted. An order has been signed approving and sanctioning the Plan and the Articles of Reorganization and providing for its implementation.

MORAWETZ J.

Date: May 6, 2011