

COURT FILE NO.: 09-CL-8456-00CL
DATE: 20091112

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

B E T W E E N:

JAMES ROBERT TUCKER, RICHARD
HEIS, AND ALLAN WATSON GRAHAM
OF KPMG LLP AS JOINT
ADMINISTRATORS

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) Orestes Pasparakis and Virginie Gauthier,
) for the Applicants
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) Applicants
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AERO INVENTORY (UK) LIMITED and
AERO INVENTORY PLC
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) Respondents
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) HEARD: November 11, 2009

Newbould J.

[1] This application was made on November 11, 2009 under s. 47(1)¹ of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") for an order recognizing the administration proceedings (the "foreign proceedings") commenced in respect of each of Aero Inventory (UK) Limited and Aero Inventory plc (the "foreign debtors") in the High Court of

¹ This section and the other sections dealing with cross-border insolvencies in part IV of the CCAA came into effect on September 18, 2009

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Justice of England and Wales as a "foreign main proceeding" for the purposes of section 47 of the CCAA, and for other consequential relief. At the conclusion of the hearing I made the order sought for reasons to follow. These are my reasons.

Factual background

[2] On November 11, 2009, the applicants were appointed by the High Court of Justice of England and Wales (Chancery Division, Companies Court) as administrators (the "Administrators") over Aero Inventory (UK) Limited ("Aero Inventory (UK)") and Aero Inventory plc ("Aero plc").

[3] Aero Inventory (UK) provides procurement and inventory management services in the aerospace industry. These services are provided with regard to consumable and expendable parts required for aerospace maintenance and related activities, such as nuts, bolts and gaskets. Aero plc is the corporate parent of Aero Inventory (UK) and has been listed on the Alternative Investment Market (AIM) of the London Stock Exchange since 2000.

[4] The foreign debtors are both located in New Barnet, Hertfordshire, United Kingdom. Their business operations are managed and administered in the United Kingdom. Aero Inventory (UK) has customers and/or supplies products from the following countries and regions: England, The Republic of Ireland, Australia, Bahrain, El Salvador, Canada, China, Hong Kong, Indonesia, Japan, Switzerland and the United States.

[5] Aero Inventory (UK) has conducted business in Canada since 2007. It provides inventory and procurement services to two Canadian customers, Air Canada and Aveos Fleet Performance Inc. ("Aveos").

[6] While it has a registered address in Quebec, Aero Inventory (UK) has no physical presence in Canada. The property at this address is in fact leased by the foreign debtors' Canadian affiliate, Aero Inventory (Canada) Inc. ("Aero (Canada)"). The foreign debtors have no premises and no employees in Canada. The inventory of Aero Inventory (UK) is physically located at the premises of its customer. /

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[7] Aero (Canada) provides services in Canada to the foreign debtors pursuant to a management arrangement. Aero (Canada) has employees but no customers or inventory and no source of revenues other than through its management arrangement.

[8] In November 2007, Aero Inventory (UK) signed a 10-year sole supplier agreement for consumable aircraft parts with ACTS Technical Support & Services Inc., which was later renamed Aveos. This agreement covers the procurement and management of all parts required by Aveos for its operations in Canada and, through its subsidiary Aeroman, in El Salvador.

[9] The entire inventory owned by the foreign debtors in Canada, whether bound for Air Canada or for Aveos, is located at various warehouses across Canada operated by Aveos. These warehouses are located in Ontario, Quebec, Manitoba and British Columbia. This inventory is not physically segregated from inventory owned by Aveos and is not within the foreign debtors' control. Further, inventory bound for Air Canada is not segregated from inventory bound for Aveos.

[10] According to the Aveos accounting systems, approximately Cdn. \$130 million in inventory owned by the foreign debtors is currently held at Aveos sites across Canada. This represents a supply of over nine months worth of inventory based upon traditional turnover rates.

[11] As stated, on November 11, 2009, James Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP were appointed Administrators of the foreign debtors by orders of the High Court of England and Wales. These orders were made pursuant to the *Insolvency Act 1986*. Pursuant to these orders, the Administrators are responsible for managing the affairs, business and property of the foreign debtors. They are required to perform their functions with the objective of: (a) rescuing the foreign debtors as a going concern or in the alternative, winding up or realizing upon the property of the foreign debtors in order to make a distribution to one or more secured or preferential creditors.

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Recognition of the UK Proceeding

(a) Jurisdiction

[12] Pursuant to section 9(1) of the CCAA, where a company does not have a place of business in Canada it may file an application in any province in which it has assets. Neither of the foreign debtors appears to have a place of business in Canada. Given that the foreign debtors have assets located within Ontario, this Court has jurisdiction to deal with this application.

(b) Recognition

[13] Under s. 47 of the CCAA, a court shall make an order recognizing a foreign proceeding if it is satisfied that the application for such recognition "relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding." Section 47(1) states:

If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding. (Underlining added)

[14] Section 45(1) of the CCAA defines "foreign proceeding" as:

a judicial or an administrative proceeding, including an interim proceeding, in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

[15] As the Administrators were appointed by the English High Court pursuant to the *Insolvency Act 1986*, there can be no doubt that the foreign proceeding is a "foreign proceeding" within the meaning of s. 45(1) of the CCAA.

[16] It is to be noted that under s. 47(1), the order sought is mandatory if the conditions in that section are met. This is in keeping with the purpose of the new cross-border provisions of the CCAA as set out in s. 44 to promote cooperation with foreign jurisdictions in cases of cross-border insolvencies. This statutory recognition of comity follows the principles of international

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comity in insolvency situations recognized in such cases as *Olympia & York Developments Ltd. v. Royal Trust Co.*(1993), 20 C.B.R. (3d) 165, *Re United Air Lines Inc.* (2003), 43 CBR (4th) 284 and *Re Lear Canada* (2009), 55 C.B.R. (5th) 57.

[17] In this case as the conditions of s. 47(1) have been met, an order recognizing the foreign proceedings shall go. It is to be noted that Lloyds TSB Commercial Finance Limited, which holds a debenture and is owed approximately \$500 million, supports the appointment of the Administrators and this application in Canada. The only other party with a registered security interest in Canada is Air Canada, but nothing is owed by the foreign debtors to it. Rather, there is a receivable of approximately \$9.6 million owed by Air Canada to Aero Inventory UK.

[18] Under s. 47(2) of the CCAA, a court making an order recognizing a foreign proceeding must specify whether such proceeding is the "foreign main proceeding" or the "foreign non-main proceeding". Under s. 45(1), a "foreign main proceeding" is a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." Section 45(2) provides that in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

[19] Aero Inventory UK has a registered office in Quebec. Thus by virtue of section 45(2), in the absence of proof to the contrary, Quebec is deemed to be the centre of its main interest. However, the foreign debtors have business interests globally and their head office is in the United Kingdom from where they are managed and administered. Aero plc is publicly listed on the AIM of the London Stock Exchange. I am satisfied that this evidence is sufficient to conclude that the main interests of the foreign debtors are centred in the United Kingdom and thus the foreign proceeding should be specified as the "foreign main proceeding".

Other relief sought

(a) Appointment of an Information Officer

[20] The applicants have requested an order appointing KPMG Inc. as an information officer in respect of these proceedings. While the CCAA does not expressly provide for the appointment

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of an information officer, such an officer is sometimes appointed under the Court's general powers to make appropriate orders in the circumstances. In the case of an application such as this in connection with a cross-border insolvency, the Court is expressly given the power to make such order as it considers appropriate in section 49(1), so long as the order is consistent with any other order that may be made under the Act, and in section 50 which provides:

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

[21] The order sought would authorize, but not require, the information officer to provide such assistance to the Foreign Representative as might be required, and authorize the information officer to respond to reasonable requests for information from stakeholders. The information officer would be required to report to the Court at least once every three months regarding the proceedings and other information the information officer believes material.

[22] In the circumstances of this case, in which the foreign debtors have no place of business or employees in Canada, it is particularly appropriate to have an information officer appointed who can deal with matters as they arise in Canada and who can also provide information and advice to the Foreign Representative as needed. The order sought shall go.

(b) Stay of Set-Off Rights

[23] In this case, because of the fact that the foreign debtors do not have physical control of their inventory in Canada as the inventory is in warehouses operated by Aveos, a concern has been raised that set-off could adversely impact the foreign proceeding and impact the recoveries available to creditors. Although Aveos is a purchaser from Aero Inventory (UK), it apparently is owed approximately \$1 million and its contract with Aero Inventory (UK) contains a liquidated damage clause.

[24] As stated, a court on an application under the CCAA in cross-border insolvencies has the power under sections 49(1) and 50 to make an order considered appropriate in the circumstances.

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[25] The provisions regarding set-off in section 21 must, however, be considered in the request for relief regarding a stay of set-off. Section 21 provides:

21. The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

[26] The applicants submit that while the provisions of section 21 of the CCAA may prevent a court from permanently barring all claims of set-off, it does not prevent a court from making an order in appropriate circumstances temporarily staying the determination and enforcement of a person's rights of set-off pending leave of the court. They rely on *Re Air Canada* (2003), 45 C.B.R. (4th) 13. In that case, Farley J. reviewed in some detail the law of set-off and struck from the Initial Order a provision that no person could set off any obligations of Air Canada to such person which arose prior to the Initial Order. Farley J. held that while the Initial Order should recognize the rights of set-off permitted under section 18.1 of the CCAA (now section 21), such rights could be temporarily stayed pending further order of the Court. In that case there was no opposition to such a temporal stay. He stated:

With respect to the question of what I have described as a temporal stay, there does not appear to be any opposition by the Moving Creditors to the proposition that whatever their rights of set-off in substance are determined to be, that such determination and enforcement of such determined rights should await until a convenient time when AC has stabilized (or I suppose, alternatively cratered). It would seem to me that the likely time for this would be in conjunction with the formation of a reorganization plan of arrangement and compromise. However I leave that question open pending future submissions and further order of the court emanating as a result thereof.

[27] I accept that a court may temporarily stay the right of set-off protected in section 21 of the CCAA. How temporary that stay should be will obviously depend on the circumstances existing at the relevant time.

[28] In his witness statement provided to the High Court in England, Mr. Trupp, a director of the foreign debtors, discussed concerns relating to the fact that the inventory is out of their control. He stated:

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19. The Companies are, in their current financial position, extremely distressed with the threat of creditor enforcement action in key countries.

and

29. This matter is now urgent and there are a number of reasons for this urgency, including:

(a) the supply of airlinc, parts is time critical and must continue uninterrupted;

(c) there is a risk that if the stock is not secured quickly it will disappear or become very difficult to access, particularly as it is not in the physical control of the Companies. There is therefore a risk of significant loss to the secured creditors and creditors generally if there is any delay in getting the administration orders made. Customers have direct control of the stock and could seize it if concerned about the solvency of the Companies;

[29] The applicants submit that no party is unreasonably prejudiced by the proposed set-off relief which is intended to operate only to prevent fresh inventory of the foreign debtors from being appropriated by third parties without an ensuing payment. The proposed relief does not affect the position of the parties on the date of the recognition order but ensures that no further prejudice is caused to the foreign debtors' estate. If the foreign debtors' inventory were in their possession rather than in the possession of third parties, they could control and minimize such potential prejudice by obtaining assurances of payment ahead of providing new supplies.

[30] The applicants are concerned that as Aveos has physical control of the foreign debtors' inventory, any refusal to supply their inventory without assurances of payment might lead to the grounding of several airplanes, thereby causing prejudice to the foreign debtors' customers. They submit that in the circumstances, the better option to ensure continued supply to customers and payment for fresh inventory is by the granting of a temporal stay of any right of set-off

[31] It seems to me that at this stage the relief sought should be granted. The amount of inventory in Canada, \$130 million, is substantial. The consolidated interim financial statements of the foreign debtors as at December 30, 2008 indicate that there are total inventories of U.S. \$751 million, although Mr. Trupp believes these are inaccurate and may be overstated. It is apparent that the Canadian inventory comprises a substantial portion of the total inventory. That


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inventory should be properly protected to enable the foreign debtors to attempt to continue as a going concern.

[32] Taking into account the purposes of part IV of the CCAA relating to cross-border insolvencies, as set out in section 44, including co-operation between the courts of the jurisdictions involved and the maximization of the value of the debtor company's property, it is appropriate in these circumstances of this case to stay set-off rights pending further order of this Court. How long that stay should be is a matter of conjecture at this stage. The proceedings have just commenced and what the outcome will be is not possible to know. Thus the length of any stay of set-off rights is unknown.

[33] The order contains a 4 days notice come-back clause and any person concerned with the order thus has the ability to make application to vary or rescind the order.

[34] The application is granted in accordance with these reasons.


Newbould J.

Released: November 12, 2009

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AND ALLAN WATSON GRAHAM OF KPMG
LLP AS JOINT ADMINISTRATORS**

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Respondents

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