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September 22, 2021

Hon. Justice John Bodurtha
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My lord:

Re: Atlantic Crane & Material Handling Limited ("Atlantic Crane"), Labrador Cranes 2005 Limited ("Labrador Cranes"), and LCB Rentals Limited ("LCB") (collectively "Atlantic Crane Group"): Hfx No. 507069

A motion is scheduled to be heard before you on September 29, 2021 at 3 p.m.

We represent the applicant Atlantic Crane Group, which applies for a Sale Approval and Vesting Order pursuant to Section 65.13 of the *BIA,* approving the sale of the Atlantic Crane Group's assets ("hereinafter "the Assets") to Hercules SLR Inc. (the "Purchaser"), and vesting title to same in the Purchaser.

Atlantic Crane Group also moves for order granting an extension of the time to file a Proposal.

Please accept these as the Atlantic Crane Group's submissions in this matter.

Factual Update

The Court is familiar with the circumstances leading up to the granting of the Stalking Horse and Bidding Procedures Order on August 19, 2021.

Reference is made to the Third Report of MNP Ltd., Proposal Trustee (the "Trustee" and the "3rd Report") which outlines in great detail the process undertaken in conformation with the Court's order. The 3rd Report details that:

(a) Two parties expressed an interest in being the Stalking Horse Bidder;

(b) Russel Industries Corp. ("RIC") entered into a Stalking Horse Asset Purchase Agreement with Atlantic Crane Group;

(c) The assets of Atlantic Crane Group were the subject of extensive marketing by the Trustee;

(d) One competing bid was received from the Purchaser in an amount $100,000 higher than the RIC bid;

(e) An auction was held, and there were no further bids, as a result of which the Purchaser's submitted Asset Purchase Agreement ("APA") was deemed accepted.

Argument

Sale Approval and Vesting Order

The Sale Approval and Vesting Order is in a form previously approved by the Court. It should be noted that the order:

(a) Vests the Assets in the Purchaser free and clear of all encumbrances, except those specifically identified in the order (in this case the mortgage on the New Brunswick property);

(b) Gives the creditors the same priority position over the sale proceeds as they enjoyed over the Assets; and

(c) Requires the Trustee to hold the sale proceeds in trust pending further order of the Court, with the exception of the payment of a $50,000 break fee to RIC.

That "further order" may come after a motion for distribution of the sale proceeds, in a proposal, or in a bankruptcy *simpliciter*. The ultimate distribution process may or may not be contested. That remains to be seen.

It is submitted that the sale process has been conducted fairly and appropriately. The process has resulted in an additional $100,000 being bid. However, it should be noted that RIC is entitled to the sum of $50,000 as a break fee, as provided in the Stalking Horse and Bidding Procedures Order.

The Extension

The Atlantic Crane Group applies to the court pursuant to section 50.4(9) of the *BIA*:

> 50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this

> subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (*a*) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (*b*) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (*c*) no creditor would be materially prejudiced if the extension being applied for were granted.

Each of the three branches of the test which the Atlantic Crane Group must satisfy are dealt with separately.

Good faith and Due Diligence

The Atlantic Crane Group has clearly acted in good faith and with due diligence, as is evidenced by the time and energy expended in obtaining a favourable sale of the Assets to the benefit of the creditors.

Likelihood of a Viable Proposal

Justice Moir had this to say about the likelihood of a viable proposal being made[1]:

> 22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.
>
> 23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

[1] *Re Kocken Energy Systems Inc.*, 2017 NSSC 80 [Tab 1]

> 24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

It is clear that "a reasonable level of effort dictated by the circumstances" has been made. Funds will be retained by the Trustee. Whether distribution will be by way of a proposal, a distribution order or in a bankruptcy is yet to be determined.

No Creditor Would Be Materially Prejudiced

There is no evidence that any creditor would be materially prejudiced by the stay being sought.

Summary on the Extension

It is respectfully submitted that the Atlantic Crane Group has adduced satisfactory evidence to show:

(a) that the Atlantic Crane Group has acted, and is acting, in good faith and with due diligence;

(*b*) that the Atlantic Crane Group will likely be able to make a viable proposal if the extension being applied for is granted; and

(*c*) that no creditor will be materially prejudiced if the extension is granted.

All of which is respectfully submitted.

BOYNECLARKE LLP

Tim Hill, Q.C.
TH/

TAB 1

2017 NSSC 80, 2017 CarswellNS 187, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

2017 NSSC 80
Nova Scotia Supreme Court

Kocken Energy Systems Inc., Re

2017 CarswellNS 187, 2017 NSSC 80, 277 A.C.W.S. (3d) 21, 50 C.B.R. (6th) 168

In the Matter of the Proposal of Kocken Energy Systems Inc.

Gerald R.P. Moir J.

Heard: January 5, 2017
Judgment: January 10, 2017
Written reasons: March 22, 2017
Docket: Hfx. 458774, 40675, Estate No. 51-2097016

Counsel: Tim Hill, Q.C., for Kocken Energy Systems Incorporated
Gavin MacDonald, for Bank of Montreal

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time

Headnote

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time
Applicant company manufactured process equipment for oil and gas industry — In 2011, two shareholders of company moved manufacturing from Alberta to Nova Scotia and company acquired plant in New Brunswick in 2015 and incorporated in Barbados — Company's main secured creditor bank had 3 million dollars in venture — Company brought motion for 45 day extension to file proposal for bankruptcy pursuant to Bankruptcy and Insolvency Act — Motion granted with conditions — Since cross-examinations had not been heard, there was no resolve to conflicting evidence on company's side and generalized opinions without raw facts on bank's side — However, judge was satisfied on three points that absence of information left bank and insolvency practitioners with serious questions relevant to bank's interest in company's inventory and receivables and they had rationally founded suspicion that equipment could be transferred to Barbados company without payment, compromising bank's interest in inventory and receivables — On conditional approval, reservation stemmed from strange purchase orders from Barbados company to Canadian company with large prices — It was ordered that company give four business days' notice of bank before shipping anything out of Canada and advise bank of amount to be paid and arrangements for payment.

Table of Authorities

Cases considered by *Gerald R.P. Moir J.*:

H & H Fisheries Ltd., Re (2005), 2005 NSSC 346, 2005 CarswellNS 541, 239 N.S.R. (2d) 229, 760 A.P.R. 229, 18 C.B.R. (5th) 293 (N.S. S.C.) — considered

NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc. (2015), 2015 ONSC 5139, 2015 CarswellOnt 12962, 30 C.B.R. (6th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 50.4(9) [en. 1992, c. 27, s. 19] — considered

s. 50.4(9)(b) [en. 1992, c. 27, s. 19] — considered

s. 178 — considered

MOTION for 45 day extension to file proposal pursuant to *Bankruptcy and Insolvency Act*.

Gerald R.P. Moir J. **(orally):**

Introduction

1 Kocken Energy Systems Incorporated filed a notice of intention to make a proposal on December 7, 2016. It moves to extend the deadline for filing the proposal by the maximum allowed under the *Bankruptcy and Insolvency Act*, forty five days. Its major secured creditor, the Bank of Montreal, opposes the extension. It says that the stay should end and Kocken should be bankrupt. Alternatively, the extension should be no more than thirty days.

Facts

2 Kocken manufacturers specialized process equipment for the oil and gas industry. The company's predecessor did business in Alberta since about 2005. By 2007, it had just two shareholders, William Famulak and Arthur Sager. In 2011, they decided to move manufacturing to Eastern Canada. In 2015, Kocken acquired a plant at St. Antoine, New Brunswick.

3 The Bank of Montreal provided financing to purchase the plant as well as current financing. Kocken also had a relationship with the Royal Bank of Canada.

4 On Tuesday, November 8, 2016 the Bank of Montreal stopped extending current credit. Kocken reverted to the Royal Bank. The Bank of Montreal invited PricewaterhouseCoopers to review Kocken's performance and make recommendations. PricewaterhouseCoopers prepared, and Bank of Montreal and Kocken endorsed, an engagement letter dated November 14. Mr. David Boyd took charge of the assignment. (I have an affidavit from him.)

5 PricewaterhouseCoopers studied the St. Antoine plant, read accounting records, and interviewed Kocken operatives until about November 21, 2015. After that, it reported to the Bank of Montreal. The bank issued a notice of intention to enforce security on November 25.

Kocken and Bank of Montreal Breakdown

6 I have the affidavit of Ms. Anna Graham for the bank. She swears to a debt well over $3 million dollars and security in the St. Antoine plant, personal property, accounts receivable, and inventory. She also swears to these defaults at para. 9 of her affidavit:

Based on the information available to BMO, the Borrower has breached its obligations to BMO including the following:

insufficient working capital to meet financial covenants, inability to fund current operations, entering into the Reorganization, as defined in the Boyd Affidavit, failing to provide financial statements and information, ceasing to conduct its banking with BMO and disposing of assets subject to the Security.

7 In para. 10, Ms. Graham swears that these defaults continue. She adds that Kocken failed to respond to requests for basic information. She offers her opinion that Kocken is deliberately hiding information.

8 At the heart of Ms. Graham's concerns is the belief that Kocken underwent some kind of reorganization and Kocken assets are being transferred to a related company recently incorporated in Barbados. That company is Kocken Energy Systems International Incorporated.

9 That this is the fundamental concern underlying the bank's decisions to suspend current financing, to enforce security, and to oppose the proposal is apparent from para. 16 of Mr. Boyd's affidavit as well as Ms. Graham's affidavit as a whole.

10 According to Mr. Sager, Kocken was simply a manufacturer. Most contracts for the sale of manufactured equipment and the intellectual property behind the equipment were with Mr. Famulak independently. Mr. Sager retained Mr. Rick Ormston, an accountant and consultant of Halifax about establishing a company that would be the design and engineering base for Mr. Famulak. That consultation lead to the Barbados company I mentioned, which I shall refer to as Kocken Barbados.

11 Mr. Ormston developed a plan, the details of which were unknown to the Bank of Montreal or PricewaterhouseCoopers. There are numerous contradictions between Mr. Boyd's affidavit and Mr. Sager's second affidavit, which responded to Mr. Boyd's. The contradictions concern what one said to the other, what Mr. Sager informed Mr. Boyd, and the subjects on which information was withheld or unavailable.

12 No one was cross-examined and I am in no position to resolve the evidentiary contradictions. The conflicting evidence is therefore unhelpful for making findings. Similarly, Ms. Graham's affidavit contains many generalized opinions without the raw facts required for findings on her subjects. I am, however, satisfied on three points.

13 Firstly, neither the Bank of Montreal nor PricewaterhouseCoopers knew the details of the Ormston plan. The absence of information left the bank and the insolvency practitioners with serious questions, itemized at para. 18 of Mr. Boyd's affidavit. Secondly, these questions were relevant to the bank's interest in Kocken inventory and receivables. Thirdly, the bank and the insolvency practitioners had a rationally founded suspicion that equipment may be transferred to Kocken Barbados without payment, compromising the bank's interest in inventory and receivables.

Recent Developments

14 In the last three working days, Kocken made some disclosure to the bank and PricewaterhouseCoopers. Most importantly, Kocken delivered a copy of the Ormston plan. It referred to draft documents that had not been disclosed yet, but the bank and the trustee must now know what the plan was really about.

Disposition

15 Subsection 50.4(9) provides three thresholds that the insolvent must prove before the court has any discretion to grant an extension:

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and,

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

16 I am not prepared to embrace the generalized allegations made in Ms. Graham's affidavit because this court makes findings on evidence of raw fact. Nor can I resolve the evidentiary contradictions between Mr. Sager and Mr. Boyd. What is left suggests good faith and due diligence.

17 I reject the submission that Kocken's initial evidence failed to disclose material facts. This submission is premised on the PricewaterhouseCoopers characterization of the relationship between Kocken and Kocken Barbados. As I said, the contradictions between the evidence of Mr. Boyd and Mr. Sager are irresolvable at present. The rest of the evidence supports good faith and due diligence.

18 I am satisfied on the first threshold.

19 Next is the requirement that a viable proposal is likely to be made.

20 Ms. Graham swears that the Bank of Montreal "has lost all confidence and trust in current management and ownership". "BMO will not engage in negotiations." She is of the view "that any proposal is doomed to fail". The Bank of Montreal is the primary secured creditor and its support will be necessary when the time comes for a vote.

21 Such statements by a secured creditor with a veto are not determinative. They are forecasts rather than evidence of present fact. We must not assume intransigence in a world in which misunderstandings occur, they are sometimes corrected, and trust is sometimes restored in whole or in part. Nor may we, in this case, assume that the proposed terms will require a restoration of confidence or trust or a continuing relationship with the Bank of Montreal.

22 I have some difficulty with the decision of Justice Penny in *NS United Kaiun Kaisha, Ltd. v. Cogent Fibre Inc.*, 2015 ONSC 5139 (Ont. S.C.J.), which suggests that s. 50.4(9)(b) requires at least a hint of what the insolvent will offer to the secured creditor and what the proposal will contain. It is in the nature of proposals that they are developed and, if an extension is needed, the proposal is developing.

23 The requirement is "would likely be able to make a viable proposal", not "has settled on terms likely to be accepted". I think that is the point made by Justice Goodfellow in *H & H Fisheries Ltd., Re*, 2005 NSSC 346 (N.S. S.C.), when he says that s. 50.4(9)(b) means "that a reasonable level of effort dictated by the circumstances must have been made that gives some indication of the likelihood a viable proposal will be advanced within the time frame of the extension applied for."

24 The affidavits prove the cash flow projections, the preparation of other documents or reports, arrangements for appraisals, the trustee's investigation of accounts receivable, and the trustee's opinion that time is required for analysis of revenue and expense. Further, terms for a proposal are being discussed and need more development. In the meantime, Kocken has remained in operation. I am told that one appraisal has been delivered and another is close. All of this has been done over the holiday season. This evidence satisfies me that there is a better than even chance of a viable proposal being developed.

25 Finally, I have only one reservation about "no creditor would be materially prejudiced". The reservation stems from very strange purchase orders from Kocken Barbados to Kocken with very large prices. They purport to be conditional on resolving issues between Kocken and the Bank of Montreal.

26 By virtue of its s. 178 security, the bank owns the inventory. The extension would prejudice the bank if it was used to deliver inventory off shore without getting paid first.

27 I can diminish my concern by exercising my inherent jurisdiction to control this proceeding and the parties to it. I will order that Kocken give four business days' notice to the bank before it ships anything out of Canada and, along with the notice, advise the bank of the amount to be paid and the arrangements for payment. In view of my willingness to make such an order, I find that no creditor will be prejudiced by the order extending time.

28 I am prepared to extend the period for filing a proposal by the full 45 days, counting from last Thursday.

Motion granted with conditions.

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