COURT FILE NUMBER	Q.B. No. 1884 of 2019
COURT OF QUEEN'S BENCH FOR SASKATCHEWAN IN BANKRUPTCY AND INSOLVENCY	
JUDICIAL CENTRE	SASKATOON
APPLICANT	S3 MANUFACTURING INC.
RESPONDENT	ALVAREZ & MARSHAL CANADA INC

BRIEF OF LAW

I. INTRODUCTION

1. This Brief is filed by the Applicants in support of their application for an order declaring the Proof of Claim submitted February 11th, 2020 on behalf of S3 Wireform (the "Claim") be deemed valid per paragraph 18 of the Claims Process Order issued January 11th, 2020 (the "Process Order") and the Notice of Revision or Disallowance (the "Disallowance") be overturned.

2. In the alternative, the Applicant requests an order, pursuant to s. 11 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended (the "*CCAA*" or the "*Act*") that the Respondent pay $17,858.62 and accept delivery of its equipment.

II. FACTS

3. The relevant facts are laid out in the affidavit of Joe Gallant, March 24th, 2020. Briefly:
    a. S3 Manufacturers items such as Harrow Tines and Springs for Morris Industry.
    b. These components are made to order and cannot be sold to other organizations.
    c. Morris and S3 customarily did business via Purchase Orders.
    d. A Purchase Order (Exhibit A) was submitted August 2nd, 2019 from Morris to S3..
    e. The materials to complete the orders were ordered, paid for and delivered to the Applicant.
    f. S3 completed the Order on or about September 3, 2019.
    g. In March of 2020, Morris requested part of the Order be sent and paid $4,173.75 to have that portion of the Order released

h. The Plaintiff became aware of the Respondents had obtained the Process Order on or about January 15th, 2020. A proof of Claim was submitted in February of 2020 claiming $22,032.37. The Notice of Revision or Disallowance was received on or about February 20th, 2020 disallowing the claim in its entirety.

i. After review, it was discovered that the payment of $4,173.75 was omitted from the original claim. Therefore, S3 is now claiming the reduced amount of $17,858.62.

III. ISSUES

A. Does a contract exist between S3 and Morris?

B. Is the Respondent's disallowance of the claim reasonable?

C. Has the agreement been resiliated?

D. What order is appropriate?

IV. ARGUMENT

A. Was a contract in place for the Second and Third Orders?

4. The customary order procedure between the Applicant and Morris Industries Ltd. was by purchase order. Morris Industries Ltd. issued a purchase in the usual way. It is respectfully submitted that the purchase order represented an agreement between the parties that Morris Industries would purchase all of the items ordered. Morris specifically requested that the order be partially completed. The partial completion did not cancel the remainder of the order, but instead expedited part of the order with the understanding that the rest was still outstanding and owed.

5. The Applicant completed the manufacture of the entire Order. The Applicant accommodated the request of Morris Industries Ltd in partial release. The Applicant honored the agreement and did everything it could under the agreement and to accommodate Morris Industries Ltd.

6. There is no suggestion that Morris Industries Ltd. was at any time entitled to unilaterally refuse to accept delivery and deny payment of the remainder of the order.

B. Is the Respondent's disallowance of the claims for the Second and Third Orders reasonable?

7. The Respondent has relied upon the delayed delivery of the remainder of the Order to disallow the claims for the Second and Third Orders. It is unreasonable to imply into the order that Morris Industries Ltd. had any right to unilaterally cancel the order, or refuse delivery of the order, and by refusing delivery in order to be able to avoid payment. The position taken by the Respondent relies upon such an unreasonable interpretation of the agreement.

C. Has the agreement been resiliated?

8. S. 32(1) of the *Act* describes the proper process for disclaimer or resiliation of an agreement:

> 32(1): Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

9. When proper notice is given, a party then has 15 days to make an application for the agreement to not be disclaimed or resiliated per 32(2). There are four non-exclusive factors for the court to consider in determining whether disclaimer or resiliation is proper found in 32(4)

> 32(4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

10. It is the Applicant's position that there was never a resiliation or disclaimer of the agreement. No notice of resiliation, in the proscribed form or otherwise, was received by the Applicant.

11. In any event, had the agreement between the parties been resiliated, S. 32(7) of the *Act* would allow to the Applicant a provable claim. S. 32(7) provides:

> 32(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

12. Had the agreement been resiliated the provable claim of the Applicant would be virtually the same given the nominal salvage value of the specialized materials.

D. What order is appropriate?

13. The Court's authority to rule on this issue is found in the *CCAA*. It has the power to make any order it considers "appropriate". This is informed by the restrictions found in the *CCAA* and consideration of its statutory objectives (*Ascent Industries Corp. (Re)*, 2019 BCSC 1880 at para 60, (*Ascent)*). Fairness is a touchstone in *CCAA* proceedings, and stakeholders are to be treated as fairly and equitably as the circumstances allow (*Ascent* at para 74).

14. Counsel submits that the leading case in analyzing the statutory objective of the *CCAA* is *Ted Leroy Trucking [Century Services] Ltd., Re* 2010 SCC 60 (*Leroy*). Justice Deschamps described the three pathways to exit *CCAA* proceedings at para 14:

> 14 The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15. Justice Deschamps then discussed the objectives of the *CCAA* in paras 17 and 18:

> 17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).
>
> 18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

16. An appropriate order should be fair to the Applicant. It is not reasonable to simply state that the Respondent does not intend to purchase the very items which Morris Industries Ltd. ordered. There should be no unilateral ability on the part of Morris Industries Ltd. or the Respondent to cancel the order or refuse delivery. Further, Morris Industries Ltd. consistently assured payment would be forthcoming. The Applicant honored the agreement and accommodated the request of Morris Industries Ltd. to partially deliver for partial payment while being assured payment would be forthcoming. The Respondent cannot now fairly rely upon non-delivery as a technical excuse to avoid responsibility under the agreement. The Respondent should be estopped from taking such a position.

17. An appropriate order should be consistent with legal principles. Contracts and representations should be honored. Misrepresentations should not be the basis upon which a contracting party is allowed to default under its agreement.

18. But for the operation of the *Act*, the Agreement would be governed by the *Sale of Goods Act* R.S.S. 1978, c. S-1 ("*Sale Act*"). Under the *Sale Ac*t and under circumstances all rights would fall to the vendor not the purchaser. Sec. 27 of the *Sale Act* provides:

> 27 It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract for sale.

The Applicant wishes to complete the agreement by delivering the ordered goods and receiving payment. Section 37(1) of the *Sale Act* states:

> 37(1) When the seller is ready and willing to deliver the goods and requests the buyer to take delivery and the buyer does not within a reasonable time after the request take delivery of the goods he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods.

The obligation to pay for that which is ordered is not determined solely by when property passes.

19. An appropriate order should be consistent with the viability of Morris Industries Ltd. The product being supplied by Morris Industries Ltd. is a quality product attractive to the market Morris Industries Ltd. serves.

20. An appropriate order should avoid unnecessary waste and damage to parties honoring agreements with Morris Industries Ltd. Under the Applicant's request, $17,858.62 is currently in dispute. If the Respondent disallowance of the is maintained the specialized product would basically be wasted.

21. An appropriate order should support, not damage, what has been a long-term and important relationship between the Applicant and Morris Industries Ltd. and should not damage the goodwill of Morris Industries Ltd.

22. An Appropriate order should honor the agreement between the parties and avoid the unfair and embarrassing position of allowing the Respondent to avoid responsibility for payment based on its ongoing failure to pay and request for partial delivery.

V. RELIEF SOUGHT

23. We seek an order overturning the Notice of Revision or Disallowance and ordering payment in the amount of $17,858.62, on delivery of the remainder of the Order to the Respondent.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Regina, Saskatchewan, this 19th day of June, 2020.

GERRAND RATH JOHNSON

Per:_____

Solicitors for the Applicants,
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