

CITATION: Clover Leaf Holdings Company, Re., 2019 ONSC 6966
COURT FILE NO.: CV-19-631523-00CL
DATE: 20191204

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF CLOVER LEAF HOLDINGS COMPANY, CONNORS BROS. CLOVER
LEAF SEAFOODS COMPANY, K.C.R. FISHERIES LTD., 6162410 CANADA
LIMITED, CONNORS BROS. HOLDINGS COMPANY AND CONNORS
BROS. SEAFOODS COMPANY

BEFORE: HAINEY J.

COUNSEL: *Kevin Zych, Sean Zweig and Mike Shakra* for the Applicants

Marc Wasserman and Martino Calvaruso for the Monitor

Natasha MacParland for FCF Co. Ltd.

Peter Rubin for Wells Fargo

Jeremy Opolsky for Lion Capital

Robert Chadwick and Christopher Armstrong for Terms Lenders

HEARD: November 25, 2019

ENDORSEMENT

Overview

[1] On November 22, 2019, the applicants (“Clover Leaf”), obtained an initial order pursuant to the *Companies Creditors Arrangement Act* R.S.C. 1985, c. C-36 as amended (“CCAA”) which appointed Alvarez & Marsal Canada Inc. as Monitor and stayed all proceedings against the applicants, their officers, directors and the Monitor until December 2, 2019.

[2] On November 25, 2019 the applicants sought an amended and restated order to supplement the limited relief obtained pursuant to the initial order. I granted the order and indicated that I would provide a more detailed endorsement. This is my endorsement.

Facts

[3] The applicants are the Canadian affiliates of Bumble Bee Foods, an international seafood supplier based in the United States (“Bumble Bee”).

[4] The applicants operate the Clover Leaf business in Ontario, New Brunswick and Nova Scotia. They have approximately 650 employees in Canada. The Clover Leaf business has long been associated with well-known brands of canned seafood products in Canada.

[5] While the Clover Leaf business in Canada is cash flow positive and profitable, the balance sheet of the Bumble Bee group, including the applicants, has suffered extreme financial pressures primarily due to extensive litigation against Bumble Bee in the United States.

[6] As a result, the Bumble Bee group has filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (“Chapter 11 proceedings”) and the U.S. Bankruptcy Court has granted certain First Day Orders in those proceedings.

[7] The applicants are seeking similar relief in these proceedings to stabilize and protect their business in order to complete a comprehensive and coordinated restructuring of Clover Leaf in Canada and Bumble Bee in the United States. This will include an asset sale of each of their respective businesses (“Sale Transaction”). This outcome is the result of extensive consideration of various options and consultations with Bumble Bee’s secured lenders in an attempt to restructure the business.

Applicants’ Position

[8] The applicants submit that this *CCAA* proceeding is in the best interests of their stakeholders and will result in their business being conveyed on a going concern basis with minimal disruption. The breathing room afforded by the *CCAA* and Chapter 11 proceedings, and the other relief sought, will allow the applicants to continue operations in the ordinary course, maintaining the stability of their business and operations, and preserving the value of their business while the Sale Transaction is implemented.

[9] Although the applicants are party to a stalking horse asset purchase agreement, they are not seeking any relief in connection with it or the Sale Transaction at this stage. The applicants will return to court for that relief at a later date. They are, instead, only seeking the limited relief required at this time.

Issues

[10] I must determine the following issues:

- a) Is the relief sought on this application consistent with the amendments to the *CCAA* which came into effect on November 1, 2019?
- b) Should I extend the stay of proceedings to December 31, 2019?
- c) Should I approve the proposed DIP financing and grant the DIP charge?

- d) Should I grant the administration charge and the directors' charge?
- e) Should I approve the KEIP and the KEIP charge, and grant a sealing order?
- f) Should I authorize the applicants to pay their ordinary course pre-filing debts? and
- g) Should I grant the intercompany charge?

Analysis

The New CCAA Amendments

[11] In determining this application I must consider the amendments made to the *CCAA* that came into force on November 1, 2019.

[12] Section 11.001 of the *CCAA* provides as follows:

An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[13] The purpose of this new section of the *CCAA* is to make the insolvency process fairer, more transparent and more accessible by limiting the decisions made at the outset of the proceedings to measures that are reasonably necessary to avoid the immediate liquidation of an insolvent company and to allow for broader participation in the restructuring process.

[14] The applicants submit that the relief sought on this application is limited to what is reasonably necessary in the circumstances for the continued operation of their business. Further relief, including approval of the Sale Transactions and related bidding procedures, will not be sought until a later date on reasonable notice to a broader group of stakeholders.

[15] I am satisfied that the relief sought on this motion is reasonably necessary for the continued operation of the applicants for the period covered by the order sought to allow them to take the next steps toward a smooth transition of their business to a new owner for the following reasons:

- (a) Prior to initiating insolvency proceedings here and in the United States the applicants conducted a thorough assessment of their options and consulted with all their major creditors before arriving at the proposed Sale Transaction;
- (b) The applicants' stakeholder such as employees, customers and suppliers who have not yet been consulted about these *CCAA* proceedings will not be prejudiced by the order sought. In fact, in my view, they will suffer prejudice if the order is not granted;
- (c) The applicants have the support of their secured creditors who are expected to suffer a shortfall if the Sale Transaction closes;

- (d) The applicants are not the cause of these insolvency proceedings; and
- (e) The applicants are only seeking relief that is reasonably necessary to take the next steps toward a smooth transition to a new owner.

[16] For these reasons, I have concluded that the relief sought is consistent with the new amendments to the *CCAA*.

[17] I will now consider whether it is appropriate to grant certain of the specific terms of the amended and restated initial order.

Stay of Proceedings

[18] The applicants seek to extend the stay of proceedings to December 31, 2019.

[19] I am satisfied that the stay of proceedings should be extended as requested for the following reasons:

- (a) The applicants have acted and are acting in good faith with due diligence;
- (b) The stay of proceedings requested is appropriate to provide the applicants with breathing room while they seek to restore their solvency and emerge from these *CCAA* proceedings on a going-concern basis;
- (c) Without continued protection under the *CCAA* and the support of their lenders the stability and value of the applicants' business will quickly deteriorate and will be unable to continue to operate as a going-concern;
- (d) If existing or new proceedings are permitted to continue against the applicants, they will be destructive to the overall value of their business and jeopardize the proposed Sale Transaction; and
- (e) The Monitor supports the requested extension of the stay of proceedings.

DIP Financing

[20] The applicants submit that the proposed DIP financing should be approved for the following reasons:

- (a) The proposed DIP financing is reasonably necessary for the continued operation of Clover Leaf in the ordinary course of business during the period covered by the order sought within the meaning of s. 11.2(5) of the *CCAA*. It is also consistent with the existing jurisprudence that DIP financing should be granted "to keep the lights on" and should be limited to terms that are reasonably necessary for the continued operation of the company; and
- (b) The proposed DIP financing is reasonably necessary to allow the applicants to maintain liquidity and preserve the enterprise value of their business while the Sale Transaction

is being pursued. The proposed DIP financing will be used to honour commitments to employees, customers and trade creditors.

[21] I am satisfied for these reasons that the requirements of s. 11.2(5) of the *CCAA* are satisfied.

[22] In this case, the applicants are not borrowers under the proposed DIP financing but they are proposed to be guarantors. The applicable jurisprudence has established the following factors which should be considered to determine the appropriateness of authorizing a Canadian debtor to guarantee a foreign affiliate's DIP financing:

- (a) The need for additional financing by the Canadian debtor to support a going concern restructuring;
- (b) The benefit of the breathing space afforded by *CCAA* protection;
- (c) The lack of any financing alternatives to those proposed by the DIP lender;
- (d) The practicality of establishing a stand-alone solution for the Canadian debtor;
- (e) The contingent nature of the liability of the proposed guarantee and the likelihood that it will be called upon;
- (f) Any potential prejudice to the creditors of the Canadian entity if the request is approved; and
- (g) The benefits that may accrue to the stakeholders if the request is approved and the prejudice to those stakeholders if the request is denied.

[23] I have concluded that I should approve the proposed DIP financing and the proposed DIP charge for the following reasons:

- (a) Because of its current financial circumstances, the Bumble Bee Group cannot obtain alternative financing outside of the Chapter 11 and *CCAA* proceedings;
- (b) The applicants' liquidity is dependent on the secured lenders providing the proposed DIP financing;
- (c) The proposed DIP financing is necessary to maintain the ongoing business and operations of the Bumble Bee Group, including the applicants;
- (d) While the proposed DIP financing is being provided by the applicants' existing secured lenders rather than new third-party lenders, eleven third-party lenders were solicited with no viable proposal being received. In my view, this demonstrates that the proposed DIP financing represents the best available DIP financing option in the circumstances;
- (e) The proposed DIP financing will preserve the value and going concern operations of the applicant's business, which is in the best interests of the applicants and their stakeholders;

- (f) Because the DIP lenders are the existing secured lenders, they are familiar with the applicants' business and operations which will reduce administrative costs that would otherwise arise with a new-third party DIP lender;
- (g) Protections have been included in the amended and restated initial order to minimize any prejudice to the applicants and their stakeholders;
- (h) The amount of the proposed DIP Financing is appropriate having regard to the applicants' cash-flow statement; and
- (i) The Monitor supports the proposed DIP financing and its report confirms that the applicants will have sufficient liquidity to operate their business in the ordinary course.

Payment of Pre-Filing Obligations

[24] To preserve normal course business operations, the applicants seek authorization to continue to pay their suppliers of goods and services, honour rebate, discount and refund programs with their customers and pay employees in the ordinary course consistent with existing compensation arrangements.

[25] The court has broad jurisdiction to permit the payment of pre-filing obligations in a CCAA proceeding. In granting authority to pay certain pre-filing obligations, courts have considered the following factors:

- (a) Whether the goods and services are integral to the applicants' business;
- (b) The applicants' need for the uninterrupted supply of the goods or services;
- (c) The fact that no payments will be made without the consent of the Monitor;
- (d) The Monitors' support and willingness to work with the applicants to ensure that payments in respect of pre-filing liabilities are appropriate;
- (e) Whether the applicants have sufficient inventory of the goods on hand to meet their needs; and
- (f) The effect on the debtors' ongoing operations and ability to restructure if they are unable to make pre-filing payments.

[26] I am satisfied that it is critical to the operation of their business that the applicants preserve key relationships. Any disruption in the services proposed to be paid could jeopardize the value of their business and the viability of the Sale Transaction. The authority in the proposed amended and restated initial order to pay pre-filing obligations is appropriately tailored and responsive to the needs of the applicants and is specifically provided for in the applicants' cash flows and in the DIP budget. In particular, the payments are limited to those necessary to preserve critical relationships with employees, suppliers, and customers, to ensure the stability and continued operation of the applicants' business and will only be made with the consent of the Monitor. The relief sought is consistent with orders in other CCAA cases.

[27] Further, in keeping with the requirements in s. 11.001 of the *CCAA* the contemplated payments are all reasonably necessary to the continued operation of the applicants' business so that there will be no disruption in services provided to the applicants and no deterioration in their relationships with their suppliers, customers and employees.

KEIP and KEIP Charge

[28] I have also concluded that the KEIP and KEIP charge should be approved because of the following:

- (a) The KEIP was developed in consultation with AlixPartners, Bennett Jones LLP and with the involvement of the Monitor. The Monitor is supportive of the KEIP. The secured creditors also support the KEIP charge;
- (b) The KEIP is reasonably necessary to retain key employees who are necessary to guide the applicants through the *CCAA* proceedings and the Sale Transaction;
- (c) The KEIP is incentive-based and will only be earned if certain conditions are met; and
- (d) The amount of the KEIP, and corresponding KEIP charge, is reasonable in the circumstance.

[29] In approving the KEIP and KEIP charge pursuant to s. 11 of the *CCAA* I have determined that the terms and scope of the KEIP have been limited to what is reasonably necessary at this time in accordance with s. 11.001 of the *CCAA*.

[30] As the KEIP contains personal confidential information about the applicants' employees, including their salaries, I am granting a sealing order pursuant to s. 137(2) of the *Courts of Justice Act*, RSO 1990, c. C. 43. This will prevent the risk of disclosure of this personal and confidential information.

Intercompany Charge

[31] I am also granting the requested Intercompany Charge to preserve the status quo between all entities within the Bumble Bee group to protect the interest of creditors against individual entities within the group. The Monitor supports the charge which ranks behind all the other court-ordered charges.

Administrative Charge

[32] I am also granting an administration charge in the amount of \$1.25 million to secure the professional fees and disbursements of the Monitor, its counsel and the applicants' counsel for the following reasons:

- (a) The beneficiaries of the administration charge have, and will continue to, contribute to these *CCAA* proceedings and assist the applicants with their business;

- (b) Each beneficiary of the administration charge is performing distinct functions and there is no duplication of roles;
- (c) The quantum of the proposed charge is reasonable having regard to administration charges granted in other similar *CCAA* proceedings;
- (d) The secured creditors support the administrative charge; and
- (e) The Monitor supports the administrative charge.

Directors' Charge

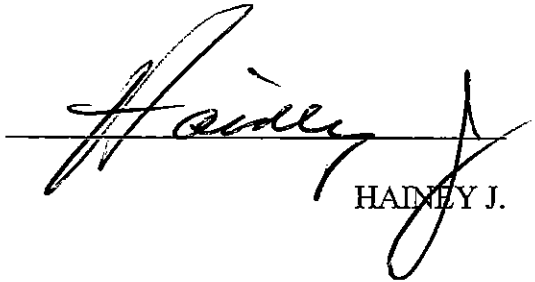
[33] Finally, I am granting a directors' charge in the amount of \$2.3 million to secure the indemnity of the applicants' directors and officers for liabilities they may incur during these *CCAA* proceedings for the following reasons:

- (a) The directors and officers may be subject to potential liabilities in connection with the *CCAA* proceedings and have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
- (b) The applicants' liability insurance policies provide insufficient coverage for their officers and directors;
- (c) The directors' charge applies only to the extent that the directors and officers do not have coverage under another directors and officers' insurance policy;
- (d) The directors' charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of the *CCAA* proceedings and does not cover willful misconduct or gross negligence;
- (e) The applicants will require the active and committed involvement of its directors and officers, and their continued participation is necessary to complete the Sale Transaction;
- (f) The amount of the directors' charge has been calculated based on the estimated potential exposure of the directors and officers and is appropriate given the size, nature and employment levels of the applicants; and
- (g) The calculation of the directors' charge has been reviewed with the Monitor and the Monitor supports it.

Conclusion

[34] For these reasons the amended and restated initial order is granted.

[35] I thank counsel for their helpful submissions.



HAINLEY J.

Date: December 4, 2019