

CITATION: Tucker v. Aero Inventory (UK) Limited, 2010 ONSC 1196
COURT FILE NO.: 09-CL-8456-00CL
DATE: 20100224

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

AND IN THE MATTER OF AERO INVENTORY (UK) LIMITED and AERO
INVENTORY PLC, Respondents

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay and Susan Rothfels, for the Applicants

Kenneth D. Kraft and John Salmas, for Air Canada

John MacDonald, for Avcos Fleet Performance Inc.

HEARD &

RELEASED: JANUARY 22, 2010

ENDORSEMENT

[1] At the conclusion of argument on January 22, 2010, I endorsed the record as follows:

The Applicant takes the position that it is necessary to determine the issue today. Counsel to Air Canada takes a different view, based on existing "deeming language" in previous orders.

I do not have to determine this preliminary point as I have determined that the motion should be granted. The reasons will follow. An order shall issue in the form presented, as amended.

[2] The following are my reasons.

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[3] The Applicants brought this motion for an order lifting the stay granted in the initial order dated November 11, 2009 in these proceedings and granting leave to John Robert Tucker, Richard Heis and Allan Watson Graham of KPMG LLP (the "Foreign Representatives") to file an Assignment in Bankruptcy in Toronto for Aero Inventory (UK) Limited and Aero Inventory plc (both in Administration and, collectively, the "Foreign Debtors"), and restoring the stay thereafter.

[4] The motion was opposed by Air Canada.

[5] On November 11, 2009, this court recognized the appointment of the Applicants as Foreign Representatives of Aero Inventory (UK) Limited ("AI") and Aero Inventory plc (both in administration, and collectively, the "Foreign Debtors"), under Part IV of the *Companies' Creditors Arrangement Act* ("CCAA") (the "Recognition Order").

[6] In order to facilitate a preference action under the *Bankruptcy and Insolvency Act* ("BIA"), the Foreign Representatives require (a) a date of an initial bankruptcy event and (b) a trustee in bankruptcy.

[7] The Foreign Representatives bring this motion for an order to temporarily lift the stay granted in the Recognition Order and for leave to assign the Foreign Debtors into bankruptcy.

[8] The Foreign Debtors and their international affiliates, including Aero Inventory Canada Inc./Aero Inventaire (Canada) Inc. ("Aero Canada"), form an integrated and inter-dependent group of companies that supply parts to the airline industry.

[9] The Foreign Debtors have assets in Canada, and their Canadian operations are administered by Aero Canada. They have two key Canadian customers: Air Canada and Aveos Fleet Performance Inc. ("Aveos"). On October 23, 2009, AI and Air Canada entered into a series of contracts including agreements providing for the exchange of a series of bills of exchange, set-off agreements and a purchase and sale agreement with respect to certain inventory.

[10] On November 11, 2009, administration proceedings (the "Foreign Proceedings") were commenced by the Foreign Representatives in respect of each of the Foreign Debtors in the High Court of Justice of England and Wales (Chancery Division, Companies Court) (the "English Court") and the Foreign Representatives were appointed as joint administrators of the affairs, business and property of the Foreign Debtors (sometimes referred to the "UK Court Administrators").

[11] On November 11, 2009, Newbould J. granted a Recognition Order, *inter alia*:

- (a) recognizing orders made on November 11, 2009 by the English Court;
- (b) recognizing the Foreign Proceedings as "foreign main proceedings" pursuant to s. 47 of the CCAA;
- (c) recognizing the Foreign Representatives as "foreign representatives" as defined in s. 45 of the CCAA;

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(d) staying all proceedings in respect of the Foreign Debtors, the Foreign Representatives or their business or property; and

(e) appointing KPMG Inc. as Information Officer in these proceedings.

[12] On December 1, 2009, this court made an order appointing KPMG Inc. as receiver and manager over Aero Canada pursuant to s. 49 of the CCAA and s. 101 of the *Courts of Justice Act*.

[13] KPMG Inc. has reported that issues have arisen with Air Canada concerning the status of its relationship with the Foreign Debtors including the effect of the October 23, 2009 transactions.

[14] On January 8, 2010, Cumming J. made an order:

(a) on the consent of Air Canada, as it relates to Air Canada, deeming the date of the Foreign Debtors' initial bankruptcy event, if it happened after January 8, 2010 to have occurred on January 8, 2010;

(b) scheduling a court attendance for February 1, 2010 and providing that the Foreign Representatives could attend earlier to file a bankruptcy application, if seen to be necessary.

[15] The Foreign Representatives wish to assign the Foreign Debtors into bankruptcy for the purpose of preserving their right to pursue any reviewable transactions, settlements and preferences or undervalue transaction which may take place during the statutory review period prescribed by the BIA.

[16] Counsel to the Foreign Representatives frames the issue to be determined as whether it is appropriate for the court to lift the stay and grant leave to the Foreign Representatives to assign the Foreign Debtors into bankruptcy.

[17] The Foreign Representatives are officers appointed by the English Court to manage the Foreign Debtors' affairs, business and property.

[18] In this case, there is no going concern business and it appears that the secured creditors will suffer a shortfall. Counsel to the Foreign Representatives submits that the statutory obligation of the UK Court Administrators in these circumstances is to maximize recoveries for the secured creditors and that the UK Court Administrators have the statutory role of managing the Foreign Debtors for the purpose of realizing property in order to make distributions to secured creditors. Further, counsel submits that s. 1 of the *UK Insolvency Act*, which is expressly incorporated into the English Court order recognized by this court, sets out the Administrator's specific powers including the power to bring legal proceedings in the Administrator's name and on behalf of the Foreign Debtors, including the power to wind-up debtor companies and other relief.

[19] The UK Court Administrators have been recognized as Foreign Representatives in the Recognition Order. This court has already recognized the UK Court Administrators' authority in

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Canada and as officers of the court to act as agent of the Foreign Debtors and/or bring legal proceedings on their behalf.

[20] Counsel to the Foreign Representatives further submits that the UK Court Administrators, as "agent" of the Foreign Debtors, have the authority to bring proceedings on their behalf and as "agent" of the Foreign Debtors have the ability under s. 49 of the BIA to make an assignment in bankruptcy.

[21] Counsel also references paragraph 15 of the Recognition Order which he submits specifically contemplates that a bankruptcy could be initiated by the UK Court Administrators:

"Nothing in this order shall prevent the Foreign Representatives or the Information Officer from acting as ... a trustee in bankruptcy of the Foreign Debtors."

[22] Part IV of the CCAA addresses issues relating to cross-border insolvencies and the court is given broad statutory discretion in Part IV and, in particular, in s. 49(1):

If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's companies' property or the interests of a creditor or creditor, make any order that it considers appropriate...

[23] The purpose of Part IV of the CCAA is to promote cooperation between "the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies...". See s. 44(a) CCAA.

[24] Counsel to the Foreign Representatives submits that Part IV of the CCAA provides the mechanism by which the Canadian court coordinates with foreign courts and, further, that the CCAA expressly contemplates that there can be concurrent Canadian and foreign proceedings. Further, counsel to the Foreign Representatives submits that Part IV is also clear in that those Canadian insolvency proceedings can include a BIA filing. Section 48 addresses recognition of a foreign main proceeding. Section 48(4) reads:

"Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act in respect of a debtor company."

[25] Since Part IV of the CCAA specifically contemplates a bankruptcy proceeding continuing during a Part IV proceeding, counsel submits there can be no inconsistency in having both proceedings concurrently.

[26] Further, counsel submits that the coordination of Canadian insolvency proceedings with Foreign Proceedings was recognized by Newbould J. at paragraph 15 of the Recognition Order referred at [21] above.

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[27] Justice Cumming also acknowledged that a filing of a bankruptcy application could be made before February 1, 2010 "if seen to be necessary", as referenced at [14] above.

[28] Counsel to Air Canada submits that the order of the English Court, which is the subject of the Recognition Order, should not be interpreted to include the ability of the Foreign Representative to make the assignment. In the circumstances of this case, I disagree for reasons set out below.

[29] Counsel to Air Canada also raised the question as to how a bankruptcy is consistent with the Part IV application. It seems to me that Part IV contemplates the possibility of concurrent proceedings involving the BIA. Further, the possibility of concurrent BIA proceedings was contemplated by the parties as it is reflected in the orders of both Newbould J. and Cumming J.

[30] In the circumstances of this case, the use of the BIA in concurrent proceedings to Part IV is consistent with Canadian public policy. The proposed actions of the UK Court Administrators in seeking to invoke Canadian bankruptcy proceedings to take advantage of Canadian preference provisions are for the purpose of maximizing the Debtors' Companies' assets. The proposed actions of the UK Administrators are consistent with what a creditor representative would undertake in Canada.

[31] If counsel to Air Canada were to be successful in opposing the relief sought, the effect may very well be that a transaction that may be preferential in nature may escape review by a creditor representative. Such an outcome would be inconsistent with Canadian public policy. It seems to me that, in the circumstances of this case, the foreign representative should have the ability to challenge the transaction under Canadian bankruptcy law.

[32] In my view, the interpretation urged by counsel to Air Canada is unduly restrictive in the circumstances. The language of the CCAA is permissive. There is no going concern operation. The stated purpose of the assignment is to engage in a review of a potential preference transaction and the only objection is being raised by the party that is likely the subject of the review.

[33] I am in agreement with all submissions made by counsel to the Foreign Representative.

[34] The UK Court Administrators seek to set aside contracts governed by Canadian law and affecting assets in Canada. It is not necessary to determine the appropriateness of the remedy today nor to assess the various defences that may be available to the responding party. Rather, this court needs only to ensure that the UK Court Administrators act consistently with Part IV and their statutory obligation to maximize the debtors' estates.

[35] In my view, in the furtherance of these objectives, it is appropriate for this court to exercise its discretion to lift the stay to permit the bankruptcy filing.

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[36] An order has been issued to give effect to the foregoing reasons.


MORAWETZ J.

Date: February 24, 2010