

CITATION: Unique Broadband Systems (Re), 2012 ONSC 1459
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-03-06

SUPERIOR COURT OF JUSTICE - ONTARIO

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 UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Wilton-Siegel J.

COUNSEL: *E. Patrick Shea*, for the Applicant, Unique Broadband Systems, Inc.

Peter Roy and Sean Grayson, for the Respondent, 2064818 Ontario Inc.

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

Jennifer Lynch, for the Ontario Securities Commission

HEARD: March 2, 2012

ENDORSEMENT

[1] On this motion Unique Broadband Systems, Inc. ("UBS") seeks a declaration that a partial takeover bid of 2064818 Ontario Inc. ("206") described below is stayed or suspended pending a determination of certain claims in the ongoing restructuring proceedings of UBS under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

Background

The Parties

[2] UBS is a public corporation incorporated in Ontario under the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA").

[3] LOOK Communications Inc. ("Look") is a public corporation incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "CBCA").

[4] UBS owns shares in Look carrying 39.2% of the equity and 37.6% of the votes. UBS also provides management services to Look pursuant to a management services agreement described below.

[5] 206 is a corporation controlled by Alex Dolgonos ("Dolgonos"). 206 is a substantial shareholder of UBS holding 22,898,255 UBS shares, representing slightly more than 22% of the outstanding shares of UBS. Between December 23, 2011 and February 1, 2012, 206 acquired

2,493,000 UBS shares in the market. Dolgonos also owns all of the outstanding shares of DOL Technologies Inc. ("DOL"), a private corporation incorporated under the OBCA.

The Election of the UBS Directors

[6] Each of the current UBS directors, being Grant McCutcheon ("McCutcheon"), Henry Eaton ("Eaton") and Robert Ulicki ("Ulicki") (collectively, the "UBS Directors"), was elected to the UBS board of directors at a special meeting of the shareholders held on July 5, 2010 to replace the former directors, being Gerald McGoeys ("McGoeys"), Douglas Reesan and Louis Mitrovich, pursuant to s. 122 of the OBCA. The election of these directors was the subject of a proxy contest between the existing management and the shareholders who supported the UBS Directors.

[7] On July 6, 2010, UBS advised Look that it had the support of shareholders of Look possessing sufficient votes to effect a change of control of the board of directors of Look. UBS requested that the board of Look resign and appoint a replacement slate of directors proposed by UBS, which included the UBS Directors, Laurence Silber ("Silber") and David Rattee ("Rattee"), without calling a special meeting of shareholders.

[8] On July 20, 2010, all five Look directors resigned and McCutcheon, Eaton and Ulicki were appointed directors of Look. On July 21, 2010, McCutcheon was also appointed the chief executive officer of Look, replacing McGoeys who had previously served in that position pursuant to the provisions of a management services agreement between UBS and Look, described below. Silber and Rattee were subsequently elected directors of Look on July 27, 2010. Ulicki resigned from the board of directors of Look on October 29, 2010, with the result that there are currently four directors of Look.

[9] The UBS Directors were re-elected at the annual general meeting of UBS shareholders on February 25, 2011. 206 opposed the current slate of directors and proposed its own slate of directors.

Current Litigation Among the Parties

[10] UBS had previously retained DOL pursuant to an agreement dated July 12, 2008 (the "DOL Technology Agreement") to provide the services of Dolgonos as a "chief technology officer" to UBS. The DOL Technology Agreement was terminated by DOL after the election of the UBS Directors based on "change of control" provisions in the Agreement. DOL then commenced an action against UBS claiming amounts totalling approximately \$8.6 million (the "DOL action"). The DOL action is being defended by UBS, which asserts that the largest component of the DOL claim is not payable pursuant to the terms of the DOL Technology Agreement. UBS has also counterclaimed to set aside the DOL Technology Agreement.

[11] UBS had also previously retained Jolian Investments Inc. ("Jolian"), a corporation controlled by McGoeys, to provide his services as chief executive officer of UBS pursuant to an agreement dated January 1, 2006 (the "Jolian Agreement"). The Jolian Agreement was also terminated by Jolian after the election of the UBS Directors based both on the failure to elect McGoeys to the UBS board and on "change of control" provisions in the Agreement. Jolian then commenced an action against UBS claiming amounts totalling approximately \$7.5 million (the

"Jolian action"). The Jolian action is also being defended by UBS, which asserts that the largest component of the Jolian claim is also not payable pursuant to the terms of the Jolian Agreement. UBS has also counterclaimed to set aside the Jolian Agreement. On July 5, 2010, McCutcheon was appointed the chief executive officer of Look to replace McGoey.

[12] In the DOL action and the Jolian action, DOL, Dolgonos, Jolian and McGoey brought motions seeking confirmation of their right to an advance of funds in respect of the legal costs of pursuing their respective claims and defending the UBS counterclaims against them. UBS resisted such relief and sought an order requiring the parties to return certain retainers previously advanced by UBS to counsel for such parties. By order dated April 11, 2011, Marrocco J. held that these parties were entitled to an advance of funds as more particularly specified therein. UBS has appealed this order to the Court of Appeal, and, pending the hearing of such appeal, has refused to advance or pay any of the amounts addressed in the order of Marrocco J.

[13] In addition, on July 6, 2010, Look also commenced an action against Dolgonos, DOL, McGoey and Jolian, among others, seeking damages based on allegations of breach of fiduciary duty and negligence (the "Look action"). The Look action relates to certain restructuring awards paid by Look in 2009, for which Look seeks recovery.

[14] On December 22, 2010, DOL commenced a further action (the "the Oppression Action") against the UBS Directors. The statement of claim in the Oppression Action seeks nine separate heads of relief against the UBS Directors in addition to interest and costs.

[15] The Oppression Action centres on two principal allegations. First, it is alleged the UBS Directors acted oppressively in approving a settlement between UBS and Look that was made pursuant to an agreement dated December 3, 2010 (the "Amending Agreement"), that amended a management services agreement dated May 19, 2004 between UBS and Look (collectively, with the Amending Agreement, the "Look MSA"). Second, it is alleged that, by failing to re-elect McGoey to the UBS board of directors on July 5, 2011, the UBS Directors intentionally triggered certain provisions of the Jolian Agreement, giving rise to a right in favour of Jolian to terminate the Jolian Agreement. It is alleged that these actions of the UBS Directors exposed UBS to the consequences of the default. 206 also alleges that the UBS Directors acted improperly in defending the DOL action. More generally, 206 alleges that the UBS Directors have depleted the funds of UBS by these actions contrary to their announced intention at the time of the proxy fight in July 2010 to minimize UBS' expenses and conserve its funds.

[16] 206 seeks damages for oppressive behaviour against the UBS Directors in the amount of any loss suffered as a result of execution of the Amending Agreement and in the amount of any payment required to be made to Jolian under the Jolian Agreement. It also seeks declarations that the UBS Directors had a conflict of interest in respect of the execution of the Amending Agreement and have preferred the Look shareholders over the UBS shareholders. On these grounds, 206 further seeks an order removing the UBS Directors from the UBS board.

The CCAA Proceedings

[17] UBS is insolvent given the amounts claimed in the DOL action and the Jolian action. UBS obtained protection under the CCAA pursuant to an Initial Order dated July 5, 2011 (the

“Initial Order”). Duff & Phelps Canada Restructuring Inc. (the “Monitor”) has been appointed the monitor in the CCAA proceedings.

[18] Pursuant to an order dated August 4, 2011, the court approved a claims process in respect of claims against UBS.

[19] The largest claims filed in the claims process are: the DOL and Jolian claims described above; a contingent claim by Look for the remainder of the monies due to it under the Amending Agreement, which will expire in June 2012 provided UBS continues to provide services to Look in accordance with the terms of the Look MSA; and the 206 claim in an amount “to be determined” in respect of the Oppression Action. Each of the UBS Directors also filed contingent claims respecting indemnification of legal fees that may be incurred in defending the Oppression Action, based on indemnities dated July 5, 2010 granted to them by UBS.

[20] 206 took the position that McCutcheon and Eaton should not review any of the claims filed against UBS in the claims process by virtue of an alleged conflict of interest addressed in the motion of 206 described below. These directors did not participate in the UBS review of the claims filed with it, which were therefore reviewed by Ulicki alone together with legal counsel. The UBS position regarding each of these claims was provided to the Monitor by letter dated December 9, 2011.

The December Motions

[21] In December 2011, both UBS and Dolgonos brought motions seeking relief in this court. The decision of the court was set out in its endorsement dated January 25, 2012 (the “Endorsement”).

[22] UBS sought an order under s. 11.03(1) of the CCAA, extending the stay of proceedings in the Initial Order to include the Oppression Action in respect of the UBS Directors. By this means, it sought to have the Oppression Action determined pursuant to the CCAA claims process. This relief was granted by the court.

[23] 2064818 Ontario Inc. (“206”) sought an order pursuant to ss. 11.5(1) and (2) of the CCAA removing McCutcheon and Eaton as directors of UBS. This relief was denied for the reasons set out in the Endorsement.

The Takeover Bid

[24] On February 1, 2012, 206 launched a partial takeover bid (the “Partial Bid”) seeking to acquire 10 million UBS shares, representing approximately 10% of the UBS voting shares, at a price of \$0.08 per share. This price represents a material premium over the current market price of the shares. The Partial Bid expires on March 9, 2011.

[25] In the takeover bid circular that was mailed to all UBS shareholders in connection with the Partial Bid, 206 states an intention, during the course of or following the Partial Bid, to requisition a special meeting of the UBS shareholders to elect a new board of directors. 206 further stated that it is seeking to preserve the remaining value of UBS, including its cash resources and its investment in Look.

[26] The Partial Bid is opposed by the UBS Directors. On February 6, 2011, legal counsel for UBS sent a letter to the Ontario Securities Commission ("OSC") alleging certain breaches by Dolgonos, directly or indirectly through his affiliates including 206, leading up to and in connection with the Partial Bid. In this letter, UBS urged staff of the OSC to investigate this matter, and if appropriate, to seek an order cease trading the Partial Bid. To date, the OSC has taken no steps to cease trade the Partial Bid or to order any other relief in respect of the Partial Bid, other than to extend the date for delivery by UBS of the directors' circular required under the *Securities Act*, R.S.O. 1990, c. S.5.

[27] UBS mailed the directors' circular in respect of the Partial Bid on or about February 27, 2011. Accordingly, UBS has already incurred the costs to it that result from the making of the Partial Bid. The UBS Directors recommended rejection of the Partial Bid and that UBS shareholders not tender their UBS shares.

Additional Circumstances

[28] In order to requisition a meeting of shareholders, 206 must first deposit a requisition under s. 105 of the OBCA. Section 105 imposes a duty on the directors of a corporation to respond to the requisition within 21 days of receipt of the requisition. Neither of these steps have occurred.

[29] In his affidavit in support of the UBS motion, Ulicki states his belief that a fair valuation of the UBS shares in Look, representing the only assets of UBS, would be between \$9 million and \$14 million, depending upon the outcome of the Look action. There are currently 102,747,854 UBS shares outstanding. The value of the UBS shares therefore essentially depends upon the outcome of the DOL action and the Jolian action. Similarly, the extent to which UBS is, in fact, insolvent depends upon the outcome of these actions. Put another way, it would appear that the value in UBS is the subject of a contest between DOL and Jolian, on the one hand, and the UBS shareholders on the other hand (including 206 to the extent of its interest as a shareholder).

[30] On February 24, 2012, Look declared a dividend in the amount of \$0.05 on each of its two classes of shares, payable on or about March 13, 2012. UBS will receive approximately \$2,739,000 in respect of this dividend, which will materially improve its current cash position.

The Current Motion

[31] On this motion, UBS seeks a declaration that the Partial Bid is stayed by paragraph 13 of the Initial Order or an order pursuant to s. 11 of the CCAA that the Partial Bid shall be stayed or suspended pending a determination of the DOL action and the Jolian action. I will address each in turn.

Does the Partial Bid Contravene the Stay in the Initial Order?

[32] UBS alleges that the Partial Bid is caught by paragraph 13 of the Initial Order, which reads as follows:

THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “Persons” and each being a “Person”) against or in respect of the Applicant or the Monitor, *or affecting the Business or the Property*, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien. [Emphasis added.]

Accordingly, UBS says 206 required the consent of UBS and the Monitor or leave of the court to make the Partial Bid.

[33] UBS argues that its “Business” is the orderly settlement of the outstanding claims against it and a winding up thereafter. While I think that the “Business” of UBS is more properly characterized as that of a holding company, I will accept the UBS description for purposes of this endorsement. UBS says that, given Dolgonos’ stated intention to requisition a shareholders meeting to change the board of directors of UBS, the purpose of the Partial Bid is to change the Business of UBS. UBS argues that the stay of proceedings should be interpreted broadly and in accordance with the objective of providing debtors with the best possible chance of affecting a successful restructuring and ensuring that creditors are treated fairly. It relies for this proposition on the statement of Pepall J. in *Re Canwest Global Communications Corp.*, 2010 ONSC 3530, [2010] O.J. No. 3075 (S.C.), at para. 30. It says that the purpose of the stay in the Initial Order is to provide it, as an insolvent company, with breathing room, and, by doing so, to preserve the *status quo* to assist it in its restructuring or arrangement and to prevent any particular stakeholder from obtaining an advantage over other stakeholders during the restructuring process; see *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 (S. Ct.) at para. 25.

[34] I am not persuaded that the Partial Bid affects either the Property or the Business of UBS, and, accordingly, I do not consider that the Initial Order extends to the Partial Bid. I reach this conclusion for four reasons.

[35] First, while I agree that the court should interpret the stay in paragraph 13 broadly to accomplish the purpose of the CCAA as described above, it is necessary to start with the concept of rights and remedies which are the subject of paragraph 13 of the Initial Order. I do not think that a takeover bid falls within the concept of a right or remedy as such terms are understood for the purposes of the stay in paragraph 13. It is not meaningful to talk of a right to make a takeover bid in this context. Paragraph 13 is instead directed toward legal rights and remedies of a contractual or statutory nature.

[36] Second, consistent with the foregoing consideration, there is a significant difference between the shares of a public corporation and either its business or its property. Absent special circumstances, an offer for the shares of a company in CCAA proceedings is not an offer “affecting” its property or its business.

[37] Third, the special circumstances alleged in this case – that the Partial Bid will necessarily entail a change in the UBS Business via a change in the directors – has not been established to the requisite standard of a balance of probabilities. The evidence before the court is not sufficient to establish that Dolgonos will be in a position to change the composition of the board of directors even if he is successful in obtaining an additional 10% of the UBS shares under the Partial Bid. Therefore, I cannot conclude, even if I were inclined to do so, that the Partial Bid will affect the Business of UBS.

[38] Fourth, I do not think that the UBS submission is commercially reasonable. The UBS shares have continued to trade freely since the Initial Order as the UBS Directors have maintained their listing on the TSX Venture Exchange. Accordingly, Dolgonos has been able to acquire shares by means of open market purchases, including a “normal course purchase” transaction under applicable securities legislation. UBS wishes the court to draw a distinction in principle for the purposes of this motion between such purchases of shares and the Partial Bid. The basis of that distinction according to UBS is that responding to the Partial Bid requires time and energy on the part of the directors whereas the earlier purchases did not. While this may be a consideration in respect of the exercise of the court’s discretion, it is not rationally connected to the UBS argument that the Partial Bid affects its Business as described above.

[39] Accordingly, I find that 206 was not required to seek leave of the court to lift the stay in paragraph 13 of the Initial Order in order to make the Partial Bid.

Exercise of the Court’s Discretion

[40] In the alternative, UBS seeks an order of the court pursuant to the exercise of its discretion under s. 11 of the CCAA which reads as follows:

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[41] The parties are agreed that the court has discretion under s. 11 of the CCAA to enjoin the Partial Bid. There are, however, no reported cases in which a court has exercised its discretion to enjoin a takeover bid. The parties disagree on the factors that the court should take into consideration in deciding whether or not to exercise its discretion in such circumstances.

[42] UBS says that the court should have regard exclusively to whether the Partial Bid will adversely affect the purpose of the restructuring. In the present circumstances, UBS argues that a stay furthers this purpose by ensuring that the focus of the attention of UBS and its management will remain on the CCAA reorganization. It says the efforts of management, and the limited financial resources of UBS, ought not to be expended on matters that are not directly related to the determination of the claims and the development of a plan of reorganization, in the absence of clear and compelling circumstances.

[43] UBS argues that it is therefore appropriate to suspend the Partial Bid in order to allow UBS to focus on a determination of the claims in the DOL action and in the Jolian action, after which it says it would be appropriate for the Partial Bid to proceed. It is supported by the Monitor who says that, in its view, it is in the best interests of the restructuring that the UBS Directors be allowed to concentrate on the restructuring rather than having to address further efforts by Dolgonos to change the board of directors.

[44] In exercising this discretion, I agree that the principal consideration must be whether the Partial Bid will adversely affect the restructuring process. On the other hand, the present circumstances are complicated by the need to balance any adverse effect of the Partial Bid against the detriment to the shareholders if they are denied the right to accept the Partial Bid if they so choose. In balancing these considerations, I have taken into account the following factors.

[45] First, I must assume that Dolgonos will requisition a special shareholders meeting with a view to changing the composition of the board of directors. On the other hand, as mentioned, the record does not establish that he would be successful in doing so even if a meeting were called. In other words, even if successful, the Partial Bid will not necessarily result in a change in the *status quo*.

[46] Second, I am also mindful not only of the beneficial effect of the Partial bid – being a price above market for shares that may ultimately have no value if the DOL action and the Jolian action are successful– but also of its potentially abusive nature as a bid for only 10% of the UBS shares, even if the OSC Staff have not taken any action to cease trade the Partial Bid in furtherance of the OSC's public interest mandate. I am also mindful of the fact that, in the circumstances of a CCAA proceeding, the usual defences to a hostile and potentially abusive takeover bid, in particular imposition of a poison pill and identification of a "white knight" – are not practical. The court must therefore have regard to maintenance of an appropriate balance between the bidder and the target corporation and its shareholders.

[47] Third, there is a later opportunity for the court to address the appropriateness of Dolgonos' plan to seek a special meeting of shareholders to change the board in the context of the restructuring. This is the real concern of UBS. As mentioned, section 105 of the OBCA requires the directors of a corporation to respond within 21 days of receipt of a shareholder requisition. If the UBS board of directors declines to order a meeting after any such requisition is delivered, the court will be required to address the merits of such action if Dolgonos wishes to proceed.

[48] Balancing these considerations, I conclude that the court should not exercise its discretion in the present circumstances for the following reasons.

[49] First, based on the evidence before the court, the only adverse consequence of the Partial Bid is the likely, if not probable, need for the UBS Directors to respond to a shareholder requisition, and, quite possibly, to a further court proceeding to compel such a meeting if the directors deny the requisition. While this will undoubtedly require some further diversion of the energies of the UBS Directors and entail some further financial expense, such actions cannot materially adversely affect the UBS reorganization on their own.

- Page 9 -

[50] Second, I think that a motion addressing the directors' response to a shareholder requisition is a more appropriate proceeding in which to address the impact of a proposed change in the board of directors. At that time, the actual proposal of Dolgonos will be available for consideration, including any features directed toward addressing the legitimate concern of the UBS Directors that his principal objective is to have a new board of directors re-examine the merits of defending the DOL action. In addition, the schedule for determination of the DOL action and the Jolian action, as well as the identities of the proposed directors, will be known. In the absence of such information, I think it is premature for the court to exercise its discretion. With this information, the court can make a more informed, and possibly a more nuanced, determination regarding the merits of any request for a special meeting of shareholders as well as the timing of any such meeting.

[51] Third, those shareholders who wish to sell their shares at a premium to market should be given an opportunity to do so. There is no suggestion that the disclosure in the market regarding the consequences of the Partial Bid on UBS, or the likelihood of pro rationing the shares taken up under the Partial Bid, is in any way inadequate. Nor is the value of the UBS shares affected by the outcome of the Partial Bid alone. It is also relevant that the OSC has not chosen to intervene in respect of the Partial Bid. In general, absent such factors, a court should be reluctant to enjoin a takeover bid, even a partial bid, at a premium to market. I think such an action should be considered only if there is an issue regarding disclosure of the purpose and effect of the bid and no later opportunity to address the principal concern in relation to the takeover bid. In this case, as mentioned above, there is no issue regarding the disclosure and there will be a later opportunity to address the issue of a proposed meeting of UBS shareholders to change the board of directors.

[52] On balance, therefore, I consider that any adverse consequences resulting from the Partial Bid are more than compensated for by the benefit to shareholders of allowing them to consider the bid as well as the protection afforded by the necessity of a subsequent proceeding in which the merits of any proposed action to change the board of directors would be addressed by the court.

[53] Accordingly, the UBS motion is denied.



Wilton-Siegel J.

Date: March 6, 2012