

# COURT OF APPEAL FOR ONTARIO

DATE: 20130220  
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Sharpe J.A. (In Chambers)

In the Matter of 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. and UBS Wireless Services Inc.

Melvyn Solmon and Kevin McElcheran, for Niketo Co. Ltd.

Peter Roy, for DOL Technologies Inc. and Alex Dolgonos

Alex MacFarlane and Patrick Shea, for UBS Wireless Services Inc.

Rocco Dipucchio, for the Monitor

Heard: February 19, 2013

Motion for a stay of the judgment of Wilton-Seigel J. pending determination of an  
application for leave to appeal.

[1] The moving party, Niketo, seeks a stay pending determination of a leave to  
appeal motion in this CCAA proceeding. The order at issue approved the sale of  
50% of the shares of LOOK Communications Inc. owned by one of the debtor  
companies. The proposed sale followed an approval process ordered by the  
CCAA judge under the supervision of the Monitor. In that process the moving  
party submitted an unsuccessful bid that was rejected because it was not the  
highest offer. When the debtor companies moved pursuant to s. 36 of the CCAA  
for approval of the sale, the moving party brought a cross-motion seeking an

order that would require the applicants to call a shareholders' meeting to consider an alternate plan developed by the moving party that involved a DIP loan to finance the debtors' operations over a specified period.

[2] The CCAA judge made an order approving the sale and dismissing the cross-motion. He found that the proposed sale process satisfied the requirements of fairness and integrity of outcome based upon the factors set out in s. 36 of the CCAA as well as the principles articulated in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1.

[3] The matter is urgent as the sale is to close today and the purchaser has refused to extend the closing date.

[4] The CCAA judge dismissed the cross-motion to require a shareholders' meeting to consider the proposed DIP loan because of its uncertainty as opposed to the certainty of result achieved if the sale were approved. The plan would require the debtor company to borrow significant funds rather than immediately monetize the value of the shares in LOOK. He found that the directors had provided reasoned basis for rejecting that option. Moreover, the plan, which includes a backstop agreement pursuant to which the moving party agrees to buy the shares of LOOK at fifteen cents, one cent higher than the price of the proposed sale, expressly requires the current directors to agree to continue in office. There was evidence from one director and from the Monitor

that it was by no means certain the directors would so agree. In these circumstances, the CCAA judge concluded that the better option was to approve the sale which had been obtained as a result of an orderly process under the supervision of the Monitor and that had the support of the directors rather than accept the last-minute proposal from the moving party, a disappointed bidder in the sale process that could collapse if the directors refused to serve. As the CCAA judge put it, loss of the sale would, given the circumstances and the debtor companies' acknowledged capital requirements, be "severely prejudicial to the CCAA proceedings."

[5] In these circumstances, it is my view that this motion for a stay must be dismissed.

[6] First, as to the merits, I am not satisfied that there is a sufficient chance that leave to appeal would be granted to warrant granting a stay. It is well-established that in CCAA proceedings this court will be reluctant to intervene. This CCAA proceeding has been under the supervision of an experienced commercial court judge for some time and, absent demonstrable error, this court will not interfere with the exercise of discretion by the CCAA supervising judge.

[7] I do not agree with the submission of the moving party that the CCAA judge essentially abdicated his discretion and mechanically approved the sale on the basis that the board has exercised its business judgment. In my view the

CCAA judge's reasons demonstrate that he carefully considered the last minute alternative plan put forth by the moving party and rejected it on the ground that the certainty of the sale was preferable to the risks inherent in the proposed plan.

[8] I note as well with respect to the merits that as the purchaser is unwilling to extend the closing date, to grant a stay would essentially decide the matter. In those circumstances it is appropriate to require the moving party to establish more than a serious question to be tried and, in my view, even the serious question to be tried test has not been satisfied.

[9] Second, I am not satisfied that the moving party has demonstrated irreparable harm. The moving party acquired shares in the debtor company and acquired a small debt to qualify it as a creditor in the CCAA proceedings after the sale process had been concluded with full knowledge of the sale and of its consequences.

[10] Finally, as it is apparent that granting a stay would cause the debtor companies to lose the sale and given the certainty of result that flows from the sale as opposed to the uncertainty of the DIP loan proposal of the moving party, the balance of convenience clearly favours refusing a stay.

[11] Accordingly, the motion for a stay is dismissed.

*Act 9 May 9.11.*