CITATION: Proposal of Alan Saskin, Re, 2018 ONSC 550
BANKRUPTCY FILE NO.: 31-2117602
DATE: 20180123

ONTARIO SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B.3, AS AMENDED

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF ALAN SASKIN

BEFORE: F.L. Myers J.

COUNSEL: *Kenneth Kraft and Neil Rabinovitch*, lawyers for Guy Gissin, the Israeli Court-appointed functionary officer and foreign representative of Urbancorp Inc.,

Mario Forte and Robert J. Drake, lawyers for The Fuller Landau Group Inc., Proposal Trustee,

Adam M. Slavens, lawyer for Tarion Warranty Corporation,

Emrys Davis, lawyer for Alan Saskin,

Mark van Zandvoort, lawyer for Cooltech Air Systems Ltd and related parties.

HEARD: January 22, 2018

ENDORSEMENT

[1] Alan Saskin has delivered a Notice of Intention to make a Proposal under the *BIA*. When he did so, creditors' enforcement efforts against Mr. Saskin were stayed under the statute.

[2] Mr. Saskin owns and was the undoubted, sole operating mind of the Urbancorp group of companies. Many of those companies are subject to CCAA proceedings before this court. One specific Saskin company, Urbancorp Inc., is subject to Israeli insolvency proceedings.

[3] Guy Gissin is the Israeli Court-appointed functionary officer and foreign representative of Urbancorp Inc. He moves to lift the stay of proceedings under s. 69.1 of the *BIA* to allow him to continue in Israel two claims against Mr. Saskin.

[4] Mr. Gissin has brought one claim on behalf of Urbancorp Inc. It involves allegations that Mr. Saskin and parties related to him violated Israeli securities laws in relation to a bond issuance under which Urbancorp Inc. raised a substantial amount of money for the Urbancorp

group of companies on Israeli financial markets not very long before much of the Urbancorp group filed for bankruptcy protection here. The other claim that Mr. Gissin has commenced against Mr. Saskin is made on behalf of Israeli bondholders. They make allegations of fraudulent misrepresentation, breaches of fiduciary duties, and similar claims in relation to the Israeli bond financing transaction. In that case, there are several separate defendants who were associated with the transaction including a Deloitte affiliate.

[5] Urbancorp Inc. has filed a proof of claim in this proposal proceeding seeking $96 million NIS (approximately $32.6 million CDN). At an initial meeting of creditors for this proposal, the Official Receiver declined to allow the Israeli functionary to vote on the claim because the claim is contingent upon relief being granted here or in Israel. If the claim is proven, the Israeli bondholders represented by Mr. Gissin will hold over 90% of the claims against Mr. Saskin. Mr. Gissin similarly represents potentially dominating creditors of some of the Urbancorp entities that are under CCAA protection as well.

[6] No one disagrees that the stay ought to be lifted to allow the claims to be heard and quantified. The two Israeli claims readily meet the requisite test applicable to a motion of this type. See *Global Royalties Ltd. v Brook*, 2015 ONSC 6277 at para. 20. Many of the causes of action alleged against Mr. Saskin would not be discharged in a bankruptcy. They are complex. They involve Israeli securities law and a very complicated set of dealings among numerous sophisticated parties in a substantial transaction. There is no efficiency and much risk of prejudice in hiving off the claims against Mr. Saskin from those against his related parties or those against the third parties associated with the bond underwriting. In both pieces of litigation, Mr. Saskin is the key player. His presence is necessary. A summary process under the *BIA* would not suffice as it would not catch the other parties and because the adjudication of the claims requires full procedural rights and time that is not generally available in a *BIA* summary proceeding.

[7] Tarion and Cooltech are creditors of Mr. Saskin with small claims as compared to the bondholders' claims. While one can debate degrees of materiality, they represent bit players or the tail that should not wag the dog. They want to improve their positions and see this motion as providing them with some leverage to try to do so.

[8] Tarion argues that allowing litigation to proceed in Israel might take up Mr. Saskin's time and deflect him from focusing on his proposal. If Mr. Saskin does not defend in Israel then Tarion fears that a default judgment might issue that could give Mr. Gissin and his bondholders an exaggerated claim. This argument is not intended by Tarion to be any criticism at all of Israeli process. It is simply voicing a fear that if a plaintiff is not challenged, the resulting default judgment may well include expansive or soft claims that might have been trimmed back had there been a fully defended trial. On the other hand, if Mr. Saskin does defend in Israel, Tarion argues that he might utilize funds or sources of funds that might otherwise be available to fund his proposal.

[9] Tarion argues that it is prepared to wait for Mr. Saskin to make his proposal and it is in the greater good of the proposal process if the Israeli bondholders wait too. If they are not content to wait, then Tarion proposes that the court should add a condition to any order lifting the stay whereby the bondholders be limited to relief against D&O and other insurance funds that

may respond to the claims in Israel. That will leave the other creditors free to chase Mr. Saskin's assets in this proceeding.

[10] The arguments raised by Tarion (and supported by Cooltech) turn on factual assumptions. They assume Mr. Saskin will be deflected from his duties under the proposal if he has to defend in Israel. They assume a default judgment might unfairly exaggerate the bondholders' proper claims. They assume that Mr. Saskin will use funds in defending in Israel that could limit the funds available for a proposal. There was no evidence before the court on these points. But there is someone who can say what effect, if any, defending in Israel might have on Mr. Saskin's time to formulate his proposal; what effect, if any, defending in Israel might have on the funds available to Mr. Saskin to make a proposal; and what the proper amount of a judgment ought to be. That person, Alan Saskin, chose not to give evidence on this motion. His lawyer supported the arguments of Tarion and Cooltech. But those creditors chose not to serve a summons on Mr. Saskin to put his actual evidence before the court to support the suppositions that they raise.

[11] The Monitor fairly points out that it has reported that Mr. Saskin has advised that he intends to make a proposal using recoveries that may become available to him and to related parties out of the Urbancorp CCAA cases. He says that he is currently defending the claims in Israel but that he does not expect to have the funds to necessary do so fully.

[12] Mr. Saskin has been prevented by Order of Newbould J. from being involved with the CCAA debtors throughout the proceedings. He is apparently living off a family trust and funds from his spouse and it is these sources, at least, that he might later access to fund a proposal. Nothing binds Mr. Saskin or his related parties to actually make a proposal however. The other creditors are content to wait and see if the CCAA process yields recovery to Mr. Saskin or his related parties that they then use to make a proposal. They have no other real sources of recovery.

[13] Tarion argues that the other creditors should be compensated for agreeing to wait for Mr. Saskin to make his proposal and the possible effect of the Israeli actions on his time and funding. Tarion argues that barring the bondholders from claiming in the proposal after they have received insurance proceeds is a fair "give" by them. Moreover, it is in the greater good for all to wait. There is no urgency for the bondholders to rush to judgment Tarion argues.

[14] I do not see any basis for "compensation" to small creditors if a major creditor proves its claim. Moreover, there is no evidence supporting their assumed fears.

[15] The discretion under s. 69.1 is to be exercised in a manner that facilitates the statutory goals of the stay in a proposal process. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 (CanLII) at para. 70. It is common ground that the stay is intended to give debtors breathing room so they can focus on rehabilitation. The stay avoids a rush to judgment that can lead to preferential outcomes. The stay maintains a level playing field among creditors by ensuring transparency and that all have input into the process to fine tune process steps to protect the substantive rights of all. There is no other greater good being promoted by waiting for a debtor who says that he, she, or it might consider making an offer in some undisclosed amount, from some unnamed source(s), at some time of his, her, or its choosing. In a CCAA or proposal process, the debtor continues at the sufferance of creditors. If the creditors are content to wait in

a "holding proposal" that is fine. But if one or more have a basis to proceed and wish to do so, that is not inherently antithetical to the goals of the proposal. Any proposal needs the support of the requisite majorities of creditors. If the creditors with proven claims are not content with the process, they are free to try to change it.

[16] The stay supports the goals of the process. It is not a sword to hold creditors at bay until the debtor feels like the time is right to make an offer.

[17] Here there is no active proposal. The current state of the proceeding is that a possible future proposal is "waiting" or "holding" pending the outcome of the CCAA proceedings after which Mr. Saskin might make an offer. There is no proven risk of prejudice to a possible future proposal if Mr. Saskin defends the claim. One way or the other, the claim has to be adjudicated somewhere. Quantification of the claims with a stay on further enforcement prevents preferential outcomes or a rush to judgment. I do not see how continuing the stay of quantification of the bondholder claims facilitates the process or how lifting the stay as proposed might prejudice it.

[18] The Monitor argues practically, that if the Israeli bondholders are going to settle (which is always the likely outcome of civil proceedings) then one or more insurance companies will have to come to the table in Israel. The amounts in issue are so large that realistically, corporate players will lead the resolution efforts. Therefore, limiting the bondholders to insurance proceeds is not necessarily prejudicial to them at all. That may be true. Certainly, the small creditors would like to see a dominant claim excluded. But I do not understand why it is fair to the bondholders to be excluded from recovery beyond insurance that may (or may not) be available or why an extraordinary *quid pro quo* or compensation should otherwise be claimable by the other creditors. This is just a claim for a windfall. I do not see a basis to exercise the discretion to remove the potentially dominant creditors from these proceedings as sought by Mr. Saskin and his supporters.

[19] Order to go lifting the stay as sought in paras. 1 (a) and (b) of the Supplementary Notice of Motions of Mr. Gissin dated January 5, 2018. It is a term of this order, on consent of Mr. Gissin, that he and the plaintiffs in the two Israeli actions will take no steps to enforce any order or judgment that they may obtain in Israel against Mr. Saskin without leave of this court. The leave granted, at this stage, is only to allow the litigation to determine the validity of and quantify the plaintiffs' claims. Whether enforcement of those claims is to occur in a proposal, bankruptcy or otherwise, is an issue for another day.

F.L. Myers J.

Date: January 23, 2018