Court File No. CV-2300696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 LOYALTYONE, CO.

Applicant

REPLY FACTUM OF THE APPLICANT / MOVING PARTY
(MOTION RETURNABLE JUNE 13 AND 14, 2024)

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PART I - BREAD'S STRAWMAN STRATEGY IS UNTENABLE

1. Despite filing a 42-page factum, Bread has failed to confront the evidence that supports the relief sought by LoyaltyOne and the Monitor. Its arguments are based on knocking down the strawmen it puts up, distorting facts, and misstating law. Remarkably (but not uncharacteristic for Bread), it relies on a court-approved funding agreement in this case to support its arguments to the prejudice of LoyaltyOne, despite the express terms of that agreement being without prejudice to the parties.[1] Bread's tactics in responding to this motion bear a striking resemblance to its disregard for LoyaltyOne and its creditors in the Spin Transaction, leading to its financial collapse.

PART II - BREAD SELECTIVELY ATTACKS, THEN IGNORES, THE RECORD

A. Bread's Criticisms of the Record Are Baseless

2. Bread complains that there is no evidence from Charles Horn about Sobeys' imminent departure. This is false. Mr. Horn's contemporaneous communications, which are in the record,[2] speak for themselves. If Bread believed it needed more evidence from Mr. Horn to spin the meaning of those documents, it had every opportunity to get it. The revised schedule provided for rule 39.03 examinations at Bread's request. Bread chose not to avail itself of that right. It does not now lie in its mouth to complain.[3] If any adverse inference should be drawn from a failure to obtain additional evidence from Mr. Horn, that adverse inference should be drawn against Bread.

3. On the other hand, LoyaltyOne obtained highly relevant evidence from former AIR MILES president and LoyaltyOne CEO Blair Cameron under rule 39.03. Mr. Cameron confirmed what is plain and obvious on the documentary record – that Bread knew beginning in January 2021 that Sobeys was withdrawing from the AIR MILES program.[4] Bread's frenzied attack on the credibility

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[1] Endorsement of the Honourable Justice Conway dated December 15, 2023, paras. 1-2, 10.
[2] LoyaltyOne Factum dated May 28, 2024 ("L1 Factum"), paras. 21-23; Cameron Exhibits 5, 6, 7; Hageman Cross Exhibit 30; Davidson Exhibit 23; Hageman 2 para. 49, Exhibit D (p. 2), L1 ARR Tab 1; Motes Cross Exhibit 53 (p. 19), Exhibit M (p. 2).
[3] Joint Aide Memoire of LoyaltyOne and the Monitor dated March 26, 2024, para. 13(c); Endorsement of the Honourable Justice Conway dated April 12, 2024. Bread also made no attempt at any time to convert this motion to a trial of an issue.
[4] Cameron Qs. 57-59, 61-67, 89, 400-406; Davidson Exhibit 23; L1 Factum paras. 21-23.

and evidence of Ms. Hageman and Mr. Fair – claiming that LoyaltyOne somehow "bought" these witnesses because they continued to provide services as consultants when their employment ended – is preposterous and entirely disregards accepted law and practice.[5] Ultimately, Bread's complaints should be viewed for what they are: an empty attempt to deflect attention away from the substantive weakness of its position on this motion.

B. The Evidence Is Clear that Sobeys Was Exiting AIR MILES

4. Bread's mischaracterization of Sobeys' intention to exit AIR MILES as speculative until it gave "formal notice" in June 2022 ignores critical evidence. Sobeys made its intention to exit clear beginning in January 2021 a number of times and in a number of ways.[6] It then confirmed and committed to those intentions by contract in March 2021 when it entered into the amending agreement which ***required*** it to exit between July 1, 2022 and February 1, 2023.[7] Bread cannot simply pretend that this binding agreement, which fixed Sobeys' departure, did not exist.

5. Bread's assertion that there is no basis for the Lenders to claim that they lacked disclosure of Sobeys' exit similarly distorts the record. The evidence is that Bread never disclosed even the risk of withdrawal to the Lenders at any time leading up to the Credit Agreement.[8]

C. LoyaltyOne Was Insolvent on the Spin Date

6. Bread's argument that LoyaltyOne's financial circumstances were not precarious because after the Spin Date it funded LVI's debt by paying dividends conveniently ignores the reasons for those payments and glosses over the impact of Sobeys' exit.

7. First, LoyaltyOne made those payments because it had complete exposure and a legal obligation as both guarantor and primary obligor.[9] Second, Bread's attempt to downplay the

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[5] *Legault v. TD General Insurance Company*, 2022 ONSC 3367, paras. 25-27, 30-31; *Legault v. TD General Insurance Company,* 2024 ONCA 439, paras. 31-32.
[6] L1 Factum, para. 21.
[7] Hageman 2 paras. 42-46, L1 ARR Tab 1; Motes Cross Exhibit L; Cameron Exhibit 15; Cameron Q. 89.
[8] Factum of Ad Hoc Group of Loyalty Ventures Inc. Lenders dated May 28, 2024, paras. 13-15.
[9] Credit Agreement, Article XI, section 11.01, Hageman 1 Exhibit P, L1 MR Tab 2.

significant negative impact of Sobeys' departure relies on its bare assertion that the "collapse of BrandLoyalty resulted in LoyaltyOne being responsible for a larger share of LVI's debt payments than had been expected". That assertion ignores the direct and uncontroverted evidence that BrandLoyalty was never expected (or able) to support those debt payments.[10] Finally, Bread's expert admitted on cross-examination that if Sobeys' departure had been a certainty – which it was, based on all of the evidence, including evidence that Bread should have provided to him when he wrote his report – then LoyaltyOne was insolvent on the Spin Date.[11]

PART III - BREAD'S ARGUMENTS ARE NOT SUPPORTED IN FACT OR LAW

A. The TMA Does Not Bind LoyaltyOne

8. Bread's argument that Delaware law governs whether the TMA binds LoyaltyOne is based on a choice of law clause in the TMA itself, premised on "holding parties to their bargain".[12] LoyaltyOne is not a party to the TMA and did not bargain for it at all. The governing law of the TMA cannot determine whether LoyaltyOne is bound by it. The applicable law can only be Nova Scotia law (where LoyaltyOne was incorporated) or Ontario law (where LoyaltyOne had its head office) since those jurisdictions have the "closest and most real connection".[13]

9. Bread's argument that Mr. Fair had authority to bind LoyaltyOne because he was the VP of Taxation at LoyaltyOne does not meet the test for agency. Among other things, it ignores that he was a Bread employee who held his title simply "to facilitate the filing of tax returns and dealing with tax authorities" in connection with his role at Bread.[14] Bread's claim that LoyaltyOne is bound

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[10] Hageman 2 para. 23, L1 ARR Tab 1; Harington Qs. 141-144.
[11] Davidson Qs. 36-45, 51-52. LoyaltyOne's funding of LVI's debt for a short period of time is not determinative of solvency on the cashflow test or balance sheet test in any event. While hindsight cannot be used to assess solvency, the expert assessment of solvency as at the Spin Date predicted what ultimately happened to LoyaltyOne: Hageman 2 para. 61, L1 ARR Tab 1; Harington Q. 286.
[12] *Aldo Group Inc. v. Moneris Solutions Corporation*, 2012 ONSC 2581 paras. 1, 89-90, 118; *Aldo Group Inc. v. Moneris Solutions Corporation*, 2013 ONCA 725, paras. 1, 44; TMA, section 22, Hageman 1 Exhibit A, L1 MR Tab 2.
[13] G.H.L Fridman, Canadian Agency Law, 3rd Ed., § 14.9; *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2015 ONCA 281, paras. 4, 9.
[14] Fair Cross Qs. 32-36; *Samek v. Black Tusk Energy Inc.,* 2000 ABQB 684, para. 10. Nova Scotia law and Ontario law are substantively the same with respect to the law of corporate separateness and agency.

to the TMA because its parent signed ignores principles of agency and corporate law. Courts are "extremely reluctant to find implied authority unless there is clear and unequivocal evidence that demonstrates that a principal has in fact consented to the agent's having authority to act on his or her behalf".[15] Without such evidence, and there is none here, it would be a radical departure from bedrock corporate law principles to permit one company to bind another.

B. The Disclaimer Should Be Approved if the TMA Is Binding

10. Bread baldly asserts that (i) disclaimers must be made early in the CCAA process, (ii) a debtor must offer sufficient evidence to establish that the disclaimer is fair and reasonable, (iii) a debtor must perform a contract that has not been disclaimed, and (iv) LoyaltyOne and the Monitor are acting in bad faith in disclaiming the TMA. Each of these assertions is wrong at law.

11. First, the disclaimer provisions in the CCAA do not mandate or even contemplate any timeframe for disclaimer. It is customary practice for a CCAA debtor to deal with the restructuring (or liquidation) process at the outset, and then disclaim contracts once the debtor has determined the trajectory of that process.[16] That is precisely what LoyaltyOne and the Monitor have done here, and what every responsible CCAA debtor does in managing its affairs to maximize value.

12. Second, Bread's "fairness" argument relies on an inaccurate interpretation of a British Columbia case from 2004 – five years before the disclaimer provisions of the CCAA even came into force in 2009. Bread's argument also relies on the assertion, without evidence, that the significant financial harm to be suffered by Bread due to the disclaimer "is patently obvious". While common sense would suggest the opposite – CAD$96M is a mere drop in the bucket for a company of its size and financial wherewithal – Bread has put in no evidence to show it will suffer harm if the disclaimer is approved. Bread also asks the court to weigh the harm it baldly claims it

[15] *Swift v. Tomecek Roney Little & Associates*, 2014 ABCA 49, para. 22; *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67, paras. 18-25; L1 Factum paras. 57-58.
[16] For example, it is common that once a debtor's operations have been wound down, contracts such as leases are disclaimed, near the end of a proceeding.

will suffer against that of the lenders, which is not the test.[17] The test is whether the disclaimer "will cause significant financial hardship" to the counterparty to the contract.[18] In any event, considering the conduct of Bread, a weighing of the prejudices would still favour disclaimer.

13. Third, there is no obligation for a debtor to perform a contract that has not been disclaimed. The ability to disclaim does not erase the option for the debtor to refuse to perform a contract.[19] Bread's claim that LoyaltyOne must perform the TMA if not disclaimed is "extraordinary" and "based on legal fiction" and contrary to appellate authority.[20]

14. Finally, Bread's accusation that LoyaltyOne and the Monitor are somehow acting in "bad faith" or for an "improper purpose" by exercising statutory rights of disclaimer is unfortunate and unfounded on the evidence. The disclaimer is intended to benefit LoyaltyOne and its creditors as a whole, not to prefer one creditor over another.[21] Bread could not have been "surprised" by the disclaimer. LoyaltyOne made clear throughout this proceeding that the TMA is not binding on it.

C. Bread Is Not Entitled to the Tax Proceeds

15. Bread's request for an equitable remedy – a constructive trust over the Tax Proceeds – fails to meet the four factors and the high standard for such a remedy, and in any event is barred by its unclean hands.[22] By imposing the Spin Transaction, Bread caused LoyaltyOne's insolvency. It now seeks to impose more harm by asking this court to prefer a recovery for Bread. The court should not countenance Bread's efforts in that regard.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of June, 2024.

CASSELS BROCK & BLACKWELL LLP

[17] Bread Quarterly Report (p. 25); Bread Investor Presentation (p. 6); *Timminco Limited (Re)*, 2012 ONSC 4471 ("*Timminco*") para. 60.
[18] *Timminco*, para. 60.
[19] *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809, paras. 41-47.
[20] *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85, paras. 32-33, 49, 61-67.
[21] *Target Canada Co. (Re)*, 2015 ONSC 1028, para. 24; *Timminco*, para. 62.
[22] *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, paras. 22-23.

SCHEDULE "A"

LIST OF AUTHORITIES

Caselaw

1. *Aldo Group Inc. v. Moneris Solutions Corporation*, 2012 ONSC 2581
2. *Aldo Group Inc. v. Moneris Solutions Corporation*, 2013 ONCA 725
3. *Bellatrix Exploration Ltd. (Re)*, 2020 ABQB 809
4. *Bellatrix Exploration Ltd. (Re)*, 2021 ABCA 85
5. *Globex Foreign Exchange Corp. v. Launt*, 2011 NSCA 67
6. *Legault v. TD General Insurance Company*, 2022 ONSC 3367
7. *Legault v. TD General Insurance Company,* 2024 ONCA 439
8. *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2015 ONCA 281
9. *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52
10. *Samek v. Black Tusk Energy Inc.,* 2000 ABQB 684
11. *Swift v. Tomecek Roney Little & Associates*, 2014 ABCA 49
12. *Target Canada Co. (Re)*, 2015 ONSC 1028
13. *Timminco Limited (Re)*, 2012 ONSC 4471

Authorities

1. G.H.L Fridman, Canadian Agency Law, 3rd Ed., § 14.9.

Chapter 14 CONFLICT OF LAWS

3. TRANSACTIONS WITH A THIRD PARTY

§14.9

An unresolved question is whether, if the issue as between principal and third party relates to the agent's actual authority, the law governing that issue should be the proper law of the contract between the principal and agent, but, if the issue concerns the agent's ostensible or apparent authority, the governing law should be the proper law of the contract between the agent and the third party. Whether this is correct may depend on the effect of the decision in *Ruby SS Corp. v. Commercial Union Assurance Co.*[1] There the English Court of Appeal held that New York law, the law which governed the contract of agency, also governed the agent's right to cancel the contract between the agent and the third party, which was an English contract of insurance. By English law such cancellation was not permissible. However, since New York law allowed it, the cancellation, with the third party's consent, was held to be valid. This case may be incorrect, as being in conflict with earlier decisions. However, it has been suggested[2] that it is reconcilable with earlier decisions in that it decides that the agent's authority is governed by the proper law of the agent's own contract with the principal, but at the same time the agent has additional authority to bind the principal under the law governing his contract with the third party.

Footnote(s)

1 (1933), 150 L.T. 38.

2 In *Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni SpA*, [1984] 2 Lloyd's Rep. 98 at 101 (C.A.), *per* Ackner L.J.

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SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY – LAWS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

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