

**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 THE HARD-ROCK PAVING COMPANY LIMITED
AND THE COMPANIES LISTED ON SCHEDULE "A"
(collectively, the "Applicants")

**RESPONDING AFFIDAVIT OF DAVID R. SEMLEY
(sworn September 12, 2008)**

I, DAVID R. SEMLEY, of the City of Port Colborne, in the Province of Ontario, **MAKE OATH AND SAY AS FOLLOWS:**

1. I am the Chairman, director and principal shareholder of Hard-Rock Paving Company Limited and as such have knowledge hereinafter deposed to. Where I do not have personal knowledge of the background matters discussed in this Affidavit, I have informed myself by review of the relevant background documents, and the source of my knowledge is set out herein. Since the closing of the transactions listed below, I have also been providing consulting services to each of the purchasers as further described below.
2. This Affidavit is submitted in response to:

- (i) the various outstanding Motions connected to the Hearing in these proceedings currently scheduled to take place on September 23, 2008,
- (ii) the impending bankruptcy of the Applicants, and
- (iii) for such other relief as is described herein.

Background

3. Hard Rock began operations in 1956. Prior to the sale of the assets of the business as further described herein, the Applicants collectively composed one of the largest road building, heavy construction and construction material companies operating in the Niagara Peninsula. The Applicants' head offices are located in Port Colborne, Ontario. Each of the Applicants are Ontario companies.
4. The Applicants would routinely bid on and receive large government tendered construction and paving contracts for streets, roads and bridges throughout southern Ontario.
5. The Applicants are principally a family owned and operated business. Prior to the sale of the Applicants' business, the Applicants remained one of the larger private sector employers in the City of Port Colborne.

6. All operating personnel of the Applicants were unionized and were represented by the Labourers International Union and The International Union of Operating Engineers (collectively, the “Unions”). The Applicants had collectively employed as many as 300 unionized employees over the course of the previous calendar year.
7. The Applicants business also involved the mining, refining and sale of construction aggregate used in road construction. To this end the Applicants owned a quarry in Wainfleet, Ontario composed of 258 acres of quarry lands. The Applicants also maintained an operations office and an asphalt processing plant which supplied hot mix asphalt to numerous third party customers.
8. The principal secured creditors of the Applicants are GE Capital Canada (“GE”) and Caterpillar Financial Services Limited (“Cat”).
9. The Applicants, in concert with the Monitor, completed a process to solicit offers for the sale of the business, which culminated with two offers being put before the Court for approval on July 9, 2008.
10. The offers of each of Brennan Paving Limited and Waterford Sand and Gravel Limited, as described in my affidavit of July 8, 2008, were approved by the Court on July 9, 2008.
11. Vesting Orders in respect of both transactions were issued by the Court on July 21, 2008. The transactions contemplated by those

offers were closed shortly thereafter and the Monitor's filed certificates with the Court evidencing the completion of those transactions on July 22, 2008.

12. As substantially all of the property, assets and undertaking of the Applicants, other than their receivables and the outstanding MTO claims (described below), were transferred to the two purchasers as of closing, and as the collection of the receivables was to be undertaken by Brennan Paving Limited with the funds to be remitted to the Monitor post closing, the Applicants effectively ceased operating following closing.
13. Among the Orders received on July 21, 2008 was an order that, notwithstanding that the CCAA process was extended on that date, the Applicants were prevented from making any further expenditures without the consent of GE, Caterpillar and the Monitor.
14. Myself, and a few other members of the Hard Rock staff have attended to the following tasks after the closing of the transaction in order to facilitate an orderly wind down of the business:
 - (i) reviewing claims owing to the Applicants
 - (ii) reviewing claims payable by the Applicants
 - (iii) reviewing of trust payables arising from those claims

- (iv) directing final billings for jobs conducted during the CCAA process
- (v) attending to the cancelation of insurance policies and collection of refunds
- (vi) communicating with the purchasers and various professionals with respect to post closing matters
- (vii) reviewing possibilities to sell a number of remaining assets, including the MTO Claims and certain tax losses
- (viii) Conducting the further review of and continuing the prosecution of the MTO claims
- (ix) analyzing the closing inventory in order to conduct a reconciliation of the closing inventory
- (x) reconciling the distribution of equipment between Brennan and Waterford, and
- (xi) communicating with the appraisers appointed by the secured creditors who were tasked with reviewing the Applicants' equipment.

15. Notwithstanding that these tasks were undertaken for the benefit of the stakeholders, and with the knowledge of GE, Caterpillar and the Monitor, I have not been paid my salary in connection with my having undertaken this work pending the consent of GE and

Caterpillar. Further, there are a number of truckers who have not been paid for work done and delivery of materials to job sites.

16. As a result of an Order in these proceedings on August 26, 2008, all remaining funds previously under the Applicant's control were transferred to the Monitor. Consequently, the Applicants have not been able to pay these amounts.

17. The Applicants are acting in good faith and with due diligence.

MTO Claims

18. As described in my earlier Affidavits filed in this process, in the years prior to the CCAA filing, the Applicants bid for and were awarded certain projects with the MTO in which the ultimate cost of the performance of the projects was in excess of the amount bid due to changes in the work and improper direction from the MTO. The Applicants have made claims for these amounts from the MTO. (the "MTO Claims")

19. The Applicants filed a claim with MTO for payment of the Henley bridge claim in the amount of \$7,253,167.00 in April 2008.

20. We are advised that the materials in respect of the Henley Bridge Claim are being reviewed at the Assistant Deputy Minister ("ADM") level which is the level at which a decision will finally be made.

21. In addition to the Henley claim, the Applicants have several other claims pending at the MTO, and one other owner, which in the aggregate amount to a further \$2,000,000.

Staffing

22. As of September 8th, 2008, there were no further employees actively employed by the Company. However, I understand from Brennan that approximately 50 to 70 former Hard-Rock employees are now employed by them. I understand from Waterford that approximately 10 former employees for Hard-Rock are currently employed by Waterford.
23. Accordingly, the completion of the transactions has in fact resulted, to date, in the preservation of jobs in Port Colborne.

Unions

24. I have reviewed the materials submitted by the Unions in connection with the September 23, 2008 Hearing. The Unions have been supportive of the Applicants throughout this process.
25. The Applicants are of the view that the Unions should, to the extent possible, be paid the outstanding remittances and other amounts due to them under their collective agreement which arose during the term of the CCAA process.

26. I am of the view that, but for the co-operation of the Unions and its members, the Applicants would not have been able to continue to operate successfully during the CCAA process. By being able to so operate, the assets of the Applicants were able to be sold on a going-concern basis, to the benefit of the secured creditors.
27. Had the Applicants remained in control of the sale proceeds after the sale of the assets was completed on July 22, 2008, the Applicants would have paid those amounts which are outstanding and properly owing to the Unions.
28. I believe it is unfair for the secured creditors of the Applicants to have received the benefit of the work that was done in good faith by the Union members but to object to the payment of these workers.

Outstanding Government Remittances

29. Pursuant to paragraph 10 of the Amended and Restated Initial Order of Justice Spence dated May 12, 2008, the Applicants are mandated to make payment of those statutory remittances described therein which accrue during the CCAA process. The Applicants have made all payments due in respect of source deductions and GST to which paragraph 10 of the Order applied. However, I was recently advised that there remains \$12,153.18 of PST outstanding which arose during the post-filing period. But for the Order of July 21, 2008 the Applicants would have paid this amount.

30. The Applicants will be requesting that the Monitor pay this outstanding PST amount prior to its discharge.

McLennan Financing Limited

31. I have reviewed the materials submitted by McLennan Financing Ltd. ("McLennan") in connection with their claim to the Break Fee, as described therein.
32. The Applicants are in support of an appropriate payment to McLennan. But for the intervention of McLennan, it is my view that there would not have been DIP financing available to the Applicants at either of the times at which it was sought in these proceedings.
33. I am advised that the inclusion of a Break Fee is a commercially reasonable requirement in a transaction such as this. The Applicants entered into the McLennan Agreement aware of the Break Fee and determined it to be a fair requirement and in the best interest of the Applicants at that time.

Lien Application by Fowler

34. As set out in my Affidavit of June 27th, 2008 in these proceedings, the Applicants continue to be of the view that the lien being advanced by Fowler Construction Company Limited ("Fowler") is out of time, inappropriate, and that no trust or other claim is provable by Fowler in connection with this matter.

35. Any Order that may be granted to Fowler to allow it to continue to prosecute its action should be clearly endorsed to be without prejudice to the positions of all parties, including the Applicants and not be deemed an admission of any aspect of the Fowler claim.

Actions of Officers and Directors

36. The officers and directors of the Applicants continued to perform their duties throughout the CCAA process. Other than those allegations contained in the materials submitted by the Guarantee Company of North America ("GCNA"), there have been no allegations by any party of which I am aware that the officers or directors have acted improperly during the CCAA process.
37. I note that the officers and directors did not receive any additional compensation or other stay on bonus for agreeing to continue to perform their duties during the CCAA proceedings, notwithstanding the insolvency of the Applicants.
38. The continued service of the officers and directors throughout this process made it possible for the business to be sold on a going concern basis, to the benefit of the secured creditors of the Applicants.
39. I note that in the draft form of Order circulated at the hearing on August 26, 2008, a release was to be provided by the Court in that

Order to the Monitor to the effect that no party would be able to pursue the Monitor for anything it may have done or not done during these CCAA proceedings without the leave of the Court. I understand that a similar release will be sought by the Monitor on September 23, 2008.

40. I am advised by our counsel that a similar release is also sometimes provided to a Chief Restructuring Officer of a company in a CCAA proceedings.

41. Given that the conduct of the officers and directors was monitored by the Monitor, the secured creditors (both directly and through their agent KPMG), and through the Court (to the extent that conduct was put before the court in the various affidavits sworn by me herein and others), and given the absence of any claims (other than in respect of the motion from GCNA), I believe the officers and directors should be provided with the same protection in the Order to be granted on September 23, 2008 as is proposed to be provided to the Monitor upon its discharge.

Bonding Company

42. The Applicants have entered into a protocol with its bonding company to facilitate dealing with the collection and distribution of funds in respect of bonded projects. As a result of this and other

measures, the Applicants have been able to continue to offer employments to a significant portion of its workforce.

43. At the time of the initial filing, GCNA raised concerns relating to the handling of trust funds on the jobs to which the GCNA had provided bonding as well as the impact of the DIP financing on the trust monies. GCNA had provided bonding on two projects being the City of Thorold and the City of Fort Erie. The bonds were in the nature of guarantees to the owners that the jobs would be completed and that trades that supplied labour and material to the projects would be paid.
44. At the commencement of the proceedings, the Company, its officers and directors, the Monitor, its counsel and counsel for the Company advised counsel for GCNA that they were fully aware of the trust provisions of the *Construction Lien Act*. Further, each of those parties confirmed that the business and affairs of the Company during the CCAA proceedings would be conducted in accordance with the trust obligations imposed by the *Construction Lien Act*. Specifically, they were advised that funds received on any particular project would be used solely for the payment of expenses on those projects.
45. GCNA sought to impose new controls on the Applicants which in our view imposed significant additional burdens in terms of administrative responsibilities and monitoring costs which were not present before the filing. These obligations were not included in any

of the bonds or related contractual documentation entered into between the Applicants and GCNA. It was certainly open to GCNA to have sought these as a condition of bonding but that had not been done.

46. GCNA was advised that the purpose of the CCAA filing was to enable the Company to carry on business in the ordinary course subject to the stay of proceedings and the review of its business and affairs by the Monitor as provided in the Initial Order. The Initial stay period was to provide the Company with an opportunity to restructure its affairs or seek other avenues and not to enhance the position of unsecured creditors or contingent creditors after the filing.
47. The Company advised GCNA that in light of the assurances of compliance with the trust obligations along with the oversight by the Monitor and KPMG as the advisor to Caterpillar, the proposed protocol was unnecessary. As a show of good faith, the Company proceeded to negotiate the terms of the protocol which was ultimately incorporated in the Order of June 12, 2008.
48. One of the key issues in negotiating the protocol was to ensure that if the Company was to use borrowed funds or non-trust funds from other sources to prepay for labour and material on the two bonded projects that the Company would be entitled to repay itself or its lender from monies received on those projects in order to continue

with operations. This was the interpretation of the *Construction Lien Act* provisions discussed and we believe incorporated directly in paragraph (vi) of the protocol which provides as follows:

However, where the Applicant pays, in whole or in part for the supply of services or materials related to a specific project, out of money that is loaned to the Applicant, or out of money that is not subject to a trust subject to review by the Monitor of any such payments as contemplated in paragraphs (iv) and (v) Trust Funds generated for that particular project as a result of services or materials paid for by the loan or monies not subject to a trust may be applied to discharge the loan or reimburse the Applicant for money not subject to a trust to the extent of the payment made for the subject supply of services or materials related to the particular project consistent with Section 11 of the *Construction Lien Act*.

49. The Company proceeded to carry out the Fort Erie and Thorold projects. All funds received on those projects were; (i) used to pay for labour and material on the projects, (ii) used to reimburse the Company for funds advanced to prepay for direct construction expenses on the projects, or (iii) remain in trust and not distribute it. Full disclosure was made to all stakeholders. The cash flow statements filed on the various motions to extend the stay provided detailed information of the status of the projects and had separate line items for trust funds.

50. The Company was scrupulous in ensuring that all funds received on a particular project were used to pay potential trust claimants on each of the two bonded projects. All payments were made after review and consultation with the Monitor. There was no leakage of any monies from either of the projects and both have monies in trust by the Monitor. The Fort Erie project is completed and all payments have been made for labour and materials supplied to the project. There is a balance available to the Company free of trust in excess of \$200,000.00.

Shell Canada

51. I have reviewed the materials provided by Shell Energy North America (Canada) Inc. It is difficult to believe that Shell was unaware of the insolvency. In any event, I deny that the Applicants in any way attempted to hide its insolvency status from Shell or from anyone else. Most important, Shell has billed for more gas than it has supplied to the Applicants.
52. I point out that the Monitor established a website with details of the insolvency, that the Monitor had a visible presence at the offices of the Applicants from the commencement of these proceedings, there were several articles in the local Niagara press about the insolvency, and that the Monitor and the Applicants placed advertisements soliciting offers for sale in the Globe & Mail, in the Daily

Commercial News, and in the Journal of Commerce in May, 2008. One of our staff accountants has advised me that he spoke to the Shell representative about the financial situation after we filed for CCAA.

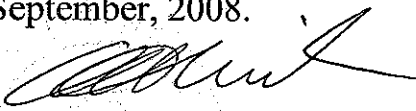
53. Shell also complains that it was inappropriate for the Applicants to sell surplus gas during the CCAA process. I note that the Shell contract required the Applicants to purchase gas in bulk amounts, as opposed to on an as needed basis. Therefore, it was not unusual for the Applicants to be obliged under the Agreement to take gas that was not needed. This was the case in the CCAA process as the Applicants curtailed their operations significantly and the major user of gas being asphalt plant did not start until late May or early June.
54. The Applicants routinely elected to sell some of its surplus gas in the ordinary course of conducting its business. The sale of this gas and the cash revenue derived from it was accounted for in the Applicant's cash flows, some of which cash flows were reviewed by the Monitor. It is not clear to me whether this gas was notionally supplied before or after the CCAA filing.
55. It appears to me that Shell is seeking to be treated on a different basis than any other creditor who may have continued to supply without requiring payment after the date of the Initial Order. That is unfair. The Applicants had every intention to pay these post-filing creditors, and would have done so had the CCAA process been able to

continue, or had the Applicants been given the opportunity to restructure itself so as to continue as a viable business going forward. Unfortunately that did not occur.

56. I do not believe that Shell should receive the relief they are seeking and I deny that the Applicants acted improperly with regard to Shell in any way.

57. I make this affidavit in support of the relief described herein and for no other or improper purpose.

SWORN before me at Port Colborne, in)
the Province of Ontario, this 12th day of)
September, 2008.)


A Commissioner, etc.)


DAVID R. SEMLEY

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My Appointment is for Life