CITATION: Return on Innovation Capital Ltd. v. Gandi Innovations Limited, 2011 ONSC 1490
COURT FILE NO.: 09-CL-8172
DATE: 20110224

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RETURN ON INNOVATION CAPITAL LTD., AS AGENT FOR ROI FUND INC., ROI SCEPTRE CANADIAN RETIREMENT FUND, ROI GLOBAL RETIREMENT FUND AND ROI YIELD PRIVATE PLACEMENT FUND AND ANY OTHER FUND MANAGED BY ROI FROM TIME TO TIME, Applicants

AND:

GANDI INNOVATIONS LIMITED, GANDI INNOVATIONS HOLDINGS LLC, GANDI INNOVATIONS LLC, GANDI INNOVATIONS HOLD CO. AND GANDI SPECIAL HOLDINGS LLC, Respondents

BEFORE: MORAWETZ J.

COUNSEL: C. J. Cosgriffe, for the Applicants

H. Chaiton, for the Monitor

E. Cobb, for TA Associates

HEARD & RELEASED: February 24, 2011

ENDORSEMENT

[1] All parties agree that the test to be applied when considering the request for leave to file the Indemnity Claims is set out in *Blue Range Corp. (Re)*, (2000) 193 D.L.R. (4th) 314 (Alta. C.A.). In my view, Hary Gandy, James Gandy and Trent Garmoe, (collectively, the "Claimants") have established that leave should be granted to file the Indemnity Claims.

[2] On the first part of the test, the court has to consider whether the delay in filing was caused by inadvertence and, if so, did the claimant act in good faith. Inadvertence in the case law has been held to include carelessness, negligence or accident and is unintentional.

[3] In this case, there is a long history of events. The major creditor, TA Associates, became involved in an arbitration as against the Claimants prior to the CCAA proceedings. The arbitration went dormant when Gandi filed under the CCAA. The Claims Bar Date passed and the arbitration subsequently became active. The claims of TA Associates were refined from August 2010 to December 2010. The evidence of Hary Gandy is that he believes that TA

Associates were not bringing forward the arbitration proceedings because more than a year had passed between the commencement of the CCAA proceedings and the Claims Bar Date and during this period the arbitration was dormant.

[4] Counsel to the Claimants takes the position that it can be inferred that the other two claimants were of the same view as Mr. Hary Gandy, and that the affidavit of Mr. Hary Gandy reflects their views. For the purposes of this motion, I accept this position.

[5] I also accept that the explanation provided by the Claimants establishes that there was inadvertence in not filing by the Claims Bar Date and, in the subsequent delay, until the filing of the Claims in December 2010.

[6] In arriving at this conclusion, I have been satisfied that the lack of activity in the arbitration process in the period following the CCAA filing, was such that it could give rise to the belief that TA Associates were not going to pursue the claim.

[7] In the period from August to December 2010, it may very well have been careless or negligent for the Claimants not to have filed a claim, but that does not, on its own, lead to a conclusion that the Claimants were not acting in good faith or that they were intentionally delaying their participation in the CCAA claims process. I also cannot conclude that the Claimants were "lying in the weeds". It has also not escaped my attention that TA Associates waited until the Claims Bar Date had passed before the arbitration was reactivated. This lack of activity on the part of TA Associates could possibly be described as "lying in the weeds". I am also of the view that the delay between August and December 2010 was not so extraordinary that it should deprive the Claimants of their opportunity to have their claim adjudicated.

[8] The first part of the test has, in my view, been satisfied.

[9] The second part of the test requires a consideration of permitting the Claims in terms of the existence and impact of any relevant prejudice caused by the delay.

[10] The fact that the creditors will receive less money if late claims are allowed is not prejudice relevant to the second criteria (see *Blue Range* and *Re Polywheels* [2009] CarswellOnt 2875).

[11] The Monitor asserts three general areas of prejudice:

(a) dilution of the current distribution pool;

(b) plan may have to be amended;

(c) process will somehow be "derailed"

[12] The issue of dilution is not a relevant consideration (*Blue Range*).

[13] With respect to (b), the Claimants argue that the Monitor proceeded to file the Plan in the face of the unresolved late claim issue and that, in doing so, the Monitor helped to create

prejudice. This argument does have a degree of merit. However, more importantly, it seems to me, is that some consideration should be given to the type of plan that is being proposed.

[14] This is a liquidation plan. The assets of the debtor have been sold and the only issue is whether the distribution is to be made on a consolidated estate basis or an individual entity basis – which, in turn, will involve an allocation of assets on an entity-by-entity basis. It is also appropriate, in my view, to take into account that TA Associates is currently the largest unsecured creditor and TA Associates supported the filing of the Plan. I find it difficult to accept that TA Associates can argue prejudice in this context as TA Associates was aware of the Claimants' position regarding indemnification. In my view, it would be inequitable and unfair to permit TA Associates to assert its claim in the arbitration but not allow the Claimants to assert their claim for indemnification in the CCAA proceedings.

[15] As far as derailing the Plan is concerned, in my view, steps can be taken to address this issue and such steps are detailed below. The impact of any prejudice can be addressed by attaching appropriate conditions to an order permitting a late filing. This is the third part of the test.

[16] I am satisfied that the Claimants have established that leave should be granted to extend the time to file their claim.

[17] The Monitor anticipated the possibility of this outcome and at 42-44 of its factum sets out possible conditions that should be put in place to address any prejudice suffered by the estate and to ensure that the process is not derailed.

[18] The first point raised by the monitor is that the Indemnity Claims should be limited to a claim against Gandi Holdings. It is premature to determine this issue on this motion. However, it seems to me that the Monitor can apply to have this issue determined as part of the claims process and that this issue could very well be determined at a preliminary stage.

[19] The second point to consider is whether a separate plan for Gandi Holdings should be filed. This decision need not be made today. The Monitor can make this determination at a later date.

[20] The third point is whether any parts of the Indemnity Claims are to be subordinated as being an equity claim. (Section 6(8) CCAA).

[21] This argument was first made at the hearing. It does not appear in the Monitor's factum. This issue does not have to be determined today, but it may be an issue that forms part of the claims process and it is possible that the Monitor may choose to bring forward this issue as a threshold issue.

[22] The final point is one of costs and the Monitor requests that the Claimants pay costs thrown away as a result of the late filings. In my view, this is a reasonable position to be taken by the Monitor, but it should be recognized that not all costs incurred in the Plan development phase are to be considered thrown away, as at some point there will be a plan. I would ask that the parties attempt to arrive at an agreed upon amount for costs thrown away, to be paid by the Claimants. If no agreement is reached within 30 days, directions may be sought.

[23] Directions can also be sought if the parties are not able to work out a hearing schedule to address threshold issues.

[24] The motion is granted. An order shall issue extending the deadline to file claims to the date the claims were actually filed by Hary Gandy, James Gandy and Trent Garmoe, subject to the conditions set forth above.

MORAWETZ J.

Date: February 24, 2011