Court File No.: CV-12-9545-00CL

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 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

RESPONDING FACTUM OF DOMFOAM INC.
(MOTION RETURNABLE AUGUST 18, 2020)

August 14, 2020

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TO THE SERVICE LIST

PART I - OVERVIEW

1. In 2012, Domfoam Inc. ("**Domfoam**"), purchased the assets, rights and undertakings of one of the applicants, with certain limited exclusions. The purchase agreement was approved by this Court.

2. In 2019, Domfoam received a cheque respecting its entitlement to a share of the proceeds of a Canadian class action in which the applicant had been a class member. The applicant's chose-in-action in those proceedings had been sold to Domfoam. The proceeds belong to Domfoam.

3. Domfoam told the applicant it had received the cheque. The applicant responded that it "*will likely assert an interest in those funds.*" Nine months later, it has not done so. It has, however, moved for an order that Domfoam pay the money to the applicant's monitor, to be held in trust. The motion should be dismissed, for three reasons.

4. Firstly, the applicant has never made a formal claim to the proceeds. It has not started a proceeding or brought a motion in this receivership in which it asserts ownership of the cheque. The only support for the applicant's motion for payment to the Monitor is an email from the applicant's lawyer to Domfoam's lawyer. Absent a formal claim, there is no possibility of a judgment by this Court declaring that the proceeds are not Domfoam's property. Absent the possibility of such a judgment, there can be no legal justification for an interim order denying Domfoam possession of its property.

5. Secondly, the applicant cannot meet the legal standard for the interim order it seeks. Properly understood, this is a motion pursuant to Rule 45, Interim Preservation of Property. The applicant has not filed evidence to satisfy any aspect of the test established by the Court of Appeal for the making of an order pursuant to this rule. Accordingly, the applicant has not mentioned Rule 45, instead preferring to invoke this Court's jurisdiction to "*make any order it considers appropriate in the circumstances*". This Court should not employ that jurisdiction when the applicable legal test has not been met.

6. Lastly, there is no evidentiary basis for the applicant's hypothetical claim to the proceeds. The asset purchase agreement is entirely silent about the proceeds of the Canadian class action, which means i) that the applicant's chose-in-action was not an asset excluded from the (otherwise comprehensive) sale and, ii) that unlike the US class action which is the subject-matter of Domfoam's motion in this proceeding, there is no language in the agreement which the applicant could possibly employ to assert that the proceeds were *intended to be* excluded from that sale, even if intent were relevant, which it is not. There is no justification for denying Domfoam possession of its property.

PART II – THE FACTS

The Agreement[1]

7. On March 12, 2012, 4037057 Canada Inc. (the "**Purchaser**") entered into an asset purchase agreement agreement ("**the Final APA**") with the applicant Domfoam International Inc. (now known as 4362063 Canada Limited) (the "**Vendor**"). The purchase price was approximately $3.7 million.[2]

8. Concerning the assets purchased, the relevant terms of the Final APA were as follows.

(a) *Section 2.1*: *"the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Purchased Assets on the Closing Date."*[3]

(b) *Section 1.1 (hh)*: *'"Purchased Assets" means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets".*[4]

(c) *Schedule 1.1(hh) "Purchased Assets": 1. All assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated, including without limitation the following...1.16* ***all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled*** *but excluding the Excluded Assets".*[5]

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[1] References herein are, in part, to material that was before Justice Wilton-Siegel on November 29, 2018. These materials have been made available to the Court on this motion. The affidavits before Justice Wilton-Siegel (those of Jacques Vincent sworn September 13 and November 12, and that of Tony Vallecoccia sworn October 16, 2018) are also reproduced, without exhibits, in Domfoam's Motion Record on its dated July 27, 2020. (Domfoam's motion record respecting the 2018 motion before Justice Wilton-Siegel is hereinafter the "**2018 Motion Record**". The Vendor's responding record on the 2018 motion is hereinafter the "**2018 Responding Record**". Domfoam's motion record respecting its motion returnable August 18, 2020 is hereinafter the "**2020 Motion Record**").

[2] Affidavit of Jacques Vincent sworn September 13, 2018 (the "**Vincent Affidavit**"), 2018 Motion Record, Volume I, Tab 2, page 10, paragraphs 19 and 24, and Exhibit "C" (Also at Tab 5 in the 2020 Motion Record.)

[3] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 203

[4] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 200

[5] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 230, emphasis added

(d) *Section 1.1(t): "Excluded Assets" has the meaning set out in Section 2.2".*[6]

(e) *Section 2.2: "The Purchased Assets shall not include…those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the "Excluded Assets").*[7]

(f) *Schedule 2.2: "This Purchaser acknowledges and agrees that the following assets shall be considered excluded from this transaction": accounts payable, except as otherwise provided; tax losses, except as otherwise provided; cash on hand or on deposit; debts due to the Vendor from any shareholder, director, officer or employee; certain equipment leases; shares in Valle Foam Industries (1995) Inc.; and shares in A-Z Sponge & Foam Products Ltd.*[8]

9. The Final APA contained an entire agreement clause: "[*t*]*his Agreement and the attached Schedules constitute the entire agreement between the parties with respect to the subject matter and supersede all prior negotiations and understandings.*[9]

10. The Final APA was subsequently approved by this Court, pursuant to a Sale Approval and Vesting Order dated March 16, 2012.[10] The Final APA was assigned by the Purchaser to 8032858 Canada Inc. (now Domfoam Inc.) (again, "**Domfoam**") on March 26, 2012.[11]

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[6] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 199
[7] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 203
[8] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 237
[9] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", clause 7.9, page 223
[10] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "D", pages 278-279
[11] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 11, paragraph 26 and Exhibit "F", page 391

The Canadian Class Action

11. The Final APA did not mention a chose-in-action against the defendants in the Polyether Polyol Price Fixing class action then pending in the Ontario Superior Court (the "**Canadian Class Action**"),[12] which chose-in-action had been an asset of the Vendor in its capacity as a class member prior to the execution of the Final APA. As a result, that chose-in-action was conveyed to the Purchaser as one of the "Purchased Assets" pursuant to the terms of the Final APA set out above, ("*all other property, assets and rights, real or personal, tangible or intangible...*"), and then by the Purchaser to Domfoam.

12. In October 2019, the administrator of the Canadian Class Action sent Domfoam a cheque representing "*a payment for your share of the settlement funds*", in the amount of $1,399,002.24 (the "**Canadian Proceeds**").[13] Domfoam had not taken any affirmative action (such as filing a claim) in order to receive these funds.[14]

13. Domfoam's counsel, Fred Tayar ("**Tayar**"), wrote the Vendor's counsel to advise that the cheque had been received, and to provide a copy of that cheque.[15] The Vendor's counsel, David Ullmann ("Ullmann"), replied to Tayar as follows.

> *Fred,*
>
> *As per my voicemail, we will likely assert an interest in these funds. I would ask that your client deposit these funds with your firm for the time being. We appreciate and respect your decision to bring this to our attention.*
>
> *David*

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[12] Affidavit of Mindy Tayar affirmed July 27, 2020 (the "**First Tayar Affidavit**"), 2020 Motion Record, Tab 2, at paragraph 14 and Exhibits "N"-"O", Tabs N-O
[13] First Tayar Affidavit, 2020 Motion Record, Tab 2, at paragraph 14 and Exhibits "N"-"O", Tabs N-O
[14] Affidavit of Mindy Tayar affirmed August 12, 2020, (the "**Second Tayar Affidavit**"), Supplementary Motion Record of Domfoam Inc. (returnable August 18, 2020) at paragraph 16
[15] First Tayar Affidavit, 2020 Motion Record, Tab 2, at paragraph 14 and Exhibits "N"-"O", Tabs N-O

(hereinafter the "**Ullmann Email**")[16]

14. The Vendor has never formally asserted an interest in the Canadian Proceeds, either by starting a proceeding or by bringing a motion within this proceeding. The Ullmann Email is the procedural *and* the evidentiary basis for this "interim" motion, which fact is made clear by the Vendor's affiant:

> *Additional Disputed Funds Held by Purchaser (Relief Sought by Cross-Motion)*
>
> *24. As set out in paragraphs 1-15 of the Tayar Affidavit, by letter dated November 1, 2019, Mr. Tayar advised Mr. Ullmann that the Purchaser had recently received a cheque for $1,399,002.24, being the "Additional Disputed Funds") (Exhibit "N" of the Tayar Affidavit). The Tayar Affidavit also sets out that* ***Mr. Ullmann responded advising that the Applicants would "likely assert an interest in these funds"*** *(Exhibit "P" of the Tayar Affidavit).* ***That is,*** *just like the Disputed Funds [the proceeds of the US class action], as proceeds of the settlement of the class action litigation,* ***Domfoam asserts that the Additional Disputed Funds were excluded from the Domfoam Transaction and thus remain property of Domfoam.***[17]

PART III – THE ISSUES AND THE LAW

15. The issues before this Honourable Court are as follows.

1. Can the Vendor obtain an interim order respecting the Canadian Proceeds if it has never made a formal claim to those Proceeds?

2. Can the Vendor meet the test for the making of an interim order pursuant to Rule 45, Interim Preservation of Property?

3. Is there any basis for a formal claim by the Vendor to the Canadian Proceeds?

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[16] First Tayar Affidavit, 2020 Motion Record, Tab 2, at paragraph 15 and Exhibit "P", Tab P

[17] Affidavit of Linc Rogers sworn August 9, 2020 (the "**Rogers Affidavit**"), Responding and Cross-Motion Record of the Vendor returnable August 18, 2020, Tab 2, at paragraph 24, emphasis added

ISSUE ONE: THE VENDOR CANNOT OBTAIN AN ORDER RESPECTING THE CANADIAN PROCEEDS

16. Ullmann's assertion that his client would "*likely*" assert an interest in the Canadian Proceeds is not a request for relief from this Court. It is a private statement to another counsel. In other words, the Vendor has done nothing to grant this Court jurisdiction over a still-hypothetical dispute concerning ownership of the Canadian Proceeds. Until that jurisdiction has been established by the Vendor's compliance with the relevant process, this Court cannot issue an order or judgment concerning that dispute.

17. It should not have to be said, but the proceeds of a class action commenced in and presided over by the Superior Court of Ontario are *not* the proceeds of a different class action commenced in and presided over by the United States District Court for the District of Kansas.[18] With respect to the latter, Domfoam has brought a motion in this proceeding seeking a declaration that certain proceeds therefrom are Domfoam's property.[19] That dispute is properly before the Court. In its factum, the Vendor repeatedly conflates its hypothetical claim to the Canadian Proceeds with Domfoam's concrete, formally-asserted claim to certain of the US proceeds.[20] The Vendor is doing so in order to incorrectly suggest that its "claim" to the Canadian Proceeds is before this Court.

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[18] See the Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, pages 3-4, paragraph 9 and Exhibit "B", pages 18 and 19
[19] Notice of Motion of Domfoam Inc., 2018 Motion Record, Tab 1, pages 1-2
[20] Responding and Cross-Motion Factum of the Applicants (the "**Vendor's Factum**") at paragraphs 6, page 2-3, paragraphs 12-13, page 4-5, and paragraph 34, pages 12-13

ISSUE TWO: THE VENDOR CANNOT MEET THE RULE 45 TEST

18. Let us assume for the sake of argument that this Court does have jurisdiction over the dispute concerning the Canadian Proceeds, perhaps by virtue of the existence of this *CCAA* proceeding. In that case, Rule 45.02 would apply, as it perfectly captures the relief sought by the Vendor on this motion.

> ***SPECIFIC FUND***
>
> ***45.02*** *Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.*

19. The guiding case on this rule is that of the Court of Appeal for Ontario in *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*[21] The Court began its analysis as follows.

> *The Rule is a limited exception to the law's deep-seated aversion to providing a plaintiff with execution before a trial. The risk of such an order, because of its invasive nature, is well explained by Sharpe J.A.[...]:*
>
>> *Clearly, pre-trial execution of any kind poses definite problems. Attachment of assets or interference with disposition of assets will often constitute a serious interference with the defendant's affairs. [...]*[22]

20. On this point, see also *Sterns v Scocchia*:

> *22 Because of the extreme nature of a rule 45.02 order and/or a Mareva injunction, they are remedies that should be available only when it is necessary to balance the interests of the plaintiff and defendant. Both orders maintain the status quo until trial in a way that is fair to both the plaintiff and defendant and must not place the interests of the plaintiff before those of the defendant. Such orders are not merely procedural in nature and should be granted only in exceptional circumstances because they have the potential to injure a defendant before the plaintiff has proven its case at trial. Furthermore, it can place a defendant in an*

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[21] 2012 ONCA 475 ("*Sadie Moranis*")

[22] *Sadie Moranis,* at paragraph 17, citiation omitted

> *unfair position because it freezes a fund that would otherwise be available to the defendant and available for the purpose of operating its business. In short, such an order can appreciably tilt the scales in favour of a plaintiff on the basis of unproven allegations. [...]*[23]

21. The test established by the Court of Appeal for the making of an order pursuant to Rule 45.02 is as follows.

(a) the plaintiff claims a right to a specific fund;

(b) there is a serious issue to be tried regarding the plaintiff's claim to that fund;

(c) the balance of convenience favours granting the relief sought by the plaintiff.[24]

22. The Vendor cannot meet any aspect of this test.

23. With respect to (a), the Court of Appeal held:

> *19 The first of these requirements...requires that there be a specific fund readily identifiable when the order is sought. It also requires that the plaintiff assert a legal right to the specific fund as a claim in the litigation. [...]*[25]

24. The Vendor has not asserted "*a legal right to the specific fund as a claim in the litigation*": its lawyer has sent an email saying it "*likely*" would do so. Further, the Vendor has not filed any evidence to substantiate such a claim, had it been made. The Vendor's affiant swore that the Ullmann Email means that "*Domfoam asserts that the Additional Disputed Funds were excluded from the Domfoam Transaction and thus remain property of Domfoam*",[26] but the Ullmann Email says nothing of the sort.

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[23] (2002), 27 C.P.C. (5th) 339 (Ont. Sup. Ct.), at paragraph 22
[24] *Sadie Moranis*, at paragraph 18
[25] *Sadie Moranis*, at paragraph 19
[26] Rogers Affidavit, Responding and Cross-Motion Record of the Vendor returnable August 18, 2020, Tab 2, at paragraph 24

25. The Court of Appeal continued:

> *20 The second [serious issue to be tried] and third [balance of convenience test] requirements. . . ensure that interference with the defendant's disposition of assets is limited to cases where the plaintiff has a serious prospect of ultimate success, and there is something compelling on the plaintiff's side of the scales, such as a real concern that the defendant will dissipate the specific fund, that is sufficient to outweigh the defendant's freedom to deal with his or her property.*[27]

26. The Vendor has not filed any evidence that attempts to meet the "*serious prospect of ultimate success*" or "*something compelling on the plaintiff's side of the scales*" elements of the test. It has not even articulated a theory of how the Final APA could be interpreted to grant it ownership of the Canadian Proceeds. There is currently *no* issue to be tried, and the Vendor cannot possibly meet the balance of convenience test.

> *24 In my view, the plaintiff's materials do not satisfy this requirement [balance of convenience test]. There is nothing in the evidence that would suggest that the defendant intends to leave the jurisdiction or to do anything else that might frustrate the plaintiff's recovery of any judgment that he might be successful in obtaining. On the other hand, making an order deprives the defendant of control over his assets. Furthermore, the plaintiff has not filed any undertaking to compensate the defendant for any damages he might sustain as a result of the making of such an order. Quite frankly, other than securing a potential judgment, no compelling reason has been advanced to justify making the requested order. Certainly it has not been demonstrated that a palpable unfairness would result if the order is not made. Accordingly, the plaintiff has not met the balance of convenience test.*[28]

ISSUE THREE: THERE IS NO MERIT TO THE VENDOR'S HYPOTHETICAL CLAIM

27. Due to the fact that the Vendor has not stated a theory of its continuing ownership of the Canadian Proceeds, or provided evidence to support that theory, this Court has no reason to accept that the Vendor's hypothetical claim to those Proceeds would be anything more than fanciful. This is doubly so because the Final APA, which Domfoam

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[27] *Sadie Moranis,* at paragraph 20
[28] *Miller v. Carley*, (2006) 148 A.C.W.S. (3d) 40 (Ont. Sup. Ct.) at paragraph 24

has put before the Court, by its terms includes the relevant chose-in-action as among the assets conveyed ("*all other property, assets and rights, real or personal, tangible or intangible*...") to the Purchaser.

PART IV – ORDER SOUGHT

28. Domfoam respectfully requests the dismissal of the Vendor's motion, and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

COLBY LINTHWAITE
OF COUNSEL FOR DOMFOAM INC..

SCHEDULE "A"

Authorities Cited

1. *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475

2. *Sterns v Scocchia,* (2002), 27 C.P.C. (5th) 339 (Ont. Sup. Ct.)

3. *Miller v. Carley*, (2006) 148 A.C.W.S. (3d) 40 (Ont. Sup. Ct.)

SCHEDULE "B"

Statutes Cited

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE

SPECIFIC FUND

45.02 *Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.*

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