CITATION: 3113736 Canada Ltd. (Re), 2019 ONSC 1050
COURT FILE NO.: CV-12-9545-00CL
DATE: 20190213

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1984, 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.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Ullmann, Varoujan Arman* and *Alexandra Teodorescu*, for the Applicant, Domfoam International Inc.

Fred Tayar, for the Respondent, Domfoam Inc.

Grant Moffat, for the Monitor, Deloitte Restructuring Inc.

HEARD: November 29, 2018

ENDORSEMENT

[1] On this motion, Domfoam International Inc. (now 4362063 Canada Limited) ("Domfoam" or the "applicant"), an applicant in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1984, c. C-36 (the "*CCAA*"), seeks leave of the Court under Rule 39.02(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to conduct examinations of two individuals who are respectively the president and an employee of Domfoam Inc. (the "Purchaser").

Factual Background

The Lawsuit

[2] Domfoam was a class member of an anti-trust class action that had been commenced in the United States District Court for the District of Kansas (the "U.S. Court") in 2004 (the "Lawsuit"). The defendants in the Lawsuit were Bayer AG, Bayer Corporation and Bayer MaterialScience LLC (collectively, "Bayer"), BASF SE and BASF Corporation (collectively, "BASF"), the Dow Chemical Company ("Dow"), Huntsman International LLC ("Huntsman") and Lyondell Chemical Company ("Lyondell") (collectively, the "Defendants").

[3] In 2008, Domfoam retained Refund Recovery Services, LLC ("RRS") to assist it in filing its claim in the Lawsuit. John Howard ("Howard") was the general manager of Domfoam at the

time. Howard signed the agreement with RRS and was therefore aware of Domfoam's claim in the Lawsuit.

[4] The plaintiffs in the Lawsuit negotiated settlements with Bayer, BASF, Hunstman and Lyondell which were approved by the U.S. Court at different times. In particular, a settlement was reached with BASF and Huntsman that was approved by the U.S. Court on December 12, 2011. The amount payable in respect of the settlement with BASF was distributed to Domfoam in three tranches.

These *CCAA* Proceedings

[5] As a result of declining sales, fines imposed by the Competition Bureau of Canada and class action lawsuits against the applicants in Canada and the United States, Domfoam, Valle Foam Industries (1995) Inc. (now 3113736 Canada Ltd.) and A-Z Sponge & Foam Products Ltd. sought protection under the *CCAA* on January 12, 2012.

The Transaction

[6] Pursuant to an agreement of purchase and sale dated March 8, 2012 between Domfoam and 4037057 Canada Inc. ("4037057") (the "APA"), 4037057 agreed to purchase the operating business of Domfoam (the "Transaction"). The APA was subsequently assigned to the Purchaser who completed the Transaction on March 26, 2012 after court approval of the Transaction was received on March 16, 2012.

[7] The APA provided in Section 2.1 that Domfoam would sell the "Purchased Assets" to the Purchaser. "Purchased Assets" was defined to mean "the right, title and interest of [Domfoam] in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets." Schedule 1.1(hh) provided that the "Purchased Assets" were "[a]ll assets, undertakings and properties of the Vendor of every nature and kind whatsoever, and wherever situated", including without limitation a list of assets that included "Purchased Receivables". "Purchased Receivables" was defined in section 2.9 of the APA to be "all of the Vendor's accounts receivable", the total amount of which was stated to be $5,996,692. It is not disputed that the term "Excluded Assets" does not include any settlement proceeds from any party to the Lawsuit.

[8] The Purchaser says that the plain meaning of "Purchased Assets" includes any monies to be received in respect of the Lawsuit. It denies that there was any agreement to exclude any such monies, relying in part on the "entire agreement" provision of the APA. Domfoam says that there was an agreement to exclude any proceeds from the Lawsuit from the "Purchased Assets". It relies in part on the evolution of the treatment of an asset category of Domfoam referred to as the "BASF Receivables" in the Transaction documentation.

[9] In both an earlier draft of the APA, in December 2011, and in the APA, "BASF Receivables" is defined to have the meaning of the term set out in Section 2.9. Section 2.9 is a provision that allocates the purchase price of the "Purchased Assets" among a number of asset categories.

[10] The earlier draft of the APA did not contain a definition of "BASF Receivables" in Section 2.9. However, the following was set out in that provision under the heading "BASF Receivables":

> As of December 16, 2011, the Purchaser has been informed that the Vendor was entitled to payments from BASF in lieu of a settlement out of court by BASF of class actions in the amount of approximately six hundred forty two thousand dollars ($642,000).
>
> The portion of the Purchase Price attributed to the BASF Receivables is three hundred eighty six thousand and two hundred dollars ($385,200) calculated at a discount rate of 60%.
>
> The purchase price of the BASF Receivables is conditional upon production by the Vendor of all the supporting documents related to said BASF Receivables and the completion of its assignment from the Vendor to the Purchaser as of the Closing Date.
>
> If the Vendor does not want to sell the BASF Receivables because it would be used by the Vendor in the negotiation of the settlement out of court of the Canadian class actions instituted against the Vendor, the Purchaser would then agree to withdraw its offer to purchase said BASF Receivables and the Purchase Price would be reduced by the amount attributed to the BASF Receivables.

[11] The APA also did not contain a definition of "BASF Receivables" in Section 2.9. In that provision, however, the narrative set out above was deleted and the word "Withdrawn" was placed under the heading "BASF Receivables". It is understood that this means that the BASF Receivables, although originally to be included in the Transaction, were removed from the Transaction and were not sold by Domfoam.

[12] Domfoam submits that, in the initial draft and the APA, "BASF Receivables" referred to all monies to be received in respect of the Lawsuit, not merely to the proceeds of the settlement with BASF. Alternatively, Domfoam says that, regardless of the meaning of "BASF Receivables", the treatment of the "BASF Receivables" in the Transaction reflects an intention of the parties to exclude any monies to be received in respect of the Lawsuit from the "Purchased Assets".

The Dow Settlement

[13] The Lawsuit in respect of Dow proceeded to a jury trial in 2013. In May 2013, a judgment was entered against Dow in the amount of $1.3 billion. Appeals of the judgment were ultimately settled in February 2016. Under the settlement, Dow agreed to pay U.S. $835 million to the benefit of the plaintiffs in the Lawsuit. The settlement was approved in December 2017.

[14] An initial distribution representing 85% of the total recovery from the Dow settlement was made to the class members, including Domfoam, in March 2018.

[15] Domfoam has structured a plan of compromise and arrangement (the "Plan") based on the proceeds to be received by Domfoam from the Dow settlement (the "Dow Proceeds"). The Plan was approved by the requisite majorities at a creditors' meeting held in October 2016 and received court approval on January 24, 2017.

[16] On May 29, 2018, the Court ordered an interim distribution to the creditors of Domfoam in the amount of U.S. $3.47 million (the "Distribution Order").

The Purchaser's Motion

[17] By notice of motion dated September 24, 2018, the Purchaser moved to set aside the Distribution Order on the ground that it is entitled to the Dow Proceeds based on the terms of the APA (the "Purchaser's Motion"). The Purchaser also says that the Distribution Motion was brought without notice to the Purchaser and that Domfoam failed to make proper disclosure to the Court regarding the Purchaser's entitlement to the Dow Proceeds when it provided an affidavit to the court stating that Domfoam's claim in the Lawsuit "was specifically excluded from the [Domfoam assets] purchased by the Purchaser".

[18] Jacques Vincent ("Vincent") was the Purchaser's lawyer in the Transaction in 2012. He negotiated the Transaction documentation with counsel for Domfoam. The motion materials for the Purchaser's Motion contained an affidavit of Vincent sworn September 13, 2018 (the "First Vincent Affidavit"). The relevant portion of the First Vincent Affidavit for present purposes are paragraphs 32-35, which read as follows:

> The Urethane Antitrust lawsuit against BASF was the only lawsuit from the Urethane Antitrust lawsuits that has been discussed prior to the execution of the APA #1 and, as mentioned above, was specifically "withdrawn" from the APA #2 and the Final APA.
>
> The Dow Action was never discussed.
>
> The Dow Action was not, and has never been, an "Excluded Asset", it being understood that the drafting of the APA was purposely broad to reach and encompass all disclosed and undisclosed assets of any nature.
>
> At the end of May 2018, I was advised by Terry Pomerantz ("Pomerantz"), President of [the Purchaser], that he was informed by John Howard, an employee of [the Purchaser] who heard through the industry's grapevine that a) a lawsuit involving [Domfoam] as one of the claimants against Dow had been instituted some time prior to the CCAA proceedings, b) a judgment had been rendered against Dow in the United States which was subsequently settled out of Court, and c) that a payment was to be made by Dow to the class action claimants, which may include [Domfoam].

This Motion

[19] Following the cross-examination of Vincent in November 2018, Domfoam brought this motion under Rule 39.02(2) of the *Rules of Civil Procedure* seeking leave of the Court to

conduct examinations of Pomerantz and Howard under r. 39.03 as witnesses in respect of the Purchaser's Motion.

Applicable Law

[20] The applicable provision of the *Rules of Civil Procedure* is r. 39.02(2), which reads as follows:

> (2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03.

[21] It is not disputed that r. 39.02(2) sets up a four-part test:

(1) Is the evidence from the party sought to be examined relevant?

(2) Does the evidence respond to a matter raised on the cross-examination, not necessarily raised for the first time?

(3) Would granting leave result in a non-compensable prejudice that could not be addressed by imposing costs, terms or an adjournment?; and

(4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?

See: *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 (Div. Ct.), at para. 13 [*First Capital*].

[22] Further, a flexible, contextual approach is to be taken in assessing the criteria relevant to r. 39.02(2), having regard to the overriding principle outlined in r. 1.04 of the *Rules of Civil Procedure* that the rules are to be interpreted liberally to ensure a just, timely resolution of the dispute: see *First Capital*, at para. 14. In this regard, a court should also consider proportionality in determining whether to grant leave for further examinations: see *Elgner v. The Estate of Harvey Freedman*, 2013 ONSC 2176, at para. 6.

The Background to this Motion

[23] The principal issue between the parties is whether the Dow Proceeds were conveyed to the Purchaser in the Transaction. In this context, the Purchaser's understanding at the time of the Transaction of the potential for future settlement proceeds in the Lawsuit, and the Purchaser's understanding of the treatment of the proceeds in respect of the settlement with BASF at that time, could well be relevant.

[24] In addition, Domfoam says that the timing of the Purchaser's first knowledge of the Lawsuit and, in particular, of the Dow Proceeds, subsequent to the completion of the Transaction, is relevant to various defences it asserts against the Purchaser's claim to the Dow Proceeds. In this regard, it makes two principal arguments.

[25] First, Domfoam suggests that the Purchaser lost any entitlement to the Dow Proceeds that it might otherwise have had under the APA by failing to assert its claim within the two year period provided under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B or otherwise. Second, Domfoam suggests that the Purchaser's failure to assert its entitlement after learning of the claim against Dow and/or the settlement with Dow is evidence of the Purchaser's understanding that Domfoam did not convey the Dow Proceeds under the APA. For the purposes of each argument, the date on which the Purchaser first learned of the claim against Dow in the Lawsuit, including the settlement with Dow and the Dow Proceeds, is material.

[26] Further, Domfoam disputes the Purchaser's claim that it had no prior notice of Domfoam's motion regarding the Distribution Order. In this context, the Purchaser's knowledge of, and any acquiescence to, the Plan is relevant. It is not disputed that Vincent was dropped from the service list in these *CCAA* proceedings after the fall of 2015. However, Howard was separately represented in these *CCAA* proceedings by counsel who continued on the service list after that date. Domfoam says that, therefore, Howard's knowledge of the Plan is relevant to this issue, at least to the extent he communicated that knowledge to Terry Pomerantz, the president and shareholder of the Purchaser ("Pomerantz").

[27] Vincent was cross-examined on the First Vincent Affidavit and a second affidavit on November 20, 2018. In the course of the cross-examination, Domfoam learned for the first time that Vincent received his instructions regarding the Transaction from Terry Pomerantz and another party.

[28] The cross-examination of Vincent also revealed that Vincent had little knowledge of when, and to what extent, the Purchaser learned of the Lawsuit, whether before or after the Transaction, or learned of the Dow Proceeds and the Plan subsequent to the completion of the Transaction. The party whose knowledge is relevant is Pomerantz. Further, Domfoam says that the nature and timing of any communication by Howard to Pomerantz of the existence of the Lawsuit, as well as of the Dow settlement beyond what was set out in the Vincent Affidavit, could also be relevant to the issues described above.

[29] As a result of Vincent's lack of direct knowledge, his cross-examination resulted in eleven undertakings of the Purchaser to obtain the answers from Pomerantz and Howard to various questions which addressed these issues. The Purchaser provided the answers to these questions. Accordingly, the result of the cross-examination was that, on a large number of the issues, the Purchaser's position was, in effect, put forward by answers to written interrogatories rather than was the subject of actual cross-examination. Domfoam now seeks to cross-examine Pomerantz and Howard directly rather than to rely entirely on these answers.

The Positions of the Parties on This Motion

[30] The Purchaser says that Vincent was the appropriate representative of the Purchaser because Vincent "negotiated" the Transaction on its behalf. I will address this assertion below. The Purchaser also says that it should have been evident to Domfoam from the First Vincent Affidavit that Vincent would be unable to answer a number of questions that Domfoam intended to put to him, in particular relating to the extent of the Purchaser's knowledge after completion of the Transaction. The Purchaser says that Domfoam should therefore have raised any concerns regarding the need to examine Pomerantz and Howard before the cross-examination of Vincent. It suggests that it is too late to do so now after having received the answers to the undertakings. The Purchaser suggests that the real reason for this motion is that Domfoam does not like the answers to the undertakings that it received and seeks to have "another kick at the can" through this motion.

[31] In response, Domfoam makes two principal arguments regarding the need to examine Pomerantz. First, it says that the facts pertaining to Vincent's role in the negotiation of the Transaction, and the fact that Pomerantz was the controlling mind and will of the Purchaser, only became clear in the cross-examination. Second, it says, in effect, that it should not be penalized for having gone forward with the cross-examination of Vincent regardless of any apparent deficiencies in his knowledge of relevant events. Further, it says that it would have raised a number of additional questions for answers by way of undertakings but felt constrained by the position of the Purchaser's counsel as to the number of questions that were appropriate in the circumstances.

[32] Domfoam also says Howard is the person best able to testify as to when the Purchaser first had knowledge of the claim against Dow in the Lawsuit, as well as the judgment against Dow, the settlement with Dow, and the availability of the Dow Proceeds. Further, Domfoam says Howard's evidence regarding the Purchaser's knowledge of the Plan is relevant because, given that Vincent was no longer on the service list after the fall of 2015, Howard would have been the Purchaser's source of such knowledge.

Analysis and Conclusions

[33] The issue for the Court on this motion is whether Domfoam can satisfy the four-part test for leave under r. 39.02(2) given that it has already received written answers to most of the matters upon which it seeks to examine Pomerantz and Howard. I will address each of the four parts of the test for granting leave separately, dealing in turn with the request to examine Pomerantz and Howard.

Relevance

[34] The first requirement of the test is demonstration that the evidence from the party sought to be examined is relevant.

[35] I conclude that the evidence of Pomerantz is relevant to the issue of the Purchaser's claim to the Dow Proceeds and to the defences asserted by Domfoam for the following reason.

[36] As discussed above, the Purchaser's knowledge of the Lawsuit, and the BASF Receivables, is relevant contextual background to the treatment of the BASF Receivables in the Transaction which, in turn, could have implications for the interpretation of that term and, more generally, for the intention of the parties regarding any future proceeds from the Lawsuit. For this purpose, the relevant knowledge is that of the controlling mind and will of the Purchaser at the time. The cross-examination revealed that this was Pomerantz. Vincent may have "negotiated" the Transaction documentation and conducted certain legal due diligence. However, he did so on behalf of, and on the instructions of, his client which came from Pomerantz. Put simply, Vincent "negotiated" the Transaction documentation but Pomerantz "negotiated" the business transaction. While any knowledge of Vincent is imputed to Pomerantz, it remains possible that Pomerantz had knowledge that he did not communicate to Vincent. There is, therefore, no certainty that Vincent had a complete understanding of the Purchaser's knowledge of the relevant matters at the time of the Transaction.

[37] With respect to Howard, the application of the test is somewhat more complicated. Before addressing this requirement of the test, it is necessary to clarify Howard's role and the nature of his evidence, as these observations inform the conclusions below regarding the request to examine him.

[38] Howard was an employee of Domfoam at the time of the Transaction. Any knowledge of the Lawsuit that he may have had at that time is attributable to Domfoam rather than to the Purchaser. More importantly, it is not suggested that, after Howard became an employee of the Purchaser, Howard held a position in the Purchaser such that any knowledge on his part was attributable to the Purchaser. Accordingly, any knowledge on his part of the Lawsuit, the Dow Proceeds, or the Plan is of relevance only to the extent that he communicated that knowledge to Pomerantz.

[39] Turning to the first requirement of the test, given that the matters on which Domfoam seeks to examine Howard pertain to his communications to Pomerantz of knowledge of matters that are relevant to the extent Pomerantz was aware of them, I think it necessarily follows that such evidence would be relevant to the issues described above. Put another way, to the extent that Pomerantz's knowledge of these matters is relevant, Howard's communication to him of such matters would also satisfy the test of relevance. To be clear, however, in reaching this conclusion I have proceeded on a narrow view of relevance. Considerations of the necessity for such evidence will be addressed later.

[40] I therefore conclude that Domfoam has satisfied the first part of the test for leave in respect of Pomerantz and Howard.

Response to a Matter Raised on the Cross-Examination

[41] The second requirement of the test requires demonstration that the evidence sought responds to a matter raised on the cross-examination.

[42] The Purchaser submits that the evidence sought from Pomerantz and Howard does not respond to a matter raised on the cross-examination of Vincent for the first time. It suggests that the evidence sought from Pomerantz and Howard was set out in the Vincent Affidavit or,

alternatively, that any limitation on Vincent's ability to give such evidence should have been clear from the First Vincent Affidavit. This argument engages the Purchaser's submission that it is too late to seek leave of the Court to examine Pomerantz and Howard.

[43] In my view, the evidence that Domfoam seeks from Pomerantz is directly responsive to a matter raised on the cross-examination. The Purchaser put forward Vincent as the party who "negotiated" the Transaction. On cross-examination, it became clear that it was Pomerantz who "negotiated" the Transaction in the more fundamental sense described above. I do not think that Domfoam can, or should, be prejudiced for failing to recognize this difference, given that the Vincent Affidavit was silent on Pomerantz's involvement. The Purchaser has, in effect, acknowledged that the relevant knowledge rested with the person who negotiated the Transaction. It cannot now object to an examination of Pomerantz after it was revealed on Vincent's cross-examination that Pomerantz was the actual negotiator of the business transaction.

[44] With respect to Howard, however, the issues pertaining to him were directly raised in the Vincent Affidavit in paragraph 35. That paragraph sets out the specific matters that were the subject of the communications between Howard and Pomerantz but without any specific timeframe for such communications. Domfoam therefore had ample notice that Howard was the source of the Purchaser's information regarding the Lawsuit, the Dow settlement, and the Dow Proceeds. If Domfoam intended to address any matters pertaining to Howard's knowledge, and the timing and substance of any communications with Pomerantz regarding such knowledge, it should have acted prior to cross-examining Vincent.

[45] I therefore conclude that Domfoam has satisfied the second part of the test for leave in respect of Pomerantz but not in respect of Howard.

Would Granting Leave Result in Non-Compensable Prejudice?

[46] The third requirement of the test requires consideration of whether granting leave would result in a prejudice that could not be addressed by imposing costs, terms or an adjournment.

[47] In this case, I am satisfied that granting leave would not result in non-compensable prejudice to the Purchaser. The only effect of granting leave would be to delay the hearing of the Purchaser's Motion for a relatively short period of time with some potential attendant cost in the form of a delayed receipt of the Dow Proceeds if it were to succeed on that Motion.

The Existence of a Reasonable or Adequate Explanation

[48] The fourth part of the test requires consideration of whether the applicant has provided a reasonable or adequate explanation for why the evidence was not included at the outset. In this case, this requires consideration of whether Domfoam has provided a reasonable or adequate explanation for its decision not to examine Pomerantz or Howard on the matters of relevance to its position on the Purchaser's Motion until after the cross-examination of Vincent.

[49] For the reasons set out above, I am of the view that Domfoam has provided a reasonable explanation for not seeking to examine Pomerantz under r. 39.03 prior to cross-examining Vincent. In short, Pomerantz's involvement as the controlling mind and will of the Purchaser

and, in that capacity, as the party who negotiated the Transaction, did not become apparent until the cross-examination of Vincent.

[50] However, I am not persuaded that Domfoam has provided an adequate explanation for its failure to examine Howard prior to the cross-examination of Vincent. The extent of his communications with Pomerantz were set out in the First Vincent Affidavit and were known to Domfoam prior to the cross-examination of Vincent. Insofar as Howard's knowledge of the Plan is relevant, it was known that Vincent had been dropped from the service list after the fall of 2015 and that Howard's counsel remained on the list. The First Vincent Affidavit was entirely silent on this matter. Moreover, there was nothing new that arose out of the cross-examination of Vincent with regard to these matters. Accordingly, if Domfoam had wished to address these matters, it should have done so before cross-examining Vincent.

[51] Accordingly, I find that Domfoam has satisfied the fourth part of the test for leave in respect of Pomerantz but not in respect of Howard.

Remaining Considerations

[52] As noted above, in reaching its decision herein, the Court should also have regard to the context in which Domfoam's Motion is brought as well as any considerations of proportionality.

[53] The principal issue of context, namely the identity of the controlling mind and will of the Purchaser in the negotiation of the Transaction, has been set out above and need not be repeated here.

[54] More generally, Domfoam urges the Court to have regard to the fact that these proceedings take place in the larger context of the *CCAA* proceedings of the applicant. The Monitor has joined Domfoam in urging appropriate attention to this consideration. In effect, each says that, because the viability of the Plan effectively turns on a ruling favourable to Domfoam in the Purchaser's Motion and that an unfavourable ruling will have adverse financial consequences to the large number of creditors of Domfoam, the Court should permit an exhaustive review of all matters of potential relevance to Domfoam's position on that Motion. While I am sympathetic to the position of the creditors, particularly given the timing of the Purchaser's Motion relative to the creditors' approval of the Plan, I am not persuaded that these considerations have any relevance for the present motion. In particular, any issue of timing is more properly considered, if relevant, on the determination of the Purchaser's Motion.

[55] More significantly, however, I am of the view that proportionality weighs strongly in favour of denying leave to examine Howard for the following reasons. As mentioned, the issue in respect of the matters raised by Domfoam on the Purchaser's Motion is the state of Pomerantz's knowledge. The questions of significance that Domfoam wishes to put to Howard are the mirror image of the questions that it wishes to put to Pomerantz. The only purpose in asking the same questions of Howard and Pomerantz would be to seek to establish a lack of correspondence between the answers of the two parties. There is, however, no evidence in the record that would warrant such a concern regarding Pomerantz's evidence.

Conclusion

[56] Based on the foregoing, Domfoam's motion for leave under r. 39.02(2) to examine Pomerantz is granted but its motion for leave to examine Howard is denied.

Wilton-Siegel J.

Date: February 13, 2019