COURT FILE NO.: 09-8307-00CL
DATE: 20090929

SUPERIOR COURT OF JUSTICE – ONTARIO
Toronto Region

RE: 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 COOPER-STANDARD AUTOMOTIVE CANADA LIMITED

BEFORE: CUMMING J.

COUNSEL *Ken Crofoot* and *Alexa Abiscott* for Cooper Tire & Rubber Company
Matthew P. Gottlieb and *Shelby Austin*, for Cooper-Standard Automotive Canada Limited
Tony Reyes for RSM Richter Inc.
Kathy Mah for DIP Agent Deutsche Bank

HEARD: September 22, 2009

ENDORSEMENT

The Motion

[1] Cooper Tire & Rubber Company ("Cooper Tire") is a Delaware manufacturing corporation, marketing components to the automotive industry.

[2] Cooper-Standard Automotive Canada Limited ("CSA Can") filed for protection under the *Companies Creditors' Arrangement Act* ("*CCAA*") August 4,

2009 which has resulted in a stay of proceedings. The stay of proceedings was extended September 1, 2009 to November 3, 2009.

[3] CSA Can is the wholly-owned subsidiary of Cooper-Standard Automotive Limited ("CSA"). CSA, an Ohio corporation, and CSA's parent, Cooper-Standard Automotive Holdings Limited ("CSA Holdings"), a Delaware corporation, and some 12 related entities, are involved in United States Chapter 11 proceedings which commenced August 3, 2009 in the United States Bankruptcy Court for the District of Delaware.

[4] Cooper Tire moves for an Order lifting the stay of proceedings so as to allow Cooper Tire to commence proceedings against CSA Can in the U.S. bankruptcy proceedings to which CSA Can is not a party.

[5] The motion is opposed by CSA Can, the Monitor and the Debtor In Possession ("DIP") lender.

The Evidence

[6] Until December 23, 2004 Cooper Tire owned CSA and indirectly, CSA Can, as the subsidiary of CSA. CS Holdings was created as purchaser in connection with the purchase of CSA from Cooper Tire.

[7] Section 5.6(c) of the Stock Purchase Agreement ("Agreement") relating to the sale of CSA by Cooper Tire to CSA Holdings (successor to CSA Acquisition Corp.) provides *inter alia* for the allocation of anticipated seller tax refunds and liabilities received after the closing date, December 23, 2004. "Seller Taxes" is defined to include taxes imposed on subsidiaries relating to a "Pre-Closing Tax Period." Refunds and interest for post-closing tax periods are to be the property of CSA or its affiliates. As a practical matter, past government payments of tax refunds have reportedly included refunds for tax periods on both sides of the closing date, requiring reconciliation. CSA Can remitted directly to Cooper Tire a tax refund it had received about November 2, 2006.

[8] The Agreement provides that the parties thereto agree it will be construed under and governed by the laws of Delaware and the parties submit to the jurisdiction of the courts of Delaware.

[9] About July 27, 2009, a week before the initial *CCAA* order was granted, CSA Can received some Cdn. $80 million in tax refunds and interest relating to the

years 2000 to 2007 pursuant to an advance pricing agreement ("APA") entered into between the US and Canadian taxing authorities.

[10] Some $50 million of these monies was reportedly distributed by CSA Can inter-corporately in the week prior to the *CCAA* filing while CSA Can itself retained Cdn. $26 million to satisfy tax liabilities resulting from the APA. These monies apparently have been commingled with CSA Can's other funds. In any event, the monies have not been accounted for by CSA Holdings pursuant to its obligations under the Agreement. CSA Can has refused a request by Cooper Tire to segregate any tax refunds and interest.

[11] A further Cdn. $45 million in provincial tax refunds is anticipated to be paid to CSA Can very shortly.

[12] Given a concern that the anticipated provincial refunds might be transferred out of CSA Can's account and disbursed to other entities for working capital, on August 18, 2009 Cooper Tire sought permission from Judge Peter J. Walsh in the United States Bankruptcy Court for the District of Delaware to commence proceedings in Ontario to determine the issue of entitlement to the anticipated tax refunds and interest from the province of Ontario. This request was refused.

[13] Cooper Tire now seeks to have the ultimate issue of the entitlement to the refunds and interest received by CSA or its subsidiaries, including CSA Can, determined by the U.S. Bankruptcy Court by amending Cooper Tire's present Complaint against CSA and CSA Holdings in that Court to include CSA Can. To do so requires that the stay of proceedings be lifted in these *CCAA* proceedings.

[14] The U.S. Bankruptcy Court has set October 5, 2009 for the hearing of a motion by Cooper Tire for a preliminary injunction to require segregation of the tax refunds and interest and the hearing of a motion by CSA and CSA Holdings to dismiss the present Complaint of Cooper Tire.

The Law

[15] The Court's power to grant and lift a stay of proceedings against a debtor company is found in ss. 11(1), (3) and (4) of the *CCAA*. A stay is generally essential to provide for a debtor to attempt to compromise with creditors and successfully restructure. See generally *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 at para. 6 (Ont. Ct. J. (Gen. Div.).

[16] Paperny, J., as she then was, in *Re Canadian Airlines* (2001), 19 C.B.R. (4th) 1 at para. 20 (Alta. Q.B.) set forth various situations in which a court might lift a stay. They include when:

> ....
> 2. the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);
>
> ....
> 4. the applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors; [and]
>
> 5. it is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

[17] CSA Can correctly asserts first, that it is not a signature party to the Agreement. Hence, there are not contractual obligations imposed upon CSA Can by the Agreement. It is, of course, not the function of this Court to rewrite a contract for the parties. *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, [2007] 3 S.C.R. 679 at para. 34.

[18] However, ss. 5.5 and 5.6 of the Agreement (relating to Tax Matters and Tax Refunds) embrace the subsidiaries of CSA Holdings, including CSA and CSA Can, within the subject matter and regime in respect of which contractual obligations are imposed upon the signatories to the Agreement.

[19] Second, CSA Can asserts that the U.S. Bankruptcy Court is not the proper forum for a trust claim against CSA Can.

[20] The Complaint of Cooper Tire in the U.S. Bankruptcy proceeding raises issues of a claimed resulting trust or constructive trust in respect of the tax refunds to prevent CSA Holdings/CSA/CSA Can (if the Complaint is amended to include CSA Can) from being unjustly enriched at Cooper Tire's expense. If either such claim to a constructive trust or resulting trust has viability, such would spring in part from the provisions of the Agreement which is subject to Delaware law.

[21] Third, CSA Can asserts that the balance of convenience favours keeping the stay of proceedings in place with respect to the Cooper Tire claim against CSA Can. I disagree.

[22] Cooper Tire is put to significant risk and possible prejudice by CSA Can's present position. CSA Can refuses to segregate future tax refunds received until the claims in respect of those funds have been adjudicated upon. As well, the record suggests CSA Can has used the July 27, 2009 tax refund for working capital or for the benefit of affiliates in contravention of the contractual obligations imposed upon CSA Holdings as signatory to the Agreement. While CSA Can is not a party to the Agreement it seems the handling of the July 27, 2009 refunds was in derogation of the obligations of CSA Holdings under the Agreement which had committed itself to remitting to Cooper Tire the tax refunds and interest of its wholly-owned subsidiary, CSA, and the wholly-owned subsidiaries of CSA, including CSA Can.

[23] Thus, Cooper Tire is put to significant risk and possible prejudice if its claimed right to the refunds is not adjudicated upon expeditiously. Conversely, there is no apparent prejudice to CSA Can in the refund being segregated until a determination of the claims to the refunds by a court of competent jurisdiction. Commingling of funds pending a determination of the rights of Cooper Tire to the tax refund may well result in competing claims by the DIP lender and by the other creditors of CSA Can to those funds even if the Cooper Tire claim of a trust is ultimately validated.

[24] The appropriate forum for an action is generally that "jurisdiction that has the closest connection with the action and the parties." *Anchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 912.

[25] In an action for a declaration of a constructive or resulting trust, the applicable law is "that with which the obligation to restore the benefit unjustly obtained has the closest and most real connection." Janet Walker, *Castel & Walker: Canadian Conflict of Laws*. 6th ed., loose leaf (Markham: LexisNexis Canada Inc., 2005) at 1396. Where there is no contract between the deprived party and the enriched party, and the property at issue is not land, the proper law is the law of the place where the unjust enrichment occurs. Castel & Walker, *supra* at S. 32.1.

[26] I have already referred to the Agreement and the regime for tax refunds provided therein for CSA Holdings, the contractual signatory, and its subsidiary CSA. and CSA's subsidiaries, including CSA Can.

[27] Most of CSA Can's secured debt is reportedly cross-collateralized as secured debt of entities in the US Chapter 11 proceedings. CSA Can is reportedly a co-borrower under the proposed DIP financing submitted in the U.S. Bankruptcy Court.

[28] Financial information is consolidated for public reporting purposes in respect of the CSA Holdings group of companies and the issues of tax refunds and interest receivable have been dealt with on a group basis, irrespective of whether the precise tax issues related to CSA or a particular subsidiary.

[29] In my view, and I so find, while both Delaware and Ontario have jurisdiction to determine the rights of the competing parties to the tax refunds Delaware is the jurisdiction that has the closest connection with any action relating to the tax refunds received by the CSA Holdings group of companies. The US Bankruptcy Court for the District of Delaware is already dealing with the Complaint of Cooper Tire against CSA Holdings and CSA. It is just and convenient for that Court to deal with any Complaint against CSA Can (through the proposed amendment to the present Complaint) which will relate to the same issues (resulting or constructive trust due to unjust enrichment) as seen in the present Complaint.

[30] In determining which jurisdiction is the *forum conveniens* the courts are to consider such factors as the applicable law, geographical factors suggesting the natural forum and whether the plaintiff would suffer the loss of a legitimate juridical advantage if the action is not heard in the plaintiff's chosen forum.

[31] The record indicates that CSA's essential corporate management and documents are in the United States and that CSA performs and provides CSA Can's administrative and executive functions and legal and tax services respectively. Moreover, as I have emphasized above, the U.S. Bankruptcy Court will be deciding in all events the rights of Cooper Tire as against CSA Holdings and CSA in respect of the tax refunds under the Agreement. It is logical, efficient and fair that the U.S. Court decide the similar issue in respect of CSA Can.

Disposition

[32] For the reasons given, the motion is granted. The stay of proceedings in respect of CSA Can is lifted to allow Cooper Tire to commence proceedings against CSA Can in the U.S. bankruptcy proceedings. An Order will issue in accordance with these reasons. As well, considering all the circumstances, in my view, it is appropriate and proper for this Court to exercise its general power under s.11 of the *CCAA* to order, and I so order, that all tax refunds and interest received by CSA Can are segregated immediately upon receipt and not disbursed or encumbered or otherwise dealt with in any way until a further order of this Court.

Peter A. Cumming J.

CUMMING J.

DATE: September 29, 2009