

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

**RE: IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF SAGECREST DIXON INC.

**APPLICATION UNDER SECTION 18.6 OF THE *COMPANIES'*
CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS
AMENDED**

Applicant

BEFORE: MORAWETZ J.

COUNSEL: John Hutchins, for the Applicant, SageCrest Dixon Inc.

**Barbara Green, for the Respondent, Terrasan Environmental Solutions
Inc.**

**Catherine Willson, for the Respondent, T. Harris Environmental
Management Inc.**

HEARD: FEBRUARY 26, 2009

ENDORSEMENT

[1] This application was brought pursuant to s. 18.6 of the *Companies' Creditors Arrangement Act* ("CCAA") for a declaration that the Applicant is entitled to avail itself of the provisions of s. 18.6 of the CCAA for recognition of the proceedings commenced by the Applicant and its indirect parent, SageCrest II, LLC ("SageCrest II") under Chapter 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the United States Bankruptcy Court, District of Connecticut, Bridgeport Division (the "U.S. Bankruptcy Court") as a "foreign proceeding" for the purposes of the CCAA, for a stay of proceedings and other ancillary relief.

[2] This application was first heard on November 27, 2008. A stay of proceedings against the Applicant, SageCrest II and SageCrest Regal Inc. was ordered at that time pending the return date of the application.

[3] The Applicant is a corporation incorporated under the laws of Delaware with a head office in Wilmington, Delaware. The Applicant was incorporated by SageCrest II as a single purpose corporation to hold title to and develop a commercial property, formerly known as the Constellation Hotel, located near Pearson International Airport, Toronto, Ontario (the "Property"). The Applicant engages in no revenue-generating business and relies upon financial support from SageCrest II to fund its working capital expenditures.

[4] On August 17, 2008, SageCrest II filed a voluntary petition under Chapter 11. Other members of the SageCrest Group also filed voluntary Chapter 11 petitions around the same date.

[5] The Chapter 11 proceeding by SageCrest II placed the financial support of the Applicant in jeopardy. As a result, the Applicant commenced its own proceeding on September 11, 2008 under Chapter 11. The Applicant's Chapter 11 case was subsequently ordered to be jointly administered with those of SageCrest II, SageCrest Finance and SageCrest Holdings.

[6] The Applicant's primary asset is the Property, with an estimated value of approximately U.S. \$35.8 million. In addition to the Property, the Applicant has financial assets in Canada in the approximate amount of U.S. \$415,000.

[7] The Applicant is indebted to SageCrest Regal in the approximate aggregate amount of U.S. \$48.8 million which is secured by mortgages as against the Property, so that the Property is fully encumbered and SageCrest Regal is undersecured. The Applicant is also facing unsecured claims in the approximate amount of U.S. \$1.68 million.

[8] The Applicant also faces three construction lien claims in connection with the Property in the aggregate approximate amount of Cdn. \$4.48 million. One of the construction lien claimants, Terrasan Environmental Solutions Inc. ("Terrasan"), has named, SageCrest II and SageCrest Regal as defendants in addition to the Applicant.

[9] In the aggregate, the Applicant's assets exceed its liabilities by more than U.S. \$13 million.

[10] The Applicant has advised that there is currently no intention to complete construction of the new hotel on the Property. Rather, the intention is to complete demolition of the existing hotel, remediate the Property and then market the Property for sale. In connection therewith, SageCrest II has been authorized by the U.S. Bankruptcy Court to make funds available to the Applicant for that purpose.

[11] The Applicant submits that absent a stay of proceedings in Canada, Canadian creditors with claims against the Applicant and/or SageCrest II arising out of or in connection with the Property may be able to obtain an advantage over other creditors of the Applicant or SageCrest II. It submits that a stay of proceedings in Canada will create a stable atmosphere with a view to

facilitating the reorganization of the Applicant, SageCrest II and other members of the SageCrest Group.

[12] The Applicant and SageCrest II are part of a corporate group that is undergoing restructuring proceedings in the United States. The Applicant submits that it should be permitted to reorganize with the other members of the group for the benefit of all stakeholders, and one jurisdiction should take charge of the principal administration of that reorganization.

[13] The Applicant further submits that it is appropriate, practicable and necessary to the coordination of a restructuring of the Applicant and the maximization of the value of the Applicant's business for the benefit of creditors, wherever they are located, that the U.S. Bankruptcy Court exercise principal control over the reorganization of the Applicant.

[14] The Applicant further submits, in light of the principle of comity, and, in order to avoid a multiplicity of proceedings, that this court should grant the stay of proceedings sought by the Applicant and that a stay in Canada will promote a stable atmosphere with a view towards facilitating the reorganization of the Applicant and SageCrest II while allowing creditors, wherever situate, to be treated as equitably and fairly as possible.

[15] The Applicant also seeks a limited stay of proceedings as against SageCrest Regal, with the stay intended to be limited in its application to those proceedings commenced against SageCrest Regal that involve a construction lien or other claim to an interest in the Property. They submit that the court has the jurisdiction to make such order and that such order will not cause an injustice to potential claimants as such claimants will have an opportunity to have their claims dealt with in the Chapter 11 proceedings of the Applicant and/or SageCrest II.

[16] I do not take issue with the submissions of the Applicant insofar as they relate to the objectives of s. 18.6. However, this court has to be satisfied that creditors of the Applicant will be treated equitably and fairly in the Chapter 11 proceedings. This court has long recognized that the substantive and procedural aspects of the U.S. Bankruptcy Code are similar to the Canadian insolvency system.

[17] In this particular case, it should be noted that there are three construction lien claimants. Even though, it appears that the Property is fully encumbered and the position of SageCrest Regal is undersecured, this does not necessarily mean that the construction lien claimants are unsecured creditors.

[18] It is conceivable that the construction lien claimants may have priority rights that would enable them to claim secured creditor status. The priority ranking of the construction lien claimants, vis-à-vis the mortgagees, has to be determined. This dispute may involve the Applicant, the mortgagees and the construction lien claimants and it will likely require an interpretation of the *Construction Lien Act (Ontario)* ("CLA"). Insofar as the primary asset of the Applicant is the Property, it would appear that this dispute is discrete from the overall Chapter 11 restructuring.

[19] The Applicant has recognized the unique nature of the claims of the construction lien claimants. In an affidavit sworn February 11, 2009, Mr. Ferreri, the Chief Financial Officer of Windmill Management LLC, which is the managing member of SageCrest II, LLC, stated that the Applicant intends to deal with all claims against it within the proceedings commenced by it under Chapter 11 and in any Chapter 11 plan proposed by the Applicant, the Applicant will provide that the claims of the construction lien claimants will have the priority, if any, that such claims have under the *CLA*.

[20] He also stated that the Applicant had made a payment of approximately \$1.36 million to Terrasan on or about September 8, 2008 and that the payment was made before the Applicant filed its voluntary position under Chapter 11 in an attempt to secure post-petition services of Terrasan to maintain security on the premises and due to the fact that it was contemplated that the Applicant would likely need Terrasan's post-petition services to complete the demolition of the structure on the Property.

[21] Mr. Ferreri also stated that the Applicant was willing to undertake not to make any further payments in respect of materials or services delivered by any of the construction lien claimants to the Applicant prior to its Chapter 11 filing absent an order of the Ontario Court obtained on notice to all construction lien claimants.

[22] It is clear that the parties to the construction lien actions recognize that the priority issues under the *CLA* have to be addressed. It becomes a practical question as to how to address these issues. It seems to me that absent a consensual resolution of the priority issues, the appropriate place to resolve any *CLA* dispute is Ontario. The dispute is, in my view, discrete from the overall Chapter 11 proceedings. The Property is located in Ontario. The governing lien statute is that of Ontario. The parties who contributed services to the Property are located in Ontario and to the extent that experts are required, such experts will have to be familiar with Ontario law.

[23] I am satisfied that the record establishes that the requested relief should be granted recognizing the Chapter 11 proceedings of SageCrest Dixon and SageCrest II as a "foreign proceeding" and the United States as the jurisdiction of principal administration.

[24] Subsections 18.6(2), (3) and (4) of the *CCAA* provide the basis for this court to grant recognition of foreign insolvency orders and ancillary relief in connection with such proceedings. Those subsections provide as follows:

(2) The court may, in respect of the debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

(3) An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.

(4) Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

[25] In my view, the appropriate relief is to grant a stay of proceedings for a period of 60 days, subject to further extensions with leave of the court. During this initial 60 day period, the Applicant are directed to circulate a proposal or plan to the Applicant's construction lien claimants that takes into account the priority issues arising out of the *CLA*. In the event that the proposal is not accepted, the construction lien claimants ought to be in a position to proceed with their lien action in Ontario up to the point of obtaining judgment. However, the enforcement of any judgment would be stayed pending further order of this court.

[26] In arriving at this disposition, it should be made clear that this court does recognize the Chapter 11 proceedings as a "foreign proceeding" and the United States as the jurisdiction of principal administration. The Applicant has established that it is entitled to a stay of proceedings, during which time the Applicant can address the unique nature of the construction lien claims. If a resolution is not reached with all construction lien claimants, the stay is to be lifted for the purposes noted in [25] but there is to be no enforcement of any judgment pending further order of this court. This court will maintain a supervisory role only, with a view towards facilitating a forum in which the construction lien claimants will have an opportunity to establish their priority position, if any, with respect to the Property.

[27] This limitation, outlined in [25] and [26] is not intended to apply to general unsecured creditors (*i.e.* non-construction lien claimants).

[28] The stay shall also extend to SageCrest Regal Inc. as requested.

[29] The parties are directed to prepare a formal order. The formal order should take into account the comments provided by counsel to Terrasan by email dated February 4, 2008. Counsel to Terrasan also requested specific provisions regarding financial security for services to be rendered. In my view, the language proposed in the draft order prepared by counsel to the Applicant is satisfactory and additional wording is not required.

[30] Counsel are requested to revisit certain issues set out in paragraph 10 of the draft order so as to ensure that the necessary information is provided so that the parties can consider their respective positions.

[31] If the parties require further direction in respect of these reasons or in the preparation of the formal order, a 9:30 a.m. appointment can be scheduled through the Commercial List Office.

[32] T. Harris Environmental Management Inc. brought a motion for declaration that the payment in the amount of \$1,367,178.50 made by the Applicant to Terrasan be declared void. It is open for the Applicant to address this issue in whatever proposal or plan it may put forth to the construction lien claimants. If the proposal or plan is not accepted, this motion can be brought

back on for determination. At this time, consideration of the T. Harris motion is deferred pending the efforts to be made by the Applicant in providing a proposal to the construction lien claimants creditors.

[33] In the result, an order shall issue pursuant to s. 18.6 of the CCAA, but the form of order is to take into account the specific protection provided for the construction lien claimants in these reasons. The formal order should also reflect the priority of the administration charge as set out in paragraph 17 of the draft order.

MORAWETZ J.

DATE: March 18, 2009