SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00703933-00CL **DATE:** September 22, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: QUALITY RUGS OF CANADA LIMITED v. WAYGAR CAPITAL INC., AS AGENT FOR NINEPOINT CANADIAN SENIOR DEBT MASTER FUND L.P.

BEFORE: JUSTICE PENNY

PARTICIPANT INFORMATION

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ENDORSEMENT OF JUSTICE PENNY (Released September 25, 2023):

In this CCAA proceeding, certain matters were scheduled for Friday, September 22, 2023. The issue of the lien regularization order (LRO) is still in process; active and positive negotiations are ongoing. The LRO matter is adjourned to October 5, 2023 at 10:00 AM, which is a date also reserved for a potential sale approval motion.

The motion to lift the stay by GG Eight, adjourned to today, is also not proceeding as a result of positive, ongoing negotiations. That, and the Housing One motion, may also be addressed on October 5, 2023 if necessary.

The remaining issues for the September 22, 2023 hearing were two motions relating to the Union, LIUNA Local 183. One motion has been brought by the Union relating to preservation of certain funds held back from amounts paid to installers for work performed (which I will call the holdback issue).

The second motion has been brought by the Applicants. This motion is for declaratory and other relief relating to the monthly payment of benefits, pension contributions and other remittances (which I will collectively refer to as the remittance issue) by one of the Applicants, QSG, into accounts administered by the Union. The remittance obligation is governed by the Union's collective agreement.

The Applicants were anxious to resolve the remittance issue, as uncertainty about whether these payments are up to date or not is having, they believe, a negative impact on the collection of accounts receivable by the

Applicants' customers (which are, generally, builders and owners). The Union was anxious to have the holdback issue resolved because, it submits, the protection of the holdback amounts needs to be dealt with before the potential sale of the Applicants' business to Ironbridge.

After hearing the parties' submissions on how to proceed, and having regard to the amount of time available on September 22 and the amount of time likely required to argue both motions, I resolved the scheduling of these motions as follows. The Applicants' motion for declaratory relief was argued on September 22, 2023. I took that decision under reserve until September 25, 2023. These are my reasons on that motion. The Union's holdback motion will be argued on September 28, 2023 commencing at 2:00 PM.

Background

The Applicants are in the business of contracting for the installation of flooring in large condominium and other construction projects. A number of the Applicants' installers are members of the Union. There is a collective agreement.

On August 4, 2023 I was faced with two competing applications under the CCAA, brought on an urgent basis, and, in the alternative, an application for the appointment of a receiver over the Applicants' business. I adjourned the applications for about two weeks to enable the stakeholders to engage in negotiations. In order to stabilize the situation, I ordered an interim stay of proceedings against the Applicants. Paras. 5 and 6 of that Order provided:

> NO EXERCISE OF RIGHTS OR REMEDIES
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> 5. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Debtors, or affecting the Business or the Property, are hereby stayed and suspended, provided that nothing in this Order shall (i) empower the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) prevent the filing of any registration to preserve or perfect a security interest, or (iii) prevent the registration of a claim for lien.
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> NO INTERFERENCE WITH RIGHTS
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> 6. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the any of the Debtors.

That order was continued on August 18, to permit further, ongoing negotiations. On August 25, I made an initial order in this matter under the CCAA. Following the comeback hearing on September 5, I made an amended and restated initial order (ARIO). The initial order contains stay provisions based on the Model Order:

> NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY
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> 14. THIS COURT ORDERS that until and including October 31, 2023, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicants, the entities named in Schedule "A" hereto (the "Protected Parties"), the Monitor, the Financial Advisor (as hereinafter defined), or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
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> NO EXERCISE OF RIGHTS OR REMEDIES

15. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants, the Protected Parties, the Monitor, or the Financial Advisor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

16. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants or the Protected Parties, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

17. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, the Cash Management System or other banking services, payroll services, insurance, transportation services, utility or other services to the Business or the Applicants, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

Factual Circumstances Giving Rise to the Remittance "Problem"

QSG is obliged under the collective agreement to make the remittance to specified Union-administered accounts in arrears by the 15th of each month. There is no evidence of any historical default or problem with these payments. However, through what later turned out to have been an administrative error (i.e., not due to financial problems or cash flow limitations), delivery of the July remittance (due August 15) was delayed by several days. Having just discovered that QSG was likely heading into insolvency proceedings under the CCAA or by way of a receivership, the Union became alarmed. Its initial enquiry was unanswered so, on August 16, 2023, the Union issued notices concerning the missed remittance payment under s. 6.1 of the collective agreement to about 60 builders involved in QSG work using Union installers. The notices said, among other things:

> Pursuant to Article 6 of the TRCLB and DRCLB Collective Agreements, the Union hereby gives notice of its intention to activate the Builder's Holdback Mechanism. Should the Defaulting Contractor fail to pay all outstanding amounts by August 18, 2023, the Builder must freeze all funds owing to Defaulting Contractor up to the amount of $250,000.00.

The monthly remittance involves three categories of earmarked payments: benefits, pension contributions and payments to the Union. The evidence is (and it is not contested) that by August 17, the July remittance had either been delivered or, in one case, mailed. The evidence is also clear (and not contested) that the three components of the July remittance were actually deposited into the appropriate accounts administered by the Union on August 17, 17 and 21 respectively. As a result of this payment, the Union took no further action on the notices it had issued a few days earlier. Finally, it is clear on the evidence, and not contested, that the next

remittance, the August remittance, was made on September 15, 2023 as required. Accordingly, the evidence establishes, and the parties agree, that as of September 15, 2023, QSG was, and remains as of today, in compliance with its remittance obligations under article 6.1. This is specifically confirmed in the affidavit of Mr. Williamson, general counsel to the Union. He swore under oath that:

> 42. QSG delivered payments of the three cheques on August 17, 17, and 21 respectively. Attached hereto as Exhibits L, M, and N are the stamped reports from the Union, benefits offices, and Pension Fund, confirming the dates that they received the Remittance Report and payments. These stamps are put in the usual and ordinary course of business on the day when the documents or payments are received. In addition, I specifically recall making inquiries within Local 183 on August 15 and 16, 2023, and they confirmed that the monthly benefits and remittances were not paid.
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> 52. QSG submitted its monthly contributions reports and cheques for work performed under the RTCA Agreement in August 2023 on or before September 15, 2023. The Union therefore did not take any action and has not sent out any further notices.
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> 55. On September 16, 2023, after receiving confirmation that the August remittances had been paid, the Union provided written notice to the RTCA, the DRCLB, TRCLB and MTABA confirming that QSG had paid its July remittances, and that the August remittance reports and cheques had been received on time and that we were optimistic that they would clear. Copies of those emails are attached at Exhibit T. That email also indicated that they could advise their members of this fact, and directed that contractors or builders could contact me if they had any further inquiries.

It is common ground, supported by uncontested evidence, that the August remittance delivered on September 15 did clear and that the funds were deposited in the relevant Union-administered accounts.

I also note that the unchallenged evidence of the Applicants is that it is fully their intention to continue to make all the ongoing Union remittances leading up to the proposed restructuring/sale and that it is, likewise, the intention of the proposed purchaser, if the sale is approved and closes, to continue to make all ongoing Union remittances as required under the collective agreement post-closing.

The problem appears to be that the August 16 notices issued by the Union "spooked" a number of the builders, who may now be uncertain what to do and whether payment of their accounts receivable to the Applicants might get them in trouble with the Union or expose them to some kind of "double jeopardy". Attempts at negotiating a solution to this problem between the Applicants, the Monitor and the Union broke down, such that the Applicants felt it necessary to bring this motion for two heads of relief:

1) an order declaring that QSG is current in its remittance obligations to the Union; and

2) an order requiring the Union to deliver notices to all builders and project owners who received a written notice on August 16, 2023: a) retracting the August 16, 2023 notice of alleged default; and b) confirming to each recipient that QSG is in good standing with its monthly remittances in accordance with the applicable collective agreement.

The Union does not object to the Court confirming in an endorsement the evidence (again, not contested) that QSG is current in its remittance obligations. The Union does object to the Court issuing a declaration to this effect on the basis that compliance/non-compliance with the provisions of a collective agreement is exclusively a matter for the appropriate arbitration tribunal, not the courts. The Union also objects to any order requiring it to retract statements made in the notices (which it maintains were true at the time they were made and not in breach of my August 4 order) or forcing it to make representations to the builders as to QSG's compliance with its obligations.

The Applicants and the Monitor submit I have the jurisdiction to make both orders sought under s. 11 of the CCAA (the court may make "any order that it considers appropriate in the circumstances"), the Union's alleged lack of good faith under s. 18.6 of the CCAA, and on the basis of the Court's remedial jurisdiction in the face of what they say was a breach of the August 4 stay order caused by the Union issuing the notices on August 16.

Analysis

In the view I take of the matter, it is not necessary to determine whether the Union's August 16 notices were in breach of the August 4 order or whether the Union failed to act in good faith. To be clear, in taking this approach I am finding neither that the Union's conduct in issuing the notices was, or was not, a breach of the August 4 order. Similarly, I am finding neither that the Union was, or was not, acting in good faith. Such findings are, in my view, simply not necessary to resolve the current problem. I will only express my fervent hope and my expectation that, now that the Union is a full, and fully informed, participant and represented by counsel in these proceedings, the kind of precipitate action taken on August 16 will not be repeated without notice to the Applicants and the Monitor (and/or the Court as necessary), whether or not it is believed to fall within one of the exceptions to para. 15 of the ARIO. Such matters are best dealt with at this stage by way of reasonable discussion between the parties with access to the Court if necessary.

As I have set out earlier, the evidence of both the Union and the Applicants establishes beyond peradventure that the monthly remittance payable to the Union which was the subject of the August 16 notices *is fully paid up and current*. Further, the evidence establishes unequivocally that the August remittance was made on September 15 and is also *fully paid up and current*. QSG is, therefore, manifestly not currently in breach of its remittance obligations. Not only does the evidence establish this fact; the parties are in complete agreement that this is so and have publicly stated as much.

As I alluded to earlier, there is one other outstanding issue between the Union and QSG. That issue (which I have referred to as the holdback issue) is distinct from the remittance issue and is scheduled to be argued before the Court on September 28, 2023. For clarity, the analysis and determinations reached in this endorsement regarding the remittance issue is without prejudice to the parties' positions on the holdback issue to be argued on September 28. I urged the parties during oral argument, and reiterate that urging in this endorsement, to find a negotiated solution to the holdback issue, which strikes me as eminently solvable without the need for judicial intervention.

It seems appropriate to remind stakeholders at this point that the only alternative to a transaction with the proposed purchaser, which is premised on a continuation of the business post-closing, is a receivership, which will likely result in a liquidation of the Applicants' assets. It is in stakeholders' interests that the business be preserved.

The timely payment of accounts receivable is a critical feature of this CCAA proceeding. A significant percentage of the value of the Applicants' business lies in its accounts receivable. It is not efficient, and perhaps not even feasible, for the Applicants to take action against dozens of builders who are reluctant to pay otherwise legitimate and owing accounts receivable for fear of stepping into possible Union conflicts or being exposed to double jeopardy. The flow of funds in the ordinary course must be preserved.

Indeed, para. 16 of the ARIO provides that "no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants or the Protected Parties, except with the written consent of the Applicants and the Monitor, or leave of this Court". I view that provision as including good faith payment by builders for all otherwise legitimate accounts receivable owing to the Applicants.

Section 11 of the CCAA provides that the court may make any order that that it considers appropriate in the circumstances. This is, of course, not an invitation to the exercise of unbridled discretion. This broad power must be interpreted within the objects and purposes of the legislative scheme. In light of the facts and the circumstances I have described above, as the judge presiding over these CCAA proceedings, I conclude that an

order declaring that the monthly remittance payable to the Union, which was the subject of the August 16 notices, as well the August remittance payable in September, are fully paid up and current is not outside the Court's remit. I am not interpreting, or resolving a dispute over the application of, the collective agreement. Regarding the remittances themselves, there is no dispute requiring such interpretation or resolution that would otherwise be in the exclusive jurisdiction of the labour tribunal. Rather, the problem requiring a solution is clarifying for the builders/owners that a perceived barrier (i.e., the August notices) to the ordinary course payment of their accounts payable to QSG is, as both the Union and the Applicants agree, no longer operative because the relevant remittances have been made and QSG is, as of today, fully paid up and current with this obligation. It is, in my view, withing the jurisdiction of this Court under s. 11 of the CCAA, and necessary in the circumstances, to correct a possible misapprehension among builders that the August 16 notices remain an impediment to payment of their otherwise legitimate accounts payable to QSG.

The Supreme Court described the criteria for declaratory relief in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, [2019] 1 S.C.R. 99, at para. 60:

> Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought. [Citations omitted.]

I find these criteria are met: I have jurisdiction under s. 11 and as the supervising judge of these CCAA proceedings; there is a real problem requiring a solution as any non-payment by builders could seriously impair the operations of QSG and the interests of the Applicants' stakeholders; the Applicants have a genuine interest in resolution of the problem so that their business can continue to be operated; and, the Union, which also has an interest, was on notice and actively participated in these proceedings. I find that a declaratory order is required in the peculiar circumstances of this case to fulfill the purposes of the CCAA and to facilitate the Applicants' attempt to restructure and preserve their business for the benefit of stakeholders.

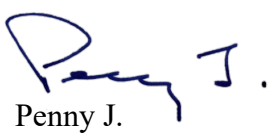
I therefore order and declare that:

(a) the July monthly remittance payable to the Union, which was the subject of the August 16 notices, as well the August remittance payable in September are fully paid up and current as of this date;

(b) the remittance delay giving rise to the August 16 notices has been resolved by virtue of the payments as declared above; and,

(c) the Union's August 16 notices to the builders are, as a result of payment being made, not an impediment to payment of otherwise legitimate accounts receivable owing to QSG or the other Applicants.

In light of my analysis and determination that a declaratory order shall issue in the form stipulated above, I conclude that any mandatory order requiring the Union to distribute a retraction and/or clarifying statement regarding the payment of the August and September remittances is unnecessary at this time. Accordingly, I make no finding or determination about my jurisdiction or the legal or factual requirements to make such an order.



Penny J.