CITATION: U.S. Steel Canada Inc. (Re), 2015 ONSC 5990
COURT FILE NO.: CV-14-10695-00CL
DATE: 20150928

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *A. Scotchmer* and *B. Walancik,* in their capacity as Representative Counsel on behalf of the non-unionized active employees and retirees, for the Applicants James Newton, Laurie Saunders and Robert Cernick

S. Kour and *R. Paul Steep,* for the Respondent U.S. Steel Canada Inc.

R. Sahni, for the Monitor Ernst & Young Inc.

HEARD: September 18, 2015

ENDORSEMENT

[1] On these motions, Representative Counsel for the non-USW active employees and retirees seeks an order directing U.S. Steel Canada Inc. ("USSC") to pay amounts to each of James Newton ("Newton"), Laurie Saunders ("Saunders") and Robert Cernick ("Cernick") (collectively, the "Applicants"), pursuant to severance agreements entered into between each of these individuals and USSC as described below. The amounts at issue on these motions total $184,485.

Background

[2] The following summarizes the undisputed facts concerning the termination of employment arrangements of each of the Applicants.

Newton and Saunders

[3] Each of Newton and Saunders were advised by USSC on February 5, 2014 that their employment would be terminated on February 5, 2016. Each was provided with, and signed back, a letter dated February 5, 2014 (respectively, the "Newton Severance Agreement" and the "Saunders Severance Agreement") that provided that each individual was "required to report to work, unless otherwise required by [USSC]," during the period from February 5, 2014 until February 5, 2016. Each Severance Agreement also stated that, if they remained employed and actively at work on that date, they would be entitled to merit pay and performance bonuses in the ordinary course.

[4] The Newton Severance Agreement and the Saunders Severance Agreement further provided that:

> The Company may advise you prior to the end of the Notice Period, you are no longer required to report for work ("the End of the Working Notice Period"). Should that occur, your current salary shall continue to be paid as though you were continuing to report for work and subject to the same conditions as set out above but you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.

[5] Subsequently, each of these Severance Agreements was amended by letters dated August 15, 2014 from USSC, which were executed in September 2014 by each of Newton and Saunders, which added the following provision:

> Further to your letter dated February 5, 2014, please accept this letter as confirmation of our discussions that should you elect to remain actively at work until December 31, 2014, the Company will agree to pay out fifty percent (50%) of the remaining work notice period as a lump sum retention bonus rather than having you continue to work the remainder of the notice period. This would equate to six and a half (6½) months base pay. All other terms and conditions of the original letter dated February 5, 2014 will remain in effect excluding the provisions of paragraph 1 "Financial Assistance" which are amended by this letter.
>
> If you elect to terminate your employment prior to December 31, 2014 or if you remain at work beyond the December 31, 2014 date, the terms and conditions of the original letter will remain in effect. ...

[6] Each of Newton and Saunders also signed a full and final release in favour of USSC after executing the amendments to their respective Severance Agreements.

[7] Each of Newton and Saunders worked for USSC until December 31, 2014 and retired on that date.

Cernick

[8] Cernick was advised by USSC on February 3, 2014 that his employment would be terminated on February 3, 2016. He was provided with, and signed back, a letter dated February 3, 2014, substantially in the same form as the Newton Severance Agreement and the Saunders Severance Agreement (the "Cernick Severance Agreement"). However, the Cernick Severance Agreement also contained an early retirement option in the following terms:

> Should you make an irrevocable application to retire in writing, and cease employment by reason of your retirement with your last day worked being within thirty (30) days of the date of this letter, you will receive 50% of the balance of the payments remaining in the Notice Period as a lump sum payment, less applicable statutory deductions.

Cernick did not accept this early retirement option. Cernick also signed a full and final release in favour of USSC on February 24, 2014.

[9] The Cernick Severance Agreement was subsequently amended as follows by a letter dated May 21, 2014, which Cernick executed on May 28, 2014, to provide for a retiring allowance:

> This letter confirms our discussion of May 16, 2014 in which I advised that you had the opportunity to replace/substitute the last 26 weeks of your working notice period with a lump sum cash payment equal to 26 weeks of base salary in the form of a retiring allowance less deductions required by law.
>
> If you elect to replace the last 26 weeks of working notice with the retiring allowance set out above, the following conditions apply.
>
> 1. You will not accrue credited service for pension purposes on or after August 5, 2015 [for the 26 weeks of your working notice period.] If applicable, there will be no contributions to the RRSP (Opportunity Plan) in the period on or after August 5, 2015.
>
> 2. You will not accrue vacation pay on or after August 5, 2015 [for the last 26 weeks of your working notice period.]
>
> 3. Your current coverage under the Company's health plan and dental plan and life insurance plan will cease on the date your working notice period ends by reason of your election to take a lump sum payment. In addition, you will not be eligible to receive merit pay and performance bonuses, or a portion thereof.
>
> 4. All other terms and conditions of your termination letter dated February 3, 2014 shall continue to apply with this letter as an addendum to that letter dated February 3, 2014.

[10] The Cernick Severance Agreement, as amended, therefore contemplated a period of working notice until August 5, 2015. However, on May 30, 2014, two days after he accepted the amendment to the Cernick Severance Agreement, Cernick was advised by his superior at USSC that USSC directed him to no longer report to work.

[11] USSC paid Cernick his monthly salary in accordance with the Cernick Severance Agreement to August 5, 2015.

[12] In this Endorsement, the Newton Severance Agreement, the Saunders Severance Agreement and the Cernick Severance Agreement are collectively referred to as the "Severance Agreements" and are individually referred to as a "Severance Agreement".

<u>The Circumstances Giving Rise to this Proceeding</u>

[13] USSC commenced legal proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, by order of Morawetz R.S.J. (as subsequently amended, the "Initial Order").

[14] Section 13 of the Initial Order prohibits payments on account of pre-filing obligations:

> THIS COURT ORDERS that, except as specifically permitted or required herein, the Applicant is hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

[15] Section 9 of the Initial Order also permits, but does not mandate, payment of certain employment-related amounts payable on or after the date of the Initial Order.

> THIS COURT ORDERS that the Applicant shall be entitled but not required, subject to the mandatory payment requirements in paragraph 11 below, to pay the following expenses whether incurred prior to, on or after the date of this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits (including, without limitation, employee and retiree medical, dental and similar benefit plans or arrangements, employee assistance programs, and other retirement benefits and related contributions), compensation (including bonuses and salary continuation or other severance payments), vacation pay and expenses (including, without limitation, in respect of expenses charged by employees to corporate credit cards) payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangement; …

[16] On November 27, 2014, each of Newton and Saunders was advised by USSC that it did not intend to pay the lump sum retention bonuses contemplated by the Newton Severance Agreement, as amended, and the Saunders Severance Agreement, as amended, respectively. The parties dispute whether each of Newton and Saunders were advised that they could cancel their intended retirement on December 31, 2014 and continue working until February 5, 2016 if they wished to receive the salary contemplated in the original forms of the Newton Severance Agreement and the Saunders Severance Agreement. Given the determination below, this factual issue is not relevant. As mentioned, however, each of Newton and Saunders chose to retire at December 31, 2014. Each individual now seeks payment of the lump sum retention bonuses contemplated by their respective Severance Agreements, as amended.

[17] By letter dated April 8, 2014, USSC advised Cernick that the Monitor in these CCAA proceedings, Ernst & Young Inc., "had determined that [USSC] may not issue the lump sum payments [sic] set out in the [Cernick Severance Agreement as amended]." Cernick has not been offered an opportunity to return to work for the remainder of his period of working notice, nor the opportunity to rescind the amendment to the Cernick Severance Agreement, both of which he says he would have accepted.

Analysis and Conclusion

[18] The Applicants make four arguments in support of their position that USSC is, or should be, required to pay the lump sum retention bonuses contemplated under the Severance Agreements. Given the determination below, it is only necessary to address their two principal arguments.

[19] First, the Applicants argue that s. 32 of the CCAA applies to the present circumstances. This submission proceeds on the basis: (1) that USSC's refusal to pay the lump sum retention bonuses under the Severance Agreements constitutes a "resiliation" or a "repudiation" of such agreements; and (2) that the acknowledged failure of USSC to comply with the provisions of s. 32 has the result that the lump sum retention bonuses are payable. In effect, the Applicants say that s. 32 is a mandatory provision in respect of the proposed termination of any agreement to which an insolvent corporation is a party.

[20] USSC says that it has not terminated the Severance Agreements. USSC says that, while payment of the lump sum retention bonuses might otherwise be permitted under paragraph 9 of the Initial Order, payment is prohibited by virtue of the provisions of paragraph 13(a), as the lump sum retention bonuses constitute amounts owing by USSC to creditors as of the date of the Initial Order. It says that the Applicants are entitled to submit a claim for such amounts in the claims process in this CCAA proceeding.

[21] The Applicants' argument assumes that non-performance of any provision of a contract for any reason whatsoever constitutes a "resiliation" or a "repudiation" of a contract requiring compliance with s. 32 of the CCAA to be effective. I think this interpretation of s. 32 implies a scope of operation that was not intended by Parliament.

[22] As Mongeon, J.C.S. noted in *Re Hart Stores Inc.* 2012 QCCS 1094, [2012] J.Q. no. 2469, at paras. 20 and 30, s. 32 is properly applicable only to contracts that are not otherwise terminable. In *Hart Stores*, Mongeon, J.C.S. found that s. 32 did not apply to oral employment contracts of indefinite duration that could be unilaterally terminated by the employer under ordinary rules of common law (in this case under the *Civil Code of Quebec*). In any event, given the determination below, it is not necessary to decide the motions on this basis, and I therefore decline to do so.

[23] The Applicants' alternative argument is that payment of the lump sum retention bonuses is not caught by paragraph 13 of the Initial Order, and that the Court should exercise its discretion under section 11 of the CCAA to order such payment on the grounds of fairness.

[24] The Applicants acknowledge that the lump sum payments fall within the language of "compensation (including bonuses and salary continuation or other severance payments)" for the purposes of paragraph 9 of the Initial Order. However, as mentioned, they submit that the lump sum retention bonuses were accrued as contingent liabilities as of the date of the Initial Order and, as such, constituted amounts payable as of that date which are therefore caught by the language of paragraph 13(a) of the Initial Order. USSC also relies on certain decisions that have found that termination and severance payments are pre-filing obligations: in particular, see *Timminco Ltd. (Re)*, 2012 ONSC 4471, [2012] O.J. No. 4008, at paras. 41-42, *Nortel Networks Corp., (Re)*, [2009 O.J. No. 2558 (S.C.) and *Windsor Machine & Stamping Ltd.*, [2009] O.J. No. 3195, 179 A.C.W.S. (3d) 611 (S.C.).

[25] Implicit in this dispute is the issue of the proper characterization of the lump sum retention bonuses at issue. USSC characterizes these lump sum payments as "termination or severance payments", which they say were contingent liabilities or obligations at the date of the Initial Order. The Applicants characterize the lump sum retention bonuses as additional compensation for post-filing services. On balance, I think these payments are properly characterized as compensation for post-filing services which are not subject to the stay in paragraph 13(a) of the Initial Order for the following reasons.

[26] The Severance Agreements constituted an agreement between USSC and each of the Applicants for the payment of certain amounts to each of them for their agreement to make themselves available to USSC during the periods contemplated by their respective agreements. It is my understanding that USSC does not dispute this characterization of the Severance Agreements, at least insofar as it pertains to the monthly salary continuation payments made thereunder. Implicit in this characterization, however, is the fact that such monthly continuation payments were made for the provision of post-filing services by each of the Applicants.

[27] On these motions, USSC distinguishes between such monthly payments and the lump sum retention bonuses, treating the latter as termination or severance payments. I do not think that this is correct in the particular circumstances of this case. Regardless of the treatment of such payment for tax or other purposes, as between USSC and the Applicants I think such payments must be regarded as an additional payment for the provision of post-filing services, i.e., their availability to USSC. In each case, the lump sum retention bonus constitutes an acceleration and compromise of certain monthly salary continuation payments otherwise payable over a further twelve-month period of working notice for the continued provision of post-filing services. I do not think that such compromise, in the form of a lump sum payment, should change the fundamental nature of the payments. In addition, while it is not determinative of this issue, USSC itself referred to the payments in the letters amending the Newton Severance Agreement and the Saunders Severance Agreement as "lump sum retention bonuses", which is more reflective of compensation for post-agreement services than of termination or severance payments. While the Cernick Severance Agreement refers to the lump sum payment as a "retiring allowance", I do not think this terminology, which appears to have a tax-related purpose, is of any significance for the present motions.

[28] I also do not think that the case law referred to by USSC, or the fact that such lump sum payments may have been treated as contingent liabilities by USSC at the time of the Initial Order, assists USSC.

[29] In *Nortel*, while the exact nature and timing of the payments at issue is not detailed in the decision, there is an important difference from the present circumstances. It is clear, both from the fact that the issue in *Nortel* pertained principally to the application of the *Employment Standards Act*, R.S.O. 1990, c. E.14, as well as from the language of paragraphs 67 and 86 of the decision, that the termination and severance payments at issue related to pre-filing services. This consideration grounded the decision of Morawetz J. (as he then was) that the termination payments were, in substance, pre-filing obligations of the debtor that were subject to a stay. In *Timminco*, it is clear from paragraph 43 of that decision that the applicant did not provide any post-filing services and that the payments at issue constituted classic termination and/or retirement benefits. Similarly, in *Canwest Global Communications Corp.*, 2010 ONSC 1746,

321 D.L.R. (4d) 561 and *Windsor Machine*, the termination and severance pay obligations were also stated to be "for the most part based on services that were provided pre-filing": see *Canwest*, at para. 24, per Pepall J. (as she then was).

[30] Given this factual basis for the decisions in *Nortel*, *Timminco*, *Windsor Machine* and *Canwest*, I do not read any of these decisions as standing for the more general proposition that all termination or severance payments, whether arising before or after the date of commencement of proceedings under the CCAA, are to be treated as pre-filing obligations.

[31] I also do not find the argument that the lump sum retention bonuses constituted accrued liabilities at the date of the Initial Order to be persuasive. Even assuming that USSC did, in fact, accrue the payment obligations as contingent liabilities in its accounting records, for which there is no evidence before the Court, the fundamental reality is that the payment obligations were contingent upon the Applicants' performance of post-filing services. The obligation to pay the lump sum retention bonuses did not become absolute until the completion of performance of these services, that is, upon expiry of the relevant period of working notice.

[32] Accordingly, I conclude that paragraph 13(a) of the Initial Order does not mandate a stay of payment of the lump sum retention bonuses due under the Severance Agreements. In these circumstances, paragraph 9(a) of the Initial Order permits USSC to make such payments. As USSC has chosen not to make such payments, however, the Applicants seek an order of the Court requiring USSC to make such payments on the grounds that it would be fair and equitable to do so.

[33] In this regard, the basis for the Monitor's position when this issue first arose in or about November 2014 is important. The Court understands that there were approximately 175 additional former employees of USSC whose employment was terminated on or about February 5, 2014, and who did not accept, or were not offered, a lump sum retention bonus option in return for a shortened period of working notice. The Monitor considered that it would be unfair and inequitable to these other former employees for USSC to pay the lump sum retention bonuses under the Severance Agreements. The Monitor reasoned that, in the absence of a claims process and a crystallization of any claims of these other employees, there was a significant likelihood that the Applicants would obtain an unintended priority. This is an important consideration that was also present in *Timminco*.

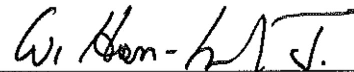
[34] However, circumstances have changed since November 2014 as a result of the continuation of the working notice period for such other employees. As of the date of hearing of the present motions, it is the Court's understanding that such employees have continued to be paid their working notice to date and that, at most, a period of five months working notice remains to be paid to such other employees.

[35] The Applicants argue that it would be unfair to treat them differently from the other terminated employees of USSC merely because they opted for a lump-sum retention bonus while the other employees are being paid in respect of working notice arrangements. I am not persuaded that this fact alone would justify an order in their favour. However, I think that it would be fair to grant the order requested for such reason together with the additional facts that: (1) as of the date of hearing of these motions, there does not appear to be any issue of an unfair priority in favour of the Applicants if such an order were granted; and (2) the amounts are *de*

minimus and accordingly payment will not affect the ability of USSC to propose a plan of arrangement or compromise. Even if USSC were to stop paying the remaining working notice period payments payable to the other terminated employees until February 2016, it would appear that, as of the date of the hearing of these motions, the Applicants and such other terminated employees will have received roughly equal amounts in respect of the termination of their employment after payment of the lump sum retention bonuses.

[36] I would also note that USSC raised the possibility that payment of the lump sum retention bonuses could breach the terms of a term sheet dated July 16, 2015 between USSC and Brookfield Capital Partners Ltd. ("Brookfield") (the "Current DIP Loan"). However, Brookfield did not appear on this motion or otherwise oppose the relief sought. In any event, for the reasons set out above, I do not think that the lump sum payments that are the subject of this motion constitute either payments in respect of pre-filing obligations or non-ordinary course payments. As such, I am of the opinion that payment of these amounts would not breach the terms of the Current DIP Loan.

[37] Based on the foregoing determinations, the Applicants are entitled to an order directing USSC to pay the lump sum retention bonuses contemplated by the Severance Agreements to the Applicants in the amounts set out in the Motion Record.



Wilton-Siegel J.

Date: September 28, 2015