SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-049838-150

DATE : MARCH 13, 2019

BY THE HONOURABLE DAVID R. COLLIER, J.S.C.

In the matter of the *Companies' Creditors Arrangement Act*

9323-7055 QUEBEC INC.
(formerly Aquadis International Inc.)
Debtor

and

RAYMOND CHABOT INC. (Mr Jean Gagnon, CPA, CA, CIRP)
Monitor

and

RONA INC.
Applicant

JUDGMENT
(Application to file a late proof of claim)

JC0B37

INTRODUCTION

[1] Rona is seeking authorization to file a late proof of claim, 34 months after the deadline of March 31, 2016 fixed by the Court for the filing of proofs of claim.

[2] Rona does not contend that it had no knowledge of the filing deadline, or that its failure to file a proof of claim before now was due to inadvertence. Rather, Rona argues that prior to the filing deadline it was unaware that the Monitor intended to commence proceedings against it, and that Rona only received the Monitor's final calculation of Rona's potential liability for the damages suffered by the purchasers of defective faucets distributed by the debtor, 9323-7055 Québec Inc., (formerly Aquadis International Inc.) in November 2018. Rona argues that it was only then that it could reasonably determine the amount of its contingent proof of claim, and that it has acted diligently since then.

[3] There are approximately 850 civil claims pending against Aquadis that have been suspended by the debtor company's proposed restructuring plan filed in December 2015 under the *Companies' Creditors Arrangements Act.*[1] As a professional vendor of defective faucets distributed by Aquadis, Rona, like other retailers who sold the faucets, is liable to the purchaser (or its subrogated insurer) for the damage caused by the defective product.

[4] In November 2016, the Court authorized the Monitor to take legal action on behalf of Aquadis' creditors against Rona and other retailers who sold the defective faucets. The Monitor has yet to institute suit, although he sent a draft Originating Application to Rona's attorneys in December 2017.

[5] Since 2016, the Monitor has conducted ongoing, albeit sporadic, negotiations with the retailers in an attempt to have them contribute to a settlement of all outstanding claims, which currently amount to about $22 million. During the course of these negotiations, the Monitor has communicated with Rona and other retailers with a view to explaining, for the purposes of settlement, his evaluation of their respective shares of responsibility for the defective faucets that have given rise to claims and insurance indemnity.

[6] Rona argues that it should now be allowed to file a contingent proof of claim for an unsecured amount of between $1.8 million and $7.7 million, based on the Monitor's recent assessment that – if the Monitor were to sue Rona on behalf of Aquadis' creditors (essentially subrogated insurers) – Rona's liability for damages could fall within that range.

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[1] R.S.C 1985, c C-36.

[7] Rona's proof of claim is couched in the following language:

> This claim is contingent upon RONA being obliged to pay a sum of money to the Debtor's creditors under a Court order or under a settlement agreement in relation to the alleged defective faucets distributed by the Debtor and is subject to adjustments depending on the evolution of the evidence's analysis.

[8] Rona explains that its contingent proof of claim is based on Aquadis' legal and contractual liability to indemnify Rona against all claims and actions relating to the defective faucets distributed by the parties.

[9] On January 9, 2019 the Monitor refused to accept Rona's contingent proof of claim, giving rise the present application.

[10] Rona's application to file a late proof of claim was heard by the Court on January 22, 2019, the same day the Monitor presented his application for authorization to file a plan of arrangement and call for an assembly of creditors to approve the proposed plan.

ANALYSIS

[11] The parties agree that the Court has discretion in deciding whether to allow a claimant to file a late claim, and that such discretion should be exercised with regard to the factors set out in *Blue Range Resources Corp,*[2] as follows:

- Was the delay caused by inadvertence and if so, did the claimant act in good faith?
- What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
- If relevant prejudice is found, can it be alleviated by attaching appropriate conditions to an order permitting late filing?
- If relevant prejudice is found which cannot be alleviated, are there any other conditions which may nonetheless warrant an order permitting late filing?

[12] The Court in *Blue Range Resources Corp* defined 'inadvertent" as including carelessness, negligence, or an accident, which is unintentional.

[13] Where a party's conduct is found to be deliberate, and not unintentional, the courts have generally refused to admit a late claim. This is particularly so where the party advancing the late claim has been receiving advice from legal counsel, as was Rona.[3]

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2 *Blue Range Resources Corp. (Re)*, 2000 ABCA 285, para 26.

3 *SemCanada Crude Co (Re),* 2012 ABQC 489; *BA Energy Inc (Re),* 2010 ABQB 507; *UBG Builders Inc. (Re),* 2016 ABQB 472.

[14] The distinction between a party's inadvertence, and its deliberate decision not to file a timely proof of claim, is relevant to the Court's appreciation of whether the allowance of a late claim will adversely impact upon the "integrity and respect for the court process and its orders".[4] Clearly, it is more difficult for a claimant who has deliberately chosen not to file a timely proof of claim to demonstrate that it should be relieved from its default and treated equally with other parties who have respected the court process.

[15] In the present case, Rona does not dispute that it made a deliberate decision not to file a contingent claim prior to the claims bar date in March 2016. Prior to that time, Rona had been sued by 13 purchasers of defective faucets and had called Aquadis into warranty in several instances. Rona was aware that the proceedings under the *Bankruptcy and Insolvency Act*, and later the *CCAA*, had suspended the legal actions against it. Rona was on the Monitor's distribution list and was kept abreast of all the Court's rulings.

[16] The question is whether Rona should be excused from its failure to file a proof of claim before now because, as it argues, the Monitor only quantified his claim against the company in November 2018, in the course of settlement negotiations. In the Court's view, this is clearly an insufficient justification for allowing the late claim.

[17] Although the Court was not privy to the parties' settlement discussions, Rona's assertion that it could not have acted before November 2018 is difficult to accept. Since Rona received the Claims Treatment Order[5] in January 2016, it knew it could file a contingent claim that could be perfected as information became available to it. Furthermore, the company must have known how many Aquadis faucets it had sold in order to estimate the extent of its potential liability. It is difficult to believe that Rona had to rely entirely on the Monitor for this information.

[18] In addition, the timing of Rona's filing appears strategic, rather than the result of *force majeure*. It is hard to dispel the notion that Rona made a deliberate decision to file a proof of claim only after it had unsuccessfully contested the Monitor's decision to settle with Gearex and others in June 2018, and after Rona's settlement discussions with the Monitor had broken down. It is also noteworthy that Rona's application was made at the same time as the Monitor's request to present a plan of arrangement to creditors.

[19] Consequently, it is not possible to conclude that Rona's late filing is due to inadvertence, or an inability to act in a timely fashion. What, then, about the possible prejudice to other creditors caused by the proposed late filing?

[20] Rona argues that there will be no prejudice to creditors by admitting its late proof of claim, since the mere dilution of claims is not a prejudice,[6] the proposed plan of arrangement has not been approved or implemented, and no funds have been distributed.

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4 *Blue Range Resources Corp. (Re), supra*, para 10.
5 *Ordonnance relative au traitement des reclamations*, dated January 6, 2016.
6 *Blue Range Resources Corp. (Re), supra*, para 40.

[21] Moreover, Rona argues there is no prejudice to other creditors because its late claim will not have caused them to lose a realistic opportunity to do something they might otherwise have done.[7]

[22] These arguments are not convincing. Admitting Rona's late claim will cause a prejudice to existing creditors, whose analysis of the transaction with the insurers in June 2018 was made without regard to Rona's claim. According to the Monitor, Rona's claim could represent between 7.7% and 25.6% of all outstanding claims against Aquadis, and could reduce the distribution to each creditor under the proposed plan from 21 cents on the dollar to between 19 and 15 cents on the dollar. Even though Rona argues that the creditors believed the insurers' June 2018 offer was the best one available at the time (thus suggesting the creditors would have accepted the offer even if they had known of Rona's claim), the fact remains that, if Rona's late claim were allowed, the creditors' decision to accept the offer would have been taken under a misconception regarding its value to them, a prejudice that cannot now be alleviated. Although dilution is not *per se* considered a prejudice to the other creditors, the magnitude of the dilution may be relevant to the question of prejudice.[8] In the present case, the potential dilution of the creditors' claims is substantial.

[23] Finally, the quantification of Rona's contingent claim, and its approval by the Monitor, will not be an easy matter, and could take many months to resolve. Arguably, Rona's contingent, recursory claim is "a double claim" that has already been made by Aquadis' other creditors. A double proof of claim is one where "two payments are being sought for a liability which, if the company were solvent, could be discharged as regards both claimants by one payment."[9] Such claims are disallowed for obvious reasons.[10]

[24] While it is true that the Court admitted other late claims, they were made by existing insurer creditors, in respect of new losses, and had no impact on the proportionate claims already made by the creditors. This is not the case here. Furthermore, if Rona's late claim were accepted, other retailers may similarly seek permission to file late contingent claims, possibly tying up all the sums held by the Monitor and leading to further protracted litigation concerning double claims.

FOR THESE REASONS, THE COURT :

[25] **DISMISSES** Rona's application for authorization to file a late proof of claim;

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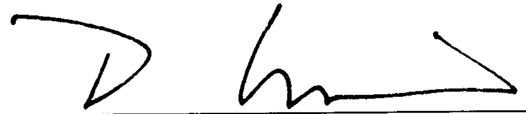
7 *Ibid.*

8 *Blue Range Resources Corp. (Re), supra*, para 37.

9 *Barclays Bank v TOSG Trust Fund Ltd*, [1984] 1 All ER 628 (CA).

10 Holden and Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed., vol. 2, Toronto, Carswell, 2016, p 5-106.1, G§53; *Olympia & York Developments Ltd, Re* (1998), 4 CBR (4th) 189, para 23; *Aslan (Re),* 2013 ONSC 4112 (Can LII).

[26] **THE WHOLE,** with costs of justice.



DAVID R. COLLIER, J.S.C.

Mtre Alain N. Tardif
Mtre Gabriel Faure
MC CARTHY TETREAULT
Counsel for Monitor

Mtre Charles Lapointe
LANGLOIS AVOCATS
Counsel for Creditors committee

Mtre François Gagnon
BORDEN LADNER GERVAIS
Counsel for JYIC and Cathay

Mtre Hubert Sibre
MILLER THOMSON
Counsel for Home Depot

Mtre Julie Himo
Mtre Dominic Dupoy
NORTON ROSE FULBRIGHT CANADA
Counsel for Rona

Mtre Pierre Goulet
Counsel for Intact and BMR and Patrick Morin

Hearing date : January 22, 2019 (taken under advisement on February 1, 2019)