SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N° : 500-11-049838-150

DATE : JUNE 20, 2018

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)
Applicant / Monitor

JUDGMENT

I. OVERVIEW

[1] In June 2015, the debtor 9323-7055 Québec Inc., (hereinafter "Aquadis"), a vendor of bathroom products, issued a Notice of intention to file a proposal to creditors under the *Bankruptcy and Insolvency Act*.[1] Aquadis' difficulties arose from its sale in Quebec and

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1 R.S.C., 1985, c. B-3, s. 50.4(6).

Ontario of defective faucets that had been manufactured in Taiwan[2] by Jing Yudh Industrial Co., Ltd. ("JYIC") and sold to Aquadis by a Taiwanese distributor, Gearex Corporation ("Gearex").

[2] Aquadis sold the defective faucets to a number of Canadian retailers, including Home Depot of Canada Inc., Groupe BMR Inc., Patrick Morin Inc. and RONA Inc. (the "Retailers"). Between 2006 and 2010 hundreds of these installed faucets failed, causing significant damage to property owners and resulting in a multitude of subrogated claims by their insurers against Aquadis and its insurers.

[3] In December 2015, Aquadis' restructuring proposal was continued under the *Companies' Creditors Arrangement Act*,[3] when this Court issued an Initial Order mandating the present Monitor and a committee of Aquadis' creditors to submit a plan of arrangement. Shortly after the Initial Order, the Court approved a procedure for the filing with the Monitor of all claims relating to the defective faucets.

[4] To give effect to the arrangement, the Court suspended approximately 300 lawsuits pending against Aquadis.

[5] Since December 2015 the Court has extended the delay to file a plan of arrangement while the Monitor attempts to negotiate a comprehensive settlement of all outstanding claims. At present, the Monitor estimates that the over 800 claims amount to almost $22 million.[4]

[6] In November 2016, the Court granted the Monitor's request for the power to institute legal proceedings, on behalf of Aquadis' creditors, against all persons involved in the manufacture, distribution or sale of the defective faucets.

[7] Accordingly, in December 2016, the Monitor instituted legal action before the Superior Court of Québec against JYIC, Gearex, their insurers, and a number of other parties, for the payment of $22.4 million in damages and insurance proceeds.[5] This proceeding has been served on JYIC, Gearex and their insurers in Taiwan.

[8] To date, there is no comprehensive settlement and the Monitor has not filed a plan of arrangement. Nevertheless, he has received offers of settlement from Fubon Insurance Co., Ltd. ("Fubon"), the insurer of Gearex, as well as from three insurers of

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2 Formally known as the Republic of China.
3 R.S.C., 1985, c. C-36.
4 On a depreciated value basis, and including approximately $1.9 million in late claims filed after March 24, 2017.
5 As amended on November 7, 2017.

JYIC, Gearex or Aquadis.[6] The Fubon offer is for US$5 million, while the other insurers' offers total $480,000. Taken together, the four offers amount to $7.2 million.

[9] The Monitor is seeking the Court's authorization to accept these offers, which are contingent upon the granting by the Monitor of releases in favour of Fubon, Gearex, the three insurers and their insureds. The Monitor's request is opposed by JYIC, the Retailers and Lloyd's, an insurer of Aquadis who is a non-settling party (the "Opposing Parties").

[10] With the exception of JYIC, the main concern expressed by the Opposing Parties is that their right of subrogation against the settling parties will be extinguished if they are released from liability under the proposed agreements.[7]

[11] Article 1730 of the *Québec Civil Code,* dealing with the contract of sale, provides that the manufacturer and distributor are bound with the seller to warrant the quality of the goods sold. Accordingly, if a retailer is sued by the purchaser of a defective faucet, or his subrogated insurer, the retailer has the right to demand contribution and indemnity from the parties (and their insurers) located higher up the chain of distribution, and against the manufacturer. All the parties are solidarily liable to the purchaser for the latent defect.

[12] In the proposed agreements the Monitor has attempted to address the Opposing Parties' concern that their rights will be prejudiced by the proposed releases. The Monitor proposes two protective measures. The first provides that in any defective product claim brought against a non-settling party its liability will be reduced by a proportionate amount of the settlement proceeds allocated to that loss. Secondly, the proposed agreements provide that the liability of the non-settling party will be further reduced by any amount that that party could have obtained against a released party by subrogation, but for the release.

[13] The Opposing Parties raise a number of objections to the Monitor's application. First, they argue that the proposed agreements are not necessary or incidental to a restructuring of Aquadis and should therefore not be approved. They argue that the CCAA is being used for an improper purpose, by purporting to settle claims arising not just between Aquadis' creditors, but claims that also involve third parties, such as the Retailers. They contend that the process is flawed because the Monitor has not been transparent, and has only recently notified a number of newly-discovered retailers of the present proceedings. They add that the Court cannot measure the reasonableness of the settlement offers, or conclude that they are in the interest of all parties, because the Court has little information respecting Gearex's capacity to contribute to a settlement, or

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6 More particularly, AIG Taiwan Insurance Co., Ltd. ("AIG"), Insurance Company of North America ("INA") and Sovereign General Insurance Company ("Sovereign").

7 The Fubon transaction provides for a full release for it and Gearex of all claims, whereas the AIG, INA and Sovereign transactions provide for the release of all claims during the applicable policy periods.

the extent of each Retailer's liability. Finally, the Opposing Parties submit that the protections offered to them under the proposed agreements are inadequate.

[14] Accordingly, the Monitor's application raises two questions. The first, broader question is whether the Court should approve the agreements in the circumstances of this case. The second question is whether the agreements provide sufficient protection to the parties in the event some of them are released from liability.

[15] For the reasons that follow the Court concludes that the agreements should be approved.

II. ANALYSIS

A) SHOULD THE COURT APPROVE THE AGREEMENTS IN THE PRESENT CIRCUMSTANCES?

i. Is the CCAA being properly applied?

[16] It is true that the proposed agreements are unlikely to lead to a restructuring of Aquadis or to a new start of its operations. The debtor company is for all intents and purposes a thing of the past. Rather, the proposed agreements are presented to the Court as part of plan to carry out an orderly collection and distribution of Aquadis' assets, which are made up of litigious claims, and to wind up its affairs.

[17] This objective falls within the scope of the CCAA. In *Hollinger*, the Ontario court was asked to approve pre-plan settlements involving some of Hollinger's debtors. Campbell J. described the utility of the CCAA to wind-up a debtor company whose principal assets consist of litigious claims:[8]

> [42] Recent jurisprudence has confirmed the application of judicial discretion and flexibility of the CCAA to achieve a variety of corporate purposes including but not limited to the restructuring of the company. These have been reaffirmed in the decision of the Supreme Court of Canada in *Century Services v. A.G. Canada* and include, in appropriate cases, the ability to effect a sale of assets and winding up or liquidation of a debtor company and its assets. Also see *Anil Range Mining Corp*.
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> [43] What has been a feature of restructuring since the financial crisis of 2008 has been a variety of processes under the CCAA.
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> [44] The conclusion that I reach is that the court does have jurisdiction consistent with the principles of the CCAA to maximize the assets available to creditors as long as the process is not being used to further a collateral objective that, in the end, is not inconsistent with the ultimate goal of these CCAA proceedings. See *Houlden, Morawetz Sara*.

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8 *Hollinger Inc. (Re)*, 2012 ONSC 5107 (CanLII), 96 CBR (5th) 1.