

Points West Fashion Outlets Inc. (Re)

IN THE MATTER OF The Proposals of Points West Fashion Outlets
Inc., Points West Fashion Outlets Langley Ltd. and Points West
Fashion Outlet Westgate Ltd.

[1996] B.C.J. No. 798
39 C.B.R. (3d) 249
62 A.C.W.S. (3d) 432
Vancouver Registry Nos. VA96 161987-161989

British Columbia Supreme Court (In Bankruptcy)
Vancouver, British Columbia
Boyd J.
(In Chambers)

Heard: April 11, 1996.
Judgment: filed April 15, 1996.
(7 pp.)

Bankruptcy — Proposals — Court approval, considerations — Approval of creditors.

This was an application for approval of the Amended Proposals of three bankrupt corporations. The Amended Proposals had been approved by a majority of the creditors of the companies by a very narrow margin. The applications were opposed by an association representing retailers, including 41 creditors of the companies.

HELD: The proposals were approved. A majority of the creditors had voted in their favour, the proposals were reasonable, and were calculated to benefit the general body of creditors. The court rejected the argument that two particular groups of creditors ought not to have been included in a single class of unsecured creditors, but rather ought to have voted separately. While the debtor had the option to create separate classes of unsecured creditors, there was nothing in the legislation or the case law which forced a debtor to create a separate class for certain preferred creditors. While the proposals were inelegantly drafted, and contained a number of gaps, the court was satisfied that there was no doubt in the minds of the creditors who attended the creditors' meeting as to the terms of the Amended Proposals.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 50, 54.

Counsel:

John Grieve, for the Peat Marwick Thorne Inc.
David A. Hobbs, for the National Apparel Bureau, Inc.
Peter Reardon, for the Points West Companies.

Neil Kornfeld, for Skeena Holdings Ltd.
Douglas Hammond, for Colonial Developments IV Ltd.

¶ 1 **BOYD J.**— The Court has before it applications for the approval of the Amended Proposals of Points West Fashion Outlets Inc., Points West Fashion Outlets Langley Ltd. and Points West Fashion Outlets Westgate Ltd., which I will collectively refer to as the "Amended Proposals". The Amended Proposals were approved by a majority of the creditors of the subject companies, which majority comprised two-thirds of the dollar value percentage of the vote. It is not contested that the creditors in attendance voted in favour of the Amended Proposals by a very narrow margin of approximately 69% of the dollar value.

¶ 2 These three applications for approval of the Amended Proposals are opposed by the National Apparel Bureau, Inc., which is an association representing a number of fashion retailers across Canada including 41 of the 49 creditors who opposed the approval of the Amended Proposals at the meeting held March 15, 1996. At the risk of being over-simplistic, I understand that the National Apparel Bureau opposes this Court's approval of the Proposals on three grounds:

- (1) That two particular groups of creditors ought not to have been included in a single class of unsecured creditors but rather ought to have voted separately in one or two classes of preferred creditors;
- (2) That the Amended Proposals themselves are sufficiently lacking in particularity and detail as to not constitute formal offers which are capable of being accepted by virtue of the operation of the vote held at the meeting of March 15, 1996; and finally
- (3) That following the meeting of March 15, 1996, the Trustee discounted the votes cast by certain creditors, as a result of which the results of the vote are not reliable.

¶ 3 Dealing with the first issue, it is the National Apparel Bureau's position that two particular groupings of creditors ought not to have been included in the single class of unsecured creditors. Firstly, Mr. Hobbs points out that 12 of the creditors who voted in favour of the proposals are suppliers who have assigned their accounts receivable to Accord Business Credit Ltd., a factoring company. He further notes that both of the debtors' landlords, Skeena Holdings and Colonial Developments, were categorized as unsecured creditors by the Trustee notwithstanding the fact that there is some evidence Colonial was originally identified by the Trustee to be a secured creditor.

¶ 4 As I understand Mr. Hobbs' submission, it is that some separate class or classes of preferred creditors ought to have been created by the Trustee to include the 12 creditors who assigned their accounts receivable to Accord, as well as the two landlords, and that this class or classes of creditors ought to have voted separately from the balance of the unsecured creditors. In the end result, Mr. Hobbs submits that their votes would not have had the effect of creating an affirmative vote in favour of the Amended Proposals.

¶ 5 In support of his submission, Mr. Hobbs relies upon a series of cases decided in CCAA proceedings in which the court applied what is described as a "contextual approach" in the determination of whether one or more classes of unsecured creditors ought to be created. (Re Grafton-Fraser Inc. and Canadian Imperial Bank of Commerce et al. (1992) 90 D.L.R. (4th) 285 [Ont. Court (General Division)] and Re Woodward's Ltd. (1993) 20 C.B.R. (3d) 74 (B.C.S.C.))

¶ 6 I agree with the Trustee's and the various debtors' counsel's submissions that the Bankruptcy and Insolvency Act (the "Act") makes no provision for the creation of a class of preferred creditors separate from the class or classes of unsecured creditors allowed for under the Act. Reading together s. 50 and s. 54 of the Act, it is clear that for the purposes of voting at a meeting of creditors, there are two classes of claimants – secured and unsecured creditors. If the creditors are unsecured creditors, then they all fall into a single mass class unless the proposal provides otherwise. I agree with both Mr. Grieve and Mr. Reardon that if it were otherwise, and preferred creditors always constituted a separate class or classes of claimants, such creditors would be accorded the potential to exercise an unwarranted degree of power, totally out of keeping with the dollar value of their claims relative to the value of the claims of the unsecured creditors as a whole.

¶ 7 There may well be cases in which the debtor decides, for good tactical reasons, to include certain unsecured creditors in a class of their own, holding the power to prevent acceptance of the proposal unless two-thirds of their dollar value in votes supports the proposal. This usually occurs in situations where the smallest claimants are offered close to one hundred cents on the dollar, thus assuring a yes vote from that class. While the debtor has the option to create such separate classes of unsecured creditors, there is nothing contained anywhere in the legislation or the case law which forces a debtor (in a situation akin to that faced by the Point West companies) to create some separate class for preferred creditors. Thus, the National Apparel's opposition on this ground cannot be supported.

¶ 8 A second major ground for opposing the proposal is the contention that the proposal itself is replete with a number of gaps and a lack of detail, such that it cannot constitute an offer capable of being accepted by the result of a vote and thus does not amount to a contract in law.

¶ 9 Mr. Hobbs points out that the Amended Proposals contain no definition of what constitutes a "secured creditor", which creditors are "ordinary creditors", and precisely when and in what amounts the creditors shall be paid out.

¶ 10 While I agree that the Proposals are inelegantly drafted, and contain a number of gaps, I am satisfied that given the underlying legislative framework of the Act, there was no doubt in the minds of the various creditors who attended the creditors' meeting as to the precise terms of the Amended Proposals put forward upon which votes were cast in the form of Voting Letters. I accept that for good practical reasons such Proposals are often amended in the course of a creditors' meeting and then put to the assembled creditors for a vote to be taken at the meeting. Not surprisingly, many such documents are inelegantly phrased and likely contain many gaps. Relying upon the underlying legislation and the appointment of inspectors to ensure the carrying out of the Proposal in the terms voted upon, I cannot accede to the National Apparel Bureau's suggestion that I should reject the Proposals because of the various gaps identified.

¶ 11 Lastly, there is the issue of whether following the meeting, the Trustee improperly discounted various creditors' votes. I do not intend to address this issue since no proper evidentiary foundation was laid in the affidavit material to support such an allegation.

¶ 12 In the end result, having reviewed the three Amended Proposals and the Trustee's report, I am satisfied that a majority of the creditors voted in favour of the Amended Proposals and that the Proposals are reasonable, are calculated to benefit the general body of creditors, and ought to be approved.

BOYD J.

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