

CITATION: FT ENE Canada Inc. (Re), 2019 ONSC 3969

COURT FILE NO.: 31-OR-208344-T and CV-18-61369

DATE: 20190627

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST) – Bankruptcy and Insolvency

IN THE MATTER OF THE PROPOSAL OF FT ENE CANADA INC.,

of the City of Brantford, in the Province of Ontario

BEFORE: Penny J.

COUNSEL: *Mervyn Abramowitz* for FT ENE Canada Inc.

Alexander Ilchenko for Proposal Trustee

Michael Nowina and *Ben Sakamoto* for Finetex ENE Inc., creditor

Patrick Shea for Yoonjun Park

HEARD: June 24, 2019

ENDORSEMENT

[1] There are two motions, both opposed.

[2] In the first motion, Finetex ENE Inc. (“Finetex”), a Korean public company (and the 100% owner of the Applicant and an unsecured creditor representing 99% of the Applicant’s unsecured obligations) seeks an order removing J.C. Park, the Applicant’s sole director, and discharging Blaney McMurtry, the Applicant’s counsel or, in the alternative, for the appointment of an interim receiver during the currency of the Notice of Intention to Make a Proposal (“NOI”) proceedings.

[3] In the second motion, the Applicant seeks an extension of its stay for 45 days, to August 7, 2019.

Background

[4] Finetex and FT ENE Canada Inc. (“FTE Canada”) are in the nanofibre business. FTE Canada operates a manufacturing facility in Brantford which employs 18 people.

[5] J.C. Park is the founder of this business. He has had a falling out with Finetex. Park has been removed from office as a “representative director” of the parent Finetex, but not as a director per se. He is the sole director of FTE Canada.

[6] J.C. Park is the owner of the principal technology/IP necessary to this business.

[7] He granted a license to Finetex to use that technology. Finetex is itself embroiled in insolvency proceedings in Korea under the *Debtor Rehabilitation and Bankruptcy Act*.

[8] As a result of his falling out with Finetex and Finetex's insolvency proceedings, J.C. Park has purported to terminate the licence agreement with Finetex. He has an agreement with FTE Canada, however, which enables FTE Canada to continue to use the technology. Finetex has taken the position that the termination is ineffective.

[9] FTE Canada made an NOI to avoid being drawn into and controlled by Finetex's Korean insolvency proceedings. The Proposal Trustee is MNP. The NOI was filed in February 2019.

Motion to Remove J.C. Park as Director

[10] The test for removing a director during proposal proceedings is set out in s. 64 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The Court may remove a director if satisfied that:

- a) the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal; or
- b) is acting or is likely to act inappropriately as a director in the circumstances.

[11] There has been no judicial consideration of s. 64, but s. 11.5 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*") contains virtually the same language. The *Unique Broadband Systems* case, 2011 ONSC 224, considered s. 11.5. The standard of proof is on a balance of probabilities. This is unlike, for example, a motion for an interlocutory injunction. The standard is a high one. The fact that a shareholder may disagree with a decision or does not trust the director is "far from being sufficient."

[12] Finetex relies on essentially four grounds for Park's removal:

- 1) an alleged conflict of interest;
- 2) allegations of embezzlement and fraud at Finetex involving Park and members of his family from 2011 to 2018;
- 3) alleged false or misleading representations to the Court in the context of the proposal proceedings; and
- 4) concerns over continued misappropriation.

[13] Although it is true that Park and Finetex are in direct conflict, I am not satisfied Park has been proved to have any conflict of interest involving the Applicant, the company of which he is the sole director. While Park has purported to terminate Finetex's license to use his technology, he has agreed to allow FTE Canada to continue to do so.

[14] Finetex's deponent, Mr. Kim, is a "representative director" of Finetex. He also deposes that he is the "rehabilitation custodian" of Finetex.

[15] There is no evidence about the Korean law of debtor rehabilitation and bankruptcy and no evidence about the nature, scope or effect of Finetex's insolvency proceedings in Korea and how it does, or might, affect insolvency proceedings in Canada of a wholly owned subsidiary.

[16] Mr. Kim has attached to his affidavit a report about an examination of Finetex prepared by Haeng Bok MaRu. It is not clear who this firm is, but it appears to be some kind of forensic examination enterprise.

[17] That report examines the conduct of J.C. Park and others at Finetex from 2011 to 2018. It suggests that J.C. Park and Y. Park, his son in law (who is the General Manager of FTE Canada), as well as others engaged in forgery, overstatement of sales and the use of nominee companies to siphon off profits from Finetex. It also suggests that J.C. Park and Y. Park interfered with legitimate auditors' enquiries in an effort to suppress or cover up their fraudulent activity. This report was only filed on June 19, 2019.

[18] I certainly agree with Finetex that this report raises concerns about J.C. Park's past conduct while employed at Finetex. However, the threshold test for removal of a director is not a "triable issue" but proof on a balance of probabilities. This report has not been properly put before the Court as expert evidence. There is for example, no information about the authors, who they are, their qualifications, etc...

[19] Importantly, these allegations have nothing to do with FTE Canada's NOI proceedings. There is no suggestion in the evidence, particularly in the Proposal Trustee's reports, of any misconduct or impropriety in the conduct of FTE Canada's business during the proposal proceedings.

[20] There is no stay operating in favour of J.C. Park. Finetex is at liberty to sue Park, if so advised, including seeking interlocutory relief against him. It has not done so.

[21] The NOI proceedings, it seems to me, are not the forum for an "investigation" into Park's past alleged wrongdoing in respect of Finetex.

[22] While more detail could have been disclosed, I am not satisfied that the non-disclosure of certain facts rises to the level of advertent misleading evidence. The deponent for FTE Canada is Y. Park, not J.C. Park. And, while it is true that more could have been explained, nothing said by Y. Park has been proven false.

[23] Mr. Kim's affidavit is also short on detail and explanation. There is no explanation for why J.C. Park remains a director of Finetex. There is, even more importantly, no explanation why Finetex has not invoked its rights as FTE Canada's 100% shareholder to hold a meeting to remove J.C. Park as the director of FTE Canada and replace him with a director of its choosing. The NOI, it would seem, creates no stay of ordinary corporate governance measures such as this. Even if it did, Finetex could seek to lift the stay for the purpose of holding a shareholders' meeting but has not done so.

[24] All in all, I am left with the strong impression that both sides are being strategic in their disclosure of information, particularly as it relates to the broader picture of the commercial disputes between them at the shareholder level.

[25] It is clear that there is a very active and acrimonious battle going on between J.C. Park and Finetex but, again, I fail to see how the NOI proceedings is the place to wage that fight. There is, in any event, conflicting evidence that cannot be resolved on this motion.

[26] Finetex's concerns over possible ongoing misappropriation of funds out of FTE Canada are met by the fact that MNP, as Proposal Trustee, is monitoring FTE Canada's financial affairs. MNP has been fully supportive of the Applicant's efforts to date and has reported no lack of cooperation or concerns over the use and disposition of funds. There is simply no evidence that J.C. Park has engaged in anything untoward involving FTE Canada during the proposal proceedings.

[27] This is a rare case which actually turns on the burden of proof. While there is some evidence giving rise to concerns, it does not relate specifically to the proposal proceedings. There are many unanswered questions. On this record, I am simply unable to conclude, on a balance of probabilities, that J.C. Park is unreasonably impairing the proposal proceedings or is acting inappropriately in the circumstances of this proposal proceeding.

[28] For these reasons, I conclude that the s. 64 test under the *BIA* has not been met. Accordingly, the motion is dismissed.

[29] That does not end the matter, however. There is a continuing concern over information access and transparency. I find that as the 99% creditor and 100% owner of FTE Canada, Finetex is not simply just another creditor. Finetex is entitled to know what is going on.

[30] MNP has offered to be the conduit for information flowing about FTE Canada's affairs. I direct therefore that Finetex may put informational questions to MNP. MNP will reasonably endeavor to obtain answers to Finetex's questions. If the parties are unable to arrive at an appropriate protocol, they may book an appointment to see me at a case conference.

[31] Likewise, Finetex has indicated it has follow up questions to the BDO report of June 21, 2019. These questions may be directed to the Applicant, via MNP, and the Applicant shall reasonably endeavor to obtain answers from BDO, which shall be made available to Finetex.

Removal of Blaney McMurtry

[32] There is a subsidiary issue involving the removal of Blaney McMurtry on account of an alleged conflict. Having found J.C. Park is not in a conflict with the Applicant, there is no conflict arising out of Blaney McMurtry acting for J.C. Park and FTE Canada at this time.

[33] These findings, relating to whether J.C. Park or Blaney McMurtry have a conflict with the Applicant, may be revisited however, as the proposal proceedings unfold if circumstances change.

Interim Receiver

[34] The problem with the alternate remedy of the appointment of an interim receiver is that no evidence or context has been provided as to the mandate or purpose for the interim receiver. Also, beyond some preliminary discussions, there has been no entity identified as willing to undertake this role. Also, Finetex has not sought an examination of the Applicant under s. 163 of the BIA.

[35] In these circumstances, I am unable to conclude it is just and convenient to appoint an interim receiver. To the extent increased transparency was an objective for seeking this relief, I have provided for access to more information in these Reasons. Ultimately, of course, as the 99% creditor, Finetex will decide whether any proposal, which must be advanced fairly soon, is or is not acceptable.

Motion to Extend Stay

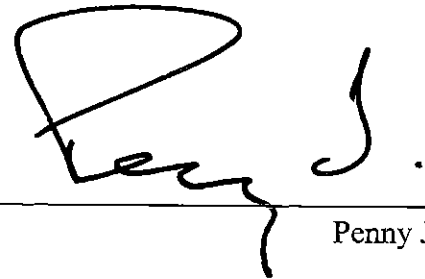
[36] My prior order gave the Applicant an extension to June 24, 2019. Because I reserved my decision on these motions, I granted an extension for two weeks, to July 8, 2019.

[37] The Applicant seeks an extension until August 7, 2019, supported by MNP. Finetex has indicated that if J.C. Park remains as the director of FTE Canada, it oppose any further stay extension.

[38] In all of the circumstances, I have concluded that a stay to August 7, 2019 is appropriate.

[39] I am satisfied that there may be alternatives to a bankruptcy, if the parties can work together to maximize value. In any event, more time is needed to renew efforts to find a buyer for the Canadian operation or for the entire enterprise.

[40] The stay extension is granted until August 7, 2019.



A handwritten signature in black ink, appearing to read "Penny J.", is written above a horizontal line. The signature is stylized and cursive.

Penny J.

Date: June 27, 2019