Court grants relief for Armstrong Flooring Canada Ltd. and Affiliates as proceedings conclude

May 17, 2023

On Sept. 28, 2022, the Ontario Superior Court of Justice (Commercial List) (the Ontario Court) made two orders granting a range of relief requested in connection with the proceedings of Armstrong Flooring Canada Ltd. (Armstrong Canada) and its U.S. affiliates under Part IV of the Companies Creditors Arrangement Act (the CCAA), which governs cross-border insolvencies and allows for the recognition and enforcement in Ontario of Orders made by a court in another jurisdiction.

What is notable about this Part IV CCAA proceeding (the Armstrong Part IV CCAA Proceedings) is that the Ontario Court granted wide ranging relief sought by Armstrong Canada, that was key to concluding the Armstrong Part IV CCAA Proceedings. This relief included:

- recognizing a U.S. Sale Order;
- approving a settlement between Armstrong Canada and its U.S. affiliates;
- expanding the Administration Charge granted in the Armstrong Part IV CCAA Proceedings to include BLG as counsel to Armstrong Canada and its U.S. affiliates;
- discharging a Personal Property Security Act (PPSA) registration against Armstrong Canada where there was no evidence of any obligations owing by Armstrong Canada to a third party; and
- authorizing Grant Thornton Limited (Grant Thornton), in its capacity as Information Officer in the Armstrong Part IV CCAA Proceedings, to file an assignment in bankruptcy for Armstrong Canada and to act as its trustee in bankruptcy.

Background

On May 8, 2022, Armstrong Canada and some of its U.S. affiliates (the U.S. Debtors) filed Chapter 11 petitions under the U.S. Bankruptcy Code, which proceedings were overseen by the U.S. Bankruptcy Court for the District of Delaware (the U.S. Court). On June 8, 2022, the Ontario Court granted the Initial Recognition Order and the Supplemental Order (collectively, the Recognition Orders), recognizing the U.S.

bankruptcy proceedings as a “foreign main proceeding” under Part IV of the CCAA, which entitled Armstrong Canada and the U.S. Debtors (collectively, the Armstrong Group) to certain automatic relief in Canada, including a stay of all claims and proceedings against the Armstrong Group. The Recognition Orders also declared Armstrong Canada as “foreign representative” of itself and the U.S. Debtors, appointed Grant Thornton as the Information Officer and granted an Administration Charge to secure the fees and disbursements of the Information Officer and its counsel.

On July 13, 2022, the U.S. Court granted an Order approving a sale transaction (the U.S. Sale Order), whereby the Armstrong Group sold certain of its North American assets, including accounts receivable and inventory belonging to Armstrong Canada (the Sale Transaction). The transaction closed in the U.S. in accordance with the U.S. Sale Order. Unfortunately, it was only after the transaction closed in the U.S. did Canadian counsel to the Armstrong Group learn that the transaction included Canadian assets belonging to Armstrong Canada. The Recognition Orders granted by the Ontario Court expressly provided that the approval of the Ontario Court was required in order for any Canadian assets of the Armstrong Group to be sold.

Armstrong Canada brought a motion on Sept. 28, 2022 seeking the Ontario Court’s recognition of the U.S. Sale Order, as well as other relief, including the approval of a settlement agreement between Armstrong Canada and the U.S. Debtors (the Settlement Agreement). Pursuant to the Settlement Agreement, the U.S. Debtors agreed to fully withdraw an intercompany claim owed by Armstrong Canada to the U.S. Debtors and to pay a portion of the Sale Transaction proceeds to Armstrong Canada, in exchange for Armstrong Canada’s accounts receivable and inventory being subsumed in the Sale Transaction, with Armstrong Canada seeking the Ontario Court’s recognition of the U.S. Sale Order.

Ontario Court decision

The Ontario Court granted all of the relief sought by Armstrong Canada.

Recognition of U.S. Sale Order

In determining that the U.S. Sale Order should be recognized, the Ontario Court accepted Armstrong Canada’s submission that the purpose of Part IV of the CCAA was to promote comity and cooperation between Canadian courts and the courts of foreign jurisdictions in order to promote the fair and efficient administration of cross-border insolvencies and to protect and maximize the value of the debtor’s property for the benefit of stakeholders.

The Ontario Court also considered the factors set out in Babcock & Wilcox Canada Ltd. (Re) with respect to the recognition of orders made by foreign courts, including the following:

- the need to accord respect to foreign bankruptcy and insolvency legislation, unless in radically different from the laws and processes in Canada;
- whether stakeholders will be treated equitably, regardless of jurisdiction;
- the importance of permitting enterprises to reorganize globally, especially where there is an established interdependence on a transnational basis, and for one

jurisdiction to take charge of the principal administration of such reorganization; and
- the fact that the appropriate role of the court depends, to a significant degree, upon the court's nexus to the debtor's enterprise in light of factors such as the location of the debtor's principal operations and assets, the location of the debtor's stakeholders, and the development of the law in each jurisdiction to address the relevant issues.

Finally, the Ontario Court considered and accepted the reasons of the U.S. Court in its decision to approve the Sale Transaction, including the determination that the Sale Transaction was in the best interests of the Armstrong Group and their stakeholders, the Armstrong Group conducted a robust and fair marketing and sale process designed to yield the highest bids and approved by the U.S. Court, the Sale Transaction was negotiated at arm's-length and in good faith, and presented the best opportunity to maximize the value of the Armstrong Group estates compared to other alternatives.

The Ontario Court was satisfied that the recognition of the U.S. Sale Order was a necessary component of the proposed Settlement Agreement between Armstrong Canada and the U.S. Debtors.

Approval of Settlement Agreement

In approving the Settlement Agreement, the Ontario Court acknowledged that section 11 of the CCAA provides it with broad powers to make any order that it considers appropriate and recognized that settlement agreements that would facilitate a successful restructuring are to be encouraged in CCAA proceedings.

Further, the Ontario Court was satisfied that the settlement was fair and reasonable, would be beneficial to the Armstrong Group and their stakeholders, and was consistent with the purpose and spirit of the CCAA. In particular, the Ontario Court accepted Armstrong Canada's submissions that the Settlement Agreement:

- mitigated collection risks and further costs which may arise if Armstrong Canada were to undertake efforts to realize on its accounts receivable;
- provided certainty and finality with respect to the intercompany debt owed by Armstrong Canada to the U.S. Debtors, given that such debt would be fully withdrawn;
- would likely result in a larger pool of funds for the creditors of Armstrong Canada; and
- is consistent with the purpose and spirit of the CCAA, given that it resolves the intercompany debt on a consensual basis between Armstrong Canada and the U.S. Debtors.

Discharge of PPSA registration

Section 56(1) of the PPSA provides that where all the obligations under a security agreement have been performed, or where it has been agreed that part of the collateral will be released upon the performance of certain obligations and those obligations have been performed, any person having an interest in the collateral covered by a security agreement may make a demand upon the secured party to amend or discharge its

PPSA registration. If the secured party is unwilling or unable to do so, section 56(5) empowers the court to order the registrar to discharge the PPSA registration.

In considering whether to direct the registrar to discharge the PPSA registration made by Element Fleet Management Inc. (Element), against Armstrong Canada, the Ontario Court took into account the absence of any evidence that Armstrong Canada owed any amounts to Element, the failure of Element to respond to Armstrong Canada's demand for Element to discharge its registration, as well as its lack of response from Element, after being served with materials related to the Armstrong Part IV CCAA Proceedings. The Ontario Court accepted Armstrong Canada's submission that there was an absence of any legitimate basis for Element's registration, which should in turn be promptly discharged. It further accepted the submission that it had the broad authority, by virtue of section 67(1) of the PPSA and its inherent jurisdiction as a provincial Superior Court, to make a binding declaration of right that a creditor does not have a security interest in a debtor's property.

Expansion of Administration Charge

The Ontario Court held that the Administration Charge should be expanded to secure the fees and disbursements of BLG as Canadian counsel to the Armstrong Group, having regard to the fact that section 11.52 of the CCAA provides the Ontario Court with the jurisdiction to grant Administration Charges to secure the fees and disbursements of advisors.

In determining whether to grant such a charge, the Ontario Court enumerated a number of considerations, as set out in Re Canwest Publishing, including the size and complexity of the business being restructured, the proposed role of the professionals that would be benefiting from the charge, whether there was any unwarranted duplication of roles among those professionals, whether the quantum of the charge was fair and reasonable, the secured creditors likely to be affected by the charge, and whether the charge was supported by the CCAA monitor (or in this case, the Information Officer).

The Ontario Court ultimately found that the Canwest factors were met, particularly considering the size and complexity of the Armstrong Group's cross-border enterprise. The Ontario Court was also satisfied that BLG, as Canadian counsel to the Armstrong Group, played a critical role in the Armstrong Group's cross-border restructuring efforts, including the Sale Transaction and the negotiation of the Settlement Agreement, and should therefore be entitled to benefit from the Administration Charge.

Assignment in bankruptcy and termination of Part IV CCAA proceedings

Finally, the Ontario Court authorized Grant Thornton, as the Information Officer, to file an assignment in bankruptcy on behalf of Armstrong Canada, allowing the Information Officer to transition into the role of trustee in bankruptcy and begin the process of distributing its assets to the creditors. The Ontario Court noted that such relief was appropriate.

Another important consideration for the Court was that assigning Armstrong Canada into bankruptcy would allow for the orderly distribution of its assets to creditors in accordance with the regime under the *Bankruptcy and Insolvency Act*, including the proceeds received from its settlement with its U.S. affiliates.

Key takeaways

This decision further highlights the flexibility of the CCAA and the relief that may be granted by a Court pursuant to its provisions, particularly in the interests of facilitating a cross-border insolvency under Part IV of the CCAA. In this case, the Court's readiness to grant the various Orders sought by Armstrong Canada, including the approval of a creative settlement between companies in the Armstrong Group, illustrates the potential to implement a wide range of solutions under Part IV of the CCAA in order to maximize recovery for creditors.Interestingly, although the Court has routinely granted orders authorizing insolvency officials such as CCAA monitors and court-appointed receivers to assign a debtor into bankruptcy and act as trustee in bankruptcy, this appears to be the first case where an Information Officer appointed in Part IV CCAA proceedings has been granted the same power.

By

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