

CITATION: Laurentian University of Sudbury, 2023 ONSC 83
COURT FILE NO.: CV-21-656040-00CL
DATE: 2023-01-19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF**
SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Andrew Hatnay and Demetrios Yiokaris*, for the Thorneloe University, Appellant

Maria Konyukhova and Ben Muller, for Ernst & Young Inc., Monitor

Andrew Hanrahan, for Laurentian University

HEARD: November 18, 2022

REASONS: January 19, 2023

ENDORSEMENT

[1] Thorneloe University ("Thorneloe") brings this motion pursuant to the Claims Procedure Order dated May 31, 2021 (the "Claims Procedure Order") for an order allowing the appeal from the decision of Claims Officer Ortved dated September 8, 2022 of his denial of Thorneloe's loss of commercial value claim in valuing that claim at \$0.00, in relation to the Applicant's disclaimer of its Federation Agreement with Thorneloe.

Background

[2] On February 1, 2021, Laurentian University (the "Applicant") applied for and obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (the "CCAA").

[3] On April 1, 2021, the Applicant delivered a Notice of Disclaimer of the Federation Agreement to Thorneloe pursuant to s. 32(1) of the CCAA.

[4] On May 31, 2021, the Applicant commenced a claims process calling for the claims of its creditors. Thorneloe submitted disclaimer-related claims under s. 32(7) of the CCAA.

[5] The Monitor disallowed certain aspects of Thorneloe's disclaimer-related claims, two of which were then determined by Claims Officer Ortved at a hearing conducted in writing: (a) the

claim for Thorneloe's loss of commercial value; and (b) professional costs that Thorneloe had to incur in respect of the disclaimers.

[6] This appeal relates only to the disallowance of Thorneloe's Loss of Commercial Value Claim (the "Claim"), which Thorneloe contends is in the amount of \$9,800,000.

[7] Thorneloe raises the following issues:

- (a) Did the Claims Officer err in law in holding that the legal principle to apply is that Thorneloe could only claim for lost profits and that since it did not show that it had lost profits, he erred by disallowing the claim for lost business value?
- (b) What is the appropriate approach to value Thorneloe's loss of commercial value claim?
- (c) What amount should be accepted for Thorneloe's loss of commercial value claim against Laurentian?

Standard of review

[8] With respect to the applicable standard of review, both Thorneloe and the Monitor referenced *Target Canada Co. (Re)*, (2017) ONSC 2595 ("*Target Canada*"). In *Target Canada*, the court held that the determination of Claims Officers in an insolvency proceeding is subject to the standard of review applicable to ordinary civil appeals. The appropriate standard of review for the appeal of the decision of the Claims Officer is as follows:

- (a) Pure questions of law: the standard of review is correctness.
- (b) Questions of fact: the standard of review is that such findings are not to be reversed unless it can be established that the decision maker made a palpable and overriding error.
- (c) Questions of mixed fact and law: the standard of review, is that, in the absence of an "extricable" legal error or a palpable and overriding error, a finding of the decision maker should not be interfered with.

[9] Although Thorneloe raises three issues on appeal, the focus on this appeal is whether the Claims Officer committed a reversible error in rejecting Thorneloe's argument that he should have deviated from assessing the claim based on the customary expectation measure of damages and should instead have assessed the claim based on the alleged loss of commercial value of Thorneloe's unprofitable business.

[10] I have concluded that the issue on appeal raises questions of mixed fact and law and there is no "extricable" legal error or a palpable and overriding error. The findings of the Claims Officer should not be interfered with. In any event, I have also concluded that the decision of the Claims Officer is correct.

[11] My reasons for arriving at these conclusions are as follows.

Position of Thorneloe

[12] In support of the Claim, Thorneloe filed the report of an expert valuator, Mr. Glenn Bowman, CBV of Farber Corporate Finance Inc.

[13] The Farber Report opines that Thorneloe's enterprise value consists of two components: (a) an "operating enterprise value" in the range of approximately \$2.8 million to \$3.3 million; and (b) total non-operating assets (effectively cash and cash equivalents) of approximately \$6.7 million.

[14] Thorneloe submits that it is well accepted under business valuation principles that there are two approaches that can be used to measure the loss of value of an entity: (a) loss of business approach and (b) the loss of cash flow or loss of profit approach. The approach to use depends on the circumstances.

[15] Thorneloe submits that when an entity has been destroyed by the actions of another such as by a breach of contract, the required approach to assess damages is the loss of commercial value approach.

[16] Thorneloe submits that the Claims Officer erred in law by holding that a claim by Thorneloe for loss of value can only be for "lost profits" and "according to the principles regarding unprofitable contracts, the claimant is not entitled to damages for lost profits." Thorneloe submits that the Claims Officer erred further in concluding that "the principles regarding unprofitable contracts... is the correct approach to the assessment of damages, not the measurement of alleged loss of commercial value."

[17] Thorneloe submits that the Claims Officer's statement is an error of law in principle for which no deference should be afforded.

[18] Thorneloe submits that the case law supports the proposition that even if the business is unprofitable it can still have value. Thorneloe relies on *Ronald Elwyn Lister Limited v. Dayton Tire Canada Limited*, 1985 CarswellOnt 1034 (ONCA) ("Lister") and *McLachlan v. Canadian Imperial Bank of Commerce*, 1989 Carswell BCJ No. 389 (BCCA) ("McLachlan").

[19] Thorneloe contends that the Claims Officer erred in distinguishing these cases solely on his interpretation of each court's comment that the shutdown business could return to profitability sometime in the future, while he concluded that Thorneloe could never be profitable. Thorneloe submits that the conclusion involved conjecture for which there is no supporting evidence.

Position of the Monitor

[20] The Monitor points out that, a closer review of the performance of Thorneloe's general operations (excluding investment income) from the last four years reveals that they had remained unprofitable in all four of those years.

Thorneloe's Net Cash Flow from Operations (excluding Investment Income) 2018 to 2021			
	General Fund Profitability	Less Investment Income:	Net Cash Flow from Operations
2018	(77,777)	(12,749)	(90,526))
2019	(57,493)	(16,811)	(74,304)
2020	(614,263)	(25,030)	(639,293)
2021	(1,156,821)	(2,089)	(1,158,910)

[21] The Monitor also makes the point that Thorneloe's business was made up of its: (a) academic operation; (b) residence operation; and (c) investments. The Monitor submits that the only relevant financial results are those that relate to Thorneloe's operations (General Fund), excluding residences and investment income.

[22] The Monitor further submits that the disclaimer had no impact on Thorneloe's residence operation or investments. Thorneloe still retains possession of \$6.7 million of investments, thus the inclusion of this \$6.7 million claim and the head of damages is inappropriate. Additionally, the disclaimer does not prevent Thorneloe from continuing operation of its residences and, in fact, Thorneloe has continued to operate its residences. Finally, the Monitor submits that there has not been any evidence provided to support a decrease in the profitability of Thorneloe's residences operation being caused by the disclaimer.

[23] The Monitor submits that based on the evidence, any suggestion that Thorneloe would have incurred profits in the future is highly speculative and cannot form the basis of a claim for lost profits.

[24] The Monitor also submits that the approach and assumptions used in the Farber Report did not assess the central question of determining the damages suffered by Thorneloe as a result of the disclaimer. Instead, the Farber Report presented a visibly flawed approach not based on the economic reality of Thorneloe. This flawed approach sought to present a value for the business, the majority of which was the assets they retained, and the operational value based on the revenue earned versus the actual operating cash flow, which in all recent periods was negative.

Findings of the Claims Officer

[25] The Claims Officer did not accept the evidence proffered by Thorneloe in support of its claim to loss of commercial value. The Claims Officer rejected the Farber Report, stating "I am not persuaded that the Farber Report is a reliable measure of Thorneloe's academic and

commercial value prior to the disclaimer". In arriving at this conclusion, the Claims Officer referenced serious questions raised by the Monitor which have not been addressed.

[26] The Claims Officer did not accept the conclusions in the Farber Report and concluded that Thorneloe had not met its burden to prove its claim.

[27] The Claims Officer referenced that the Monitor identified significant criticisms of the methodology employed in the conclusions reached in the Farber Report. The Claims Officer noted that the response on the part of Thorneloe had not been to address these criticisms, but to take the position that the Farber Report had not been challenged with a responding report or on cross-examination. The Claims Officer rejected Thorneloe's position that he was obliged to fully accept the Farber Report in the absence of a responding report or cross-examination, regardless of whether the methodology employed in the conclusions reached in the Farber Report was flawed.

[28] The Claims Officer accepted that "a party with a claim arising under s. 32(7) of the CCAA is entitled to no greater claim than a party would be entitled for breach of contract in the ordinary course". With respect to the principles applicable to the assessment of damages, the Claims Officer concluded that the wording of s. 32(7) engages the same principles of damage assessment as are currently applied for breach of contract. The Claims Officer held that the customary remedy for breach of contract is compensation measured in expectation damages, also known as lost profits.

[29] The Claims Officer found as a fact that Thorneloe had not been profitable prior to the issuance of the Notice of Disclaimer and that Thorneloe's financial results would not likely have improved in subsequent years had there been no disclaimer.

[30] The Claims Officer came to the conclusion that in the case of an unprofitable contract, where the nonbreaching party makes a claim based on the expectation measure of damages, if the breaching party can show that the nonbreaching party would have incurred a loss it completed the contract, only nominal damages are owed. The Claims Officer stated that there cannot be a claim for lost profits where the non-breaching party would not have earned any profits. Contract damages are limited by the principle that the nonbreaching party is not entitled to be put into a better position than it would have been in had the contract been performed.

Analysis

[31] Applying the customary legal principles relevant to damage assessment, the Claims Officer came to the conclusion that Thorneloe was not entitled to damages for the Applicant's breach of contract.

[32] I am satisfied that the Claims Officer carefully reviewed the evidence and based on factual findings in the circumstances of this case and concluded that the appropriate method to value damages is to focus on lost profits.

[33] In arriving at his decision, the Claims Officer made a number of findings of fact. The Claims Officer made a factual finding that the evidence demonstrated that Thorneloe was not

profitable and was not likely to be profitable in the future if the Federation Agreement continued. On the evidence, it was open to the Claims Officer to make these findings.

[34] At paras. 33 – 40 of his decision, the Claims Officer accepted case law which establishes that a nonbreaching party is not entitled to be put into a better financial position than it would have been had the contract been performed. Accordingly, a party is not entitled to a claim for expectation damages based on a breach of contract where it was not expected to generate any profits.

[35] The Claims Officer also addressed the case law referenced by Thorneloe at [18].

[36] In *Lister*, the Court of Appeal for Ontario assessed damages after the Supreme Court of Canada held that the receiver had been wrongfully appointed. The Court of Appeal referenced the findings of the Monitor who had assessed the damages. At para. 47, Morden J.A. (as he then was) quoted the findings of Master McBride: "I have a little doubt, but only a little, that had Lister Ltd. succeeded in making the move to Orangeville and the switch from Dunlop to Goodrich it would have become a profitable operation. It is in this respect that I think Lister Ltd. was deprived of future profits by the seizure of March 20, 1972.

[37] At para. 67, Morden J.A. said:

"I turn now to the application of this approach to the facts of this case. I am not prepared to disturb the master's determination of future annual gross sales of \$500,000 as a starting point in the calculation. It is supportable on the evidence as is the determination of a net profit of 10%, \$50,000.00."

[38] In *Lister*, damages were assessed for the going concern value rather than a liquidation value.

[39] In *McLachlan*, the plaintiffs operated an auto dealership. The bank called its loans and enforced its security. The plaintiff successfully sued for damages for wrongful acts which occurred in the course of security realization, which the plaintiff said caused him to lose his business and forced it into bankruptcy. The trial judge assessed damages on a going concern basis. The trial judge decided that the business would have survived if the trespass had not occurred, so he evaluated the business as a going concern. His conclusion that the business would have survived was unsuccessfully challenged on appeal.

[40] On appeal, the British Columbia Court of Appeal held that although the plaintiffs business was considered unprofitable by the defendant bank, it still held value as a business of "going concern."

[41] The Monitor submits that, in both *Lister* and *McLachlan*, the courts decision to award damages was rooted in their obligations to defer to the findings of the decision-makers at first instance that concluded that the companies in question were reasonably expected to generate a profit in the future. I agree and in my view, the Claims Officer did not err in distinguishing the applicability of both *Lister* and *McLachlan*.

[42] Thorneloe also referenced case law from the United States. These cases are not binding on this Court and, in any event, are distinguishable. *Indu Craft v. Bank of Baroda*, 47 F3d 490, was a fact specific case which at the outset recognized the general rule for measuring damages for breach of contract has long been settled. It is the amount necessary to put the plaintiff in the same economic position he would have been had the defendant fulfilled his contract. This is the approach taken by the Claim's Officer. Further, the U.S. Court assessed business value based on the company's past earnings. *Jim's Hot Shot Serve v. Continental W. Ins. Co.*, 353 N.W. 2d 279, involved a damage calculation for a profitable entity. Here the Claims Officer found that Thorneloe was unprofitable.

- (a) There is no Canadian case law which requires courts in these circumstances to assess damages on the basis of "loss of commercial value".
- (b) At its highest, the issues raised by Thorneloe are of mixed fact and law and deference must be shown to the findings of the Claims Officer.

[43] I am satisfied that the Claims Officer carefully reviewed the evidence and concluded that the Monitor had established that Thorneloe was not profitable prior to the Disclaimer, nor that its results would have improved in subsequent years had there been no Disclaimer. Consequently, it was appropriate to focus on lost profits.

[44] The assessment of damages, including the appropriate loss quantification theory in any given case, is, in my view, within the sole jurisdiction of the trier of fact – in this case, the Claims Officer. His findings are well supported on the record and accordingly attract considerable deference on appeal. I am also satisfied that it was appropriate for the Claims Officer to reject the Farber Report. The decision of the Claims Officer in this respect is a discretionary decision and, in exercising his discretion, the Claims Officer concluded that the lost profits approach was the preferable approach to taking this case.

[45] It is Thorneloe's burden to prove its claim (See: *U.S. Steel Canada Inc., Re*, 2016 ONSC 569 at para 140). The Monitor may rely upon identifying significant deficiencies in Thorneloe's evidence and is not required to proffer its own expert report. Further, a CCAA claims process is not a formal civil trial. As pointed out by the Monitor, the adjudication of claims within a claims process demands expedience and cost efficiency, and necessarily warrants a more flexible approach to the rules of evidence. The Claims Officer has broad discretion to set rules for adjudication that are consistent with the principles underlying a CCAA claims process. This is also underscored by the provisions of s. 20(1) of the CCAA which provides as that in these circumstances, the amount of the claim is to be determined on a summary application.

[46] In summary, Thorneloe has not demonstrated that the Claims Officer committed an error in arriving at his decision for several reasons, including:

- [1] The Claims Officer's assessment of an ultimate rejection of the Farber Report is an evidentiary determination and is entitled to significant deference;

- [2] Having rejected the Farber Report, the Claims Officer was entitled to conclude that Thorneloe had not met its burden to prove its claim;
- [3] The Monitor's notice of revision or disallowance ("NORD") sets out the reasons why the Monitor rejected the position set forth in the Farber Report. The Monitor was not required to proffer its own evidence. It was entitled to scrutinize Thorneloe's evidence and accepted or rejected, and advance its views before the Claims Officer based on Thorneloe's flawed analysis;
- [4] The Farber Report was based on assumptions that do not reflect Thorneloe's financial reality or the damages they suffered as a result of the disclaimer. The Farber Report implies Thorneloe is a profitable entity and does not reflect reality. The Farber Report ascribes value to Thorneloe's business based on a revenue multiplier. The Farber Report does not consider Thorneloe's net cash flows – i.e. revenues net of expenses. The Claims Officer accepted the Monitor's opinion that any valuation of Thorneloe should be based on net cash flow. Because Thorneloe's net cash flow is reasonably expected to continue to be negative, it is not entitled to claim the loss of academic and commercial value.
- [5] There is no Canadian law which requires courts in these circumstances to assess damages on the basis of "loss of commercial value".

Disposition

In the result, Thorneloe's appeal is dismissed and Thorneloe's claim to loss of commercial value is denied.



Chief Justice G.B. Morawetz

Date: January 19, 2023