

No. S-169079
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C36, AS AMENDED

AND IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF TEXAS WITH RESPECT TO THE COMPANIES LISTED ON SCHEDULE "A" HERETO

APPLICATION OF CHC GROUP LTD UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

APPLICATION RESPONSE

Application response of: CHC Group Ltd., (the "**Application Respondent**" or "**CHC Group**" or, together with the companies listed on Schedule "A" hereto, "**CHC**")

THIS IS A RESPONSE TO the notice of application (the "**Application**") of 0921528 B.C. Ltd. ("**Argo**") filed on February 7, 2017.

Capitalized terms not otherwise defined in this Application Response have the meanings ascribed to them in Argo's Application.

Part 1: ORDER CONSENTED TO

The Application Respondent does not consent to the granting of any of the orders set out in Part 1 of the Application.

Part 2: ORDERS OPPOSED

The Application Respondent opposes the granting of the each of the orders set out in Part 1 of the Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

N/A



Part 4: FACTUAL BASIS

The Boundary Bay Facility

1. The premises subject to this Application, located in Delta, British Columbia, consist of a 200,000 square foot office and maintenance facility referred to in the pleadings filed in this proceeding as the "**Boundary Bay Facility**".

2. The lands on which the Boundary Facility was constructed (the "**Premises**") were leased to Alpha Aviation Inc. ("**Alpha**") pursuant to an amended and restated lease agreement (the "**City Lease**") between the Corporation of Delta, as landlord, and Alpha, as tenant.

3. In 2006, CHC Helicopters International Inc. (as predecessor in interest to Heli-One) and Alpha entered into a sublease agreement (the "**Alpha Lease**") with respect to the Premises dated July 31, 2016.

Contractual Relationship between the Heli-One and Argo

4. Heli-One is party to two written agreements with Argo relating to the Boundary Bay Facility which are relevant to the issues before this Court:

   (a) the "**Sale Agreement**" dated June 30, 2011 between Heli-One, as vendor, and Argo Ventures Inc., as purchaser, whereby Heli-One sold, among other things, its interest in the Alpha Lease to Argo Ventures Inc.; and

   (b) the "**Heli-One Lease**" dated April 17, 2012 between Argo, as landlord, and Heli-One, as tenant, whereby Heli-One agreed to sub-lease the Premises from Argo.

5. The sale and assignment of Heli-One's interests in the Alpha Lease pursuant to the Sale Agreement was consented to by, among others, Alpha, in its capacity as Heli-One's landlord under the Alpha Lease, and Delta, in its capacity as Alpha's landlord under the City Lease (the "**Alpha Lease Assignment**").

6. As a result of the Alpha Lease Assignment, Heli-One has no contractual relationship with Alpha, whether pursuant to the Alpha Lease or otherwise. Heli-One is not privy to the Alpha Lease.

The Disclaimer of the Heli-One Lease

7. The circumstances and legal disputes leading up to the U.S. Bankruptcy Court's granting of an order (the "**Lease Rejection Order**") authorizing CHC to disclaim the Heli-One Lease have been reported on in pleadings and affidavits filed in this proceeding.

8. Prior and subsequent to the entry of the Lease Rejection Order on January 27, 2017, Heli-One and Alpha, through their respective counsel, engaged in negotiations of terms for Heli-One's exit from the Boundary Bay Facility.

9. The correspondence relating to these negotiations is attached to the Affidavits of Cristine Bosma and Alice Knowlden filed in this proceeding.

10. Among other facts, this correspondence indicates that Heli-One was well advanced in its efforts to vacate the premises before Argo took the positions that are the basis of this Application.

Heli-One's Trade Fixtures

11. In its Application, Argo takes the position that certain trade fixtures, including paint booths, engine test beds, cooling towers, a generator, cleaning stations, and certain unidentified "property" (together, the "**Trade Fixtures**") are the property of Argo which it acquired pursuant to the Sale Agreement. Argo alleges that its property, the Trade Fixtures, has been improperly removed by Heli-One from the Boundary Bay Facility and that Heli-One must return and re-install the Trade Fixtures.

12. Heli-One disagrees with the descriptions of the Trade Fixtures set out in Argo's Application. Heli-One's evidence with respect to the Trade Fixtures is set out in Affidavit #1 of Guy Borowski.

13. Each of the Trade Fixtures is a chattel that is specifically used, useful, and dedicated to the operation of Heli-One's business as a helicopter maintenance and repair facility. Any affixation to the building (and many of the Trade Fixtures were not affixed to the building at all as evidenced) was to render the Trade Fixtures more useful in the operation of Heli-One's business being carried out in the premises rather than an element of the building.

14. At no point in time between the entry into the Heli-One Lease by the parties until about December 2016 did Argo ever conduct itself as the owner of the Trade Fixtures.

Part 5: LEGAL BASIS

The Heli-One Lease Authorizes the Removal of the Trade Fixtures

15. The issue before this Court is whether Heli-One is entitled to remove its Trade Fixtures from the Boundary Bay Facility.

16. The Heli-One Lease expressly authorizes Heli-One, at the end or sooner termination of the term of the Heli-One Lease, to remove Heli-One's equipment and trade fixtures from the Boundary Bay Facility. The definition of "Buildings" found in Clause 1.1 of the Sale Agreement excludes "the trade fixtures which shall be removable under the [Alpha Lease]..."

17. The Heli-One Lease does not define the term "trade fixture" and, contrary to Argo's submissions in its Application, it does not incorporate the definition of "Trade Fixtures" found in the Alpha Lease. In this circumstance, the term trade fixture as referenced in the Heli-One Lease must be interpreted on the basis of the common law definition of trade fixtures.

18. The concept of a trade fixture is well established at common law. A trade fixture:

> [...] is something installed by a tenant for the purpose of the tenant's trade or business which technically becomes part of the land or building. Unless, there is a provision to the contrary in the lease, a tenant has a common law right to remove tenant's fixtures on the expiration of the lease.

Richard Olson, *A Commercial Tenancy Handbook* (Toronto: Thomson Carswell, 2004) (loose-leaf revision 2016), ch 3 at 57
Homestar Holdings Ltd. v. Old Country Inn Ltd. (1986), 8 B.C.L.R. (2d) 211 (S.C.)
Arctic Transit Mix and Concrete Products Ltd. v. Rolling Mix Concrete (Edmonton) Ltd. (1999), 247 A.R. 7 (Q.B.)
Cormier v. Federal Business Development Bank (1984), 25 B.L.R. 194 (Ont. Co. Ct.)

19. The status of trade fixtures while they are attached to and are part of the property has been described in the following terms:

> That, even in the case of tenant's fixtures put in for the purpose of trade, they form part of the freehold, with the right, however, to the tenant, as between him and the landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

859587 Ontario Ltd. v. Starmark Property Management Ltd. (1997), 34 O.R. (3d) 43 (Gen. Div.)

20. Heli-One submits that the evidence before this Court establishes that the Trade Fixtures fall within the common law definition of trade fixtures on the grounds that, among other things, they were placed and/or installed at the Boundary Bay Facility for the purpose of being used by Heli-One in its business.

Heli-One did not sell the Trade Fixtures to Argo

21. Argo's argument that it purchased the Trade Fixtures from Heli-One pursuant to the Sale Agreement is not supported by the text of the Sale Agreement or the evidence before this Court.

22. On a plain reading, the Sale Agreement expressly excludes the Trade Fixtures from the "Property" sold by Heli-One to Argo. The definition of "Buildings" in the Sale Agreement provides that the "Buildings" being sold by Heli-One to Argo do <u>not</u> include "trade fixtures which shall be removable under the Head Lease [...]". The term "trade fixtures" is not defined in the Sale Agreement. The Sale Agreement does not import the definition of trade fixtures, or any other definition, from the Alpha Lease. Heli-One's removal of the Trade Fixtures is consistent with its rights under the Heli-One Lease and the rights of an occupant to remove its trade fixtures pursuant to the terms of the Alpha Lease.

23. Additionally, Argo's position that Heli-One is not able to remove chattels or equipment which are attached in any manner to the premises (as allegedly stipulated in the definition of "Trade Fixtures" in the Alpha Lease) on the grounds that it purchased Heli-One's trade fixtures pursuant to the Sale Agreement is inconsistent with the definition of "Chattels" in that agreement. Specifically, certain of the items listed as falling within the definition of "Chattels" under the Sale Agreement, and which were specifically purchased by Argo, are trade fixtures

and chattels which are attached to the premises. They are substantially similar to the types of fixtures to which Argo now claims ownership. The parties would not have included the relevant items as purchased "Chattels" in the Sale Agreement if they had intended the term "trade fixtures" in the Sale Agreement to be as broad as Argo now claims it to be.

The Terms of the Alpha Lease do not assist Argo

24. Even if the contractual definition of Trade Fixtures found in the Alpha Lease governing the relationship between Alpha and Argo were to define the nature of Heli-One's rights to the Trade Fixtures, which is denied, it would not assist Argo's argument.

25. Argo's interpretation of the definition of Trade Fixtures found in the Alpha Lease, as set out in its Application, is based on the misreading of the applicable definition.

26. The applicable definition of "Trade Fixtures" in the Alpha Lease provides as follows:

> "Trade Fixtures" means the unattached, moveable chattels and equipment installed prior to or during the Term in, on or which serve any of the Buildings, for the purpose of the Subtenant or an Occupant carrying on its business in such Buildings and which Trade Fixtures and [sic] Subtenant or Occupant is permitted to remove only to the extent permitted by the terms of this Agreement, but Trade Fixtures do not include Leasehold Improvements.

27. Argo interprets the above clause conjunctively as meaning that the definition of Trade Fixtures includes both "unattached moveable chattels" and "unattached movable equipment". Such an interpretation would result in an internal inconsistency between the definitions of "Leasehold Improvements" and "Trade Fixtures" found in the Alpha Lease. Additionally, contrary to the principles of contractual interpretation, it would result in legal uncertainty and commercial absurdity by limiting the "trade fixtures" which a tenant or occupant is entitled to remove from the premises to items generally falling outside of that definition as known to the common law and commercial parties for decades.

> Geoff R. Hall, Canadian Contractual Interpretation Law, 3rd ed. (Toronto: Lexis Nexis, 2016) p. 61-63

28. In summary, Argo agreed in the Heli-One Lease that Heli-One could remove trade fixtures. That is what Heli-One has done. There is no basis in either fact or law for the positions advanced by Argo in this Application.

29. **Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Paul King, made September 29, 2016;

2. Affidavit #2 of Paul King, made November 5, 2016;

3. Affidavit #4 of Robert A. Del Genio, made January 27, 2017

4. Affidavit #1 of Guy Borowski, to be filed;

5. Affidavit #1 of John Hanbury, to be filed; and

6. Affidavit #1 of Alice Knowlden, made February 10, 2017.

The Application Respondent estimates that the application will take 1 day.

The Application Respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: February 10, 2017

Signature of William C. Kaplan, Q.C. / Peter Bychawski
Lawyer for the Application Respondent

SCHEDULE "A"

LIST OF COMPANIES

CHC Group Ltd.

6922767 Holding SARL

Capital Aviation Services B.V.
CHC Cayman ABL Borrower Ltd.
CHC Cayman ABL Holdings Ltd.
CHC Cayman Investments I Ltd.
CHC Den Helder B.V.
CHC Global Operations (2008) ULC
CHC Global Operations Canada (2008) ULC
CHC Global Operations International ULC
CHC Helicopter (1) S.á.r.l.
CHC Helicopter (2) S.á.r.l.
CHC Helicopter (3) S.á.r.l.
CHC Helicopter (4) S.á.r.l.
CHC Helicopter (5) S.á.r.l.
CHC Helicopter Australia Pty Ltd
CHC Helicopter Holding S.á.r.l.
CHC Helicopter S.A.
CHC Helicopters (Barbados) Limited
CHC Helicopters (Barbados) SRL
CHC Holding (UK) Limited
CHC Holding NL B.V.
CHC Hoofddorp B.V.
CHC Leasing (Ireland) Limited (n/k/a CHC Leasing (Ireland) Designated Activity Company)
CHC Netherlands B.V.
CHC Norway Acquisition Co AS
Heli-One (Netherlands) B.V.
Heli-One (Norway) AS
Heli-One (U.S.) Inc.
Heli-One (UK) Limited
Heli-One Canada ULC
Heli-One Holdings (UK) Limited
Heli-One Leasing (Norway) AS
Heli-One Leasing ULC
Heli-One USA Inc.
Heliworld Leasing Limited
Integra Leasing AS
Lloyd Bass Strait Helicopters Pty. Ltd.
Lloyd Helicopter Services Limited
Lloyd Helicopter Services Pty. Ltd.
Lloyd Helicopters International Pty. Ltd.
Lloyd Helicopters Pty. Ltd.
Management Aviation Limited