CITATION: Re Torstar Corporation and Nordstar Capital LP, 2020 ONSC 4679
DIVISIONAL COURT FILE NO.: CVD-TOR-43-20AP
DATE: 20200804

SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT

BETWEEN:

IN THE MATTER OF AN APPLICATION UNDER SECTION 182 OF THE *BUSINESS CORPORATIONS ACT* (ONTARIO), R.S.O. 1990, CHAP. B. 16 AS AMENDED

AND IN THE MATTER OF RULES 14.05(2) AND 14.05(3) OF THE RULES OF CIVIL PROCEDURE

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT INVOLVING TORSTAR CORPORATION AND NORDSTAR CAPITAL LP

BEFORE: Penny J.

COUNSEL: *Alistair Crawley, Melissa MacKewn and Michael Byers* for the Appellants Canadian Modern Media Holdings Inc. and Matthew Proud

Ryan A. Morris and Daniel Szirmak for the Respondent Torstar

Orestes Pasparakis and Andrew McCoomb for Nordstar Capital LP

HEARD by videoconference due to COVID-19 on: July 31, 2020

REASONS

[1] On July 31, 2020 I dismissed the Appellants' motion for a stay of the July 27, 2020 order of Gilmore J. approving a plan of arrangement by which the Respondent NordStar Capital LP will acquire the outstanding voting and non-voting shares of the Respondent Torstar Corporation. Due to the urgency of the matter for all concerned, I issued a brief endorsement, and fixed costs in the agreed amount of $15,000, with reasons to follow. These are those reasons.

BACKGROUND

Overview

[2] Torstar entered into an Arrangement Agreement with NordStar by which NordStar would acquire all the shares of Torstar. During the course of the process laid out in the Arrangement Agreement, Canadian Modern Media Holdings Inc. (a corporation established to make a proposal to acquire Torstar) made unsolicited (and ultimately unsuccessful) proposals to acquire the Torstar

shares. CMMH and Mr. Proud, a holder of Torstar shares and co-founder of CMMH, unsuccessfully opposed approval of the Arrangement before Gilmore J. They appealed Gilmore J.'s order approving the plan of arrangement to the Divisional Court. The Respondents intended to proceed to implement the plan of arrangement, so the Appellants sought a stay of the effect of Gilmore J.'s order pending the hearing of the appeal. The appeal, originally scheduled for the week of August 30, was moved to August 7. The motion for a stay was argued on July 31.

The Plan of Arrangement

[3] These are challenging times for traditional print media. In 2019 the Torstar Board of Directors began a consideration of various options to create or unlock additional shareholder value and engaged financial advisors to assist in the exploration of strategic alternatives.

[4] In February 2020, Torstar received an unsolicited offer from Jordan Bitove; under the proposed transaction NordStar, a company controlled by Mr. Bitove, would acquire 100% of the Torstar's Class A voting shares and Class B non-voting shares for $0.566 per share in cash. The Board considered this proposal and established a Special Committee of the Board with a mandate to solicit third-party proposals and to consider whether any third party transaction would be in the best interests of Torstar and its stakeholders. The Special Committee and its advisors canvassed 26 potential strategic and financial buyers as well as high net worth individuals to solicit interest in a transaction. By March 27, however, the Board resolved to enter into exclusive negotiations with NordStar.

[5] Protracted negotiations between Torstar and NordStar resulted in an increase in consideration from $0.566 to $0.63 per share in cash. The Board retained flexibility to consider other offers in the best interests of Torstar in the event that a Superior Proposal emerged following the announcement of a transaction with NordStar. Ultimately, on May 26, the Special Committee recommended acceptance of the NordStar proposal. The Board accepted this recommendation and, later that day, executed the Arrangement Agreement with Nordstar.

[6] As of the close of business on May 25, Torstar's capital stock consisted of 9,803,535 Class A voting shares and 71,615,373 Class B non-voting shares. The Class B non-voting shares are listed and traded on the Toronto Stock Exchange. Approximately 99% of the Class A voting shares and 18% of the Class B non-voting shares are held by a Voting Trust, the members of which are the five family groups that have controlled Torstar for more than 60 years. Approximately 40% of the Class B non-voting shares are held by Hamblin Watsa Investment Counsel Inc., an affiliate of Fairfax Financial Holdings Ltd.

[7] Also on May 26, the Voting Trust, the Torstar directors who held Class B non-voting shares and HWCI entered into what are referred to as "soft" voting support agreements with NordStar which would automatically terminate upon termination of the Arrangement Agreement. Torstar issued a news release announcing the Arrangement Agreement with NordStar.

[8] On June 18, Justice Conway issued an Interim Order directing Torstar to call, hold and conduct a shareholders' meeting in accordance with the *OBCA* and the articles and bylaws of Torstar in order for the shareholders of Torstar to consider the Arrangement.

[9] On June 30, Torstar received a non-binding unsolicited offer from CMMH to acquire the shares of Torstar for $0.72 per share. The offer was conditional on confirmatory due diligence, the negotiation of definitive documentation and execution of voting support agreements with the Voting Trust and HWIC. On July 3, the Board determined that the CMMH offer might reasonably be expected to constitute or lead to a Superior Proposal, which would permit Torstar to engage in discussions and negotiations with CMMH. On the same day, Torstar entered into a customary confidentiality and standstill agreement with CMMH. Among other things, this agreement provided that there would be no agreement, understanding or arrangement of any nature whatsoever relating to a transaction with CMMH unless a definitive agreement had been executed. Torstar had the right to reject any proposal made by CMMH and to terminate discussions and negotiations at any time.

[10] In the course of negotiations, between July 3 and July 11, CMMH amended its proposal and offered to acquire all the Torstar shares for a combination of $0.72 per share in cash and the issuance of a non-transferable contingent value right (CVR) whose payments, if any, were contingent on proceeds of disposition from selected Torstar non-core assets in certain circumstances.

[11] On July 10, NordStar offered to increase its proposal from $0.63 to $0.72 per share in cash conditional on the Trustees of the Voting Trust signing a hard lockup voting support agreement with NordStar. The following day, the Voting Trust rejected the $0.72 offer from NordStar and proposed $0.74 per share in cash in a counteroffer. This counteroffer was accepted by NordStar. This amended offer price represented an increase of 30.7% from NordStar's original proposal and 17.5% from the price agreed to in the Arrangement Agreement. The Voting Trust and HWIC then advised the Board that they would not support the CMMH offer and that they proposed to enter into new, so called "hard" lockup voting support agreements with NordStar to vote their shares in favour of the acquisition by NordStar of all of the outstanding shares at a price of $0.74 per share in cash.

[12] Later the same day, July 11, the Board consulted with its outside legal and financial advisors and obtain updated fairness opinions from two financial advisors. The updated fairness opinions took into account the CMMH offer of $0.72 and one CVR per share. The Board determined, with no dissents, that the CMMH offer could not constitute a Superior Proposal as defined in the Arrangement Agreement because it was not reasonably capable of being completed, given the position taken by the Voting Trust and HWIC. The Board determined that the amended Arrangement Agreement at $0.74 was in the best interest of Torstar and that the Board would recommend that shareholders vote in favour of this Arrangement. The Board executed the amended Arrangement Agreement and the Voting Trust and HWIC entered into new hard lockup voting support agreements, committing to vote their shares in favour of the Arrangement.

[13] On June 20, after the amended Arrangement Agreement had been publicly announced, CMMH stated in the media that it would have increased the cash component of its proposal to $0.80 per share. Later that day, CMMH submitted another unsolicited proposal to acquire the shares for $0.80. This proposal expired by its terms on July 24, 2020. At a meeting later that day, the Board unanimously determined, after consultation with its financial and outside legal advisors, that the latest CMMH proposal could not reasonably be expected to constitute or lead to a Superior

Proposal under the Arrangement Agreement because this proposal, in light of the commitments made by the Voting Trust and HWIC to NordStar, was not reasonably capable of being completed.

[14] The Board considered that the Voting Trust and HWIC, both sophisticated parties with access to independent legal and financial advice, voluntarily entered into hard lockup voting support agreements with NordStar. This represented 84.3% of the Class A voting shares and 57.6% of the Class B non-voting shares, for an aggregate of approximately 60.8% of the issued and outstanding shares of Torstar. Due to the hard lockup voting support agreements, no other proposal could obtain sufficient votes to be approved, with the result that no other proposal could constitute a Superior Proposal under the Arrangement Agreement and entitle Torstar to terminate its transaction with Nordstar.

[15] The shareholders' meeting to vote on the Arrangement was held on July 21 in accordance with the Interim Order of Conway J. The Arrangement was approved by 98.7% of the votes cast by shareholders - 99.7% of the votes cast by holders of Class A voting shares and 98.1% of the votes cast by the holders of Class B non-voting shares. 81.9% of shares held by shareholders other than members of the Voting Trust and HWIC voted at the meeting were voted in favour of the Arrangement.

[16] At the hearing before the application judge, the Appellants sought an adjournment. The hearing was booked for one hour and they maintained that they would need more time. The application judge proceeded with the application as scheduled in the Interim Order. The application judge heard submissions from counsel for each of Torstar, NordStar, CMMH and Mr. Proud and one other objecting shareholder. She reserved her decision for more than four days to review the material.

[17] The application judge released her endorsement on the evening of July 27, 2020, approving the Arrangement as fair and reasonable. In dismissing the objections of the Appellants, the application judge held Torstar had complied with the Interim Order and brought its application in good faith. The application judge further held that Torstar met the test for a fair and reasonable arrangement set out by the Supreme Court in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69. With respect to the objections raised, the application judge held that the objectors delivered their respective notices of appearance after the required deadline in the Interim Order, such that their standing was in question. In the alternative, the application judge held that CMMH could not blame Torstar for its business decision not to increase the cash component of its offer in a timely way and that, by the time CMMH made its final bid, the lockup agreements were in place and no further bid could have been considered. As such, disclosure of the bid was not required.

ANALYSIS

The Test for a Stay

[18] Section 134(2) of the *Courts of Justice Act* provides that a court to which an appeal is taken may, on a motion, make any interim order that is considered just to prevent prejudice to a party pending appeal. The test for whether a stay pending appeal ought to be granted is the same test that applies on a motion for an interlocutory injunction:

(1) there must be a serious question to be determined on the appeal;

(2) the appellant must suffer irreparable harm if the stay is refused; and

(3) the balance of convenience must favour granting the stay,

Longley v. Canada (Attorney General), 2007 ONCA 149 at para. 14; *RJR MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

Serious Issue for Appeal

[19] To satisfy the first prong of the test, the Appellants need only show that their appeal is neither frivolous nor vexatious. The court does not engage in a prolonged examination of the merits. Nevertheless, in the circumstances of this case, I am not satisfied that the Appellants have shown that they meet this threshold.

Standing

[20] The application judge found that CMMH lacked standing. She did, nevertheless, go on to consider its arguments. The application judge's conclusion on this issue was well-founded. This conclusion, however, does not rest solely on the fact that the Appellants were late to file their notices of appearance.

[21] The Supreme Court of Canada determined in *BCE Inc.*, that a fairness hearing "looks primarily to the interests of the parties whose legal rights are being arranged." The court must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way, paras. 119 and 138.

[22] First, the CMMH interest in these proceedings (to the extent it has one at all) is purely commercial and self-interested. It made an offer to purchase assets which was not accepted. No "legal rights" of CMMH are being arranged.

[23] Second, the Arrangement Agreement is a contract between Torstar and NordStar. CMMH is not a party to this contract nor is it an intended beneficiary. CMMH, therefore, has neither obligations of its own nor can it enforce the obligations of others under the Arrangement Agreement.

[24] Finally, this is not a case where CMMH's standing is required in order for this matter to be brought before the court. Mr. Proud is a shareholder and an Appellant.

The One Hour Hearing

[25] Both Appellants' "primary ground of appeal" relates to the alleged procedural unfairness associated with the one-hour Arrangement approval hearing which gave rise to the Final Order. This ground of appeal is entirely misguided.

[26] In *Ashmore v. Corp. of Lloyd's*, [1992] 2 All ER 486, the House of Lords established the principle that the amount of time litigants get is not the amount of time they want or think they need but the amount of time the judge determines is necessary for the proper determination of the relevant issues. This principle is well accepted across Canada and, in particular, on the Commercial List. The allocation of time is a matter of discretion which can only be interfered with where there is a manifest error in principle.

[27] The Appellants argue, however, that there was a manifest error in principle because the limitation on their time for oral argument at the hearing resulted in a denial of procedural fairness or natural justice. There are at least three problems with this argument.

[28] First, the appellants caused this problem themselves by, the night before the hearing (and in violation of the Interim Order governing the conduct of the final approval hearing made by Conway J. on June 18, 2020), delivering a responding record in excess of 790 pages and a factum of 34 pages (despite the 25-page limit for factums prescribed by the Commercial List Practice Direction).

[29] Second, all parties were subject to essentially the same time limit on their submissions.

[30] Third, and most importantly, applications of this kind before the Commercial List are heavily oriented to documentary evidence and written submissions. No doubt in part because of the Appellants' late filing of voluminous material, the application judge took the somewhat unusual step of reserving on this application and used the time during the reserve to read the material carefully. Thus, any limitations arising from the Appellants' late filing and the brevity of the oral hearing were entirely cured by the application judge's approach to deciding the matter before issuing her decision.

[31] There is, simply put, no merit whatsoever to this ground of appeal.

The "Other" Grounds of Appeal

[32] The Appellants also argue that the application judge committed a number of additional legal or factual errors.

[33] When one looks at the substance of the remaining arguments, they fall into essentially three categories, (a) the Board's alleged failure to consider the Appellants' proposal; b) the Board's alleged acquiescence in the hard lock up agreements; and (c) the Board's alleged failure of disclosure to the shareholders. Each of these issues is closely interrelated with the others.

The CMMH Proposal

[34] On June 30 CMMH submitted its non-binding unsolicited proposal at $0.72. Importantly, this offer was conditional on CMMH: (a) conducting due diligence; b) negotiating definitive documents; and (c) entering into lock up agreements with the Voting Trust and HWIC.

[35] On July 3, the Board determined that the CMMH proposal *may* reasonably be expected to constitute or lead to a Superior Proposal under the Arrangement Agreement.

[36] On July 9 Torstar issued a press release which disclosed the initial CMMH offer.

[37] Later the same day, CMMH amended its offer to provide for $0.72 plus a CVR.

[38] Before Torstar made a determination of whether CMMH's amended proposal could constitute a Superior Proposal, Nordstar increased its offer to $0.74 on July 11 conditional on hard lock up agreements with the Voting Trust and HWIC. Torstar's Board also received updated fairness opinions concluding that the consideration being offered under Nordstar's $0.74 offer was fair to shareholders from a financial point of view.

[39] The Voting Trust and HWIC were not, as of July 11, prepared to support the CMMH proposal. It is easy to see why. CMMH's proposal was unsolicited. CMMH was a new entrant to this process and unknown. Neither Torstar nor its majority shareholders were aware of CMMH's financial capacity to consummate any transaction. Its proposal was conditional on due diligence and the negotiation of a definitive agreement. The Board, the Voting Trust and HWIC had just taken over three months to negotiate the Arrangement Agreement with NordStar. The CMMH proposal was not a "cash only" offer. It is clear that the Board, the Voting Trust and HWIC were only interested in an all cash offer. The fact that CMMH thought that the CVR was worth something is largely irrelevant. The Board, the Voting Trust and HWIC did not share CMMHs optimistic viewpoint, as was their right. A bird in the hand, as the saying goes, is worth two in the bush.

[40] The Board's ability to pursue the CMMH proposal required the offer to fall within the definition of a "Superior Proposal". One requirement of a Superior Proposal under the Arrangement Agreement was the Board's determination, "in its good faith judgment, after receiving the advice of its outside legal counsel and financial advisors, [that the proposal] is reasonably capable of being completed without undue delay relative to the arrangement taking into account all financial, legal, regulatory and other aspects of such proposal."

[41] With the Voting Trust and HWCI's refusal to support the CMMH proposal and subsequent agreement to sign hard lock up agreements to vote in favour of the NordStar proposal, the Board reasonably determined, with the benefit of its outside legal counsel and financial advisors, that the CMMH proposal was not reasonably capable of being completed without undue delay relative to the Arrangement, taking into account all financial, legal, regulatory and other aspects of the proposal.

[42] The Board was under no legal obligation to continue to negotiate with CMMH. Indeed, under the terms of the Arrangement Agreement, it was effectively prohibited from doing so. That was the finding of the application judge. It is, on the documents and the evidence, unassailable.

[43] It is worth noting in this context as well that CMMH continuously refers to this process as an "auction". This was not an auction. This was a private agreement between NordStar and Torstar supported by the overwhelming majority of Torstar's shareholders. CMMH was a stranger to that process and made an unsolicited proposal. Whatever obligations the Board owed, they were not owed to CMMH. The duty of good faith applies to contract performance, not contract formation.

Disclosure

[44] In a press release of July 9, the Board disclosed the CMMH offer. The Board accurately disclosed that this new offer "may reasonably be expected to constitute or lead to a Superior Proposal" and that the Board was "engaging in discussions and negotiations with" CMMH regarding its non-binding proposal.

[45] Once the Board determined, however, as discussed above, that the CMMH proposal was not reasonably capable of being completed, it was contractually bound not pursue it. It logically follows from these conclusions that it was also not obliged to disclose it.

[46] The application judge's decision on this issue is also unassailable.

The Voting Lock Up Agreements

[47] There is a suggestion in the notice of appeal, although not advanced in the Appellants' factum on the stay motion, that the voting lockup agreements with NordStar entered into by the Voting Trust and HWIC were somehow improper.

[48] It is difficult to lend credence to this argument given that CMMH itself imposed, as a condition of acceptance of its proposal, a requirement that the Voting Trust and HWIC enter into voting lockup agreements with CMMH.

[49] While it is true that under the Arrangement Agreement, Board consent was required for the existing "soft" voting lockup agreements with the Voting Trust and HWIC to be converted into so-called "hard" lockup agreements, it is hard to see what purpose would be served by the Board's refusal to grant this consent, given the significant majority position the Voting Trust and HWIC occupied, their stated opposition to the CMMH proposal, the Board's conclusion that the CMMH proposal was not reasonably capable of being completed and the fairness opinions obtained from qualified, independent third parties indicating that the NordStar proposal was fair to shareholders from a financial point of view.

[50] The evidence is really no more than that a substantial majority of shareholders were voting with their feet, as they were *prima facie* entitled to do. There is no evidence that the voting lockup agreements were being used in a way that was abusive or manipulative.

[51] Again, the application judge's conclusions on this issue are unassailable.

[52] Although not dispositive of the serious issue criterion, it is also relevant that, although one other shareholder opposed approval of the Arrangement at the hearing, Mr. Proud, a founder of CMMH, is now the only shareholder doing so. The overwhelming support of the shareholders for the Arrangement simply cannot be ignored.

[53] For these reasons I conclude that the requirement to establish a serious issue for appeal has not been met.

Irreparable Harm

[54] Even if I were wrong on the serious issue prong of the test, the Appellants have not established that they will suffer irreparable harm.

[55] Under this prong of the test, the circumstances of CMMH and Mr. Proud must be analysed separately.

CMMH

[56] As noted above, CMMH was an unsuccessful bidder for Torstar's shares. It was not a shareholder or otherwise a stakeholder of Torstar. It was not a party to and had no rights or obligations under the Arrangement Agreement which underpins the Arrangement. The confidentiality agreement which CMMH did enter into at the outset of its discussions with Torstar provided that there would be "no agreement, understanding or arrangement of any nature" until a definitive agreement had been executed and that Torstar had "the right to reject any proposal and to terminate discussions and negotiations at any time". This was not an auction. The process was not at all analogous to a government tender process. CMMH had an opportunity, but not a right, to make a proposal. Its proposal was never accepted.

[57] In the circumstances, I am not satisfied that CMMH has established that it has suffered any harm, much less irreparable harm. Even if there was a basis to claim some harm, there is no basis upon which to conclude that it is "irreparable". CMMH was formed for the purpose of making this bid. It has no history or association with Torstar or the media business of any kind. Whatever financing it could have deployed for this acquisition remains available to it for another acquisition.

[58] For these reasons, I find that the requirement for irreparable harm has not been established by CMMH.

Mr. Proud

[59] Under s. 185 of the *OBCA*, and under the terms of the Arrangement, any shareholder can dissent from the Arrangement and assert a claim for payment of the fair value of their shares. The only shareholder of Torstar to do so was Mr. Proud.

[60] Mr. Proud's only stake in the Arrangement is as a holder of Class B shares. Like CMMH, he has no history or past association with Torstar. Mr. Proud is a short-term shareholder who only acquired his shares *after* the NordStar transaction was announced. Given his association with CMMH, this was clearly in conjunction with CMMH's plan to make a proposal to acquire Torstar's shares.

[61] By the exercise of his dissent rights, Mr. Proud has conceded that his claim as a shareholder is subject to monetary quantification. In the circumstances, therefore, the harm he is claiming can cannot possibly qualify as irreparable.

[62] For these reasons I find that the requirement for irreparable harm has not been established by Mr. Proud either.

Balance of Convenience

[63] Again, if I were wrong about the serious issue and irreparable harm components of the test, it would still be necessary for the Appellants to demonstrate that the balance of convenience (or "inconvenience", as it is sometimes called) favours granting a stay. In the circumstances of this case, the balance of convenience does not favour granting a stay.

[64] Neither CMMH nor Mr. Proud have established any real prejudice in the circumstances of this case. CMMH has no freestanding right to acquire Torstar and there is no guarantee that it would be able to consummate any transaction if the stay were granted and its appeal subsequently allowed. Given the hard lockup voting support agreements signed by the Voting Trust and HWIC, there is no basis to conclude that the Voting Trust and HWIC would be prepared, or legally allowed, to sell to CMMH in any event. The only harm that Mr. Proud could suffer is, as noted above, compensable in the context of his assertion of dissenting rights under the Arrangement.

[65] By contrast, the granting of a stay would create a real risk of prejudice for both Torstar and its shareholders. A stay of the Final Order would not only delay Torstar shareholders' receipt of the proceeds of the Arrangement; delay also risks losing the NordStar transaction altogether. This is because there is no guarantee that NordStar's ability to finance the acquisition, or that its willingness to close, will survive further delay and further uncertainty. Further, given manifestly uncertain times with respect to both the media business and the impact of COVID-19, there is a heightened risk that a Material Adverse Effect under the terms of the Arrangement Agreement could occur that would prevent or change the parameters of the NordStar acquisition. If the NordStar transaction were abandoned, there is a significant risk that the shareholders would be unable to benefit from *any* sale to a third party. CMMH has no current open offer to acquire Torstar and has not committed to make one or, if made, what it would be. Even if another offer were made by CMMH, there is no evidence that it would be supported by the Voting Trust, HWIC or the other shareholders. Other than NordStar, no other party ever made an offer to acquire Torstar following its initial canvass of 26 possible buyers and no party other than CMMH made any offer to acquire Torstar after the public announcement of the Arrangement Agreement. Further, Torstar is operating under the constraints of the Arrangement Agreement, including restrictions on operating its business outside the ordinary course. These constraints prevent Torstar from engaging in significant efforts and initiatives outside of the ordinary course of business that it needs to undertake to remain competitive in the current media environment. The need for these fundamental changes lay at the very heart of its search for strategic options which commenced last year and culminated in the Arrangement Agreement with NordStar.

[66] Leaving aside the question of whether CMMH was *required* to give an undertaking as to damages in connection with a motion for a stay pending appeal, the fact that it has not done so is telling. CMMH seeks to set aside the approval of the Arrangement on appeal so that it can have another kick at the can in relation to a Torstar transaction. It seeks, in that context, however, to lay all of the risk of delay onto Torstar and has given no indication that it was prepared to provide any indemnity against that risk whatsoever.

[67] In the circumstances, I conclude that the balance of convenience favours denying the stay pending appeal.

CONCLUSION

[68] For all these reasons, the appellant's motion for a stay pending appeal is dismissed with costs, as agreed, in the amount of $15,000 (inclusive of fees disbursements and all applicable taxes).

Penny J.

Date: August 4, 2020