COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-021082-102
(500-11-038474-108)

DATE OF JUDGMENT: October 25, 2010
DATE OF FILING OF REASONS FOR JUDGMENT: November 1, 2010

PRESENT: THE HONOURABLE PIERRE J. DALPHOND, J.A.

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT PROPOSED BY:

WHITE BIRCH PAPER HOLDING COMPANY, ITS SUBSIDIARIES AND AFFILIATED COMPANIES
Debtors
and

BLUEMOUNTAIN LONG/SHORT CREDIT MASTER FUND L.P.

BLUEMOUNTAIN CREDIT ALTERNATIVES MASTER FUND L.P.

BLUEMOUNTAIN TIMBERLINE LTD

BLUEMOUNTAIN DISTRESSED MASTER FUND L.P.

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

MACQUARIE AMERICAS CORP.

MFP PARTNERS L.P.

STEELHEAD NAVIGATORS MASTER L.P.
APPLICANTS - Interveners
and

WHITE BIRCH PAPER HOLDING COMPANY

WHITE BIRCH PAPER COMPANY

STADACONA GENERAL PARTNER INC.

BLACK SPRUCE PAPER INC.

F.F. SOUCY GENERAL PARTNER INC.

3120772 NOVA SCOTIA COMPANY

ARRIMAGE DE GROS CACOUNA INC.

PAPIER MASSON LTÉE
RESPONDENTS - Debtors
and

ERNST & YOUNG INC.
IMPLEADED PARTY - Monitor
and

BD WHITE BIRCH INVESTMENT LLC

SIXTH AVE. INVESTMENTS CO., LLC
IMPLEADED PARTIES - Interveners
and

STADACONA LIMITED PARTNERSHIP

F.F. SOUCY LIMITED PARTNERSHIP

F.F. SOUCY INC. & PARTNERS, LIMITED PARTNERSHIP
IMPLEADED PARTIES – Impleaded parties

REASONS FOR JUDGMENT PRONOUNCED ORALLY ON OCTOBER 25, 2010

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[1] On October 25, 2010, at the conclusion of a long hearing, I dismissed from the bench the Applicants' motion for leave to appeal of a judgment rendered by the Honourable Robert Mongeon of the Quebec Superior Court, Commercial Division, 2010 QCCS 4915, approving the sale of substantially all of the Debtors' assets to BDWhite

Birch Investment Co., LLC (BDWBI). I provided orally only the essence of my reasons. What follows is my formal judgment.

CONTEXT

[2] Both the Canadian and American bankruptcy courts have approved a Sale and Investor Solicitation Process (SISP) for the sale of the Debtors' assets.

[3] After a thorough canvass of the market, a Stalking Horse Bid process was initiated through BDWBI, a corporation organized by members of a syndicated loan holding about 65% of the US$480,000,000.00 debt secured by a first ranking security on the fixed assets of the Debtors (First Lien Loan). Current assets (inventories and account receivables) are free of liens. However a DIP financing lender, to be repaid shortly, has security over all assets of the Debtors.

[4] The applicants are minority members of this syndicate holding about 10% of the First Lien Loan (US$48 million). For the purpose of participating in the sale by auction of the Debtors' assets, they incorporated Sixth Ave. Investment Co., LLC. (Sixth Ave) which submitted a qualifying offer and became a qualified bidder.

[5] The auction was held on September 21, 2010 in New York City. Only BDWBI and Sixth Ave were entitled to participate. Under the terms of the bidding procedures approved by the Superior Court and the US Bankruptcy Court, a secured creditor could bid up to the full amount of the secured debt for the purchase of property secured in its favour. In the case of a syndicated loan, such as the First Lien Loan, the bidder must act as an agent of the syndicate to be entitled to use such credit.

[6] BDWBI won with a bid of US$236,052,825.00, exceeding by US$500,000 Sixth Ave's bid. Its bid included an amount of US$78,000,000.00 credit for the purchase of the fixed assets, following an authorization from the agent of the syndicate. Sixth Ave's bid was in cash only.

[7] Despite the applicants' opposition, the Quebec Superior Court approved the sale of the assets to BDWBI on September 24, 2010 and the US Bankruptcy Court recently did the same. Closing of the transaction is scheduled on November 29, 2010.

ARGUMENTS OF THE APPLICANTS

[8] The applicants argued that the bids were asymmetrical and should not have been compared by looking at the nominal aggregate price indicted in each. Instead, the Superior Court should have considered the benefits arising from each bid for each class of creditors, especially for the unsecured creditors, a class of which the lenders are a part for the unsecured portion of the syndicated loan. The applicants contend that the

trial judge, while paying lip service to s. 36 of the *Companies' Creditors Arrangement Act*, R.S., 1985, ch. C-36, (*CCAA*), erred in law by omitting to take into account the fact that the fixed assets are worthless and that the BDWBI's bid allows it to use a worthless claim as currency to acquire current assets (inventories and account receivables) at a reduced price, all to the detriment of the unsecured creditors.

[9] According to the applicants, the trial judge also erred in law in his application of ss. 36(3)(e) *CCAA*. He failed to exercise his discretion properly by ignoring the fact that BDWBI had blatantly placed themselves in a position to prefer their own interests to those of the other First Lien Lenders for which they were mandataries. By receiving the U.S. fixed assets for their exclusive benefit and to the prejudice of the other First Lien Lenders, BDWBI breached their fiduciary duties as sub-agent for the agent of all the First Lien Lenders.

[10] The applicants explained that if the appeal is authorized and later is allowed, they want the Court to declare that Sixth Ave's bid is the winning one.

DECISION

[11] As correctly stated by the trial judge, the factors that he had to consider in deciding whether to approve the sale to BDWBI are found at ss. 36(3) *CCAA*:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
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> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[12] As far as I am concerned, the four factors to be considered when deciding to grant leave to appeal are well known:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised of is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

[13] For the reasons that follow, I am of the view that this appeal is not *prima facie* meritorious and will unduly hinder the progress of the reorganization of the debtors as a going concern.

[14] Firstly, the use of credit was part of the process approved by the parties, the monitor and the courts; it cannot be described now as unreasonable in the circumstances (ss. 36(3)(a)). To hold that before approving a winning bid the Superior Court should have considered the impact of the use of credit on the value of the bids is tantamount to changing the rules of the game once it has been played. The approved process allowed for the use of credit by a bidder duly authorized and at no time was it said or hinted that a credit bid should be considered differently from a cash bid.

[15] Secondly, to assert that the fixed assets are worthless is rather surprising considering that Sixth Ave offered US$35,300,000.00 in cash for them. There is no indication in the file that this amount corresponds to the real value of the fixed assets as part of an ongoing business or that the US$82,500,000 BDWBI attributed to them is unreasonable (US$78,000,000 in credit and US$4,500,000 in cash). The use of credit entails an allocation of value to the fixed assets. Unless such allocation is proven to be unreasonable and unfair taking into account their market value (ss. 36(3)(f)), it should not be disturbed when the monitor's report states that in their opinion the winning bid represents the highest and best offer when gauged against total overall value returned to the Debtors.

[16] Thirdly, the applicants are not the class of unsecured creditors the interest of which Parliament wanted to protect at ss. 33(3)(e) *CCAA*. Their belonging to that class is largely dependant upon the amount of credit used as authorized by the agent of the syndicate; if the whole amount of the loan had been used as credit, the applicants would not qualify as unsecured creditors for the excess part of the loan. In the case at bar, no ordinary unsecured creditor has opposed the proposed sale to BDWBI.

[17] Fourthly, to refuse to approve BDWBI's bid would mean that a new bid process or at least a new auction would need to be held since I do not see how Sixth Ave's bid could be declared the winning one. If the rules are changed, a new process under the new rules must decide the winner and the closing date will most likely be missed. Would the Stalking Horse accept to participate again? What kind of delay would this mean? Overall, this may well compromise the reorganization of the Debtors (ss. 36(3)(e)).

[18] Fifthly, with regard to the allegation that BDWBI breached its fiduciary duties as sub-agent of the lenders by bidding the claim against only the Canadian assets, it is a matter that should be decided by the forum designated under the lenders' agreement. In my opinion this is not a bankruptcy issue to be dealt with under the *CCAA*.

[19] Sixthly, the applicants' opposition to the sale of the assets to BDWBI can be summarized as a desire to receive a bit more cash upfront, as unsecured creditors, rather than a minority equity interest (shares) (I understand that First Lien lenders will end up being equity holders). They may be right but they hold a minority view amongst the group of lenders and according to the lenders' agreement, majority shall prevail. Moreover, the fact that they may end with equity can hardly be considered a serious problem for them since they were quite willing to get the whole equity if their bid had won.

[20] For these reasons, the petition was dismissed with costs.

PIERRE J. DALPHOND, J.A.

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For the Applicants

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Date of hearing: October 25, 2010