2010 ONSC 1161
Ontario Superior Court of Justice [Commercial List]

Maxtech Manufacturing Inc., Re

2010 CarswellOnt 1072, 2010 ONSC 1161, 185 A.C.W.S. (3d) 22, 64 C.B.R. (5th) 239

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 MAXTECH MANUFACTURING INC. (Applicants)

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985 C.B-3, AS AMENDED

Morawetz J.

Heard: January 28, 2010
Judgment: February 23, 2010
Docket: 09-CL-8352

Counsel: Alissa Mitchell for Receiver, Tim Gleason
Tim Gleason for United Steel Workers of America
Brett Harrison for Export Development Canada
Fred Myers for Maple Trade Finance Inc.
Ian Aversa for VLM Finance Ltd.
George Benchetrit for General Electric
Jonathan Wigley for Alpha Sitered Metals Inc.
Jane Dietrich for Tenneco Automotive
Jeffrey J. Simpson for Kacee Visudeva, Maxtech Consumer Products Limited, Maxtech Manufacturing Inc., 12600976 Ontario Limited

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Sale of assets by receiver — Receiver wished to sell assets of insolvent business, and solicited offers — Highest offer was withdrawn before it could be accepted — Receiver negotiated with another offeror and reached agreement better than previous agreement — Offeror of original highest offer submitted another bid, which was not accepted — Receiver brought motion for approval of sale — Motion granted — Sale approved — Cash component of offer was higher, and was payable earlier — Offeror of original highest offer's ability to service debt assumption was suspect — Process was fair — Creditors with first ranking charge over assets at issue approved of sale — No evidence of what bid other offerors wished to make, and if they could provide deposit interest of guarantor was not prejudiced — Appendices contained confidential information and were sealed.

Table of Authorities

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Romspen v. 6176666 Canada Ltee. (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

MOTION by receiver for approval of sale of assets.

***Morawetz J.*:**

1 At the conclusion of the motion on January 28, 2010, I endorsed the record as follows:

Motion granted. Transaction with Alpha Sitered approved. Sealing Order granted. Second Report approved. Reasons will follow. Order to go in form presented as amended.

2 The following are the reasons.

3 Grant Thornton Limited, in its capacity as Receiver of Maxtech Manufacturing Inc. (the "Receiver") brought this motion to approve the transaction as contemplated by an asset purchase agreement (the "Agreement") between the Receiver, as Seller and Alpha Sitered Metals, Inc., as Purchaser ("Alpha" or the "Purchaser").

4 The Receiver also sought an order to seal certain appendices annexed to its Second Report and for an order approving the actions and activities of the Receiver as described in the Second Report and the Supplementary Report.

5 The motion was supported by Export Development Canada ("EDC") and General Electric ("GE"). Counsel to Maple Trade did not oppose the motion on the basis that there was no other offer.

6 The motion was opposed by counsel on behalf of Mr. Kacee Vasudeva, Maxtech Consumer Products Limited, Maxtech Manufacturing Inc. ("Maxtech") and 1260976 Ontario Limited.

7 At the outset of argument, Mr. Simpson on behalf of Mr. Vasudeva, Maxtech and related companies brought a motion to adjourn the motion to February 3, 2010 in order that his clients could put forward a further and better offer that complied with requirements previously set forth by the Receiver. The adjournment request was supported by counsel to Maple Trade.

8 I did not grant the adjournment. Separate reasons were provided.

9 The Receiver was appointed on November 23, 2009 by order of Pepall J. [2009 CarswellOnt 7318 (Ont. S.C.J. [Commercial List])] (the "Appointment Order"). The Appointment Order authorized the Receiver to commence a marketing and sale process.

10 The Receiver implemented the marketing process and identified and contacted prospective buyers and investors.

11 The Receiver received six offers to purchase (the "Offers") by December 14, 2009.

12 The record establishes that the Receiver considered the Offers. The Receiver asked each offeror to provide their "best" offer.

13 On December 21, 2009, after receipt of its increased offer and after express inquiry from the Receiver, the Receiver was informed by one of the six offerors its increased offer was final (the "Final Bali Offer"). No deposit accompanied the Final Bali Offer. The Final Bali Offer was submitted by an entity related to Mr. Vasudeva.

14 By early January 2010, the Receiver determined that it was imperative that the sales process be completed as there was a demand for additional cash in order to continue operations on a cash-neutral basis and no additional sources of cash had been identified.

15 The Receiver, in consultation with the secured lenders, decided to accept the most favourable "asset based" offer. However, on January 7, 2010, before the Receiver was able to accept such offer, it was withdrawn.

16 The Receiver undertook further negotiations with another of the "asset based" offerors, Alpha and on January 8, 2010, the Receiver reached an agreement in principle with Alpha. The Receiver is of the view that Alpha's offer was more favourable than the withdrawn offer, the Final Bali Offer, or any of the other Offers. The Alpha Offer was accompanied by the requisite deposit.

17 Within hours of accepting the Alpha Offer on January 8, 2010, a further Bali Offer was received (the "Amended Bali Offer"). No deposit accompanied the Amended Bali Offer.

18 On January 11, 2010, with the support of GE and EDC, the Receiver formally accepted the Alpha Offer subject only to court approval.

19 The Receiver indicates in its Report that, despite the Amended Bali Offer being late, it was considered and it remains the Receiver's opinion that the Alpha Offer is a more favourable offer than the Amended Bali Offer.

20 The Receiver provided the following reasons for its opinion:

(a) the cash component of the Alpha Offer is higher;

(b) the cash payable in the Alpha Offer was due on closing whereas the Amended Bali Offer deferred payment beyond closing;

(c) based upon the lack of support of Maxtech's remaining key customers, the Receiver did not expect sufficient future business on a "going concern" basis to support the cash flow required to service the debt assumption component of the purchase price proposed in the Amended Bali Offer;

(d) the Alpha Offer was obtained through a fair and equitable process and reflects an offer which respected that process; and

(e) GE and EDC supported the Receiver's recommendation. The assets being sold are comprises largely of assets in respect of which GE and EDC appear to hold a first-ranking charge.

21 In opposition to the motion, Mr. Simpson submitted that the Alpha Offer should not be approved in the face of representations that his client could put forward a further and better offer that complied with the requirements previously set forth by the Receiver. However, as I noted in my reasons for refusing the adjournment request, Mr. Simpson's clients had taken no steps to put anything on the record which would substantiate the submissions made by counsel.

22 Mr. Simpson's clients provided no evidence of what offer they wanted to submit. There was no evidence as to why they needed additional time. There was no evidence that they could submit a deposit and they provided no evidence that they would be in a position to consummate the transaction.

23 The test on a motion to approve a sale by a receiver is set out in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) which was later adopted by the Court of Appeal in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.):

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

24 In this case, I have concluded that the Receiver has acted properly. Indeed, there is no evidence to the contrary.

25 The Receiver implemented the sales process which had been approved by the court. There is ample evidence to support the Receiver's contention that the Alpha Offer represents the best bid.

26 To the extent that the submissions were being made on behalf of Mr. Vasudeva in his capacity as guarantor, his affidavit sworn January 28, 2010 states that his interests as a guarantor have been ignored throughout the receivership process and, if the proposed transaction is approved, he may be one of the largest unsecured creditors of Maxtech, with no ability to collect. Accordingly, he states that his interests will be prejudiced by the sale.

27 I am satisfied that the Receiver conducted the sales process in an acceptable manner and obtained a fair and reasonable price for the assets in the circumstances. The interests of Mr. Vasudeva have, in my view, not been prejudiced by the sales process nor the actions taken by the Receiver. The fact that he may be a large unsecured creditor results from other factors. In my view, the opposition expressed by Mr. Vasudeva is not such that the transaction should not be approved.

28 In the result, I am satisfied that it is appropriate to approve the Agreement.

29 The Receiver also requested an order sealing the confidential appendices to the Second Report pending further order. In considering this request, I am guided by the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order.

30 I reviewed the confidential appendices to the Second Report. I am satisfied that the appendices contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that it is appropriate to grant the requested sealing order.

31 Finally, counsel to the Receiver advises that there has been no adverse comment received in respect of the actions and activities of the Receiver insofar as they relate to the sales transaction including the acceptance of the Purchaser's offer described in the Second Report and the Supplementary Report and, in my view, it is appropriate to approve the actions and activities of the Receiver as described in the Second Report and the Supplementary Report on this basis.

32 Finally, it is noted that issues relating to allocation of proceeds are not being dealt with at this time. This has been reflected in the modified language to paragraph 13 of the order.

33 An order shall issue to give effect to the foregoing.

Motion granted.

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