TAB 12

2013 ABQB 224
Alberta Court of Queen's Bench

Medican Holdings Ltd., Re

2013 CarswellAlta 513, 2013 ABQB 224, [2013] A.W.L.D. 2731, 16 B.L.R. (5th) 327, 229 A.C.W.S. (3d) 331

In the Matter of The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended and The Judicature Act, R.S.A. 2000, c. J-2, as Amended

In the Matter of a Plan of Compromise or Arrangement of Medican Holdings Ltd., Medican Developments Inc., R7 Investments Ltd., Medican Construction Ltd., Medican Concrete Inc., 1090772 Alberta Ltd., 1144233 Alberta Ltd., 1344241 Alberta Ltd., 9150-3755 Quebec Inc., Axxess (Sylvan Lake) Developments Ltd., Canva (Calgary) Developmentxs Ltd., Elements (Grande Prairie) Developments Ltd., Medican (Edmonton Twrwillegar) Developments Ltd., Medican (Grande Prairie) Holdings Ltd., Medican (Kelowna Move) Developments Ltd., Medican (Lethbridge - Fairmnt Park) Developments Ltd., Medican (Red Deer - Michener Hill) Developments Ltd., Medican (Sylvan Lake) Developments Ltd., Medican (Westbank) Development Ltd., Medican (Westbank) Land Ltd., Medican Concrete Forming Ltd., Medican Les Entreprises Medican Inc., Medican Equipment Ltd., Medican Framing Ltd., Medican General Contractors Ltd., Medican General Contractors 2010 Ltd., Riverstone (Medicine Hat) Developments Ltd., Sanderson of Fish Creeek (*calgary) Developments Ltd., Sierras of Eaux Claires (Edmonton) Developments Ltd., Sonata Ridge (Kelowna) Developments Ltd. Sylvan Lake Marina Developments Ltd., the Estates of Valleydale Developments Ltd., the Legend (Winnipeg) Developments Ltd., and Watercrest (Sylvan Lake) Developments Ltd. Petitioners

K.M. Horner J.

Heard: February 21, 2013
Judgment: April 23, 2013
Docket: Calgary 1001-07852

Counsel: David W. Mann, Scott D. Kurie, for Medican Holdings Ltd. et al
Sean Collins, for MCAP
A. Aaron Stephenson, for Monitor

Subject: Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.3 Arrangements
    XIX.3.d Effect of arrangement
      XIX.3.d.i General principles

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles
Creditor was senior secured lender on debtor's condominium project — After debtor obtained Companies' Creditors Arrangement Act (CCAA) order which provided that secured creditors were liable to pay certain charges, creditor obtained

order permitting it to appoint receiver and market condominiums — Application by creditor for declaration that no monetary amount be allocated to it on account of charges arising under CCAA order — Application dismissed — Proposed charge levy treated creditor like other senior secured lenders and was prima facie equitable — Creditor had participated in CCAA process for 18 months and had obtained direct and potential benefits.

Table of Authorities

Cases considered by *K.M. Horner J.*:

Bank of Nova Scotia v. Norpak Manufacturing Inc. (2003), 2003 CarswellOnt 4953, 180 O.A.C. 40 (Ont. C.A.) — referred to

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — followed

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

Respec Oilfield Services Ltd., Re (2010), 2010 CarswellAlta 830, 2010 ABQB 277, 68 C.B.R. (5th) 189, 17 P.P.S.A.C. (3d) 148, 28 Alta. L.R. (5th) 239 (Alta. Q.B.) — distinguished

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — distinguished

Winnipeg Motor Express Inc., Re (2009), 2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242, 56 C.B.R. (5th) 265, 243 Man. R. (2d) 31 (Man. Q.B.) — considered

Winnipeg Motor Express Inc., Re (2009), 245 Man. R. (2d) 274, 466 W.A.C. 274, [2009] 12 W.W.R. 224, 59 C.B.R. (5th) 36, 2009 MBCA 110, 2009 CarswellMan 512 (Man. C.A. [In Chambers]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION by creditor for declaration that no monetary amount be allocated to it on account of charges arising under *Companies' Creditors Arrangement Act* order.

***K.M. Horner J.*:**

Introduction

1 The applicant, MCAP Financial Corporation ("MCAP") is seeking a declaration that no monetary amount be allocated to it on account of certain charges arising under an Order made pursuant to the *Companies Creditors' Arrangement Act*, RSC 1985, c C-36 ("CCAA"). It argues that it should not have to bear any portion of the proposed allocated costs because it received no benefit from the CCAA proceedings, eventually was released from the proceedings and incurred separate fees to enforce its security. The Medican Group and the Monitor submit that MCAP should pay $397,500 in charges. For the reasons given below MCAP's application is denied.

Background

2 Medican Holdings Ltd. is the parent entity of the Medican Projects division of the Medican Group of companies.[1] The various Medican Project entities are all affiliated companies engaged in the business of residential real estate development. Both Medican (Westbank) Development Inc. ("Medican Development") and Medican (Westbank) Land Ltd. ("Medican Land") are wholly owned subsidiaries of Medican Holdings.

3 MCAP is the senior secured lender of the initial phases of a multiunit condominium project in Westbank, British Columbia, known as the Kaleido Project. The Kaleido Project was developed on lands owned by Medican Land as bare trustee on behalf of Medican Development (together the "Kaleido Companies"). MCAP held a first mortgage over the Kaleido Project.

4 In 2010 the Medican Group sought protection under the CCAA in an attempt to restructure its affairs. The Kaleido Companies were among the petitioners. The initial order which included a stay of proceedings was granted on May 26, 2010 and provided, inter alia, that secured creditors of Medican were liable to pay certain court-ordered charges in relation to the proceedings, including the suppliers' charge, a directors' and officers' indemnification charge, an administration charge, and the debtor-in-possession ("DIP") lender's charge (the "Charges"). In order to pay for the Charges proceeds from the sale of condominium units of projects over which creditors held security were deposited into a separate account (the "Charge Levy").

5 The Medican Group obtained a DIP loan from Paragon Capital Corporation Ltd. which ultimately totalled $3.5 million. It was secured as a first priority against all of the Medican Group's assets including those of the Kaleido Companies. As stated, the DIP lender's charge formed part of the Charges. On several occasions project-specific financing was arranged (known as "Mini DIPs"); however, the DIP loan was approved on the basis that it would be used to support the general funding requirements of the Medican Group.

6 As a part of the restructuring, and with the approval of MCAP, the Medican Group engaged a listing agent (Coldwell Banker) to market the unsold condo units in the Kaleido Project of which only Phase I had been completed. During the time the units were listed with Coldwell Banker none were sold. MCAP expressed dissatisfaction with the restructuring efforts.

7 On December 5, 2011 MCAP obtained an Order permitting it to apply to court in British Columbia to appoint a receiver (and ultimately a trustee in bankruptcy) over its collateral in the Kaleido Companies. This occurred following the approval of a related agreement between MCAP and the Medican Group whereby the Kaleido Companies' property and assets were released into the possession of the receiver upon consent of the Medican Group. As a part of the court approved agreement the Medican Group consented to the receivership on the basis that, *inter alia*, the Charges were to remain in existence and that nothing in the agreement "shall determine the allocation to be made against the [Kaleido] Property in respect of the Charges and the parties hereto reserve all rights and remedies in connection with the allocation to be made". The stay of proceedings was lifted for the limited purpose of allowing such receivership to proceed.

8 At the same time the Medican Group lodged a consolidated Plan of Compromise and Arrangement (the "Plan") dealing with all Medican Group entities subject to the CCAA proceedings excepting the Kaleido Companies and another Medican company. The CCAA proceedings provided that the DIP lender's charge was to be repaid by the Medican Group in part through the Charge Levy and in part through operating cash flow. The Monitor submits that the Kaleido Companies' outstanding contribution to the Charge Levy should be $397,500. The Monitor further estimates that due to the Charge Levy surplus this amount will be reduced to approximately $279,300 following the allocation of a portion of the anticipated surplus back to the Kaleido Companies.

9 On January 11, 2012, MCAP was granted an order nisi by the British Columbia Supreme Court declaring that the outstanding balance owing to MCAP was $18,216,064. Following the appointment of a receiver MCAP advanced $2.5 million more than $1.6 million of which was used to pay strata fee arrears, fix building deficiencies, pay security deposits, and pay fees associated with the National Home Warranty Program. MCAP submits this was done in order make the condo units in the Kaleido Project marketable by the receiver. The receiver is still in the process of completing the sale of units in the Kaleido Project. MCAP submits that when the final sales figures are available it will have sustained a shortfall of approximately $10.6 million. I note that MCAP did file a proof of claim to participate in the Plan as an unsecured creditor.

10 MCAP's position through the proceedings has been that even though the Kaleido Project was subject to the CCAA proceedings this did not amount to an agreement on behalf of MCAP that it would bear any obligation for the Charge Levy. The parties disagree as to whether MCAP is obliged to contribute to the Charge Levy.

Issue

11 This court must determine whether the proposed portion of the CCAA Charge Levy allocated against the Kaleido Project should be reduced or illuminated.

Argument

12 The parties' positions on the application can be summarized as follows:

a. MCAP

13 Essentially, Counsel for MCAP submits that it would be inequitable to allocate the Charge Levy against it as though it were an affected secured creditor under the Plan. In particular, it submits that the following factors should be taken into account in determining its allocation: first, it submits that the entities under the Medican Group are distinct with each entity undertaking the development of stand-alone real estate projects such as the Kaleido Project. MCAP stresses that this is not a situation in which a group of debtors carries on a common consolidated purpose. In addition, counsel for MCAP drew attention to the fact that there was no cross-collateralization in that MCAP did not hold security over any other assets of the Medican Group for the obligations arising under the Kaleido Project.

14 Second, MCAP submits that it received no benefit in connection with the CCAA proceedings. It states that none of the DIP financing was spent on the Kaleido Project. In particular post-filing obligations were not paid during the stay and the Kaleido Project deteriorated during the course of the CCAA proceedings. For example, nothing was paid to the strata corporation, the municipal taxing authority, or to utility providers in relation to the Kaleido Project. MCAP argues that this negatively affected its security over the Project. It submits that the situation became severe enough that the strata corporation (which was stayed from enforcing its rights) approached MCAP directly for funding which it refused to provide absent the ability to appoint a receiver. During this period the National Home Warranty Program ultimately cancelled its coverage, notwithstanding the stay.

15 In addition, MCAP argues that its ability to realize on any condo unit sales was negatively impacted by the CCAA Proceedings. The initial order was granted on May 26, 2010. MCAP states that it waited approximately 18 months for the Medican Group to come up with a plan in relation to the Kaleido Project or propose some other alternative acceptable to MCAP; all the while MCAP was stayed from enforcing its remedies. During this period, the Medican Group retained Coldwell Banker to market unsold condo units in the Medican Group properties. The Monitor implemented a course of action known as the "MCAP Protocol" to market the unsold units in the Kaleido Properties with a range of proposed square footage listing prices for the units ranging from $260 to $280 depending on the unit. MCAP submits that given the deteriorating state of the Kaleido Project and deficiencies in the units the price per square foot was too high and in any event no units were sold during the CCAA Proceedings. Subsequent to the appointment of the Receiver 46 of the 47 saleable units have been sold at an average square foot price of $186.

16 Third, MCAP argues that the case at bar can be distinguished from the authorities before this court in that the existing case law involved failed CCAA proceedings with the eventual appointment of a receiver. MCAP submits that in the present case the Medican Group's Plan sanctioned by the Court excludes the Kaleido Companies. As such, the affected creditors - other than MCAP - benefit from the Plan's pool of funds with the Monitor estimating an average payout of 10 cents on the dollar. MCAP takes the position that it should not have to pay any portion of the aggregate charges for a plan from which it was excluded. It submits that it did not want the Kaleido Project included in the CCAA proceedings from the outset and in getting the stay lifted there was an express reservation of rights.

it being unilaterally imposed upon MCAP. In addition, the Medican Group asserts that the saleability issues concerning the Kaleido Project, including unpaid strata fees, utilities and property taxes, as well as deficiencies in the units themselves, constituted pre-filing claims as opposed to being issues which arose solely during the stay.

The Law

24 There is a limited body of case law providing guidance on the principles of cost allocation. In arguing their positions before me, counsel referred to the following authorities: *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277, 28 Alta. L.R. (5th) 239 (Alta. Q.B.); *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.); *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204, 243 Man. R. (2d) 31 (Man. Q.B.), aff'd 2009 MBCA 110, 245 Man. R. (2d) 274 (Man. C.A. [In Chambers]); *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56 (N.L. T.D.); *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.); *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.); and, *Bank of Nova Scotia v. Norpak Manufacturing Inc.* (2003), 180 O.A.C. 40 (Ont. C.A.).

25 The parties all agree that the case law instructs that any allocation under the Charge Levy must be fair and equitable and that each case is to be decided on the facts. However, they disagree as to what amounts to an equitable allocation on the facts at bar. In particular, MCAP argues that the unique facts of this case dictate an approach that, while equitable, would not result in an equal allocation. In so doing it relies on this Court's statement in *Hunters Trailer & Marine Ltd., Re*, at para 15 that:

> Equity informs the decisions made by courts in the exercise of their jurisdiction under the CCAA. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the CCAA costs. That is not to say that equity calls for an equal allocation of costs.

26 In *Hunters Trailer & Marine Ltd., Re* the Court examined whether super-priority DIP financing and administrative costs in relation to CCAA proceedings should be allocated equally between a number of major secured creditors. One of the creditors, UMC Financial Management, held a first and second mortgage on the debtor's real property as well as an assignment of certain life insurance proceeds. UMC argued that it would be inequitable to bear the costs on the basis proposed by the other creditors as it would be liable for a disproportionate share of the costs. UMC took the position that it was a 'passive' creditor that gave loans on the value of land as opposed to the value of the business as a going concern. It argued that as the risk of loss was greater for operating lenders these creditors should bear a larger portion of the CCAA costs.

27 In directing that UMC bear a proportion of the DIP costs, the Court held that it would be unfair to ignore differences in the type of security held by creditors and the degree of potential benefit that they might obtain from CCAA proceedings. In allocating 15 percent of the Monitors fees and 5 percent of the DIP costs to UMC the Court noted that a strict accounting on a cost-benefit basis would be impractical. Of particular note to the case at bar the Court opined at para 23 that:

> Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security, However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was of the benefit, at least the potential benefit, of all creditors.

28 *Respec Oilfield Services Ltd., Re* dealt with a number of applications to apportion CCAA costs incurred with respect to a failed attempt to reorganize. In *Respec Oilfield Services Ltd., Re*, the debtor was placed into receivership and a number of pieces of heavy equipment were sold via auction. Pursuant to a court order those creditors who wished to remove equipment subject to their security from the auction were entitled to do so upon paying the monitor a deposit on the proportion of allocated costs it would ultimately have to pay. Certain parties (including GE and JPL) paid this deposit and removed their equipment. Two separate banks, Canadian Western and the Business Development Bank, held a first and second priority claim, respectively, over the debtor's assets excepting a considerable number of pieces of equipment which were subject to a priority Purchase Money Security Interest ("PMSI").

29 The monitor recommended that all costs associated with the auction and all DIP related costs be allocated on a *pro rata* basis amongst all secured creditors based upon actual or estimated recovery. This would result in the two banks contributing to the indirect costs on the auction notwithstanding that they were unlikely to receive any of the auction proceeds given that their security status ranked behind the PMSI holders. The court confirmed at para 22 that it was under no obligation to allocate costs on the basis of a cost-benefit analysis as to which creditor benefitted to what degree as a result of the CCAA proceedings.

30 GE opted to remove the equipment over which it held security from the auction but failed to sell it. It produced evidence that the unsold equipment was worth less than the guaranteed auction price. The court held that the *pro rata* share of the allocated costs would not be reduced based upon the reduced value of the equipment as this would reward GE for making what ended up being a poor business decision by placing the differential upon the other creditors.

31 JPL also opted to remove its equipment from the auction. However, the Court held that in this instance JPL should not be allocated any costs, as it was a "true" lessor of equipment and therefore received no benefit from the CCAA proceedings. A similar result was reached in *Western Express Air Lines Inc., Re* where the court held that the lessors of certain aircraft were not obliged to pay any portion of the charges under the CCAA proceedings as the lessors were not creditors and did not receive any benefit from a successful restructuring.

32 In *Hunjan International Inc., Re* the Court confirmed that the allocation of costs is to be analyzed on a case-by-case basis, that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not directly benefit from a proceeding before costs can be allocated against it.

33 In *Hickman Equipment (1985) Ltd., Re* the company initially sought protection by obtaining a CCAA order. The debtor went bankrupt and the court subsequently issued a receivership order covering all property of the debtor in the same manner and to the same extent as the CCAA order. The receiver developed a cost allocation plan which included a holdback of 15 percent of the proceeds of sale of assets as a contribution to the plan on the understanding that the final allocation of costs would occur upon the completion of the realization process. GMAC Leasco, a first secured creditor, brought an interlocutory application to seek payment of proceeds arising from security taken in assets which the receiver had sold. Specifically it argued that no costs/holdback should be allocated in respect to 18 vehicles which were sold solely through the effort and expense of its agent and not through any effort or expense of the receiver.

34 The receiver argued that generally speaking it did not make a distinction between the assets that the debtor had in its possession and that the costs incurred in the management of the receivership were generally incurred in relation to all property. It argued that the plan applied to numerous matters, in addition to the simple cost of realizing assets. It was unable to determine which costs and fees were directly attributable to the units eventually sold by GMAC. In finding that GMAC was entitled to a reduction in the holdback cost allocation due to the fact that the receiver did not have to expend its efforts on the sale of the equipment the court formulated the following principles, at para 17:

> (1) The allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
>
> (4) Exceptions to a uniform application of cost to creditors ought not to be lightly granted. Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would

likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

35 *Winnipeg Motor Express Inc., Re* also dealt with a dispute over the appropriate allocation of DIP financing and administrative costs incurred since the granting of a stay. The monitor recommended that the costs be allocated among secured creditors based on *pro rata* recovery. Paccar, which had entered into a financing lease with the debtor under which it leased certain equipment opposed the monitor's proposed allocation on the grounds that it was inequitable. It argued that it received no benefit from the restructuring and that its equipment actually deteriorated during the stay. In discussing the applicable legal principles, the court held, at para 41:

> I turn, then, to the question of principles of allocation of Court Ordered Charges under the CCAA. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in Hunters Trailer & Marine Ltd., Re, 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the CCAA make a strict accounting on a cost benefit basis impractical and ultimately defeating. It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.

36 In noting that the purpose of a stay under the CCAA is to provide a struggling company with the opportunity to restructure in the hopes of achieving viability, the court stated that based upon the monitor's expertise and familiarity with the events surrounding the restructuring period, the onus is on an objecting creditor to demonstrate inequity in instances where the proposal is *prima facie* fair. A number of creditors argued that they would have been better off had they realized on their security and not participated in the CCAA proceedings. In addressing this argument the court found "that may or may not have been so, but of course the point of the CCAA is that the collective good and the benefit to all stakeholders governs": para 45.

37 After reviewing the factors espoused in *Hickman Equipment (1985) Ltd., Re*, the court made the following observations in adopting the monitor's recommendations for a uniform costs application:

> 49 So, then, is there a basis to deviate from the proposal? As noted earlier, while exceptions to a uniform application of costs should not be lightly granted, and the basis for any exception must be reasonably articulable, the court can take into account the different nature of the security held by various creditors, and the potential benefit to them when deciding if the allocation is fair and equitable. This was the focus of much of the argument raised by the secured creditors here.
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> 50 As I said, for the most part, each minimized the benefit or potential benefit to them of the restructuring process, and pointed to how certain expenditures or actions taken were detrimental to their interests.
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> [...]
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> 52 Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to objectives of the CCAA.

38 On appeal, Paccar reiterated its position that it never stood to gain from the CCAA proceedings and that it suffered

under the stay. It further argued that the lower court erred in treating all secured lenders equally despite differences in their security and the benefit received. In denying application for leave to appeal the court of appeal noted that the trial judge had been alive to the fact that she could take into account the different nature of the securities held by, as well as the potential benefit to, creditors in determining whether a proposed allocation was equitable. She noted that that Paccar, as well as other contesting creditors, did in fact receive a benefit under the proceedings. In particular, the cost, effort, delay and risk involved in recovering their equipment had been reduced pursuant to the restructuring efforts.

Analysis

39 The law is clear that where a monitor's proposed allocation is prima facie fair the onus falls on the objecting creditor to demonstrate an inequity in the circumstances: *Hunjan International Inc., Re*, paras 58 and 73; *Winnipeg Motor Express Inc., Re*, para 48.

40 MCAP argues that the facts in this case do not demonstrate an allocation which, on the face of it, is fair and reasonable. It states that an inherent unfairness exists in that MCAP has been allocated costs on the same basis as those creditors who were included in and benefited under the Plan. In addition, it argues that the Monitor should not be able to rely on arguments in equity when its proposed allocations do not treat all creditors equally. In support of this position, MCAP submits that although the Monitor is purporting to treat senior secured lenders equally those secured lenders who did not suffer a shortfall in the realization of their security are not included in the allocation of the Charge Levy. In addition, MCAP submits that the actual calculation of the $397,500 it is being called upon to contribute does not relate to the same "per unit charge" basis that the Monitor used in calculating the amount owing by other creditors. MCAP's per unit allocation equated to $7,500 per unit while the Monitor indicated that the global per unit allocation would be $8,500 per unit. While MCAP agrees this discrepancy is favourable to it it suggests that it is nonetheless inequitable.

41 Given the above MCAP thus submits that the burden remains with the Monitor to demonstrate the fairness of the proposed allocation.

42 The Monitor takes the position that its proposal is both reasonable and fair. As an officer of the court, the Monitor's allocation is a discretionary decision and is therefore entitled to deference: *Winnipeg Motor Express Inc., Re*, para 48. While the Monitor acknowledges that there may have been a number of different approaches in this instance it asserts that its choice of method was reasonable and reflects the potential benefit to creditors under the CCAA proceedings.

43 I find that notwithstanding the distinction in the per unit charge allocated by the Monitor the Monitor's proposed Charge Levy treats MCAP like the other senior secured lenders. While the proposal may not be equal (given the $1,000 per unit charge distinction), it is *prima facie* equitable. Therefore the onus lies with MCAP to demonstrate that the allocation is unfair.

44 I do not find that MCAP has satisfied this onus. With respect, its arguments are based upon a cost-benefit analysis utilizing any actual benefits received under the CCAA proceedings. The courts have consistently rejected this approach in favour of one based upon a potential benefit analysis. Exceptions to a monitor's proposed allocations are not to be lightly granted and should only be made where the necessity for departure is reasonable articulable: *Hickman Equipment (1985) Ltd., Re*, para 17.

45 This court cannot accept MCAP's position that its suggested contribution of nothing is grounded in equity. In essence, MCAP participated in the CCAA process for 18 months in cooperation with the monitor in the hopes that the process might yield some benefit. It accepted the Medican Protocol and the sales process established under Coldwell Banker. At any point it could have applied, on appropriate notice and evidence, to have its own receiver put into place but it did not. If it had a serious concern about the sales process or pricing, it could have brought a court application to amend the Protocol; again it did not. It cannot say that it participated, but with no result, so it does not now wish to contribute. The allocation of the Charge Levy is not to be determined with the benefit of hindsight.

46 There are other factors which bear on whether MCAP's proposed allocation is equitable or not. MCAP would have been aware of the outstanding strata fees and the possible termination of utility services. In a letter from the Strata Corporation's legal counsel to MCAP dated July 26, 2010 the 'dire financial straits' of the Strata Corporation is outlined,

along with a forecast that "...the resulting disarray will not enhance the value of the individual strata lots." MCAP acknowledged that it was aware that pre-funding strata fees were not being paid. It acknowledged that it had no reason to believe that the DIP funds were being used to correct these arrears. Yet it waited out the 18 month stay period. That MCAP believed it stood to possibly benefit from the CCAA proceedings and the MCAP Protocol is implicit in its choice to remain under and cooperate within the process. MCAP was aware throughout the process that the ultimate allocation was reserved for future determination.

47 It is agreed that the CCAA proceedings did not yield any direct benefits to MCAP. No DIP funding was directly allocated to the Kaleido Project and no Mini DIP was established in relation to Kaleido. However, the Charges relate to general expenses associated with the entirety of the CCAA proceeding. The MCAP Protocol was established and condo units were marketed. There was an unsuccessful attempt to sell the Kaleido Project *en bloc*. The National Home Warranty Program (for the majority of the stay period) did not cancel its coverage. The Strata Corporation was prevented from claiming unpaid fees and the municipality for unpaid taxes. The Kaleido Project fell within the scope of the CCAA proceedings and formed a part of the Monitor's responsibilities. Effort was expended in dealing with the Kaleido sales process. DIP funding allowed Medican to meet urgent financial needs during the stay. As such, while no direct benefit was obtained, MCAP acquired the above-mentioned indirect benefits (maintenance of the status quo) as well as "potential" benefits in the form of possible unit sales under the MCAP Protocol. Indeed, the degree of potential benefit to MCAP under the sales Protocol was far from negligible. The Monitor is not obliged to perform an analysis as to which creditors benefited and to what degree. Here, costs incurred as a part of the Charges were borne in the management of the CCAA proceedings and generally incurred in relation to all Medican property including that of the Kaleido Companies.

48 Moreover, it is not entirely accurate to argue that MCAP received zero benefits under the proceedings. In addition to its position as a secured creditor of the Kaleido Project, MCAP also stood as a potential unsecured creditor to Medican. In this latter position, MCAP did in fact participate in the Plan and, although there was little evidence before the court in this regard, seemingly benefitted by filing its proof of claim.

49 I note also that the stay period allowed MCAP to attempt to "wait out" what was clearly a downturn in the residential real estate market although the condominium units were eventually marketed at a reduced price per square foot. Again, MCAP cannot now advance an argument grounded in hindsight. Nor, as per *Respec Oilfield Services Ltd., Re*, should it be rewarded for what may have ultimately amounted to a poor business decision.

50 MCAP argues that its position is analogous to situations in which the courts have refused to allocate priority charges against true lessors. It relies on *Respec Oilfield Services Ltd., Re* and *Western Express Air Lines Inc., Re* in this regard. I do not find MCAP's position in the current case to be analogous to that of a true lessor. While the courts in *Respec Oilfield Services Ltd., Re* and *Western Express Air Lines Inc., Re* clearly held that a true lessor was exempt from contribution towards a cost levy, such cases can be clearly distinguished on the basis that, as property owners, a true lessor does not stand to gain a potential benefit from CCAA proceedings. As an owner of the collateral, a lessor is entitled to a return of the collateral regardless of the outcome of the restructuring attempt. There is no reason on the facts before me to liken MCAP's situation to that of a lessor.

51 MCAP held the same type of security as other secured creditors. It suffered the same fate as other secured creditors who experienced a shortfall. While it did not receive direct benefits as a result of the Charges the potential for direct benefit clearly existed. It would be inequitable to redistribute MCAP's proposed contribution upon the remainder of the secured creditors given that all assets of the Medican Group were encumbered by the Charges. There is simply no basis upon which to deviate from the Monitor's proposed Charge Levy allocation. For these reasons the Application is denied.

Application dismissed.

Footnotes

1 There are 39 applicant entities comprising the Medican Group, 36 of which filed the consolidated plan of arrangement under the CCAA (excepting the Kaleido companies and Sanderson)

TAB 13

Most Negative Treatment: Distinguished
Most Recent Distinguished: Medican Holdings Ltd., Re | 2013 ABQB 224, 2013 CarswellAlta 513, [2013] A.W.L.D. 2731, 16 B.L.R. (5th) 327, 229 A.C.W.S. (3d) 331 | (Alta. Q.B., Apr 23, 2013)

2010 ABQB 277
Alberta Court of Queen's Bench

Respec Oilfield Services Ltd., Re

2010 CarswellAlta 830, 2010 ABQB 277, [2010] A.W.L.D. 2826, 17 P.P.S.A.C. (3d) 148, 188 A.C.W.S. (3d) 31, 28 Alta. L.R. (5th) 239, 68 C.B.R. (5th) 189

In the Matter of the Bankruptcy of Respec Oilfield Services Ltd.

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and 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 Respec Oilfield Services Ltd.

Myra B. Bielby J.

Heard: March 25, 2010
Judgment: April 28, 2010
Docket: Edmonton BK03-115337, 0903-06823

Counsel: Richard Reeson, Q.C., Satpal Bhurjee for PricewaterhouseCoopers Inc.
Terrence Warner for National Leasing Group Inc.
Charles Russell, Q.C. for Canadian Western Bank
Kibben Jackson for Business Development Bank
Ryan Zahara, Michael O'Brien for Komatsu International (Canada) Inc.
Sean Collins, Jeffrey Whyte for GE Capital
Stephen Livingstone for Little Red River Cree Nation
Colin Brousson, Eugene Macchi for North Shore Leasing Ltd.
Paul Pidde for Ford Credit Canada
Robert Kennedy for Jim Pattison Leasing
Justice Agyemang for Bank of Nova Scotia
Ed Bresky for Great West Kenworth
Karl Driedger for K & N Contracting
Tara Hamelin for Wells Fargo Equipment Finance Company

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses

Headnote

Bankruptcy and insolvency --- Receivers --- Fees and expenses
Debtor was placed into receivership — Number of pieces of equipment were sold in auction, monitor applied for approval to apportion its costs among all creditors on pro rata basis — CWB bank was secured lender that held first priority claim and BDC was secured creditor that held second priority claim over much of debtor's assets — Pursuant to court order, any lender or lessor who wished to remove equipment subject to its security from auction was permitted to do so upon paying monitor deposit on account of any portion of allocated costs it was found liable to pay — Two banks supported proposed distribution, bank CWB was likely to recover entire indebtedness whereas BDC anticipated shortfall — Monitor brought application for approval to deduct allocated costs due from each creditor from sale proceeds of equipment upon which that creditor had charge, where creditor removed equipment deposit paid to monitor would be applied to its share of allocated costs, and where deposit was inadequate to cover its share then judgment against that creditor for shortfall — Application granted — Argument that costs be allocated based on proportion of debt owed to each creditor to total debt owed by debtor was rejected as it would result in creditor who would receive least from auction bearing greatest portion of costs — Monitor granted judgment against GE for amounts owed, court in Companies' Creditors Arrangement Act proceeding has ability to deal with assets, debt and costs incurred in that proceeding including right to grant judgment against party which it determines liable to contribute to those costs — Fairness did not require that two banks bear more than their pro rata share of allocated costs, plan did impose pro rata contribution on CWB but it would ultimately be indemnified because its security gave it first charge for such recovery, however, BDC would bear ultimate cost because it held second-in-line security — Fact that CWB would be indemnified in full was because it had enough security to protect it for its entire exposure while others did not — JPL, true lessor of equipment, was exempted from contributing to allocated costs as there were true leases in sense that parties always intended leased equipment would be returned to JPL — Restructuring attempt did not benefit JPL and JPL did not receive uninterrupted flow of lease payments — Wages payable to debtor's principals were incurred prior to granting of receivership order and on account of work done while monitor was in place, funds ordered to be withheld from distribution of auction proceeds.

Table of Authorities

Cases considered by *Myra B. Bielby J.*:

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — followed

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — distinguished

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — followed

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — referred to

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — referred to

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — distinguished

Winnipeg Motor Express Inc., Re (2009), 2009 CarswellMan 383, 2009 MBQB 204, 15 P.P.S.A.C. (3d) 242, 56 C.B.R. (5th) 265, 243 Man. R. (2d) 31 (Man. Q.B.) — distinguished

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68
Generally — referred to

APPLICATION by monitor to have its proposed apportionment of allocated costs approved.

Myra B. Bielby J.:

Decision

1 An attempted reorganization of a debtor company under the *Companies' Creditors Arrangement Act* ("CCAA") failed whereupon the debtor was placed into receivership. A number of pieces of heavy equipment were sold in an auction held before the termination of the CCAA stay. The Monitor applied for approval to apportion its costs, the costs of conducting the auction and Debtor-in-Possession financing costs ("the allocated costs") among all creditors on a *pro rata* basis, to deduct those costs from the auction proceeds payable to creditors who had security on the auctioned equipment, and to distribute the balance of the auction proceeds accordingly.

2 The Court approved an apportionment of costs calculated through a comparison of the net funds received on the sale of each secured asset or the estimated value of unsold secured assets against the value of the debt secured on that asset. Where costs of sale could be traced to a specific asset those costs were deducted from the value received on the sale of that asset. Otherwise the costs of sale were attributed on the same *pro rata* basis as other costs.

3 Approval was granted as sought except in relation to a proposed apportionment of allocated costs to a "true" lessor of equipment. That lessor was not obliged to bear any portion of those costs because it received no benefit from the CCAA proceedings. The lease payments it received during the period of the stay were no more than that to which it was entitled as a continuing supplier pursuant to s. 11.01(a) of the CCAA.

4 The auctioneer had provided a guaranteed price for assets placed in the auction. GE Canada Equipment Financing G.P. ("GE") had first-in-priority security on assets for which that guaranteed price was $1.4 million. It elected to retrieve those assets from the auction rather than allow them to be sold. They remained in GE's possession and unsold as of the date of this application. GE led evidence to show that those assets are worth only $990,000. It was unsuccessful in its application to reduce its *pro rata* share of the allocated costs through using $990,000 rather than $1.4 million as the basis upon which that share should be calculated. It would not be fair and equitable to permit a creditor to avoid the consequences of a poor business decision by foisting them in part on other creditors. The Monitor was granted judgment against GE for its share of the allocated costs in the amount of $215,688.46, less any portion of the deposit paid by GE which has not been accounted for in the determination of that figure.

5 The charge granted to the Monitor under the initial CCAA order ("the First Day Order") was increased from $200,000 to $240,000 to reflect the estimated actual costs to be incurred by the Monitor to complete the distribution and other work remaining from events which occurred during the operation of the stay. This was notwithstanding the fact that the Monitor otherwise did not have any function in relation to the disposition of remaining assets, which were placed in the control of the Receiver shortly after the conclusion of the equipment auction.

Facts

6 On May 8, 2009 Respec Oilfield Services Ltd. ("Respec") applied for and received a First Day Order granted pursuant to s. 11 of the CCAA imposing a stay of proceedings on any actions by its creditors to collect any debts owing to them and appointing PricewaterhouseCoopers ("PWC") as Monitor. The initial stay was to expire May 23, 2009 but was extended by various Court orders up until November 30, 2009 at which time PWC was appointed Receiver of the undertaking upon the collapse of Respec's efforts to devise a plan of compromise of its debts.

7 Canadian Western Bank ("CWB") is the secured lender which holds a first priority claim and the Business Development Bank ("BDC") is the secured creditor which holds a second priority claim over all Respec's assets except for a significant number of pieces of heavy equipment which were subject to personal property security interests ("PMSI"s) held by various lenders and finance companies. CWB and BDC are together referred to as "the two banks".

8 Pursuant to the provisions of orders granted by me on October 8 and 20, 2009, Respec entered into a contract with Ritchie Bros. Auctioneers ("Ritchie Bros.") which provided that many pieces of the heavy equipment were to be auctioned on November 24 and 25, 2009 in Grande Prairie, Alberta. Under that contract Ritchie Bros. undertook to pay Respec a minimum amount of money in respect of each item auctioned irrespective of the net bid price received at the auction.

9 Pursuant to Court order any lender or lessor who wished to remove equipment subject to its security from the auction, and take it away was permitted to do so upon paying the Monitor a deposit on account of any portion of the allocated costs it was ultimately found liable to pay.

10 Certain lenders paid this deposit and removed their equipment including GE, Wells Fargo Equipment Finance Co. ("Wells Fargo") and Jim Patterson Lease ("JPL"). The balance was sold netting $5,643,858.46, a figure below the guaranteed price offered by Ritchie Bros. of $6,338,000. Ritchie Bros. has paid the Monitor an additional $114,048, being the difference between the guaranteed and actual net auction proceeds.

11 The Monitor incurred certain professional and legal fees during the period of the stay, secured by the granting to it of a $200,000 administration charge in the First Day Order. It anticipates incurring additional fees to a maximum of $35,000 to conclude its involvement in this matter. In its 15th report dated March 12, 2010 the Monitor has recommended that these costs as well as all the other allocated costs including the Debtor-in-Possession financing ("the DIP funds") and the indirect costs incurred to sell assets in the auction be allocated on a *pro rata* basis among the secured creditors based on their actual or estimated recovery (for those assets not yet liquidated). Any direct costs of sale of a particular asset are proposed to be charged against the sum recovered on the sale of that asset.

12 Then, based on that proposed distribution, the Monitor seeks approval for the following:

• to deduct the allocated costs due from each creditor from the sale proceeds of the equipment upon which that creditor had a PMSI charge and to distribute the net balance to that creditor;

• where a creditor removed the equipment upon which it had security from the auction the deposit it paid to the Monitor would be applied to its share of the allocated costs;

• where the deposit is inadequate to cover its share in full the Monitor would be granted a judgment against that creditor for the shortfall; and

• when the Receiver sells the assets upon which the two banks have security their shares of the allocated costs will be recovered from those sale proceeds.

13 In its 15th report the Monitor sets out its suggested calculation of the allocated costs relating to each piece of equipment or other asset, plus the direct costs of sale for that asset, if any, identifies the auction price received for or estimated value of each and proposes the net difference as the payment to be made to each affected creditor. Each of the two banks and a majority of the PMSI creditors support the Monitor's proposed distribution. GE, Caterpillar Financial Services Ltd. (Cat), Komatsu International (Canada) Inc. (Komatsu), Kingland Ford Sales Ltd. (Kingland), Wells Fargo, and JPL do

not. I note that the proposed allocation will require the two banks to contribute to the indirect costs of the auction notwithstanding that it is highly unlikely that either will receive any of the auction proceeds given their status as second-in-priority creditors behind the PMSI holders.

14 The DIP costs represent the amount of monies Respec borrowed to keep its operations afloat during the period of the stay while it was attempting to reorganize. They total $1.368 million. That money just happened to be borrowed from a company related to GE. The DIP costs have now been repaid in their entirety including interest; the remaining issue is which parties should bear ultimate responsibility for that liability and in what proportion.

15 The two banks each advise that CWB is very likely to recover its entire indebtedness from the liquidation of its security. BDC is left in the unenviable position of anticipating a significant shortfall after the liquidation of all remaining secured property including real estate, accounts receivable and some remaining equipment. The relative security positions of the two banks have the effect of ultimately redistributing to BDC any contribution CWB makes to the allocated costs as a result of this application. It is therefore in BDC's particular interest to ensure that the PMSI creditors bear as many of those costs as possible.

16 Accompanying its application to approve payment of the allocated costs and distribution of the balance of the auction proceeds, the Monitor also seeks an order requiring GE to pay it $215,688.46 as the balance remaining from its share of the apportioned costs. Unlike other PMSI creditors which removed equipment from the auction, GE did not pay the Monitor a deposit equivalent to its estimated *pro rata* share of the allocated costs but only $30,000 which apparently represented only its share of the administration costs, which are just a portion of the allocated costs. GE argues that it should not be obliged to pay this additional sum.

17 Wells Fargo objects to the Monitor's proposed distribution because it does not directly apportion the costs of transporting the equipment from Red Earth, Alberta to the auction site, i.e. the cost of transporting each piece of equipment is not charged against that piece. Rather, the entire transportation costs are allocated *pro rata* among the creditors.

18 JPL objects to paying any portion of the allocated costs because it is not a secured creditor but rather a "true lessor" of five pieces of heavy equipment.

19 The Monitor also seeks an order increasing the priority administration charge it has on Respec's assets on account of its professional and legal expenses from the current $200,000 to $240,000.

20 It also seeks direction as on whether funds payable to principals of Respec as wages, conditional upon their providing certain information which has yet to be provided, should be accounted for in the distribution of auction proceeds or from the liquidation of other assets in the subsequent receivership.

21 When this application was argued, BDC sought and was granted an order placing Respec in bankruptcy which gives it a strategic advantage in relation to a claim by Canada Revenue Agency in relation to unpaid Goods and Services Tax ("GST").

Issues

1. Should the proposed distribution of auction proceeds be approved?

   a. should GE be required to pay a further $215,688.46 on account of its share of the allocated costs?

   b. does fairness require the two banks to bear more than their *pro rata* share of the allocated costs?

   c. should the costs allocated to Wells Fargo be reduced rather than, as proposed, attributing the direct costs of disassembling the camps upon which it held security to its share of the auction proceeds given the costs of transporting all the equipment to the Ritchie Bros. auction are attributed on a *pro rata* basis among creditors?

d. should JPL, a "true lessor" of equipment, thus be exempted from contributing to the allocated costs?

2. Should the Monitor's administration charge be increased to $240,000?

3. Should the funds payable to Respec's principals as wages be "held back" from the distribution of the auction proceeds or taken from proceeds realized in the receivership? and,

4. Should Respec be placed into bankruptcy?

Analysis

1. Should the proposed distribution of auction proceeds be approved?

22 Each application to apportion costs incurred in a failed attempt to reorganize under the CCAA must be decided on its own facts. In cases where a pre-existing Court order prescribes the apportionment method to be used, that method will be used. Where, as here, no such order yet exists, the issue will be decided based on the facts in the case. I note that I have no obligation to attempt to allocate those costs on the basis of a cost-benefit analysis as to which creditor benefited to what degree as a result of the activities of the Monitor; see *Hunjan International Inc., Re*, 2006 CarswellOnt 2718 (Ont. S.C.J.). No such analysis has been undertaken in any case either by counsel or by myself. However, it is fundamental that any allocation of Court-ordered charges be fair and equitable; see *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 (Man. Q.B.) at para. 41.

23 Hall J. set out the following principles for apportioning costs in *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.) at para. 17:

> (1) the allocation of costs ought to be fair and evenhanded amongst all creditors upon an objective basis of allocation;
>
> (2) the fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;
>
> (3) there must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relate to all receivership costs whether direct sales cost or indirect cost;
>
> (4) exceptions to a uniform application of cost to creditors ought not to be lightly granted . Noneth eless it must be recogni zed that certain activiti es of the Receiv er in managi ng the affairs of the receive rship may have been less intensi ve or less advant ageous with respect to certain groups of assets as oppose d to other groups of assets and that the extent of this intensit y or disadv antage may not be immed iately or easily determ inable.
>
> To require the Receiv er to calcula te and determ ine an absolut ely fair value for its service s for one group of assets vis-à-vis another would likely not be cost effecti ve, would drive up the overall receive rship cost and would likely be a fool's errand in any event;
>
> (5) exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.

24 Allocating costs on a uniform percentage of the sale price received for the asset in question has been interpreted and applied to mean allocating the costs on the basis of a *pro rata* share using the total recovery as a factor in the calculation; see *Winnipeg Motor Express Inc. (Re)*, *supra*, at paras. 46 and 47. That is the approach the Monitor proposes be used here.

25 While none of the creditors challenging the Monitor's proposed cost allocation has described an alternate method of apportionment which they believe to be more equitable, the following challenges have been raised:

a. Should GE Be Required to Pay a Further $215,688.46 on Account of Its Share of DIP and the Administrative Charge?

i. Does the Proposed Allocation and Distribution Fail to Attribute a Proper Portion of the Allocated Costs to the Two General Secured Lenders, CWB and BDC?

26 In addition to seeking approval for apportionment of the allocated costs to the PMSI creditors, the Monitor has apportioned part of those costs to each of the two banks based on estimated liquidation values for the assets subject to their charges. GE originally challenged the Monitor's proposed distribution under the mistaken impression that all allocated costs were proposed to be borne by the PMSI creditors. This point has now been clarified.

27 GE did not press the issue of the proposed apportionment to be borne by the two banks being based on estimated values rather than realized values perhaps because its own share of the allocated costs, however calculated, must also be based on estimated values as the equipment it removed from the auction has yet to be sold by it.

28 GE also challenged the distribution on the basis that it was impossible to calculate the proper *pro rata* share of the allocated costs to be borne by the two banks because the total amount of Respec's indebtedness to them was not known. CWB was quick to advise that it is owed $1,872,000 plus interest to be calculated at prime rate plus 1% from May 21, 2009 to the date of payment. Similarly, BDC advised it was owed $3,430,000 as of March 22, 2010. The Monitor's calculation of their proposed share of allocated costs is based on these figures.

ii. Method of Determination of Pro Rata Share - the Debt Owed to Any PMSI Creditor as Against Respec's Total Indebtedness Versus the Net Sale Proceeds Recovered on the Sale of a Given Piece of Equipment as Against the Total Amount Owed on That Equipment;

29 The Monitor's calculation of each creditor's *pro rata* share of the allocated costs is based on a comparison of the sale proceeds recovered on the sale of each asset or the estimated value of that asset as against the total amount owed by Respec on that asset. GE argued that its share should be calculated based on a comparison of the debt owed to it against the total debt owed by Respec to all its creditors. While each application for apportionment must be considered in the context of its own facts, no case law was produced in which any court has attributed costs on this basis.

30 BDC vigorously opposed this proposal which would have the effect of offloading most of the allocated costs onto it, reducing its recovery accordingly. That is because it and CWB are together owed much more than the PMSI lenders. However, the two banks will recover little, if anything, from the auction proceeds as they are in a position to recover only any surplus earned after applying the sale proceeds produced from the auction of a given piece of equipment from the debt owed to the PMSI lender holding security on it.

31 In other words, if the allocated costs were to be calculated as suggested by GE they would be borne in large measure by the two banks, and ultimately therefore by BDC which will not receive much, if any, benefit from the Monitor's actions in organizing the auction which produced the sale proceeds which are now to be distributed virtually in their entirety to the PMSI creditors.

32 This is not a situation where BDC or the Monitor must prove that GE and the other PMSI creditors would be unjustly enriched at the cost of BDC before I can take this consideration into account. The laws of unjust enrichment do require that certain prerequisites be met which may or may not have been established on the evidence in this application. However, what is important, and is not disputed is that the approach advocated by GE would result in the creditor who will receive the least from the auction proceeds bearing the greatest portion of them, contrary to the principles in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094 (Alta. Q.B.) at para. 20 where Chief Justice Wachowich concluded that in allocating costs it is unfair to ignore the differences in the type of security held by various creditors and the degree of potential benefit that each creditor may derive from the proceedings.

33 I therefore reject GE's proposal that the allocated costs be allocated among creditors based on proportion of debt owed to each creditor to total debt owed by Respec.

iii. should GE's pro rata share of allocated expenses be calculated on the basis that its secured assets have a value of $990,000 or $1.4 million?

34 In the supplement to the Monitor's 15th report dated March 18, 2010 the Monitor provided evidence that the guaranteed minimum price offered by Ritchie Bros. for the equipment GE removed from the auction was $1,398,200. There was also some additional equipment removed which was not included in the guarantee which the Monitor values at $100,000.

35 There is no evidence as to why GE elected to remove the equipment against which it held PMSI security from the auction. GE's counsel advised the Court that it removed the equipment for business reasons, based on a policy that required GE to be responsible for liquidating its own security. That equipment has not yet been liquidated.

36 On October 27, 2009 GE advised the Monitor's staff that it had received an evaluation of $1.4 million on that equipment from Century Services Inc. However, in support of this application it filed evidence that it had received only an appraisal of $990,000 "on an orderly liquidation" basis dated November 25, 2009 from that firm. The date of that $990,000 evaluation is the same as the date upon which Ritchie Bros. made its offer of the $1.4 million guarantee.

37 GE asks that the $990,000 value be used to calculate its proportionate share of the allocated costs rather than the $1.4 million figure used by the Monitor. The Monitor argues that the other creditors should not be penalized as a result of a poor decision made by GE which could have received a minimum of $1.4 million for its equipment had it been left in the auction. Further, it has not provided evidence to support its earlier advice that it had a higher appraised value for it at the time the decision was made to withdraw it.

38 In furtherance of the principle that costs should be allocated in a fair and equitable manner, it is fair and equitable that one creditor not be permitted to avoid the consequences of a poor business decision by foisting them in part on other creditors. GE should bear the consequences of its decision to walk away from a guaranteed price almost 50% higher that the most recent appraised value for this equipment. GE's share of the allocated costs should be calculated based on those assets being valued at $1.5 million, being the total of the Ritchie Bros. guaranteed price plus the estimated value of the additional equipment at $100,000.

iv. Should GE Be Exempt from Contributing to the DIP Financing Costs Because of Its Relationship to the DIP Lender?

39 GE's counsel argued that had GE known it would have had to bear a portion of the DIP financing costs it would not have permitted its related company to advance the DIP financing. There is no evidence which supports this allegation.

40 GE argues that it took a risk in advancing the DIP loan and urges the Court to exercise its discretion to excuse it from responsibility for its *pro rata* share of that obligation on the basis it would be equitable given that only it, and no other creditor, was prepared to advance these operating funds to the debtor company as it attempted to restructure. I recall, however, that another lender was available and willing to advance DIP financing and that I approved the GE source on the basis that it would charge a lower cost for lending than that lender.

41 GE argues that by advancing the DIP financing it assumed a risk attendant with the potential benefit which might ensue had the restructuring of Respec been successful. Had that restructuring been successful presumably all creditors would have secured a benefit beyond that which they will recover through the liquidation of Respec's assets. GE should therefore be compensated for taking that risk on behalf of all creditors in the form of its not being required to bear its share of the DIP financing costs.

42 GE was repaid the entire DIP loan of $1.138 million within four months of it being borrowed plus an administration fee of $300,000 plus interest which was charged at 9.72% per annum over the bank's acceptance rate. CWB argued that this

TAB 14

2009 MBCA 110
Manitoba Court of Appeal [In Chambers]

Winnipeg Motor Express Inc., Re

2009 CarswellMan 512, 2009 MBCA 110, [2009] 12 W.W.R. 224, 182 A.C.W.S. (3d) 15, 245 Man. R. (2d) 274, 466 W.A.C. 274, 59 C.B.R. (5th) 36

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD., and 5275634 MANITOBA LTD.

Freedman J.A.

Heard: October 6, 2009
Judgment: November 10, 2009
Docket: AI 09-30-07191

Proceedings: refusing leave to appeal *Winnipeg Motor Express Inc., Re* (2009), 2009 CarswellMan 383, 2009 MBQB 204, 56 C.B.R. (5th) 265 (Man. Q.B.)

Counsel: R.A. McFadyen for Paccar Financial Services Ltd.
H.G. Chaiton for Heller Financial Canada Holding Company, GE Canada Leasing Services Company
D.G. Ward, Q.C. for Business Development Bank of Canada
D.R.M. Jackson for Ernst & Young
K.A. McCandless (on a watching brief) for RamWinn Diesel Inc.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.h Miscellaneous

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Personal property security
I Scope of legislation
I.6 True lease versus sales financing

Headnote

Personal property security — Scope of legislation — True lease versus sales financing
W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using

actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges, and were entitled to payment for use of property during restructuring under Act — Agreement between W Inc. and M Inc. was determined to be true lease, but agreement with S Corp. was financing lease or sufficiently akin to one — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Miscellaneous
W Inc. filed for protection under Companies' Creditors Arrangement Act — M Inc. and S Corp. provided trailers to W Inc. under leases — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Motion was brought for ruling on appropriate distribution of charges — M Inc. and S Corp. took position that they were true lessors and therefore should not be included in allocation of charges and are entitled to payment for use of property during restructuring under Act — Agreement between W Inc. and M Inc. was determined to be true lease, but agreement with S Corp. was financing lease or sufficiently akin to one — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
W Inc. filed for protection under Companies' Creditors Arrangement Act — Monitor recommended that certain charges be allocated among secured creditors on pro rata recovery using actual or estimated recovery — Charges consisted of DIP loan and administrative charges incurred since stay of proceedings was granted — Motion was brought for ruling on appropriate distribution of DIP loan and administrative charges — Methodology proposed by monitor on its face was determined to be fair, had objective basis and was applied uniformly — Creditor P brought application for leave to appeal — Application dismissed — Reasons of judge amply demonstrated that there was no substance to P's arguments — Judge was well aware of differences in nature of security held by secured creditors — There was no misdirection by judge and no injustice in result, which was based on reasonable recommendation of monitor.

Table of Authorities

Cases considered by *Freedman J.A.*:

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — considered

Edgewater Casino Inc., Re (2009), 446 W.A.C. 274, 265 B.C.A.C. 274, 2009 CarswellBC 213, 51 C.B.R. (5th) 1, (sub nom. *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.)* 308 D.L.R. (4th) 339, 2009 BCCA 40 (B.C. C.A.) — referred to

Elsom v. Elsom (1989), 37 B.C.L.R. (2d) 145, [1989] 1 S.C.R. 1367, [1989] 5 W.W.R. 193, 59 D.L.R. (4th) 591, 96 N.R. 165, 20 R.F.L. (3d) 225, 1989 CarswellBC 95, 1989 CarswellBC 707 (S.C.C.) — referred to

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 5 C.B.R. (5th) 56 (N.L. T.D.) — referred to

Hunjan International Inc., Re (2006), 2006 CarswellOnt 2718, 21 C.B.R. (5th) 276 (Ont. S.C.J.) — considered

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — referred to

Muscletech Research & Development Inc., Re (October 24, 2006), Doc. M34242-C46020 (Ont. C.A.) — referred to

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — referred to

Repap British Columbia Inc., Re (1998), 1998 CarswellBC 1878, 9 C.B.R. (4th) 82 (B.C. C.A. [In Chambers]) — referred to

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — referred to

Stomp Pork Farm Ltd., Re (2008), 41 C.B.R. (5th) 126, 312 Sask. R. 256, 2008 SKQB 152, 2008 CarswellSask 207 (Sask. Q.B.) — referred to

Stomp Pork Farm Ltd., Re (2008), 2008 SKCA 73, 2008 CarswellSask 358, [2008] 8 W.W.R. 607, 428 W.A.C. 186, 311 Sask. R. 186, 43 C.B.R. (5th) 42 (Sask. C.A.) — considered

Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 CarswellMan 375, 2009 MBCA 81 (Man. C.A.) — referred to

Western Express Air Lines Inc., Re (2005), 7 P.P.S.A.C. (3d) 229, 2005 BCSC 53, 2005 CarswellBC 72, 10 C.B.R. (5th) 154 (B.C. S.C.) — referred to

Winnipeg Motor Express Inc., Re (2008), 2008 MBCA 133, 2008 CarswellMan 564, 48 C.B.R. (5th) 202, 448 W.A.C. 3, 236 Man. R. (2d) 3, [2009] 7 W.W.R. 104, 15 P.P.S.A.C. (3d) 1 (Man. C.A. [In Chambers]) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 13 — referred to

APPLICATION by creditor for leave to appeal judgment reported at *Winnipeg Motor Express Inc., Re* (2009), 2009 CarswellMan 383, 2009 MBQB 204, 56 C.B.R. (5th) 265 (Man. Q.B.).

***Freedman J.A.*:**

Overview

1 This is an application by Paccar Financial Services Ltd. (Paccar) for leave to appeal an order (the Order) made by the judge supervising the proceedings under the *Companies' Creditors Arrangement Act* (the *CCAA*) in respect of Winnipeg Motor Express Inc. and related entities (WME). The Order allocates among secured creditors of WME liability to pay certain court-ordered charges (the Charges) relating to the *CCAA* proceedings. I have concluded that leave to appeal the Order should be denied.

Background

2 WME was in the transportation business. Paccar leased certain equipment to WME, and Heller Financial Canada Holding Company and GE Canada Leasing Services Company (Heller) provided financing to WME.

3 WME has been under the protection of the *CCAA* since May 15, 2008, when the judge made her initial order (the Initial Order). In the Initial Order, the judge provided for the Charges to facilitate efficient and orderly proceedings under the

CCAA. The Charges comprise expenses incurred since the date of the Initial Order, such as a debtor-in-possession (DIP) loan, the fees of Ernst and Young (the monitor), the monitor's and WME's legal fees and other items. The aggregate amount of the Charges, some $1.8525 million, was not at issue before the judge. What was at issue was by whom and in what proportion the Charges should be borne.

4 The resolution of this matter is the last step in the *CCAA* proceedings relating to WME. During the course of those proceedings, the monitor made a number of reports about the restructuring and the judge made a number of orders. At one point, subsequent to the Initial Order, when it appeared that WME could not reorganize and continue in business successfully, its assets were sold. An order of bankruptcy against WME was made by the judge on July 2, 2009.

5 The monitor filed its Twelfth Report dated February 10, 2009, in which it recommended to the judge a method for the allocation of the Charges among the secured creditors of WME. That report led to a number of questions from creditors which were answered in the monitor's Fourteenth Report dated April 22, 2009, and the supplement thereto dated April 28, 2009.

6 The monitor recommended that the Charges be allocated among WME's secured creditors based on *pro rata* recovery of the amounts of their claims, using actual or estimated recovery. As the judge stated (at para. 5), the monitor relied on certain principles in making its recommendations, including that a strict accounting on a cost/benefit basis was impractical and that the allocation should be equitable rather than equal.

7 Paccar opposed the recommendation, arguing that Heller, which had a multi-million dollar loan outstanding with WME at the time of the Initial Order, had suffered virtually no loss and should pay a larger proportion of the Charges. In contrast, said Paccar, it had suffered a very substantial loss and was being asked to absorb a disproportionate amount. Some other creditors opposed while some supported the monitor's recommendation.

The Judge's Decision

8 The judge took into account the applicable legal principles; this is not challenged by Paccar. She noted (at para. 41) that the determination of a method of allocation is a matter for the judge's discretion, and said that any means of calculating a precise percentage would be arbitrary. She relied on several of the cases frequently cited in such applications, including *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 30 C.B.R. (4th) 206 (Alta. Q.B.), *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164, 5 C.B.R. (5th) 56 (N.L. T.D.), *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.), and *Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.).

9 She observed that the monitor's recommendation, in effect, simply required the secured creditors to pay a fee to collect their outstanding receivables, which was "not a novel concept in debt collection" (at para. 46). She found the methodology to be fair, objective and uniformly applied. Thus, the onus shifted to those opposing the recommendation (see *Hunjan* at para. 73) to demonstrate that the proposal was unfair or prejudicial.

10 She was cognizant of the fact that she could take into account the different nature of security held by creditors, as well as the potential benefit to them when deciding whether the proposed allocation was equitable. She then said (at para. 51):

> My conclusion is that all the secured creditors who the monitor suggests should participate in the allocation received real and meaningful benefit as a result of these proceedings. Heller's success in collecting receivables was increased and made less costly than had the company been placed in receivership. The equipment lessors' [including the present applicant, Paccar] effort, cost, delay, and risk in recovering their equipment from various locations across North America was considerably reduced by virtue of WME's organized return of equipment to its yard or other agreed upon locations. ....

11 She declined any attempt to undertake an analysis of precisely what benefit each creditor had received as a result of the *CCAA* proceedings. She considered and rejected Paccar's suggestion that relative loss suffered be used as a basis for allocation, saying that would amount to readjusting priorities among creditors. She did, however, note that equipment lessors

(such as Paccar) in a business operation like WME's "do suffer undue prejudice" (at para. 62), but in this case that was mitigated by the payment for leased equipment which started about 10 weeks after the Initial Order. Thus her conclusion was that: "the undue prejudice suffered has been recognized, albeit not totally, perfectly or precisely, but, in my view, in an amount sufficient amount [*sic*] to justify the uniform application of the methodology proposed by the monitor" (*ibid.*).

12 She approved the methodology proposed by the monitor, with one relatively minor adjustment relating to a discount rate on certain leases.

The Leave Application

13 Paccar now seeks leave to appeal the Order, leave being required by s. 13 of the *CCAA*. Paccar was the only creditor which sought leave to appeal. Its application was opposed by Heller and Business Development Bank of Canada. Counsel for another creditor, RamWinn Diesel Inc., attended on a watching brief, and counsel for the monitor was present to provide assistance if needed.

14 In a previous leave application in these proceedings (*Winnipeg Motor Express Inc., Re*, 2008 MBCA 133, 236 Man. R. (2d) 3 (Man. C.A. [In Chambers])), my colleague Monnin J.A. referred to the principles governing decisions by judges on leave applications such as this. He noted that leave is to be granted sparingly; see, e.g., *Edgewater Casino Inc., Re*, 2009 BCCA 40, 265 B.C.A.C. 274 (B.C. C.A.) at para. 18. He referred to the dicta of the Alberta Court of Appeal in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]) (at paras. 6-7):

> .... [T]here must be serious and arguable grounds that are of real and significant interest to the parties: *Re Multitech Warehouse Direct Inc.*, (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Re Smoky River Coal Ltd.*, (1999), 237 A.R. 83 (Alta. C.A.); *Re Blue Range Resource Corp.*, (1999), 244 A.R. 103 (Alta. C.A.); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Re Blue Range Resource Corp.*, (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) at 396 (B.C. C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C. C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised 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.
>
> . . . . .

Paccar's Argument

15 Paccar observed that leave may be granted where the appellate court decides that the judge has given no or insufficient weight to relevant considerations, resulting in a wrongful exercise of discretion by the judge. It relied on the decision of the Saskatchewan Court of Appeal in *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, 43 C.B.R. (5th) 42 (Sask. C.A.) (which I will discuss below), where leave was granted to appeal part of an order of allocation of *CCAA* charges.

16 Paccar argued that its application satisfied all the tests described in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) (see para. 14 above). It said that there are few

reported decisions on the allocation of charges such as those here, as between major secured creditors, so the matter is of significance to the practice under the *CCAA*. As well, the point is important to the proceedings themselves, if only because of the magnitude of money involved. And clearly an appeal of the Order will not interfere with the progress of the proceedings, since the restructuring process has come to an end.

17 Paccar said that the real issue here was whether its proposed appeal was meritorious. It said that the judge had treated all secured creditors equally by requiring each to pay a *pro rata* allocation based on total recovery, but this approach was flawed. Paccar argued that the judge gave no weight to the differences in the security held by it and other equipment lessors and by Heller, and to the potential benefit Paccar and Heller received from the proceedings. On this latter point, Paccar said that Heller's projected losses were about $50,000 whereas Paccar's were over $2.7 million. Thus it was reasonable to infer that Heller "benefitted mightily" from the *CCAA* proceedings as compared to Paccar, even taking into account the different nature of their respective security.

18 The judge erred, said Paccar, in deciding that allocations of the Charges should be based on total recovery, thus treating all secured lenders on an equal basis. She erred in placing little or no weight on the differences in security and on the benefit received. Paccar reiterated its position that it never stood to gain from the *CCAA* process and suffered significantly from it.

19 It said that the allocation ought to follow the result in *Hunters Trailer & Marine Ltd.*, where a mortgagee was allocated the burden of charges on other than a proportionate basis (at para. 21):

> ... UMC [the mortgagee] is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of *CCAA* costs.

20 Paccar suggested that the equipment lessors should share in not more than ten per cent of the Charges. The effect of the Order is to allocate about 15.5 per cent of the Charges to Paccar and about 65.6 per cent to Heller. Paccar acknowledged that it took no issue with the principle that in *CCAA* proceedings the collective good prevails and that secured creditors should bear a share of the Charges; it was unhappy with the amount of the charges it was ordered to bear. It did not allege any error of law by the judge, but argued rather that in her exercise of discretion she erred in failing to give weight to the differences in security and to the benefits received.

Decision

21 I am far from persuaded that a case has been made out for leave to be granted.

22 Of the four factors subsumed in the general criterion which is applicable in these situations (see para. 14), two are at issue. Heller does not dispute that the appeal would be significant to the action itself, since it is the Order which determines who bears the Charges. Further, the appeal would obviously not delay the proceedings, which are complete except for this particular matter.

23 The other two factors are at issue, and in my opinion Paccar must fail on each.

24 First, and most importantly, in my view the proposed appeal lacks merit.

25 If leave were to be granted, this court would apply a standard of review regarding the Order which would vary depending on the nature of the issue under consideration. See *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at paras. 22-28. The court would only modify or set aside the Order if one (or more) of three circumstances existed.

26 First, applying a standard of correctness, the court would have to conclude that the judge erred at law. That is not argued or at issue here. Or, second, applying a standard of palpable and overriding error, the court would have to conclude that the judge made such an error on a factual matter. That is also not argued or at issue here. Or, finally, applying a standard of considerable deference, the court would have to conclude that in exercising her discretion the judge misdirected herself, or

the Order was so clearly wrong as to amount to an injustice. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at 1374-75. Paccar argued, in effect, that this is what had occurred.

27 The judge had a detailed and intimate knowledge of the affairs of WME in the *CCAA* proceedings. She gave full consideration to the objections of those creditors who opposed the monitor's recommendation. She was fully familiar with the positions of the parties, and with the implications of her Order. She advised herself properly on the law and relied on the applicable decisions to assist her reasoning process. She made no error in her factual analysis. Against that backdrop of her thorough consideration of all relevant matters she exercised her discretion in favour of adopting the monitor's recommendation.

28 That recommendation was based on sound practice and precedent, as the judge found. See the observations of C. Campbell J. in *Hunjan* (at paras. 4-5, 57):

> Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.
>
> Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."
>
> The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-212.]

29 As noted, Paccar acknowledges that the judge made no legal error. It did not assert that she had made a palpable and overriding error (or, indeed, any error) in relation to factual matters. There is no issue of jurisdiction. But the decision, argued Paccar, shows that the judge "failed to adequately consider the arguments advanced by Paccar." It shows, in Paccar's submission, that the judge failed to give any weight to the degree of potential benefit to Paccar and Heller from the *CCAA* proceedings and to the difference in security held by those creditors.

30 But, as a review of the reasons of the judge amply demonstrates, there is no substance to Paccar's arguments. The judge did, in fact, consider all the issues raised by Paccar. She rejected Paccar's arguments and adopted a different approach. She did not give to certain matters the weight which Paccar urged her to give, but she was fully cognizant of the issues and clearly explained why she was taking a different approach.

31 For example, Paccar agreed that it was open to the judge to find that it received some benefit from the *CCAA* proceedings, but it complained that she did not analyze the potential benefit to the parties. The judge expressly dealt with this, saying, when referring to the benefits received by the secured creditors (at para. 52):

> Who benefitted more? If a meaningful answer could be given to that question, it would require a careful accounting and cost benefit analysis of each party's circumstance. This is exactly what courts repeatedly have said should not be done. It is economically self-defeating and the cost and the time involved in finding such an answer would only serve to benefit the professionals hired to assist in the process. It is antithetical to [the] objectives of the ***CCAA***.

32 Similarly, the judge was well aware of the differences in the nature of the security held by the secured creditors. She

rejected Paccar's suggested solution in these words (at para. 53):

> I am also of the view that the relative loss - the issue raised by Paccar - results more from the nature of the security and the specific business decisions made by the parties. Heller, and Ramwinn, for example, experienced very small relative losses; BDC's and [another creditor's] loss was considerable. The difference in their respective security is substantial. To make adjustments as Paccar requests would, in my view, amount to readjusting priorities among creditors.

33 The present dispute is not based on any principle; rather, it relates only to the dollar amount of the Charges which Paccar has to bear. As Heller stated succinctly in its motion brief: "[t]he Court is not being asked to establish a general principle or a new test for the allocation of the Charges - it is simply being asked to lower the amount allocated to Paccar."

34 In any given case there may be more than one legitimate method of cost allocation. That simply emphasizes the high degree of deference an appellate court would give to a supervising judge's cost-allocation order. As C. Campbell J. said in *Hunjan* (at para. 71):

> ... [E]ach creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

35 I see no flaw in the judge's reasoning or in her analysis. The relevant factors were properly considered, and the weight to be accorded to the factors was for her discretion. See *Muscletech Research & Development Inc., Re*, [2006] O.J. No. 4583 (Ont. C.A.) at para. 9. She exercised her discretion judicially and in accordance with the applicable principles. See *Stelco Inc., Re* (2005), 9 C.B.R. (5th) 135 (Ont. C.A.) at para 63.

36 More to the point, there was no misdirection by the judge and I see no injustice in the result, which is based on a reasonable recommendation of the monitor. While Paccar is unhappy with the result, it cannot justifiably complain about the judge's reasoning process, nor has it persuaded me that this court might find that such result is unjust.

37 I can see no basis upon which this court would act to upset the judge's exercise of discretion in this matter. Thus, the proposed appeal lacks merit.

38 Paccar also fails in respect of the other factor, that is, whether the point on appeal is of significance to *CCAA* practice. I agree with the argument of Heller's counsel, to the effect that the decision of the judge raises no issues of general application and thus has little, if any, precedential value. See *Blue Range Resource Corp., Re*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Alta. C.A.) at paras. 5, 17, and *Repap British Columbia Inc., Re* (1998), 9 C.B.R. (4th) 82 (B.C. C.A. [In Chambers]) at para. 9.

39 Paccar argued that *Stomp Pork* shows that the allocation of court-ordered charges may be a proper subject for appellate review. As described by Jackson J.A. for the court, the issue to be determined was the extent to which a chambers judge had authority "to allocate priority among the assets of pre-filing creditors for debtor in possession ... financing *early in the process*" (at para. 1) (emphasis added) of *CCAA* proceedings. The court (at para. 12) refused leave to appeal the decision regarding priority for financing that had already been advanced, but did grant leave to appeal the allocation regarding future financing. That is clearly not this case.

40 The court said (at para. 16) that the question whether the restructuring judge can allocate priority *before* the outcome of the restructuring is known was a matter of first instance. The restructuring judge had acknowledged as much, noting in her decision that "[t]he issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152 (Sask. Q.B.) at para. 21). The Court of Appeal granted leave to appeal her decision. In my view, the decision granting leave is of no assistance or application here.

41 Paccar's proposed appeal simply seeks a lesser participation in the burden of the Charges. There is nothing in this

TAB 15

Most Negative Treatment: Distinguished
Most Recent Distinguished: Respec Oilfield Services Ltd., Re | 2010 ABQB 277, 2010 CarswellAlta 830, 17 P.P.S.A.C. (3d) 148, 68 C.B.R. (5th) 189, 28 Alta. L.R. (5th) 239, [2010] A.W.L.D. 2826, 188 A.C.W.S. (3d) 31 | (Alta. Q.B., Apr 28, 2010)

2006 CarswellOnt 2718
Ontario Superior Court of Justice

Hunjan International Inc., Re

2006 CarswellOnt 2718, 21 C.B.R. (5th) 276

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 with respect to Hunjan International Inc., Hunjan Moulded Products Ltd., Hunjan Tools & Mould Ltd. and Hunjan Holdings Ltd. (Applicants)

C. Campbell J.

Heard: March 8, 2006
Judgment: May 3, 2006
Docket: 05-CL-5886

Counsel: Frederick Myers, L. Joseph Latham for KPMG Inc.
Ashley John Taylor, Diana Juricevic for GE Capital Canada Leasing Services Inc., GE Capital Equipment Financing C.P., GE Capital Canada Leasing Trust and GE Capital Leasing Services Company
Paul R. Basso for Canadian Imperical Bank of Commerce
S. Harvey Starkman, Q.C., Kevin W. Fisher for En-Plas Inc.
E. Peter Auvinen, Arthi Sambasivam for CIT Financial Ltd.
Edmond Lamek for Expost Development Canada
Kenneth Dekker for Hunjan Holdings

Subject: Insolvency; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Debtors obtained initial order granting protection from creditors under Companies' Creditors Arrangement Act ("CCAA") — Initial order allowed debtors to borrow funds from lender in order to briefly continue operations while attempts were made to secure necessary financing to continue to operate long-term — Debtors reached such accommodation agreement with lender — Accommodation agreement anticipated shortfall between financing advances and post-filing receipts to be generated by debtors, and therefore lender reached agreement with debtor's customer to take responsibility for half of such deficiency —

Debtors never achieved restructuring or going-concern sale — Lender was granted receivership order terminating CCAA proceedings and appointment of receiver to oversee debtors' assets — Because debtors had ceased all operating activities before receivership order was granted, no on-going revenues existed with which to fund receiver's fees or costs from CCAA proceedings — Receiver proposed allocation of costs required that debtor's customers pay owed deficiency but did not mandate that lender provide other half — Hearing was held to rule on propriety of receiver's proposed allocation of costs — Receiver's proposed allocation of costs was upheld as it was not unfair or inequitable — Receiver had reasonably determined that lender had not contractually agreed to fund deficiency — Creditors who were grieving receiver's proposal had not been parties to accommodation agreement — Surrounding facts did not illustrate involved parties felt lender would be responsible for half of deficiency — Lender would not have provided financing if it were aware of significant liability in event of deficiency.

Table of Authorities

Cases considered by *C. Campbell J.*:

Canadian Imperial Bank of Commerce v. Acchione Construction Co. (1989), 36 C.L.R. 144, 1989 CarswellOnt 708 (Ont. S.C.) — considered

Hickman Equipment (1985) Ltd., Re (2004), 5 C.B.R. (5th) 56, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re)* 716 A.P.R. 294, 2004 NLSCTD 164, 2004 CarswellNfld 263 (N.L. T.D.) — referred to

Hunters Trailer & Marine Ltd., Re (2001), 2001 ABQB 1094, 2001 CarswellAlta 1636, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp. (1993), 106 D.L.R. (4th) 132, 67 O.A.C. 49, 1993 CarswellOnt 1844 (Ont. C.A.) — referred to

Ontario (Securities Commission) v. Consortium Construction Inc. (1992), 14 C.B.R. (3d) 6, 9 O.R. (3d) 385, 93 D.L.R. (4th) 321, 11 C.P.C. (3d) 352, 57 O.A.C. 241, 1992 CarswellOnt 176 (Ont. C.A.) — referred to

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 47 — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

HEARING to rule on propriety of receiver's proposed allocation of costs from failed CCAA proceedings.

C. Campbell J.:

1 The issue before the Court concerns the allocation and apportionment of the costs arising from failed *Companies Creditors' Arrangements Act* ("CCAA") proceedings, which evolved into a receivership sale by auction of assets of the Hunjan Group, held November 30 and December 7, 2005.

2 At issue is the allocation of actual disbursements incurred to keep the debtor companies operating during the CCAA proceedings, plus the fees, disbursements and expenses incurred during the receivership proceedings to preserve, protect and realize on the debtors' assets.

3 The recommended allocation of costs by the Receiver as contained in its Tenth Report is challenged by different first-ranking secured creditors on different issues (the "Opposing Creditors.")

4 Canadian courts have recognized that the allocation of costs arising from insolvency proceedings must be done on a case-by-case basis and is a task involving a receiver's or trustee's discretion. It has also been recognized that a strict accounting to allocate costs is neither necessary nor desirable in all cases and that a creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery. See *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 9 O.R. (2d) 84 (Ont. C.A.) at 89; *Ontario (Securities Commission) v. Consortium Construction Inc.* (1992), 9 O.R. (3d) 385 (Ont. C.A.); *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) at 209-210.

5 Costs should be allocated in an equitable manner and in a manner that does not readjust the priorities between creditors. When determining what is an equitable allocation of costs, the Court in *Hunters Trailer & Marine Ltd., Re* noted that it would be unfair to ignore the degree of potential benefit that each creditor might derive, but also recognized that "any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical."

6 The facts necessary for the determination of the issues that have arisen are largely not in dispute and are set out in the Tenth Report.

7 Pursuant to the Order of this Honourable Court dated May 4, 2005 (the "Initial Order"), the Hunjan Group and Hunjan Holdings Ltd. (the "CCAA Applicants") obtained protection from their creditors under the CCAA. Under the Initial Order, Deloitte & Touche Inc. was appointed to act as Monitor.

8 The Initial Order allowed the CCAA Applicants to borrow money from Canadian Imperial Bank of Commerce ("CIBC") pursuant to a special loan facility known as "debtor-in-possession" or "DIP" financing. The Initial Order and the May 16 Order contain specific provisions that deal with certain aspects of the Court-approved DIP financing. In the Initial Order, the CCAA Applicants were limited in the amount that they could borrow by way of DIP financing to $1 million in the aggregate. This amount would allow the CCAA Applicants to continue operations for a period of ten days, during which time it was anticipated that they would attempt to secure the necessary financing and other arrangements with their customers to allow them to continue to operate while they attempted to restructure over a longer period of time.

9 After the Initial Order was granted, the CCAA Applicants began negotiations with CIBC, the CCAA Applicants' principal first-ranking secured lender, and five of their largest customers (the "Participating Customers"). As a result of those negotiations, an accommodation agreement was entered into on or about dated May 13, 2005 (the "Accommodation Agreement.")

10 The Accommodation Agreement provided, among other things:

(i) that the Participating Customers would continue to order product from the CCAA Applicants (sections 2-6);

(ii) the basis upon which CIBC would provide additional DIP financing to allow the CCAA Applicants to operate during the CCAA Proceedings (the "Amended DIP Facility"), which financing was anticipated to peak at approximately $8.8 million (paragraph 7);

(iii) that the Amended DIP Facility was to be secured by a first ranking charge (subject only to the Administrative Charge contained in the Initial Order) and that all "Post-Filing Receipts" (monies received from operations or production after the Filing Date) would be first used to repay the Amended DIP Facility. This preserved to CIBC's existing secured claims the proceeds of receipts that arose from the operations of the CCAA Applicants prior to during the CCAA Proceedings, and were permitted to have excess inventory banks built to give them an assurance that they would have sufficient time to arrange for alternative suppliers and a smooth transition to such new suppliers if a restructuring failed.

18 There is an incentive for both Participating Customers and major creditors to cooperate even in a very likely bankruptcy, again to maximize the value of the inventory and return from its sale in the ordinary course.

19 During the CCAA proceedings, the CCAA Applicants, with the assistance of the Monitor, carried out a marketing and sales process. However, no restructuring or going-concern sale was achieved.

20 As a result of the failure of the CCAA proceedings, on July 18, 2005, CIBC applied for, and was granted, an Order by the Honourable Justice Stinson terminating the CCAA proceedings and appointing KPMG as the interim receiver and receiver of the Hunjan Group pursuant to Section 47 of the *Bankruptcy and Insolvency Act* (Canada) and Section 101 of the *Courts of Justice Act* (Ontario) (the "Receivership Order.") Pursuant to the terms of paragraph 37 of the Receivership Order, the Amended DIP Facility was terminated going forward but remained available to fund the finalization of certain matters that arose during the CCAA proceedings.

21 The Hunjan Group had ceased all operating activities before the Receivership Order was granted. As a result, there were no on-going revenues generated with which to fund either the Receiver's fees or the disbursements required to fund the costs to be incurred during the Receiver's mandate, such as rent, maintenance, insurance, utilities, and other costs incurred for the preservation, protection and administration of the assets of the estate.

22 Furthermore, pursuant to paragraphs 22 to 30 of the Receivership Order, the terms of the May 16 Order regarding the repayment of the Amended DIP Facility (and any Amended DIP Deficiency) were preserved, such that all Post-Filing Receipts are to be first applied to the Amended DIP Deficiency, and not used to fund the receivership proceedings. Pre-Filing Receipts remain pledged to CIBC's pre-existing secured claims.

23 However, paragraph 22 of the Receivership Order provides that any expenditure or liability that is made or incurred by the Receiver, including the fees and disbursements of its legal counsel, are protected by a court-ordered charge referred to as the "Receiver's Charge".

24 Furthermore, paragraph 25 of the Receivership Order authorized the Receiver to borrow up to $2.0 million for the purpose of funding the exercise of its powers, which borrowings were to be protected by a court-ordered charge referred to as the "Receiver's Borrowing Charge".

25 Both the Receiver's Charge and the Receiver's Borrowing Charge are a charge on all of the assets of the Hunjan Group, except the Pre-Filing Receipts. Both the Receiver's Charge and the Receiver's Borrowing Charge enjoy first-ranking priority over the Amended DIP Deficiency, except in respect of Post-Filing Receipts which, as stated above, are to be applied first to the Amended DIP Facility.

26 On October 7, 2005, with the permission of the Court, the Receiver assigned each member of the Hunjan Group into bankruptcy.

27 On November 30, 2005 and December 7, 2005, the Remaining Assets of the Hunjan Group were auctioned by CIA CPCC Inc. pursuant to an auction services agreement approved by Justice Ground on November 7, 2005.

28 As a result of negotiations on July 18, 2005, paragraph 3A of the Receivership Order granted GE the right to exclude assets over which it had a first-ranking security from the Receiver's auction process. However, over time, the Receiver extended this same option to each secured creditor whose security the Receiver acknowledged was first ranking or was confirmed as first ranking by court order. GE availed itself of this option, as did CIT to a lesser extent.

Allocation of the DIP Financing Costs

29 As anticipated at the time it was put in place, there is a deficiency associated with the DIP financing estimated by the

48 The second reference is in Schedule N3 to the Tenth Report as originally filed, and reads as follows:

> Pursuant to the Accommodation Agreement, the DIP deficit is to be shared 50%/50% between the Participating Customers and CIBC to a maximum of $4 million. Any excess of over $4 million is to be allocated between all [Opposing] Creditors.

49 Schedule N3 was amended at the oral hearing to provide as follows:

> Pursuant to the Accommodation Agreement, the Participating Customers were responsible to contribute 50% of the Amended DIP Deficiency, with their maximum contribution being $2 million.

50 While I respect the reasons behind the position advanced on behalf of the Opposing Creditors, I am not prepared to accept the references in the Receiver's reports as determinative. The Opposing Creditors were not parties to the Accommodation Agreement. None of the Participating Customers, the Receiver or CIBC support the meaning now being advanced.

51 I do not find the May 16 Order in any way ambiguous even though it does make reference to the Accommodation Agreement. The closing words of paragraph 6 read, "pro rata in the proportion that the Applicants or any of them were indebted to each such secured lender as at the Filing Date."

52 At the time of the Accommodation Agreement, the representation in effect of Hunjan was that the DIP Deficiency would be between $3.5 and $4.0 million. I accept the submission on behalf of the Receiver and CIBC that it is not likely that the latter would have provided the DIP financing if it were aware that in the event the deficiency that it financed exceeded the anticipated amount by 100%, that it would in effect have contributed an additional $2 million.

53 In this as well as many allocation cases, the effect of a decision can be said to operate disproportionately on one or more creditors to the benefit of others or even only one.

54 The first principle of priority is to allocate in the manner prescribed by the Order. [See *Ontario (Registrar of Mortgage Brokers) v. Matrix Financial Corp.* (1993), 106 D.L.R. (4th) 132 (Ont. C.A.) at 137.]

55 Each case is to be considered on its own facts with the exercise of discretion and without the necessity to allocate on a direct "benefit" basis. *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd., supra.*

56 The conclusion at which I have arrived might well have been different had the other Opposing Creditors been parties to the Accommodation Agreement and the surrounding facts and matrix clearly pointed to an understanding of all parties that CIBC would in effect be responsible for an additional $2 million regardless of the DIP Deficiency. That is not the case on the material before me.

57 The test for the allocation proposed by the Receiver is that it be in a manner that is fair and equitable. This exercise of discretion, while it must not ignore benefit or detriment to any creditor, does not require a strict accounting on a cost benefit basis or that the costs be borne equally or on a pro rata basis [see *Hunters Trailer & Marine Ltd., Re* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.) pp 209-212.]

58 The position advanced by the Opposing Creditors has not met the onus of satisfying me that the allocation prepared by the Receiver is unfair or unreasonable in all the circumstances.

59 I have considered carefully the submission made on behalf of the opposing creditors. Each has some merit. The assertion by CIT is that given its exposure ($20 million), CIBC had more incentive to invest more money in the DIP financing.

60 Counsel for En-Plas made much the same point, suggesting that the parties (CIBC) that take the risk should bear the cost on the basis that no one thought the DIP Financing Deficit would exceed $4 million and the DIP Financing did not particularly benefit En-Plas given its particular position. The DIP Financing did permit the opportunity for improvement of their position by all creditors.

61 The response from counsel for CIBC is simply that it is not equitable for his client to advance $8 million and not have a charge on the DIP Financing simply doesn't make sense.

62 In my view, the reason the cases referred to emphasize the discretion in the presiding judge is that between competing creditors, there is often competing equitable claims. I accept that if one result would work a manifest unfairness, that fact will likely be determinative where as I found here, that there is no manifest unfairness in permitting the creditor (CIBC) with the largest exposure some recovery from the DIP Financing Deficit.

63 As I have concluded on the language of the Accommodation Agreement and the May 16 Order, there is no express restriction on recovery by CIBC. I am not persuaded that there is any manifest unfairness to the Opposing Creditors in accepting the position advanced by the Receiver, CIBC.

Allocation of Receiver's Expenses

64 Not all the issues dealt with in the Receiver's Tenth Report were dealt with on this motion. The one that requires determination at this stage is that submitted on behalf of some creditors, which urge that the general administration expenses should be based on the percentage of pre-filing debt of each of the Opposing Creditors, rather than recovery.

65 The Receiver reports that in allocating costs, it took into consideration the following factors:

(a) these proceedings evolved from the CCAA Proceedings to the Receivership Proceedings and, as such, proceeds of realizations can be attributed to three different time periods, which may affect the entitlement to the proceeds from such assets and consequent costs allocations:

(i) *Pre-Filing Period* — The period prior to the Filing Date (being the commencement of the CCAA proceedings);

(ii) *Post-Filing Period* — The period between the Filing Date and the commencement of the Receivership Proceedings; and

(iii) *Receivership Period* — The period after the commencement of the Receivership Proceedings;

(b) the May 16 Order already mandates how the Amended DIP Deficiency is to be allocated;

(c) the Receiver's Charge and the Receiver's Borrowing Charge were generally incurred for the benefit of all creditors with assets in the Receivership; and

(d) there were some circumstances in which specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between the cost and the benefit derived therefrom.

66 Those creditors who urge that the allocation of costs should be on the basis of pre-filing debt do so on the basis that in their view CIBC derived a benefit from a significant amount of recovery pre-filing that should be taken into account and not just the amount that was recovered post-filing.

67 The total amount of the Receiver's Borrowing and expenses is set out in Schedule W to the Report of the Receiver and totals some $2,087.629.00. On the basis of realization based on security and the allocation, relative cost to CIBC is at a level of 42.7%, that of GE at 38.3%, EnPlas at 14.3% and CIT at 4.5%.

68 The response by the Receiver submits that while CIT's gross realizations were $612,663, of that amount it has already received free of any deduction an account of costs the sum of $300,000, leaving only $312,663 against which CIT's total share of the costs must be charged.

69 There is some evidence of what each of the creditors recognized might be its share of anticipated costs at the time of the May 16, 2005 order, which makes the Receiver's allocation reasonable in relation.

70 I have considered the submissions of those objecting creditors, as well as those of the Receiver.

71 I am mindful that each creditor from its own particular perspective will have a view of what is or is not fair in terms of allocation. There is unlikely to be one specific method that can objectively point to absolute fairness to all parties. The exercise is inevitably one of viewpoint for the creditor and exercise of discretion for the Court.

72 I am satisfied that the Receiver has to the extent possible attempted to apply costs in a reasonable and fair manner and has taken into account to the extent possible a distinction between those costs that could be said to benefit all creditors with assets in the Receivership and those where it was possible, where specific costs could be fairly allocated to one or more particular creditors as a result of a clear and direct link between cost and benefit derived.

73 I also accept that where the allocation is *prima facie* fair, the onus should be on an opposing creditor to satisfy the Court that they are unfair or prejudicial. (See *Canadian Imperial Bank of Commerce v. Acchione Construction Co.* (1989), 36 C.L.R. 144 (Ont. S.C.) [Master] 146.

74 I recognize that there are other bases of allocation and have no issue with the general principles set out by Hall J. in *Hickman Equipment (1985) Ltd., Re*, [2004] N.J. No. 299 (N.L. T.D.)

75 Having considered the submissions of all creditors, I am not persuaded that the onus has been met. The Receiver's cost allocation is therefore approved.

76 Counsel may obtain a further appointment to deal with any issues remaining on the motion and the fixing of costs, if required.

Order accordingly.

TAB 16

2001 ABQB 1094
Alberta Court of Queen's Bench

Hunters Trailer & Marine Ltd., Re

2001 CarswellAlta 1636, 2001 ABQB 1094, [2001] A.J. No. 1638, [2002] A.W.L.D. 61, 110 A.C.W.S. (3d) 795, 305 A.R. 175, 30 C.B.R. (4th) 206

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended; And In the Matter of the Hunters Trailer & Marine Ltd.

Wachowich C.J.Q.B.

Heard: November 20, 2001
Judgment: December 14, 2001
Docket: Edmonton 0003-19315

Counsel: *Kentigern A. Rowan*, for Canadian Western Bank
Terrence M. Warner, for CIT Financial Ltd.
Douglas H. Shell, for Deutsche Financial Services
R. Craig Steele, for Bank of America Canada Specialty Group Ltd.
Juliana E. Topolniski, Q.C., for Mr. Blair Bondar
Darcy G. Readman, Darren R. Bieganek, for UMC Financial Management Inc.
Jeremy H. Hockin, Deborah J. Polyn, for Deloitte Touche Inc.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Corporations — Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
U Inc. held first and second mortgage on real property of H Ltd. and assignment of certain life insurance proceeds — Order granted super-priority for debtor in possession financing or administrative costs over all of H Ltd.'s property — Interim receiver brought application to determine allocation of costs, including debtor in possession financing and administrative charges in Companies' Creditors Arrangement Act proceedings, between H Inc.'s major secured creditors — U Inc. allocated 15 per cent of monitor's fees and five percent of debtor in possession financing — Equitable that all major secured creditors be liable for portion of costs — Unfair to ignore differences in type of security held by creditors and degree of potential benefit that could be derived from proceedings under Act — U Inc. was in different position than other major secured creditors — Not equitable that it be allocated same proportion of costs — Interim receiver's proposal that U Inc. be charged percentage of monitor's fees was accepted — Debtor in possession financing was granted to meet H Ltd.'s urgent needs during sorting out period which was for benefit of all creditors — Majority of financing was used for wages, some of which could be attributable to building maintenance — Some of financing was used to provide security on premises — Some of financing was applied to life insurance premiums and protecting policy was of potential benefit to U Inc. — U Inc. was to bear portion of financing costs — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Wachowich C.J.Q.B.*:

Canadian Asbestos Services Ltd. v. Bank of Montreal, 16 C.B.R. (3d) 114, [1992] G.S.T.C. 15, 11 O.R. (3d) 353, 93 D.T.C. 5001, 5 C.L.R. (2d) 54, [1993] 1 C.T.C. 48, 5 T.C.T. 4328 (Ont. Gen. Div.) — considered

Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co. (1991), 5 C.P.C. (3d) 299, (sub nom. *Rieger (Wm. C.) Co. (Receivership), Re)* 126 A.R. 69 (Alta. Q.B.) — referred to

Keddy Motor Inns Ltd., Re (1992), 90 D.L.R. (4th) 175, 13 C.B.R. (3d) 245, 6 B.L.R. (2d) 116, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 110 N.S.R. (2d) 246, (sub nom. *Keddy Motor Inns Ltd., Re (No. 4))* 299 A.P.R. 246 (N.S. C.A.) — considered

Starcom International Optics Corp., Re (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]) — referred to

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) — considered

Wellington Building Corp., Re, 16 C.B.R. 48, [1934] O.R. 653, [1934] 4 D.L.R. 626 (Ont. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

APPLICATION by interim receiver to determine allocation of costs between major secured creditors.

***Wachowich C.J.Q.B.*:**

THE APPLICATION TO DETERMINE COST ALLOCATION

1 The court-appointed Interim Receiver of Hunters Trailer & Marine Ltd. (Hunters) seeks an Order determining the allocation as between Hunters' major secured creditors of the costs and expenses of the insolvency proceedings, including the "debtor in possession" (DIP) financing and administrative charge provided for in the ***Companies' Creditors Arrangement Act*** proceedings (***CCAA*** costs) and the fees and disbursements of Deloitte & Touche Inc. as Interim Receiver and Trustee in Bankruptcy.

2 Counsel for Deutsche Financial Services (DFS) prepared and circulated a proposal relating to cost allocation. The parties appear to agree with the manner in which costs for the ***CCAA*** proceedings, the interim receivership and the bankruptcy have been segregated by DFS. The primary issue of contention is the extent to which UMC Financial Management Inc. (UMC), which held a first and second mortgage on the real property of Hunters and an assignment of certain life insurance proceeds, should be responsible for any of the ***CCAA*** costs. It is acknowledged by the parties that there is no case law directly on point in terms of allocation of ***CCAA*** costs.

THE ARGUMENTS OF THE PARTIES

3 DFS takes the position that the matter is settled by my Order of October 11, 2000, which gave all ***CCAA*** costs priority over Hunters' real and personal property. DFS proposes that all major secured creditors share the ***CCAA*** costs *pro rata* on the basis of their recovery. Each dollar of proceeds realized from the assets would have a percentage cost component to be applied toward payment of the applicable costs. DFS argues that the Court would be readjusting priorities if it assigns all of the cost burden for the ***CCAA*** proceedings to one class of creditors.

4 CIT Financial Services (CIT) supports the suggestion that all of the secured creditors should participate in the ***CCAA*** costs. However, it submits that cost allocation should be based on the ratio of a secured creditor's recovery to total recoveries of the secured creditors. In effect, this leads to the same result as the DFS proposal. Canadian Western Bank (CWB) agrees in principle with the allocation of costs proposed by DFS and also contends that any allocation should be based on recoveries. Bank of America did not take any stand on this application.

5 UMC argues that it would be inequitable for it to be forced to bear costs on the basis proposed by DFS or CIT as it would then be liable for a disproportionate amount of the costs. UMC contends that it was a passive creditor which advanced funds based on the value of land rather than on the value of the business as a going concern. As the risk of loss was greater for the operating lenders, they should be responsible for most of the ***CCAA*** costs. However, UMC concedes that it should bear some of the insolvency costs to the extent that those costs relate to the lands over which it was the primary security holder.

6 The Interim Receiver recommends something of a middle ground. While acknowledging that the ***Bankruptcy and InsolvencyAct*** does not apply to ***CCAA*** proceedings, it adopts the philosophy of that Act that secured creditors with a commonality of interest should be treated alike. In determining whether creditors fall within the same class, consideration should be given to the nature of the debt giving rise to the claims, the nature and priority of the security in respect of the claims, the remedies available to the creditors in the absence of the proposal, and the extent to which the creditors would recover their claims by exercising those remedies.

7 The Interim Receiver submits that all of the floor planners and CWB, which held security on non-floored assets and was the DIP lender, have a common interest while the interest of UMC is quite different in terms of the nature and priority of its security, the remedies available to it and the extent of its recoveries. Apparently, the price at which the lands were sold substantially exceeded Hunters' debt to UMC. The Interim Receiver suggests that UMC should bear 15 percent of the Monitor's fees and $500.00 of the Monitor's legal fees. According to the Interim Receiver, these figures are comparable to the estimate by DFS and its own estimate of UMC's share of the interim receivership costs.

8 UMC supports the Interim Receiver's proposal. In the event that the Court does not agree with this proposal, UMC contends that it would not be appropriate for the Court to make an assessment on the basis of a summary hearing. Rather, DFS should continue to bear the costs and sue the remaining creditors for contribution and indemnity.

WHETHER UMC SHOULD BEAR A PROPORTION OF THE *CCAA* COSTS

9 The ***CCAA*** does not contain any provisions dealing specifically with payment of DIP financing or administrative costs. In my initial Order of October 11, 2000, I granted a super-priority for these amounts over all of Hunters' property. In addition, I directed that:

> 38. The Monitor shall review the security position of the creditors of Hunters with a view to determining whether any secured creditor is inequitably affected by the priority given to the DIP Financing and Administrative Charge and, if any secured creditor is inequitably affected the Monitor shall report the circumstances and provide its recommendation in connection therewith. Based on such report, and any other information the Court deems pertinent, the Court shall be entitled to apply the Doctrine of Marshalling or such other equitable principles as it sees fit to effect a result that treats all of the creditors equitably having regard to their security, priority and indebtedness as of the date of this Order and in directing the distribution of funds held back pursuant to paragraph 17 of this Order.

10 The present application relates to the allocation of those costs. While it is within the Court's jurisdiction to determine

which parties are to bear the costs and in what proportion, I am cognizant of the following cautionary remarks made by Chadwick J. in *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 11 O.R. (3d) 353 (Ont. Gen. Div.), at 359:

> The purpose of the Act is not to give a benefit or an advantage to one class of creditors at the expense of other creditors. Likewise, it is the duty and responsibility of the Court not to alter the security arrangements entered into by the company and its various creditors. It is not the Court's duty, responsibility or mandate to attempt to readjust the priorities between the creditors and the applicant company.

11 Chadwick J. in that case ordered that the fees of the monitor and its legal counsel should be paid out of the assets of the company prior to distribution to the creditors as the ***CCAA*** proceedings were for the benefit of all creditors. In addition, the court gave priority to funds advanced by two of the creditors so that construction projects could be completed to avoid incurring late penalties and charge-backs. The court reasoned that advancement of those funds was for the benefit of all creditors and that granting priority for payment of the funds would not change the priority of the various other creditors or jeopardize their security.

12 Like the argument raised by UMC in the present case, the secured creditors in *United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C. C.A.) argued that the super-priority granted for monitor's fees was unfair given that they had no interest in preserving the active business of the debtor. Mackenzie J.A. responded at para. 28:

> The object of the ***CCAA*** is more than the preservation and realization of assets for the benefit of creditors, as several courts have underlined. In ***Chef Ready*** [*Hongkong Bank v. Chef Ready Foods* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.)]..., Gibbs J.A. said that the primary purpose is to facilitate an arrangement to permit the debtor company to continue in business and to hold off the creditors long enough for a restructuring plan to be prepared and submitted for approval. The court has a supervisory role and the monitor is appointed "to monitor the business and financial affairs of the company" for the court. The appointment of a monitor is mandatory when the court grants ***CCAA*** relief.

13 The Monitor acts on behalf of the Court for the benefit of all parties (*Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C. [In Chambers]); *Canadian Asbestos Services Ltd. v. Bank of Montreal, supra*). It is for that reason that I was prepared to grant a super-priority for the Monitor's fees and disbursements and those of its legal counsel.

14 All creditors may be affected by a stay imposed in the ***CCAA*** proceedings and there is at least the potential that all may benefit to some extent from maintaining the company as a going concern. Obviously, any operating creditors who are less than fully secured stand to benefit the most from a successful reorganization. However, I note in this case that UMC along with CWB supported the company's application for an extension of the original stay under the ***CCAA***. In terms of a mortgagee such as UMC, allowing the debtor company to continue as a going concern would negate the need for foreclosure proceedings and might result in the mortgagee receiving additional interest payments, if nothing else. Obviously, there is greater risk to the mortgagee in a falling real estate market. However, there is no indication of any such trend in the present case.

15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the ***CCAA***. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the ***CCAA*** costs. That is not to say that equity calls for an equal allocation of costs.

16 The Interim Receiver suggests that costs may be allocated differently between separate classes of creditors. This eventuality was anticipated in my Order of October 11, 2000. The Interim Receiver argues that UMC has no commonality of interest with the other major secured creditors and therefore may be treated differently. UMC does not dispute that it has some obligation in terms of ***CCAA*** costs but agrees with the Interim Receiver's assessment that it stands in a different position than the floor planners and CWB.

17 Six classes of creditors voted on a reorganization plan in *Keddy Motor Inns Ltd., Re* (1992), 90 D.L.R. (4th) 175 (N.S. C.A.). The appellants were some of the only creditors who were fully secured. They complained that the class of secured

creditors was too broad and that they should not have been placed in a class with creditors secured by non-core properties and mechanics' lienholders. Freeman J.A., who delivered the decision of the court, acknowledged that it might have been better if secured creditors of core properties had been placed in a separate class (see also *Wellington Building Corp., Re* (1934), 16 C.B.R. 48 (Ont. S.C.). However, he was of the view that no substantial injustice had occurred. In response to the appellants' contention that the plan was tailored to individual creditors, Freeman J.A. stated at p. 184:

> It necessarily follows that plans for broad classes of secured creditors must contain variations tailored to the situations of the various creditors within the class. Equality of treatment - as opposed to equitable treatment - is not a necessary, nor even a desirable goal. Variations are not in and of themselves unfair, provided there is a proper disclosure. They must, however, be determined to be fair and reasonable within the context of the plan as a whole.

18 Granted, that statement was made in the context of a plan of arrangement. Nevertheless, it is equitable rather than equal treatment which is the objective in ***CCAA*** proceedings.

19 In his article "Financing the Debtor in Possession", presented at the Tenth Annual Meeting and Conference of the Insolvency Institute of Canada, November, 1999 in Scottsdale, Arizona (online: e-Carswell, Insolvency.Pro), H. Alexander Zimmerman stated:

> It does appear fundamentally unfair, and counter-intuitive, that those with little or no economic incentive to allow the debtor to restructure should be asked to bear the cost and risk inherent in funding that restructuring by way of super-priority secured funding which primes (subordinates) their position. It also clearly represents a divergence from the principles in ***Kowal*** [*Robert F. Kowal Investments Limited v. Deeder Electric Limited* (1975), 9 O.R. (2d) 84 (C.A.)]. that, to charge property subject to a pre-existing lien in priority to such lien, the Court must find (a) the consent of such lienholder, or (b) a preservation of or realization upon such property enuring to the benefit of such lienholder, or (c) necessary preservation (of the property itself or for environmental or other public health and safety grounds).

20 I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from ***CCAA*** proceedings. The ***CCAA*** recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.

21 Under the circumstances, I conclude, as did the Interim Receiver, that UMC is in a different position than that of the other major secured creditors and it would not be equitable that it be allocated the same proportion of ***CCAA*** costs. I agree with the Interim Receiver's proposal that UMC be charged 15 percent of the Monitors fees and $500.00 of the Monitor's legal fees, the same percentage proposed for its share of the interim receivership costs. I note that UMC also agreed with this proposal.

22 Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.

23 Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.

24 Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.

25 An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered ***CCAA*** costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the ***CCAA*** proceedings there could have been no certainty as to the sale price of the land or UMC's share of the ***CCAA*** costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of ***CCAA*** costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.

26 I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above.

27 UMC argued that I should not make any allocation of costs if I choose not to agree with the Interim Receiver's proposal. In my view, there is nothing to preclude my deciding the matter now. The parties have had an opportunity to make submissions on the issue of allocation of ***CCAA*** costs and the principles that should be applied in such a determination. There is no need, as there was in*Canadian Imperial Bank of Commerce v. Wm. C. Rieger Co.* (1991), 126 A.R. 69 (Alta. Q.B.), for a special reference to the Master. It is in everyone's best interests that this matter be resolved now.

CONCLUSION

28 UMC is allocated 15 percent of the Monitor's fees, $500.00 of the Monitor's legal fees and five percent of DIP financing as its share of the ***CCAA*** costs. This is in addition to its share of the interim receivership costs as calculated by the Interim Receiver.

Order accordingly.

TAB 17

2014 ONSC 1531
Ontario Superior Court of Justice [Commercial List]

Royal Bank of Canada v. Atlas Block Co.

2014 CarswellOnt 2780, 2014 ONSC 1531, 238 A.C.W.S. (3d) 373

Royal Bank of Canada, Applicant and Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

D.M. Brown J.

Heard: February 13, 2014
Judgment: March 10, 2014
Docket: CV-13-10201-00CL

Counsel: S. Babe, for Applicant, Royal Bank of Canada
R. Fisher, for Business Development Bank of Canada
S. Friedman, for Receiver, KPMG Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Debtors and creditors
XIV Miscellaneous

Headnote

Debtors and creditors --- Miscellaneous
Respondent debtors manufactured various brick and concrete building and landscaping supplies at three facilities — Largest facility built and equipped with loans of $17.5 million from creditor BDC, $4.8 million from provincial government and $2.2 million from creditor RBC — BDC and RBC also provided other financing — In October 2013, receiver appointed over all of debtors' assets and undertakings — Receiver sold most assets through two agreements in which purchaser allocated purchase price between real property, equipment leases, equipment and inventory — Receiver accepted purchaser's allocations and proposed to distribute some $8.2 million to BDC and $3.46 million to RBC, deducting fees and expenses pro rata — BDC, owed approximately $17.39 million — Receiver brought motion for court approval of distribution of net sales proceeds from certain of debtors' assets between two main secured creditors — Motion granted — Nothing inappropriate in purchaser's assumption of equipment leases from RBC on undiscounted basis — BDC's objection to allocation of only $1 million to real property previously valued significantly higher weakened by failure to advance objection at earlier time — Evidence did not establish allocation inappropriate in any event — Receiver's proposed distribution reasonable in circumstances.

Table of Authorities

Cases considered by *D.M. Brown J.*:

B & M Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4587, 56 C.B.R. (5th) 313 (Ont. S.C.J.) — referred to

42 This Court approved the Receiver's fees and legal fees for the period up to November 30, 2013 in its December 20, 2013 order. As to the fees incurred after that date, in paragraph 21 of her affidavit Matson "sought clarification" of certain work performed by the Receiver and its counsel. In section 3.1 of the Second Supplement to its Third Report the Receiver provided detailed clarification. In light of that clarification, I conclude that the fees for which the Receiver sought approval were reasonable in the circumstances.

43 As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

(i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;

(ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;

(iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;

(iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.[5]

44 The Receiver responded to BDC's complaint about the allocation of certain time by reporting that it had only charged time for accounts receivable collections and the Holcim/Tackaberry claims to RBC. That addressed that complaint.

45 As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their allocation from BDC, and it was not aware that BDC took issue with the allocation until February 4, 2014.

46 I find it difficult to place must credence in an "11th hour" objection by a creditor to the receiver's proposed allocation of fees when the Receiver disclosed the proposed methodology at the start of the administration of the receivership estate, the creditor did not object, and the Receiver provided on-going, transparent reporting to the creditor of the fees incurred.

47 The Receiver also stated:

> The Receiver believes that BDC derived a significant benefit from the Receiver's operations and eventual sale to BBL. As discussed previously the DSL Appraisal makes it clear that the realizable values of Atlas' assets would have been significantly impaired absent a going concern sale when one compares the appraised value of \$6.5 million in a going concern type sale versus a value of \$1.5 million in a liquidation sale...The Receiver agrees with BDC that BBL paid more for all of the Atlas assets, and most notably the Hillsdale Equipment (as the Hillsdale plant is the only plant of the two sold in the First BBL Sale that BBL is operating), because of the Receiver's preservation of the Atlas customer base through continued operations during the receivership. This was of great benefit to BDC, perhaps more so than to RBC.

TAB 18

2018 NSSC 77
Nova Scotia Supreme Court

Atlantica Diversified Transportation Systems Inc. (Re)

2018 CarswellNS 231, 2018 NSSC 77, 290 A.C.W.S. (3d) 463, 59 C.B.R. (6th) 149, 8 P.P.S.A.C. (4th) 147

In the matter of: A Plan of Compromise or Arrangement of Atlantica Diversified Transportation Systems Inc.

Peter P. Rosinski J.

Heard: March 23, 2018
Judgment: April 4, 2018
Docket: Hfx 470769

Counsel: D. Bruce Clarke, Q.C., Leon Tovey, for Applicant
Gavin MacDonald, for Canadian Western Bank
Adam Crane, Heather Wyse, for BDO Canada Ltd.
Matthew Moir, for Trailer Wizards Ltd.
Gregory MacIntosh, for Federal Dept. of Justice

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Company operated trucking business, and many of trucks and trailers were leased from CW Inc. — CW Inc. sent demand letter for full balance owing under contract — Company was granted initial order under Companies Creditors Arrangement Act (CCAA) — Efforts were made to sustain company using CCAA but hope for revival was beyond reach, court-imposed stay expired, and parties agreed that CCAA proceedings should be terminated — This was motion to determine payment of administrative charge — Motion granted — Accounts of monitor, counsel and financial advisors was approved — Order limited administration fees to maximum of $75,000, and there was to be allocation on proportional basis — Dispute was over how administrative charge should be allocated among secured creditors — In circumstances of true lease, lessors were generally exempted from allocation of administrative expenses — Based on examination of relevant factors identified in jurisprudence and findings of fact, all trucks and trailers leased by company from CW Inc. represented true leases — CW Inc. was true lessor in relation to $6,480,416.64, and it had only been shown to have gained very modest actual direct or indirect benefit from CCAA proceedings — Remaining $595,401.97 of non-lease obligations owed by company to CW Inc. provided basis for conclusion that it was just and equitable to allocate some percentage of administrative charge to CW Inc. — Company's non-lease obligations of $595,401.97 accounted for 18.18 percent of remaining overall secured debt, and just and equitable allocation for CW Inc. was 20 percent of administration charge.

Table of Authorities

Cases considered by *Peter P. Rosinski J.*:

HSBC Bank of Canada v. Maple Leaf Loading Ltd. (2016), 2016 BCSC 361, 2016 CarswellBC 559, 34 C.B.R. (6th) 55 (B.C. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2004), 2004 NLSCTD 164, 2004 CarswellNfld 263, 5 C.B.R. (5th) 56, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re*) 241 Nfld. & P.E.I.R. 294, (sub nom. *Hickman Equipment (1985) Ltd. (Receivership), Re*) 716 A.P.R. 294 (N.L. T.D.) — considered

Kocken Energy Systems Inc., Re (2017), 2017 NSSC 215, 2017 CarswellNS 598, 51 C.B.R. (6th) 339 (N.S. S.C.) — considered

Medican Holdings Ltd., Re (2013), 2013 ABQB 224, 2013 CarswellAlta 513, 16 B.L.R. (5th) 327 (Alta. Q.B.) — considered

Respec Oilfield Services Ltd., Re (2010), 2010 ABQB 277, 2010 CarswellAlta 830, 68 C.B.R. (5th) 189, 28 Alta. L.R. (5th) 239, 17 P.P.S.A.C. (3d) 148 (Alta. Q.B.) — referred to

Western Express Air Lines Inc., Re (2005), 2005 BCSC 53, 2005 CarswellBC 72, 7 P.P.S.A.C. (3d) 229, 10 C.B.R. (5th) 154 (B.C. S.C.) — referred to

Winnipeg Motor Express Inc., Re (2009), 2009 MBQB 204, 2009 CarswellMan 383, 56 C.B.R. (5th) 265, 15 P.P.S.A.C. (3d) 242, 243 Man. R. (2d) 31 (Man. Q.B.) — referred to

Winnipeg Motor Express Inc., Re (2009), 2009 MBCA 110, 2009 CarswellMan 512, [2009] 12 W.W.R. 224, 59 C.B.R. (5th) 36, 245 Man. R. (2d) 274, 466 W.A.C. 274 (Man. C.A. [In Chambers]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — considered

s. 11.01 [en. 2005, c. 47, s. 128] — considered

s. 11.3(a) [en. 1997, c. 12, s. 124] — considered

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
Generally — referred to

MOTION to determine payment of administrative charge.

***Peter P. Rosinski J.*:**

Introduction

1 Corporations are deemed at law to be "persons". Incorporation may be seen to be the birth, and ceasing to operate, and eventual dissolution, as the death of the Corporation.

2 During their lives, corporations generate benefits for their shareholders, their employees and agents, and ultimately, the

community. When they fail to remain viable, the impact is widespread.

3 When corporations appear to be failing to remain viable, because their lifeblood (cash flow) is being drained to the extent that the coffers of the corporation are overwhelmed by their present payment obligations to others, the *Companies Creditors Arrangement Act*, RSC 1985, c. C — 36, (CCAA) provides a means to resuscitate, by financial restructuring, the company's operations to a viable condition.

4 Atlantica Diversified Transportation Systems Inc. (ADTS) is such a company.

Background

5 In his affidavit, sworn November 23, 2017, David Montgomery confirmed that he is its President. The company operates a trucking business from its head office in Burnside, HRM (Halifax Regional Municipality — "Halifax"), Nova Scotia, with a yard(s) in Moncton, New Brunswick. The chief place of business is at Burnside, Halifax. It then had 102 employees and revenues for 2017 were expected to be in the range of $15-$17 million.

6 It was not disputed that, at the time of the CCAA Initial Order, ADTS had approximately 137 trucks and 147 trailers in its operation, and that they ranged over Ontario, Québec, and the Atlantic provinces. As I discuss below, not all those were leased from Canadian Western Bank/Canadian Western Bank Leasing Inc. (for convenience, collectively or individually, CW).

7 On August 24, 2017, CW sent a demand letter for the full balance owing under the Contract, being $628,836.97 (as of August 22, 2017, plus accruing interest, fees and costs of enforcement).

8 On November 24, 2017, ADTS filed a Notice of Application in Chambers seeking *inter alia*, "an initial order under the CCAA, granting a stay of proceedings... the appointment of a person to monitor the business and financial affairs of the Applicant, and such other relief...".

9 An Initial Order was granted by Justice Chipman on December 7, 2017.[1]

10 The terms of the order included that ADTS "shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, but expressly not including any accounts receivable factored or sold to Accutrac Capital Solutions Inc., prior or subsequent to the date of this order (together, the "Property"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property.

11 Furthermore, the Order reads at clause 10 and 11, respectively:

> 10 -The Applicant shall, subject to such requirements as are imposed by the Monitor and under any agreements for debtor-in -possession financing which may hereafter be approved by this court, have the right to:
>
> . . .
>
> (b) return to any equipment lessor any asset under lease not required for the ongoing operations of the Business;
>
> . . .
>
> 11 -Until and including the 22nd day of December 2017 or such later date as this court may order (the "Stay Period"), no claim, grievance, application, action suit, right or remedy, or proceeding or enforcement process in any court, tribunal or arbitration association (each a "Proceeding") shall be commenced continued or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor or with leave of this Court, and any and all proceedings currently underway against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order

of this Court. Not to limit the generality of the foregoing [included in the draft order were the following provisions — they were excised by Justice Chipman on that day]:

a) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant any "fully paid for" units seized by them described in Exhibit "B" of the supplemental affidavit of David Montgomery; and

b) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant transport records, equipment, personal effects and other documents required for the business of Atlantica seized by them as described in paragraph 7 of the supplemental affidavit of David Montgomery.

12 A second Order from Justice Chipman on December 22, 2017, on motion of ADTS, included:

The stay of proceedings in the Initial Order is hereby lifted to the extent necessary to permit Canadian Western Bank or Canadian Western Bank Leasing Inc. to continue to enforce its *lease or security interest* with respect to the units *seized prior to the date of the Initial Order*, and waiving any requirement for prior notice of sale or disposition to any party pursuant to section 60 of the Personal Property Security Act [Nova Scotia] and the equivalent sections of the legislation of any other province;...

[My italicization]

13 Regrettably, although efforts were made to sustain the company using the CCAA, by February 20, 2018, the hoped-for resuscitation was beyond reach. The court imposed stay expired that day.

14 The parties agreed that the CCAA proceedings should be terminated, after the court addresses payment of the Administrative Charge, and Directors Charge (a $50,000 contingency fund referenced in the Initial Order, "to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of these proceedings, but subject however to the limitations contained in CCAA subsection 11.51 (4)."). Both these charges rank in priority to the secured creditors, other than the monies owing to the Canada Revenue Agency. I confirm that, concurrently, I have approved the accounts of the Monitor, its counsel and PwC, and counsel for ADTS.

15 Next, I will address the payment of the Administrative Charge.

How should the maximum allowable $75,000 available for the Administrative Charge be allocated?

16 The Initial Order provided for payment of, upon approval by the Court, the "Administrative Charge"; namely, professional fees and disbursements of the legal counsel and financial advisors of ADTS (Burchells LLP and PwC respectively); BDO Canada Limited (the Monitor) and its legal counsel (Patterson Law).

17 That Order limited those fees to a maximum $75,000. Though their fees and disbursements were greater for each, proportionally that $75,000 presently breaks down among them as follows:

Patterson Law — $12,552.67

BDO Canada Limited — $41,973.88

Burchells LLP — $12,197.04

PWC — $8,276.42

18 This decision deals with the disputed issue of how the court should allocate the above-noted professional fees and

disbursements among the secured creditors. It is noteworthy that the CCAA process ended prematurely-namely, without a restructuring plan in place.

19 No one takes issue with the Monitor's proposal that the allocation be based upon "a proportional basis... using the most current balance of debt as the denominator". It is premised on the notion that secured creditors ought to be somewhat responsible to pay to collect those debts owing to them because the prospect thereof flows from such plans of compromise or arrangement.

i) The position of the parties at the hearing

20 BDO has recommended in its Third Report filed February 15, 2018 (a portion thereof excerpted as Exhibit "1" in the hearing), that CW bear approximately 73% of those fees based on their percentage of monies owed ($7,357,700) of the total $10,037,632.80.

21 CW disagrees. It says as a true lessor of its trucks/trailers, it is entitled to either be exempted entirely from the allocation process, or if not, should only bear a modest allocation therefor, based on the remaining non-lease obligations owed to it by ADTS, i.e. the $595,401.97, as of December 13, 2017 or some similar figure as of the hearing date, March 23, 2018.

22 According to David Miller's March 2, 2018, affidavit (Senior Assistant VP and Manager Equipment Leasing Group with CW), as of December 13, 2017, ADTS owed to CWB, pursuant to a 2014 Master Loan and Security Agreement approximately $595,401.97, and to CWL, $6,480,416.64 pursuant to a 2010 Master Lease Agreement a total of $7,075,818.61.

23 No other parties served took positions on this issue.

ii) What the jurisprudence says about CW's argument that it should be exempted from allocation of the Administrative Charge, because it is a "true lessor", and not a secured creditor regarding the truck/trailer leases

24 At this juncture, it is useful to examine the state of the jurisprudence regarding whether, and when, true lessors should be exempted from the allocation.

25 A helpful summary of the general principles applicable to such allocations is set out by Justice Masuhara in *HSBC Bank of Canada v. Maple Leaf Loading Ltd.*, 2016 BCSC 361 (B.C. S.C.):

> 34 Allocation is an exercise in judicial discretion. The overall result must be one that is fair and equitable. This does not necessarily equate to equality. Usually, there will be some who do better than the average and other who do not.
>
> 35 There are numerous approaches and methodologies to allocations. In some areas professional careers have been built in propounding allocation methodologies.
>
> 36 A summary of the general principles governing the allocation of receiver's costs was recently provided in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531at para. 43 by Justice D.M. Brown as follows:
>
> > (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
> >
> > (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
> >
> > (c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
> >
> > (d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
> >
> > (e) An allocation does not require a strict cost/ benefit analysis or that the costs be borne equally or on a *pro rata* basis;
> >
> > (f) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.

37 Other cases handed up on this point included: *Hickman Equipment (1985) Ltd. (Re)*, 2004 NLSCTD 164; and *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

26 CW has argued that it provided leased trucks and trailers to ADTS, and the circumstances of that financial arrangement reflect a "true lease" rather than a "security interest" or "financing lease".

27 The persuasive jurisprudence leads me to conclude that in circumstances of a "true lease", lessors are generally exempted from the allocation of such administrative expenses: *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 (Man. Q.B.), leave to appeal refused, 2009 MBCA 110 (Man. C.A. [In Chambers]), per Freedman JA, in Chambers (who notably favourably commented on the hearing judge's use and application of relevant legal principles); *Western Express Air Lines Inc., Re*, 2005 BCSC 53 (B.C. S.C.); *Respec Oilfield Services Ltd., Re*, 2010 ABQB 277 (Alta. Q.B.).

28 Ultimately, what is just and equitable is largely determined by the facts of each case. Therefore, at Appendix "A", I will set out in detail what Justice Suche stated in *Winnipeg Motor Express Inc., Re*, 2009 MBQB 204 (Man. Q.B.).

29 Based on my examination of the relevant factors identified in the jurisprudence, and my findings of fact, all the trucks and trailers, which were leased by ADTS from CW represent "true" leases.

30 The parties represented facts, and presented evidence, to the effect that:

1. CW leased 82 vehicles to ADTS. 27 were returned to possession of CW in November 2017 *before* CCAA proceedings were commenced. Of the 55 remaining after the expiration of the court-ordered stay on February 20, 2018 (two were those of the Warren Group/ Vaughan Sturgeon, and are to be returned March 26, 2018), 24 were delivered to the Rexton, and Moncton, New Brunswick premises for pickup by CW during the CCAA proceeding.

2. The remaining 29 were still outstanding as of March 10, but only 9 were still unreturned to CW on March 23, 2018.

31 CW's counsel takes the position that it is not just and equitable that it should bear 73% responsibility for the $75,000 flowing from the approved Administrative Charge, since approximately 91% of the money owed by ADTS to CW arises from "true leases", and only the remaining 9% arises from non-lease obligations. CW agrees that the 9% non-lease obligations amount *may* provide a basis for some modest allocation against it.

32 Moreover, CW notes that it received no lease payments from ADTS for a period of over two months during the CCAA proceeding. It was suggested that ADTS did not have sufficient funds throughout to fully pay CW's lease payments. Notably, once CW began seizing its trucks and trailers (per Alton Bubar Sales, Ltd.) ADTS's core source of revenue flow was being cut off, consequently ADTS commenced the CCAA proceeding. However, it is noteworthy that *ADTS's obligation to make these payments to CW remained even during the CCAA process*, as they were not subject to a court-ordered stay, by operation of Section 11.01 of the CCAA, which section reads:

No order made under section 11 or 11.02 has the effect of

a. prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

b. requiring the further advance of money or credit.

33 Notably, Section 11, which sets out the general power of the court, also circumscribes the power of the court ("subject to the restrictions set out in this Act"). It states in part:

... If an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, *subject to the restrictions set out in this Act*, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

34 Based on that authority, CW had made a motion, filed January 25, 2018, to compel ADTS to pay the outstanding lease obligations, but in response to the expiration of the stay of proceedings of February 20, 2018, the motion was withdrawn.

35 CW further argues that it received no actual "real and meaningful benefit", nor would it have received any potential benefit from the CCAA proceeding.

36 Although BDO takes no position regarding whether CW has "true leases" or not, it argues even if that is the case, true lessors can be allocated some of the relevant costs, provided it is just and equitable in all the circumstances.

37 BDO suggests there were actual benefits because the CCAA process which appointed BDO as monitor, imposed statutory obligations upon it to keep all the parties informed etc. and to treat them similarly, while also practically providing a central contact entity which permitted a more organized processing of information and assets/monies which reduced the efforts that CW may have had to make in order to obtain such information (e.g. ADTS was given a list of vehicles and where they were, as well as access to information that a typical creditor would not receive, in contrast to the pre-CCAA — see paragraphs 15 - 19 of Kevin Woycheshin, Assistant VP and Manager of CW, sworn affidavit of November 29, 2017) and the Monitor's efforts to provide some measure of financial compensation to CW for use of its trucks and trailers — see clauses 14 (e), 36 and 44(b) of BDO's second report dated January 30, 2018 — see also the February 20, 2018 email from ADTS's counsel, Bruce Clarke, to CW's counsel attached to the March 23, 2018 letter to the court from BDO's counsel, which factual representations were presented to the court by agreement).

38 Moreover, BDO notes that the benefit of the CCAA process generally must be considered from the perspective of the collective good of the secured and unsecured creditors of the corporation, and the benefit derived by any single creditor need not be directly demonstrated, as that is inherently difficult in such circumstances.

39 CW argued that the CCAA process did not provide the *potential* benefits to it, that it might to other creditors, because its situation, involving specific assets which it still owned but were leased by ADTS, is a somewhat unusual and distinguishable circumstance.

40 Regarding the suggestion that it had the *actual* benefit of the organized return of its vehicles/trailers as a result of the CCAA process, it noted that although 24 were returned to CW at Rexton/ Moncton, New Brunswick, during the process, those returns were not necessarily all attributable to the Monitor's actions. Thereafter, 29 units were still unreturned to CW as of March 10, 2018. I observe that 9 were still unreturned as of March 23, 2018.

41 Moreover, CW says it suffered prejudice as a result of the process, because it could not seize the vehicles itself, though it was not being paid for its leased trucks and trailers while it remained entitled to be paid during the CCAA process; and which unreturned trucks and trailers continued to depreciate over that two-month period, and may have required repairs which were not effected in a timely manner.

42 BDO's counsel notes that, if the allocation to CW is based only upon the 9% of the non-lease obligations or $595,401.97, or a generalized notional benefit that it received as a result of the Monitor's availability and actions, such as the mere stabilizing economic effect of the CCAA proceeding to February 20, 2018, its roughly revised calculation suggests that the allocations to the top three creditors would be as follows:

Penske Truck Leasing Canada Inc.'s share would increase from 8.68% to 27.5%

Accutrac Capital Solutions Inc.'s share would increase from 15.09% to 48%

CW's share would decrease from 73.3% to 15%.

43 BDO says that, as an independent entity assisting the court, it is considered to be an officer of the court (*Medican Holdings Ltd., Re*, 2013 ABQB 224 (Alta. Q.B.), at paras. 39-42), and provided that its recommended allocation appears *prima facie* fair to the court, the onus is upon CW to establish that its situation is of such an exceptional nature as to be capable of rebutting that recommendation. I agree.

44 Therefore, since the onus upon CW to demonstrate its circumstances are one of a "true lessor" has been satisfied, it should be exempted from the allocation, except to the extent that other parties have satisfied the court that either:

> CW received an *actual* direct or indirect ("real and meaningful") benefit;
>
> or
>
> they can otherwise elucidate a sufficiently articulable *potential* direct or indirect benefit that CW could have received (*Winnipeg Motor*, at para. 41, and *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.) per Hall J, at para. 17) which would justify concluding, it would be fair and equitable to include some allocation of the Administrative Charge against CW.

45 BDO urges the court to follow the Monitor's recommendation as being "just and equitable" in all the circumstances.

Conclusion

46 I have found that CW is a true lessor in relation to the $6,480,416.64 referenced in the March 2, 2018 affidavit of David Miller. In relation to that amount CW has at best only been shown to have gained a very modest actual ("real and meaningful") direct or indirect benefit from the CCAA proceeding.

47 Insofar, as potential benefits that could have accrued to CW due to the CCAA proceeding, such a quantification is particularly difficult.

48 As Justice Freedman reiterated in *Winnipeg Motor*, at para. 40:

> ... The question whether the restructuring judge can allocate priority *before* the outcome of the restructuring is known was a matter of first instance. The restructuring "judge had acknowledged as much, noting in her decision that" the issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152, at paragraph 21).

49 Nevertheless, the remaining $595,401.97 of non-lease obligations owed by ADTS to CW, as of March 2, 2018, provide a basis for the court to conclude that it is just and equitable to allocate some percentage of the Administrative Charge to CW.[2]

50 It is fair, just and equitable that, CW compensate the effort to recover some of its owed income from the truck and trailer leases, and monies from its secured CSC/Master Loan obligations.

51 ADTS's $595,401.97 non-lease obligations account for 18.18% of the remaining overall secured debt ($10,037,632.80 less [$7,357,700 - $595,401.97]) $3,275,334.77.

52 In my view, a just and equitable allocation for CW is 20% of the Administration Charge - $15,000.

Motion granted.

Appendix "A"

THE PARTIES AND THEIR POSITIONS

Heller

7 Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of

the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

8 Heller supports the monitor's recommendation.

GE

9 GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

10 In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

11 GE supports the monitor's proposed allocation.

Paccar

12 As at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

13 Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

14 Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

15 It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

16 These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

17 Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

18 These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

19 When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

20 Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

21 Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts to altering the security arrangements between WME and its creditors, which is something that should not be done.

22 Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The

monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

23 *Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease*. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

24 BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. *Since the date of the hearing, I have made an order of bankruptcy against WME*.

25 I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

26 *Both Stoughton and Maxim claim to be "true" lessors*. The significance of this issue is twofold; s. 11.3(a) of the *CCAA* provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

27 Section 11.3(a) was added to the *CCAA* in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2278 (B.C. C.A.) (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the *CCAA* into line with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), which has a similar provision concerning proposals.

28 The leading authority on the proper interpretation of s. 11.3(a) is *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (B.C. S.C.) (QL). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). *The distinction between a true lease — that is, a contract of bailment also known as an operating lease — and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost*.

29 It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. *Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects*.

30 At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

31 All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

32 In *Smith Brothers*, Bauman J. concluded that *s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay*, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the *CCAA*. He says:

> 56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

33 And further, at para. 61:

> 61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment.* All this being so, the result has some unintended consequences, which I address later on in these reasons.
35 I turn, then, to the two creditors in this case, Maxim and Stoughton. *I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.*
36 I say this because a review of *Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment* — it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. *The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.*
37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.
38 *The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on Western Express Air Lines Inc., Re*, 2005 BCSC 53, 10 C.B.R. (5th) 154 (B.C. S.C.), over that in *Paccar of Canada Ltd. v. Peterbilt of Ontario Inc.* (2005), 18 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).
39 *The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a).* In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.
40 *The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.*

THE LAW

41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re*, 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.). While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. *It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.*
42 In *Hickman Equipment (1985) Ltd., Re*, 2004 NLSCTD 164 (N.L. T.D.), at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

> (1) The allocation of costs ought to be fair and even handed amongst all creditors upon an objective basis of allocation;
>
> (2) *The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;*
>
> (3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;
>
> (4) *Exceptions to a uniform application of cost to creditors ought not to be lightly granted.* Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and

determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) *Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable*.

[my italicization]

Footnotes

1 In the Atlantic Provinces, Superior Courts have adopted model CCAA and Receivership Orders — specifically contained in Practice Memorandum No. 8 to the *Nova Scotia Civil Procedure Rules*.

2 In conjunction with the mere fact of the potential general benefit of the orderly attempt to restructure the business of ADTS under court supervision, arising in part from the court-ordered stay, which can prevent an accelerated domino effect that could negate the restructuring attempts otherwise, although the repercussion on the business which is seeking CCAA protection can be negative, as well as positive — see *Kocken Energy Systems Inc., Re*, 2017 NSSC 215 (N.S. S.C.).

TAB 19

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

In the Matter of the Companies' Creditors Arrangement Act R. S. C. 1985, c.C - 36, as amended

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to

estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.

Table of Authorities

Cases considered by *J.E. Topolniski J.*:

Afton Food Group Ltd., Re (2006), 18 B.L.R. (4th) 34, 2006 CarswellOnt 3002, 21 C.B.R. (5th) 102 (Ont. S.C.J.) — followed

Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 8 C.B.R. (5th) 34, 2005 SKQB 24, 2005 CarswellSask 22 (Sask. Q.B.) — considered

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 68, 2005 SKQB 252, 2005 CarswellSask 410 (Sask. Q.B.) — referred to

Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

Hess, Re (1977), 23 C.B.R. (N.S.) 215, 1977 CarswellOnt 68 (Ont. S.C.) — followed

Hickman Equipment (1985) Ltd., Re (2002), 2002 CarswellNfld 154, 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126, 642 A.P.R. 126 (Nfld. T.D.) — considered

Laidlaw Inc., Re (2002), 2002 CarswellOnt 790, 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2007), 30 C.B.R. (5th) 59, 2007 CarswellOnt 1029 (Ont. S.C.J. [Commercial List]) — considered

Nelson, Re (2006), 2006 CarswellOnt 4198, 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) — referred to

Northland Bank v. G.I.C. Industries Ltd. (1986), 1986 CarswellAlta 426, 45 Alta. L.R. (2d) 70, 60 C.B.R. (N.S.) 217, 73 A.R. 372, [1986] 4 W.W.R. 482 (Alta. Master) — considered

Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re)* 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

843504 Alberta Ltd., Re (2003), 30 Alta. L.R. (4th) 91, 4 C.B.R. (5th) 306, 351 A.R. 222, 2003 CarswellAlta 1786, 2003 ABQB 1015 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

> (i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);
>
> (ii) duplication;
>
> (iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);
>
> (iv) mathematical errors ($47,979.39); and
>
> (v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

> (i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;
>
> (ii) HSBC would be unaffected by the *CCAA* proceedings;
>
> (iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and
>
> (iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous ...
>
> ...The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the

degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

(a) allowing the trustee a fair compensation for his services;

(b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and

(c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

TAB 20

2005 ABQB 431
Alberta Court of Queen's Bench

Agristar Inc., Re

2005 CarswellAlta 841, 2005 ABQB 431, [2005] A.W.L.D. 2828, [2005] A.J. No. 727, 12 C.B.R. (5th) 1, 140 A.C.W.S. (3d) 971

In the Matter of the Companies' Creditors Arrangement Act R.S.C. 1985 c. C-36, as Amended

And In the Matter of Agristar Incorporated, Agristar Foods Inc., Agristar Farms Ltd., Agristar Produce Ltd. and Agristar Produce (Sask.) Ltd.

Hart J.

Heard: May 10, 11, 2005
Judgment: June 10, 2005
Docket: Calgary 0401-00548

Counsel: Larry B. Robinson, Q.C. for Applicant
Howard A. Gorman for Respondents

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.g Monitor

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues
Applicant acted as consultant and court-appointed monitor to debtor group of companies in connection with Companies' Creditors Arrangement Act proceedings — Applicant had been retained prior to initial order dated January 14, 2004 — Initial order stated applicant had right to be paid reasonable fees and disbursements incurred both prior to and following order — Applicant invoiced debtors $447,745.30 for consultant/monitor fees and further $33,929.70 through to December 2004 — Applicant also submitted disbursement invoice for $5,700 dated January 7, 2005 — Applicant was terminated by November 10, 2004 order with replacement monitor appointed — Plan of arrangement was presented on December 16, 2004 — Applicant brought application to pass accounts — Accounts allowed with fees reduced by 40 percent and all disbursements allowed — Debtors' restructuring was not particularly difficult — Debtors had sound core business which required fresh refinancing together with liquidation of unproductive assets — It was noteworthy that new monitor presented plan in one month while applicant was unable to in ten months and replacement monitors fees totalled only $133,139.50 from September 2000 to February 2005 — Applicant had minimal knowledge and experience in Act proceedings and spent too much time unproductively — Tangible results of applicant's efforts were very limited and its fees were clearly unjustified and excessive.

Table of Authorities

Cases considered by *Hart J.*:

Belyea v. Federal Business Development Bank (1983), 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

Tariffs considered:

Alberta Rules of Court, Alta. Reg. 390/68
Sched. C, Tariff of Costs, column 5 — referred to

APPLICATION by monitor to pass accounts in connection with *Companies' Creditors Arrangement Act* proceedings.

***Hart J.*:**

1 This is an application by Ian P. Makin and Associates Inc. (the Applicant) for a passing of its accounts rendered in connection with proceedings under the Companies Creditors Arrangement Act R.S.C. 1985, c. -36 as amended (the CCAA proceedings) wherein it acted as consultant and court appointed monitor for the debtor Agristar Group of Companies (the Respondents).

2 The Applicant had been retained to assist the Respondents prior to the January 14, 2004 Initial Order under the CCAA proceedings and was appointed monitor under that Order with the right to be paid "reasonable fees and disbursements ... incurred both prior to and following the making of this Order (which for greater certainty shall include any fees and disbursements of Ian P. Makin and Associates Inc. as a consultant to the Applicants prior to its appointment as the Monitor."

3 The essential issue on this passing of accounts is whether the fees charged, and possibly still remaining to be charged, by the Applicant to the Respondents are reasonable.

4 A leading authority on the factors to be considered when assessing the reasonableness or otherwise of the charges of a monitor or receiver is the decision of the New Brunswick Court of Appeal in the case of *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.).

5 The factors mentioned in *Federal Business Development Bank* include:
(a) the nature, extent and value of the assets being handled;
(b) the complications and difficulties encountered;
(c) the degree of assistance provided by the company, its officers or its employees;
(d) the time spent;
(e) the receiver's knowledge, experience and skill;
(f) the diligence and thoroughness displayed;
(g) the responsibilities assumed;
(h) the results of the receiver's efforts; and
(i) the cost of comparable services when performed in a prudent and economical manner.

6 In the present case the Respondents have been invoiced $447,745.30 for consultant/monitor services and a further $33,929.70 through December 31, 2004 with respect to this taxation of accounts. In addition, a "disbursement invoice" dated January 7, 2005 has been submitted in the further amount of some $5,700. representing previously unbilled disbursements.

7 In my view, having granted the Initial Order in this matter and virtually all subsequent Orders, this was not a particularly difficult or complex restructuring. The Respondents had a sound core business which required fresh financing together with a liquidation of unproductive assets. As the CCAA proceedings moved ahead, however, it became clear that there was a rupture of the relationship between the Applicant and the Respondents, most apparent with respect to fees. In the

