

Wallace

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2008 SKQB 152

Date: 2008 04 07
Docket: Q.B.G. No. 363 of 2008
Judicial Centre: Saskatoon

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT FOR THE BENCH
CREDITORS OF STOMP PORK FARM LTD

QUEEN'S BENCH
JUD. Centre of SASKATOON
APR 7 2008
FILED

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for the Stomp Pork Farms Ltd.
for the National Bank of Canada
for Farm Credit Canada
for Cargill Limited
for the Monitor, Meyers
Norris Penny Limited

FIAT
April 7, 2008

ROTHERY J.

[1] The applicant, Stomp Pork Farm Ltd., ("Stomp"), applied *ex parte* on March 27, 2008, for an initial order under the *Companies' Creditors Arrangement Act* (the "CCAA") for a stay of proceedings. I granted the order on March 28, 2008, after hearing submissions from counsel for Stomp, the National Bank of Canada ("NBC"), Farm Credit Canada ("FCC") and Cargill Limited ("Cargill"). Because debtor-in-possession ("DIP") financing was immediately required to cover the operating costs during the initial stay period, an issue arose between NBC and FCC as to the priority over assets created by the

- 2 -

proposed \$3 million DIP loan. Although Stomp's original application contemplated NBC as the DIP lender, NBC was not agreeable to this role unless its superpriority charge was allocated such that 50% of the outstanding indebtedness under the charge was secured by a first priority charge on the current assets (that is, accounts receivable and inventory of Stomp) and the other 50% of the outstanding indebtedness was secured by a first priority charge over Stomp's fixed assets (that is, all assets other than accounts receivable and inventory).

[2] FCC objects to this allocation because it, as the major secured lender over the fixed assets (land and buildings), would be liable for the costs of preserving the current assets which, by and large, were secured by NBC. In NBC's proposal, the \$3 million DIP loan would be repaid by Stomp at the end of the thirty day stay period by receipt of \$1.5 million from the Canadian Agricultural Income Stabilization Program - AgriStability Targeted Payment (the "CAIS TAP") and by the \$1.5 million proceeds of a pending sale of Stomp's feed mill.

[3] NBC and FCC have a *pari passu* agreement with Stomp whereby NBC, as the operating lender, has first ranking over Stomp's current assets (inventory and accounts receivable) to a maximum of \$18 million, then NBC and FCC share that security in a ratio of 15% to NBC and 85% to FCC. The proportionate sharing over the fixed assets is 15% to NBC and 85% to FCC. In essence, NBC's proposal for the superpriority created by the DIP financing meant that it would incur an additional risk of \$1.5 million over current assets, of which the total amount would be repaid by the CAIS TAP. FCC would lose 85% of \$1.5 million (\$1.275 million) because the proceeds of the feed mill would be used to repay the DIP loan to NBC.

- 3 -

[4] Although DIP financing is usually addressed at the first return date of the motion, rather than the initial stay brought as a result of an *ex parte* application, \$3 million had to be made available to Stomp immediately to preserve the inventory. The pigs had to be fed. Cargill, as a critical supplier, would not ship the feed until financial arrangements were in place. A decision was required with very little evidence before the court and without any benefit of the Monitor's analysis.

[5] FCC submitted that it would immediately provide the DIP financing for \$3 million, and argued that it was equitable that the DIP lender be granted a charge on inventory and accounts receivable, including the CAIS TAP. It agreed that the administration charge of \$100,000 ought to be allocated on a basis of a 50% charge on current assets and a 50% charge on fixed assets. Counsel for FCC argued that the DIP financing was required to preserve the inventory – that is, to feed the hogs – and the charge ought to be allocated against that inventory. The risks fall with the rewards.

[6] Although counsel for NBC objected to this proposal, I granted the initial order on this basis. By Friday afternoon, the trucks left Cargill's yard, just in time to replenish the dwindling feed supply.

[7] Five days later, on April 2, 2008, counsel for NBC applied to return the matter to me the next afternoon, seeking an order that NBC be substituted for FCC as the DIP lender, and that I amend the initial order such that the DIP financing be allocated equally between the current assets and fixed assets as initially proposed by NBC.

- 4 -

[8] At the application on April 3, 2008, counsel for NBC argued that FCC was not capable of being the DIP lender because it had not, prior to NBC bringing this motion, advanced any funds to Stomp. Stomp had utilized monies from the NBC U.S. dollar account to meet payroll on March 31, 2008. Cargill had not been paid for the feed shipped to Stomp.

[9] As it turned out, and unknown to NBC at the time, FCC advanced funds to Stomp as soon as Stomp requested them, that is, the same day that NBC launched this application. Stomp decided on its own to utilize NBC's U.S. dollar account to meet payroll. Cargill was paid the morning of this application.

[10] Counsel for Stomp brought another motion, concurrent with NBC's motion, to amend the initial order to allow all U.S. creditors to be paid for expenses they were, and will continue to incur, in finishing the hog inventory for market. That amendment to the initial order, consented to by all parties to the motion, also directed that NBC's U.S. dollar account be replenished from the DIP financing.

[11] Stomp's counsel submitted that FCC ought to continue as the DIP lender. All arrangements for the DIP financing are now in place and necessary bank accounts are operational. Any disruption in this financing arrangement would set Stomp back in its attempts to provide a plan or proposal to the court on the return date of April 22, 2008.

[12] It is obvious that this application was premature. No crisis was looming. There is no need to substitute NBC as the DIP lender. Oppositely, at this stage, it would be counterproductive. NBC's application to be substituted as the DIP lender is dismissed.

- 5 -

[13] NBC's other application is to revisit the DIP financing charge against inventory and accounts receivable. NBC's motion is advanced on the basis that my decision was made without the benefit of case authority, without evidence of liquidation values of the assets, and without the benefit of a report from the Monitor. I agree that this was a decision that was made at the "eleventh hour" and with very little relevant evidence.

[14] I recognize the legal principle that there must be an equitable allocation of costs among the creditors in a CCAA application. See: *Re Hunters Trailer and Marine Ltd.* (2001), 30 C.B.R. (4th) 206 (Alta. Q.B.). And see: *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (4th) 156 (Ont. S.C.J.).


[15] Risk allocation is determined by the court with the assistance of its Monitor's assessments and recommendations. Because of the urgency of this situation, the initial order placed the risk with the security that immediately benefitted from it, that is, the current assets. Half of that loan will be recouped from the CAIS TAP. That being said, the Monitor's recommendations would be helpful. Meyers Norris Penny Limited has the expertise to analyze Stomp's situation and to recommend an equitable approach to allocating the DIP lender's charge at the first return date of April 22, 2008. Counsel for FCC supports this concept. And, counsel for NBC suggests it as an alternative to reallocating the cost now.

[16] It is hereby ordered that this part of NBC's application be adjourned to April 22, 2008. The Monitor is directed to file a report with the court, and to serve all parties to this motion, by April 18, 2008. The Monitor's report is to provide its recommendations on the fair and equitable allocation of any future DIP financing. As

- 6 -

well as any other information the Monitor considers relevant, it should consider the proportionate amounts of total aggregate indebtedness of Stomp to each of NBC and FCC and it should consider the relative liquidation values and fair market values of Stomp's current assets and fixed assets.

[17] For the time being, the DIP lending will be provided by FCC in accordance with a Revolving Demand Credit Agreement dated April 3, 2008 (and appended to the Monitor's report of April 3, 2008), which replaces the Commitment Letter referred to in paragraph 33(a) of the Amended Initial Order.


A. R. Rothery