

QUEEN'S BENCH FOR SASKATCHEWAN

Date: 2008 10 17
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
CREDITORS OF STOMP PORK FARM LTD.

Counsel:

M. K. Anderson & S. M. Sinclair
J. A. Hesje, Q.C.
L.A. Widdup
I. A. Sutherland
G. A. T. Meschishnick
G. J. Scharfstein, Q.C.
D. M. A. Stack

for the applicant
for Farm Credit Canada
for the National Bank of Canada
for Cargill Limited
for the Monitor, Meyers Norris Penny Limited
for Agracity Ltd.
for the University of Saskatchewan

FIAT
October 17, 2008

ROTHERY J.

[1] Counsel for Stomp Pork Farm Ltd. ("Stomp") applies for court approval of the sale of its feed mill located at North Battleford, Saskatchewan to the University of Saskatchewan.

Counsel for Agracity Ltd. ("Agracity") opposes the approval of this sale, and seeks an adjournment to allow it to obtain financing for its offer to purchase the feed mill.

[2] Under Stomp's restructuring plan pursuant to the C.C.A.A., Ivan Stomp ("Ivan") was permitted to market the remaining fixed assets still owned by Stomp. Such sale of assets

was subject to further order of the court to ensure that Stomp's creditors were protected in the process. Those assets included the feed mill which is subject to mortgages in favour of Farm Credit Canada ("FCC") and the National Bank of Canada ("NBC").

[3] The evidence is that Ivan, on behalf of Stomp, pursued buyers of the feed mill. He first negotiated with Jason Mann ("Mann"), one of the directors of Agracity. Discussions throughout the spring culminated with Agracity's counsel sending to Stomp's counsel an offer to purchase for \$3 million, subject to financing and court approval, among other things. The evidence is that Stomp executed the acceptance of the Agracity offer to purchase on July 16, 2008, but did not deliver the agreement to Agracity. Not too long before July 16th, Agracity became aware that Stomp was in C.C.A.A. proceedings, and any sale of the feed mill was subject to court approval. This worried Agracity because it was concerned this agreement might be used to aid Stomp in shopping for a better offer. Whether this happened or not is incidental to what I must decide, but by August 6, 2008, Stomp received an offer to purchase from the University of Saskatchewan ("U of S") for \$3.25 million and a healthy non-refundable deposit if court approved.

[4] Agracity was made aware of the U of S offer, and Stomp's counsel advised Agracity that, because there was no delivery of the accepted offer to Agracity, there was no binding agreement with it.

[5] Sometime between August 6 and August 15, 2008, Stomp's counsel invited both the U of S and Agracity to provide their best offers for the feed mill. Agracity took the position that Stomp was bound by its \$3 million offer, but was prepared to submit an offer of \$3.3 million, subject to financing. Agracity was prepared to provide a deposit of \$25,000 as well.

[6] On the recommendation of the Monitor, Stomp accepted the offer by the U of S. It was seen as the most attractive because it included a \$100,000 non-refundable deposit upon court approval and a second \$100,000 non-refundable deposit upon the Board of Governors' approval, which must be made by November 3, 2008. That offer is not subject to financing, but does require the approval of the Minister and Lieutenant Governor in Council, within 90 days of November 3, 2008.

[7] FCC, NBC, and Cargill all support Stomp's application for court approval of the agreement with U of S dated September 19, 2008.

[8] During argument, counsel for Agracity conceded that the court could not approve its \$3 million offer, because the U of S offer was better for Stomp's creditors. The issue of whether delivery was required to make it a binding contract became a moot point. Indeed, counsel is correct to concede that point. Delivery of the acceptance was a term of the agreement, and Stomp intentionally did not deliver it to Agracity. (See: *Beer v. Townsgate I Ltd.* (1997), 152 D.L.R. (4th) 671, (Ont. C.A.) at para. 59).

[9] Counsel for Agracity then stated that, because Ivan had led his client along during the early stage of negotiation, causing it time and expense, Agracity should be afforded the opportunity to arrange financing and present its \$3.3 million offer for court approval. That is a higher offer, and the court ought to allow an adjournment for financing because that is better for the creditors.

[10] Counsel for all other parties object to this adjournment, for the following reasons. The Monitor has already considered Agracity's \$3.3 million offer of August 15, 2008, and concluded the offer by the U of S was the best offer. While there will be some delay in obtaining final government approval of the U of S offer, the \$100,000 non-refundable deposit

upon court approval and the second \$100,000 non-refundable deposit by November 3, 2008 upon the Board of Governors' approval provide comfort to Stomp and the creditors. If final approval is not given, Stomp has \$200,000 for the creditors to offset any time delay. Furthermore, the U of S offer is not subject to financing. It is a major educational institution with the ability to close the transaction.

[11] Counsel for all the other parties are concerned that Agracity may not qualify for a \$3.3 million loan. It is a small entity, being a service provider to an organization of family farms called Farms and Families of North America Inc. Its gross sales for the year ending March 31, 2008 were somewhat higher than \$8 million.

[12] Understandably, when Agracity's offer was not accepted by Stomp after August 15, 2008, it did not incur any further costs in pursuing financing. In August, Agracity had discussions with the Business Development Bank of Canada to fully finance the loan for its \$3 million offer. However, no application was ever made because a \$15,000 loan processing fee was required. The result is that the court has no indication whether Agracity would even qualify for the \$3.3 million loan.

[13] The court does not know whether the U of S would continue to be interested in pursuing its offer if an adjournment were provided simply to see if Agracity qualifies for financing. Thus, for the sake of \$50,000, the adjournment may result in no potential buyer. This uncertainty and risk is of no benefit to Stomp's creditors. When one considers the additional professional fees created by the adjournment, the \$50,000 difference becomes even less significant.

[14] I agree with Agracity's counsel that Agracity may not have been fairly dealt with by Ivan. But Agracity's grievance against Ivan ought not to be visited upon Stomp's

creditors. That is no basis to grant an adjournment to allow Agracity to attempt to qualify for financing. At any rate, any unfairness in the process was corrected in mid-August when Stomp's counsel provided an opportunity for Agracity and the U of S to submit their best offers for review by Stomp and the Monitor.

[15] The only offer to purchase before the court at the moment is that provided by the U of S. Considering all factors, the offer by the U of S is the best offer for Stomp's creditors. I therefore grant my approval of the sale of the feed mill to the U of S.

[16] I initially indicated to Stomp's counsel that I would require that he return to court with a further application for the requisite vesting order upon completion of the sale of the feed mill to the U of S. On reflection, I do not find that necessary. The draft order approving sale in its present form clarifies that the vesting order appended as schedule "A" may only be issued upon confirmation by counsel that all conditions of closing have been satisfied. The draft order also grants leave for any party to return to court should any difficulties arise. Thus, it follows that the vesting order would not be issued unless all outstanding matters have been resolved.

[17] Order approving sale may be granted in the form of the draft order filed. That includes the order discharging Agracity's miscellaneous interest. However, Stomp is not entitled to any costs against Agracity. It is partially responsible for this turn of events.

[18] Finally, the stay of proceedings expires at 11:59 p.m. on November 10, 2008. The local registrar is directed to set aside Monday, November 10, 2008 at 10:00 a.m. (or such

other time in consultation with counsel) for the purposes of any further motions that may arise.


A. R. ROTHERY