COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-027026-178
(500-11-048114-157)

DATE: April 9, 2018

CORAM: THE HONOURABLE **FRANCE THIBAULT, J.A.**
PATRICK HEALY, J.A.
CAROL COHEN, J.A. (AD HOC)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

VILLE DE FERMONT
APPELLANT – Objecting Party
v.

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUEBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.
RESPONDENTS - Petitioners
and
BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY LIMITED
WABUSH LAKE RAILWAY COMPANY LIMITED
IMPLEADED PARTIES – Impleaded parties
and
FTI CONSULTING CANADA INC.
IMPLEADED PARTY - Monitor
and
SYNDICAT DES MÉTALLOS, sections locales 6254 et 6285
IMPLEADED PARTY - Objecting Party

JUDGMENT

[1] Appellant Ville de Fermont ("Fermont") challenges a judgment rendered on July 25, 2017[1] by The Honourable Mr. Justice Stephen W. Hamilton from the Superior Court, district of Montreal, dismissing its objection to the contractual allocation of the proceeds from a sale of immoveable assets in a restructuring context.

[2] Respondents operated in the mining sector near Fermont. They requested and obtained an initial order pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA") and the impleaded party FTI Consulting ("FTI") was appointed to serve as monitor throughout the *CCAA* proceedings[2].

[3] Approval was then sought and obtained from the Superior Court for the sale of the mine and related residential properties (the "Bloom Lake Properties"). As part of the sale, the purchaser proposed to allocate the sale price of $6.9 million amongst the assets purchased as follows: 58% for residential properties and a hotel, 22% for the mine, and 20% for the mining leases. This allocation, accepted by the respondents and by FTI, was drastically different than the relative values set out in the municipal evaluation (7% for the housing, 92% for the mine, and 1% for the mining leases).

[4] In first instance, Fermont did not challenge the sale price but argued that the allocation should reflect the relative property values as set out in the municipal evaluation.

[5] The judge refused to adopt Fermont's proposed allocation. In the absence of evidence that the purchaser was not acting at arm's length, the judge presumed that the contractual allocation was reasonable and that the burden of proving otherwise lay with the appellant. In his view, the appellant failed to rebut this presumption.

[6] The judge also relied upon the fact that the contractual allocation was accepted by the parties, including Fermont, without negotiation. Moreover, he held that there was no evidence to support Fermont's claim that the purchaser was motivated by tax considerations or benefits the purchaser might gain in challenging the municipal evaluation of the mine following the sale.

[7] The judge concluded that the actual sale price must be taken to be the current market value of the properties and held that Fermont's *pro rata* approach was inappropriate in the circumstances.

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1 2017 QCCS 3529.
2 2015 QCCS 169.

[8] It should be noted that Fermont would receive an additional $3.5 million in real estate taxes if its proposed allocation, based upon the municipal evaluation at the time of the sale, were adopted.

[9] Fermont raised four issues on appeal:

- Le juge de première instance a-t-il erré en fait et en droit sur l'analyse du caractère raisonnable de la valeur accordée aux actifs résidentiels pourtant accessoires à l'exploitation minière en cause?

- Le juge de première instance a-t-il erronément qualifié certains facteurs comme étant pertinents à l'évaluation de la valeur d'actifs miniers de la mine de Bloom Lake?

- Le juge de première instance a-t-il commis une erreur déterminante en concluant à l'inexactitude du rôle d'évaluation foncière de la Ville de Fermont, ainsi qu'en estimant que ce rôle n'était pas un indice fiable de la valeur des immeubles concernés?

- Le juge de première instance a-t-il manifestement erré en fait et en droit en avalisant l'allocation du produit de réalisation telle que proposée par l'acheteur alors qu'elle ne favorise aucunement l'intérêt public?

[10] More specifically, Fermont pleads that the judge erred when he failed to conclude that the residential properties were accessory to the principal asset sold (the mine). In support of this claim, Fermont argues that the judge erred by according probative value to the testimony offered by FTI's witness regarding the future value of the properties, and not giving greater weight to the testimony of Fermont's municipal assessor. Fermont also submits that the judge erred when he concluded that the sale price of the Bloom Lake Properties was representative of their real market value. In its view, the evidence presented before the judge was insufficient to rebut the presumption that the municipal evaluation was correct. Finally, Fermont pleads that in approving the allocation, the judge failed to take the public interest into account as he was required to do, unduly favouring private gain over the public good.

[11] The respondents argue that this Court may only intervene in cases such as this one in the presence of a palpable and overriding error. They urge the Court to recognize the presumption that the allocation provided by the arm's-length purchaser was reasonable, reiterating that the sale was not attacked by Fermont. In their view, the residential properties are not accessory to the mine and the sales process was fair, transparent and reasonable. The respondents further plead that the presumption that the municipal evaluation represents the market value of the properties was clearly rebutted.

[12] The impleaded party FTI agrees with the respondents that the judgment under appeal is owed significant deference, submitting that the sale process was fair, transparent and reasonable. In FTI's view, the negotiated sale price is the best indicator of the market value of the assets sold. To this end, FTI highlights that the first instance judge was not tasked with reviewing the municipal evaluation, which is currently being contested by the purchaser before the Tribunal administratif du Québec.

[13] The appeal in the present case should be dismissed.

[14] On the standard of review, the exercise of judicial discretion in matters subject to the provisions of the *CCAA* is accorded a high degree of deference[3]. Appellate courts across the country have agreed that, absent an error of law (reviewed for correctness)[4], intervention will only be justified in the presence of a palpable and overriding error[5].

[15] Fermont invokes two such errors: (1) that the judge erred by failing to apply the presumption that the property assessment roll is accurate and (2) that he erred in holding that the residential properties were of greater value to the purchaser than the mine.

[16] These submissions must be dismissed.

[17] The judge made no palpable or overriding error in retaining the contractual allocation of the purchase price for the Bloom Lake Properties. He also did not err in holding that the residential properties were of greater value to the purchaser than the mine.

[18] It should be noted that the presumption of accuracy of an assessment role is not absolute[6], especially given that the judge was not called upon to review the municipal evaluation. Rather, he was asked to determine whether the contractual allocation was reasonable. FTI and the respondents properly submit that the reasonableness of an arms-length contractual allocation was a fact he was entitled to presume in the absence of any evidence to the contrary. Moreover, where an allocation appears *prima facie* to be fair, as

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3 Janis P. Sarra, *RESCUE! The Compagnies Creditors Arrangements Act, 2nd edition*, Toronto, Carswell, 2013, p. 126, 181-182.

4 *8640025 Canada Inc. (Re)*, 2017 BCCA 303, para. 2; *Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91, para. 21; *Resort Funding LLC v. Fairmont Resort Properties Ltd.*, 2009 ABCA 265, para. 6; *Lexxor Energy Inc. v. Richter, Allan & Taylor Inc.*, 2003 ABCA 158, para 20.

5 *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, para. 29 cited in *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, Hilton, J.A.; *Imprimerie Mirabel inc. c. Ernst & Young inc.*, 2010 QCCA 1244, Dufresne, J.A.; Papiers Gaspésia inc. (Arrangement relatif à) (2003), AZ-50285203, Bich, J.A.; *Commission des droits de la personne et des droits de la jeunesse c. Provigo Distribution inc., division Maxi* (2002), AZ-50156157, Rochon, J.A.; *Aurora v. Safeguard Real Estate Investment Fund LP*, 2012 ABCA 58; *Edgewater Casino Inc. (Re)*, 2009 BCCA 40.

6 *St-Bruno-de-Montarville (Ville de) c. Grégoire*, 2011 QCCA 1689; *Corneliu Dumitrescu c Longueuil (Ville)*, 2017 QCTAQ 09315; *9073-4260 Québec Inc. c Paroisse de L'ascension-De-Notre-Seigneur*, 2013 QCTAQ 01621.

in the present case, the onus falls on the opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial[7].

[19] Fermont argued at length as to the reasonableness of the sale price as well as the actual value of the mine, especially in relation to the residential properties, submitting that the contractual allocation of the $6.9 million sale price as between the mine and the residential properties is "unreasonable". The judge considered these submissions, concluding (at paragraph 42) that it was reasonable for the purchaser to place relatively little value on the mine, which had been closed for several years and which was "more of a liability than an asset", having maintenance costs of $1.5 million per month. The judge concluded (at paragraph 48) that on the evidence, the municipal evaluation does not reflect the value of the mine and that he preferred to retain the contractual allocation, as set out in the arm's length sale.

[20] The judge also concluded that there was no evidence allowing him to accept the submission that the contractual allocation was made for reasons of taxation alone (paragraphs 45 and 46), and Fermont has pointed to nothing in the evidence which could lead to a different conclusion.

[21] Finally, the judge properly took the public interest into account when he considered the loss of tax income to Fermont resulting from the difference between the two proposed allocations (paragraph 43), emphasizing that Fermont had opposed neither the sale nor the purchase price. While public interest is one factor which should be considered by the judge, it is not the sole determining factor[8]. It may be regrettable that Fermont will lose significant tax income from the contractual allocation set out by the purchaser, but courts must consider and weigh all of the various interests at stake in a reorganization, not just the consideration of public interest[9].

[22] In the present case, the judge considered all of the pertinent factors, including public interest, and his decision to accept the contractual allocation is not marked by a palpable and overriding error.

[23] The exercise of judicial discretion in matters subject to the provisions of the *CCAA* is accorded a high degree of deference and the role of an appellate court is largely supervisory. Here, the judge made no palpable and overriding errors in assessing the evidence and the reasonableness of the contractual allocation, even though it differed significantly from the municipal evaluation.

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7 *Royal Bank of Canada* v. *Atlas Block Co. Limited*, 2014 ONSC 1531, para 43.
8 *Century Services Inc.* v. *Canada*, [2010] 3 S.C.R. 379, 413.
9 *Id.*

FOR THESE REASONS, THE COURT:

[24] **DISMISSES** the appeal, with judicial costs.

FRANCE THIBAULT, J.A.

PATRICK HEALY, J.A.

CAROL COHEN, J.A. (AD HOC)

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Date of hearing: March 14, 2018