TAB 14

Indexed as:

Royal Bank of Canada v. Fracmaster Ltd.

Between
Royal Bank of Canada and Royal Bank of Canada as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, plaintiffs, and
Fracmaster Ltd., defendant

[1999] A.J. No. 632

1999 ABQB 425

245 A.R. 138

11 C.B.R. (4th) 217

88 A.C.W.S. (3d) 741

Action No. 9901-08246

Alberta Court of Queen's Bench
Judicial District of Calgary

Paperny J.

Oral judgment: May 21, 1999. Filed: May 25, 1999.

(22 pp.)

Counsel:

B.P. O'Leary, for Arthur Anderson Inc. - Receiver/Manager.
V.P. Lalonde, for Alfred Balm.
B.A.R. Smith, Q.C., for the Outside Directors.
G.B. Davison, for Fracmaster Ltd.
T. Mallett, for BJ Services Company.
H.A. Gorman, for UTI Energy Corp.
J.P. Peacock, Q.C., E.W. Halt, G.G. Turnbull, for Calfrac Limited.
F.R. Dearlove, for Lending Syndicate.
W.E.B. Code, for Banque Nationale de Paris (Canada).
D.B. Higa, for Cananwill Ltd.
W. McDonald, Jr., Q.C., for TrizecHahn.
M.G. Damm, for Various Employees.

A.G.P. Shewchuk, for Various Shareholders.
L. Robinson, for TD Asset Management Ltd.

REASONS FOR DECISION

1 **PAPERNY J.** (orally):-- This is an application to approve the sale of all or substantially all of the assets of Fracmaster Ltd. ("Fracmaster"). It is brought by the receiver-manager appointed by this Court on May 17, 1999 (the "Receiver") and considers the role of the Court and of a Court-appointed receiver upon such a motion.

I. BACKGROUND AND FACTS

2 On March 18, 1999, LoVecchio J. granted an order pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (CCAA) imposing a stay of proceedings and appointing Arthur Anderson Inc. ("Arthur Anderson") as the monitor (the "Monitor") of Fracmaster. On May 14, I heard arguments from various parties on numerous applications, and I extended the stay to May 17. The disposition of those applications is embodied in my reasons for decision of May 17, 1999.

3 On that date I granted an order lifting the stay so that the primary secured creditors could enforce their security. The primary secured creditors are the Royal Bank of Canada ("Royal Bank"), Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada (together, the "Syndicate"). Royal Bank also has a separate interest as operating lender. I refer to these primary secured creditors, collectively, as the Syndicate.

4 On May 17, I granted the Syndicate's application to appoint Arthur Anderson as Receiver of Fracmaster, on certain terms and conditions. From the valuation information available at that time, it appeared that there was insufficient equity in Fracmaster to satisfy fully the claims of the Syndicate. Consequently, there did not appear to be any remaining equity in Fracmaster for the secondary secured creditor, the unsecured creditors or the shareholders. The Syndicate had requested that I immediately direct the Receiver to sell substantially all of Fracmaster's assets to UTI Energy Corp. ("UTI"). As I stated (para. 44):

> In my view the purpose of the appointment of the Receiver would be largely defeated were I to fetter his discretion in that regard....I am confident, given his prior involvement in this matter, that he will be able to take whatever immediate action he deems necessary and to report to the Court as required.

At paragraph 46 of that decision, I set out some of the terms of the Receiver's appointment, including:

> The Receiver shall report to this Court at the earliest opportunity,...as to its recommendation with respect to a sale of Fracmaster's assets, or such other immediate action as it may deem appropriate for the benefit of all claimants, including the secured creditors.
>
> The Receiver may from time to time apply to this Court for advice and direction in the discharge of its powers and duties...

5 The Court appointed the Receiver recognizing that its previous involvement with Fracmaster as

Monitor would be of great assistance. For example, the Receiver had observed the previous sale process. At paragraph 40 of my May 17 decision, one of the reasons I rejected the UTI offer under the CCAA was the absence of evidence from an independent source as to the integrity of that previous process. The Court left open to the Receiver the possibility of recommending the UTI offer, or either of the other offers, without more, if it could comfortably make that recommendation bearing in mind the concerns I had raised.

6 On May 18, the Receiver returned to the Court and recommended to it a new process to fulfill its mandate. The Receiver proposed that the process should respond to a number of concerns I had raised in my reasons, including the need: (1) to resolve the uncertainty surrounding Fracmaster's business; (2) to have a process that would be fair, binding all parties to the same rules; and (3) to bring finality and closure to the process of selling the assets. The Receiver proposed a sealed bid process with bidding to close at 2:00 p.m. on May 20; the bids to be opened shortly thereafter; and the Receiver to make an application at 10:00 a.m. on May 21 for Court approval of a bid.

7 At that time all known interested parties appeared before the Court and made submissions as to the fairness, timing and method of conducting such a re-bid process. Fracmaster, the Syndicate and UTI were opposed to the process. Fracmaster noted that the Receiver, while acting as Monitor, had not expressed any criticisms of the previous sale process undertaken and expressed concerns about further uncertainty. The Syndicate submitted that it continued to support the UTI bid and intended to continue to do so even if I granted the Receiver's application for approval of a re-bid process. UTI submitted that the entire re-bid process put it at a disadvantage, because all interested bidders were now aware of the amount and terms of its offer.

8 The Receiver became aware of a side agreement between the Syndicate and UTI with respect to the UTI Offer prior to making its recommendation to the Court on a sale process. It recommended the re-bid process notwithstanding this agreement for a number of reasons, including:

a) the agreement was only one factor to be considered by the Court; and
b) the bidding process was the only way to finally determine if an offer were available in excess of the Syndicate's claim.

9 Notwithstanding the objections raised by the opposing parties, the Receiver maintained that the re-bid process ought still to occur so that it could fulfill its mandate to ensure that everyone had a fair and reasonable opportunity to bid on the assets, taking into consideration the interests of all parties.

10 It is to be noted that the original sale process undertaken by Fracmaster, although conducted under the protection of the CCAA, was a company-run sale process that was not controlled by or supervised by the Monitor or the Court.

11 I accepted the Receiver's recommendation and directed him to conduct the process of re-bidding. In accordance with Court direction the Receiver contacted all parties who had previously made an offer on the Fracmaster assets during the CCAA proceedings and who had earlier expressed an interest in making an offer.

12 In addition, the Receiver issued a press release outlining the terms of sale. The Receiver's proposed form of purchase and sale agreement document was circulated to prospective purchasers on May 19, 1999. Three bids were received by the deadline on May 20, at which time the content of every bid was disclosed to the parties present.

II. APPLICATION TO APPROVE SALE

13 The Receiver applies today for the Court to approve a sale of all of the assets of Fracmaster to BJ Services Company (the "BJ Services Offer") for $80 million, all cash. Some basic terms of the BJ Services Offer are as follows:

$80 million cash.

$8 million deposit.

Closing date 30 days from Court approval (possible two week extension by payment of $2 million; 50% of deposit (i.e., $4 million) forfeited if BJ Services elects not to extend).

Subject to Canadian and U.S. regulatory approval.

$6 million "debtor-in-possession" or interim financing ("DIP financing").

14 The Receiver also received offers from UTI (the "UTI Offer") and Calfrac (the "Calfrac Offer").

15 Some basic terms of the UTI Offer are as follows:

$60.7 million cash price (subject to a reduction based on accounts receivable), plus warrants for a 5% equity position in the purchaser.

Closing date appears to be June 10, 1999.

$6.07 million deposit.

Investment Canada approval required.

16 Some basic terms of the Calfrac Offer are as follows:

$66 million cash price, plus warrants for a 5% equity position in the purchaser.

Closing date of June 21, 1999 or 30 days from Court approval.

$6.6 million deposit for purchase; $2.9 million deposit for operating credit.

$2 million trust fund to be managed by the Receiver, for the benefit of certain parties (e.g., certain former employees and trade creditors).

Objections To The BJ Services Offer

17 Fracmaster objects to the BJ Services Offer essentially on the basis that BJ Services is a direct competitor to Fracmaster, already has a presence in the Canadian market and as such has duplicate operating facilities and if operations were combined with Fracmaster the result might be significant job losses.

18 As well concern is raised that the Director of the Canadian Competition Bureau could challenge the proposed transaction and such denial of approval would force Fracmaster into liquidation.

19 However I note in paragraph 7 of Mr. Margetak's affidavit that these concerns did not prevent

Fracmaster's substantive negotiations with BJ Services in May-June 1997, in October 1998 and in late February 1999.

20 It is clear that the interests of current employees are a consideration. There is conflicting evidence and contrary submissions as to whose bid will likely employ more people. While the employees are significant stake-holders, no bid guarantees jobs. No bidder is prepared, quite realistically, to say how many jobs there would be and where such jobs would be. Some suggest more opportunity; others less. However, without a contractual commitment from any bidder this factor cannot be determinative.

21 Regarding the risks of obtaining regulatory approval from Investment Canada, UTI submitted a letter dated May 21, 1999 from the Minister of Industry, granting unconditional approval under the Investment Canada Act.

22 BJ Services submits that it foresees no difficulty obtaining the same approval within the same expedited two-week time frame. UTI questions whether the factors in s. 20(a) and (d) of the Investment Canada Act will cause BJ Services some difficulty. Those requirements, which help determine if the proposed investment is likely to be of net benefit to Canada, relate to the effects of the proposed investment on employment and competition in Canada.

23 BJ Services states that it has received advice from Canadian and American counsel, and that it does not believe there are any serious competition issues that would prevent the transaction from closing. BJ Services points to its willingness to pay to extend the closing date and its willingness to forfeit part of its deposit if there are regulatory approval difficulties.

24 There has been much discussion regarding the assessment of closing risk. There was also some effort by one of the bidders to enter into an agreement which, although made for a business purpose, it submits has the effect of increasing the closing risk of another bid. The assessment of closing risk is properly within the domain of the Receiver and I rely on the assessment it has maintained since the outset.

25 I am satisfied that the Receiver has carefully assessed the closing risks associated with each of the bids as outlined in his affidavit.

26 I accept the Receiver's recommendation that the closing risk associated with BJ Services is more than the Calfrac Offer and no greater than the UTI Offer and more than offset by the purchase price.

III. ANALYSIS

27 In Royal Bank of Canada v. Soundair Corp. (1991), 83 D.L.R. (4th) 76 at 93, the majority of the Ontario Court of Appeal set out the Court's duties when assessing whether a receiver who conducted a sale has acted properly:

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

I accept this formulation of the Court's responsibilities in the present circumstances.

A. Effort to Obtain the Best Price

28 The Receiver is of the opinion that it has made all possible efforts to obtain the best price for the assets of Fracmaster for the following reasons:

a) The evidence provided to the Court during the CCAA proceedings indicated that Fracmaster (as a company) and its assets had been exposed to the market since at least September 1998.
b) Fracmaster and its assets were further exposed for either an equity injection or asset sale during the CCAA proceedings.
c) All parties who had made previous offers were made aware of the sales process.
d) The process was well publicized.

29 Based on its analysis the Receiver recommended that the BJ Services offer of $80 million be accepted because:

a) It provides the highest cash purchase price at closing ($13 million more than Calfrac and $19.3 million more than UTI).
b) The closing risk associated with BJ Services is more than the Calfrac Offer and no greater than UTI and is more than offset by the increased amount of cash purchase price.
c) Although the Calfrac offer provides some recovery to unsecured creditors, its offer provides for $13 million less in cash recovery to the secured lenders.
d) The UTI offer was considered least favourable because the purchase price is subject to downward adjustment, the offer does not indemnify the Receiver for certain costs, and it did not confirm acceptance of the Receiver's form of Purchase and Sale Agreement.
e) Both the UTI and Calfrac Offers include upside potential, the value of which is speculative.

30 Fracmaster attempted to obtain the funds necessary to carry out a Plan of Arrangement by seeking an equity injection or a sale of assets. The sale process was conducted by Fracmaster and was not managed, controlled or otherwise supervised by Arthur Andersen as Monitor.

31 On May 14 an application was made by Fracmaster for approval of a sale of substantially all of its assets to UTI. It would not have generated any proceeds for unsecured creditors. The offer was not approved under the CCAA. Upon application by the Syndicate, Arthur Andersen was appointed Receiver with powers to sell the assets of Fracmaster subject to Court approval and to make recommendation with respect to a sale or such other immediate action as it deemed appropriate for the benefit of all claimants.

32 After discussion with representatives of Fracmaster, the Syndicate, former and prospective offerors and counsel for certain other creditors, the Receiver made its recommendation for the sale process which I approved.

33 The recommended offer exceeds the original bid cash purchase price by $19.3 million although it is not enough to fully satisfy the claims of the Syndicate which exceed $96 million.

B. The Interests of All Parties

34 The Court directed the Receiver to return to the Court with a recommendation bearing in mind the interests of all claimants including the secured creditors. The Calfrac Offer attempts to provide some monies for former employees and trade creditors. However, in my earlier decision I recognized, on the evidence before me, that it appeared that the Syndicate had the only remaining financial stake in the outcome. The bid process confirms this. The issue is what weight the Court ought to give the Syndicate's wishes to close the UTI Offer notwithstanding an apparent 33% increase in return to the Syndicate under the BJ Services Offer.

35 The law makes it clear that creditors' interests are an important consideration; However, they are not the only consideration - see, e.g., Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. H.C.J.) at 243, 244.

36 The decision in Soundair is instructive on this point. The court there split on the issue of how much weight to give the secured creditors' wishes, where they were the only ones with any real financial stake in the outcome. The majority held that the secured creditors's views should be taken into account (Galligan J.A. at 103), and the receiver's procedure should be carefully scrutinized (McKinlay J.A., concurring, at 89), but that the secured creditors' opinions are not necessarily determinative "if the court decides that the receiver has acted properly and providently" (Galligan J.A. at 103).

37 Galligan J.A. mentioned that the secured creditors had chosen to initiate the court process, by asking for a court-appointed receiver, rather than a private receiver. He stated that this decreased the secured creditors' risks, but also decreased their control over the sale process (at 103-04). However, McKinlay J.A., while concurring in the result, emphasized that the secured creditors' rights should not be diminished merely because they invoked the court process: "Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver." (at 89).

38 Goodman J.A., in dissent, stated that the receiver's and the court's prime consideration is the interests of the creditors, with the process as a secondary, but important, factor (at 79). He concluded that the process there was unfair to the unsuccessful bidder and improvident for the secured creditors (at 81). The secured creditors preferred the bid with a significantly higher down payment, which also apparently offered more security for payment of the balance.

39 To summarize, Soundair states that the creditors' opinions are important, but are not the deciding factor.

40 I accept the principle that although creditors' views should be very seriously considered, if I am satisfied that the Court-appointed Receiver acted properly and providently, I should be reluctant to withhold approval from a sale agreed to or recommended by the Receiver.

41 I do not think the decision of Bank of Nova Scotia v. Yoshikuni Lumber Ltd., (1992), 99 D.L.R. (4th) 289 (B.C.C.A.) regarding a referential bid is applicable. Neither do I find British Columbia Development Corporation v. Spun Cast Industries Ltd., (1977), 26 C.B.R. (N.S.) 28 (B.C.S.C.) on point. Its facts regarding the sale process are not similar to the case at bar.

42 In the present circumstances, the Syndicate supports the UTI Offer, for both contractual and business reasons. To evaluate those concerns effectively one must weigh the Syndicate's position carefully. It has business concerns and legal concerns. It has agreed to use its reasonable best efforts to conclude the transaction with UTI provided it receives the same consideration in a receivership as under the original offer.

43 The business risks articulated are: delay in closing due to regulatory approvals or simply a failure to close, not the financial ability of BJ Services to close. The Receiver's assessment was that these risks were not significant. The Syndicate does not share the Receiver's view. One cannot help but wonder to what extent the Syndicate's assessment is influenced by its contractual obligation. The Receiver was not so burdened in its analysis.

44 The Syndicate's opinion is a very important consideration. However, noble the commercial considerations were for entering into and maintaining support for the UTI bid, that agreement, while a consideration, cannot fetter the discretion of this Court.

C. The Efficacy and Integrity of the Process

45 As mentioned earlier, the Receiver, in its discretion, and with its experience (including its previous involvement as Monitor of Fracmaster) applied to have a re-bid process. Concerns were raised over several aspects of the re-bid process, with the allegation that it was not conducted with fairness and integrity because it did not exactly follow the requirements set out in my May 18 order.

46 That order directed the Receiver to "contact all parties who had previously made an offer" during the CCAA proceedings, to invite them to submit bids. Calfrac submits that BJ Services was ineligible to participate in the re-bid process because it had not made a bid during the CCAA proceedings. However, it was clear during the submissions before the Court on May 18 that there was no intention on the Receiver's part to limit bidding only to CCAA bidders. The Receiver merely wished to limit the number of parties that it was directed to contact, given the short time frame involved. I accept that the BJ Services Offer does not violate the letter or spirit of this part of the May 18 order.

47 Calfrac also alleges non-compliance by BJ Services with several terms required by my May 18 order to be in each offer. First, Calfrac states that BJ Services' deposit is not a "real" deposit because there are limitations on the amount and conditions of forfeiture.

48 Second, Calfrac notes that BJ Services, under clause 2.1 of its offer, is entitled to exclude any assets prior to the closing date, with no reduction in the purchase price. I agree with the Receiver that this does not contravene the requirement for the offer to be for "all or substantially all of the assets." Moreover, the Receiver emphasizes that there is no risk to Fracmaster or the Syndicate from this clause, as it allows for no reduction in the purchase price.

49 Third, Calfrac argues that BJ Services' closing date contravenes the May 18 order's requirement for a 30-day closing date. Fourth, Calfrac notes that BJ Services' operating financing is capped at $6 million. Apart from the Receiver's statement that $6 million will likely be sufficient, these two concerns of Calfrac's can be easily addressed in the context of commercial reality. While the May 18 order set out terms for the offers, that must be read in light of the commercial realities of the business world in general and a bidding process in particular. In my view, minor variations are not problematic.

50 Fifth, as part of the re-bid process established on May 18, I ordered that no offer or changes to offers received after 2:00 p.m. on May 20 would be considered by the Court. I also ordered that the Receiver's proposed form of Purchase and Sale Agreement be substantially accepted to by the offeror, subject to any amendments approved by this Court.

51 Calfrac argues that the conditions precedent to closing contravene this requirement and that the waiver by BJ Services of one of those conditions precedent in Court constitutes an unallowable amendment. I disagree. The Court reserved the right to make amendments in order to allow for flexibility and commercial reality. Moreover, the extent of such changes is not material here. Finally, I

cannot equate a waiver of a condition precedent to an amendment.

52 Calfrac also notes that, after the 2:00 p.m. deadline, the Receiver received a letter dated May 20, 1999 from Canadian counsel for BJ Services. It identified what it characterized as an "error" in the wording of s. 6.1(6). That section relates to the offeror's responsibility for all amounts accruing to employees. The purported amendment states that BJ Services is prepared to be responsible for those amounts, subject to its "review and approval" of the amounts.

53 There is no indication of a lack of good faith in this purported amendment and I recognize the severe time pressure faced by all parties. The Purchase and Sale Agreement of the BJ Services Offer is still in substantially the same form as proposed by the Receiver. Moreover, the Receiver has stated that in the highly unlikely "worst-case scenario", if BJ Services does not approve any of the amounts, the highest possible amount the Receiver would be liable for is approximately $4.8 million. Even if that were to happen, the Receiver notes that the BJ Services Offer would still be substantially higher than the other two.

54 Based on that business evaluation by the Receiver, I am prepared to amend the Purchase and Sale Agreement to include the language erroneously omitted by BJ Services in the first instance. The evidence satisfies me that the re-bid process was conducted in accordance with the Receiver's recommendation and this Court's direction.

55 Counsel for Fracmaster, the Syndicate and UTI argue that certain policy considerations including sanctity of contract and certainty of result are cornerstones of a bid process. They submit that the original sale process conducted by the company was a broad and efficacious process and as such the decision of the company and its lenders to enter into a contractual arrangement with UTI ought not to be disturbed. Further, UTI expresses great concern that what it considers to be its final and best offer has been used as the floor price of the re-bid process. I am sensitive to those concerns and have some sympathy for the position that UTI was in. However, I cannot overlook the fact that UTI was aware that it was involved in a process originally under the CCAA requiring the Court to consider the offer within the context of the Act and the best interests of all stake-holders. UTI recognized those commercial and legal risks and contracted to account for them. Further, the Syndicate, in asking the Court to appoint a Receiver, recognized the duties of the Receiver including the duty to make a sufficient effort to get the best possible price for the assets, for all claimants, to assess the business issues involved in the disposition of assets including a disposition strategy, and to analyse and consider the offers. Within the new process UTI had full opportunity to improve its bid. It chose not to.

56 I find the Receiver acted in good faith and with integrity. I also find that the process as designed had the effect of determining if an offer was available for the assets of Fracmaster in an amount in excess of the Syndicate's claim. It was not, but was successful in increasing the cash offer price by almost $20 million.

D. Fairness in Working Out the Process

57 As noted the process itself was commented on by all counsel before the Court and eventually approved by the Court after hearing submissions from counsel. I find nothing unfair in the working out of the process.

IV. CONCLUSION

58 This Court appointed the Receiver based on its experience and expertise. It is the Receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers and to make a recommendation to the Court. As Anderson, J. stated in Crown Trust Co. v.

Rosenberg (1986), 60 O.R. (2d) 87 (H.C.J.) at 109, the Court ought not:

> enter into the market-place. ... The Court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise. ... The Court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

59 I find that the Receiver has acted properly throughout. Its decision to recommend a re-biding process, although not popular with all parties, is fair in light of the circumstances of the original sale process and the subsequent proposals put before the Court. The re-bid process unfolded fairly and equitably, according to the requirements set out in my order. All bids received by the deadline were carefully considered by the Receiver, which used its business experience and acumen to recommend the BJ Services Offer. I accept the validity and integrity of the process conducted in good faith by the Receiver. On that basis I am exercising my discretion and approve the BJ Services Offer as recommended.

V. DISPOSITION

60 The Receiver's application to approve the BJ Services Offer for all or substantially all of Fracmaster's assets is granted in the form of the draft order presented.

61 The draft order as provided is acceptable. Paragraph 5 is to include that the order is made without prejudice to the rights and interests of Cananwill and TD Asset Management Ltd. The applications of TD Asset Management Ltd. and TrizecHahn are adjourned sine die to be brought on two days notice.

PAPERNEY J.

cp/i/jpn