TAB 15

Indexed as:

CCFL Subordinated Debt Fund and Co., Limited Partnership v. Med-Chem Health Care Ltd.

Between
CCFL Subordinated Debt Fund and Company, Limited Partnership, plaintiffs, and
Med-Chem Health Care Limited/Soins de Sante Med-Chem Limitee, defendants

[1999] O.J. No. 1485

8 C.B.R. (4th) 171

87 A.C.W.S. (3d) 924

Court File No. 98-CL-3200

Ontario Court of Justice (General Division)
Toronto, Ontario

Gans J.

Oral judgment: April 15, 1999.

(10 pp.)

Receivers -- Property -- Sale of property -- Duties of receiver -- Court approval -- Considerations.

Motion by the receiver, PWCI, in respect of the company Med- Chem, for approval of the sale of certain assets of Med-Chem to a numbered company owned and controlled by CML. The motion was opposed by the union which represented most of Med-Chem's employees. The union supported a sale to the Teacher's Pension Plan. There was no issue that the receiver acted throughout the process with the highest integrity. The union argued however that the sale it sought approval of was improvident as it failed to provide for the continued employment of the employees in the union. The receiver and union had entered into a transitional agreement whereby the receiver agreed not to contract work out during the transition period. The union argued that the sale amounted to a breach of that agreement.

HELD: Motion granted approving the sale. There was no breach of the transition agreement contemplated by the intended sale. The issue as to the re-employment of Med-Chem's staff was a matter properly for the Labour Relations Board and not this court. It was not for this court to speculate from a labour relations point of view on the results of the corporate structure proposed by the purchaser. In the result, there was nothing in the materials to suggest that the sale was improvident. It was equal to or better than the proposed Teachers' deal. This was not a proper case in which to exercise the court's discretion not to approve the receiver's intended sale.

Counsel:

L. Corne, for the plaintiffs.
D. Hager, for Gelbloom.
N. Saxe, for 703186 Ontario Inc.
D. Tay, for Savage Walker.
Leo Klug and W. Phelps, for the purchaser.
S. Kowland, for trustee.
Frederick L. Myers and Harold W. Sterling, for the Bank of Montreal and Malik Khalid.
Jeremy M. Freedman, for 1211443 Ontario Inc.
John Keefe and Jay Carfagnini, for Price Waterhouse, Coopers & Lybrand.
Robert P. Armstrong, Paul Cavalluzzo and Mario Forte, for Brewery, General and Professional Workers' Union.

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1 **GANS J.** (orally):-- This is a motion by PWCI in its capacity as Court-appointed Receiver and Manager of Med-Chem as more particularly described in paragraph 1 of the moving party's Notice of Motion for an order approving the sale of certain assets of Med-Chem and the Med-Chem Companies to a numbered company owned and controlled by CML.

2 PWCI also seeks an order approving certain settlement agreements entered into by it as Receiver, which are, as best as I understand, designed, in part, to facilitate the aforesaid sale to CML.

3 The motion is vigorously opposed by The Brewery General and Professional Workers Union ("the Union") who represent most of the Med-Chem employees. The Union argues that the CML deal should not be approved, and in its place the Receiver should be mandated to entertain an Offer recently tabled by Savage Walker Capital Inc., for and on behalf of the Teachers Pension Plan, (the "Teachers Offer").

4 The Union is joined in its opposition by a group of landlords who own or control eight sites (of more than 190) where Med-Chem carried on business as at the date of the Receiving Order, namely, February 1st 1999.

5 The process in respect to the sale of the Med-Chem assets and business was established by this court pursuant to an order made on the 17th of February. The steps undertaken by the Receiver are set out in detail on the third and fourth reports of the Receiver. I do not intend to review these steps in this endorsement, since no one takes issue with the Receiver's actions. There is, indeed, consensus that the Receiver acted with the highest degree of integrity and propriety throughout in what, by all accounts, was a most complex process.

6 While it is accepted by all concerned that the Receiver has been able to conclude a deal with CML which will more than satisfy the claims of the secured creditors and go a long way to satisfy the claims of the unsecureds, the proposed deal is objected to, in the main, because it will result in the "termination" of some 445 Med-Chem employees currently working for the Receiver at the Sheppard Avenue facility of Med-Chem.

7 It is with respect to this permanent dislocation of those human resources that the Union urges that the CML deal should not be approved, and the Teachers' deal should be considered. The full range of the Union's argument is summarized at paragraph 3 of its factum and amplified upon thereafter.

8 The test to be employed by a court on a motion of this nature is not in issue. It was expressed by Mr.

Justice Galligan at page 17 of the Royal Bank of Canada v. Soundair Corporation, et al. case (1991), 4 O.R. (3d) 1. At page 17 his Lordship said:

> "As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sales strategy adopted by the receiver." (emphasis added)

9 In the case before me, there is no question about the propriety of the Receiver's conduct. There is no suggestion that the Receiver did not use every effort to get the best price. There is no suggestion that the receiver acted unfairly, nor is there any suggestion that the Receiver failed to consider the interests of all the parties. As previously referenced, there is no suggestion that the process wasn't efficacious or that it lacked integrity.

10 It is suggested, however, that the Receiver acted, as best as I understand, improvidently or that the deal, because it results in the dislocation of 450 people, is now improvident. The answer to that issue in some respects is found in the mandate described, again by the Court of Appeal in Soundair at page 7 of the report of that judgment.

> "When deciding whether a receiver has acted providently, the Court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer ...
>
> The Court should be very cautious before deciding that the Receiver's conduct was improvident based upon information which has come to light after it made its decision."

11 The Court went on to refer to the decision of Mr. Justice Anderson in Crown Trust Co. v. Rosenberg, who said as follows:

> "Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the Court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver, both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers."

Messrs. Cavalluzzo and Armstrong suggest that this a case of exceptional circumstances and, therefore, the Court's discretion against approval should now be exercised. They argue that the Receiver has or, indeed, will breach its agreement with the Union of February 17th last by "contracting out" work to be done during the transition period. They further argue that by the very structure of the deal, CML will breach the Union-Med-Chem Collective Agreement with which it will be bound as a successor employer.

12 Although I do not believe such is necessary for my decision, I do not believe the argument vis-à-vis the Receiver's alleged breach is sustainable for the reasons advanced by Mr. Keefe in argument. In my view, the February 17th agreement between the Union and the Receiver is a complete answer to that notion. Furthermore, factually, it does not appear to me that the agreement will in fact be breached during the transition period, since the work needed to be down will be attended to by Union members who will be employed for that purpose in the interim.

13 Insofar as what might happen with CML and its proposed or anticipated re-deployment of work from Sheppard Avenue to its other facilities, I agree with labour counsel for CML that the matter is not properly before me and rests exclusively with the OLRB. It is not for this court to speculate from a labour relations point of view on the results of the corporate structure proposed by the purchaser, CML, as appealing a task as that might be. I am obliged in this motion to review the activities of the Court-appointed Receiver, to determine if it has transgressed or otherwise failed to carry out its mandate. As suggested above, I am of the view that it has not.

14 I do not intend to review the offer of Teachers. I believe the decision of Soundair and those other judges of this court make it clear that the Receiver's view of the business matters are not to be second-guessed or placed under a microscope. There is nothing before me to suggest that the CML deal is improvident. It is equal to or, as was stated by the Receiver, better than the proposed Teachers' deal. In my view, such an assertion brings any further inquiry into a comparison of the deals to a halt.

15 Furthermore, I do not believe the complaint of the landlord group augments this argument. The fact that they have not concluded separate deals with CML, although regrettable, is a normal consequence of doing business under work-out conditions.

16 One of my highest concerns is and has always been to preserve jobs throughout the course of the CCAA proceedings and, indeed, during the course of this Receivership. To some extent, this task was accomplished, albeit, for some just five months, indeed, over the protestations of the secured creditors.

17 Having regard to the circumstances of this Receivership, the intricacies attendant to its subject matter and the necessity to bring some form of closure to the proceedings, I do not believe this is a proper case for the exercise of my discretion to withhold approval of the proposed sale to CML and the supplementary settlement agreements.

18 Furthermore, although not decisive to the process, I do not believe the Court should entertain offers tabled at the eleventh hour. In my view, such a course of conduct plays havoc with the process. There was, in all the circumstances, time sufficient before March 20th to have engaged the Receiver in some form of auction which should not be countenanced at the courthouse door.

19 As was said again by Mr. Justice Galligan in Soundair at page 10:

> "In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged."

20 An order will go in the terms asked, and a Vesting Order will issue if that is necessary and incidental to the form of the original order.

qp/s/bbd