

TAB 2

Indexed as:
Consumers Packaging Inc. (Re)

**IN THE MATTER OF The Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C.36, as amended
AND IN THE MATTER OF a plan of compromise or arrangement of
Consumers Packaging Inc., Consumers International Inc. and
64489 Canada Inc.**

[2001] O.J. No. 3908

150 O.A.C. 384

27 C.B.R. (4th) 197

12 C.P.C. (5th) 208

108 A.C.W.S. (3d) 765

Docket No. M27743

Ontario Court of Appeal
Toronto, Ontario

McMurtry C.J.O., Finlayson and Austin JJ.A.

Heard: September 27, 2001.

Judgment: October 10, 2001.

(10 paras.)

Bankruptcy -- Companies' Creditors Arrangement Act -- Sale of assets -- Appeals.

Motion by Ardagh PLC for leave to appeal and appeal from a decision that approved a sale of assets of Consumers Packaging Inc. to Owens-Illinois Inc. Consumers filed for protection under the Companies' Creditors Arrangement Act. Consumers was authorized, through an independent restructuring committee and its chief restructuring officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of its business. Ardagh and Owens participated in the bid process. Owens was the preferred bid since it provided more cash to Consumers' creditors, had the least completion risk, was not conditional on financing, was likely to close in a reasonable period of time, resulted in the continuation of Consumers' business and retained a vast majority of its employees. Ardagh's restructuring proposal was not backed by financing commitments, required further due diligence by its lenders and offered less by way of recovery to Consumers' creditors. It was the unanimous view of the monitor, the Committee and the Officer that Ardagh's proposal was not viable and would, if pursued, result in its liquidation causing a lower return to creditors, the loss of jobs and cessation of business operations. The judge approved Owens' bid on the basis that it was the only

presently viable option better than a liquidation with substantially reduced realization of value.

HELD: Motion for leave to appeal dismissed. Granting leave to appeal would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders in light of the significant time and financial constraints faced by Consumers and was contrary to the objectives of the Act. The sale of certain of Consumers' assets to Owens allowed the preservation of its business and was consistent with the purposes of the Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.7.

Appeal From:

On appeal from the order of Justice James M. Farley dated August 31, 2001.

Counsel:

Peter F.C. Howard, Patrick O'Kelly and Craig Martin, for Ardagh PLC.

Robert S. Harrison and Carole J. Hunter, for the Ad Hoc Noteholders Committee.

Daniel V. MacDonald and Paul G. Macdonald, for Consumers Packaging Inc., Consumers International Inc. and 164489 Canada Inc.

L. Joseph Latham and Elizabeth Moore, for the Toronto-Dominion Bank Syndicate.

Lily I. Harmer, for the United Steelworkers of America.

Marc Lavigne, for Anchor Glass Container Corp.

Dale Denis, for Owens-Illinois, Inc.

Terrence J. O'Sullivan, for KPMG Inc.

The following judgment was delivered by

1 THE COURT:-- Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

2 Consumers had filed for protection under the Companies' Creditors Arrangement Act (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

3 On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23, 2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

4 The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

5 In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc. (Re)*, a judgment of the Ontario Court of Appeal, delivered May 25, 2001, [2001] O.J. No. 1943 at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives of the CCAA. The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

6 The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

7 Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or

to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharmaceutical plc v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 at 238 (C.A.). O'Connor J.A. went on to say at p. 242:

There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands [of] a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

8 The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being ultra vires the CCAA.

9 Finally, while we do not propose to become involved in the merits of the appeal, we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

10 Accordingly, leave to appeal is refused with costs.

McMURTRY C.J.O.
FINLAYSON J.A.
AUSTIN J.A.

cp/e/nc/qlrme