Tab 3

Case Name:
Winnipeg Motor Express 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 proposed plan of compromise or arrangement of Winnipeg Motor Express Inc., 4975813 Manitoba Ltd. and 5273634 Manitoba Ltd., ("the applicants")

[2008] M.J. No. 388

2008 MBQB 297

49 C.B.R. (5th) 302

233 Man.R. (2d) 267

2008 CarswellMan 560

Docket: CI 08-01-56696

Manitoba Court of Queen's Bench
Winnipeg Centre

C. Suche J.

Oral judgment: October 24, 2008.

(44 paras.)

Creditors and debtors law -- Receivers -- Private receivers -- Monitors and consultants -- Sales by receiver -- Application for approval allowed -- The company continued to operate through protection proceedings -- The monitor recommended acceptance of an offer for the sale of assets -- A secured creditor opposed acceptance on the basis that the offer was unfair, and that there was no jurisdiction for approval in the absence of a filed plan of arrangement -- The court found that the offer was preferable to forced liquidation -- It was in the interests of all stakeholders that the transaction proceed -- Requiring a plan of arrangement was inconsistent with the remedial objectives of the Companies' Creditors Arrangement Act.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11

Counsel:

G. Bruce Taylor and Jennifer J. Burnell for the applicants.

Harvey G. Chaiton for Heller Financial Canada Holding Company and GE Canada Leasing Services Company.

Donald G. Douglas for Paccar Financial Services Ltd.

John M. Reimer-EPP for 7062001 Canada Limited.

Douglas G. Ward, Q.C. for Alterinvest Fund L.P. (BDC).

Robert A. Dewar, Q.C. for Ramwinn Diesel, Inc.

William G. Haight for Key Equipment Finance Canada Ltd.

David R.M. Jackson for Ernst & Young Inc. (the "monitor").

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1 **C. SUCHE J.** (orally):-- WME seeks an order approving the sale of certain of its assets to 7062001 Canada Limited. I advised the parties yesterday that I was granting the order as requested and would provide reasons today.

2 This transaction is the end result, although perhaps not the final step, in these proceedings, which began on May 15, 2008 when I granted an initial order under s. 11 of the *CCAA*, staying all proceedings against the company, appointing Ernst & Young Inc. as the monitor, and authorizing DIP financing on the amount of $1,000,000.

BACKGROUND

3 WME is a trucking distribution and storage company headquartered in Winnipeg. As at the date of the initial order, it had terminals in several other cities in Canada and a customer base, diverse both geographically and in nature. Most of its business involved travel to the United States. It operated a fleet of approximately 175 tractors and 243 trailers. It employed 215 employees and over 80 independent contractor owner/operators. It also had outstanding liabilities of approximately $34,000,000. In 2007, WME experienced escalating losses, declining revenues, and increased expenses. It lost approximately $3,400,000 on total revenues of $71,000,000 during the year. This trend accelerated in 2008. The fact that the bulk of WME's business was in the United States, given the rising Canadian dollar, increased cost of fuel, and a downturn in the American economy, was a poisonous mix for WME. By early 2008, senior management had come to the realization that it was necessary for the company to downsize if it was to survive. Actions by several creditors, most significantly its fuel supplier, brought the issues to a head and precipitated an application under the *CCAA*.

4 From the outset of these proceedings the view of WME management was that the company needed to be downsized - or right-sized - for it to continue to carry on business, but that prospect, or at worst a sale as a going concern once that had been achieved, was a realistic goal.

5 When the order was granted, WME was supported by its major secured creditors, GE and Heller, who together supplied acquisition funding, operating funds, and equipment under leases. At various times some or other of BDC, who has security over WME's fixed assets, the prior vendor, who provided

take-back financing, and an assortment of equipment lessors, have also supported the proceedings.

6 Over the last five months WME, with the assistance of the monitor, has undertaken the very considerable task of consolidating its operations, reducing staff/independent contractors, reducing its fleet, and returning equipment no longer required to lessors from various locations across North America, with what appears to be minimal disruption to service to its customers and while at the same time readying the company for sale and collecting its receivables in more or a less an orderly fashion.

7 Certain leases - both for premises and equipment - have been repudiated with lessors suffering losses, employees have been terminated, and a significant number of trade creditors have been left without payment. However, WME has continued in business and met all of its ongoing obligations. With the exception of GE, and except otherwise for approximately two months, it has also paid all ongoing equipment lease and financing charges.

THE MONITOR

8 Within a week of the initial order, the monitor prepared a Notice of Opportunity to Acquire WME and distributed it to 22 perspective purchasers. This generated interest from nine different parties. By late August, three parties had either expressed interest, made an offer, or sent a letter of intent. At about this point, Mr. Page, the CEO of WME, (and now the sole shareholder of 7062001 Canada Limited) indicated interest in submitting an offer.

9 The monitor requested that offers be updated and, ultimately, only two formal offers were presented: one from Mr. Page and another from another transport company.

10 None of the offers - either those that were initially made or the two eventually submitted as formal offers - contemplated any financial return or funds for WME's unsecured creditors or shareholders, and secured creditors would suffer substantial shortfalls in all instances. The sale before me for consideration will result in at least $9,000,000 in unpaid liabilities.

11 The two offers also required the acceptance of the purchaser as a customer by GE. As both left something to be desired, the monitor requested and was granted an order extending its power to allow it to negotiate the best deal and report back thereafter. Ultimately the other party was unable to obtain GE's consent. The Page offer was improved and all other conditions were either met or waived by it.

12 The choice before the court, then, is to approve the Page offer (now structured through the corporation 7062001 Canada Limited), or to allow a forced liquidation or bankruptcy.

13 The monitor has been of the view from the time the first set of offers were received in late August, that a going concern sale was preferable to a forced liquidation because it would provide at least the following benefits:

* an orderly transition of customers;
* offers of employment to some employees;
* enhanced collection of WME's receivables;
* opportunities for certain equipment lessors to continue leasing equipment; and
* a sale of unencumbered equipment.

14 In terms of the offer that is before the court, the monitor expresses the view that it is fair and reasonable and will provide substantial benefit to the stakeholders. It recommends that the offer be accepted. It is joined in this recommendation by all secured creditors and even certain of the equipment lessors whose leases will not be assumed. The only party opposing is BDC.

15 WME is indebted to BDC in the approximate amount of $2,400,000. In addition to a charge on WME's fixed assets, BDC has a charge over receivables but stands second to Heller. The possibility exists that it may receive some return on this. It also likely has first claim to proceeds of sale of some of WME's equipment. These are the only payments it will receive.

16 The monitor obtained an appraisal of the fixed assets at approximately $430,000 before any liquidation costs. In its recent report, the monitor has expressed the view that $260,000, being the allocation to the equipment owned by WME, in the proposed transaction, represents a reasonable estimate of what would be available in net funds after taking into consideration all costs of liquidation.

17 BDC argues that this transaction should not be approved, in essence because it works an unfairness or, perhaps in other language, it is not appropriate in all the circumstances because of disadvantage to BDC. Mr. Ward points out that unlike a plan of arrangement, where all creditors with the same type of security are paid the same percentage return, BDC is left with considerably less than the other secured creditors and much less than what it would obtain on a liquidation.

18 Mr. Ward also raises the fact that as part of the purchase price, some $40,000 will go to pay outstanding pre-order vacation pay, which would otherwise be a liability of Mr. Page as a director of WME.

19 Finally, and perhaps most importantly, Mr. Ward cites the recent decision of the British Columbia Court of Appeal in ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.***, 2008 BCCA 327, [2008] B.C.J. No. 1587 (QL), where the court found that absent a plan of arrangement or compromise a stay of proceedings should not be ordered.

ANALYSIS

20 I turn, then, to the applicable law.

21 In ***Royal Bank of Canada v. Soundair Corp.,*** (1991) 7 C.B.R. (3d) 1, the Ontario Court of Appeal stated that in considering whether to approve a sale by a court-appointed receiver, the duty of the court was to consider:

(i) whether the receiver had made sufficient effort to get the best price and had not acted improvidently;
(ii) the interests of the parties;
(iii) the efficacy and integrity of the process by which offers were obtained; and
(iv) whether there has been unfairness in the working out of the process.

22 In ***Canadian Red Cross Society, Re*** (1998), 5 C.B.R. (4th) 299 , Blair J. adopted this same test when considering a proposed transaction in a *CCAA* proceeding.

23 In this case, the actions of the monitor in making sufficient effort to obtain the best price, and the efficacy and integrity of the process by which offers were obtained, are not questioned by any party. The efforts, not only of the monitor but also of WME in locating potential purchasers, the use of confidentiality agreements and sealed reports to protect the integrity of the process, and the monitor's efforts in negotiating the best deal, together, speak of an efficient and very professional approach by the monitor.

24 The issue of unfairness in the process identified in ***Soundair***, concerns actions of the receiver

typically towards a potential purchaser. As long as the receiver has acted reasonably prudently, fairly and not arbitrarily, its recommendation should be accepted.

25 Last, is the question of the interest of the parties. It is well accepted in *CCAA* proceedings that regard should be had to the interests of all of the stakeholders, which may well go beyond the debtor and creditor, and extend to employees, customers, and the like. It is perhaps under this heading that BDC's concern could be considered.

26 Having said that, BDC has either supported or taken no position on every request made by WME during the course of these proceedings. It has actively supported several extension motions, including when the stated objective of the monitor in seeking the extension, was to locate a buyer; and the extension which allowed Mr. Page the opportunity to prepare an offer. I note this was done after having received a summary of the earlier three offers or expressions of interest.

27 Ultimately BDC was in support of the other formal offer submitted but not accepted by GE. That support, I might add, was conditional on BDC not being subject to the DIP financing.

28 This brief summary is telling, in my view. I take from it that BDC is simply unhappy that it did not get more out of this transaction. That in and of itself is not sufficient objection to say that the interests of the parties have not been served.

29 It is also the case that the matter of the priority of the DIP financing is yet to be determined, so in theory, BDC may have an opportunity to improve its position.

30 Considerable time was also spent on the issue of the "optics" of the situation, namely, that Mr. Page, the CEO of WME in the period leading up to and during its financial difficulties, will ultimately be the sole owner of a well capitalized company, while creditors, secured and unsecured, are left with substantial losses. The matter of the unpaid vacation wages, it is argued, adds to this concern.

31 Having canvassed the matter thoroughly during the hearing of this motion - perhaps the point of leaving no stone unturned - I agree with WME that no benefit accrues to Mr. Page or any of the other directors by inclusion of $40,000 to pay pre-May 15 vacation pay, as part of the purchase price. Directors' liabilities under ***The Employment Standards Code*** only arise when the employer company is not able to pay. Here, the $40,000 would otherwise have been paid by WME on the expiry of the stay and prior to the closing of this transaction.

32 As to the fact that Mr. Page ends up being the effective owner of the business, in the end, the only viable offer made for the purchase of the assets of WME was his. "Optics" are only a concern if the appearance is a reflection of the substance of a situation. In this instance it is not. Mr. Page himself gave up a considerable claim for vacation pay. WME, with Mr. Page leading the management team, has acted with due diligence and good faith throughout these proceedings.

33 My conclusion is that the offer is clearly preferable to a forced liquidation or a bankruptcy and it is in the interests of all stakeholders that the transaction proceed.

34 The last issue concerns the question of the jurisdiction of the court to approve a sale where no Plan of Arrangement has been filed. In ***Cliffs Over Maple Bay***, *supra*, the British Columbia Court of Appeal overturned a lower court decision granting a stay under s. 11 of the *CCAA* and authorizing DIP financing.

35 The business of the company was the development of some land into residential homes and a golf course. Various parts of the property were between 50% and 95% complete. Financial difficulties

occurred when delays and cost overruns developed, but the situation became critical when it was discovered that the anticipated water source for the golf course was not available. When the company advised the mortgagees of the property of this, they responded with Notices of Intention to enforce their security. A receiver was appointed, which precipitated an application by the company for a stay under the *CCAA*. The order was granted.

36 On appeal, the lenders argued that the *CCAA* should not apply to companies whose business is a single land development or is essentially dormant. The court rejected these arguments but found that the real question was whether a stay of proceedings should have been granted at all. Tysoe J.A., writing on behalf of the court, states:

> 26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.
>
> 27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:
>
> > "An Act to facilitate compromises and arrangements between companies and their creditors".

37 While recognizing that the legislation is intended to have wide scope and allows a judge to make orders to effectively maintain the status quo while an insolvent company attempts to restructure or otherwise organize its affairs, Tysoe J.A. goes on to say:

> 32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at para. 7 (Ont. Ct. Jus. - Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at para. 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.
>
> 33 Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (BCSC), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is

> frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

38 Given that the debtor company proposed only a restructuring and did not intend to propose a plan of arrangement or compromise, Tysoe J.A. was of the view that this was not a proper case for a stay. He concludes:

> 38 ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

39 Justice Tysoe's description of the fundamental purpose of the *CCAA*, is not, in my view, consistent with that of other courts, who have accepted that a sale of assets without a plan of arrangement can be ordered. In ***Re Lehndorff General Partner Ltd.***, Farley J. stated:

> 5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

40 In ***Red Cross***, *supra*, this issue was considered by Blair J., who states at para. 45:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is

> remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

41 In the flight away from receiverships resulting from the potential liability of receivers, it seems that *CCAA* proceedings are becoming not only vehicle of choice, but a necessary remedy where liquidation or bankruptcy would not be in the interests of a debtor company and creditors. Everyone agrees the *CCAA* is intended to be flexible, and must be given a broad and liberal interpretation to achieve its objectives. I consider those objectives to be both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement. The world of commercial lending and the complexity of security interests has evolved, and I consider the remedial nature of the *CCAA* allows it to deal with such changes.

42 It also seems to me that a formal plan of arrangement or compromise is, at least theoretically, always a possibility, so to require a debtor company to utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such a conclusion may simply be that applicants would make a statement in some *pro forma* or boiler plate language, or go through an exercise for no valid purpose.

43 However, even if the view expressed by the B.C. Court of Appeal is the correct one, this is an issue which ought to have been raised at the time the initial order was granted or on the comeback hearing. So, even if this were a reason to deny the initial stay, I do not see that it is a reason to reject a sale transaction some five months later.

44 In conclusion, then, I see no jurisdictional impediment in granting the order sought and I am of the view that the proposed sale is preferable to the alternatives, and clearly in the interests of all stakeholders.

C. SUCHE J.

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