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BITTER BIDDER BITES THE DUST

ABITIBIBOWATER INC. (ARRANGEMENT RELATIF À), 2010 QCCS 1742 (S.C.)

JEAN-YVES SIMARD

ON MAY 3, 2010, JUSTICE CLÉMENT GASCON OF THE SUPERIOR COURT RENDERED AN INTERESTING DECISION IN THE CONTEXT OF A MOTION FOR AUTHORIZATION OF THE SALE TO AMERICAN IRON & METAL L.P. (HEREINAFTER "AIM") OF ASSETS BELONGING TO ABITIBIBOWATER INC. (HEREINAFTER "ABITIBI") IN CONNECTION WITH ABITIBI'S RESTRUCTURING UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*¹ (HEREINAFTER THE "CCAA").

MORE SPECIFICALLY, THE COURT CONSIDERED THE FAIRNESS OF THE SALE PROCESS AND A REJECTED BIDDER'S LEGAL STANDING TO INTERVENE IN AND CONTEST THE APPROVAL OF THE SALE SOUGHT BY ABITIBI, BY ITS MONITOR AND THE CHOSEN PURCHASER.

FACTS:

In the context of its restructuring, Abitibi decided to slow down its operations and, ultimately, to sell some of its plants that were no longer necessary to meet market demand, and which were no longer a part of its post-restructuring plans. Thus, Abitibi put four of its pulp and paper plants² up for sale by tender as a single block.

Although Abitibi received higher bids than the amount tendered by AIM, it considered that no other bidder had satisfactorily shown the ability to consummate the transaction within a reasonable time and according to financial conditions that met its approval.

Therefore, Abitibi brought a motion for authorization by the court to sell the block of plants to AIM.

However, Arctic Beluga (hereinafter "Beluga"), an unsuccessful bidder in the sale of the plants, applied to intervene in the motion, objecting to the order sought. It pleaded, in particular, that since its bid for the plants was substantially higher than the bid of AIM, it was unfairly denied the opportunity to purchase the plants, and that the tender process was therefore tainted. In substance, Beluga claimed that it had been treated unfairly because its monetary bid, although much higher, was rejected in favour of another bidder (AIM). In response, Abitibi argued, among other things, that Beluga did not have a sufficient legal interest to contest the court's approval of the sale.

It is relevant to note that the tendering process conducted by Abitibi had not received the court's prior approval. Also, both the monitor and a number of key creditors openly supported Abitibi's motion. Furthermore, the court pointed out that none of Abitibi's numerous creditors in this case objected to the proposed sale.

¹ R.S.C., 1985, c. C-36

² The plants being sold were in Dalhousie, N. B., Donnacona, Qc., Beauré, Qc., and Fort William, On.

ANALYSIS OF SALE PROCESS

The Superior Court reviewed the following criteria laid down in the case of *Royal Bank v. Soundair Corp.*,³ noting that these criteria apply in the context of a motion to authorize the sale of assets in arrangement proceedings under the CCAA:

- ▶ Was there a sufficient effort to obtain the best price and did the parties act providently?
- ▶ Was the process conducted effectively and with integrity?
- ▶ Were the interests of the parties involved considered?
- ▶ Was the sale process fair?

Regarding the sale process as such, the court dismissed Beluga's claims of unfairness. It found that the sale process carried out by Abitibi and the monitor was unimpeachable and held that, in attempting to obtain the best possible price in the shortest possible time, Abitibi and its monitor conducted a fair, reasonable, transparent and effective sale, adding that there was simply no factual basis for Beluga's claims.

Indeed, Beluga submitted several bids that were all diligently considered by Abitibi, even some unsolicited bids, which were submitted after Abitibi had already accepted AIM's bid. The court noted that Beluga had had every opportunity to improve its offer, to provide particulars and documents, and to give sufficient financial commitments, and that it had simply failed to do so. Therefore, the court found that Beluga had participated actively in the tender process and that it was paradoxical, to say the least, for Beluga to argue that the process was unfair when it had participated in the process and had had every opportunity to submit its bids.

In addition, the court considered the grounds that led Abitibi and the monitor to prefer AIM's bid, namely:

- ▶ The purchase price—supported by an in-depth market study—was fair and reasonable;
- ▶ The bid included a profit-sharing formula for the sale of the equipment in the plants;
- ▶ AIM required no further due diligence and provided sufficient evidence of its ability to assume any potential environmental liability for the facilities;
- ▶ AIM's bid contained no financing conditions and it provided satisfactory evidence of its financial ability to consummate the sale.

Conversely, Beluga did not provide satisfactory proof of its financial ability to consummate the sale. Also, it was unable to show that it could contend with the possibility of exposure to future environmental liability of as much as \$10 million.

The court observed that, contrary to Beluga's bid, AIM's bid responded to Abitibi's legitimate concerns both in terms of the environmental risk and the financing conditions.

Therefore, the court held that the parties properly used their business judgment (business judgment rule) in deciding that AIM's was the better bid, and that it was not the court's role to intervene in the exercise of this judgment in connection with the asset sale process, if this process was found to be fair and reasonable and there was no wrongful conduct by the monitor. Accordingly, the court acknowledged that Abitibi and its monitor had rejected Beluga's bid for reasonable and defensible grounds. In this regard, the court added that the parties' duty during the sale process is not to obtain the highest possible price at any cost, but to make every possible effort to obtain the best price, and that the amount of Beluga's bid was not relevant unless Abitibi and its monitor had acted improvidently:

In prior decisions rendered in similar context, courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

In the circumstances, the Court agrees that the Petitioners and the Monitor were "entitled to prefer a bird in the hand to two in the bush" and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments.⁴

SUFFICIENT LEGAL INTEREST TO INTERVENE

Although the court dismissed Beluga's arguments, it did consider the issue of whether Beluga had a sufficient legal interest to object to the motion for authorization of the asset sale. In this regard, the court noted that the standing of a rejected bidder has not yet been considered in Quebec:

Interestingly, the Court notes that in the few reported decisions of this province's courts dealing with the contestation of sale approval motions, the standing issue of the disgruntled bidder has apparently not been raised or analyzed.⁵

³ (1991) 7 C.B.R. (3d) 1 (Ont. C.A.)

⁴ Par. 72-73

⁵ Par. 81

The court referred to the decision by the Ontario Court of Appeal in *Skyepharm v. Hyal Pharmaceutical Corporation*⁶ ("Skyepharm"), and identified the following principles regarding the legal interest of the bidder or potential purchaser at the stage of the court's approval of the sale:

- ▶ Its interest in the sale is purely commercial;
- ▶ If a prospective purchaser does not acquire a sufficient interest to be a party to the motion for the authorization of the asset sale, it follows that no rights of such purchaser will be decided by the order issued on the motion;
- ▶ This being said, there are two reasons underlying the principle that an approval order has no effect on the rights or interest of an unsuccessful bidder in the sale process:
 - ▶ The prospective purchaser has not yet acquired ownership in the property being sold, and therefore, the submission of a bid creates no rights in favour of the bidder;
 - ▶ The fundamental objective of the process of approving the sale by the court is to consider the interests of the persons with a direct interest in the sale process, including, first and foremost, the creditors. At this stage, the prospective purchaser does not hold a sufficient interest. Conversely, the involvement of a prospective purchaser, who was previously eliminated from the sale process, in the motion to authorize the sale of the assets could confuse the debate by adding extraneous issues that could lead to additional expense and delay.

- ▶ Certain policy reasons have prompted the courts to restrict the presence of prospective purchasers as much as possible in the sale approval process given that, as a general rule, there is a measure of urgency to such proceedings, and the presence of such purchasers can add a degree of uncertainty to, and delay, the process. In some cases, such uncertainty and potential for delay can be used as leverage by the unsuccessful purchaser contrary to the interests of those for whose benefit the sale is intended.

The court noted also that the Superior Court of Justice of Ontario, in the *Nortel Networks Corporation* case, recently confirmed that the principles elucidated in the *Skyepharm* case could serve as a precedent in the context of proceedings instituted under both the CCAA and Chapter 11 of the *US Bankruptcy Code*.

Finally, the Court considered that Beluga's attempted opposition to the sale of Abitibi's facilities to AIM was a typical example of the situations that underlie the policy reasons for the courts' exclusion of prospective purchasers from the sale approval process. Indeed, the court noted that Beluga was the only person to contest the sale; nor was it supported by any of the creditors. Beluga's contestation was based purely on its own commercial interests. As a result, it created uncertainty surrounding the sale and delayed its approval, while the parties with a legitimate interest in the sale were concerned that it should proceed as quickly as possible.

In other words, Beluga had no legal standing either to contest the sale process or to intervene at the sale authorization stage. Its intervention, motivated solely by its own commercial interests, was detrimental to the definite interests of the parties—notably the creditors—who were entitled to have the process concluded as quickly as possible.

CONCLUSION

This decision is particularly important because, in addition to providing a comprehensive review of the principles governing the asset sale process under the CCAA, it is the first time the courts of Quebec have ruled on the lack of legal standing of a prospective purchaser, who is unsuccessful in bidding for an asset in the sale process, to contest the application for approval of the sale.

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⁶ [2000] O.J. No. 467 (Ont. C.A.)

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