

Tab 5

Case Name:
Hunjan International Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement
Act**

**AND IN THE MATTER OF a plan of compromise or
arrangement with respect to Hunjan International Inc.,
Hunjan Moulded Products Ltd., Hunjan Tools & Mould
Ltd., and Hunjan Holdings Ltd.**

[2005] O.J. No. 4943

18 C.B.R. (5th) 89

2005 CarswellOnt 6658

Court File No. 05-CL-5886

Ontario Superior Court of Justice

J.D. Ground J.

Heard: November 7, 2005.

Judgment: November 15, 2005.

(16 paras.)

Civil procedure -- Judgments and orders -- Amendment, rescission and variation -- Cross-motion by En-Plas Inc. for variation of previous order allegedly including En-Plas's property in the auction dismissed -- No evidence of fraud or new facts that would have allowed court to amend order of sale that allegedly included En-Plas's equipment -- Order made with full knowledge of priority dispute and specifically provided that equipment be included in auction.

Insolvency law -- Receivers, managers and monitors -- Property -- Sale of -- Motion by receiver of Hunjan International for order approving sale of assets by auction process to CIACPCC Inc. allowed -- Receiver correct in accepting CIACPCC's bid despite new company's bid being higher -- Receiver made sufficient effort to obtain best price, considered interests of all parties and the integrity of bidding process -- No unfairness in bidding process -- Receiver rejected new company's proposal because of concerns over risks -- CIACPCC's offer contained few conditions and did not require negotiation of agreement.

Motion by receiver of Hunjan International for order approving sale of assets by auction process to CIACPCC Inc. and cross-motion by En-Plas Inc. for variation of previous order allegedly including En-Plas's property in the action -- Receiver obtained order to sell Hunjan's assets at auction -- CIACPCC bid in auction and receiver concluded that its proposal was most prudent course -- A new company related to Hunjan amended terms of its bid, increasing its offer -- New company's bid higher than

CIACPCC's bid -- Receiver concerned about risks associated with selling to new company and requested that bidders provide their final best offers within two days -- New company increased its bid but amendment did not address receiver's concern about amount of deposit -- Receiver accepted CIACPCC's proposal -- Hunjan's landlord opposed proposal -- En-Plas claimed receiver converted its possessions and sold them in the auction -- HELD: Motion allowed, cross-motion dismissed -- Sale process ended when receiver accepted CIACPCC's final offer -- CIACPCC's offer was qualified even though initial deposit not received until day after bidding closed -- Receiver authorized to waive terms of sales process at its sole discretion -- Receiver made sufficient effort to obtain best price, receiver considered interests of all parties and the integrity of bidding process -- No unfairness in bidding process -- Receiver rejected new company's proposal because of concerns over risks -- CIACPCC's offer contained few conditions and did not require negotiation of agreement -- Receiver's recommendation supported by two secured creditors of Hunjan -- Fact that landlord would have received benefit if new company's proposal accepted was irrelevant -- Damage to landlord's premises caused by removal of equipment compensable by insurance held by CIACPCC -- En-Plas should have brought motion to determine priority of security in its equipment prior to hearing of motion to approve sale -- No evidence of fraud or new facts that would have allowed court to amend order of sale that allegedly included En-Plas's equipment -- Order made with full knowledge of priority dispute and specifically provided that equipment be included in auction.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 s. 187(5)

Ontario Rules of Civil Procedure Rule 59.06(2)

Counsel:

L. Joseph Latham and Adam Larry for Interim Receiver

James C. Orr for Hunjan Holdings Ltd.

ENDORSEMENT

1 J.D. GROUND J. (endorsement):-- As stated at the conclusion of the hearing of this motion, an order will issue granting the relief sought in paragraphs (a) to (f) of the Notice of Motion of KPMG Inc. (the "Receiver") and in particular approving the transactions contemplated by the Auction Services Agreement dated October 26, 2005 between the Receiver and CIACPCC Inc. ("CIA") ("the ASA"). An order will also issue dismissing the cross motion brought by En-Plas Inc.

2 The initial receivership order of Stinton, J. dated July 18, 2005, with respect to the Receiver's powers, provides in part as follows:

To market any or all of the Property, save and except for the inventory (as defined in paragraph 4 herein), including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate, provided that with respect to the Hunjan Group's machinery, equipment and office furniture and equipment (the "Equipment") the Receiver is authorized to solicit auction proposals and to entertain any offers which may be received up to any deadline which may be established for

receipt of auction proposals, and for greater certainty, the Receiver may not be obliged to advertise or solicit offers with respect to the Equipment, other than the auction proposals.

3 The ASA arose from the proposal of CIA obtained as a result of the sales process undertaken by KPMG as set out in its Eighth Report now before this court including a rebidding by CPA and 2057412 Ontario Inc. ("New Co."), a corporation formed by a former officer of Hunjan International Inc., to purchase the equipment.

4 With respect to the offers received from CIA and New Co., the Receiver in its Eighth Report states as follows:

The CIACPCC NMG proposal generates the highest recovery in all auction scenarios until the gross auction proceeds exceed \$6,500,000. If gross auction proceeds exceed \$6,500,000, four of the other proposers' offers could yield recoveries in excess of the CIACPCC NMG proposal. The best of those four offers would result in an approximately \$240,000 greater recovery than CIACPCC's based on the auction yielding \$7,000,000 (this number being the upper range of an auction yield based upon estimates provided by one proposer). However, each of those four offers provide lower NMGs than CIACPCC's NMG proposal, with the one offering the highest recovery at gross auction proceeds of \$7,000,000 having a NMG of approximately \$218,000 less than that of CIACPCC. Given the uncertainties of an auction scenario, and after weighing the potential upside against the lower NMG's, the Receiver believes that the CIACPCC NMG proposal represents the highest likely recovery scenario for an auction process.

Having determined that the CIACPCC proposal represented the highest likely net recovery to the estate on both an outright purchase and NMG basis, and given that the NMH amount and the purchase price were identical, the Receiver believes that the NMG proposal submitted for the Receiver to recover, in addition to the NMG amount, a percentage of any gross auction proceeds in excess of \$6,750,000.

LATE SUBMITTED UNSOLICITED OFFER

Since the Receiver had concluded that the CIACPCC NMG proposal was the most prudent course, by October 16, 2005, the Receiver had advised all of the other bidders, save CIACPCC and one auction bidder, that the Receiver was proceeding to try to deal with another offer. CIACPCC was advised that the Receiver expected to proceed with its offer subject to receipt of its deposit and the finalizing of an auction services agreement. The other auction bidder was told that the Receiver was attempting to finalize a transaction with another party, however, if that did not occur the Receiver would attempt to finalize a transaction with it.

During the afternoon of October 17, 2005, and without solicitation from the Receiver, the Other Bidder amended the terms of its proposal by reducing the amount of the deferred consideration, making it payable on closing and shortening the period to closing. These changes resulted in the Other Bidder's offer generating, on the face of it, \$275,000 more in net recoveries than the CIACPCC NMG proposal. However, the Receiver's concerns regarding the closing risk associated with the Other Bidder's offer remained unabated.

After considerable deliberation, the Receiver determined that the most prudent course of action was to contact CIACPCC and the Other Bidder and ask that each of them submit their final best offer by the close of business on October 19, 2005. In each such call, the Receiver identified areas of concern with that party's proposal, while keeping confidential the terms of the other offer.

The Other Bidder did submit a further enhancement that consisted of a \$150,000 increase in the purchase price, and a minimal (i.e. \$75,000) increase in its deposit resulting in the Other Bidder's proposal generating approximately \$425,000 more in net recoveries to the estate than CIACPCC's NMG proposal (the Other Bidder's allocations by Lot were also superior to those contained in CIACPCC's final submission). However, the enhancement did not address the Receiver's concern about the quantum of their deposit, as a more substantial increase in the deposit would have helped mitigate the closing risk associated with accepting the Other Bidder's proposal. The Receiver continues to believe that there is significant closing risk associated with the Other Bidder's final offer given the other matters which must be concluded in order for a transaction with the Other Bidder to close, and the Receiver is of the view that the deposit offered in the Other Bidder's final offer is insufficient to compensate for the additional costs which the Receiver would incur if the Other Bidder's transaction were to be selected and then not close.

5 On October 20, 2005 the Receiver advised the principals of New Co. by e-mail as follows:

Thank you for your continued interest in the Hunjan assets. We have decided to head in a different direction and, therefore, are rejecting your proposal. No further submissions will be accepted from any parties.

Notwithstanding the Receiver's e-mail of October 20, 2005 on October 24, 2005, the Other Bidder once again tried to put forward an enhancement to its offer by way of e-mail to the Receiver, a copy of which is attached hereto as Schedule "M". The Receiver's counsel responded by letter dated October 25, 2005, again advising that the sale process was closed and that the Receiver was not in a position to consider any further offers or enhancements.

6 I am satisfied that the sale process was concluded on October 19, 2005 and that the proposals of CIA and New Co. to be considered on this motion for comparative purposes are the proposals and enhancements thereto as of October 19, 2005. I am also satisfied that the offer of CIA as of October 19, 2005 is a qualified offer even though the initial deposit was not received until October 20, 2005 and the enhanced deposit not received until October 27, 2005. The Receiver is authorized by paragraph 20 of the Information Package appended to the Fifth Report of the Receiver and incorporated by reference in the order of Hoy, J. dated September 12, 2005 to waive any term and condition of the sales process procedures at its sole discretion.

7 It is the position of the Receiver that the court when considering the recommendation of a Receiver with respect to the sale of assets should be conscious of the need to preserve the integrity of the sales process regime for sales of assets by officers of the court and follow the principles set out in *Royal Bank of Canada v. Soundair Corp.* (1991) 83 D.L.R. (4th) 76 (O.C.A.) and should consider the following matters.

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.

8 The Receiver submits that all of the principles of Soundair, supra, have been complied with and, on the evidence before this court, I concur. It appears to be the submission of Hunjan, apparently as a stalking horse for New Co., that the requirement for New Co. to advise within 18 hours that it would increase its deposit to \$1,500,000 constitutes such a degree of unfairness in the process that the recommendation of the Receiver should be rejected by this court. The Receiver disputes the allegation of unfairness raised by Hunjan with respect to the requirement that New Co. advise the Receiver within 18 hours whether it would increase its deposit to \$1,500,000. It is the position of the Receiver that the proposal of New Co. was not rejected because of its failure to advise that it would increase its deposit but was rejected because of concerns of the Receiver with respect to the New Co. proposal. Among those concerns was the lack of certainty that New Co. had the necessary financing to close the transaction, that it had no commitment letter with respect to such financing, that it had no binding agreements for the acquisition of the premises in which it proposes to continue to carry on the Hunjan business, that a formal asset purchase agreement would have to be negotiated with New Co. which would likely include a number of conditions to closing related to agreements with third parties and that New Co. would likely encounter serious difficulties in attracting back the customers who had left Hunjan and would not be able to re-establish the Hunjan business. The Receiver was also of the view that, considering the various offers received from prospective purchasers, there was a strong possibility that the proceeds from the CIA proposal would exceed the purchase price offered by New Co. In addition, the CIA offer was a "clean offer" with very few conditions other than the approval of this court and did not require a negotiation of an Asset Purchase Agreement. I accept the submission of the Receiver in this regard and find that there was no unfairness in the Receiver asking New Co. to confirm within 18 hours that it would increase its deposit to \$1,500,000 such that the Receiver recommendation should not be accepted by this court. I also note that the Receiver's recommendation of acceptance of the CIA proposal is supported by two of the principal secured creditors, being CIBC and EDC, and that two of the other principal secured creditors, IBM and CIT, have left the assets on which they hold security in the auction process.

9 It also appears to be the position of Hunjan that the proposal of New Co. is the best proposal in that the purchase price offered by New Co. is \$240,000 or \$450,000 greater than the net minimum guarantee in the CIA proposal. I am unable to accept this submission. The fact that the New Co. proposal provided for a purchase price which was more than the net minimum guarantee under the CIA proposal is not, in my view, determinative. It has often been stated in this court that the highest bid is not necessarily the best bid and, considering all the factors as stated above, I am of the view that the Receiver acted reasonably in concluding that the CIA proposal was the preferable proposal and in recommending acceptance of that proposal.

10 The owners of the properties in which Hunjan formally carried on business (the "Landlord") have also opposed the recommendation of the Receiver. To a large extent their opposition seems to be based on enlightened self interest in that they are strongly recommending that the court should accept the New Co. proposal presumably because New Co. proposes to enter into a lease with the Landlord of the premises and to carry on the business formerly carried on by Hunjan on those premises. I am not satisfied that the fact that the Landlord will receive a benefit if the New Co. proposal is accepted rather than the CIA proposal is any basis on which to conclude that the recommendation of the Receiver to accept the CIA proposal was unreasonable or unfair. The other basis on which the Landlord opposes the Receiver's recommendation appears to be a concern about the cost of repairs that may be necessary to the premises as a result of the removal of the equipment, which cost appears to be estimated by the

Landlord to be in the neighbourhood of \$600,000 to \$800,000. There is no breakdown of that amount in the estimates in reports filed by the Landlord with this court and, in any event, I have some reservations about the estimates in that they appear to be estimates to restore the premises to "its original condition" which, of course, is not what the obligation of the tenant is with respect to repair of damage to the premises. In addition, in my view, the Landlord is well protected by the fact that CIA has in place an insurance policy for \$3,000,000 which will cover any damage to the premises resulting from the auction process and the removal of the equipment where such damage is caused by CIA or any purchaser or their agents. CIA has also required every purchaser to obtain insurance in like terms in the amount of \$1,000,000. CIA has offered to provide copies of such insurance policies to the Landlord. I must conclude that the Landlord's concerns with respect to damage to the premises as a result of the auction sale and the subsequent removal of the equipment is no basis on which to reject the recommendation of the Receiver and is probably not a legitimate concern in any event.

11 With respect to En-Plas, it does not appear to be taking any position on the recommendation of the Receiver. It has brought a cross motion to, in effect, vary the order of Hoy, J. by excluding Lot 2, which is the equipment in respect of which there is a priority dispute as between En-Plas and CIBC, from the auction process pending the determination of the priorities motion to be heard on December 5, 2005. In this regard, it appears to me that En-Plas is, in part, the author of its own misfortune in failing to take steps to bring on the priorities motion prior to the hearing of this motion.

12 The En-Plas cross motion also seeks an order permitting En-Plas to claim against the Receiver for wrongful conversion of its property. The Receiver, in dealing with all of the assets of Hunjan, including Lot 2, is acting pursuant to a court order and I know of no basis on which any conversion claim could be brought against the Receiver.

13 With respect to that part of the En-Plas cross motion which seeks to vary the order of Hoy, J., I have considerable difficulty. Subsection 187(5) of the Bankruptcy and Insolvency Act R.S.C. (1985) c. B-3, as amended (the "BIA") sets out this court's power to review, rescind or vary the order made in the course of an interim receivership. It has been held that such jurisdiction should be exercised sparingly and by analogy to the provincial law as with respect to variation of orders. Rule 59.06(2) provides that an order may be varied on the ground of fraud or a fact arising or discovered after it was made. There is no allegation of fraud with respect to the issuance of the order of Hoy, J.

14 As to facts arising or discovered after the order was made, these would have to be facts that are material and could reasonably be expected to have affected the outcome of the proceedings which resulted in the order. There is no evidence before this court of any such facts. En-Plas submits that it would lose something in the neighbourhood of \$1,000,000 if Lot 2 is included in the auction process. This appears to be based on the prices suggested by CIA for its net minimum guarantee and there is obviously no certainty that this would be the result or that the assets claimed by En-Plas are in fact worth \$1,000,000 more than the price suggested by CIA for the net minimum guarantee. En-Plas also appears to submit that Hoy, J.'s order was made on the basis of the Receiver's Fifth Report which contained erroneous and incorrect information in that it did not deal with apparently oral communications between En-Plas and Hunjan to the effect that the equipment comprising Lot 2 was provided to Hunjan on some sort of bailment basis and was never the property of Hunjan. En-Plas points out that paragraph 63 of the Fifth Report provides that if assets included in the auction sale process are not the "property of the Hunjan Group", they would be removed in the process and returned to the appropriate party. There is no documentary evidence before this court to support the contention that the Lot 2 equipment was provided to Hunjan on some sort of bailment basis but, in any event, it appears to be the position of En-Plas that, as a result of a transaction entered into between En-Plas and Hunjan approximately two weeks before the initial CCAA order, the Lot 2 equipment was held by Hunjan at the date of the CCAA order pursuant to a Conditional Sale Agreement and that Hunjan had a purchase

money security interest in such equipment which it registered within the appropriate time period and which, accordingly, takes priority over the charge in favour of CIBC. If that it is the case, Hunjan clearly had a property interest in the Lot 2 equipment and the provisions of paragraph 63 of the Fifth Report are not applicable. In my view, Hoy, J.'s order was made with full knowledge of the positions of En-Plas and CIBC with respect to the priorities dispute and her Endorsements specifically provides that Lot 2 would be included in the auction sale process and that any claims of any party with respect to the equipment could be brought against the proceeds of the sale subject to the same ranking and priority as such claim would have had against the equipment. I am accordingly of the view that there is no basis on which the order of Hoy, J. can be varied and the cross motion of En-Plas is dismissed.

15 I am compelled to say that I see no reason why either New Co. or En-Plas could not bid for the assets they are interested in during the auction process. It occurs to me that, if the Lot 2 equipment is worth so much more than the amount likely to be received during the auction process as En-Plas has submitted, En-Plas would be well advised to bid in the auction process and resell the equipment for such a higher price. With respect to New Co., it appears to me that New Co. would have a considerable leg-up in the auction process in that it could base its price taking into account that, if successful, it would not incur a cost of \$3,300,000 which is the astounding estimated cost of removing the equipment. New Co. could presumably outbid any other parties who would incur such costs.

16 Any party feeling compelled to make submissions on the costs of this proceeding may do so by brief written submissions to me, on or before, December 9, 2005.

J.D. GROUND J.

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