2003 ABQB 1015
Alberta Court of Queen's Bench

843504 Alberta Ltd., Re

2003 CarswellAlta 1786, 2003 ABQB 1015, [2003] A.J. No. 1549, 127 A.C.W.S. (3d) 1135, 30 Alta. L.R. (4th) 91, 351 A.R. 222, 4 C.B.R. (5th) 306

# In the Matter of the Bankruptcy and Insolvency Act R.S.C. 1985, C. B-3, As Amended and 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
843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

Topolniski J.

Heard: November 10, 2003
Judgment: December 9, 2003
Docket: Edmonton 0303-19663

Counsel: A. Robert Anderson for EdgeStone Capital Mezzanine Fund II Nominee Inc.
Emi R. Bossio for Ingersoll-Rand Canada Inc.
Michael McCabe for Proposal Trustee, PricewaterhouseCoopers LLP
Kent Rowan for GE Commercial Distribution Finance Canada Inc.
Michael Penny, Stuart Weatherill for Unknown Purchaser
Darren Bieganek for Transportation Lease Systems Inc.
David Stratton for CNH Canada Ltd. (New Holland Construction), New Holland (Canada) Credit Company
Jerry Hockin for JLG Industries Ltd., CAFO Inc.
Rick Reeson for Alberta Treasury Branches

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

APPLICATION by creditor and monitor to extend stay of proceedings under *Companies' Creditors Arrangement Act*.

***Topolniski J.*** **(orally):**

**Introduction**

1 EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral decision on the reasons given on November 10, 2003.

Facts

2 Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches — 19 in Alberta and 3 in British Columbia.

 

3 Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

4 On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

5 EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

> a) circumstances exist to make the extension order appropriate and
>
> b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure — That is the test for terminating, not extending, a stay of proceedings (*Rio Nevada Energy Inc., Re* (2000), 283 A.R. 146 (Alta. Q.B.)).

6 The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

7 EdgeStone and the Monitor rely on the Monitor's *Third Report to the Court* and an excerpt from an *Information Circular*. as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

*1. The Initial Order*

8 On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

9 Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than $100,000 and, in the case of assets subject to PIMSI's, $20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

10 The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other then those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (*Mine Jeffrey inc., Re* (2003), 40 C.B.R. (4th) 95, [2003] R.J.Q. 420 (Que. C.A.)). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

  

*2. Subsequent Motions*

11 The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

12 GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

*3. This Application*

13 The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (*United Used Auto & Truck Parts Ltd., Re* (2000), 135 B.C.A.C. 96, 2000 BCCA 146 (B.C. C.A.), at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others — there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised . . . and have the pain of the compromise equitably shared." (*Sammi Atlas Inc., Re*, [1998] O.J. No. 1089 (Ont. Gen. Div. [Commercial List]) citing *Campeau Corp., Re*, [1992] O.J. No. 237, 10 C.B.R. (3d) 104 (Ont. Gen. Div.), at 109).

14 As acknowledged by LoVecchio J. in *Blue Range Resources Corp.* (1999), 245 A.R. 154, 1999 ABQB 1038 (Alta. Q.B.), reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion — the solutions are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (*Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (Alta. C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

15 This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: *Anvil Range Mining Corp.* (2002), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.); *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104; *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 46.

**EdgeStone's Application and Evidence**

16 As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: *Alberta (Human Rights Commission) v. Alberta Blue Cross Plan* (1983), 48 A.R. 192 (Alta. C.A.) at para. 8; *Allen v. Alberta*, [2001] A.J. No. 863, 2001 ABCA 171 (Alta. C.A.) at para. 8; *Hovsepian v. Westfair Foods Ltd.*, [2003] A.J. No. 1133, 2003 ABQB 641 (Alta. Q.B.). I note that the Monitor's report is filed with the court for information purposes and is available to me.

 

17 GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of $15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

**The Monitor's Duties, Application, and Evidence**

18 The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

19 As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

20 Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

21 The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

a) all or part of the debtor's assets business and undertakings,

b) refinancing,

c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or

d) any combination thereof.

22 The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

**The proposed restructuring process**

23 The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;

2. report the results of the solicitations to the Court by December 19

3. close transactions after obtaining court approval by January 30 2004, and

4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

 

24 Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

25 The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on *Consumers Packaging Inc., Re* (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. C.A.) and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) in support of the proposition that this is an acceptable practice.

26 Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

27 In *Consumers Packaging Inc.* the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

28 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

29 I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (*PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]); [2001] O.J. 3829, *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge* and *Consumer's Packaging*). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's *bona fides* nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

30 EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (*Blue Range Resource Corp, Gauntlet Energy Corp* action 0301-09612, *Liberty Oil & Gas Ltd., Re* action 0201-03299 [2002 CarswellAlta 1364 (Alta. Q.B.)], and *Mirant Canada Energy Marketing Ltd.* action 0301-11094. *Blue Range* and *Liberty Oil & Gas Ltd.* obtained court sanctioning for liquidation-style plans. *Gauntlet* obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. *Mirant's* creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

**The Extension should be granted**

31 Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

32 Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

33 In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;

  

2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (*Rio Nevada Energy Inc.*, and cases cited at para. 36)

3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a $337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.

4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.

5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.

6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than other insolvency proceedings;

**Order**

1. The stay of proceedings under the CCAA is extended to December 19 th

2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;

3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;

4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.

5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.

6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.

7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.

8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

*Application granted.*