MCINNES COOPER

Our File: 181890

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The Honourable Justice John Bodurtha
The Law Courts
Supreme Court of Nova Scotia
1815 Upper Water Street
Halifax NS B3J 1S7

Hfx No. 507069

My Lord:

Re: In the Matter of the Notice of Intention to Make a Proposal of Atlantic Crane & Material Handling Limited, Labrador Cranes 2005 Limited, and LCB Rentals Limited (collectively, the "Debtors"): Hearing Scheduled For October 12, 2021 at 2:00 p.m.

We are counsel for Bank of Montreal ("**BMO**") in connection with this matter.

BMO and other creditors were advised on October 4, 2021 in an email sent by Mr. Hill that the Court-approved purchaser of the assets of the Debtors, Hercules SLR Inc. ("**Hercules**"), was suddenly insisting on a purchase price reduction of $376,000, or roughly 28%. While we believe the reduction relates to Hercules' altered view of the value of the Debtors' inventory, the nature of this material departure from the approved transaction has not been explained to BMO. It is BMO's understanding that Hercules purported to rely upon a provision within the Agreement of Purchase and Sale which allows for pre-closing price adjustment, presumably in the event of loss in asset value occurring between the valuation date of August 4, 2021 and the projected closing date (here October 5, 2021).

With respect, that price adjustment provision is not intended to be *ex post facto* insurance against an regrettable bid (AKA buyer's remorse), nor does it give license to a purchaser to fundamentally alter the purchase price which had been put before the Court (in presumed good faith), was debated amongst affected stakeholders, and ultimately approved. In our submission, this provision is intended to preserve basic equity, in the event (between the Agreement being signed and the closing) assets are damaged, stolen, sold or lost. Rarely do these adjustments amount to anything significant in magnitude, and certainly they are not capable of supporting "game-changing" reductions such as the $376,000 proposed by Hercules. That would drop the successful bid well below the floor of the Stalking Horse process approved by the Court on August 19, 2021, and thus its acceptance would injure the Stalking Horse bidder Russell Industries Corp. ("**Russell**"), which might have been the successful proponent had this situation developed before the auction.

We expressed some cynicism at the September 29, 2021 hearing on BMO's behalf. We admitted to being both *weary from and wary of* changes of course in this procedurally cumbersome matter. On BMO's behalf, we also expressed concern that the sale might again be delayed or terminated, and while not surprised that this has occurred, BMO is disappointed.

These hearings cost money for affected stakeholders seeking to preserve their statutory rights. When the approved transactions are dashed, and further returns to Court become necessary, it is wasteful of time and expense for the interested parties, to say nothing of the time and energy of this Honourable Court and its staff.

During the September 29, 2021 hearing, counsel for the Debtors opened his submissions by mentioning that the Stalking Horse "Plan B" purchaser option in the matter, Russell, remained ready, willing and able to close at the previously approved price of $1.25 million, plus payout of the BDC mortgage over the Warehouse, if called upon to do so. Why reference was made to a Plan B *at a hearing to approve the Hercules "Plan A"* was not explained, but it was somewhat ominous. We will not speculate, but are hopeful that at the time of the September 29, 2021 hearing, the Debtors were not actually or constructively aware of the inventory valuation issue which ultimately sidetracked that deal, because nothing was said on that subject. Section 4.2 of the BIA, which was added in 2019, sets out the duty of good faith, and empowers this Court to remedy any instances where that standard is departed from. This Section provides as follows, and applies to all parties interested in a BIA-related proceeding, including prospective purchaser Hercules and the Debtors:

> "**Good faith**
> **4.2** (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith — powers of court**
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by any interested person, the court may make any order that it considers appropriate in the circumstances."

If torpedoes were in the water on the inventory valuation at the time of the September 29, 2021 hearing, as much should have been brought to the attention of the Court by *anyone* who then knew about that issue. Because that is a fundamental change of terms, such would mean that the deal placed before the Court was not yet a deal at all. A post-approval material reduction in the purchase price was never discussed in Chambers on September 29, 2021. Counsel for the Debtors and counsel for Hercules, as well as a representative from the NOI Administrator (MNP Limited) were all present in Chambers.

If counsel for the Debtors and counsel for Hercules advise the Court on October 12th that nothing was known or suspected before 3:00 p.m. on September 29, 2021 about any actual or foreseeable *material disagreement* between the Debtors and Hercules on inventory (or fixed asset) value, we will take counsel at their word.

If such cannot be confirmed, we suggest we are approaching that blurred line between bad form and bad faith.

Situations like this one underscore the danger of approving asterisks left in a sale price. Commercial parties do not trade in asterisks, they trade in certainty. Numbers are used in commerce to provide comfort that all are on the same page. We have repeatedly challenged the unprecedented use of placeholder dollar amounts (and no valuation evidence) in Section 65.13 sale approval Motions, a practice which departs from the review criterion set out at Section 65.13(4)(f). While some comfort was offered in Chambers that the Warehouse valuation would come before the Court at some point in the form of an explainable dollar figure, *with the recent $500,000 market value being a useful frame of reference in that regard, this was not said by the*

prospective purchaser itself, and we were left with no other comfort. What was reasonably assured on September 29th however, was that the lump sum of $1.357 million was to be the sale price for the assets of these Debtors. Within that global figure, there is ample room for a reasonable Warehouse allocation. Now we learn that even this figure, the only one actually disclosed to the Court for approval, was itself still pliable in the hands of the purchaser.

If a price adjustment clause can be exploited like this *after Court approval*, and asterisks can be approved by the Court and later, once beyond the view of the Court and affected creditors, *made into any dollar amount which suits the purchaser's convenience*, one wonders why the Debtors elected to proceed to the Court approval stage at all? Affected stakeholders were entitled to presume that the deal being submitted for approval was real and binding. While *de minimus* closing adjustments are common in any commercial transaction, barring clear misrepresentation by a vendor (not discernable through standard due diligence) price adjustment clauses are not intended to be used as after-the-fact insurance against careless due diligence, or to justify opportunistic reductions in price. We have not heard anything from Hercules in this matter, and are left to speculate as to the nature and purported justification for this massive reduction.

Russell's Alternative Offer

In Chambers on September 29, 2021, it was noted that Russell remained in the picture, and would conclude a deal if called upon to do so in accordance with the baseline asset value described in the Stalking Horse Sale Process Approval Order (and its attachments) of August 19, 2021. We note the following in relation to the proposed alternative sale to Russell's affiliate:

1. That August 19, 2021 Stalking Horse and Bidding Procedures Order was just that, a process approval which, while referable to Section 65.13, was not an actual sale approval, which calls for itemized demonstration of the fairness and reasonableness of the price obtained relative to market values. It cannot simply morph into a Sale Approval and Vesting Order at this juncture, and the Court must assess all relevant approval criteria, including the allocation of fair market value to the Warehouse, and review a proper draft Sale Approval and Vesting Order, which we've not yet seen;

2. The current Russell bid is not the same as the Stalking Horse bid. The Stalking Horse Bid (which was not a sale price in any event, but a pace car for a competitive race to follow) was $1.25 million, plus payout of the BDC Warehouse Mortgage. It was to be the opening bid, the floor of the auction, but this week we learned that *there also exists a basement*. It has been lowered by $100,000. We don't know why, but suspect it may have to do with the vulnerable state in which these scrambling Debtors now find themselves, lacking both time and money to proceed to a third sale process for these assets. Regardless, that $100,000 reduction is a material departure from the original baseline price which Russell was willing to pay only a few weeks ago. For all we know, if the original starting threshold had been lowered by $100,000, *other bidders might have joined in the bidding sweepstakes the August 19, 2021 Order created*. Ours is not to speculate, but 5-10% makes a difference in a matter like this, and other proponents who didn't materialize in the end might well have emerged at that starting point;

3. **BMO would support the new Russell/Canadian Maritime Engineering Limited bid, but only if it remains firm, binding and *unchanging* from $1.15 million, plus payment of the BDC Warehouse Mortgage arrears (being the higher available return, relative to**

the Hercules bid); has no outstanding conditions precedent to closing; and in fact closes before October 22, 2021, but we renew BMO's standing objection to the non-allocation of any sale price component to the Warehouse by Russell *at this time* to permit a proper Section 65.13(4)(f) approval review. The events of the past 48 hours underscore just how important it is for parties to follow the BIA's processes and present for approval clear deal terms which can be assessed in accordance with that statute. The seeking of approval of deals which are not confirmed in all material respects is something to be discouraged. Asterisks generate mischief, and by their very nature, are *hallmarks of uncertainty* in an area of the law which demands much more than that; as do the Court and affected stakeholders.

The Stay of Proceedings and the Requested Revocation of the September 29, 2021 Order:

Not part of the Motion but also worthy of discussion on October 12th is the potential need for a further stay extension in the matter. Though we've not seen a new draft Sale Approval and Vesting Order at the time of writing, we understand from the Notice of Motion that a sale to the Russell-affiliated company is submitted for approval under Section 65.13, as were the sales approved on June 29, 2021 and September 29, 2021. Those prior Orders confirmed rights for recorded interest holders such as BMO, notwithstanding any subsequent bankruptcy of the Debtors. We submit the current draft Order must do the same, and we reserve the right to comment on it when we see it.

On September 29, 2021, following the written submissions of TD Bank requesting a reduction of the stay period's end from November 15, 2021 to October 22, 2021, that Order was granted without objection. BMO did not object because it saw before it a Sale Approval and Vesting Order which preserved its rights, and was assured that an October 5, 2021 closing would take place, well within the stay period. Both of those conditions have since changed.

The current Motion seeks to rescind that September 29, 2021 Order and all of the rights it confirmed, just as the June 29, 2021 Order was similarly frustrated in early July, along with all of *the rights it confirmed*. When that happens, an unsettling yo-yo effect is created, and parties protected under those Orders are suddenly exposed, and vulnerable to having those rights undermined by further Orders or by operation of the BIA. A Section 65.13 sale, by its design, cannot be achieved in a bankruptcy, and hence extension of the stay beyond October 22, 2021 to accommodate this latest twist in the road would appear to be logical.

The way these Sale Approval Orders operate is that both the vesting in the purchaser and the carry-forward of existing creditor rights against proceeds are activated not by the Order itself, but only *upon closing, i.e. "from and after" the delivery of a Trustee's Certificate evidencing same*. The rescission now sought will take place 10 days before the scheduled end of the current stay period and thus creates a special form of prejudice if the ***closing of the transaction which activates its terms* does not take place before bankruptcy occurs**. It could cut the yo-yo string on its way back up to the protection of existing charge holders' rights. Also dashed could be the long-promised distribution hearing, which might be replaced with the standard BIA proof of claim submission process. Assurances may be made at this time about closing with haste, but creditors are *twice bitten* in this matter, having relied on those assurances before.

All of which is respectfully submitted.

Ben R. Durnford

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