

COURT FILE NO.: CV-08-00007503-00CL

DATE: 200870711

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Hard-Rock Paving Company Limited, Diamond Stonebridge Contracting Inc.,
Hard-Rock Construction Inc., 942355 Ontario Limited and 942356 Ontario
Limited v. Caterpillar Financial Services Limited

BEFORE: Justice H.J. Wilton-Siegel

COUNSEL: *Raymond M. Slattery* and *David T. Ullmann*, for the Applicants

Tim Hogan, for the Monitor, BDO Dunwoody

Steven T. Weisz and *Katherine McEachern*, for the Respondent, Caterpillar
Financial Services Limited

Harvey Chaiton, for GE Equipment Financing GP

Sam Sasso, for the Guarantee Company of North America as D&O Insurer of
Hard-Rock Paving Company Limited

Sam Rappos, for Guarantee Company of North America

Andrew Hatnay, for Operating Engineers Local 793 and Labourers Local 837

David Hager, for Miller Paving Limited

HEARD: July 9, 2008

ENDORSEMENT

[1] The applicants seek the Court's approval for the sale of their property and undertaking to the two parties that, in the opinion of the applicants and the Monitor, collectively bid the highest price in the sales process previously ordered by the Court.

[2] GE Canada Equipment Financing GP ("GE") argues that its consent is required pursuant to paragraphs 42 and 44 of the initial order dated May 12, 2008, as amended and restated, (the "Initial Order"). It refuses to grant its consent. Instead, it proposes that the bid process be extended for ten days to allow it, and any other interested party, to bid. GE is prepared to waive its right to consent if such an order is granted. It says it intends to bid the same price as the two proposed purchasers and, if it does so, will argue that it should be the successful bidder. It believes that it could realise more for its equipment through its re-marketing division than is attributed to the equipment in the proposed transactions. In view of its request to be allowed to

bid for the entirety of the assets and undertaking of the applicants, this is not a relevant consideration on its own on this motion.

[3] The other interested parties, including the employees of the applicant and Caterpillar Financial Services Limited ("Caterpillar"), the other senior secured creditor, support the proposed transaction. The Monitor says the sales process was reasonable, the outcome represents the highest price achievable in its opinion, and the Company has run out of money and, therefore, needs to complete the proposed sale as soon as possible. Caterpillar seeks a bankruptcy order if the Court does not approve the proposed transaction.

[4] As a general rule, the Court is loath to displace the results of a sales process conducted under Court order unless there are exceptional circumstances, including but not limited to circumstances that demonstrate that the outcome does not represent the market value of the assets. In the present circumstances, there is no doubt that, apart from the issue raised by GE, the Court would approve the proposed transaction.

[5] The Initial Order granted GE the right to approve the sales process. It was fully involved in overseeing that process in the exercise of that right. GE could have chosen, as an alternative, to participate in the sales process as a bidder. It did not do so. As a general rule, the Court would not give GE a right to bid at this stage because GE has full knowledge of the successful bids. It would be even more reluctant to do so where the intention of GE was, in effect, to seek a right to match rather than to put in a materially higher bid.

[6] Do the terms of the Initial Order constitute an exceptional circumstance? This is a matter of interpretation of the Initial Order. I think the proper interpretation of that order is that the right of consent of GE applies only to sales of individual pieces of collateral subject to the security of GE, rather than to the entirety of the assets of the applicants.

[7] I reach this conclusion both on the basis of the express wording of the Initial Order, which distinguishes between the sales process and piecemeal sales of equipment, and the business context in which the Initial Order was granted. I will address each in turn.

[8] Paragraph 42 of the Initial Order addresses the sales process. It authorizes the Monitor and the applicants to conduct a sales process in accordance with such steps as are approved by GE and Caterpillar. It expressly stops short of a requirement for GE approval of the transaction that results from the Sales Process. The Initial Order also provides in paragraph 46 that the Monitor may obtain advice and directions from the Court with respect to the "Sales Process", which is the sales process addressed in paragraph 42.

[9] On the other hand, paragraph 44 of the Initial Order provides that the applicants may not sell any part of their property that is subject matter to security in favour of GE without the consent of GE. It makes no reference to the Sales Process as defined in paragraph 42. Moreover, paragraph 44 refers to a sale of "any part" of the Property of the applicants. It does not refer to a sale of all of the property that is the subject of security in favour of GE. To effect that result, the Initial Order had to refer to "any or all" of such property or expressly provide that the outcome of the "Sales Process" would remain subject to the requirement of the approval of GE.

[10] The structure and the language of the Initial Order in these paragraphs therefore reflects a distinct separation between the "Sales Process" contemplated in paragraph 42 and the sales of equipment on a piecemeal basis contemplated by paragraph 44. The wording does not reflect an intent that the consent contemplated by section 44 was to extend to the outcome of the "Sales Process".

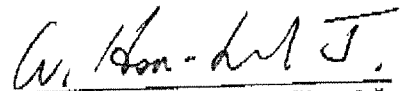
[11] Any doubt with respect to this interpretation is removed when paragraph 44 is considered in the business context at the time of the grant of the Initial Order. From the outset, it was apparent to the parties, including GE and Caterpillar, that it was imperative that a sales process be conducted with the utmost speed. This was made more urgent by the need to obtain Court approval for two tranches of DIP financing.

[12] In this business context, it would be highly unusual to contemplate a sales process that would run its course but could be rejected by one of the two secured creditors acting unilaterally. At the very least, such a provision would result in considerable additional delay that could frustrate the sales process in its entirety. It could also result in lower-than-market bids by scaring off potential bidders. In addition, it could also give unintended leverage to one of the secured creditors that could be used for bargaining purposes against the other.

[13] In the absence of express language extending the right of consent in paragraph 44 to the circumstances of a sale resulting from the Sales Process, these possible consequences argue strongly for the conclusion that the parties did not intend to provide a right in favour of GE to veto the transaction resulting from the sales process.

[14] Based on the foregoing, I conclude that GE does not have the right to refuse its consent to the outcome of the sales process.

[15] For the reasons set out above, I also conclude that the Court should approve the proposed transaction.


H.J. Wilton-Siegel J.

DATE: July 11, 2008