SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantica Diversified Transportation Systems Inc. (Re)*, 2018 NSSC 77

Date: 2018-04-04
Docket: Hfx No. 470769
Registry: Halifax

In the matter of: A Plan of Compromise or Arrangement of Atlantica Diversified Transportation Systems Inc.

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	March 23, 2018, in Halifax, Nova Scotia
Counsel:	D. Bruce Clarke, Q.C., and Leon Tovey for the Applicant Gavin MacDonald for Canadian Western Bank Adam Crane and Heather Wyse for BDO Canada Ltd. Matthew Moir for Trailer Wizards Ltd. Gregory MacIntosh for the Federal Dept. of Justice (watching brief)

By the Court:

Introduction

[1] Corporations are deemed at law to be "persons". Incorporation may be seen to be the birth, and ceasing to operate, and eventual dissolution, as the death of the Corporation.

[2] During their lives, corporations generate benefits for their shareholders, their employees and agents, and ultimately, the community. When they fail to remain viable, the impact is widespread.

[3] When corporations appear to be failing to remain viable, because their lifeblood (cash flow) is being drained to the extent that the coffers of the corporation are overwhelmed by their present payment obligations to others, the *Companies Creditors Arrangement Act*, RSC 1985, c. C – 36, (CCAA) provides a means to resuscitate, by financial restructuring, the company's operations to a viable condition.

[4] Atlantica Diversified Transportation Systems Inc. (ADTS) is such a company.

Background

[5] In his affidavit, sworn November 23, 2017, David Montgomery confirmed that he is its President. The company operates a trucking business from its head office in Burnside, HRM (Halifax Regional Municipality – "Halifax"), Nova Scotia, with a yard(s) in Moncton, New Brunswick. The chief place of business is at Burnside, Halifax. It then had 102 employees and revenues for 2017 were expected to be in the range of $15-$17 million.

[6] It was not disputed that, at the time of the CCAA Initial Order, ADTS had approximately 137 trucks and 147 trailers in its operation, and that they ranged over Ontario, Québec, and the Atlantic provinces. As I discuss below, not all those were leased from Canadian Western Bank/Canadian Western Bank Leasing Inc. (for convenience, collectively or individually, CW).

[7] On August 24, 2017, CW sent a demand letter for the full balance owing under the Contract, being $628,836.97 (as of August 22, 2017, plus accruing interest, fees and costs of enforcement).

[8] On November 24, 2017, ADTS filed a Notice of Application in Chambers seeking *inter alia*, "an initial order under the CCAA, granting a stay of proceedings… the appointment of a person to monitor the business and financial affairs of the Applicant, and such other relief…".

[9] An Initial Order was granted by Justice Chipman on December 7, 2017.[1]

[10] The terms of the order included that ADTS "shall remain in possession and control of its current and future assets, undertakings, and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof, but expressly not including any accounts receivable factored or sold to Accutrac Capital Solutions Inc., prior or subsequent to the date of this order (together, the "Property"). Subject to further order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property.

[11] Furthermore, the Order reads at clause 10 and 11, respectively:

> 10 -The Applicant shall, subject to such requirements as are imposed by the Monitor and under any agreements for debtor-in -possession financing which may hereafter be approved by this court, have the right to:
>
> …
>
> (b) return to any equipment lessor any asset under lease not required for the ongoing operations of the Business;
>
> ...
>
> 11 -Until and including the 22nd day of December 2017 or such later date as this court may order (the "Stay Period"), no claim, grievance, application, action suit, right or remedy, or proceeding or enforcement process in any court, tribunal or arbitration association (each a "Proceeding") shall be commenced continued or enforced against or in respect of any of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor or with leave of this Court, and any and all proceedings currently underway against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court. Not to limit the generality of the foregoing [included in the draft order were the following provisions – they were excised by Justice Chipman on that day]:

[1] In the Atlantic Provinces, Superior Courts have adopted model CCAA and Receivership Orders – specifically contained in Practice Memorandum No. 8 to the *Nova Scotia Civil Procedure Rules*.

> a) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant any "fully paid for" units seized by them described in Exhibit "B" of the supplemental affidavit of David Montgomery; and
>
> b) Canadian Western Bank, Canadian Western Leasing and Alton Bubar Sales Ltd shall forthwith deliver to the Applicant transport records, equipment, personal effects and other documents required for the business of Atlantica seized by them as described in paragraph 7 of the supplemental affidavit of David Montgomery .

[12] A second Order from Justice Chipman on December 22, 2017, on motion of ADTS, included:

> The stay of proceedings in the Initial Order is hereby lifted to the extent necessary to permit Canadian Western Bank or Canadian Western Bank Leasing Inc. to continue to enforce its *lease or security interest* with respect to the units *seized prior to the date of the Initial Order*, and waiving any requirement for prior notice of sale or disposition to any party pursuant to section 60 of the Personal Property Security Act [Nova Scotia] and the equivalent sections of the legislation of any other province;…
>
> [My italicization]

[13] Regrettably, although efforts were made to sustain the company using the CCAA, by February 20, 2018, the hoped-for resuscitation was beyond reach. The court imposed stay expired that day.

[14] The parties agreed that the CCAA proceedings should be terminated, after the court addresses payment of the Administrative Charge, and Directors Charge (a $50,000 contingency fund referenced in the Initial Order, "to indemnify the directors and officers against obligations and liabilities that they may incur as a director or officer of the company after the commencement of these proceedings, but subject however to the limitations contained in CCAA subsection 11.51 (4)."). Both these charges rank in priority to the secured creditors, other than the monies owing to the Canada Revenue Agency. I confirm that, concurrently, I have approved the accounts of the Monitor, its counsel and PwC, and counsel for ADTS.

[15] Next, I will address the payment of the Administrative Charge.

How should the maximum allowable $75,000 available for the Administrative Charge be allocated?

[16] The Initial Order provided for payment of, upon approval by the Court, the "Administrative Charge"; namely, professional fees and disbursements of the legal counsel and financial advisors of ADTS (Burchells LLP and PwC respectively) ; BDO Canada Limited (the Monitor) and its legal counsel (Patterson Law).

[17] That Order limited those fees to a maximum $75,000. Though their fees and disbursements were greater for each, proportionally that $75,000 presently breaks down among them as follows:

Patterson Law – $12,552.67

BDO Canada Limited – $41,973.88

Burchells LLP – $12,197.04

PWC – $8,276.42

[18] This decision deals with the disputed issue of how the court should allocate the above-noted professional fees and disbursements among the secured creditors. It is noteworthy that the CCAA process ended prematurely- namely, without a restructuring plan in place.

[19] No one takes issue with the Monitor's proposal that the allocation be based upon "a proportional basis… using the most current balance of debt as the denominator". It is premised on the notion that secured creditors ought to be somewhat responsible to pay to collect those debts owing to them because the prospect thereof flows from such plans of compromise or arrangement.

i) The position of the parties at the hearing

[20] BDO has recommended in its Third Report filed February 15, 2018 (a portion thereof excerpted as Exhibit "1" in the hearing), that CW bear approximately 73% of those fees based on their percentage of monies owed ($7,357,700) of the total $10,037,632.80.

[21] CW disagrees. It says as a true lessor of its trucks/trailers, it is entitled to either be exempted entirely from the allocation process, or if not, should only bear a modest allocation therefor, based on the remaining non-lease obligations owed to it by ADTS, i.e. the $595,401.97, as of December 13, 2017 or some similar figure as of the hearing date, March 23, 2018.

[22] According to David Miller's March 2, 2018, affidavit (Senior Assistant VP and Manager Equipment Leasing Group with CW), as of December 13, 2017, ADTS owed to CWB, pursuant to a 2014 Master Loan and Security Agreement

approximately $595,401.97, and to CWL, $6,480,416.64 pursuant to a 2010 Master Lease Agreement a total of $7,075,818.61.

[23] No other parties served took positions on this issue.

ii) What the jurisprudence says about CW's argument that it should be exempted from allocation of the Administrative Charge, because it is a "true lessor", and not a secured creditor regarding the truck/trailer leases

[24] At this juncture, it is useful to examine the state of the jurisprudence regarding whether, and when, true lessors should be exempted from the allocation.

[25] A helpful summary of the general principles applicable to such allocations is set out by Justice Masuhara in *HSBC Bank of Canada v. Maple Leaf Loading Ltd.,* 2016 BCSC 361:

> 34 Allocation is an exercise in judicial discretion. The overall result must be one that is fair and equitable. This does not necessarily equate to equality. Usually, there will be some who do better than the average and other who do not.
>
> 35 There are numerous approaches and methodologies to allocations. In some areas professional careers have been built in propounding allocation methodologies.
>
> 36 A summary of the general principles governing the allocation of receiver's costs was recently provided in *Royal Bank of Canada v. Atlas Block Co.*, 2014 ONSC 1531 at para. 43 by Justice D.M. Brown as follows:
>
> > (a) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
> >
> > (b) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
> >
> > (c) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
> >
> > (d) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;
> >
> > (e) An allocation does not require a strict cost/ benefit analysis or that the costs be borne equally or on a *pro rata* basis;

> (f) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial.
>
> 37 Other cases handed up on this point included: *Hickman Equipment (1985) Ltd. (Re)*, 2004 NLSCTD 164; and *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[26] CW has argued that it provided leased trucks and trailers to ADTS, and the circumstances of that financial arrangement reflect a "true lease" rather than a "security interest" or "financing lease".

[27] The persuasive jurisprudence leads me to conclude that in circumstances of a "true lease", lessors are generally exempted from the allocation of such administrative expenses: *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204, leave to appeal refused 2009, MBCA 210, per Freedman JA, in Chambers (who notably favourably commented on the hearing judge's use and application of relevant legal principles); *Western Express Airlines Inc. (Re)*, 2005 BCSC 53; *Respec Oilfield Services Ltd. (Re)*, 2010 ABQB 277.

[28] Ultimately, what is just and equitable is largely determined by the facts of each case. Therefore, at Appendix "A", I will set out in detail what Justice Suche stated in *Winnipeg Motor Express Inc. (Re)*, 2009 MBQB 204.

[29] Based on my examination of the relevant factors identified in the jurisprudence, and my findings of fact, all the trucks and trailers, which were leased by ADTS from CW represent "true" leases.

[30] The parties represented facts, and presented evidence, to the effect that:

> 1. CW leased 82 vehicles to ADTS. 27 were returned to possession of CW in November 2017 *before* CCAA proceedings were commenced. Of the 55 remaining after the expiration of the court-ordered stay on February 20, 2018 (two were those of the Warren Group/ Vaughan Sturgeon, and are to be returned March 26, 2018), 24 were delivered to the Rexton, and Moncton, New Brunswick premises for pickup by CW during the CCAA proceeding.
>
> 2. The remaining 29 were still outstanding as of March 10, but only 9 were still unreturned to CW on March 23, 2018.

[31] CW's counsel takes the position that it is not just and equitable that it should bear 73% responsibility for the $75,000 flowing from the approved Administrative Charge, since approximately 91% of the money owed by ADTS to CW arises from "true leases", and only the remaining 9% arises from non-lease obligations. CW

agrees that the 9% non-lease obligations amount *may* provide a basis for some modest allocation against it.

[32] Moreover, CW notes that it received no lease payments from ADTS for a period of over two months during the CCAA proceeding. It was suggested that ADTS did not have sufficient funds throughout to fully pay CW's lease payments. Notably, once CW began seizing its trucks and trailers (per Alton Bubar Sales, Ltd.) ADTS's core source of revenue flow was being cut off, consequently ADTS commenced the CCAA proceeding. However, it is noteworthy that *ADTS's obligation to make these payments to CW remained even during the CCAA process*, as they were not subject to a court-ordered stay, by operation of Section 11.01 of the CCAA, which section reads:

> No order made under section 11 or 11.02 has the effect of
>
> a. prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> b. requiring the further advance of money or credit.

[33] Notably, Section 11, which sets out the general power of the court, also circumscribes the power of the court ("subject to the restrictions set out in this Act"). It states in part:

> … If an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, *subject to the restrictions set out in this Act*, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[34] Based on that authority, CW had made a motion, filed January 25, 2018, to compel ADTS to pay the outstanding lease obligations, but in response to the expiration of the stay of proceedings of February 20, 2018, the motion was withdrawn.

[35] CW further argues that it received no actual "real and meaningful benefit", nor would it have received any potential benefit from the CCAA proceeding.

[36] Although BDO takes no position regarding whether CW has "true leases" or not, it argues even if that is the case, true lessors can be allocated some of the relevant costs, provided it is just and equitable in all the circumstances.

[37] BDO suggests there were actual benefits because the CCAA process which appointed BDO as monitor, imposed statutory obligations upon it to keep all the parties informed etc. and to treat them similarly, while also practically providing a central contact entity which permitted a more organized processing of information and assets/monies which reduced the efforts that CW may have had to make in order to obtain such information (e.g. ADTS was given a list of vehicles and where they were, as well as access to information that a typical creditor would not receive, in contrast to the pre-CCAA – see paragraphs 15 – 19 of Kevin Woycheshin, Assistant VP and Manager of CW, sworn affidavit of November 29, 2017) and the Monitor's efforts to provide some measure of financial compensation to CW for use of its trucks and trailers – see clauses 14 (e), 36 and 44(b) of BDO's second report dated January 30, 2018 – see also the February 20, 2018 email from ADTS's counsel, Bruce Clarke, to CW's counsel attached to the March 23, 2018 letter to the court from BDO's counsel, which factual representations were presented to the court by agreement).

[38] Moreover, BDO notes that the benefit of the CCAA process generally must be considered from the perspective of the collective good of the secured and unsecured creditors of the corporation, and the benefit derived by any single creditor need not be directly demonstrated, as that is inherently difficult in such circumstances.

[39] CW argued that the CCAA process did not provide the *potential* benefits to it, that it might to other creditors, because its situation, involving specific assets which it still owned but were leased by ADTS, is a somewhat unusual and distinguishable circumstance.

[40] Regarding the suggestion that it had the *actual* benefit of the organized return of its vehicles/trailers as a result of the CCAA process, it noted that although 24 were returned to CW at Rexton/ Moncton, New Brunswick, during the process, those returns were not necessarily all attributable to the Monitor's actions. Thereafter, 29 units were still unreturned to CW as of March 10, 2018. I observe that 9 were still unreturned as of March 23, 2018.

[41] Moreover, CW says it suffered prejudice as a result of the process, because it could not seize the vehicles itself, though it was not being paid for its leased trucks and trailers while it remained entitled to be paid during the CCAA process; and which unreturned trucks and trailers continued to depreciate over that two-month period, and may have required repairs which were not effected in a timely manner.

[42] BDO's counsel notes that, if the allocation to CW is based only upon the 9% of the non-lease obligations or $595,401.97, or a generalized notional benefit that it received as a result of the Monitor's availability and actions, such as the mere stabilizing economic effect of the CCAA proceeding to February 20, 2018, its roughly revised calculation suggests that the allocations to the top three creditors would be as follows:

> Penske Truck Leasing Canada Inc.'s share would increase from 8.68% to 27.5%
>
> Accutrac Capital Solutions Inc.'s share would increase from 15.09% to 48%
>
> CW's share would decrease from 73.3% to 15%.

[43] BDO says that, as an independent entity assisting the court, it is considered to be an officer of the court (*Medican Holdings Ltd. (Re)*, 2013 ABQB 224, at paras. 39-42), and provided that its recommended allocation appears *prima facie* fair to the court, the onus is upon CW to establish that its situation is of such an exceptional nature as to be capable of rebutting that recommendation. I agree.

[44] Therefore, since the onus upon CW to demonstrate its circumstances are one of a "true lessor" has been satisfied, it should be exempted from the allocation, except to the extent that other parties have satisfied the court that either:

> CW received an *actual* direct or indirect ("real and meaningful") benefit;
>
> or
>
> they can otherwise elucidate a sufficiently articulable *potential* direct or indirect benefit that CW could have received (*Winnipeg Motor*, at para. 41, and *Hickman Equipment(1985) Ltd. (Re)*, 2004, NLSCTD 164 per Hall J, at para. 17) which would justify concluding, it would be fair and equitable to include some allocation of the Administrative Charge against CW.

[45] BDO urges the court to follow the Monitor's recommendation as being "just and equitable" in all the circumstances.

Conclusion

[46] I have found that CW is a true lessor in relation to the $6,480,416 .64 referenced in the March 2, 2018 affidavit of David Miller. In relation to that amount CW has at best only been shown to have gained a very modest actual ("real and meaningful") direct or indirect benefit from the CCAA proceeding.

[47] Insofar, as potential benefits that could have accrued to CW due to the CCAA proceeding, such a quantification is particularly difficult.

[48] As Justice Freedman reiterated in *Winnipeg Motor,* at para. 40:

> … The question whether the restructuring judge can allocate priority *before* the outcome of the restructuring is known was a matter of first instance. The restructuring "judge had acknowledged as much, noting in her decision that" the issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique" (2008 SKQB 152, at paragraph 21).

[49] Nevertheless, the remaining $595,401.97 of non-lease obligations owed by ADTS to CW, as of March 2, 2018, provide a basis for the court to conclude that it is just and equitable to allocate some percentage of the Administrative Charge to CW.[2]

[50] It is fair, just and equitable that, CW compensate the effort to recover some of its owed income from the truck and trailer leases, and monies from its secured CSC/Master Loan obligations.

[51] ADTS's $595,401.97 non-lease obligations account for 18.18% of the remaining overall secured debt ($10,037,632.80 less [$7,357,700 – $595,401.97]) $3,275,334.77.

[52] In my view, a just and equitable allocation for CW is 20% of the Administration Charge - $15,000.

Rosinski, J.

[2] In conjunction with the mere fact of the potential general benefit of the orderly attempt to restructure the business of ADTS under court supervision, arising in part from the court-ordered stay, which can prevent an accelerated domino effect that could negate the restructuring attempts otherwise, although the repercussion on the business which is seeking CCAA protection can be negative, as well as positive – see *Kocken Energy Systems Inc. (Re)*, 2017 NSSC 215.

APPENDIX “A”

THE PARTIES AND THEIR POSITIONS

Heller

7 Heller provided a demand operating loan to WME margined against 85% of eligible accounts receivable. At the time of the stay, this loan was at $5,643,297, which was secured by accounts receivable of $5,868,630. During the restructuring, Heller continued to allow the operating loan to revolve. It advanced approximately $8,750,000 (Cdn.) and $2,800,000 (U.S.) under the operating loan to pay WME's ongoing business expenses. The pay down of the loan was as a result of a combination of the sale of assets and collection of receivables. In the end, Heller is projected to suffer a loss of approximately $55,000. It makes the point that it would likely have avoided this had its collateral not been used to make lease payments of approximately $394,000 to financing lessors.

8 Heller supports the monitor's recommendation.

GE

9 GE leased 44 tractors and 204 trailers to WME under financing leases. Despite my order of July 3, 2008 requiring WME to pay equipment lessors as of August 1, 2008, GE did not seek payment under any of its leases. Ultimately, GE's equipment was included in the purchase by Newco, although as part of that transaction, GE wrote off approximately $250,000 in principal and unpaid interest and renegotiated its leases at an interest rate of 9.25%.

10 In calculating GE's net recovery, the monitor used the average between the liquidation value of its equipment and the present value of the leases assumed, discounted at the rate of 9.25%. It was argued by several creditors that this discount is commercially unreasonable, and seriously understates the value of GE's recovery.

11 GE supports the monitor's proposed allocation.

Paccar

12 As at the date of filing, Paccar leased 83 tractors and 19 trailers to WME, pursuant to financing leases. As a result of my order of July 3, 2008, Paccar received $279,855 in lease payments between August 1 and the date on which its equipment was returned. Although Newco was amenable to including Paccar's equipment in its purchase, Paccar was not agreeable to this. Accordingly, all its equipment (save one or two units which could not be recovered) was returned.

13 Paccar disputes the monitor's proposed allocation, arguing that GE and Heller have received the lion's share of the benefit from these proceedings and have suffered virtually no loss. It further maintains that it has been unduly prejudiced, as have all equipment lessors, by virtue of the fact that its security has been used to the benefit of WME (and the other secured creditors, particularly Heller) during the restructuring. In contrast, Paccar's security has suffered significant deterioration.

14 Paccar maintains that the appropriate methodology would be to recognize the net losses suffered. It points out that its loss from its dealings with WME is approximately $2.7 million, compared to Heller's loss of $55,000, on virtually the same level of debt owed. It maintains that GE should be considered to have effected 100% recovery, given that Newco has assumed the leases for its equipment.

15 It also maintains that the benefit of an orderly return by WME was not all that significant, given that Paccar is in the business of supplying transport equipment, and is experienced in recovering vehicles in such situations.

CIT Financial Ltd., Wells Fargo Equipment Finance Company, Capital Underwriters Inc. and Stoughton

16 These four equipment lessors collectively had 115 trailers under lease to WME at the time of filing. Stoughton maintains that its lease is not a financing lease.

17 Collectively they argue that the monitor's methodology is not appropriate as it does not adequately reflect the relative benefit derived from the proceedings by different secured creditors. They, too, argue that Heller and GE have essentially been paid in full, which stands in contrast to their situation, each of them having incurred substantial losses. They also did not have the opportunity to have their equipment included in the Newco purchase.

18 These creditors ask that I allocate specific expenses to the secured creditors who they say benefitted from various expenses, which they did not.

19 When considering the issue of recovery, they say the only benefit they received from the restructuring was the orderly return of equipment. However, they maintain that several of their units should not be included in the calculation as these were recovered through their efforts, with no help from WME. They also argue that they were well equipped to pick up all units and would have happily done so.

Ramwinn

20 Ramwinn provided mechanical services to WME. At the time of the stay, it had some vehicles in its possession and, thus, possessory lienholder rights. It also had lien claims against a significant number of other vehicles. An arrangement was made among the various equipment lessors to whom equipment was to be returned, to pay Ramwinn for the work performed in order to secure release of the equipment. Ramwinn was also granted leave to commence certain actions where the limitation dates were approaching during the restructuring period. It also recovered $4,738.12 out of the proceeds of sale of WME's redundant assets.

21 Ramwinn argues that the money it received from the equipment lessors should not be included in its net recovery, as it was recovered from third parties, not WME. It also points out that Ramwinn's garagekeeper security was of a different kind than the other secured creditors and gave it priority ahead of all other creditors. Thus, to include its recovery in the allocation, effectively amounts

to altering the security arrangements between WME and its creditors, which is something that should not be done.

22 Finally, Ramwinn has a claim against WME in the amount of $18,679 for an account incurred subsequent to the stay. The monitor disputes liability on the part of WME and asserts the account payable by Newco. This dispute has yet to be resolved. Ramwinn seeks payment of this account, or, at least an order requiring that this amount ought to be set aside by Heller pending the determination of the matter.

Maxim

23 *Maxim provided 15 trailers to WME under a lease which it maintains is an operating lease*. It was paid its lease payments of $5,985 per month during the restructuring period, and its leases have been assumed by Newco. It says its registration in the Personal Property Registry is for purposes of giving notice that WME is in possession of its equipment, and is not a registration of a security interest.

BDC

24 BDC was owed approximately $2.5 million plus interest as at the date of the stay. It holds security over all of WME's assets. In general terms, it was subordinate only to Heller on accounts receivable but had a first charge on all other assets. It recovered $78,998.79 plus interest from the redundant asset sale and will recover $260,000 plus interest from the proceeds of the sale to Newco. BDC supports the monitor's methodology and its recommendation, although it argues that the application was premature given that there may be statutory creditors such as Worker's Compensation who might be entitled to be paid their claims in priority to the secured creditors who are being asked to contribute to the Court Ordered Charges. *Since the date of the hearing, I have made an order of bankruptcy against WME.*

25 I turn, then, to the legal issues raised on this motion.

TRUE VERSUS FINANCING LEASES

26 *Both Stoughton and Maxim claim to be "true" lessors*. The significance of this issue is twofold; s. 11.3(a) of the *CCAA* provides that an owner of property is entitled to require payment for its use during the restructuring. In addition, of course, the recommendation of the monitor is that only the secured lenders be included in the allocation of the Court Ordered Charges.

27 Section 11.3(a) was added to the *CCAA* in 1997, apparently to clarify, or address, the point made by the British Columbia Court of Appeal in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 51 B.C.L.R. (2d) 105, [1990] B.C.J. No. 2497 (QL), namely, that a stay under s. 11, presumably would never be used to enforce the continuous supply of goods or services without payment for current deliveries. The amendment, of course, makes good sense and also brings the *CCAA* into line with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*BIA*"), which has a similar provision concerning proposals.

28 The leading authority on the proper interpretation of s. 11.3(a) is *Smith Brothers Contracting Ltd., Re* (1998), 53 B.C.L.R. (3d) 264, [1998] B.C.J. No. 728 (QL) (B.C.S.C.). There, Bauman J. relied on jurisprudence arising out of personal property security legislation as a starting point in the determination of the circumstances which would bring a party within s. 11.3(a). *The distinction between a true lease -- that is, a contract of bailment also known as an operating lease -- and a financing, or capital lease, is critical, in a variety of situations. Where a supplier of equipment retains ownership solely for the purposes of enforcing the obligations of the debtor/lessee until payment in full has been made, a security interest is created, and ownership is lost.*

29 It is worth observing that the precise legal nature of an agreement in these situations has considerable commercial significance, and seems to have generated something of an ongoing legal struggle. *Purveyors of equipment, ever concerned with the legitimate business goal of minimizing risk, try to appear as owners engaging in acts of bailment, thus minimizing the risk of the failure of a debtor/lessee's business, while at the same time passing off the risks of the equipment; that is, loss, damage and defects.*

30 At the same time, it is also true that the world of commercial arrangements is increasingly diverse, complex and focused on cost recovery, so it is very difficult to generalize about how any particular type of relationship will be structured.

31 All of this is to say that, with the benefit of sophisticated legal advice and astute business judgment, the true nature of arrangements involving the supply of equipment can be very difficult to peg.

32 In *Smith Brothers*, Bauman J. concluded that *s. 11.3(a) should be narrowly construed, given that it is an exception to a s. 11 stay*, which in turn is of a remedial nature, and to be interpreted broadly and in a manner which supports the objectives of the *CCAA*. He says:

56 What I take from all of this is that by preserving a limited remedy for lessors, that is, "payment for use", in a field of commercial transactions which, as I have shown with these leases, encompasses a variety of arrangements with much broader remedies on default, s. 11.3(a) can be interpreted as restricting itself to the type of arrangement which is characterized by the narrower bargain. More simply: this analysis suggests that s. 11.3(a) does not cover all leases. Rather, it covers traditional true leases where the essential bargain is payment for use.

33 And further, at para. 61:

61 It is only payments for the use of leased property that are excepted from a s. 11 stay order under s. 11.3(a). Payments for use *and* equity are not. Similarly payments for use *and* equity *and* an option to purchase are not. This is another reason to conclude the s. 11.3(a) is not inclusive of all forms of lease.

34 *Smith Brothers has been widely accepted and applied by courts across the country. The exclusion of financing leases makes perfect sense, of course, based on the notion of ownership: if the financing lessor has given away ownership, it*

cannot seek the benefits of ownership. Similarly, the narrow construction of s. 11.3 limiting it to payments for use of equipment only, is consistent with the idea that a supplier could not be expected to continue to provide its product without payment. All this being so, the result has some unintended consequences, which I address later on in these reasons.

35 I turn, then, to the two creditors in this case, Maxim and Stoughton. *I have no hesitation in concluding that the agreement between Maxim and WME is a "true" lease. The essential bargain is payment for use of Maxim's property.*

36 I say this because a review of *Maxim's obligations reveal that it undertakes all the risks associated with ownership of the equipment* -- it is responsible for providing all parts and supplies, carrying out maintenance and repairs, providing road service for vehicles which suffer mechanical breakdown, supplies substitute vehicles to WME if there has been mechanical failure, and provides and pays for all licencing and taxes. *The option to purchase is truly an option, and the purchase price is determined by a formula, which seeks to determine the true market value of the vehicle at the time the option is exercised.*

37 It was argued that the "Elective Termination" provision, which allows Maxim to require WME to purchase the equipment in accordance with the Option if a default has not been cured within seven days, changes the nature of the arrangement. I disagree. While on its face it may be an unusual remedy and probably has more bark than bite, it seems that Maxim is letting WME know that it may take tardiness very seriously.

38 *The Maxim agreement does not, in my view, create a security interest. In this regard, I prefer the analysis on Western Express Air Lines Inc., Re, 2005 BCSC 53, (2005), 10 C.B.R. (5th) 154, over that in Paccar of Canada Ltd. v. Peterbilt of Ontario Inc., (2005), 18 C.B.R. (5th) 125 (Ont. Superior Court of Justice).*

39 *The agreement between Stoughton and WME is a different matter. When Stoughton's agreement is viewed as a whole, I conclude that it is either a financing lease or sufficiently akin to one to fall outside the scope of s. 11.3(a).* In particular, the agreement provides that WME bears the entire risk of loss from any cause and is required to make payments to Stoughton regardless of loss, or any claim against the manufacturer of the equipment. The warranties by the manufacturers are excluded. All registration, licence fees and taxes are paid by WME, as is any and all maintenance and repair costs.

40 *The lease also requires that the vehicle be returned to Stoughton in a condition that would require significant expenditure. This, combined with an option to purchase the vehicle for a stated amount, which appears to be the difference between the initial value of the equipment less payments made over the term of the lease, suggest to me that the parties intended that WME purchase the vehicle, and ownership was retained solely for the purpose of enforcing WME's obligation.*

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41 I turn, then, to the question of principles of allocation of Court Ordered Charges under the *CCAA*. This is a matter of discretion for the court. Each case must be judged on its facts, but fundamentally any allocation must be fair and equitable. This does not mean equal, however, as observed by the court in *Hunters Trailer & Marine Ltd., Re,* 2001 ABQB 1094, (2001), 305 A.R. 175. While it is unfair to ignore the degree of potential benefit that each creditor might derive, it is also accepted that any means of calculating a precise percentage will be arbitrary. The nature of proceedings under the *CCAA* make a strict accounting on a cost benefit basis impractical and ultimately defeating. *It is also accepted that the concept of potential benefit versus direct benefit be utilized, otherwise the process would dissolve into a cost benefit analysis.*

42 In *Re Hickman Equipment (1985) Ltd. (In Receivership),* 2004 NLSCTD 164, at para. 17, Hall J. set out the principles to be applied in allocating restructuring costs, as follows:

(1) The allocation of costs ought to be fair and even handed amongst all creditors upon an objective basis of allocation;

(2) *The fairest basis of allocation would be a uniform percentage of the sale price received for the asset over which the paying creditor had a realizable security interest;*

(3) There must be a recognition that the Cost Allocation Plan acknowledges that costs are not limited to the cost of realization alone but relates to all receivership costs whether direct sales cost or indirect cost;

(4*) Exceptions to a uniform application of cost to creditors ought not to be lightly granted.* Nonetheless it must be recognized that certain activities of the Receiver in managing the affairs of the receivership may have been less intensive or less advantageous with respect to certain groups of assets as opposed to other groups of assets and that the extent of this intensity or disadvantage may not be immediately or easily determinable. To require the Receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-a-vis another would likely not be cost effective, would drive up the overall receivership cost and would likely be a fool's errand in any event;

(5) *Exceptions to the rule of uniform cost allocation should only be made where the requirement for such variation is reasonably articulable.*

[my italicization]