

CANADA / JUDGMENT

Cox v. Crystal Graphite Corporation et al

2006 BCSC 984

COURT

Supreme Court of British Columbia

DECIDED

27 June 2006

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2006BCSC0984 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cox v. Crystal Graphite Corporation et al, 2006 BCSC 984 Date: 20060627 Docket: S060335 Registry: Vancouver Between: Alexander W. Cox aka Alexander William Cox Plaintiff And Crystal Graphite Corporation, Canada Pumice Corporation, James T. Deith and Lisa J. Stephens-Deith Defendants Before: The Honourable Madam Justice Satanove Reasons for Judgment Counsel for the Plaintiff: P. Reardon Counsel for the Receiver-Manager, PricewaterhouseCoopers Inc.: John F. Grieve and Kibben Jackson Counsel for Brian Wear: Gregory K. Steele, Q.C. Counsel for United Concrete & Gravel Ltd.: John I. McLean Date and Place of Trial/Hearing: June 19, 2006 Vancouver, B.C.

- [1] There is an application before me by a Receiver-Manager to approve the sale of some of the assets of Canada Pumice Corporation ("CPC") to Mr. Brian Wear for the sum of \$851,000. Those assets include, among other things, mining permits, leases, licences, bonds and other rights over property about which there may be a duty to consult with the Nazko Indian Band. Therefore Mr. Wear has made his offer to purchase subject to the condition that the Province will approve the assignment of the minerals rights from CPC to himself. The Receiver-Manager's application is supported by both Mr. Wear and the plaintiff, who is the secured creditor and who is owed in the vicinity of five million dollars.
- [2] The Receiver-Manager's application is vehemently opposed by United Concrete & Gravel Ltd. ("United"), whose offer to purchase all of the assets of CPC for \$910,000 subject only to court approval was received and accepted by the Receiver-Manager before Mr. Wear's offer.
- [3] On an application such as this it is incumbent on the court to look at what will achieve the best result for CPC, but also to be mindful of the process and integrity of court approved sales (*West Coast Savings Credit Union v. Wachal* (1988), 32 B.C.L.R. (2d) 390 (C.A.)).
- [4] The Receiver-Manager submits that the best possible price for the assets of CPC is the one offered by Mr. Wear, notwithstanding its conditional nature, because his offer excludes additional equipment with an appraised value of \$117,000 and assumes liability for a \$21,000 lien. United's offer results in the Receiver-Manager having to pay \$248,000 to a charge holder in order to transfer certain equipment to United. The net proceeds to CPC from Mr. Wear's offer will be \$840,300 as opposed to \$629,300 from United's offer. Therefore Mr. Wear's offer is \$328,000 higher than United's offer.

- [5] United argues that its offer should be preferred because it is unconditional. Unconditional offers will usually be preferred, however in this case the Receiver-Manager has concluded that the premium of the conditional offer is sufficiently high to more than offset the risk of unfulfillment of the condition, and therefore should be preferred.
- [6] I accept the analysis of the Receiver-Manager who has been charged with the responsibility of weighing the various benefits of the offers. I conclude that Mr. Wear's offer contains the best possible price.
- [7] In certain cases, however, the principle of best price must give way to the principle of fairness and integrity in the process (*Gene Drennan Ltd. v. Med Grill Ltd.*, 2001 BCSC 117).
- [8] I do not find that this is one of those cases. United complains that it submitted its offer during the fixed time period and Mr. Wear came along lately with a "shopped" bid. This is not borne out on the evidence. The facts disclose that while United did submit a bid prior to the deadline of April 7, 2006, the Receiver-Manager did not accept this offer. The United offer that was accepted was tendered after April 7.
- [9] More importantly, I find the form of offer to which United committed itself clearly stated in paragraph 7.1 that the Receiver-Manager could advocate court approval of subsequent offers that it received before presentation to the court: 7.1 The Purchaser acknowledges that this agreement and the carrying out of the transaction subject of this agreement are subject to Court approval, and that the Vendor has advised the Purchaser that the Vendor's sole obligations in connection with this agreement are limited to presenting this agreement, by itself or together with other agreements, to the Court and the parties which are participating in the Court Proceedings. Without limitation, if there are no other offers to purchase the Property or any part thereof prior to presenting this agreement to the Court (the "Presentation Time"), the Vendor will advocate the acceptance of this agreement; however, if there is another offer to purchase the Property or any part therefore prior to the Presentation Time, the Vendor may advocate the acceptance of such offer. The Purchaser acknowledges having been advised by the Vendor to arrange for its own representation at any court application to approve the transaction subject of this agreement, it being acknowledged that the Purchaser's ability to make representations at such application is subject to orders of the Court.
- [10] United submitted that the wording in the Request for Offers to Purchase suggested that the Receiver-Manager would only reserve the right to accept other offers or negotiate with any purchaser prior to the deadline of April 7, 2006. However, I have found that United's offer was made outside the time period, and in any event, the specific terms of the agreement signed by United should override the Request for Offers to Purchase.
- [11] Therefore Mr. Wear is granted court approval of his offer in the terms set out in the Receiver-Manager's fourth report. "D.A. Satanove, J." The Honourable Madam Justice D.A. Satanove

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