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File Reference: SM001411-337

January 13, 2023

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Hand Delivered

The Honourable Justice Darlene Jamieson
Supreme Court of Nova Scotia
The Law Courts
1601 Lower Water Street
Halifax, NS B3J 1S7

Honourable Justice Darlene Jamieson:

Re: In the Matter of the Receivership of 11016946 Canada Inc. – Hfx No. 501252

We are counsel for Business Development Bank of Canada ("**BDC**"), the Applicant in the above noted matter. Mark Charles is counsel for the Respondent, 11016946 Canada Inc. (the "**Company**"). The guarantor, Ian Cousins, is self-represented.

The Court is well familiar with the facts of this matter and the previous submissions that have been made to this Court. BDC is seeking an Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and by the equitable jurisdiction of this Court as partially codified under s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240 (the "***Judicature Act***") for the appointment of Deloitte Restructuring Inc. ("**Deloitte**") as Receiver and Manager over the real property located at 123-125 Prince William Street in Saint John, New Brunswick (the "**Property**").

The last update to this Court indicated that the parties entered into a forbearance agreement to allow the Company the opportunity to get alternative financing for the Property. The Company has not been able to obtain financing or sell the Property and the forbearance period ended on July 29, 2022 (extended from July 8, 2022). As part of the forbearance, the Company consented to a Receivership Order, although the signed consent receivership order did not limit the powers of the Receiver to the Property, which the Order being sought does limit. A blackline copy of the Order being sought from the consent receivership order is included with the motion materials.

Please accept the following as BDC's submissions in support of its request that Deloitte be appointed as Receiver and Manager over the Property. As the receivership is limited to the Property, the service list has been restricted only to parties that could be affected by the Receivership Order.

I. FACTS

1. BDC relies on its submissions previously filed with this Court on October 20, 2020 and December 18, 2020.

2. BDC relies on the facts and evidence set out in the following affidavits:

   (a) Affidavit of Matthew J. Golding sworn October 19, 2020 (the "**Initial Golding Affidavit**"), filed with the Court;

   (b) Solicitor's Affidavit of Sara L. Scott sworn October 19, 2020, filed with the Court;

   (c) Affidavit of Sara L. Scott sworn December 15, 2020, filed with the Court;

   (d) Affidavit of James Foran sworn December 18, 2020, filed with the Court; and

   (e) Supplemental Affidavit of Matthew J. Golding sworn December 18, 2020, filed with the Court;

   (f) Affidavit of Linda Savoie sworn and January 4, 2023 (the "**Savoie Affidavit**"), filed with this motion;

   (g) 2nd Supplemental Affidavit of Matthew J. Golding sworn January 11, 2023 (the "**2nd Supplemental Golding Affidavit**"), filed with this motion; and

   (h) Supplemental Solicitor's Affidavit of Sara L. Scott sworn January 12, 2023 (the "**Supplemental Solicitor's Affidavit**"), filed with this motion.

3. BDC further relies on the Pre-Filing Report of the Receiver dated January 13, 2023 (the "**Pre-Filing Report**").

4. Except as herein defined, capitalized terms in these submissions are defined in the submissions previously filed with this Court on October 20, 2020 and December 18, 2020.

5. The Company is a real estate investment and property management business. It originally had properties in Nova Scotia and New Brunswick (the "**Properties**"). BDC extended loans to the Company to allow for the purchase of and renovations to the Properties. The credit facilities extended to the Company are set out in the Initial Golding Affidavit at paragraph 10 (the "**Credit Facilities**"). BDC held various security in relation to the Credit Facilities, set out in the Initial Golding Affidavit at paragraphs 11 and 12 (the "**Security**").

6. Since the initial filing by BDC in 2020, the Company was able to complete a refinancing for the three properties in Nova Scotia. BDC agreed to a partial release of its Security as it related to the three Nova Scotia properties in exchange for a payment of $7.3 million.

7. Rather than continuing with the receivership application over the Property, BDC agreed to allow the Company time to sell the Property. The listing price was $1.2 million and no successful offers were received.

8. The Company then indicated it was seeking to refinance. Despite having a significant amount of time to refinance, the Company was unable to do so, that would pay out the outstanding amount owing to BDC.

9. The Company is not making any payments to BDC, with interest continuing to accrue. As of January 2, 2023, the Company was indebted to BDC in the total amount of $1,033,653.25, broken down as follows:

Principal arrears	$901,037.94
Interest accrued to January 2, 2023	$85,276.81
Fees	$2,000.00
Protective Disbursement	$43,926.74
Interest on Protective Disbursement	$1,411.76
TOTAL	**$1,033,653.25**
Per Diem	$145.88

Savoie Affidavit, para 11

10. The Company has not paid any amount towards property taxes for the Property since 2019. The amount of outstanding property taxes as of January 10, 2023 are $162,813.25.

Supplemental Solicitor's Affidavit, para. 16(a), Exhibit K

11. In addition to the property tax arrears, there are three judgments registered in the Land Registration Office against the Company in the following amounts:

(a) $234,229.39 – 441515 Ontario Ltd.;

(b) $47,032.49 – Frederick Hamilton; and

(c) $61,756.45 – Lisa C. Beddow

(collectively, the "**Judgments**").

Supplemental Solicitor's Affidavit, paras 21-23, Exhibits N-O

12. The Company recently received an offer to purchase the Property in the amount of $900,000; however, as of January 10, 2023, the Company has not advanced a plan as to how it intends to address the property tax arrears, the Judgments and the shortfall on the BDC loan, if it proceeded to sell the Property.

Savoie Affidavit, paras 6-8, Exhibits B & C

II. ISSUE

13. The issues to be determined on this motion are whether:

(a) this Honourable Court should issue the Receivership Order and appoint Deloitte as the Receiver and Manager over the Property, pursuant to s. 243(1) of the BIA and s. 43(9) of the *Judicature Act*; and

(b) this Honourable Court should approve of the proposed sales process for the Property, as described herein and in the Pre-Filing Report of the Receiver.

III. LAW AND ARGUMENT

Issue 1 – Appointment of Deloitte as Receiver and Manager

14. BDC repeats its submissions in the brief filed on October 20, 2020 in relation to the current motion for relied.

15. Section 243(1) of the BIA and section 43(9) of the *Judicature Act* both permit the appointment of a receiver if it is "just and convenient".

16. BDC continues to rely on the decisions of this Court in *Bank of Montreal v Linden Leas Limited*, 2018 NSSC 82 (**Tab 1**) and *First National Financial GP Corporation v 3291735 Nova Scotia Limited*, 2018 NSSC 235 (**Tab 4**), in support of its request that Deloitte be appointed receivers and managers. In particular, BDC submits:

    (a) BDC holds the first property security over the Property;

    (b) the Company is in default under the terms of the Credit Facilities and Security;

    (c) the unpaid property taxes date back to 2019 and are $161,586.65 as of December 13, 2022;

    (d) the Demand Letters and Notice of Intention to Enforce a Security have long expired;

    (e) the forbearance period in the Amended Forbearance Agreement has expired, with no alternative financing being in place that would address the encumbrances on the property;

    (f) the value of BDC's security continues to erode, as the principal, interest and property tax arrears continue to accrue;

    (g) there are three Judgments, amounting to more than $343,000 that will need to be addressed;

    (h) the appointment of Deloitte as Receiver and Manager will allow for the Property to be preserved and protected during the liquidation/sales process; and

(i) Deloitte, as an Officer of the Court, will provide transparency and reassurance to all interested parties, including the tenants at the Property, that the matter will be handled in a timely and consistent manner and that the liquidation will be handled expeditiously and in a commercially reasonable manner.

17. The Company is in default under the Credit Facilities and Security Agreements and has failed to secure alternative financing or sell the Property sufficient to retire its outstanding debts, despite having almost two years to do so.

18. BDC submits that a consideration of all factors has a result that it is just and convenient that Deloitte be appointment as Receiver and Manager over the Property, with the powers set out in the Order filed with this motion.

19. While the Order being sought is limited to the Property at this time, it is submitted that this Court remains the appropriate jurisdiction for the following reasons:

(a) the BIA is federal legislation;

(b) the Company's operations had significant connections to Nova Scotia;

(c) the registered extra-provincial office for the Company is in Halifax, Nova Scotia;

(d) the long history of this matter is with this Court;

(e) the proposed sales process will be managed with the oversight of the Court; and

(f) there may be a need to expand the powers in the Order at a future date.

20. For these reasons, it is submitted that this Court is an appropriate jurisdiction.

Issue 2 – Proposed Sales Process

21. In its capacity as Receiver and Manager, Deloitte will develop a sales process to sell the Property (the "**Sales Process**"). As part of the Sales Process, Deloitte plans:

(a) to develop a tender package in relation to the sale of the Property, including a teaser package to send to potential purchasers;

(b) advertise the sale of the Property in various publications;

(c) solicit potential bids for the sale of the Property from a targeted list;

(d) provide the tender package to parties expressing interest, after receipt of a non-disclosure agreement; and

(e) evaluate the bids and make a recommendation on the most favourable bid.

Pre-Filing Report, pars. 23-31

22. After the Sales Process has been completed, Deloitte will seek Court approval for the successful bid.

23. As set out in the Pre-Filing Report, the estimated timeline for the Sales Process is eight weeks (Pre-Filing Report, paras 29-30).

24. BDC submits that a review of the test that will ultimately have to be met is necessary in order to provide this Court with the comfort that the proposed Sales Process will meet with this Court's approval on a final motion for approval.

25. Section 243 of the BIA (**Tab 7**) grants a receiver or trustee the power to negotiate agreements for the sale of assets of a bankrupt, subject to the approval of this Court. Section 243 provides:

> *243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:*
>
> *(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;*
>
> *(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or*
>
> *(c) take any other action that the court considers advisable.*

The Test

26. As noted by Galligan J.A., writing for the majority in *Royal Bank v. Soundair Corp.* 1991 CarswellOnt 205 (C.A.) (**Tab 5**), the test as to whether court approval should be granted

was originally set out in the unreported decision of *Crown Trust Co. v. Rosenberg,* 1986 CarswellOnt 235 (S.C.) (**Tab 3**) at paragraph 16:

> *16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in* Crown Trust Co. v. Rosenberg *(1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:*
>
> > *1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.*
> >
> > *2. It should consider the interests of all parties.*
> >
> > *3. It should consider the efficacy and integrity of the process by which offers are obtained.*
> >
> > *4. It should consider whether there has been unfairness in the working out of the process.*

27. The test set out in *Soundair, supra,* was approved in Nova Scotia by Duncan J. in *Bank of Montreal v. Sportsclick Inc.,* 2009 NSSC 354 (**Tab 2**) at paragraph 32.

28. Section 247(b) of the BIA requires that a receiver deal with any property of an insolvent person in a "commercially reasonable manner". In *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 NSSC 105 (**Tab 6**), Moir J. stated the following in respect of the test set forth in *Soundair*:

> *[5] The receiver submits that Royal Bank of Canada v. Soundair Corporation 1991 CanLII 2727 (ON CA), [1991] O.J. 1137 (CA) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.*
>
> *[6] The Bankruptcy and Insolvency Act was amended after Soundair. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).*
>
> *[7] As stated by Justice Wood at paragraph 14 of ECBC v. Crown Jewel Resort Ranch Inc., 2014 NSSC 420 (CanLII): "it is not the role of the*

> *Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the Bankruptcy and Insolvency Act, a receiver must deal with the receivership property in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of Crown Jewel, that the court will consider fairness of the process that led to the sale.*
>
> *[8] As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the Bankruptcy and Insolvency Act, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.*
>
> [Emphasis added]

29. It is submitted that the factors set out in *Soundair* should be considered with a view to the overall commercial reasonableness of the proposed sale of the Property.

30. BDC does not intend to go through each factor as required by *Soundair, supra*, but respectfully submits that the proposed Sales Process, through a maximization of the exposure of the Property to the marketplace and a maximization of the ultimate price received, will meet the factors that will ultimately be necessary to obtain the approval of this Court.

31. As set out in the Pre-Filing Report, Deloitte is of the view that the proposed Sales Process will provide the maximum exposure of the Property to the widest market, to obtain the highest and best value of the assets.

32. BDC respectfully submits that the proposed Sales Process will meet the test as required in *Soundair, supra*, and requests that the Sales Process for the Property be approved.

IV. RELIEF SOUGHT

33. It is respectfully submitted that the following relief should be granted:

(a) the Consent Receivership Order should be granted and Deloitte be appointed as Receiver and Manager, limited to the Property; and

(b) the proposed Sales Process for the Property be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13 day of January, 2023.

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TAB 1

2018 NSSC 82
Nova Scotia Supreme Court

Bank of Montreal v. Linden Leas Limited

2018 CarswellNS 497, 2018 NSSC 82, 293 A.C.W.S. (3d) 685, 61 C.B.R. (6th) 322

Bank of Montreal (Applicant) v. Linden Leas Limited (Respondent)

Peter P. Rosinski J.

Heard: March 20, 2018
Judgment: April 11, 2018
Docket: Tru. 470166

Counsel: Bruce Clarke, Q.C., Leon Tovey, for Applicant
Jillian Foster, for Respondent

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Debtor was corporate farm which controlled cattle herd — Bank was lender under agreement in which herd was guarantee — Debtor did not make required payments on loan — Bank brought application to appoint receiver over herd — Application granted — Bank had not established irreparable prejudice might occur if no receiver was appointed by court, although it was not essential to demonstrate irreparable harm — Herd had value of approximately $1 million and debtor had significant equity in assets — Cattle herd was ever-changing group of living assets that by nature required intensive monitoring, handling and care, by trained or experienced personnel — Realistically, monitoring must be done by members of debtor, although it could be under auspices of court-appointed receiver — All parties were motivated to protect herd as asset — Amount of indebtedness was in dispute — Farm corporation had no particularized plan to pay debt — Creditor had right to appoint receiver under documentation provided for in loan — Court appointment was necessary to enable receiver to carry out its duties more efficiently — No misconduct by parties.
Table of Authorities
Cases considered by *Peter P. Rosinski J.*:
Bank of Montreal v. Linden Leas Limited (2017), 2017 NSSC 223, 2017 CarswellNS 607, 51 C.B.R. (6th) 270, 9 C.P.C. (8th) 46 (N.S. S.C.) — considered
Bank of Montreal v. Sherco Properties Inc. (2013), 2013 ONSC 7023, 2013 CarswellOnt 16848 (Ont. S.C.J. [Commercial List]) — considered
Brett v. Amica Mature Lifestyles Inc. (2004), 2004 NSCA 100, 2004 CarswellNS 321, 226 N.S.R. (2d) 188, 714 A.P.R. 188 (N.S. C.A. [In Chambers]) — referred to
British Columbia (Attorney General) v. Malik (2011), 2011 SCC 18, 2011 CarswellBC 923, 2011 CarswellBC 924, 76 C.B.R. (5th) 56, [2011] 6 W.W.R. 383, 1 C.P.C. (7th) 374, 17 B.C.L.R. (5th) 1, 330 D.L.R. (4th) 577, 414 N.R. 332, 303 B.C.A.C. 1, 512 W.A.C. 1, [2011] 1 S.C.R. 657 (S.C.C.) — followed
Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 128, 2014 CarswellNS 263, 12 C.B.R. (6th) 181, 1084 A.P.R. 108, 343 N.S.R. (2d) 108 (N.S. S.C.) — considered
Statutes considered:
Bank Act, S.C. 1991, c. 46
s. 427 — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 243(1) — referred to
Companies Act, R.S.N.S. 1989, c. 81
s. 77 — referred to
Judicature Act, R.S.N.S. 1989, c. 240
s. 43(9) — referred to
Rules considered:
Civil Procedure Rules (1972), N.S. Civ. Pro. Rules
R. 38.14 — considered
Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
Generally — referred to

R. 5.05(5) — considered

R. 39.06 — considered

R. 73 — referred to

R. 73.07(a) — referred to

***Peter P. Rosinski J.*:**

Introduction

1 Linden Leas Ltd. (LL) is a corporation. However, its embodiment is the Foster family.

2 Frank and Edna Foster and their children started, and continue to grow, a distinctive herd of cattle, which are highly sought after by buyers. They have collectively worked and managed the farm that sustains the cattle herd that is its core enterprise. Their daughter, Jillian, is a veterinarian and intimately involved with the farm. Even in the documents filed herein, the respondent Corporation is referred to by the Fosters as the "Farmer". [1]

3 The Bank of Montréal (BMO) are presently the *only* secured creditor having as security the farm's cattle herd. Its financial dealings with LL stretch back to at least May 2001. [2] It seeks a receivership order in relation to the cattle herd.

4 LL contests the application. It does not deny that it owes approximately $200,000 in principal payments, while recognizing BMO is claiming a further $220,000 for legal *and* receiver fees to date, some of which began accruing between 2012 and 2017, and $165,000 in accrued interest on those outstanding amounts.

5 BMO made a demand for the immediate full payment of those outstanding amounts on September 20, 2017. [3]

6 LL has made no payments towards the claimed indebtedness since October 2016. [4]

7 LL says, based on various arguments, including that they were unnecessary and unreasonable, that it should not be responsible to pay a substantial portion of the legal and receiver fees to date and accrued interest thereon.

8 BMO says that throughout, it is has made sustained diligent and good faith efforts to provide financing to LL, and particularly so over the course of the years 2011 to present, but that LL has not paid its indebtedness as agreed. BMO therefore no longer has confidence in the financial management of the farm by the Fosters. BMO is no longer prepared to place itself at such a level of ongoing risk. Its primary security is the herd, and it proposes to have the receiver sell off not more than $40,000 worth of cattle per month (without an express "total amount owing" limit in the draft order), which it suggests will still allow the herd to retain a critical mass for viability. BMO also wants the receiver to have the power to insure the herd.

9 LL says that the farm is a "going concern", and still has a bright future, without the appointment of a receiver as suggested by BMO. It strenuously argues that insuring the herd is prohibitively expensive. From the evidence and representations presented I infer that no insurance is presently in place, nor has there been in the past [5]

10 As Justice Moir summarized it in his recent decision, when the bank made its application for an interlocutory receivership:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

The evidence presented at the hearing

11 BMO presented only the affidavit of Rachel Chemtob, sworn January 25, 2018. No notice of intent to cross-examine was filed - Civil Procedure Rule (CPR) 5.05(5), nor was there a request to do so at the hearing. [6]

12 LL presented no evidence. I note that Jillian Foster, who was authorized to speak on behalf of the Corporation, indicated in her written materials that she wished to rely upon previous decisions of, and evidence from, proceedings in this court contained in files Tru. No. 408708 and Amh. No. 348700, including affidavits filed therein.

13 I advised Ms. Foster that I would not be reviewing the contents of those files [7] or the affidavits therein, because BMO had provided evidence that was up-to-date and superseded any evidence presented therein; and our Civil Procedure Rules require that the affidavits be related to the same "proceeding". In my view that is not the case here. I have as the "proceeding", an originating application in chambers before me. [8]

14 CPR 39.06 reads:

> (1) An affidavit may be filed for use on a motion or application.
>
> (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding, if the party who wishes to use the affidavit filed a notice to that effect before the deadline for that party to file an affidavit on the motion.
>
> (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

15 Thereafter, Ms. Foster spontaneously suggested that she wished to call as witnesses to give *viva voce* evidence to the court on the application, her brother Robert Foster, and David Boyd (the proposed receiver), both of whom were present.

16 I ruled against her request. Nevertheless, I do believe that some of her representations of fact/opinion made by way of inclusion of her unsigned September 14, 2012 affidavit from the proceeding in Amh. No. 390679, found at Tab 8 of LL's "brief", are not disputed by the bank and remain relevant at present. Those representations include:

> I am a veterinarian with 25 years of professional experience in livestock medicine and health. I have witnesses [sic] firsthand on clients' farms in the Maritimes, and Ontario and through observation in Alberta, the effects of moving cattle from their "homes". Movement of cattle where unnecessary, results in direct costs and losses to health, life and consequently value and food safety.
>
> . . .

a) the gestational period, the time from breeding or conception to calving or giving birth, for the common North American cattle breeds is between 275 and 292 days, with 285 being used as average.

b) The ideal is for breeding females to calve or give birth to one calf every year (12 months)

c) the weaning age in days used as an industry standard for calculations to compare animals is 205 days. Weaning is the graduation of calves from being dependent on their mother's milk for nutrition to not. Premature weaning causes stress to both calf and cow and consequentially results in a loss in value and becomes a welfare issue.

d) Cows or breeding females ideally are already 3 to 5 months pregnant when their calves are weaned.

e) Premature weaning of calves results in excess stress and consequently even if safeguarded for, can result in substantial losses and welfare concerns (see [reference to "shipping fever"]).

f) Bred females are most safely moved between four and six months of gestation, after the risk of early embryonic death caused by change of home and stress, when their calf is naturally weaned and before they become heavy in calf. The calf they are pregnant with gets big.

g) Pregnancy tested cattle, *certified safe in calf* at least four months, have a market value above that of *exposed to the bull* and not confirmed pregnant and substantially more than *open not bred* cattle.

h) The Linden Leas herd is synchronized to optimize the benefits of the seasons and grass growth.

i) Calving. Cows calve or give birth on grass with most births occurring in the summer months.

j) Breeding. Insemination. Eligible females are bred by bulls at pasture starting at the beginning of August.

k) Natural weaning of calves occurs between December and February as calves reach adolescence. At this age they are ruminating and able to forage on their own.

. . .

'Shipping fever' is the common term used to describe the diseases of cattle that occur when they are moved from their home. Orderly weaning, proper "preconditioning" at least five weeks ahead of shipping and an adequate period of bunk adjustment are preventative measures that can make a substantial difference to losses. Given the time that is needed to travel to the next "home" destination for calves weaned early the price paid by buyers is reflective of the expected morbidity and mortality rates that occur from purchasing "high risk" calves. The associated price drop per pound can be 50% of optimal for calves of the same weight as the losses can be substantial to the buyer not to mention the unnecessary suffering and deaths that occur.

The position of BMO

17 The bank has established that no payments have been made since October 2016, and that at least $200,000 in principal payments presently remain outstanding. *Prima facie*, approximately $220,000 in legal counsel and receiver fees and $165,000 in interest are also presently outstanding. The bank has permitted LL to have the benefit of five Forbearance Agreements (October 4, 2012; February 7, 2013; June 24, 2013; September 4, 2014; and April 30, 2015). Mr. Clarke represented to the court that most of the legal counsel expenses arose not as a result of litigation, but rather solicitor work, in preparing and dealing with the forbearance agreements etc. Notably, within each Forbearance Agreement, LL acknowledged the debt outstanding, and that it was in default. There was no rectification to those defaults, and on September 20, 2017, the debt was again demanded to be immediately paid. On the limited evidence presented, I infer that it is more likely than not, that LL is insolvent.

18 There is a provision in the contractual documentation for the bank to have a receiver appointed in circumstances such as in evidence before the court. BMO emphasizes that it is seeking the receivership as a "final remedy", and not as a typical

interim receivership. It points out that the Model Order from this court does *not* require a judgment amount to be determined before such appointment. [9]

19 BMO relies on several legal bases to support its application in chambers, filed October 30, 2017, for the court-ordered appointment of a receiver:

1- Section 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (BIA)-"... on application by a secured creditor, a court may appoint a receiver to do any or all of the following *if it considers it to be just or convenient to do so*:

a- take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

b- exercise any control of the court considers advisable over that property and over the insolvent persons or bankrupt's business; or

c- take any other action that the Court considers advisable."

2- Section 77 of the *Companies Act*, RSNS 1989, C. 81-"upon an application by a receiver or receiver manager, whether appointed by a court or under an instrument, or upon an application by any interested person, *a court may make any order it thinks fit including*, without limiting the generality of the foregoing,

a-*An order appointing*, replacing or discharging *a receiver* or receiver manager and approving his accounts;

. . .

c-An order fixing the remuneration of the receiver or receiver manager;

. . . "

3- Civil Procedure Rule 73 and specifically 73.02(2)(b) and 73.04 -

73.01 (1) This Rule provides for receivership as a final remedy, such as an order appointing a receiver to liquidate mortgaged property or to sell a business as a going concern.

(2) An interlocutory or interim receivership may be obtained under Rule 41...

(3) A receivership may be ordered and conducted in accordance with this Rule.

73.02 (1) A party who obtains a judgment for an amount of money may make a motion for the appointment of a receiver to enforce the judgment.

(2) A party who claims for the appointment of a receiver may make a motion for an order appointing a receiver in either of the following circumstances:

(a) the party is entitled to the order under Rule 8 - default judgment, or Rule 13 - summary judgment;

(b) *a judge determines, after* the trial of the action or *hearing* of the application in which the claim is made, *that the appointment should be made*.

4- Section 43(9) of the Nova Scotia *Judicature Act*, RSNS 1989 c. 240 - "A... receiver [may be] appointed by an interlocutory order of the Supreme Court, in all cases in which *it appears to the Supreme Court to be just or convenient* that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Supreme Court thinks just..." based on principles established pursuant to the equitable common-law jurisdiction of this Superior Court.

20 The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128 (N.S. S.C.); and the decision of Justice Morawetz, in *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (Ont. S.C.J. [Commercial List]), which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.

21 Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:

> 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
>
> > (a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
> >
> > (b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
> >
> > (c) The nature of the property;
> >
> > (d) The apprehended or actual waste of the debtor's assets;
> >
> > (e) The preservation and protection of the property pending judicial resolution;
> >
> > (f) The balance of convenience to the parties;
> >
> > (g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;
> >
> > (h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
> >
> > (i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;
> >
> > (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
> >
> > (k) The effect of the order on the parties;
> >
> > (l) The conduct of the parties;
> >
> > (m) The length of time that a receiver may be in place;
> >
> > (n) The cost to the parties;
> >
> > (o) The likelihood of maximizing return to the parties; and
> >
> > (p) The goal of facilitating the duties of the receiver.
>
> 27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:
>
> > [42] Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the

receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477; Freure Village, supra; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616 and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, 2011 ONSC 1007.

28 The court in *Bank of Montreal v. Sherco Properties Inc*. offered the following reasons for its decision at paragraph 47 below:

> [47] I have reached this conclusion for the following reasons:
>
> (a) The terms of the security held by the Bank in respect of Sherco and Farm permit the appointment of a receiver;
>
> (b) The terms of the mortgages permit the appointment of a receiver upon default;
>
> (c) The value of the security continues to erode as interest and tax arrears continue to accrue;
>
> (d) Mr. Sherk contends that, with his assistance and knowledge, the Bank will get the highest and most value from the sale of the lands. It has been demonstrated over the past two years that Mr. Sherk has not been able to accomplish a refinancing or a sale.

22 *Crown Jewel* involved a request for the appointment of a receiver to effect a final remedy. As was the case there, here, a security instrument contains an express clause permitting the creditor to appoint a receiver. Justice Edwards reiterated the importance of appreciating the distinction between a court-appointed and private receiver:

> 40 The authors of *The 2013-2014 Annotated Bankruptcy and Insolvency Act* comment at page 1018 that there is an important distinction between the duties and obligations of a receiver and manager privately appointed under the provisions of a security document and those of a receiver and manager appointed by court order. A privately appointed receiver and manager is not acting in a fiduciary capacity; it need only ensure that a fair sale is conducted of the assets covered by the security documents and that a proper accounting is made to the debtor. *A court-appointed receiver and manager, on the other hand, is an officer of the Court and acts in a fiduciary capacity with respect to all interested parties. Further, a court-appointed receiver derives its powers and authority wholly from the order of the court appointing it. It is not subject to the control and direction of the parties who had it appointed, or of anyone, except the Court.* Given the significant unsecured debt owed to both ECBC and the Atlantic Canada Opportunity Agency, as set out at paragraphs 9 and 10 of the Affidavit of Steve Lane, a court-appointed receiver will more adequately and appropriately consider the interests of these, as well as potentially other, unsecured creditors and therefore the appointment by way of a court order is more appropriate in these particular circumstances.
>
> 41 *The appointment of a receiver is, generally speaking, an extraordinary relief that should be granted cautiously and sparingly. However*, in Houlden, Morawetz and Sarra at p. 1024 below:
>
> > The court has held that while generally, the appointment of a receiver is an extraordinary remedy, where the security instrument permits the appointment of a private receiver, and/or contemplates the secured creditor seeking a court-appointed receiver, and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the court determining whether or not it is more in the interests of all concerned to have the receiver appointed by the court: *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 1996 CarswellOnt 2328, 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List].
>
> 42 Finally, the authors note at p. 1024 of The 2013-2014 Annotated Bankruptcy and Insolvency Act that the court's appointment of a receiver does not necessarily dictate the financial end of the debtor. In *Romspen Investment Corp. v.*

1514904 Ontario Ltd. et al. (2010), 2010 CarswellOnt 2951, 67 C.B.R. (5th) 231 (Ont. S.C.J.) the court commented at paragraph 32:

> [32] The court's appointment of the Receiver does not dictate the end of this development nor the financial end necessarily of the Debtors. Some receiverships are terminated upon presentment of an acceptable plan of refinancing or after a sale of some but not all assets. Time will be necessary for the Receiver to determine value and appropriately market the subject properties. During this time, the Debtors are entitled to continue to seek out prospective lenders or identify potential purchasers, with the qualification that they cannot usurp the role of the Receiver. Other than the cost of the Receiver, there is no existing or imminent harm beyond the potential future risk of the Receiver obtaining court approval of an improvident sale. Market value versus a proposed sale price will form the very argument on the approval motion. It is premature to argue irreparable harm at this time.
>
> [My italicization]

23 Notably, although Justice Moir was dealing with a request for an interlocutory appointment of a receiver in *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.), he did state in relation to the appointment of receivers to effect a final remedy:

> 19 While I accept the proposition that a security instrument containing provisions for receivership is a strong factor in favour of ordering a receivership, and engages the need to protect the credibility of security, it is prominent in trials or hearings for a final order....
>
> 20 The approach our Rules adopted leaves the final receivership order to default, summary judgement, trial of an action, or hearing of an application. This embraces the policy against pre-judgement that underlines the *Metropolitan Stores*, *RJR-MacDonald Inc.*, and *Google Inc.* line of cases.

24 *An examination of some factors relevant to whether it is just and equitable to appoint a receiver* [10]

a) Whether irreparable harm might be caused if no order were made (although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed) [11]

25 Although BMO's security contains a provision permitting it to have a private receiver appointed, insofar as a court-appointed receiver is concerned, it still bears the onus. Its evidence as contained in the Chemtob affidavit suggests that:

> i) On January 25, 2018 the outstanding amounts were: $203, $314.36 in principal; $220,419.12 in legal and receiver fees; and $164,915.63 in interest, for a total of $588,649.11.
>
> ii) That indebtedness is also secured by the May 18, 2001 personal guarantees of Frank Foster and Edna Foster (limited to $200,000); the July 26 2004 personal guarantees of Frank Foster, Edna Foster, Jillian Foster and Robert Foster, (limited to $100,000) the July 26, 2004 guarantee of Robert Foster (limited to $100,000); and the July 26, 2004 guarantee of Jillian Foster (limited to $100,000).
>
> iii) LL and the Nova Scotia Farm Loan Board are the registered owner of 24 real properties in Nova Scotia. The cattle herd has grown from 650 in 2012 to approximately 850 head in 2016. The 2017 financial statements of LL indicate the value of its cattle to be more than $1 million.
>
> iv) "BMO is concerned about Linden Leas' ability and willingness to take necessary steps to reduce the Indebtedness... [and] is therefore of the view that a receiver needs to be appointed by the court with the authority to begin selling some of the company's cattle in order to reduce the amount of the Indebtedness.

26 In its brief, BMO argued that there exists a risk of such harm to its security. Because the herd is the company's most valuable asset,and is BMO's only direct security, BMO may be at greater risk. To the extent that there are valid concerns about the company's financial ability to care for the herd, and no insurance on the herd, its security is presently particularly vulnerable.

27 On the facts and representations herein, I cannot conclude that BMO has established irreparable prejudice might occur, if no receiver is appointed by the court. I accept that, at law, it is not essential that BMO demonstrates irreparable harm.

b) The risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets, while litigation takes place

28 As set out above, the cattle herd, which is the primary security that BMO can claim, has an estimated $1 million value. [12] The debtor's equity in the assets appears to be significant.

c) The nature of the property

29 The cattle herd is an ever-changing group of living assets. By its nature, it requires intensive monitoring, handling and care, by trained or experienced personnel in order to ensure its maximum value. Realistically, this monitoring must be done by the Fosters, although it could be under the auspices of a court-appointed receiver.

d) The apprehended or actual waste of the debtor's assets

30 This is not a significant concern here.

(e) The preservation and protection of the property pending judicial resolution (i.e. material reduction or elimination of the Indebtedness)

31 While this is a significant concern given that the cattle herd is BMO's primary security (beyond any risk reduction attributable to the personal guarantees), LL, and the Fosters collectively, are similarly motivated to preserve and protect the cattle herd.

f) The balance of convenience as between the parties.

32 LL argues that the receiver should not be appointed, but more importantly even if appointed, should not be permitted to sell off *any* of the cattle herd without its consent; and in particular not to do so to pay down the indebtedness attributable to past receiver and legal fees or any interest accruing on those amounts. The amount of that indebtedness is in dispute. In contrast, the approximately $200,000 in principal owing is not seriously in dispute. LL suggested at the hearing, it will be in a position within several weeks to pay close to $200,000 to BMO. [13]

33 However, LL has presented no particularized plan to pay off, or pay down, the Indebtedness. BMO has received no payments since October 2016 - this is suggestive of a failing business. BMO could fairly comment that there is no evidence, but only a somewhat vague representation by Ms. Foster at the hearing, that there has been an accumulation by LL of such vast stores of surplus monies, now available to it to pay BMO $200,000.

34 I observe that, if issued including terms to an order appointing a receiver is limit the sale of cattle to the amount of the principal owing such monies are paid, then LL would be able to avert the sale of any of the herd *at this time.*

g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan

35 This factor generally strongly supports BMO's position that the Court should appoint a receiver.

h) The enforcement of rights under security instrument where the security holder encounters, or expects to encounter, difficulty with the debtor and others

36 BMO and LL have fundamentally different perspectives on how to resolve the financial dispute between them. I repeat Justice Moir's recent comments:

> 11 Linden Leas is concerned that the herd has to be kept at a critical mass for viability, which mass is made up of a mixture of cull or slaughter cows, males, heifers, yearlings, and calves and of breeding bulls, yearling heifers, older heifers, and cows with calves mostly not to be slaughtered or culled. Partial liquidations could take the herd below the critical mass required for viability or upset the balance required for viability.
>
> 12 The Bank of Montreal is concerned that the debt owed to it has been in arrears for many years and there is no satisfying plan for retiring the debt. It is a secured creditor, and its borrower is in breach of its covenant to pay.

37 If the court appoints a receiver with conditions that ensure that the Foster family have meaningful input[14] into the decisions of the receiver which affect the viability of the herd, it would expect a genuine good faith collaborative effort by the parties will emerge.

i) The principle of the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly

38 While this is generally true, here the contractual provisions between the parties permit a private receiver to be engaged, and LL does not seriously dispute that it owes at least $200,000 to BMO under the security, and has not made a payment since October 2016, thereon.

j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently

39 I am satisfied that this is the case. The receiver is responsible to the court. This heightened fiduciary responsibility is to the benefit of both parties.

k) The effect of the order on the parties

40 The Foster family is understandably very protective of its hands-on management of the cattle herd, and the farm generally. They have invested their lives, as much as their money and talent, in creating and growing this distinctive and valuable herd. However, while they appear to have had the determination, knowledge, and resources to be outstanding farmers, they have not managed their financial affairs to that same standard. The bank is entitled to be paid according to law. They have sought the Court's intervention to effect payment by LL of the Indebtedness. The appointment by the court of a receiver, who is an officer of the court, and must take instructions from the court, and not favour the interests of the debtor or creditor, can be an effective means of resolving disputes such as the one before the court. It is intended to let the Fosters be farmers, and the receiver be a conduit through which BMO can receive sufficient payments towards its indebtedness to alleviate its concerns.

l) The conduct of the parties

41 There is no evidence of past misconduct, nor any anticipated.

m) The length of time that a receiver may be in place.

42 If the receiver is entitled to sell some of the herd over time in order to satisfy at least the $200,000 principal indebtedness, and if the 850 head of cattle have a value of $1 million, then, in static terms, roughly speaking 20% of them (170 head) would need to be sold in order to generate $200,000. If BMO's proposal to sell *no more* than $40,000 worth per month is accepted by the court, that would see no more than 34 cattle sold monthly (presuming their price is approximately $1200 per head), for five months to reach 170 head in total.

43 I am reluctant to arbitrarily set out a fixed monthly maximum allowable sale of the cattle by the receiver. No particulars were offered in evidence regarding such a timetable. Even presuming 20 head are sold per month continuously, that could entail roughly 8 consecutive months of sales. Given LL's legitimate concerns about sustaining a critical mass and mix required for

herd viability, and the requirement to sell approximately 170 head in total to pay back $200,000, the receiver may need to be in place for an indefinite period of time. This cannot be calculated with precision. The court must accord the Receiver the necessary discretion to effect an orderly and thoughtful reduction of the debt.

Conclusion

44 Upon consideration of all the circumstances, viewing those through the factors noted above, and collectively pursuant to the statutory and equitable jurisdiction of the court, [15] I am satisfied that it is convenient or just to appoint a receiver.

The order to issue

45 Specifically, I appoint Price Waterhouse Coopers Inc., without security. [16]

46 Although, it is not necessary to articulate a precise amount of indebtedness in the order, I am satisfied it is more likely than not that LL is indebted to BMO for an amount of at least $200,000 as at March 23, 2018.

47 The Receiver will effect a reasonably timely reduction of LL's indebtedness to BMO, only toward payment for any true principal and interest thereon outstanding as of March 23, 2018, and to a maximum of $200,000. [17] The Receiver will reduce that indebtedness, by making payments to BMO arising from the revenue generated by sales of portions LL's cattle herd. The timing, content, and amounts thereof to be in the Receiver's sole discretion, *but* only after having had genuine and timely collaborative consultations with LL regarding the ongoing objective of keeping the cattle herd at a critical mass and mix for viability. LL will fulsomely facilitate the Receiver's patent and patently implied responsibilities to effect the debt reduction.

48 I decline to order LL to be responsible for the cost of any herd insurance.

49 I believe it appropriate for the court to order the parties to attend at a mutually convenient time for a status update in approximately six months. [18]

Costs

50 Typically, an application in chambers set for one half day, would justify an order of approximately $1,000 in costs as against the Respondent. I note that in the *Crown Jewel*, Justice Edwards ordered $1,500 costs. BMO has suggested deferring the determination of the costs of this proceeding to the date when the legal, professional fees and outstanding interest amounts are assessed. I believe this can best be addressed at a future date.

Application granted.

Footnotes

1 Some of the background is contained in Justice Moir's decision - *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.); the herd had grown between 2012 and 2016 from 650 to 850 head - para. 52 Rachel Chemtob affidavit sworn January 25, 2018

2 See comprehensive affidavit of Rachel Chemtob, sworn January 25, 2018

3 Exhibit "R", Chemtob affidavit

4 The only payments made in 2015, were pursuant to the Fifth Forbearance Agreement, and limited to: $2000 in January; $900 in June; $1000 in August; and $1000 in December; the only payments made in 2016 were: $1000 in March, $1000 in August, and lastly $10,000 in September and October - see Exhibit "Q" and paras. 41-46, Chemtob affidavit

5 See also para. 26 *Bank of Montreal v. Linden Leas Limited*, 2017 NSSC 223 (N.S. S.C.).

6 Rachel Chemtob was present at the hearing

7 Keeping in mind the principles in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 (S.C.C.)

8 Under the old Rule 38.14, see Justice Fichaud's comments at paras. 15-18, *Brett v. Amica Mature Lifestyles Inc.*, 2004 NSCA 100 (N.S. C.A. [In Chambers]). Moreover, although the Truro file might have been readily available as we were sitting in Truro, the Amherst file was not.

9 However, in these specific circumstances, the bank requests the Receiver be appointed soley to sell cattle and effect a pay down of the debt. In my view, the better practice is to determine a fixed amount that this Receiver will be authorized to reduce over time by sales of cattle (as well as payment of its own reasonable fees and disbursements, and any statutory claims having priority to the bank's security).

10 While these factors arise in the general context of interlocutory receivership applications, they do provide a ready starting point for determining whether, as a final remedy for a secured creditor, it is "just or convenient" to appoint a receiver.

11 In the circumstances of this case, there is a serious concern that *any* culling of the herd could precipitously undermine the viability, and value of the cattle operation.

12 The bank's security includes the cattle specifically, pursuant to s. 427 *Bank* Act security documentation registered April 19, 2010 - see Exhibit "C" Chemtob affidavit referred to at paras. 4-6.Linden Leas also owns real property.

13 At the hearing, Jillian Foster alluded to monies LL had received from timbering operations, and suggested $200,000 would shortly be available to pay BMO.

14 A right to be meaningful consulted in a timely manner regarding, but not a right to veto, decisions of the receiver in determining, which cattle, and how many should be sold, and when.

15 As reflected in s. 43(9) of the *Judicature Act*, and s. 243(1) of the *Bankruptcy and Insolvency Act*, s. 77 of the *Companies Act (Nova Scotia)* and our *Civil Procedure Rule* 73

16 I am satisfied that this is appropriate - see Rule 73.07(a).

17 The Receiver shall also pay from the proceeds before paying BMO's indebtedness: its costs incurred in acting as Receiver, including its own fees, charges and expenses; any statutory claims due and owing, which have prioirity over the secured claim of BMO.

18 The mutually convenient date will be ascertained in advance and inserted into the body of the court's order. BMO also sought payment of the legal and Receiver fees and disbursements with interest to date, but were agreeable to defer the court's assessment of their reasonableness to a future date. I will leave it to the parties to arrange any further hearings required, on notice to all parties including the guarantors, regarding the remaining claimed indebtedness beyond $200,000, and costs of this Application. I direct the Applicant to draft the form of order.

TAB 2

2009 NSSC 354
Nova Scotia Supreme Court

Bank of Montreal v. Sportsclick Inc.

2009 CarswellNS 649, 2009 NSSC 354, 183 A.C.W.S. (3d) 326

Bank of Montreal (Plaintiff) v. Sportsclick Inc. (Defendant)

Patrick Duncan J.

Heard: November 10,12, 2009
Judgment: November 12, 2009
Docket: Hfx 314220

Counsel: Stephen Kingston, Benjamin Durnford for Plaintiff
Christopher Robinson for Defendant
Dennis Pickup, Jonathan Saulnier (Articled Clerk) for Third Party, T & A Venture Properties Inc.

Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.b Sale by tender
XIV.6.b.ii Miscellaneous

Headnote
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous
Defendant was parent company of S Inc. and owned all of S Inc.'s shares ("shares at issue") — Plaintiff bank obtained order appointing interim receiver for defendant — Receiver proceeded with public tender of shares at issue — At tender close date there was single offer in amount of $25,000US made by non-party ("amount offered") — Amount offered barely covered cost of advertising tender — Bank brought motion to approve sale of shares at issue for amount offered — Motion granted — Sale was commercially reasonable — Decisions made by receiver were made in good faith and were cognizant of receiver's duties — No alternatives to receiver's marketing approach were shown that would have provided greater return — S Inc. had been in serious financial decline for several years at time of sale — It was speculative to suggest that shares at issue would have attracted better price if defendant had continued managing S Inc. — Tender process was carried out in transparent and fair manner, consistent with industry standards.

Table of Authorities

Cases considered by *Patrick Duncan J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — considered

Greyvest Leasing Inc. v. Merkur (1994), 8 P.P.S.A.C. (2d) 203, 1994 CarswellOnt 780 (Ont. Gen. Div.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 47(1) — referred to

***Patrick Duncan J.*:**

Introduction

1 This is a motion that seeks an order to approve the sale by the Receiver of Sportsclick Inc. of a certain asset of Sportsclick, being the shares of a company known as Southprint Inc. The application is supported by T & A Venture Properties Inc., the intended purchaser of the asset, who is participating as an interested non party. The motion is opposed by Sportsclick.

Background

2 Upon application of the plaintiff, Bank of Montréal, an order was issued on July 14, 2009 by the Registrar of Bankruptcy appointing Ernst & Young Inc. as the interim Receiver of Sportsclick Inc. and Sun Vette Racing Inc. pursuant to section 47 (1) of the *Bankruptcy and Insolvency Act* (Canada), R.S. 1985, c. B-3.

3 Following appointment the Receiver offered the personal assets of the defendant for sale by tender, excepting the Southprint shares, which the Receiver characterizes as a unique asset.

4 The Receiver learned that the defendant is the parent company of Southprint Inc. a Martinsville, Virginia, USA based company which carries on business selling hats, jackets, shirts, toys and other items with NASCAR logos and designs. It prepares various artwork to customer specifications and silkscreens these designs on apparel and other textile products.

5 The evidence indicates that Sportsclick completed the purchase of all shares of Southprint on or about May 12, 2009. The CEO and sole director of the company is Jack Ross, who is also the president, CEO and director of the defendant.

6 During its investigations, the Receiver determined that the plaintiff has a charge on the shares of Sportsclick in Southprint. It does not have direct security or other agreements with Southprint.

7 The information initially gathered by the Receiver indicated the following:

- Southprint had a net operating loss of $1.4 million in 2008 and $1.04 million in 2007;
- Southprint lacked operating capital, was in default in payments to trade suppliers and licensors, and did not have access to a bank operating line of credit;
- the majority of Southprint's accounts receivable were factored;
- important licensing agreements of its' major products were tied to the personal relationships of a small group of management personnel within Southprint;
- that on the eve of the appointment of the Receiver in July, 2009, $75,000 US was withdrawn from a then balance of $76,000 US that Southprint held in a US bank. This was done on the direction of Mr. Ross. Because of the concern that this may have been done as a preferential payment, the Receiver acted as a catalyst to have the signing authority of Mr. Ross, among others, removed from the Southprint bank accounts.

8 The Receiver sent a representative to the Virginia plant to do a preliminary review of the business and operations of Southprint. The information indicated that the company was downsizing with declining sales, employees and facilities.

9 On July 31, 2009 the Receiver was presented with an offer in the amount of $100,000 for the purchase of the Southprint shares. The prospective purchaser included the previous shareholders who had, only months before, sold their interest to Sportsclick. One of these persons was understood to be Butch Hamlet, one of the founders of Southprint, and a key player in the company's operation and management. The offer was reaffirmed in a letter of August 7 from counsel for the purchasers. It set 5 PM on August 12, 2009 as the deadline for acceptance.

10 The fact of this offer was communicated to Mr. Ross and others associated with Sportsclick by counsel for the Bank of Montréal. He set out various adverse conditions associated with Southprint and states:

The Bank of Montréal is not prepared to fund a very expensive receivership of Southprint in the United States to take control and operate the company. In light of the real and adverse situation presented by Mr. Hamlet, the receiver has to consider acceptance of the offer.

11 The Receiver discussed a potential sale of the shares to Green Swan Capital Corporation, a company that held a subordinate security interest against Southprint. It was not in a position to make an offer and so the Receiver entered into negotiations with Mr. Hamlet and others, sometimes referred to as the "US group".

12 In deciding to attempt a private sale of the shares, the Receiver considered the information identified previously, and also:

• that the assets of Southprint were fully encumbered, including accounts receivable factored to Amerisource Funding;

• the machinery and equipment were secured to River Community Bank. This bank, in view of the default by guarantor Sportsclick (by its being put into receivership), made a demand for repayment of the debt owed to it in the amount of $487,705 as of August 6, 2009;

• a review of the United States UCC filings and of the company financial statements indicated that there were multiple secured and unsecured creditors of the company, which claims against Southprint assets would rank in priority to the plaintiff's security interest.

• that a legal opinion obtained by the Receiver indicated that under the laws of the state of Virginia, a claim by a shareholder to the assets of the company is subject to secured and unsecured creditors, making a shareholder a junior creditor;

• the Bank of Montréal again confirmed that it would not fund an action for the carrying on of the business of Southprint;

• the management team of Southprint was prepared to resign unless a deal was completed to assure the company's viability.

13 The Receiver concluded that sale as a "going concern" represented the best option.

14 A Nova Scotia-based group contacted the Receiver in mid-August indicating an interest in the Southprint shares. Believing that it should allow this new expression of interest to be explored, it advised the US group who, as a result, withdrew their offer of $100,000.

15 No other offers were forthcoming and so the Receiver proceeded with a public tender of the Southprint shares owned by Sportsclick. This was also in response to pressure being exerted by Sportsclick management who favored a public tender process.

16 An advertisement of the sale was posted in newspapers in Nova Scotia and in Virginia in four successive weeks commencing September 5, with the deadline for offers by September 30, 2009.

17 In addition, Ernst & Young developed a direct marketing list of prospective buyers who were contacted and advised of the opportunity to purchase the Southprint shares. Of this listing, 17 groups requested and were provided a copy of the Information Package.

18 The advertising costs alone are valued at in excess of $24,000.

19 Mr. Ross was also invited on various occasions to provide a list of names of any potentially interested parties for the purchase of these shares. No suggestions came forward.

20 At the tender close date there was a single offer in the amount of $25,000US made by T & A Venture Properties Inc. There has been representations by counsel for T & A that this is a company that is separate from the previous shareholders. The evidence provided by Mr. Kinsman, being the only evidence I have on this issue, is that it consists of individuals who currently have a managerial or operational role in Southprint and is the same group that previously made the $100,000 offer.

21 If the offer is accepted then it will barely cover the cost of the advertising.

22 On October 13, 2009 Justice McDougall of this court issued an order appointing Ernst & Young Inc. as Receiver of all of the assets, property and undertaking of Sportsclick Inc. with broad powers that included:

> 2(i) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
>
> (j) To apply for any vesting order or other orders necessary to convey the Property or any part of parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such property;
>
> (o) to exercise any shareholder ... rights which the Company may have; and
>
> (p) take any steps reasonably incidental to the exercise of these powers.

23 The Receiver has recommended to this court that it approve the sale of the Southprint shares for the sum of $25,000US because this is the value which presented itself to the Receiver when the asset was widely exposed to the market for sale, and after Sportsclick's principals and others (such as Green Swan capital Corporation) were consulted for assistance with marketing the asset.

Position of Sportsclick

24 Jack Ross, in his affidavit, concisely sets out the basis of the defendant's opposition to approval of the sale.

25 He says that the value of Southprint was, "...after considerable effort and due diligence, determined to be in the region of $4 million as at the date of acquisition by May 12, 2009." He rejects the suggestion that the assets deteriorated to $25,000US.

26 He says that from the commencement of the receivership until September 2, 2009 the Southprint bank balance "consistently averaged $200,000 +" which challenges the accuracy of the assertions that there were cash flow problems in Southprint.

27 He questions the effort expended by the Receiver in trying to achieve reasonable value for the asset alleging that the Receiver acted improvidently, without commercial reasonableness, and without regard for the best interests of the shareholders and creditors of Sportsclick. He maintains that the assistance and guidance of members of the Sportsclick management group should have been utilized to achieve reasonable value for the shares.

28 In his submissions, counsel for the defendant expanded on these points. He argues that there were several failings of the Receiver which led to the current situation:

> • that there is no evidence before the court to demonstrate that the Receiver conducted a proper valuation of the asset at any point during the receivership;
>
> • that in eliminating the participation of Sportsclick management from a position where they could oversee the operations of Southprint, and by allowing the previous shareholders and management group of Southprint to have unfettered control of the company, the Receiver created the current situation where those same people are able to inhibit the marketability of the asset by threatening to withdraw or engage in activities that would be detrimental to the value of Southprint;
>
> • that the most current value by which the offer should be measured is the acquisition price paid in May, 2009 which is so substantially more than the amount offered in the tender process as to demonstrate that it is not commercially reasonable to accept it;
>
> • that because of the unique nature of the asset, the marketing attempt of the Receiver was inadequate in that:

1. Newspaper advertising only referred to the "shares of Southprint" as being made available for sale. In Virginia the company operated under a different business name and so the Southprint name would not be meaningful to prospective purchasers;

2. The newspaper advertising in Virginia was confined to one paper with a circulation of 170,000 people;

3. The advertisement should have provided more detail about the nature of the asset in order to generate interest and should have been more widely disseminated through newspapers with larger circulation and broader geographic appeal;

• that the targeted group was not large enough.

Position of the Receiver

29 The applicant submits that the nature of this asset, with its adverse characteristics for operation as a going concern, was unique and of interest to a very limited class of potential purchasers who it attempted to reach with its marketing efforts. It stands by the tender process as being a commercially reasonable effort to maximize the realization value of the shares.

30 I have been referred to the principles set out in the decision of *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) as addressing the criteria applicable to this court's review of the Receiver's sale of assets. I am urged that all of the criteria contained therein have been met.

31 In response to the specifics of the allegations of Mr. Ross and Sportsclick the Receiver says:

• that Mr. Kinsman, acting on behalf of Ernst & Young in this matter, is an experienced and savvy Receiver who made adequate inquiries throughout to ensure that he understood the nature and financial characteristics of Southprint;

• that he was prepared to accept the risk in walking away from the $100,000 offer which demonstrates his commitment to achieve the best possible realization value;

• that the advertising of the shares undertaken in the tender process was consistent with the industry-standard;

• that the Receiver generated inquiries from 17 different parties through targeted marketing efforts;

• that due to the position taken by the Bank of Montréal in refusing to undertake the management or control of Southprint there was no direct route to liquidate the assets of Southprint. Further that it would be subject, as a shareholder, to taking a junior position as a creditor;

• that in triggering the removal of Sportsclick's management from signing authority at Southprint it was acting to preserve the value of the asset. The Receiver was concerned that on the direction of Sportsclick management $75,000US was transferred from Southprint to a principle of Sportsclick on the eve of the receivership in July. Fearing a preferential payment the Receiver sought to block future such transactions. The Receiver did not intend to, nor did it communicate to Mr. Ross that he was barred from otherwise taking an operational role in Southprint;

• And finally, that it has consistently invited the assistance of Mr. Ross, but that none has been forthcoming, except to the extent that Mr. Ross indicated he would assist in return for a six month contract paying him his then current salary of approximately $10,000 per month, an offer that the Receiver rejected. Mr. Ross rejected a counter proposal to be paid on an hourly rated basis. He also did not respond to an invitation by the Receiver to present another proposal to assist the Receiver.

Law

32 In *Royal Bank v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:

1. It should consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

33 Certain principles have been enunciated by the courts in consideration of these points:

• The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation... in any but the most exceptional circumstances... would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them." *see*, Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), at 112 ;

• the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para 40;

• the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg*, *supra*, at page 124, Anderson J. said:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

• a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co.*, *supra*.

Analysis

34 I agree that the shares of Southprint presented as a unique or unusual asset. Southprint opened in 1991 and began operating under that name in 1992. It developed a customer base of large branded companies that grew to include Adidas, Big Dog Sportswear, J. America (college licensee), and MJ Soffe (U.S. Army exclusive licensee). In 1994 it purchased Checkered Flag Sports and developed and marketed NASCAR apparel to retail outlets. It was owned and managed privately, with Mr. Hamlet being the president and majority shareholder.

35 The evidence suggests the company became successful on the strength of the personal relationships of its management team, particularly with the licensors whose business was crucial to the viability of the company.

36 Sportsclick had a Business Acquisition Plan that was intended to improve profitability in a relatively short time. i.e. within 12 months of acquisition. However, two months after acquisition, Southprint was in receivership and unable to carry out its plan.

37 While Sportsclick made some initial changes to the operations of Southprint, including financing and some staffing changes, it does not appear from the evidence that it had any major influence on the operations. There is no evidence that Sportsclick provided an infusion of capital for Southprint nor did anything that substantially attacked the problems affecting its financial operating capabilities.

38 In consequence thereof, the previous management team, that included its founders, remained in place. They have continued to operate the business under the benign oversight of the Receiver who has made it clear that it was never in the Receiver's

mandate to operate or manage Southprint. There is no persuasive evidence on which to conclude that the financial situation of Southprint has improved.

39 The prospective purchaser, I am told, includes members of the current management team. Those persons have threatened to walk away from the business if a purchaser is not in place to guarantee the financial viability of the company. Their participation in the operation of the company at this time is crucial if it is to continue as a going concern.

40 The defendant complains that this is a situation that should not have been allowed to take place and that it has negatively impacted on the market for the shares of Southprint. The inference I am asked to draw is that either by the continued involvement of the Sportsclick management team, or the more active oversight of the Receiver, the shares of this company would have made a more attractive buying opportunity. It is also suggested that the equity in the assets alone should attract a substantially greater purchase price. All of this presupposes that there is a person or company who sees that potential as significant enough to offset the problems that acquisition will inevitably entail.

41 The Receiver says that the market place determines value and that the marketplace has spoken. No one agrees with the defendant's view of the value that this opportunity presents. Only T & A has an interest now.

42 For its part the Bank of Montreal, a significant secured creditor of Sportsclick, has also accepted that it is not worth pumping more money into selling the shares. They have gauged the marketplace and obviously have come to the same conclusion as the Receiver.

43 Neither have other creditors stepped up to offer, even a dollar, to acquire these shares in hopes of somehow realizing some greater return, in a break up of the assets of Southprint, or as a going concern.

44 Unfortunately there is no evidence on which I could conclude that any marketing scheme would attract a better price or more interest. It is speculative to suggest that it would. It is not sufficient, in my mind, to challenge the business judgment of an experienced Receiver on the basis of speculation.

45 The underlying assumption of the defendant's argument is that the limited interest in the company is derived from the Receiver's handling of the company and the marketing effort. In support of this view, I have been referred to the valuation put on Southprint by Sportsclick at the time of purchase which closed in May, 2009.

46 It is suggested that that is the best, if not the only reliable way to measure the value of the shares.

47 I have examined Southprint's financial statements, the PWC due diligence draft report of January 2009 and the Southclick Inc. Business and Acquisition Plan, also dated January 2009. I have also considered the affidavits of Jack Ross.

48 The following is a snapshot of what I view as indicators of the relative financial health of Southprint in the years 2004-2008:

	2004	2005	2006	2007	2008
Sales	20.1 M	18.8 M	16.7 M	14.01 M	13.9 M
Operating Loss	601.5 K	221 K 398 K	1.38 M	1.73 M	
Net Operating Loss	396 K	242 K 306 K	1.04 M	1.4 M	

49 As can be seen, sales were dropping long before the current economic downturn. Net operating losses climbed to the point where they totaled $2.44 million on sales of $28 million in the last 2 years before Sportsclick made its purchase.

50 Southprint was reliant for day to day operations on approximately $4.0 million in financing that was dependent on its then shareholders' personal financing backed by a traditional lender. It closed one plant in 2008, cut back shifts, laid off employees and in January 2009 closed completely for a short period of time.

51 As at January 2009 a number of the 2009 licencing agreements had not been signed, including the contract thought to have the most value. One account that had generated sales of almost $2.0 million in 2007-2008 was not expected to be part of sales in 2009. It is not clear in the business plan how this significant loss of revenue was going to be replaced or how expenses were going to be controlled to off set such a loss.

52 Notwithstanding its capital and real property assets Southprint is a company that has been in serious financial decline for several years.

53 According to Mr. Ross's affidavit, Sportsclick acquired all of the outstanding shares of Southprint in exchange for the issuance of 6 million shares of Sportsclick to various of the former Directors and Officers of Southprint . The book value of the shares was $3 million. The value of the Sportsclick shares on the TSX Venture Exchange at the close of business on May 12, 2009 was $.15 per share, or $900,000. In addition, shareholder loans owed by the two previous principals of Southprint were treated as goodwill and taken off the books of the company in a non-cash transaction. While I agree that the purchase price was approximately $4,000,000 in value, it was not put up in cash, which is the expectation of a Receiver.

54 Put another way, there are certain methods of effecting a sale that would be available in an unfettered sale between a willing and financially stable vendor and a willing and financially stable purchaser that are not feasible on a liquidation. It is one of the reasons why it is common for assets to be sold off at significantly reduced prices in a Receivership from what might be negotiated in the ordinary course of business. In a liquidation the sale is typically for cash and is to be achieved in an abridged time frame. The longer the time extends, the greater the costs of the Receiver, and the greater the deterioration of the asset values to the creditors.

55 The Sportsclick business plan for Southprint had the following general features:

- to improve the sales culture
- to reduce salary and benefit commitments by reducing staff and capping compensation
- renegotiating royalties
- reduction of some promotional costs
- to reorganize the financing
- to take advantage of the "synergies between Sportsclick and Southprint."

56 The result was predicted to reduce overhead by $1 million.

57 Sportsclick intended to sell 2 pieces of real property for $150,000 and to obtain direct financing of $4.0 million by factoring accounts receivable, mortgage financing, term financing and inventory financing.

58 These forms of financing would be dependent upon the financial soundness of Sportsclick as the owner and guarantor. At no point does the plan speak to the infusion of capital by Sportsclick to Southprint.

59 Under its current situation, Sportsclick has no ability to guarantee, nor to otherwise financially support the operations of Southprint. Creditors of Southprint who stand ahead of the shareholder have seen this and issued demand for payment. Neither is there a prospect for the predicted benefits of the "synergies" between parent and subsidiary.

60 Southprint can only survive as a going concern with a purchaser that has the financial ability and the will to take on a company that is now losing almost $2 million per year on declining sales, has limited creditworthiness, and is largely dependent on the willingness of the existing management team to continue to use their knowledge of the company and of its existing business relationships to the benefit of Southprint.

61 The Receiver has no mandate to operate Southprint. The only other option is to simply close Southprint down and liquidate the assets, hoping that the equity will cover the cost of acquisition. That option is not open to the Receiver in this case. None of the creditors of Sportsclick have seen fit to step forward to take on this challenge. Whether that is a good business decision is not relevant to the position of the Receiver, who can only act with the resources that it has available to it. As Mr. Durnford indicated in his submissions, there may be collateral issues to this matter that arise for resolution in the principal action as between the Bank and Sportsclick, but that is not determinative of the considerations before me.

62 Finally, I am urged to accept that the accumulated financial acumen of the management of Sportsclick in making this purchase is a reliable indicator of the accuracy of the value they attached to Southprint. With respect, even good business people fail as a result of unexpected conditions, or because of errors, some within their control, some beyond their control. In this case the fate of Sportsclick speaks to a business model that failed. I will not defer to the judgement of those who oversaw that failure over the judgment of the Receiver.

Conclusion

63 In *Greyvest Leasing Inc. v. Merkur*, [1994] O.J. No. 2465 (Ont. Gen. Div.), the Ontario Court of Justice held at paragraph 45 as follows:

> Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A Receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. [See *Royal Bank v.Soundair Corp.*, 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1 (C.A.).] This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

64 I am satisfied that the Receiver in this case did that. It is a most disappointing result for the creditors, and the debtor. It will at best cover some of the disbursements on sale. No one benefits greatly from this, except perhaps the principals of T & A, but the evidence suggests that they have significant challenges ahead of them to make this a profitable company, in difficult economic times. They may be the only ones who have the ability to do so.

65 The decisions made by the Receiver were made in good faith, cognizant of the duties that a Receiver is subject to. It made business judgments that may be easy, with the benefit of hindsight, to criticize, but they were reasonable having regard to the circumstances in existence at the time. No alternatives to the targeted marketing approach have been shown to exist that would provide, beyond speculation, the potential for a greater return.

66 The tender process, once decided upon, was carried out in a transparent and fair manner, consistent with industry standards.

67 Having regard to the facts as set out herein, and the duties on a court as enunciated in *Soundair*, I am satisfied that the Receiver's recommendation should be accepted. I am prepared to grant an Order to give effect to the sale of the shares of Southprint to T & A Venture Property Inc for the sum of $25,000 US.

68 Delivered orally at Halifax, Nova Scotia this 12 th day of November 2009.

Motion granted.

TAB 3

1986 CarswellOnt 235
Ontario Supreme Court, High Court of Justice

Crown Trust Co. v. Rosenberg

1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note)

CROWN TRUST COMPANY, SEAWAY TRUST COMPANY and GREYMAC TRUST COMPANY v. ROSENBERG et al.

Anderson J.

Judgment: November 6, 1986
Docket: No. 1380/83

Related Abridgment Classifications
Civil practice and procedure
III Parties
III.8 Intervenors
III.8.a General principles
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.a Actions by receiver

Headnote
Receivers — Sale of debtor's assets — Approval by court — Court discussing obligations in determining whether to approve sale.
On a motion by a court appointed receiver and manager to approve the sale of certain properties, the duties of the court are to consider: whether the receiver has made a sufficient effort to get the best price and ensure he has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process.
The court has the power and responsibility to disregard the recommendation of the receiver and to approve another offer or offers. On the other hand, the court ought not to enter into the market place or sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which his decision has been reached. Furthermore, the court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance or proceed against the recommendations of its receiver except in special circumstances or where the necessity and

propriety of doing so are plain. It is only in exceptional circumstances that a court will intervene and proceed contrary to the receiver's recommendations if satisfied that the receiver has acted reasonably, prudently and fairly, and not arbitrarily.
It is necessary to keep in mind not only the function of the court but the function of the receiver. The receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets. However, the court is not to apply an automatic stamp of approval to the decision of the receiver. The court has power to come to a different decision and a discretion to exercise which must be exercised judicially.
The courts have recognized that they are not making a decision in a vacuum; that they are concerned with the process not only as it affects the case at bar, but as it stands to affect situations of a similar nature in the future. The delicate balance of competing interests is relevant and material.

***Anderson J.*, (orally):**

1 This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

2 A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

3 In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

4 In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

5 On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

6 On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

7 On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

8 This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

9 Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest bidder. The extent of the difference I will discuss in a moment and I will also discuss the reasons advanced by Clarkson for not recommending it.

10 On the return of the motion Larco moved to be added as an intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

11 On Wednesday, October 27th, Larco presented during the hearing of the motion an entirely new offer in a still higher amount. On Thursday, October 23rd, I made a ruling that I would not consider that offer. My reasons for that ruling are likewise an appendix to these reasons. (See App. II [not reproduced]). On the argument of the motion no criticism was advanced of any of the offers recommended by the Receiver. The only criticism that was advanced on behalf of some defendants was that the Larco bid should have been recommended and in any event should be approved by the court. The plaintiffs in the action supported the recommendation of the Receiver.

12 Before dealing with the elements of the ensuing dispute, I turn to a consideration of the nature of the motion which is before me and of the duty of the court in the disposition of such a motion. The duties of the court I conceive to be the following, and I do not put them in any order of priority:

> I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently. Authority for that proposition is to be found in a judgment of the Alberta Court of Appeal, *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58. The [D.L.R.] headnote is of assistance, as is the judgment delivered by Kerans J.A. and particularly that portion which appears at p. 476. The questions with which the court was dealing were similar to those with which I am now concerned.
>
> The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court in an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Canada Permanent Trust Co. v. King Art Developments Ltd. et al.* (1984), 12 D.L.R. (4th) 161, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.
>
> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.
>
> II. The court should consider the interests of all parties, plaintiffs and defendants alike.
>
> That is made apparent by the judgment of this court in *Ostrander v. Niagara Helicopters Ltd. et al.* (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, although the conclusion appears rather by indirection and as a statement *obiter* to judgment.
>
> III. The court must consider the efficacy and integrity of the process by which the offers are obtained.
>
> The first authority which is of assistance in that regard is the judgment of Saunders J. in *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.). There, in dealing with the question of approval, he has this to say in his reasons at p. 246:
>
> > In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 at p. 11 (C.A.), where he said:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

A further authority for that proposition is to be found in *Bank of Montreal v. Maitland Seafoods Ltd. et al.* (1983), 57 N.S.R. (2d) 20 at p. 23, 46 C.B.R. (N.S.) 75 (N.S.S.C.):

> If any efficacy is to be given to the tender system, then it requires that ... a person, whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos in the commercial world". Not only would there be uncertainty ... but it could lead to the situation where there might be no bidders.

IV. The court should consider whether there has been unfairness in the working" out of the process.

The authority for that is the case to which reference was made by Saunders J., *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1. The [C.B.R.] headnote again is useful as is, in this connection, the language at the concluding portion of the judgment where this is said:

> Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale.

That case is also authority, if authority were needed for the proposition that in a proper case the court has the power to disregard the recommendation of the Receiver and to approve another offer.

13 It is with those areas of responsibility in mind that I proceed to deal with the motion. I have already said that no criticism is made of the offers which are recommended. Likewise no criticism has been made of the process by which the offers were obtained.

14 Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as $7 million odd, or as low as $1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

15 The central issue is whether the court should disregard the recommendations of the Receiver and approve the higher bid. Indeed at the end of the day that is the only real issue. This requires first some review of the reasons advanced by the Receiver for rejecting or at any rate not recommending the Larco bid. This is dealt with in the motion record in the Receiver's report in para. 38, at pp. 51-67 of the record:

> 38. Clarkson did not accept Enterprises'[1] Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:
>
> (a) Clarkson's concern to maintain the integrity and fairness of the tender process embodied in the Invitation to Tender, and Clarkson's conviction that the evident success of the marketing and tender process as reflected both in the quantity and quality of the offers which were received was due in large measure to the faith and trust of prospective purchasers that they would each be afforded a fair and equal opportunity to purchase, have been discussed at length above. Clarkson and Cogan were advised on August 14, 1986 by representatives of Enterprises that Enterprises shared those concerns as a result of an unsuccessful tender recently made by Enterprises in respect of certain other properties, and particular emphasis was placed by the said representatives of Enterprises on their need to understand the tender rules, that the rules not be changed, and that they expected everyone to adhere to such rules.
>
> Nevertheless, Clarkson does not believe that Enterprises' Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,
>
> (i) the above-mentioned mechanism for determining the price at which Clarkson would be required to sell the Note might be said to have afforded Enterprises the opportunity to change the cash purchase price offered for the subject Properties, after the Bid Deadline, although no objection could be raised to a change in such cash purchase price if the percentage to be stipulated by one of the designated financial institutions was determined by such financial institution solely on the basis of objective market interest rate criteria; Clarkson and Fraser & Beatty, following the Bid Deadline, therefore repeatedly requested confirmation from The Royal Bank of Canada that the percentage set out in its said letter dated September 15, 1986 was determined by such bank based upon objective market interest rate criteria alone, but no such confirmation was received by Clarkson;
>
> (ii) Enterprises or persons acting on its behalf changed or attempted to change or might have changed, after the Bid Deadline, material terms and conditions of Enterprises' Offer; namely
>
> (A) price by means of the Note purchase mechanism;
>
> (B) the financing condition in Enterprises' Sealed Bid referred to in paragraph 34 above was included in such sealed bid despite repeated statements by Clarkson, Cogan and Fraser & Beatty to representatives of and to the solicitors for Enterprises prior to the Bid Deadline that this would represent a serious negative feature of any offer submitted; by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson (a copy of which is annexed hereto as Schedule H (Appendix III [not reproduced]) and received by Clarkson the following day, nine days after the Bid Deadline, this condition was purportedly waived;
>
> (C) as mentioned in paragraph 36 above, Clarkson did not receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";
>
> (D) Clarkson and Eraser & Beatty had indicated to Enterprises and its solicitors following the Bid Deadline that Clarkson had difficulty in properly evaluating Enterprises' Offer until it knew what mortgages

Enterprises intended to require be discharged. While the amount payable by Enterprises would increase dollar for dollar for each dollar spent to obtain a mortgage discharge, the effect of the aforesaid Note purchase mechanism would be to satisfy such amount (including dollars expended to obtain mortgage discharges) at 81.2 cents per dollar. Fraser & Beatty therefore asked Enterprises' solicitors to confirm in writing to Clarkson what mortgages Enterprises' solicitors believed Enterprises was entitled to request a discharge of under the terms of Enterprises' Offer, it being a fair assumption that a request for a discharge of as many mortgages as possible would be received by Clarkson given the aforesaid discount achieved by means of the Note purchase mechanism. Instead, by letter dated September 21, 1986, a copy of which is annexed hereto as Schedule I, (Appendix IV [not reproduced]) Enterprises' solicitors purported to further amend Enterprises' Offer in this regard; and

(E) notwithstanding the clear provisions of the Invitation to Tender, as late as September 17, 1986 and again on September 18, 1986 a representative of Enterprises requested that Clarkson agree to negotiate a reduction in the amount of the required deposits, which request was denied, and then requested that Clarkson agree to a reduction in the amount of the further deposit to be provided within 5 days of acceptance of any offer, which further request was also denied by Clarkson;

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

(c) Clarkson was concerned and remains concerned, particularly given the history of the subject Properties and the attention they have attracted in federal, provincial and municipal political circles and with the tenants thereof and those representing such tenants, with the appearance of the proposed transaction in the minds of the tenants, the media, the politicians and the public at large, some of whom might be expected to question seriously whether the inflated nominal purchase price was being used to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. In the absence of definitive evidence to the contrary, Clarkson believes that this aspect raises perceptible risks of intervention of some kind which might imperil a successful closing of the proposed transaction with Enterprises;

(d) as was mentioned above, Enterprises failed to cause the Note purchase undertaking from Citibank to be delivered to Clarkson on or before September 17, 1986 as provided in Enterprises' Sealed Bid, and Clarkson was concerned and remains concerned with the acceptance of any offer in respect of which the offeror, before Clarkson has even had a reasonable opportunity to accept the same, has already failed to perform a material term thereof; and

(e) Clarkson was not satisfied, notwithstanding all of the foregoing, that Enterprises' Offer was capable of acceptance, and believed that certain aspects thereof would have to be successfully negotiated prior to any such acceptance, including in particular:

(i) the waiver of the financing condition which, as noted above, was purportedly effected by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson despite the relevant provisions of Enterprises' Offer in respect of amendments and despite the statement of Enterprises' solicitors, with which Fraser & Beatty agreed, in a telephone conversation between such solicitors that this and any other matter pertaining to the terms of Enterprises' Offer should be in the name of and executed by Enterprises;

(ii) the substitution of Enterprises' agreement to cause the Note to be purchased on closing "on the same terms and conditions as contemplated in paragraph 8", which again was purportedly effected by the letter dated September 18, 1986 and therefore suffered from the same difficulties as the purported waiver plus the additional difficulty that it is unclear what such "same terms and conditions" are; in Clarkson's view, it is totally unsatisfactory for

a transaction of this magnitude, which contemplates an unsecured note in the order of $375,000,000, to hinge on such vague and uncertain wording;

(iii) in connection with the aforesaid purchase of the Note on closing, reference was made in paragraph 34 above to the provision in Enterprises' Sealed Bid that the Note was to be purchased "at the closing at the said [price] as part of the escrow arrangements herein provided", but in view of the uncertainty as to the intent and effect of these words, clarification would be required to ensure that there was no misunderstanding in this respect; and

(iv) the amendment to Enterprises' Offer purportedly effected by the aforesaid letter dated September 21, 1986 from Enterprises' solicitors addressed to Clarkson in respect of the mortgages to be discharged on closing and the effect thereof on the ultimate purchase price realized by Clarkson, which at the very least suffers from the same difficulties as the aforesaid purported waiver.

Apart altogether from its concern to maintain the integrity and fairness of the tender process, Clarkson concluded that, even if it were prepared to attempt such negotiations in an effort to put Enterprises' Offer into acceptable form, the time constraints imposed by the tender rules and the fact that all offers would expire on September 25, 1986 and the difficulties encountered in resolving outstanding questions to date raised a serious question as to the successful outcome of such negotiations. In view of the risks to the entire sales process if that had happened, Clarkson decided not to attempt such negotiations but to accept the offers in hand that were capable of acceptance as they stood.

16 The motion was brought on in the usual way on a written report of the Receiver signed by Mr. S.R. Shaver, a vice-president of Clarkson, and unsworn.

17 Counsel for the Receiver submitted at the opening of the motion that for reasons pertaining to the importance of the matter and its public interest, he proposed to lead the evidence of Mr. Shaver *viva voce* although it is something of an exception in the disposition of a motion of this kind. I acceded to that submission. I confess to having had moments during the subsequent proceedings when I doubted the wisdom of that decision. The inevitable result was that evidence was called by the defendants who were advancing a different position, and a considerable amount of time was spent. Notwithstanding my doubts, I think that for the reasons advanced by the Receiver, and because an element of catharsis is involved, perhaps the hearing of *viva voce* evidence was appropriate in all the circumstances.

18 I have made references to the Disposition Strategy Report which lay behind the negotiations which produced the offers which are now before the court for consideration. It is a voluminous and detailed document comprising, without its various appendices and schedules, some 98 pages. It was pursuant to that strategy report that the order of Catzman J. in July of this year set in motion the sequence of events leading to the report and motion which are now before me.

19 Throughout that sequence of events, the Receiver has had the benefit and assistance of the advice of eminent solicitors and counsel and of an eminent real estate consultant appointed for the purpose.

20 In the motion which is before me some 15 counsel appeared at various times, eight for most of the time, representing various interests. The evidence consumed seven full days and final argument a further day. Most of the principal participants in the sequence of events made their appearance in the witness-box. The ponderous chain of happenings which followed the order of Catzman J. and culminating in the motion and the nature and extent of that motion are both matters of consequence to which I will refer subsequently.

21 Events were set in train by a letter written by Clarkson to potential purchasers which is dated July 28, 1986. It is found in the motion record at p. 124:

On July 25, 1986 Mr. Justice Catzman approved the final stages of the disposition process which include the following:

1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").

2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).

3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.

4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of $100,000 or 2 $^{1}/_{2}$% of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.

For greater certainty and clarity we request that you carefully review the Invitation to Tender, Sealed Bid form and Standard Form of Offer in order that all aspects of the above outlined disposition process are understood and, more importantly, closely adhered to so that no one is disadvantaged throughout this process.

We urge each of you to convene meetings with us at the earliest possible date to ensure that all of your queries and concerns are adequately addressed. These meetings should assist you in preparing and submitting an Approved Offer on or by September 3, 1986. To this end, we have prepared all of the schedule for each Property to be affixed to the offer(s) including financial information and rent rolls as of June 30 and July 1, 1986 respectively.

There will be one and only one opportunity to bid. Because of the nature of the process, prospective purchasers will be automatically encouraged to submit their highest and best offers. Please be cognizant of the fact that all offers will be evaluated on a "cash equivalent" basis to ensure a fair and equitable evaluation process.

A prospective purchaser's chance to be the successful bidder will be enhanced relative to another purchaser, assuming equal "cash equivalent" offers are received, if:

1. the Approved Offer contains fewer onerous and time consuming conditions.

2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is provided; and

3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.

22 The invitation to tender is an exhibit on these proceedings. Again, its contents are material. I do not intend to read them but they will be included in the reasons. (See App. V [not reproduced])

23 I said when referring to the portion of the report which set out the reasons by the Receiver for not recommending the Larco offer that I did not propose to deal in detail with each of the points raised. The objections upon which emphasis was particularly placed were the following:

1. the use of the promissory note and the related problems of the discount rate and the sale and purchase of that note;

2. the inclusion in the sealed bid of a financing condition which had not been provided in Larco's formal offer;

3. the identification and amount of the mortgages which Larco would require to be discharged upon closing, and

4. relating to the financing condition, the ultimate waiver of that condition.

24 The uncontentious history of the Larco offer is that prior to its being made there was a meeting in August of 1986 attended by representatives of Larco and representatives of Clarkson when the prospective offering and bidding procedure were discussed.

25 On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was announced September 25th the Larco offers were not recommended.

26 I have already indicated that the difference between the competing offers figured largely in the hearing and blow-by-blow accounts were given by the various participants of the exchanges between representatives of Larco and representatives of the Receiver. These exchanges must be explored to some extent, though not with the attention to detail which they received during the hearing.

27 I do not intend to deal *seriatim* with each of the Receiver's objections as was done by counsel for the defendants, Green Door and Walton, and I trust that he will not feel that his argument was slighted or not considered because I do not do so. I do intend to mention some of the major points.

28 The first of those was the note mechanism. In the preliminary discussions between representatives of Larco and the Receiver there had been some mention of the use of a note or debenture to finance a portion of the price. I think nothing turns on the contents of those precise discussions. The actual mechanism was not fully disclosed until the bid deadline and the submission of the sealed bid.

29 It is appropriate I think to consider that, in the offer which was submitted on September 3rd, para. 3 dealing with payment, after setting out provisions with respect to deposit and the taking back of mortgages, concluded with the following subparagraph:

30 And the balance of the price for the Properties shall be paid subject to adjustments to the Interim Receiver on the Escrow Closing by certified cheque or bank draft payable to the Interim Receiver drawn on or by a Canadian chartered bank or by another Canadian financial institution acceptable to the Interim Receiver.

31 When the sealed bid was submitted the note mechanism, a phrase which I shall adopt although it is not in all respects a happy one, was in the form which appears at p. 136 of the record, this by way of amendment to the offer to which I have just referred:

> 8. Paragraph 3 of the Form of Offer shall be amended by adding thereto the following paragraphs:
>
> > The balance of the price referred to in paragraph 3 of the Form of Offer shall be paid by Offeror to the Interim Receiver by Offeror's delivering to the Interim Receiver a promissory note ("Citibank Guaranteed Note") in that amount, which note shall be unsecured by any charge against the Properties, but which shall be absolutely and unconditionally guaranteed by one of Citibank Canada, Royal Bank of Canada or another financial institution reasonably acceptable to the Interim Receiver (which financial institution is herein referred to as "Citibank"). The said promissory note shall require equal monthly payments of principal and interest sufficient to fully amortize the said sum at the rate of 8.222% per annum over a term of thirty (30) years. Offeror shall arrange a conventional mortgage loan with Citibank or its designee (which party is herein called ("Lender") which shall be secured by a charge against the Properties which shall be subject and subordinate in all respects to the existing loans which are assumed by Offeror on the date of Closing.
>
> The Interim Receiver shall sell the Citibank Guaranteed Note on the date of Closing to Lender for cash purchase price determined as follows:
>
> > on or before Monday, September 15th Citibank shall report in writing to the Interim Receiver stating the cash price (the "Cash Purchase Price") for the Citibank Guaranteed Note as of Wednesday, September 10, 1986. On or before

Wednesday, September 17, 1986 the Interim Receiver shall have received in form satisfactory to Interim Receiver acting reasonably an undertaking from Citibank to purchase or cause to be purchased the Citibank Guaranteed Note at the Closing at the said Cash Purchase Price as part of the escrow arrangements herein provided, subject only to the acceptance of this Offer and such reasonable warranties and representations from the Interim Receiver that he has not encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a nonrecourse basis.

Any Court approval of this Agreement to be effective and acceptable to the Offeror shall also include approval of the sale by the Interim Receiver of the Citibank Guaranteed Note as herein provided.

32 The concerns of the Receiver to which this aspect of the transaction gave rise are set out, as I have indicated, in para. 38 of the report. It was, I think it is fair to say, a complicated mechanism and had some elements of novelty. In its very nature it gave rise to questions, particularly perhaps having regard for the history of these properties in the recent past. It gave rise to questions as to the reasons for its use and also as to its possible effect on the price. In my view, the questions raised by the Receiver were reasonable questions and they were not answered promptly, frankly or fully.

33 The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

34 The next contentious item to which I propose to make reference was what has been called in the evidence the "Financing Condition". This was not part of the draft offer but was contained in the sealed bid and was set out in the following terms by way of amendment to that offer:

Notwithstanding any other provision of this Offer, the obligation of the Offeror to proceed with this transaction shall be conditional upon the Offeror's obtaining written commitments, reasonably acceptable to Offeror, for the Citibank Guaranteed Note and the conventional mortgage loan from the Lender no later than twenty (20) days after Acceptance of this Offer. If Offeror does not obtain the written commitments from Citibank and the Lender within the time period of twenty (20) days, Offeror may terminate this Agreement, in which case, the Interim Receiver shall return the deposits and interest thereon to Offeror promptly following demand.

35 In my view, such a provision given the mechanism and procedure, the process which was being followed, ought to have been part of the Larco offer and subject to negotiation at the proper time and not at the 11th hour.

36 The evidence of Mr. Shiraz Lalji was to the effect that he considered the offer as merely a format for the transaction and that the real substance was to be in the sealed bid. He also testified that he had been led to believe that conditional offers would be at no disadvantage. I find it difficult to accept that evidence. The financing condition was a provision so material and of such obvious advantage to the purchaser and a commensurate disadvantage to the vendor that it went to the very root of the transaction. Indeed, as the apprehension of the Receiver indicated, it converted what purported to be an offer into what was in substance an option. I shall have to discuss further in a moment the reasons that I cannot accept Mr. Lalji's evidence in that regard. I can only say for the present that if he entertained the view which he expressed with respect to the form of offer it was a mistaken view and should have been recognized as mistaken having regard particularly for the form of the invitation to tender and of the converting letter with which that invitation went out. Whether this deferral of a term so critical was deliberate or inadvertent, I need express no conclusion. It operated, however, to the detriment of Larco in the consideration of its offer by the Receiver.

37 Eventually it was recognised by Larco that the financing condition was likely to be seriously prejudicial, if not fatal. Steps were set in train to address its removal. That removal entailed a financial cost and risk to Larco which it had sought to avoid. Approval of its board of directors was required and that approval was obtained early on the morning of September 18th, 10 days after the bid deadline. Written confirmation of that waiver is found in sch. 8 to the report, at p. 179, in a letter from Messrs. Weir & Foulds, Solicitors to Clarkson Gordon Inc. which says after some reference of a preliminary nature to the sealed bids: "Our client has instructed us to waive, and we hereby waive, the benefit of paragraph 10 to Schedule 3."

38 The evidence indicated that Mr. Carthy apparently wanted some assurances from Larco before writing that letter; an apprehension which is not difficult to understand. The Receiver has taken the position that the waiver should have come direct from Larco and not from its solicitors. I do not propose to determine as a matter of law whether the purported waiver was effectual or not, although invited in argument to do so. I do not consider it any necessary part of my function on this motion. What is to be considered is the reaction of the Receiver.

39 In a transaction of such magnitude and pertaining to a condition so material, I do not consider it in any way unreasonable that the Receiver looked upon it as one of the unfavourable elements which ultimately tipped the scales against the Larco bid. Solicitors, of course, have certain general and accepted authority to bind their clients. But the annals of law are not wanting in cases where the authority and its exercise have become a topic of litigation. And there is a maxim well-known among businessmen that no one wants to buy a lawsuit. All of this dealing with the form of the waiver I say, without any reflection upon or lack of respect for the eminently capable and reliable firm of solicitors who offered it.

40 I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the mechanism of the promissory note, which was to be sold at a discount, it was essential for the Receiver to know the mortgages to be discharged in order to know the real price. The final position of Larco in this regard is contained in a letter dated September 21st from Weir & Foulds which is contained at p. 181 of the record:

> **4. Assumed Mortgages**
>
> By letter dated September 16, 1986, provided you with a letter explaining the "Estimated Assumed Loans" in connection with 's bids. As you may know, we have not had the opportunity to fully review all of the existing mortgages which affect the properties and make a final decision as to which existing mortgages will be assumed at closing by hereby agrees that the "Reconciled Contract Price" set forth in 's letter for each of 's bids shall be the exact cash equivalent price which the Receiver shall receive at closing from . For example, if the actual assumed mortgages are less than the amount stated by in his letter, the shortfall shall be paid by in cash at closing in order to maintain the "Reconciled Contract Price" as stated in 's letter. On the other hand, if the actual assumed mortgages are more than the amount stated by in his letter, the "Face Value of Vendor Note at Closing" will be adjusted downward in such a manner as to maintain the stated "Reconciled Contract Price" as stated by in his letter.
>
> If further clarifications of the offers are required, please advise the undersigned.

41 It does not respond in exactly the terms in which the Receiver had put its inquiries but instead provided a mechanism for possible adjustment with respect to the mortgages assumed. Again, I do not propose to consider whether this was a satisfactory response or not. It was another complication, another blemish on the Larco offer, another factor which the Receiver not unreasonably considered to be adverse and to weigh against approval.

42 There is a further matter dealing with the utilization of the note. As I have indicated, the precise mechanism made its appearance in the sealed bid and I have already read the relevant paragraph. I do not propose to review all of the evidence, which was considerable, bearing on this topic. It is sufficient to say that the final solution unilaterally proposed by Larco is as found in the record at p. 179 in the letter from Weir & Foulds of September 18th to which I have already referred in another context. The concluding paragraph of that letter reads:

Enterprises Inc. hereby agrees to cause the Citibank Guaranteed Note to be purchased on closing on the same terms and conditions as contemplated in paragraph 8.

No reference is made to the Royal Bank who at one time had been proposed as a potential purchaser or to any other purchaser. The covenant of Larco has been substituted for that of Citibank, and as I have indicated, no purchaser has been provided or even proposed.

43 It is the position of Larco, as put in argument and in evidence, that from a commercial standpoint the purchase of the note became irrelevant once Larco had demonstrated credit capacity adequate for the transaction, as it did by a letter from Citibank dated September 9th. Larco was then, it is said, in the same position as other tenderers, obliged to pay on closing or otherwise make good. Ignoring any frailties which may be inherent in that argument, it is undeniable that it did not put the Receiver in the position which it had originally been proposed of having a bank liable to make good.

44 It has been submitted by counsel supporting the Larco offer that the requirement for a purchaser of the note had been waived by the Receiver. Again, I do not propose to dispose of waiver or estoppel as matters of law. I refer to the episode as yet another problem for the Receiver and its counsel and a problem which militated against the Larco offer.

45 In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the Receiver has in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

46 Any suggestion that Larco was misled in this respect must be approached with a measure of skepticism. Larco is apparently a large sophisticated enterprise and those charged with its affairs appear expert in matters of contract negotiation and finance. It was advised in and about this transaction not only by members of its own board of directors but by an attorney of Seattle, Washington, Mr. Thaddas Alston. Mr. Alston testified and was quite evidently an able and experienced lawyer with a connection of some duration with the affairs of Larco. Larco was also advised by eminently capable solicitors in Toronto. It had every advantage to review and consider every aspect of the transaction.

47 Mr. Lalji testified that early in the discussions Shaver indicated that conditional offers would be considered on a par with unconditional offers. This Shaver denies and says that all he ever said was to the effect that: "We will look at all offers." The evidence of other representatives of the Receiver was that Larco was repeatedly told that a condition would be to its disadvantage.

48 It is always difficult and distasteful to a judge to have to resolve a direct conflict of evidence between what are apparently respectable and reliable witnesses. But sometimes the duty is one which cannot be avoided, and in this instance I find myself compelled to accept the evidence of Shaver and to reject that of Lalji. I do so chiefly on what is most probable. The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it. Indeed it is a clear inference from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

49 It was also suggested that Larco was misled into concluding at the last stages that the Receiver was not insisting on the undertaking of the bank to purchase the note. I have already made brief reference to this. It was said that Mr. Cogan, a representative of the real estate consultant advising the Receiver, had either said so or had plainly inferred it. This Cogan denies. Cogan was responsible for the real estate aspects of the transaction and not for the legal or financial ones. If Larco received such an impression from Cogan, prudence would have dictated that the matter be verified either with Mr. Shaver or with the solicitors advising the Receiver. So much Mr. Alston conceded in his evidence. It would appear that Mr. Carthy of Weir & Foulds recognized that there was a deficiency in that regard.

50 The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alson were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

51 Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

52 In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

53 There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

54 A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

55 By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

56 In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

57 I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

58 [Court recessed 11.07 a.m. and resumed 11.19 a.m.]

59 I propose now to express some factual conclusions with respect to the matter.

60 The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

61 Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

62 In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

63 Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

64 Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

65 The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

66 In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

67 To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

68 The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

69 It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

70 Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

71 I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

72 Reference was made in argument to *The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

73 The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

74 It is clear on the one hand that the court is not to apply an automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

75 The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

76 In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear *viva voce* evidence in this case.

77 It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

78 Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

79 In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

80 In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245, and *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in *Cameron.* In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

81 In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

82 If I were persuaded, and I am not, to conclude that as a result of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

83 Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

84 If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception

of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

85 Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are, as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

86 During the time which I have spent considering this matter, I have asked myself many times what the situation would have been had we been dealing with hundreds of thousands of dollars, rather than hundreds of millions, and a potential difference in the result potentially reduced accordingly. I have asked myself whether I would have had any difficulty in arriving at a conclusion and have found myself forced to answer that question in the negative. It is a well-worn adage among lawyers and judges that hard cases make bad law. Perhaps there is a corollary proposition that large cases have a tendency to do the same sort of thing.

87 The actual difference between the offers under consideration, I am repeating myself, is substantial. It is that alone which has really created the issue before me. While the actual difference is a factor of much weight, it must also be viewed in its relative relation to the size of the transaction. No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

88 The importance of this motion, and the measure of interest which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

89 There will be orders as asked upon the motion approving the sales. I presume that there will be some mechanical matters to be dealt with before we all part and I invite counsel, I guess first of all Mr. Lamek, to suggest whether it would be appropriate that I adjourn for a few moments while those matters be considered and discussed, or whether I should proceed to deal with them immediately.

> MR. LAMEK: I suggest a short adjournment might be useful, My Lord. On the possibility that your lordship would take the view of this matter that you have expressed this morning a revised draft order was prepared to take into account the matters that occurred during the course of the hearing. We have not been so bold as to distribute that to other counsel in advance. Having not seen the revised draft, and of course neither has your lordship, it might be helpful if we do and until your lordship has a good look at the draft.
>
> HIS LORDSHIP: Does it make any disposition as to costs, Mr. Lamek.
>
> MR. LAMEK: I did not, my lord.
>
> HIS LORDSHIP: If you will be kind enough to send my copy of it through the Registrar, I will recess now for what, 15 minutes?
>
> MR. LAMEK: I think that should be sufficient, my lord, yes. If it is not perhaps ...
>
> HIS LORDSHIP: You can let me know?
>
> MR. LAMEK: Thank you, my lord.

90 [Court recessed 11.45 a.m. and resumed 12.07 p.m. Counsel made submissions as to costs.]

HIS LORDSHIP: There will be no order as to costs. Mr. Strosberg's argument, as usual, makes good sense and I would be hard put to diagree that a measure of benefit has flowed from the proceedings.

91 At the same time, I think it fair to observe that the objecting defendants were not proceeding *pro bono publico*, and I see no sufficient reason that their participation should be other than at their own expense.

92 Before I depart from the matter I should, which I normally do at the outset before anybody knows whether they have won or lost, record my gratitude to counsel for their assistance in dealing with the matter and for the orderly conduct of the proceedings throughout.

93 *Motion granted*.

Footnotes

1 Enterprises was the initial name used for Larco Enterprises Inc.

TAB 4

2018 NSSC 235
Nova Scotia Supreme Court

First National Financial GP Corporation v. 3291735 Nova Scotia Limited

2018 CarswellNS 714, 2018 NSSC 235, 297 A.C.W.S. (3d) 94, 64 C.B.R. (6th) 289

First National Financial GP Corporation and First National Financial LP (Applicants) v. 3291735 Nova Scotia Limited (Respondent)

Christa M. Brothers J.

Heard: May 11, 2018
Judgment: May 11, 2018
Written reasons: September 27, 2018
Docket: Hfx 474742

Counsel: D. Bruce Clarke, Q.C., for Applicants
Gavin D.F. MacDonald, for KSV Kofman Inc. (Proposed Receiver, for the Respondent, 3291735 Nova Scotia Limited)
Brian W. Stilwell — Watching Brief

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Headnote
Bankruptcy and insolvency --- Receivers — Appointment
Applicant creditor made demand on respondent debtor for $2,870,520.62 plus daily interest and provided notice of intention to enforce security — Deadlines passed without payment and debtor informed creditor it could not make further payments — Receiver proposed by creditor was registered and had adequate professional liability insurance — Creditor brought application for receivership order and sales process order — Application granted — Service had been properly effected and all conditions precedent were satisfied — Security, demand and default were proven and it was appropriate for court to exercise powers under Bankruptcy and Insolvency Act and Judicature Act — Appointment of receiver would allow debtor's property to be preserved and protected pending liquidation, and receiver would provide transparency and reassurance to creditors that liquidation was being handled expeditiously and in commercially reasonable manner — Administrative charges and borrowing power were appropriate — Stalking horse agreement was supported by largest creditor and was commercially reasonable way to protect downside risk given property had been listed for two years without satisfactory results.
Table of Authorities
Cases considered by *Christa M. Brothers J.*:
Bank of Montreal v. Carnival National Leasing Ltd. (2011), 2011 ONSC 1007, 2011 CarswellOnt 896, 74 C.B.R. (5th) 300 (Ont. S.C.J.) — considered
Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — considered
CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 243 — considered

s. 243(1) — considered

s. 244(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

Judicature Act, R.S.N.S. 1989, c. 240

Generally — referred to

s. 43(9) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 6(1) — considered

Christa M. Brothers J. **(orally):**

Overview

1 This is an application for a Receivership Order pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. P-3 (BIA) and s. 43(9) of the *Judicature Act*, R.S.N.S. 1989, c. 240, as well as a Sales Process Order. The Applicants, First National Financial GP Corporation and First National Financial LP (collectively "First National") seek appointment of KSV Kofman Inc. as Receiver of all the property, assets, and undertakings of the Respondent, 3291735 Nova Scotia Limited (the "Company"). Additionally, if the Receivership Order is granted, the Receiver seeks approval of its proposed process for sale of the Respondent's properties, characterized as a stalking horse bid process.

2 The Company was served and its President attended the Motion, taking no position and making no submissions. Notice of this Motion was given to all affected parties and no one appeared to oppose the orders sought.

The Application for a Receivership Order

3 The Court received written and oral submissions. The evidence submitted included affidavits from Chris Sebben (Manager of Commercial Default Management for First National), a solicitor's affidavit of Stephen Kingston, and the affidavit of Sharon MacLeod, Legal Assistant with Burchells L.L.P. The materials confirm that the Company is indebted to First National pursuant to a Letter of Offer dated October 19, 2015, as amended by letters dated January 5, 2016, and April 29, 2016. The security for the Company's obligations to First National is in various forms, more particularly described and evidenced in the court file.

4 The applicants say the Company has defaulted on its obligations and the Company's principal has advised that the Company could not make further payments. As of February 26, 2018, the company owed First National a total of $2,870,520.62 with interest accruing at a daily rate of $486.51. On that date, First National issued a demand for payment to the Company for its indebtedness, as well as a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act* (hereinafter referred to as "BIA"). The deadline for payment and the time limitation in the Notice of Intention to Enforce Security have both expired without payment being made. Reasonable time was given to raise the funds to satisfy the demand and the Company, through its Principal, confirmed payment could not and would not be made.

5 The Receiver, KSV Kofman Inc., is a registered member of the Canadian Association of Insolvency and Restructuring Professionals, carrying adequate professional liability insurance.

6 I have reviewed all the materials with regard to the proposed Receivership Order.

7 I am satisfied that service was effected. The affidavit of Sharon MacLeod, sworn and filed on May 11, 2018, confirms that service was properly effected as per s. 6(1) of the Bankruptcy and Insolvency General Rules, CRC, c. 368. All conditions precedent for the order have been satisfied.

8 I am satisfied that the security has been proved, that demand and default has been proved, and that this is an appropriate matter for the Court to exercise its powers as contained in the BIA and the *Judicature Act*.

9 Section 243(1) of the BIA provides:

> Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be, 'just or convenient to do so'.
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
> >
> > (c) take any other action that the court considers advisable.

10 In addition, a Receiver can be appointed pursuant to provincial law, as provided for in s. 43(9) of the *Judicature Act*:

> A *mandamus* or an injunction may be granted or a receiver appointed by an interlocutory order of the Supreme Court, in all cases in which it appears to the Supreme Court to be just or convenient that such order should be made, and any such order may be made either conditionally or upon such terms and conditions as the Supreme Court thinks just [...].
>
> [emphasis added]

11 The test that I must apply is whether it is just and convenient in the circumstances to appoint a Receiver.

12 In making this decision, I must consider all the circumstances, the particular nature of the property, and the rights and interests of all of the parties. Taking into account all the materials filed with the Court and having heard counsel, I find that it is just and convenient in the circumstances to approve and issue the Receivership Order. In reaching this decision, I have considered the following:

> 1. First National holds first priority security over the Company's real and personal property;
>
> 2. The Company is in default of its obligations to First National;
>
> 3. First National has made demand for payment upon the Company and issued a Notice of Intention to Enforce Security pursuant to the BIA;
>
> 4. Both the Demand Letter and the Notice have expired, without payment being made;
>
> 5. First National is in a position to enforce its security as against the Company should it choose to do so;
>
> 6. The appointment of a Receiver would allow for the Company's property to be preserved and protected pending liquidation; and
>
> 7. A Receiver, as an officer of the court, would provide transparency and reassurance to the Company's creditors that the liquidation of the property is handled expeditiously and in a commercially reasonable manner.

13 I have reviewed the case law and, in particular, *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) . In that case, the Court noted that under section 243 of the *BIA* and section 101 of the *Courts of Justice Act*, a Court may appoint a Receiver if it is "just and convenient" to do so. The Court said:

> 23. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment

must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

14 In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private Receiver or an application to court to have a court-appointed Receiver. The legal principles involved were summarized as follows:

> 10 The Court has the power to appoint a receiver or receiver and manager where it is 'just or convenient' to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374; *Confederation Trust Co. v. Dentbram Developments Ltd*. (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd*. (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49.

15 *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 (Ont. S.C.J.) , spoke of the remedy of appointing a receiver and the use of such remedy where there is a secured creditor.

> 25. It is argued on behalf of Carnival that the appointment of a receiver is an extraordinary remedy to be granted sparingly and that, as it amounts to execution before judgment, there must be strong evidence that the Plaintiff's right to judgment must be exercised sparingly. The cases that support this proposition, however, are not applicable as they do not deal with a secured creditor with the right to enforce its security.

16 I also have heard from counsel with regard to the administration charges and the borrowing power set out in the proposed Order. I am satisfied, in all the circumstances having regard to the materials filed with the Court, that this is an appropriate quantum. This is a multi-million dollar asset and this possible charge is not out of line in the circumstances.

17 Also, in terms of the borrowing power, there is a need for funding of the Receivership and this is a reasonable proposal in the circumstances, having regard to the materials filed by the proposed Receiver.

Sale Process Order

18 Having granted the Receivership Order, I heard submissions from counsel for KSV Kofman Inc. concerning the approval of the proposed sale process.

19 The principal asset owned by the Company is the real property described as 1017-1021 Beaufort Avenue in Halifax (six condominium lots).

20 First National is a mortgagee of the Company. There are subsequent mortgages held by Canadian Western Trust Company and Nick Bryson. Both have been served with the application materials and took no position on the application. The purpose of this receivership is to conduct a sale process for the real property.

21 KSV recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders.

22 KSV also recommended Keller Williams be retained as listing agent due to its experience dealing with residential developers.

23 On April 13, 2018, Keller Williams presented KSV with an offer from 3308949 Nova Scotia Limited (3308 NS Ltd.) to purchase the real property. In order to maximize the value for creditors and to minimize the risk of losing this offer, KSV asks that the offer be a "stalking horse" in a court supervised sale process.

24 The Stalking Horse Agreement was provided to the Court and the key terms and conditions are as follows:

- **Purchaser:** 3308

- **Purchased Assets:**

  (i) The Real Property

  (ii) prepaid expenses and all deposits with any Person, public utility or Governmental Authority relating to the Real Property

  (iii) plans

  (iv) contracts

  (v) permits in connection with the Real Property, to the extent transferable

  (vi) all intellectual property, if any, owned by the Company with respect to the project

- **Purchase Price:** $3,708,750, including HST

- **Deposit:** $322,500 being 10% of the purchase price (before HST)

- **Excluded Assets:** Receiver's and Company's right, title and interest in any assets of the Company, other than the Purchased Assets, and includes: (i) books and records that do not exclusively or primarily relate to the Purchased Assets; and (ii) tax refunds

- **Representations and Warranties:** consistent with the standard terms of an insolvency transaction, i.e. on an 'as is, where is' basis, with limited representations and warranties.

- **Closing:** first business day which is five business days after receipt of Sale Approval Order

- **Material Conditions:**

  (i) There shall be no order issued by a Governmental Authority against either the Company or 3308 or involving the Purchased Assets that prevents the completion of the Transaction;

  (ii) there shall be no new work orders or similar orders and no new Encumbrances registered on title to the Real Property or affecting title to the Real Property or affecting title to the Real Property arising or registered after the Acceptance Date which cannot be foreclosed pursuant to the Sale Approval Order;

  (iii) there shall be no new environmental issue that causes a material adverse change to the condition or operation of the Real Property; and

  (iv) the Court shall have issued the Bidding Procedures Order and the Sale Approval Order and those orders shall not have been amended or dismissed at the time of Closing.

- **Termination:**

  (i) The Stalking Horse Agreement can be terminated:

• upon mutual written agreement of the Receiver and 3308;

• if any of the conditions in favour of 3308 or the Receiver are not waived or satisfied; or

• if prior to closing: (a) the Purchased Assets are substantially damaged or destroyed; or b) all or material part of the Real Property is expropriated by a Governmental Authority.

(ii) The Stalking Horse Agreement will be terminated in the event it is not the Successful Bid.

25 3308949 NS Ltd. has provided an offer which warrants being a "stalking horse," as the offer is in line with opinions of value given by realtors. Furthermore, the property has been listed since June 2016 and no acceptable offers have been received. The largest creditor, First National, supports the "stalking horse" sales process.

26 A "stalking horse" bidding process is an accepted means of realization in insolvency matters in Canada, as confirmed in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]). While uncommon in Nova Scotia, MacDougall, J. approved such a process in a Companies' Creditors Arrangement Act proceeding: *Victory Farms Incorporated and Jonathan Mullen Mink Ranch Limited*, Hfx. No. 454744.

27 Simply put, the "stalking horse" process establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained.

28 D.M. Brown J. stated in *CCM Master Qualified Fund, Ltd.* , at para 7:

> The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, *BIA* proposals, and *CCAA* proceedings.

29 I must consider the following factors as set forth in *CCM Master Qualified Fund, Ltd.* , *supra*:

1. The fairness, transparency and integrity of the proposed process;

2. The commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

3. Whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

30 In all the circumstances, the "stalking horse" process is commercially reasonable. While uncommon in Nova Scotia, "stalking horse" sale processes are commonly used to maximize recovery elsewhere in Canada. The bidding procedures in this matter allow a market test for the benefit of all stakeholders and provide an opportunity to realize greater value than the Stalking Horse Agreement.

31 The Stalking Horse Agreement protects the downside risk in this matter given the property has been listed since 2016 with no satisfactory results.

32 First National, as the principal stakeholder in these proceedings, has consented to the relief sought.

33 I have considered the deviations in this matter and I find that they are appropriate in the circumstances. There is a break fee and expense reimbursement proposed in this case. I have heard from counsel as to why this is appropriate, and considered this amount in the context of break fees across Canada. I accept both as reasonable.

34 In considering the particular circumstances of this case, I find this sales process provides the most reasonable, robust and transparent process in the circumstances and will likely provide the best value to the stakeholders.

35 I also note that no formal auction is being proposed, but I am satisfied that this is a more practical and efficient way to proceed with the Sale Process Order and will likely reduce the costs.

36 I understand that the bidding procedures do not allow for credit bids and am satisfied that this is reasonable in the circumstances.

Application granted.

TAB 5

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.
To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

***Galligan J.A.* :**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively

called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
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> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air

> Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my

opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
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> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
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> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of

OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate

was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other

persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL

with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

TAB 6

2017 NSSC 105
Nova Scotia Supreme Court

Royal Bank of Canada v. 2M Farms Ltd.

2017 CarswellNS 272, 2017 NSSC 105, 278 A.C.W.S. (3d) 474, 47 C.B.R. (6th) 157, 7 P.P.S.A.C. (4th) 151

Royal Bank of Canada (Applicant) v. 2M Farms Ltd. (Respondent)

Moir J.

Heard: February 23; March 2, 2017
Judgment: March 3, 2017
Docket: Hfx. 425907

Counsel: Gavin D.F. MacDonald, Meryn Steves, for Applicant
Tim Peacock, for Intervenor, National Building Group Inc.
Marc Comeau, for Dana Robinson Fisheries Limited

Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities
Headnote
Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
Applicant receiver B Ltd. sought approval of sale of five-acre lot — Receivership and power of sale were to enforce security for bank debts — Plaintiff encumbrancer N Inc. had builder's lien that was registered after banks' security — In letter dated June 17, 2016, B Ltd.'s counsel advised N Inc.'s counsel of $350,000 agreement purchase and sale and provided copy — About one month later, counsel had to advise that agreement was terminated under due diligence conditions — Inadvertent failure occurred on November 24, 2016 — Agreement of purchase and sale now sought to be approved had been concluded — On that day, receivers' counsel prepared letter to be sent by email to N Inc.'s counsel to advise of $210,000 sale — Copies were sent to B Ltd., but through inadvertence nothing was sent to main addressee — B Ltd. brought motion for approval of sale by receiver — Motion granted — Sale was approved — After approval hearing started, N Inc. produced offer of $230,000 and evidence that another offer for $236,500 could be coming — General obligation under s. 247(b) of Bankruptcy and Insolvency Act is touchstone for approval of sale by receiver when receiver has been appointed under Act, alone or in combination with provincial law — Commercial reasonableness is touchstone for approval and includes fairness, efficacy, integrity, and sufficiency of sale process — Interests of parties have to be borne in mind — Approving sale by receiver is not opportunity to reopen marketing effort — Failure to send email on November 24, 2016 caused no unfairness to N Inc. — On November 24, 2016, there was nothing left for N Inc. to do because receiver was subject to binding agreement of sale subject to approval process that could not be turned into new opportunity for making offers — N Inc. knew receiver had concluded that earlier list prices were too high because in June, 2016 N Inc. was told of $350,000 sale — List prices were public — Lowest list price and actual sale price exceeded debt owed to N Inc. — Reductions in list price would be of practical concern to other parties, but not to N Inc. — Sale process was fairly conducted in interest of various parties Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 247(b).
Table of Authorities
Cases considered by *Moir J.*:

Bank of Montreal v. Maitland Seafoods Ltd. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20, 120 A.P.R. 20, 1983 CarswellNS 43 (N.S. T.D.) — considered

Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc. (2014), 2014 NSSC 420, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 1115 A.P.R. 194, 353 N.S.R. (2d) 194 (N.S. S.C.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 242(1)(c) — considered

s. 247(b) — considered

Builders' Lien Act, R.S.N.S. 1989, c. 277

s. 8(3) — considered

Conveyancing Act, 1881 (44 & 45 Vict.), c. 41

Generally — referred to

s. 25(2) — considered

Real Property Act, R.S.N.S. 1989, c. 385

s. 15 — considered

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009

R. 35.12 — considered

R. 42.09 — referred to

Authorities considered:

McGhee, Q.C., John, *Snell's Equity, 33rd ed.,* (London: Sweet & Maxwell, 2015)

p. 947 — considered

Words and phrases considered:

commercial reasonableness

Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

motion to approve a sale by the receiver

A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort.

***Moir J.* (orally):**

Introduction

1 BDO Canada Limited, as receiver of 2M Farms Ltd., moves for approval of a sale of a five acre lot including a potato warehouse and as counsel puts it: "foreclose out the encumbrances on title to the property." The receivership and power of sale are to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, had been joined as a party.

2 The other encumbrancer is National Building Group Inc. It has a builder's lien that was registered after the banks' security. The priority between the banks' security and the builder's lien is in dispute. National Building Group seeks to make a case under s. 8(3) of the Builder's Lien Act.

3 The proposed order provides for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities.

4 In addition to the issues of approving the sale and ordering the proceeds be paid into court, I raised questions about the proposed terms for the order for sale by the receiver. Also, some questions about the appropriateness of permitting sale before priorities are settled have been raised by National Building Group. I will deal with those issues after determining whether to accept the receiver's recommendation.

Approval of Sale

5 The receiver submits that *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) is the leading case on approval of sales. It emphasizes: (1) sufficiency of the sales effort, (2) interests of the parties, (3) efficacy or integrity of the sale process, and (4) fairness in working out the process.

6 The *Bankruptcy and Insolvency Act* was amended after *Soundair*. The amendment established a national receivership and included a provision on the general duties of receivers, which must now be kept in mind when approval of a receiver sale is sought. An appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law).

7 As stated by Justice Wood at paragraph 14 of *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 (N.S. S.C.): "it is not the role of the Court to review in detail every element of the process followed by the Receiver". Under s. 247(b) of the Bankruptcy and Insolvency Act, a receiver must deal with the receivership property in a commercially reasonable manner. Justice Wood followed long standing authorities when he held, also at paragraph 14 of *Crown Jewel*, that the court will consider fairness of the process that led to the sale.

8 As I see it, the general obligation under s. 247(b) is the touchstone for approval of a sale by the receiver when the receiver has been appointed under the *Bankruptcy and Insolvency Act*, alone or in combination with provincial law. Commercial reasonableness is the touchstone for approval. The case law tells us that commercial reasonableness includes fairness, efficacy, integrity, and sufficiency of the sale process. It also tells us that the interests of the parties have to be borne in mind.

9 BDO Canada Limited was appointed receiver of 2M Farms Ltd. in April 2014 and it was given power to sell assets, mainly the potato warehouse in Berwick. The Royal Bank of Canada held a general security agreement and a collateral mortgage of the property. National Building Group Inc. registered a builders' lien. It appears that the Royal Bank is owned about a million dollars and National Building Group is owed about $130,000. These are the only secured creditors of the warehouse property. As I said, priority is in dispute.

10 The land is five acres just outside Berwick. The bank financed and the National Building Group constructed a building on the property. It is a 18,300 square foot vegetable warehouse equipped to store and ventilate potatoes. The construction was nearly complete when the bank called its' loans and National Building Group filed its' lien.

11 To finish the building, a new owner will have to install heating, plumbing, and septic systems. A part of the concrete floor remains to be poured.

12 The receiver listed the property with a firm of commercial realtors in July, 2014 for about $700,000. No offers were received until June, 2015. Offers were well under list prices. As a consequence of the apparent lack of interest in the first year and disappointing offers after that, the receiver reduced the list price from time to time. In rounded figures the list prices went as follows:

February, 2015	$600,000
January, 2016	$550,000
March, 2016	$500,000
June, 2016	$425,000
July, 2016	$350,000

October, 2016 ..... $315,000.

13 The realtors reported regularly to the receiver and the bank. The reports, and testimony from one of the realtors, evidenced the marketing efforts and recommendations on listing prices. The evidence also shows that there were at least three impediments in the market. First, was the incomplete state of the construction. Secondly, uses desired by at least one potential purchaser required a change from the agriculture A1 zone attached to the five acres. Thirdly, there were problems with egress in the winter months.

14 Four offers were made and negotiated over. The first was for $300,000 in June, 2015. The receiver attempted to move the price to $400,000 but the party was not interested. In August, 2015 $200,000 was offered. The negotiations stopped at $240,000. In June, 2016 there was an offer of $275,000, which the receiver succeeded in increasing to $350,000. The agreement failed when the purchaser attempted to negotiate a lengthy extension of a due diligence condition, mainly to pursue a change in the zoning.

15 In November of 2016, Dana Robinson Fisheries Limited offered $200,000. Negotiations only got this party to $210,000. The receiver accepted an offer of that much, subject of course to approval by the court. That is the sale that concerns us today.

16 National Building Group criticizes the sale in a number of ways. An MLS listing was not pursued. For several months before the sale there were no signs on the road that passes the property. There was a sign visible from Highway 101, but it was inadequate. At one time, the property could have been sold for $300,000, which is $90,000 more than the present sale.

17 National Building Group also argues "the reasonableness of the purchase price... is a difficult analysis without an accounting by the receiver of the expenses incurred in the management and marketing of the property." It proposed that we determine the priorities before considering sale approval or "delay the proposed sale for 30 days to allow for an accounting", and an opportunity for National Building Group "to explore its' options".

18 The difficulty with these arguments is that the purchaser will not be bound unless the receiver closes on the closing date or an agreed extension of it. The court cannot "delay the proposed sale". Further, I failed to see the connection between expense of receivership and the reasonableness of the sale price. The representatives of the lien holder explained that knowing the amount of the expense was requisite to National Building Group formulating or soliciting an amount to be offered now.

19 This argument is augmented by the disclosure that there was a failure in communications between the receiver and National Building Group about the sale. Also, National Building Group counsel argues that the receiver's failure to consult when reducing the list price to $315,000 caused unfairness and obscured transparency. I will dispose of the other criticisms, then come back to the issue of whether National Building Group was treated fairly.

20 The decision to reject the $300,000 offer was made almost two years ago. At that time the list price was $600,000, appraisals were available, and experienced commercial realtors were advising. To seek $400,000 was a judgement made by the receiver in the circumstances of that time. It may not have been commercially reasonable to accept $300,000 at that time.

21 The complaint about signs takes us into a review far to detailed for a motion to approve a receiver's sale. Also, I refer to the details of the marketing effort and the testimony of Mr. Tom Carpenter, which I accept.

22 The complaint about MLS was fully answered by Mr. Carpenter. That kind of listing is not usually helpful for marketing a commercial property in the Annapolis Valley. What is important is that MLS realtors were regularly informed about the property and the list prices. This was one of the several marketing techniques Mr. Carpenter's firm used, and it did lead to potential purchasers.

23 In light of the amount of secured debt and the appraisals, a $210,000 purchase price is disappointing. However, the property was exposed to the market for over twenty months while it was the subject of a professional marketing effort. I find the sale is commercially reasonable, unless it treats National Building Group unfairly.

24 Communications between the receiver and National Building Group were through lawyers.

25 In this case, the receiver chose to discharge its' power of sale by listing with a commercial realtor and exercising skill and judgement as exposure to the market unfolded. Just as when a receiver markets secured property through tender, auction, or direct negotiations, the receiver who employs a realtor advances a sale by the court.

26 On May 8, 2015, National Building Group wrote to the receiver and its' lawyer complaining that there was no forsale sign on the warehouse property and requesting a report on the marketing efforts. That complaint and request was reiterated by National Building Group's counsel on August 13, 2015.

27 Receiver's counsel provided a full response on August 13, 2015. He advised of the two offers and the termination of negotiations when the potential purchasers were unwillingly to come up towards what the receiver believed at the time was a reasonable price. He said negotiations with a "sophisticated property owner" were underway. He provided a detailed report from Mr. Carpenter. And, receiver's counsel wrote "Again, if your client knows of any person willing and able to make an offer on the property, they should encourage that person to make the offer either to the listing brokerage or to the receiver directly."

28 There was further correspondence in December 2015 and January 2016 which included various requests by National Building Group for disclosure and disclosure by the receiver in response.

29 By letter dated June 17, 2016, receiver's counsel advised National Building Groups counsel of the $350,000 agreement purchase and sale and provided a copy. A little over a month later counsel had to advise that the agreement was terminated under the due diligence conditions.

30 An inadvertent failure occurred on November 24, 2016. The agreement of purchase and sale now sought to be approved had been concluded. On that day, receivers' counsel prepared a letter to be sent by email to National Building Groups' counsel. It was to advise of the $210,000 sale to Dana Robinson Fisheries Limited. Copies were sent to the receiver, but through inadvertence nothing was sent to the main addressee.

31 After the approval hearing started, National Building Group produced an offer of $230,000 and evidence that another offer could be coming. That offer would be for $236,500.

32 A motion to approve a sale by the receiver is not an opportunity to reopen the marketing effort. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. The integrity of the sale process depends on this. See Justice Nunn's decision in *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 57 N.S.R. (2d) 20 (N.S. T.D.).

33 The failure to send the email on November 24, 2016, caused no unfairness to National Building Group. If it wanted to drum up interest in the receiver's sale it ought to have done so as the receiver suggested and directed interested parties to the realtor or the receiver before an agreement of purchase sale was finalized. On November 24, 2016, there was nothing left for National Building Group to do because the receiver was subject to a binding agreement of sale subject to an approval process that cannot be turned into a new opportunity for making offers.

34 National Building Group says that the prospects it has recently solicited show that the receiver could have gotten a better price last November if National Building Group was advised of the sale. Again, producing slightly higher offers after the agreement of purchase and sale was completed would make no difference. To make a difference, National Building Group needed to solicit interest before the receiver contracted in good faith with a purchaser.

35 National Building Group was not consulted about the reductions in list prices. It says this caused unfairness. There are three answers to that. First, National Building Group knew the receiver had concluded that the earlier list prices were too high because in June, 2016 National Building Group was told of the $350,000 sale. Second, list prices are public. Third, the lowest list price and the actual sale price exceed the debt owed to National Building Group. The reductions in list price would be of practical concern to the Royal Bank, to the defendant, to any guarantors, but not to National Building Group.

36 I find that the sale process was fairly conducted in the interest of the various parties.

Proposed Terms for Foreclosure

37 The draft order approving the sale provides for a receivers' deed and a receivers' certificate that would foreclosure "all of the right, title and interest of 2M Farms Ltd. and all those claiming through it". That language is fine for an order for sale to which all of those claiming through the mortgagor are bound.

38 However, the draft order goes further. It says:

> including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levees, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the "Claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the Applicant; and, (iii) all recorded interests showing in the parcel register for the Property (collectively, the "Encumbrances").

Clearly, this language captures unascertained or unknown property interests.

39 Does the broad language of the proposed order exceed the bounds of Nova Scotia receivership sales?

Foreclosure-Based Versus Vesting Order-Based Receiverships

40 Counsel for the receiver writes:

> With respect for the concerns identified in *enterprise Cape Breton Corporation v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, the Applicant submits the following arguments in favour of the Court's power to order a sale of property by a receiver and foreclose out the various encumbrances on title subsequent to the security of the Applicant.

41 Counsel then argues that s. 15 the Real Property Act incorporates the English Conveyancing Act, 1881 into Nova Scotia law. Subsection 25(2) of the English statute permitted the high court to order a sale of mortgaged property.

42 This same argument, and others, were put forward by Mr. Robert G. MacKeigan, later of Queen's Counsel, in an extensive brief on receivership sales in *Canadian Imperial Bank of Commerce v. Yarcom Cable T.V. Limited and K-Right Communications Limited* 1977 S.H. No. 13482. For the past forty years that brief has often been consulted by lawyers and judges. So much so, that it should be regarded as a published authority, as a reliable record of long standing practices, and as a work that has much influenced receivership practice in our province.

43 Mr. MacKeigan finds, in the statutes, judicial decisions, and learned texts he cites equitable and statutory sources for our power to order a receiver's sale in proceedings to enforce security. He grounds the power in the equitable jurisdiction to order foreclosure.

44 Justice Wood's decision in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.* is not about the foreclosure-based receivership order that has been our practice for many years. In that case the receiver agreed to a sale. It sought approval. The subsequent encumbrancers got notice. Justice Wood approved the sale. The problem was that the receiver, following the practice in Ontario, sought a vesting order rather than an order for sale effecting foreclosure. Vesting orders are statutory and we have no statute for them. See paragraphs 19 and 20 of *Crown Jewel*.

45 Also, the receiver of *Crown Jewel* had agreed to provide a deed and the purchaser had an opportunity to investigate title, consistent with our foreclosure-based receivership. Justice Wood said at paragraph 25:

> The effect of the vesting order requested by the Receiver is that the purchaser assumes no risk with respect to the title and the Court discharges all encumbrances. There is no need for the purchaser to investigate title and raise objections. The Receiver has not explained why the Court should provide this assurance and override the terms of the Agreement.

46 The *Crown Jewel* decision suggests that we may not have broad authority to grant vesting orders on unlimited grounds. It, therefore, questions the use of a vesting order-based receivership sale. It does not, however, raise any question about our foreclosure-based receivership sale.

47 I respectfully adopt Justice Wood's reasons in *Crown Jewel Resort Ranch Inc.* . In my opinion, there is no statutory authority in Nova Scotia giving the court unbound authority to vest property. In my opinion, a power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of paragraph 242(1)(c) of the Bankruptcy and Insolvency Act. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of the those claiming by, through, or under the debtor.

48 I am prepared to make an order along those lines and not an order that appears to end unascertained or unknown rights the way a vesting order might do.

The Need to Join Interested Parties

49 We do not take rights away from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties.

50 I am told that a receiver had to get releases from subsequent encumbrancers in some unreported cases. Not joining subsequent encumbrancers as parties could be fatal to foreclosure. If joined in a receivership proceeding to enforce security in this province, subsequent encumbrancers are foreclosed by the receiver's sale and have no right that may require a release.

51 *Snell's Equity* says this at page 947:

> When a foreclosure claim is made, all encumbrancers subsequent to the claimant, as well as all other persons interested in the equity of redemption must be made parties or they will not be bound by the foreclosure decree.

John McGhee, Q.C., *Snell's Equity, Thirty-Third Edition* (2015, Sweet & Maxwell, London).

52 There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforcers security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. They can be made parties through the mechanism of a notice to subsequent encumbrancer under Rule 35.12. Or, they may be privies prevented by collateral estopple for denying the foreclosure.

53 The problem with relying on the third way is that the parties, and more importantly, the purchaser have no certainty until there is finding against the subsequent encumbrancer. The better practice therefore, is to join all subsequent encumbrancers as parties by the first or second method. In the case of 2M Farms, the only known encumbrancers are parties.

Dispute about Priorities

54 When priorities are in dispute, the court commonly orders a sale with the proceeds standing in the place of the property. This preserves the value of the property while allowing time for a resolution or determination of the dispute. See, Rule 42.09.

55 Thus, even if National Building Group Inc. turns out to have priority, the purchaser will take title free of that interest.

Conclusion

56 I will grant an order approving the sale agreed to by the receiver. The order will contain the terms for approval and for payment into court found in the draft order. The terms concerning foreclosure need to conform with what I have said on that subject.

Motion granted.

TAB 7

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

An Act respecting bankruptcy and insolvency.

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act.*

...

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

> **(a)** take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> **(b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
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> **(c)** take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

> **(a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> **(b)** the court considers it appropriate to appoint a receiver before then.