

Our File: 192164

August 25, 2023

The Honourable Justice Presiding in Chambers
The Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord/My Lady:

**Re: 11016946 Canada Inc. (in Receivership)
(Hfx. No. 501252)**

We are counsel to Deloitte Restructuring Inc. in connection with this matter.

Deloitte Restructuring Inc. (the "**Receiver**") was appointed as Receiver and Manager of the assets, undertakings, and properties of 11016946 Canada Inc. (the "**Company**") acquired for or used in relation to a business carried on by the Company, including all proceeds thereof, as limited to the real property located at 123-125 Prince William Street and 60 Water Street in Saint John, New Brunswick (the "**Property**").

The Receiver has scheduled a Motion to be heard in Chambers in Halifax on **Wednesday, September 6, 2023 at 9:30 a.m.** The Receiver is seeking an Order:

- (i) Abridging the time for service of the Notice of Motion and associated pleadings (if required) pursuant to Rule 6 of the ***Bankruptcy and Insolvency General Rules***, C.R.C. 1978, c. 368, as am. (the "**BIA Rules**"), and dispensing with further service thereof;
- (ii) Approving the Sale Process for the Property (the "**Sale Process**") as described and defined in the First Report of the Receiver (the "**Receiver's First Report**") dated August 24, 2023;
- (iii) Authorizing the Receiver to carry out the Sale Process and to take such steps and to execute such documentation as may be necessary or incidental to the implementation of the Sale Process; and
- (iv) Approving the contents of the Receiver's First Report and the conduct and activities of the Receiver to date, as described therein.

The Receiver's First Report has been filed to assist the Court in determining whether to grant the relief requested.

Please accept the following as the Receiver's Pre-Hearing Memorandum.

Facts

1. Receiver's Mandate

The Receiver's mandate is set out in Section 3 of the Receivership Order, and includes:

"3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without limiting the generality of the foregoing, the Receiver is hereby empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) ...
- (l) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or in part or parts thereof in negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (m) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court, in respect of any transaction not exceeding \$100,000, provided that the aggregate consideration for all such transactions does not exceed \$250,000, and
 - (ii) with the approval of this Court in respect of any transaction which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case under Section 60 of the *Personal Property Security Act* shall not be required.

- (n) to sell the right, title, interest, property, and demand of the Respondent in and to the Property at the time the Respondent granted a security interest or at any time since, free of all claims including the claims of subsequent encumbrances bound as named respondents, bound as parties joined as unnamed respondents, or bound under Rule 35.12;

...

- (t) to take such steps reasonably incidental to the exercise of these

powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps it shall be authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Respondent, and without interference from any other Person.

2. The Property

The Receiver has taken possession and control of the Property.

3. Proposed Sale Process

As described in greater detail in the Receiver's First Report and in its Pre-Filing Report January 13, 2023, the Receiver intends to broadly market the Property to potentially interested parties involved in the Atlantic Canada real estate and development industry - with a particular focus on those parties with existing properties in the New Brunswick market.

The Receiver considers that the Property is suitable for marketing by way of the proposed Sale Process, which would include:

- (i) Publishing notices in the Telegraph Journal and Chronicle Herald newspapers, and online in Insolvency Insider (insolvencyinsider.ca) and All Atlantic Canada (allatlanticcanada.com);
- (ii) Contacting industry participants across Atlantic Canada to generate broad visibility for the tender process and the proposed sale of the Property;
- (iii) Providing copies of the Sale and Information Package ("**SISP**") (Receiver's First Report, Appendix "B") to parties expressing an interest in the Property;
- (iv) Facilitation of inspections of the Property, upon request;
- (v) Offers to Purchase the Property in the stipulated form to be received on or before the Offer Deadline (as established by the Receiver), subject to customary terms and conditions used in receivership sales, including a 15% deposit;
- (vi) Communication of acceptance to the successful offeror (the "**Purchaser**") (subject to the Approval of this Honourable Court); and
- (vii) Applying to this Honourable Court for a Sale Approval and Vesting Order approving of the proposed sale to the Purchaser, and conveying and vesting title to the Property in the Purchaser.

The SISP contemplates an eight week process for the marketing of the Property to prospective buyers. The Receiver considers that this timeline, which follows the Company's own marketing efforts, is sufficient to allow interested parties the time to perform adequate due diligence and to submit an offer. The SISP also includes a certain amount of flexibility which will allow the Receiver to extend timelines should that be required.

The Receiver is of the opinion that the proposed SISP provides for transparency process and is a fair and effective method to market the Property and to maximize realizations for the benefit of stakeholders.

The Receiver respectfully submits that the proposed SISP merits the authorization and approval of this Honourable Court.

Issue

Should this Honourable Court exercise its discretion so as to approve the Sale Process as set out in the Receiver's First Report?

Law and Argument

1. Service and Notice

Service of Motion pleadings herein will be effected upon affected creditors and stakeholders pursuant to the **Bankruptcy and Insolvency Act**, R.S.C. 1985, c. B-3 (as am.) (the "BIA") and, in particular, BIA Rule 6.

BIA Rule 6 states:

"6. (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided for in these Rules, every notice or other document given or sent pursuant to the Act or these Rules:

(a) must be received by the addressee at least 4 days prior to the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or courier.

(emphasis added)

The Receiver will serve copies of the Notice of Motion and associated pleadings herein on all parties having registered security interests as against the Property, and an Affidavit of Service will be filed in advance of the Motion Hearing date.

2. Governing Principles

In *Bank of Montreal v. Sportslick Inc.* (2009) CarswellINS 649, Justice Duncan referenced the factors to be considered by the Court in evaluating the sale of assets by a Receiver.

Justice Duncan stated (at paras 32-33):

"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.

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 the 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) (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 is bargained at some expense in time and money to achieve a 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 should be consistent with commercially 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. Best 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.

- The 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.*"

It is respectfully submitted that the proposed Sale Process as set out in the Receiver's First Report satisfies the "*Soundair* criteria" and that it merits the authorisation and approval of this Honourable Court.

Conclusion

The Receiver respectfully requests that this Honourable Court grant the relief requested for the reasons set out in the Receiver's First Report and in this Memorandum.

All of which is respectfully submitted.

Yours very truly,

McINNES COOPER



Stephen Kingston

cc: Service List

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.

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

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

MOTION by bank to approve interim receiver's sale of shares owned by bankrupt corporation.

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 12th day of November 2009.

Motion granted.