Court File No. CV-20-00636080-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*

B E T W E E N:

NATIONAL BANK OF CANADA

Applicant

- and -

EVERGREEN CONSUMER BRANDS INC.

Respondent

RECEIVER'S BRIEF OF AUTHORITIES

(Approval and Vesting Order)
(Returnable March 10, 2020)

March 2, 2020

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Tab

1. *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, 2018 ONCA 713
2. *Elleway Acquisitions Limited v 4358376 Canada Inc.*, 2013 ONSC 7009
3. *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920
4. *Nelson Education Limited (Re)*, 2015 ONSC 5557
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TAB 1

See spec. paras. 55, 56, 61, 62

COURT OF APPEAL FOR ONTARIO

CITATION: Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization, 2018 ONCA 713
DATE: 20180831
DOCKET: C65109

Hoy A.C.J.O., van Rensburg and Pardu JJ.A.

BETWEEN

Reciprocal Opportunities Incorporated

Plaintiff (Respondent)

and

Sikh Lehar International Organization, Narinderjit Singh Mattu, Rajwant Kaur Nijjar, Manjit Singh Mangat, Kamaljit Kaur Mangat, Suchet Singh Saini, Kamaljit Kaur Saini, Gurdev Singh Gill, Kanwaljit Kaur Gill, Inderjeet Singh Saini, Jatinder Kaur Saini, Harjeet Singh Thabal, Jaswinder Thabal, Hardeep Singh Dhoot, Raminder Dhoot, Daljit Singh Jammu, Parnpal Jammu, Harkanwal Singh, Kanwaljit Singh, Ramandeep Singh Athwal, Harnish Mangat, Sikanderjit Singh Dhaliwal, Sukhinder Dhaliwal, Gurdish Singh Mangat, Satinderjit Kaur Mangat and Guru Nanak Property Management Ltd.

Defendants (Respondent)

Paul J. Pape, for the appellant Sukhinder Sandhu

Dennis Touesnard, for the receiver JP Graci & Associates Ltd.

Ted R. Laan, for the respondent Sikh Lehar International Organization

Jonathan Piccin, for the respondent Community Trust Company and 2283435 Ontario Inc.

Heard: July 18, 2018

On appeal from the order of Justice R.J. Harper of the Superior Court of Justice, dated February 28, 2018.

Hoy A.C.J.O.:

[1] The appellant, Sukhinder Sandhu, appeals the February 28, 2018 order of the motion judge, declining to approve the sale by a court-appointed receiver of the property known as 79 Bramsteele Road, Brampton, Ontario (the "Property") to him.

[2] For the following reasons, I would allow the appeal, set aside the order of the motion judge, and direct a new hearing.

Background

[3] Sikh Lehar International Organization ("SLIO") was established as a religious, private charitable organization to buy the Property and establish, manage and operate a Gurdwara (a Sikh temple). The Gurdwara is a tenant, but not the sole tenant, of the Property.

[4] By 2014, SLIO was insolvent.

[5] The Property has been the subject of litigation. The trustees of SLIO all wanted to sell the Property, and purported to sell it to different purchasers. Disagreements about selling the Property led to the departure of some of the trustees and litigation about the amounts owing to the departing trustees: see *Sikh Lehar International Organization v. Saini*, 2018 ONSC 2839. It also gave rise to litigation between SLIO, its two remaining trustees, Manjit Mangat and Harkanwal Singh, and the appellant, who had sought to purchase the Property:

see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680.[1] Further, Canadian Convention Centre Inc. ("CCC"), a tenant of the Property, is seeking damages for alleged breaches of its lease in the amount of $2 million.[2]

[6] On September 1, 2017, at the instance of the first mortgagee of the Property,[3] Reciprocal Opportunities Incorporated ("ROI"), the motion judge granted an order appointing J.P. Graci and Associates Ltd. (the "Receiver") as receiver of all the assets, undertakings and property of SLIO. The order authorized the Receiver to sell the Property, subject to the approval of the court.

[7] The Receiver proceeded to have the Property appraised on September 15, 2017 and contacted persons who had expressed an interest in purchasing the Property.

[8] However, in an email on October 4, 2017, SLIO advised the Receiver that it had a firm commitment from a lender to take an assignment of "your mortgage" (presumably referring to the first mortgage), with the transaction to close in the next two weeks. The Receiver responded by email on October 5, 2017. It advised that the payout on the first mortgage was $4,092,745.31, the per diem rate was $1,114.51, and the Receiver's fees and legal fees were $80,000. The

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[1] In that action, the trial judge found that neither party was ready, willing and able to close the transaction, as at the contemplated closing date, and ordered SLIO and its two remaining trustees to pay a total of $2,206,729.07 to the appellant. An appeal of the decision is pending to this court.
[2] CCC's action has been stayed by the receivership order in these proceedings.
[3] While at the instance of the first mortgagee, ROI, the appointment ultimately proceeded with the consent of SLIO and CCC.

Receiver further advised that if the mortgage amount and outstanding expenses were paid, it would apply to the court to approve the assignment of the mortgage and to be discharged. The Receiver also stated it anticipated having the information necessary to begin marketing the Property by November 1, 2017. The Receiver copied its counsel and SLIO's real estate counsel with its response, and separately forwarded its response (together with SLIO's October 4, 2017 email) to, among others, counsel for the appellant.

[9] There is no indication in the record that SLIO – or the proposed assignee – was in funds and prepared to close within two weeks of its October 4, 2017 email to the Receiver.

[10] The Receiver retained the services of a commercial real estate broker, who listed the Property for sale and put it on MLS as of October 31, 2017. The real estate broker also opined that the current value of the Property was significantly less than the appraised value, as the appraisal obtained by the Receiver assumed that the Property's roof structures were in good working order, but in fact a significant portion of the roof required immediate replacement.

[11] By letter dated October 31, 2017 to real estate counsel for SLIO, counsel for the Receiver confirmed that "provided [SLIO] buys out the first mortgage on the property on or before November 14, 2017, then the Receiver will move for an Order having itself discharged." He advised that, as of that date, the payout of

the first mortgage was in the amount of $4,121,722.50, with a per diem rate of $1,114.51. He further advised that provided payment was made before November 14, 2017, the Receiver's fees and legal fees would be capped at $80,000 plus HST.

[12] The Receiver received three offers to purchase the Property. It entered into an agreement (the "Agreement") to sell the Property to the appellant on November 2, 2017.[4]

[13] Under the Agreement, the appellant agrees to purchase the Property on an "as is where is" basis, and to complete the transaction 15 business days after the Receiver obtains an approval and vesting order. With the exception of the requirement for an approval and vesting order, the appellant's obligation to complete the purchase is essentially unconditional. The Agreement provides for a purchase price that exceeds the current value of the Property as assessed by the commercial real estate broker retained by the Receiver, and that approximates the appraised value of the Property.

[14] In an affidavit sworn December 22, 2017, Mr. Mangat, one of the remaining trustees of SLIO, deposed that the appellant was "aware of the

[4] The Receiver received offers from: (1) the appellant; (2) 2207190 Ontario Inc.; and (3) Sukhmeet S. Sandhu. 2207190 Ontario Inc. is controlled by the appellant and is a judgment creditor in the action relating to the appellant's prior attempt to purchase the Property: see *Sandhu v. Sikh Lehar International Organization*, 2017 ONSC 5680. In his affidavit dated December 22, 2017, Mr. Mangat deposes that Sukhmeet S. Sandhu is the appellant's son.

Receiver's intention to assign the first mortgage upon payment of the amounts owing." Mr. Mangat was not cross-examined on his affidavit.

[15] The "buy out" of the first mortgage did not proceed by November 14, 2017.

[16] In an email to the Receiver on November 23, 2017, real estate counsel for SLIO confirmed that SLIO had secured financing from a lender that was prepared to pay out all amounts owed to the Receiver in exchange for an assignment of the first mortgage. He advised that, among other items, the lender required a corporate resolution of ROI authorizing the assignment, the consent of the Receiver to the discharge of the certificate of pending litigation ("CPL") registered on title to the Property by the appellant, and the Receiver's undertaking to obtain a court order discharging the receivership upon payment of all amounts owing, in order to complete the assignment.

[17] In an email later the same day, counsel for the Receiver clarified that while the Receiver could undertake to move for an order discharging the Receiver, the court would have discretion to grant the relief. He asked that counsel for the lender confirm that the lender was in funds. He indicated that the Receiver and its counsel could confirm their fees, and the Receiver could prepare a summary of its receipts and disbursements. He stated he trusted that the information he had previously provided regarding the amount owing on the first mortgage was satisfactory. He inquired as to the closing date.

[18] In an email from counsel for the Receiver to real estate counsel for SLIO dated November 24, 2017, counsel for the Receiver seems to suggest the proposed lender would have to work out the discharge of the CPL and, if it could not, would have to decide whether or not to take the assignment without the CPL being discharged.[5] Counsel for the Receiver cautioned that, "[i]f we cannot move forward with your proposal, I will be moving on January 5, 2018 for an order approving a sale agreement signed by the Receiver."

[19] In an email later that day to SLIO's litigation counsel, counsel for the Receiver indicated that, "[i]f your client can get financing and the CPL issue can be dealt with, we will deal with you as per [SLIO's real estate counsel's] original email to the receiver." (This presumably refers to the November 23, 2017 email, which is the earliest email in the record from SLIO's real estate counsel). He cautioned, "[t]hat said, we will keep moving towards the sale of the property and I intend to bring the motion on January 5, 2018 for approval if the mortgage is not assigned beforehand."

[20] In an email on November 29, 2017 to both SLIO's real estate and litigation counsel, counsel for the Receiver characterized their prior exchanges as "without prejudice settlement discussions." He indicated that, as an officer of the court, the Receiver must have its actions approved by the court. He explained that the

[5] In his affidavit sworn December 21, 2017, real estate counsel to SLIO advised that the CPL was discharged before the hearing date on the motion below.

Receiver could not assign ROI's mortgage, but SLIO has a right to redeem the mortgage.

[21] He further outlined the Receiver's position on the proposed assignment of the first mortgage:

> As you also know, prior to receipt of [the November 23 proposal] the receiver signed an agreement to sell the property to a third party. A motion will be served returnable January 5, 2017 [sic] for approval of that sale.
>
> If your client wishes to redeem the mortgage and have the receiver discharged, it can bring a motion for [sic] in my action on notice to all affected parties for an order allowing it to redeem, and, on redemption, an order that the receiver be discharged. The Receiver will consent to leave to bring the motion and will not oppose that relief if sought.

[22] In an email to counsel for the Receiver on November 30, 2017, litigation counsel for SLIO asked who ROI's representative was for the purpose of assigning the first mortgage.

[23] Counsel for the Receiver provided the identity of ROI's counsel in a responding email on the same date. ROI's counsel is with the same law firm as Receiver's counsel.

[24] By email dated December 5, 2017, counsel for the Receiver provided his fees and those of the Receiver to date to real estate counsel for SLIO.

[25] Real estate counsel for SLIO contacted counsel for ROI by email dated December 5, 2017. He advised of the documents the proposed assignee was requesting from ROI, including an accounting of all monies owed to ROI under the mortgage. He asked counsel for ROI to confirm that ROI was prepared to deliver the assignment and the other requested documents. He stated that "[t]he solicitor for the proposed assignor [sic] confirms he is in funds."

[26] The First Report of the Receiver is dated December 6, 2017. The Receiver prepared it in support of its motion for court approval of the Agreement and sale of the Property. The Report details the sales process the Receiver undertook with respect to the Property, leading it to seek court approval of the Agreement. The Report makes no reference to SLIO's attempts to arrange an assignment of the first mortgage held by ROI.

[27] In his affidavit of December 6, 2017, real estate counsel for SLIO deposed that SLIO was concerned that if counsel for ROI did not respond quickly to the requisitions referred to in his email of December 5, 2017, the Property would be lost to a third-party purchaser in January 2018.

[28] In his supplementary affidavit of December 21, 2017, filed in response to the Receiver's motion for approval of the Agreement, real estate counsel for SLIO further deposed that:

> - On December 8, 2017, counsel for ROI delivered a draft mortgage statement to counsel for SLIO.

- He advised counsel for ROI that counsel for the proposed lender took the position that the default interest rate charged by ROI was contrary to s. 8 of the *Interest Act*, R.S.C 1985, c. I-15 and the proposed lender would not pay it. Counsel for ROI suggested that some amount in excess of the rate charged on the principal balance of the mortgage may have been the result of extension agreements entered into by SLIO and ROI.

- On December 19, 2017, counsel for ROI delivered various documents setting out revised amounts required for the payout of the first mortgage. These amounts differed from those set out in the original Notice of Sale, dated May 17, 2017, and from other amounts provided by ROI in the interim.

- The delay in effecting the assignment of the first mortgage was entirely the responsibility of ROI because of its failure to provide appropriate calculations of the amount owing.

- The requisitions required by the proposed assignee from the Receiver or ROI had otherwise been substantially complied with.

[29] In his affidavit sworn December 22, 2017, Mr. Mangat deposed that the emails of October 5, November 23 and 24, 2017 and the letter of October 31, 2017, referred to above, led SLIO to believe that "upon payment of the proper amounts owing under the First Mortgage, the Receiver would arrange the assignment of the First Mortgage. As a result [SLIO] took steps to secure the proper financing of that assignment and incurred substantial costs in the process." Mr. Mangat then detailed borrowings from five individuals totaling approximately $396,268.87 incurred since the beginning of September 2017,

which he says are or "will be" debts of SLIO. He deposed that of those borrowings:

> - $207,000 was paid to the broker who had been trying to arrange financing for SLIO since September 2017, in part payment of his brokerage fee;
>
> - $24,518 was paid to the second mortgagee on October 14, 2017 to bring that mortgage into good standing, as required by the proposed assignee of the first mortgage;[6]
>
> - $ 91,617.36 was paid to the City of Brampton on November 24, 2017 on account of tax arrears, again a condition of the proposed assignee of the first mortgage; and
>
> - $73,133.51 was paid on or after November 21, 2017 to obtain the discharge of a CRA lien for HST arrears, again a condition of the proposed assignee of the first mortgage.

[30] Mr. Mangat further deposed that SLIO was unaware of the Agreement until the Receiver delivered its motion materials. The Receiver's motion materials are dated December 6, 2017.

[31] Neither Mr. Mangat nor SLIO's real estate counsel deposed that all the proposed assignee's conditions of closing had been satisfied and that, but for the determination of the payout amount, the proposed assignee was prepared to close the assignment transaction.

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[6] Counsel for the second mortgagee (who is also counsel for the proposed assignee of the first mortgage) advised at the hearing of the appeal that, as of that date, the second mortgage was in arrears.

The January 5, 2018 attendance before the motion judge

[32] In its notice of motion dated December 6, 2017, filed in connection with the January 5, 2018 attendance before the motion judge, the Receiver sought an order approving the sale of the Property to the appellant.

[33] SLIO opposed the Receiver's motion. In response, SLIO brought its own motion seeking: (1) an order requiring ROI to assign the first mortgage, upon payment of all amounts owed to the Receiver or ROI; and (2) an order discharging the Receiver upon payment of such amounts.

[34] In its factum filed on the motion, the Receiver indicated that it was prepared to be discharged – but only on the condition that the court be satisfied that it had discharged its duties, and on approval of the activities and accounts of the Receiver and its counsel. It stated that it entered into the Agreement prior to the "conditional request to take an assignment of the first mortgage of ROI." It noted that the effect of the discharge sought by SLIO, as a condition of the assignment of the first mortgage, was that the sale transaction would not be approved and that the Receiver would seek, as part of the discharge order, a release from any potential liability to the appellant. The Receiver noted that the appellant and CCC opposed its discharge. In the event that the court was unwilling to exercise its discretion to discharge the Receiver, it sought an order approving the sale of the Property to the appellant.

[35] The appellant appeared and filed a factum. Among other arguments, the appellant submitted that SLIO had not said how it would make future payments to its mortgagees or creditors if the assignment transaction proceeded, or even that it would. The appellant argued that the sale to him should be approved and a vesting order issued.

[36] CCC filed a responding motion record opposing the form of vesting order sought because that order purported to vest the Property in the appellant free and clear of all encumbrances, including CCC's lease.

The motion judge's reasons

[37] The motion judge declined to approve the sale of the Property to the appellant and, instead, established a process that would permit the assignment of the first mortgage: *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization et al.*, 2018 ONSC 227.

[38] In his reasons, the motion judge briefly reviewed SLIO's financial position. He noted that the first, second and third mortgages on the Property remained in default; a construction lien was registered in the amount of $406,500; the Ministry of Revenue had a tax lien in the amount of $108,156; the City of Brantford [sic] was in a position to put the Property up for sale for tax arrears in the amount of $433,818.59; CCC was seeking damages in the amount of $2 million for breach

of its lease; there was a judgment in favour of the appellant in the amount of $2,206,729.01; and that there were numerous other debts.

[39] At para. 18, the motion judge instructed himself on the four duties which *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.) directs a court must perform when deciding whether to approve a sale of a property by a receiver:

> 1. The court should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. The court should consider the interests of all parties.
>
> 3. The court should consider the efficacy and integrity of the process by which the offers are obtained.
>
> 4. The court should consider whether there has been unfairness in the working out of the process.

[40] The motion judge found that the Receiver took reasonable steps to obtain the best price for the Property. The motion judge noted, at para. 22, that interest was accruing rapidly on both the first mortgage and SLIO's other debts:

> The [first] mortgage has been in arrears since September 2, 2016. There are substantial other debts that have also been in arrears for lengthy periods of time. Interest on the first mortgage and other debts has been accruing and escalating at a rate that the receiver must consider when acting in a manner that is efficient and fair to all interested parties.

[41] Then, at para. 23, the motion judge stated he would not approve the sale, explaining: "[e]xcept for the conduct of the Receiver/Plaintiff relative to the Defendant SLIO, I would have approved the sale."

[42] At para. 26, the motion judge found that central to the communications from October 5, 2017 to the end of December 2017 between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee "were inconsistent representations of what the pay-out amount would be in order to effect the proposed assignment of the first mortgage."

[43] He found, at para. 30:

> It is clear that as of the end of December, 2017, the Receiver/Plaintiff was prepared to accept payment of the outstanding balance of the first mortgage and assign the mortgage to a third party. The only thing that had not been established was the proper payout.

[44] He concluded, at para. 32:

> Having regard to the final consideration of *Royal Bank of Canada v. Soundair Corp*, I find the manner in which the process was conducted resulted in an unfairness to the Defendant SLIO and the prospective assignee of the first mortgage.

[45] In his order dated February 28, 2018, the motion judge ordered that the proposed sale was not approved. He ordered ROI and the Receiver to provide a statement that they intend to rely on for purposes of the payout of the first mortgage and adjourned the matter to a further hearing before him, in order to fix

the payout and set the terms of closing the payout and assignment of the first mortgage. He specifically ordered that the Receiver was not discharged.

The parties' submissions on appeal

(a) The appellant's submissions

[46] The appellant does not challenge the motion judge's finding that the manner in which the process was conducted resulted in an unfairness to SLIO and the prospective assignee of the first mortgage. Rather, the appellant argues that the motion judge provided insufficient reasons because he did not explain why the unfairness to SLIO and the prospective assignee of the first mortgage should trump the unfairness to the appellant of not having the sale approved.

[47] Further, the appellant argues that the motion judge erred in his application of the second *Soundair* duty by failing to consider the interests of creditors and the interests of the appellant, *qua* purchaser. He submits that this court should set aside the order of the motion judge and approve the sale of the Property to him. Alternatively, he asks that the order be set aside and new hearing ordered.

[48] The appellant does not argue that that SLIO's right of redemption or assignment terminated when the Receiver entered into the Agreement.

(b) The Receiver's submissions

[49] On appeal, the Receiver supports the position of the appellant. It argues that the motion judge erred in his application of the second *Soundair* duty by

failing to consider the interests of all parties and by focusing solely on the interests of SLIO. It says that not approving the sale leaves SLIO's creditors in limbo as to when and by what means the Property will be sold to satisfy their debts.

[50] It also argues that the motion judge failed to consider the third *Soundair* factor – namely, the efficacy and integrity of the process by which offers were obtained. It argues that this factor weighs in favour of approving the sale.

[51] Finally, the Receiver argues that the fourth *Soundair* duty only requires an inquiry into the fairness of the sale process, and does not contemplate an inquiry into the fairness of other aspects of the receivership. In its submission, any unfairness resulting from the Receiver's conduct in relation to SLIO and the proposed assignment is unrelated to the sale process undertaken with respect to the Property. Its position is that unfairness in the broader receivership is relevant only to an analysis of the interests of the parties under the second *Soundair* duty.

(c) SLIO's submissions

[52] SLIO argues that the motion judge correctly identified the test in *Soundair*, identified the appellant as a creditor, and considered the creditors' interests. It states that there is sufficient equity in the Property such that the appellant's position as a creditor is not at risk.

[53] SLIO argues that it was treated unfairly because the Receiver breached its written consent to permit the redemption/assignment of the first mortgage and to obtain an order for discharge. In SLIO's submission, it is implicit in the motion judge's reasons that he found that the unfairness to SLIO was the most important factor in the circumstances and the motion judge's reasons were sufficient in this regard. SLIO notes that, in any event, insufficiency of reasons is not automatically fatal to a decision.

Analysis

(a) The motion judge erred in his performance of the second *Soundair* duty

[54] The motion judge's order was discretionary in nature. An appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based upon irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations: see *HSBC Bank of Canada v. Regal Constellation Hotel (Receiver of)* (2004), 71 O.R. (3d) 355, 242 D.L.R. (4th) 689 (C.A.), at para 22.

[55] I agree with the appellant and the Receiver that the motion judge erred in performing the second *Soundair* duty: first, by failing to properly consider and give sufficient weight to the interests of the creditors; and second, by failing to consider the interests of the appellant, *qua* purchaser.

[56] I begin by acknowledging that while the primary interest is that of the creditors of the debtor, the interests of the creditors is not the only or overriding consideration. The interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. And in appropriate cases, the interests of the debtor must also be taken into account: see *Soundair*, at paras. 39-40.

[57] Although the motion judge noted that there were substantial debts in arrears and interest was accruing on those debts, he did not consider how declining to approve the sale, so that the assignment of the first mortgage might proceed, would affect the creditors' interests.

[58] If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. It would not permit SLIO to repay the other substantial debts which the motion judge indicated were in arrears. It is also not clear that SLIO would be in a position to service the first mortgage, if assigned to a new mortgagee.

[59] Further, according to Mr. Mangat's evidence, if the assignment proceeds SLIO will assume additional debt in respect of the brokerage fees payable for arranging the assignment, thus worsening SLIO's financial position. While Mr. Mangat deposed that certain debts had been repaid (at least in part) to satisfy the prospective assignee's conditions of closing, it is intended that SLIO will

assume debts incurred to facilitate those repayments. It also appears that the Property is deteriorating and urgently requires repair. There is no indication as to how those repairs will be funded.[7]

[60] The receivership was triggered by SLIO's insolvency. The motion judge did not engage in any analysis of the continued viability of SLIO and SLIO's ability to pay the creditors if the sale did not proceed. He did not consider whether declining to approve the sale transaction would merely delay the inevitable. Given that *Soundair* directs the primary interest to be considered is that of the creditors of the debtor, this was an error.

[61] Moreover, the motion judge did not give any consideration to the interests of the appellant, *qua* purchaser. He did not consider the potential prejudice that would result to the appellant's interests if the sale was not approved. Significantly, while the motion judge declined to approve the sale based on the conduct of the Receiver and first mortgagee vis-à-vis SLIO, he did not find that the appellant was implicated in this conduct.

[62] As a result, I conclude that the motion judge erred in his application of the second *Soundair* duty. In light of this conclusion, it is unnecessary to address the appellant's argument that the motion judge provided insufficient reasons or the

[7] In a letter dated October 31, 2017, the commercial real estate broker retained by the Receiver notes that there are visible roof leaks and a portion of the tar-gravel roof needs to be replaced immediately. The broker estimated that half of the HVAC units and a portion of the parking lot will need to be replaced. The broker also indicated that the exterior of the building requires immediate attention.

Receiver's arguments regarding the application of the third and fourth *Soundair* factors.

(b) The appropriate remedy is to set aside the order below and direct a new hearing

[63] As I have concluded that the motion judge erred in principle, the next question is whether this court should consider whether to approve the sale transaction *de novo* or set aside the order below and order a new hearing. For several reasons, I would set aside the order below and order a new hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[64] First, the circumstances are unusual. Contrary to what is suggested by the Receiver's notice of motion filed below, and to what I had understood at the hearing of the appeal, this is not a case where the Receiver unequivocally recommended that the sale be approved. Rather, its factum below indicates that it did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. It recommended the sale only in the event that the motion judge was unwilling to insulate it from liability to the appellant. A re-hearing would permit the motion judge to obtain clarity on the Receiver's position.

[65] Second, the First Report of the Receiver does not provide an update on SLIO's financial position, indicate how the assignment option would affect creditors other than ROI, explain what it told the appellant about the proposed assignment before entering into the Agreement and what it told SLIO about the proposed sale, or describe what role it took in determining the amount outstanding under the first mortgage. A re-hearing would permit the Receiver to provide a further report and assist the motion judge in balancing the interests of the creditors, the appellant, SLIO, and the proposed assignee. If the motion judge were inclined to discharge the Receiver, an updated report would also assist the motion judge in determining the terms of its discharge.

[66] Third, it is not clear that the proposed assignee is ready, willing and able to close the assignment upon determination by the motion judge of the payout amount under the first mortgage. Among other things, the discharge of the Receiver, which the motion judge declined to grant, at least at this juncture, appears to be a condition of the proposed assignment.

[67] Mr. Mangat deposed that SLIO has borrowed money to discharge certain debts, as required by the proposed assignee of the first mortgage. But, based on the amounts owing to those creditors as set out in the motion judge's reasons, the amounts Mr. Mangat says have been repaid are less than the amounts owing to those creditors. Moreover, despite Mr. Mangat's evidence that the arrears on the second mortgage had been repaid, the motion judge's reasons indicate, and

counsel for the second mortgagee advised this court in oral argument, that the second mortgage is in arrears. SLIO's overture to the Receiver also followed on the heels of unsuccessful attempts by SLIO to refinance the first mortgage before the Receiver was appointed. A re-hearing should permit the motion judge to determine whether the assignment transaction could proceed without delay.

[68] Fourth, a number of factual determinations may need to be made in order to permit the balancing of the interests of the creditors, the appellant, SLIO and the proposed assignee, to determine whether or not the sale should be approved and, if the motion judge is inclined to order the discharge of the Receiver, the terms of its discharge.

[69] For example, as indicated above, Mr. Mangat deposed that the appellant was aware of the Receiver's intention to assign the first mortgage upon payment of the amounts owing. I understand that his allegation is based on the fact that counsel for the Receiver forwarded its October 5, 2017 email, and SLIO's email of October 4, 2017, to counsel for the appellant. However, as I have stated, the motion judge made no finding as to what the appellant knew, and when. The emails of October 4 and 5, 2017 seemed to contemplate that the assignment would close by October 18, 2017 (i.e. "in the next two weeks"). It is unclear what the appellant knew about the proposed assignment transaction thereafter. There may also be credibility issues at play, as Mr. Mangat has been previously censured for his serious failure to disclose material facts to the court on a motion

for an injunction involving the Property: *Sikh Lehar International Organization v. Suchet Saini et al.*, (28 January 2016), Brampton, CV-15-1855-00 (Ont. S.C.).

[70] Nor did the motion judge make any findings about what SLIO knew, and when. In his affidavit of December 22, 2017, Mr. Mangat deposes SLIO did not know of the Agreement until the delivery of the Receiver's motion materials on the motion to approve the sale of the Property. The Receiver's motion materials are dated December 6, 2017. However, counsel for the Receiver advised both SLIO's litigation counsel and real estate counsel by emails dated November 24, 2017 that he intended to bring a motion to approve the sale of the property returnable January 5, 2018 if the assignment did not proceed. Counsel for the Receiver repeated this caution in his email of November 29, 2017. Indeed, as early as October 5, 2017, the Receiver had told SLIO that it would likely be in a position to market the Property by November 1, 2017. It may be that Mr. Mangat incurred at least some – and perhaps most – of the costs he did, purportedly on behalf of SLIO, with "fair warning" that, in the appellant's words, the Receiver was "riding two horses."

[71] Also, in terms of the unfairness to SLIO, the motion judge made no findings about what the Receiver knew about Mr. Mangat incurring indebtedness in connection with the assignment, purportedly on behalf of SLIO. The motion judge also did not make any finding as to whether Mr. Mangat incurred these debts contrary to the receivership order, which empowers and authorizes the

Receiver, to the exclusion of SLIO and all other persons, to manage SLIO's business and incur obligations.

[72] Similarly, while the motion judge referred to what he described as inconsistent representations about the payout amount between counsel for the Receiver, counsel for SLIO, and counsel for the intended assignee as creating the unfairness to SLIO and the prospective assignee of the first mortgage, the evidence of SLIO's real estate counsel was that the delay was "entirely the responsibility of ROI because of its failure to provide appropriate payout calculations of the amount owing" [emphasis added]. More detailed findings may be required about the cause of the delay in settling the payout amount.

[73] To be clear, I do not purport to make any of these factual findings; that is a matter for the motion judge on the new hearing, to the extent necessary to resolve the motion.

[74] Fifth and finally, the issue raised by CCC regarding the form of the vesting order contemplated by the Agreement remains to be resolved.

Disposition

[75] For these reasons, I would allow the appeal, set aside the order below, and order a re-hearing, on notice to all persons with an interest in the Property, including the lessees, and any execution creditors.

[76] Subject to any further directions that the motion judge may provide, I would also direct that, for the re-hearing: (1) the Receiver provide a further report, detailing SLIO's current financial position, indicating how the sale and assignment options would affect SLIO's creditors, explaining what it told the appellant about the proposed assignment before entering into the Agreement, explaining what it told SLIO about the proposed sale, explaining what role it took in determining the amount outstanding under the first mortgage, and clarifying its position; (2) ROI provide a statement of the amounts owing under the first mortgage, indicating the extent to which interest on arrears has been calculated at a rate greater than the pre-default interest rate; and (3) SLIO provide a copy of its agreement with the proposed assignee of the first mortgage and evidence from the prospective assignee of the first mortgage, confirming what (if any) conditions to closing remain outstanding and that it is in funds and willing and able to close upon satisfaction of those conditions.

[77] I would order that the appellant be entitled to his costs of the appeal, fixed in the amount of $19,100, inclusive of HST and disbursements.

Released: "AH" "AUG 31 2018"

"Alexandra Hoy A.C.J.O."
"I agree K.M. van Rensburg J.A."
"I agree G. Pardu J.A."

TAB 2

See spec. paras. 29-37, 47-48

CITATION: Elleway Acquisitions Limited v. 4358376 Canada Inc., 2013 ONSC 7009
COURT FILE NO.: CV-13-10320-00CL
DATE: 20131203

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c.C.43, AS AMENDED.

RE: **ELLEWAY ACQUISITIONS LIMITED, Applicant**

AND:

4358376 CANADA INC. (OPERATING AS ITRAVEL 2000.COM), THE CRUISE PROFESSIONALS LIMITED (OPERATING AS THE CRUISE PROFESSIONALS), AND 7500106 CANADA INC. (OPERATING AS TRAVELCASH), Respondents

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Natalie Renner, for the Applicant**

John N. Birch, for the Respondents

David Bish and Lee Cassey, for Grant Thornton, Proposed Receiver

HEARD
&ENDORSED: NOVEMBER 4, 2013

REASONS: **DECEMBER 3, 2013**

ENDORSEMENT

[1] At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

[2] On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

[3] The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

[4] The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

[5] The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

[6] The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

[7] Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

[8] The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

[9] In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

[10] In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

[11] In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

[12] In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

[13] The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

[14] In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

[15] In January 2013, discussions ended and the independent committee was disbanded.

[16] In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

[17] In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

[18] In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

[19] In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

[20] In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

[21] On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for

Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

[22] The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

[23] itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

[24] The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

[25] Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

[26] In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

(a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;

(b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

[27] The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

[28] The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

[29] Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

[30] Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

[31] It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).

[32] In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

[33] Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

(a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

(b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp*. (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

[34] In the case of *Re Tool-Plas,* I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

[35] Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

[36] Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

[37] I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

[38] Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

[39] This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

[40] It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

[41] Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

[42] Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

[43] Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

[44] In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

[45] The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

[46] The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

[47] The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

[48] In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

[49] For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

MORAWETZ J.

Date: December 3, 2013

TAB 3

See spec. paras. 26-30, 39, 59-61

SUPERIOR COURT

Commercial Division

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 27, 2015

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
Petitioners
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
Mises-en-cause
And
FTI CONSULTING CANANDA INC.
Monitor
And
9201955 Canada inc.
Mise-en-cause
And

EABAMETOONG FIRST NATION
GINOOGAMING FIRST NATION
CONSTANCE LAKE FIRST NATION and
LONG LAKE # 58 FIRST NATION
AROLAND FIRST NATION
MARTEN FALLS FIRST NATION
Objectors

JH5439

And
8901341 CANADA INC.
CANADIAN DEVELOPMENT AND MARKETING CORPORATION
Interveners

JUDGMENT ON PETITIONERS' AMENDED MOTION FOR THE ISSUANCE OF AN APPROVAL AND VESTING ORDER WITH RESPECT TO THE SALE OF THE CHROMITE SHARES (#82)

INTRODUCTION

[1] The Petitioners have made an Amended Motion for the Issuance of an Approval and Vesting Order with respect to the Sale of the Chromite Shares (#82 on the plumitif; the original motion was #65). Objections were filed by (1) six First Nation bands (#85, as amended at the hearing) and (2) 8901341 Canada Inc. and Canadian Development and Marketing Corporation (together, CDM) (#87).

CONTEXT

[2] On January 27, 2015, Mr. Justice Castonguay issued an Initial Order placing the Petitioners and the Mises-en-cause under the protection of the *Companies' Creditors Arrangement Act*.[1] The ultimate parent of the Petitioners and the Mises-en-cause is Cliffs Natural Resources Inc. (Cliffs), which is neither a Petitioner nor a Mise-en-cause.

[3] The Petitioner Cliffs Québec Iron Mining ULC (CQIM) owns, through two subsidiaries, a 100% interest in the Black Thor and Black Label chromite mining projects and a 70% interest in the Big Daddy chromite mining project. All three projects form part of the Ring of Fire, a mining district in northern Ontario.

[4] Other entities related to Cliffs but which are not parties to the CCAA proceedings own other mining interests in the Ring of Fire.

[5] The proposed transaction with respect to which the Petitioners are seeking an approval and vesting order involves the sale of those various interests, including in particular the sale of CQIM's shares in the subsidiaries described above.

[6] Cliffs and its affiliates paid approximately US$350 million to acquire their interests in the Ring of Fire projects, and invested a further US$200 million in developing these projects.

[7] By 2013, Cliffs had suspended all activities related to the Ring of Fire and began making general inquiries with potential interested parties with a view to selling its interests in the Ring of Fire. No material interest resulted from these efforts.

---

[1] R.S.C. 1985, c. C-36, as amended.

[8] By September 2014, Cliffs's desire to sell its interests in the Ring of Fire was publicly known.[2] It hired Moelis & Company LLC to assist with the sale process for various assets including the Ring of Fire in October 2014.[3]

[9] The sale process will be described in greater detail below. It resulted in the execution of a letter of intent with Noront on February 13, 2015.[4]

[10] While the sellers were negotiating the Share Purchase Agreement with Noront, CDM sent an unsolicited letter of intent to acquire the Ring of Fire interests on March 14, 2015.[5] That letter of intent was analyzed by the sellers, Moelis and the Monitor and was rejected.[6] Two revised letters of intent followed and were also rejected.[7]

[11] The sellers executed the initial Share Purchase Agreement with Noront on March 22, 2015, which provided for a price of US $20 million.[8] Noront issued a press release describing the transaction on March 23, 2015.[9]

[12] The initial SPA provided in Section 7.1 a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party.

[13] On April 2, 2015, the Petitioners made a motion for the issuance of an approval and vesting order with respect to the initial SPA. Four First Nations bands who live and exercise their Aboriginal and treaty rights in and on the land and territories surrounding the Ring of Fire filed an objection to the motion. CDM did not. Instead, on April 13, 2015, CDM made an unsolicited offer for the interests in the Ring of Fire which included a purchase price of US $23 million.[10]

[14] CDM's offer was considered by the sellers, Moelis and the Monitor to be a "Superior Proposal" as defined in Section 7.1 of the initial SPA. As a result, they advised Noront,[11] which expressed an interest in making a new offer.

[15] The sellers, after consulting Moelis and the Monitor, developed the Supplemental Bid Process to give each party the chance to submit its best and final offer.[12]

[16] Both Noront and CDM participated in the Supplemental Bid Process and submitted new offers, with Noront's offer at US $27.5 million and CDM's at US $25.275 million.[13]

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2 An article from the Globe & Mail dated September 17, 2014 was produced as Exhibit R-7.
3 The CCAA Parties formally engaged Moelis by engagement letter dated March 23, 2015, and the Court approved the engagement of Moelis by order dated April 17, 2015.
4 Exhibit R-9.
5 Exhibit R-17.
6 Exhibit R-18.
7 Exhibits R-19 to R-22.
8 Exhibit R-3 (redacted) and R-4 (unredacted).
9 The press release was provided to the Court during argument and was not given an exhibit number.
10 Exhibit R-23.
11 Exhibit R-24.
12 Exhibits R-25 and R-26.
13 Exhibits R-29 and R-30.

[17] The sellers accepted the Noront offer and entered into a revised SPA with Noront on April 17, 2015.[14] The Petitioners then amended their motion to allege the additional facts since April 2, 2015 and to seek the issuance of an approval and vesting order with respect to the revised SPA.

[18] The First Nation bands maintained their objection (#85)[15] and CDM filed a Declaration of Intervention and Contestation with respect to the amended motion (#87).

POSITION OF THE PARTIES

[19] The Petitioners argue that the revised SPA should be approved because:

1. the marketing and sales process was fair, reasonable, transparent and efficient;
2. the price offered by Noront was the highest binding offer received in the process;
3. CQIM exercised its commercial and business judgment with assistance from Moelis;
4. the Monitor assisted and advised CQIM throughout the process and recommends the approval of the motion.

[20] Moreover, they argue that no creditor has opposed the motion, and that the First Nations bands and CDM do not have legal standing to oppose the motion.

[21] The Monitor and Noront supported the position put forward by the Petitioners.

[22] The First Nations bands argued the following points:

1. they have a legitimate interest and standing to contest the motion as an "other interested party" under Section 36 of the CCAA, because they have Aboriginal and treaty rights that are affected by the change in control of the Ring of Fire interests;
2. there was a duty on the part of the sellers and their advisers to consult with and advise the First Nations bands about the sale process. Instead, the First Nations bands were ignored and did not even learn of the existence of the sale process until March 23, 2015;
3. the sale process was not open, fair or transparent and did not recognize the rights of the First Nations bands;
4. there was no sales process order; and
5. there is no urgency and they should be given the opportunity to present an offer.

[23] Finally, CDM argued as follows:

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[14] Exhibit R-11 (redacted) and R-12 (unredacted).

[15] It was amended at the hearing to add two First Nations bands as objectors.

1. the sellers were required to accept the "Superior Proposal" made by CDM on April 13, 2015;
2. the Supplemental Bid Process did not treat the two parties fairly;
3. the Monitor's support of the process is not determinative;
4. it had the necessary interest to intervene in the CCAA proceedings and contest the motion.

ISSUES

[24] The Court will analyze the following issues:

1. Was the sale process "fair, reasonable, transparent and efficient"?

   In the context of the analysis of this issue, the Court will consider various sub-issues, including the business judgement rule, the importance of the Monitor's recommendation, and the interpretation of Section 7.1 of the initial SPA.

2. Do the First Nations bands have other grounds on which to object to the proposed transaction?
3. Do the First Nations bands and CDM have legal standing to raise there issues?

ANALYSIS

1. Was the sale process "fair, reasonable, transparent and efficient"?

[25] Section 36 of the CCAA provides in part as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> …
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;

> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> …

[26] The criteria in Section 36(3) of the CCAA have been held not to be cumulative or exhaustive. The Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

> [48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.[16]

[27] Further, in the context of one of the asset sales in *AbitibiBowater*, Mr. Justice Gascon, then of this Court, adopted the following list of relevant factors:

> [36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally.
>
> [37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:
>
> - have sufficient efforts to get the best price been made and have the parties acted providently;
> - the efficacy and integrity of the process followed;
> - the interests of the parties; and
> - whether any unfairness resulted from the working out process.

[16] *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (leave to appeal refused: 2010 QCCA 1950), par. 48-49.

> [38] These principles were enunciated in *Royal Bank* v. *Soundair Corp.* They are equally applicable in a CCAA sale situation.[17]

[28] The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36 CCAA:

1. the business judgment rule:

> [70] That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.
>
> [71] A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.[18]

2. the weight to be given to the recommendation of the Monitor:

> The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders.[19]

[29] Debtors often ask the Court to authorize the sale process in advance. This has the advantage of ensuring that the process is clear and of reducing the likelihood of a subsequent challenge. In the present matter, the Petitioners did seek the Court's authorization with respect to a sale process for their other assets, but they did not seek the Court's authorization with respect to the sale process for the Ring of Fire interests because that sale process was already well under way before the CCAA filing. There is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case.

[30] The Court will therefore review the sale process in light of these factors.

(1) From October 2014 to the execution of the Noront letter of intent on February 13, 2015

[31] The sale process began in earnest in October 2014 when Cliffs engaged Moelis.

[32] Moelis identified a group of eighteen potential buyers and strategic partners, with the assistance of CQIM and Cliffs. The group included traders, resource buyers,

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[17] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460, par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2012 QCCS 4074, par. 50.

[18] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 70-71. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2011 QCCS 7304, par. 68-70.

[19] *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

[33] Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

[34] Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

[35] By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

[36] The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

[37] Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015.[20]

[38] With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

[39] The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers, with Moelis and the Monitor, took reasonable steps.[21] The Court is satisfied that this test was met.

(2) From letter of intent to initial SPA

[40] Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

[41] CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

(3) The initial SPA and the "Superior Proposal"

[42] The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

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[20] Exhibit R-9.

[21] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247, par. 48.

[43] Section 7.1 of the initial SPA allowed the sellers to pursue a "Superior Proposal", defined as an unsolicited offer from a third party which appeared to be more favourable to the sellers. In that eventuality, the sellers had the right to terminate the initial SPA upon reimbursing Noront's expenses up to $250,000.

[44] CDM made a new offer on April 13, 2015.[22] The sellers, in consultation with their advisers and the Monitor, concluded that it was a Superior Proposal.

[45] CDM argues that in those circumstances, the sellers had the obligation to terminate the initial SPA and to accept the CDM offer.

[46] The Court does not agree.

[47] On its face, the language in Section 7.1 is permissive and not mandatory. It says that the sellers "may" terminate the initial SPA and enter into an agreement with the new offeror. It does not require them to do so.

[48] CDM argued that Section 7.1 does not provide for a right to match, which is found in other agreements of this nature. That may be true, but a right to match is different. Specific language would be necessary to contractually require the sellers to accept an offer from Noront that matched the new offer. No language was required to give Noront the right to make a new offer. Further, specific language would be required to remove the possibility of Noront making a new offer. There is no such language. It would be surprising to find such language: why would Noront give up the right to make another offer, and why would the sellers prevent Noront from making another offer? Any such language would be to the detriment of the two contracting parties and for the exclusive benefit of an unknown third party. As the Monitor pointed out, Section 12.2 of the initial SPA specifies that the SPA is for the sole benefit of the parties and is not intended to give any rights, benefits or remedies to a third party.

[49] As a result, the sellers had no obligation to accept the April 13 offer from CDM.

(4) The Supplemental Bid Process

[50] Once the sellers, their advisers and the Monitor determined that the April 13 offer from CDM was a Superior Proposal, they had to decide how to manage the process. They had two interested parties and they decided to give them both the chance to make their best and final offer through a process that they created for the purpose, which is referred to as the Supplemental Bid Process. This was a very reasonable decision, in the best interests of the creditors, although probably not one that either offeror was very happy with.

[51] The sellers, their advisers and the Monitor established a series of rules, and they sent the rules to the two offerors at the same time:

> 1. Each of the Bidders' best and final offer is to be delivered in the form of an executed Share Purchase Agreement (the "Final Bid"), together with a blackline mark-up against the March 22 SPA to show proposed changes.

[22] Exhibit R-23.

2. Final Bids can remove section 7.1(d) and the related provisions of the March 22 SPA.

3. Final bids are to be received by Moelis by no later than 5:00 p.m. (Toronto time) on Wednesday, April 15, 2015 in accordance with paragraph 7 below.

4. Final Bids may be accompanied by a cover letter setting any additional considerations that the Bidder wishes to be considered in connection with its Final Bid but such cover letter should not amend or modify any of the terms and conditions contained in the executed SPA.

5. Final Bids will be reviewed by the Sellers in consultation with moelis and the Monitor. A determination of the Superior Proposal will be made as soon as practicable and communicated to the Bidders.

6. Any clarifications or other communications with respect to this process should be made in writing to the Sale Advisor, with a copy to the Monitor.

7. Final Bids are to be submitted to the Sale Advisor c/o Carlo De Giroloamo by email at **carlo.degirolamo@moelis.com**.

8. All initially capitalized terms used herein unless otherwise defined shall have the meanings given to them in the March 22 SPA.[23]

[52] They declined a request from Noront to modify the rules.[24]

[53] Both Noront and CDM decided to participate in the Supplemental Bid Process and both submitted offers.

[54] All parties agree that the CDM offer was in compliance with the rules of the Supplemental Bid Process.

[55] Noront's offer was received at 5:00 p.m. on April 15.[25] CDM argues that the offer was not in compliance with the rules:

- The cover email states that final approvals are still required (presumably from Franco-Nevada which was advancing the funds for the transaction and Resource Capital Fund (RCF) which was the principal lender to Noront) and that Noront expected to receive them within the next hour;
- The cover letter was not signed;
- The cover letter stated that the revised offer was effective only if the sellers received another offer; and
- The email did not include an executed SPA, but only a blackline mark-up of the SPA.

[56] Subsequent to 5:00 p.m., Noront completed the requirements:

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23 Exhibits R-25 and R-26.
24 Exhibit CDM-1.
25 Exhibit R-30A.

- At 5:34 p.m., Noront sent a signed cover letter. A paragraph was added to explain that "certain representations and warranties and conditions to the advance of the loan with Franco-Nevada have been reduced in order to provide certainty on Noront's financing" and that the signature pages for the SPA and the fully executed loan agreement would be sent separately;[26]
- At 8:50 p.m., Noront's counsel sent the executed SPA and the amended and restated loan agreement. The executed SPA included some changes described as "cleanup" and "not substantive" since 5:00 p.m. Among those changes, Noront deleted RCF from Exhibit C (Required Consents), suggesting that it had obtained that consent;[27]
- At 10:00 p.m., Moelis asked Noront for confirmation of the RCF consent and an executed copy of it, an explanation for the source of the additional funds, and clarification of the deadline for the vesting order;[28]
- At 10:35 p.m., Noront provided the executed RCF consent and an explanation of the funding;[29] and
- At 1:25 p.m. on April 16, Noront agreed to extend the date for the vesting order from April 20 to April 27.[30]

[57] The Noront offer was the higher of the two offers in terms of the purchase price. The issue is whether these issues are such as to invalidate the process such that the Court should require the sellers to start over.

[58] The Court considers that these issues are relatively minor and that they do not invalidate the process:

- Noront submitted its offer on time;
- The offer was not amended in any substantive way after 5:00 p.m. In particular, the purchase price was not amended;
- The lack of a signature on the cover letter was irrelevant;
- The condition that the revised offer was effective only if the sellers received another offer had already been fulfilled before Noront submitted its offer. Noront did not know this, but the sellers, Moelis and the Monitor did;
- The missing third party consents were not within Noront's control. Noront said at 5:00 p.m. that it expected to receive them within the next hour. In fact, it provided the consents to Moelis at 8:50 p.m.;

[26] Exhibit CDM-3.
[27] Exhibit CDM-4.
[28] Exhibit CDM-4.
[29] Exhibit CDM-4.
[30] Exhibit CDM-4.

- The executed SPA was provided at 8:50 p.m. The delay appears to be related to the missing consents. There is no evidence that Noront was using this as a means to preserve an out from the offer; and
- The questions with respect to the source of the funding and the date were clarifications requested by Moelis for its evaluation of the offer and were not elements missing from the offer.

[59] This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection.

(5) Conclusion

[60] As a result, the Court concludes that the sale process was reasonable within Section 36(3)(a) of the CCAA. Moreover, the other factors in Section 36(3) favour the approval of the sale:

- The monitor approved the process and was involved throughout;
- The monitor filed a report with the Court in which he recommends the approval of the sale;
- The creditors were not consulted, but the motion and amended motion were served on the service list and no creditor has objected to the sale;
- The consideration appears to be fair, given that it is the result of a reasonable process. The Court gives weight to the business judgment of the sellers and their advisers.

[61] For all of these reasons, the Court dismisses CDM's contestation of the motion.

[62] There remain the issues raised by the First Nations bands.

2. Do the First Nations bands have other grounds on which to object to the transaction?

[63] The First Nations bands raise issues of two natures.

[64] First, they argue that they were denied the opportunity to participate in the sale process and they ask for time to examine the possibility of presenting an offer for the Ring of Fire interests.

[65] Second, they argue that the transaction has an impact on their Aboriginal and treaty rights protected under Section 35 of the *Constitution Act, 1982*.

[66] The Court has already concluded that the process of identifying potential buyers and strategic partners was reasonable.

[67] Further, it is not clear to what extent the First Nations bands had knowledge of the sale process and could have participated. The September 17, 2014 newspaper article says that Cliffs is exploring alternatives including the possibility of selling its

Ring of Fire interests.[31] That article refers to a letter which was sent to the First Nations bands in the area which again would have referred to a possible sale.

[68] At the very latest, they knew about the potential sale when a press release was published on March 23, 2015.

[69] Moreover, in its materials, CDM alleged that its final offer on April 15 "had the support of two of the most impacted First Nations communities",[32] which suggests that the First Nations bands had at lest some involvement in the sale process.

[70] Nevertheless, the interest of the First Nations bands remains at a very preliminary level. Although the First Nations bands say that they have hired a financial adviser and that they want a delay to analyze the possibility of making an offer for the Ring of Fire interests, whether on their own or with a partner, there is no evidence to suggest that the bands on their own would make a serious offer, or that they would partner with a party that was not already identified by Moelis and included in the process. It is pure speculation as to whether they will ever present an offer in excess of the Noront offer. The Courts have rejected firm offers for greater amounts received after the sale process has concluded.[33] The Courts should also refuse to stop the sale process because a party arriving late might be interested in presenting an offer which might be better than the offer on the table.

[71] The First Nations bands also plead that they have a special interest in this transaction because they live and exercise their Aboriginal and treaty rights guaranteed by the Constitution on the land and territories surrounding the Ring of Fire.

[72] For the purposes of this motion, the Court will assume that to be true. It is nevertheless unclear to what extent a change of control of the corporations which own the interests in the Ring of Fire project impacts on those rights. The identity of the shareholders of the corporations does not change the rights of the First Nations bands or the obligations of the corporations in relation to the development of the project.

[73] The First Nations bands pointed to two specific issues.

[74] First, they argued that there was a duty to consult which was not respected. It is clear that as a matter of constitutional law, there is a duty to consult. It is equally clear that this duty lies on the Crown, not on private parties.[34] As a result, the Crown has a duty to consult when it acts, including when it sells shares in a corporation with interests that impact on the rights of the First Nations.[35] However, a sale of shares from one private party to another does not trigger the duty to consult. The First Nations bands also produced the Regional Framework Agreement between nine First Nation bands in the Ring of Fire area, including the six objectors, and the Ontario Crown.[36] Cliffs was not a party to this agreement, and the sale of the sellers' interests

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31 Exhibit R-7.

32 Declaration of Intervention and Contestation (#87), par. 30.

33 See, for example, *Boutiques San Francisco inc. (Arrangement relatif aux)*, [2004] R.J.Q. 965 (C.S.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

34 *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, par. 35, 56; *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, par. 79..

35 *In the Matter of CCAA and Skeena Cellulose Inc.*, 2002 BCSC 597, par. 14.

36 Exhibit O-1.

in the Ring of Fire project does not affect any party's rights and obligations under the agreement. It is indeed unfortunate that the First Nations bands were not included in the sale process, because they will have an important role to play in the development of the Ring of Fire. But the failure to include them was not a breach of the duty to consult or of the Regional Framework Agreement.

[75] Second, the First Nations bands gave as an example of how the proposed transaction might prejudice their rights a royalty arrangement which Noront appears to have entered into with Franco-Nevada as part of the financing for the proposed transaction. The press release announcing the initial transaction on March 23, 2015 provided:

> Franco-Nevada will receive a 3% royalty over the Black Thor chromite deposit and a 2% royalty over all of Noront's property in the region with the exception of Eagle's Nest, which is excluded.[37]

[76] Assuming that the financing arrangements for the final transaction include a similar provision, which seems likely, the Court is unconvinced that it should refuse the approval of the transaction for this reason.

[77] It is difficult to see how granting a 2 or 3% royalty impacts the rights of the First Nations bands, unless it is their position that they are entitled to a royalty of more than 97%. They did not advance such an argument during the hearing.

[78] Further, the Court is not being asked to approve the financing arrangements between Noront and Franco-Nevada. If there is something in those financing arrangements that infringes on the rights of the First Nations bands, their rights and their remedies are not affected by the order that the Court is being asked to issue today.

[79] For all of these reasons, the Court dismisses the objection made by the First Nations bands.

3. Interest or Standing

[80] For the reasons set out above, the Court will dismiss CDM's contestation and the objection made by the First Nations bands. In principle, it is not necessary to deal with the issue of interest or standing. Also, given that the Court was given only a short delay to draft this judgment, it might not be wise to get too far into the issue.

[81] However, all parties pleaded the question at length and the Court will therefore deal with it.

[82] The Ontario authorities supporting the position that the "bitter bidder" has no interest or standing to challenge the approval motion are clear[38] and they have been followed in Québec.[39]

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[37] *Supra*, note 9.

[38] *Crown Trust* v. *Rosenberg*, 1986 CanLII 2760 (ON SC), p. 43; *Skyepharma plc* v. *Hyal Pharmaceutical Corp.*, [2000] O.J. No 467 (ON CA), par. 24-26, 30; *Consumers Packaging Inc. (Re)*, 2001 CanLII 6708 (ON CA), par. 7; *BDC Venture Capital Inc.* v. *Natural Convergence Inc.*, 2009 ONCA 665, par. 7-8.

[83] However, the issues which the Court must consider before approving a sale include the reasonableness of the sale process, which involves questions of the fairness and the integrity of the process.

[84] A losing bidder is not seeking to promote the best interests of the creditors, but is looking to promote its own interest. It will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can. The narrow technical ground on which the losing bidder is found to have no interest is that it has no legal or proprietary right in the property being sold.[40] The underlying policy reason is that the losing bidder is a distraction, with the potential for delay and additional expense.

[85] However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process.

[86] Perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections. In this case, the Monitor's Fourth Report deals with the objection of the First Nations bands in fair and objective manner. However, because CDM filed its intervention after the Monitor filed his report, the Monitor's Fourth Report does not deal with the issues raised by CDM. In that sense, the CDM intervention was useful to the Court in exercising its jurisdiction under Section 36 of the CCAA.

[87] The objection of the First Nations bands went beyond their status as losing bidders or excluded bidders, and included issues related to their Aboriginal and treaty rights guaranteed by the Constitution.

[88] The case law on the interest or standing of the "bitter bidder" and the policy considerations underlying that case law have no application to these issues. The interest of the First Nations bands is closer to the interest of "social stakeholders" that have been recognized in a number of cases.[41]

[89] Although the Court will dismiss the objections raised by the First Nations bands and CDM, it will not do so on grounds of a lack of interest or standing.

FOR THESE REASONS, THE COURT HEREBY:

[90] **GRANTS** the Petitioners' Amended Motion for the Issuance of an Approval and Vesting Order (#82).

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39 *AbitibiBowater*, *supra* note 18, par. 81-88; *White Birch*, *supra* note 16, par. 55-56.

40 Purchasers generally do not have a proprietary interest in the property they are buying.

41 *Re Canadian Airlines Corporation*, 2000 ABQB 442, par. 95; *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. Gen. Div. [Commercial List]), par. 50; *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), par. 9; *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]), par. 6-7.

[91] **ORDERS** that all capitalized terms in this Order shall have the meaning given to them in the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "**Share Purchase Agreement**") by and among Petitioner Cliffs Québec Iron Mining ULC ("**CQIM**"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers, as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "**Purchaser**"), a redacted copy of which was filed as Exhibit R-11 to the Motion, unless otherwise indicated herein.

SERVICE

[92] **ORDERS** that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

[93] **PERMITS** service of this Order at any time and place and by any means whatsoever.

SALE APPROVAL

[94] **ORDERS and DECLARES** that the transaction (the "**Transaction**") contemplated by the Share Purchase Agreement is hereby approved, and the execution of the Share Purchase Agreement by CQIM is hereby authorized and approved, *nunc pro tunc,* with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Monitor.

[95] **AUTHORIZES and DIRECTS** the Monitor to hold the Deposit, *nunc pro tunc*, and to apply, disburse and/or deliver the Deposit or the applicable portions thereof in accordance with the provisions of the Share Purchase Agreement.

EXECUTION OF DOCUMENTATION

[96] **AUTHORIZES and DIRECTS** CQIM and the Monitor to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in or contemplated by the Share Purchase Agreement (Exhibit R-12) and any other ancillary document which could be required or useful to give full and complete effect thereto.

AUTHORIZATION

[97] **ORDERS and DECLARES** that this Order shall constitute the only authorization required by CQIM to proceed with the Transaction and that no shareholder approval, if applicable, shall be required in connection therewith.

VESTING OF THE AMALCO SHARES

[98] **ORDERS and DECLARES** that upon the issuance of a Monitor's certificate substantially in the form appended as **Schedule "A"** hereto (the "**Certificate**"), all of CQIM's right, title and interest in and to the Amalco Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all right, title,

benefits, priorities, claims (including claims provable in bankruptcy in the event that CQIM should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, rights of first refusal or other pre-emptive rights in favour of third parties, restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Encumbrances**") by or of any and all persons or entities of any kind whatsoever, including without limiting the generality of the foregoing (i) any Encumbrances created by the Initial Order of this Court dated January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time), and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Civil Code of Québec, the Ontario Personal Property Security Act, the British Columbia Personal Property Security Act or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, **ORDERS** that all of the Encumbrances affecting or relating to the Amalco Shares be expunged and discharged as against the Amalco Shares, in each case effective as of the applicable time and date of the Certificate.

[99] **ORDERS and DIRECTS** the Monitor to file with the Court a copy of the Certificate, forthwith after issuance thereof.

[100] **DECLARES** that the Monitor shall be at liberty to rely exclusively on the Conditions Certificates in issuing the Certificate, without any obligation to independently confirm or verify the waiver or satisfaction of the applicable conditions.

[101] **AUTHORIZES and DIRECTS** the Monitor to receive and hold the Purchase Price and to remit the Purchase Price in accordance with the provisions of this Order.

[102] **AUTHORIZES and DIRECTS** the Monitor to remit, following closing of the Transaction, that portion of the Purchase Price payable to the Non-Filing Sellers, to the Non-Filing Sellers in accordance with the Purchase Price Allocation described under Exhibit D of the Share Purchase Agreement (Exhibit R-12), as it may be amended by the Non-Filing Sellers, or as the Non-Filing Sellers may otherwise direct.

CANCELLATION OF SECURITY REGISTRATIONS

[103] **ORDERS** the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of or strike the registrations in connection with the Amalco Shares, listed in **Schedule "B"** hereto, in order to allow the transfer to the Purchaser of the Amalco Shares free and clear of such registrations.

[104] **ORDERS** that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing

change statements in the Ontario Personal Property Registry ("**OPPR**") as may be necessary, from any registration filed against CQIM in the OPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

[105] **ORDERS** that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the British Columbia Personal Property Security Registry (the "**BCPPR**") as may be necessary, from any registration filed against CQIM in the BCPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

CQIM NET PROCEEDS

[106] **ORDERS** that the proportion of the Purchase Price payable to CQIM in accordance with the Share Purchase Agreement (the "**CQIM Net Proceeds**") shall be remitted to the Monitor and shall be held by the Monitor pending further order of the Court.

[107] **ORDERS** that for the purposes of determining the nature and priority of the Encumbrances, the CQIM Net Proceeds shall stand in the place and stead of the Amalco Shares, and that upon payment of the Purchase Price by the Purchaser, all Encumbrances shall attach to the CQIM Net Proceeds with the same priority as they had with respect to the Amalco Shares immediately prior to the sale, as if the Amalco Shares had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

VALIDITY OF THE TRANSACTION

[108] **ORDERS** that notwithstanding:

a) the pendency of these proceedings;

b) any petition for a receiving order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA"**) and any order issued pursuant to any such petition; or

c) the provisions of any federal or provincial legislation;

the vesting of the Amalco Shares contemplated in this Order, as well as the execution of the Share Purchase Agreement pursuant to this Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against CQIM,

the Purchaser or the Monitor, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

LIMITATION OF LIABILITY

[109] **DECLARES** that, subject to other orders of this Court, nothing herein contained shall require the Monitor to take control, or to otherwise manage all or any part of the Purchased Shares. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Purchased Shares within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[110] **DECLARES** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

CONFIDENTIALITY

[111] **ORDERS** that the unredacted Initial Purchase Agreement filed with the Court as Exhibit R-3, the summary of the two LOIs filed with the Court as Exhibit R-8, the unredacted Share Purchase Agreeement filed with the Court as Exhibit R-12 and the unredacted blackline of the Share Purchase Agreement showing changes from the Initial Purchase Agreement filed with the Court as Exhibit R-16 shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

GENERAL

[112] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[113] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Petitioners and Mises-en-cause. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[114] **REQUESTS** the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

[115] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

[116] **THE WHOLE WITHOUT COSTS**.

STEPHEN W. HAMILTON J.S.C.

Me Bernard Boucher
Me Sébastien Guy
Me Steven J. Weisz
BLAKE, CASSELS & GRAYDON, S.E.N.C.R.L.
for:
Bloom Lake General Partner Limited
Quinto Mining Corporation
8568391 Canada Limited
Cliffs Quebec Iron Mining ULC
The Bloom Lake Iron Ore Mine Limited Partnership
Bloom Lake Railway Company Limited

Me Sylvain Rigaud
Me Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L.
for:
FTI Consulting Canada Inc.

Me Jean-Yves Simard
LAVERY DE BILLY, S.E.N.C.R.L.
Me Sean Zweig
BENNETT JONES
for:
9201955 CANADA INC.

Me Stéphane Hébert
Me Maurice Fleming
MILLER THOMSON, S.E.N.C.R.L./LLP
for:
Eabametoong First Nation
Ginoogaming First Nation
Constance Lake First Nation and
Long Lake # 58 First Nation
Aroland First Nation
Marten Falls First Nation

Me Sandra Abitan
Me Éric Préfontaine
Me Julien Morissette
OSLER, HOSKIN & HARCOURT, S.E.N.C.R.L./S.R.L.
for:
8901341 Canada inc.
Canadian Development and Marketing Corporation

Date of hearing: April 24, 2015

SCHEDULE "A"
FORM OF CERTIFICATE OF THE MONITOR

SUPERIOR COURT
(Commercial Division)

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
File: No: 500-11-048114-157

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED:

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC
Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

9201955 CANADA INC.

Mise-en-cause

-and-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS

Mise-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CERTIFICATE OF THE MONITOR

RECITALS

A. Pursuant to an initial order rendered by the Honourable Mr. Justice Martin Catonguay, J.S.C., of the Superior Court of Québec, [Commercial Division] (the "**Court**") on January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time, the "**Initial Order**"), FTI Consulting Canada Inc. (the "**Monitor**") was appointed to monitor the business and financial affairs of the Petitioners and the Mises-en-cause (together with the Petitioners, the "**CCAA Parties**").

B. Pursuant to an order (the "**Approval and Vesting Order**") rendered by the Court on <*>, 2015, the transaction contemplated by the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "**Share Purchase Agreement**") by and among Petitioner Cliffs Québec Iron Mining ULC ("**CQIM**"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers (as defined therein), as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "**Purchaser**") was authorized and approved, with a view, *inter alia*, to vest in and to the Purchaser, all of CQIM's right, title and interest in and to the Amalco Shares.

C. Each capitalized term used and not defined herein has the meaning given to such term in the Share Purchase Agreement.

D. The Approval and Vesting Order provides for the vesting of all of CQIM's right, title and interest in and to the Amalco Shares in the Purchaser, in accordance with the terms of the Approval and Vesting Order and upon the delivery of a certificate (the "**Certificate**") issued by the Monitor confirming that the Sellers and the Purchaser have each delivered Conditions Certificates to the Monitor.

E. In accordance with the Approval and Vesting Order, the Monitor has the power to authorize, execute and deliver this Certificate.

F. The Approval and Vesting Order also directed the Monitor to file with the Court, a copy of this Certificate forthwith after issuance thereof.

THEREFORE, THE MONITOR CERTIFIES THE FOLLOWING:

A. The Sellers and the Purchaser have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions under the Share Purchase Agreement have been satisfied and/or waived, as applicable.

B. The Closing Time is deemed to have occurred on at <TIME> on <*>, 2015.

THIS CERTIFICATE was issued by the Monitor at <TIME> on <*>, 2015.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity.

By: _____

Name : Nigel Meakin

SCHEDULE “B”
REGISTRATIONS TO BE REDUCED OR STRICKEN

Nil.
[NTD: Updated searches will be run before motion is heard to confirm no registrations in Quebec.]

8453339.6

TAB 4

See spec. paras. 31-33, 35-40

CITATION: Nelson Education Limited (Re), 2015 ONSC 5557
COURT FILE NO.: CV15-10961-00CL
DATE: 20150908

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' LENDERS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jessica Kimmel and Caroline Descours,* for the Applicants

Robert W. Staley, Kevin J. Zych and Sean Zweig, for the First Lien Agent and the First Lien Steering Committee

John L. Finnigan, D.J. Miller and Kyla E.M. Mahar, for Royal Bank of Canada

Orestes Pasparaskis, for the Monitor

HEARD: August 13 and 27, 2015

ENDORSEMENT

[1] The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale.

The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

[2] RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

Nelson business

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and

approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

[6] Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

Discussions leading to the sale to the first lien lenders

[8] In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

[9] Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

[10] In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

[11] The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

[12] In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

[13] The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the

SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

[14] In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

[15] Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

[16] Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

[17] Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

[18] On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

[19] Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

[20] Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

Sale transaction

[21] The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

(a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

[22] The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

Analysis

(i) Sale approval

[23] RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

[24] Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that it will raise no objection or oppose a sale or other disposition of any Collateral free and clear of its Liens and other claims under Section 363 of the

> Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets. (underlining added)

[25] Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

[26] The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y. 2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (1988).

Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms.[1]

[27] The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

[28] Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

[29] While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

[1] I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171 para. 103.

[30] It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

[31] This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

[32] Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out[2]. None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair*[3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

[33] I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

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[2] See *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 at paras. 35-40 and *Re Brainhunter Inc.* [2009] O.J. No. 5207 at paras. 12-13.

[3] *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

[34] Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

[35] FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

> (a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
>
> (b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;
>
> (c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;

(d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;

(e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;

(f) The SISP was undertaken in a thorough and professional manner;

(g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement

(h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

[36] The Monitor expressed the further view that:

(a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;

(b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;

(c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;

(d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

[37] *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

> (a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
>
> (b) whether the interests of all parties have been considered;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[38] These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its

report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results

> of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

[39] In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

(ii) Ancillary claimed relief

(a) Vesting order

[40] The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

(b) Payment of amounts to first lien lenders

[41] As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

[42] If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien

agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

[43] These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

(c) Releases

[44] The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

[45] The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

[46] The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

[47] The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release…". "Affiliates" is defined to include "any other Person that directly or indirectly…controls…such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

[48] Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan[4].

[4] This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien

[49] While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

[50] The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

(d) Stockholders and Registration Rights Agreement

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lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

[51] The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

[52] The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

RBC Motion

(a) Second lenders' pre-filing interest and second lien agent's fees

[53] RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US$15,365,998.83.

[54] Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

[55] There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral[5]. The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

[56] Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral,

[5] See 65 A.B.A. Bus Law. 809-883 (May 2010).

institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)… and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any… motions… which assert rights… available to unsecured creditors…arising under any insolvency… proceeding.

[57] My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

[58] Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement. ... (underlining added).

[59] Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to

be first applied to the first lien obligations and requires any payments received by the second lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

[60] It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

[61] The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

[62] RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the

end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

[63] Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

[64] There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

[65] What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and

the transaction closes, the cash on hand will go to the purchaser and the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

[66] I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

[67] In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

[68] I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

[69] I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

(b) Consent fee

[70] The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

[71] RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

[72] Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it**, or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line

> Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them . . . [emphasis added].

[73] RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

[74] I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

Conclusion

[75] An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

Newbould J.

Date: September 8, 2015

TAB 5

See spec. paras. 2-5, 7

Ontario Supreme Court
Skyepharma PLC. v. Hyal Pharmaceutical Corp.
Date: 1999-10-24

Skyepharma PLC, Plaintiff

and

Hyal Pharmaceutical Corporation, Defendant

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: October 20, 1999

Judgment: October 24, 1999

Docket: 99-CL-3479

Steven Golick and Robin Schwill, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers Incorporation.

Berl Nadler and James Doris, for Skyepharma PLC.

S.L. Secord, for Cangene Corporation.

Robert J. Chadwick, for Bioglan Pharma PLC.

***Farley J.*:**

Endorsement

[1] PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to

understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context—as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

[2] Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

[3] Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a

receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back-doored in some way. See *Royal Bank v. Soundair* at pp 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Royal Bank v. Soundair* of pp.5 and 11. Specifically the court's duty is to consider as per *Royal Bank v. Soundair* at p.6:

(a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the receiver obtained offers; and

(d) whether the working out of the process was unfair.

[4] As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

[5] In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopordize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

> 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.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

[6] Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Royal Bank v. Soundair* at p. 12 and *Re Central Capital Corp.* (1996), 38 C.B.R. (3d) 1 (Ont. C.A.) at pp.31-41 (per Weiler, J.A.) and pp. 50-53 (Laskin, J.A.).

[7] Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It 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. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.

[8] Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

[9] It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately $40,000.

[10] On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt “the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99.” Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver’s considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased, the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives—all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver

had to select its choice and execute (in the sense of “sign”) the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver’s reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of “realizing the superior value inherent in the respective Exclusive Parties’ offers”, when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an “attached” share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

[11] I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the $1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye’s substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

[12] It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

[13] As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

[14] Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr, Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Receiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

[15] I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

[16] It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

[17] Order to issue accordingly.

Motion granted.

TAB 6

See spec. paras. 4, 5, 18-21

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **D. Bish, for the Applicant, Tool-Plas**

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD & RELEASED: **SEPTEMBER 29, 2008**

E N D O R S E M E N T

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: October 24, 2008

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT* AND SECTION 101 OF THE *COURTS OF JUSTICE ACT* BETWEEN NATIONAL BANK OF CANADA, APPLICANT, AND EVERGREEN CONSUMER BRANDS INC., RESPONDENT

Court File No. CV-20-00636080-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced in TORONTO

RECEIVER'S BRIEF OF AUTHORITIES
(Approval and Vesting Order)
(Returnable March 10, 2020)

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