	Clerk's Stamp
COURT FILE NUMBER	1903 12504
COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	MAYNBRIDGE CAPITAL INC.
DEFENDANTS	VOICE CONSTRUCTION OPCO ULC, VOICE MANAGEMENT LTD., VOICE CONSTRUCTION LTD., EARTH & ENERGY CONSTRUCTION LTD., VOICE HOLDINGS LTD., and 2012442 ALBERTA LTD.
DOCUMENT	**BRIEF OF LAW FOR ORDER APPROVING AND VESTING SALE AND OTHER RELIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Rick T.G. Reeson, QC Stephanie A. Wanke Lawyer's Email: rreeson@millerthomson.com / swanke@millerthomson.com File No.: 182818.4

INDEX

I. INTRODUCTION

1. This brief of law is submitted on behalf of Alvarez & Marsal Canada Inc. (the "**Receiver**") in its capacity of the court-appointed Receiver and Manager of the Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd., Voice Holdings Ltd., and 2012442 Alberta Ltd. (collectively, the "**Debtor**") in support of its application (the "**Application**") for, among other things, an Order approving the agreement between the Receiver in its capacity as receiver of the Debtor (and not in its personal or corporate capacity) and Maynbridge Capital Inc. ("**Maynbridge**") for the purchase and sale of certain equipment of the Debtor, herein defined as the "Remaining Equipment", on certain terms offered and accepted by the Receiver (the "**Maynbridge Credit Bid Offer**") on behalf of the Debtor and vesting the Assets with Maynbridge.

2. The Application has been brought in accordance with paras 3(h), (k), (l), and (m) of the Order of the Honourable Associate Chief Justice K.G. Nielsen of the Court of Queen's Bench of Alberta (the "**Court**") granted June 25, 2019 (the "**Receivership Order**"), which authorized the Receiver to, among other things, execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (as defined in the Receivership Order) for any purpose pursuant to the Receivership Order and market any or all of the Property, sell the Property or any parts thereof, and apply for any vesting order necessary to convey the Property or any parts thereof, free and clear of any liens of encumbrances.[1]

3. The Receiver has reviewed and determined that the Maynbridge Credit Bid Offer is fair and reasonable and in the best interest of the Debtor, the creditors, and shareholders. As set out below, the Receiver has met the test for this Honourable Court to grant the Order approving and ratifying the Maynbridge Credit Bid Offer.

4. In addition to the Sale and Vesting Order with respect to the BSC Offer, the Receiver seeks, among other things:

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[1] *Consent Receivership Order*, granted by the Honourable Associate Chief Justice K.G. Nielsen on June 25, 2019 QB Action No. 1903 12504 [*Consent Receivership Order*] [**TAB 1**] para 3.

(a) an Order sealing the Confidential Appendices 1, 2 and 3 (collectively, the "**Confidential Appendices**") to the Fourth Report of the Receiver dated October 17, 2019 (the "**Receiver's Fourth Report**");

(b) making declarations with respect to the secured interests of John Deere Financial Inc. ("**John Deere**"), Komatsu International (Canada) Inc. ("**Komatsu**"), Boyd Ventures Inc. ("**Boyd**"), Grande Tire Inc. ("**GTI**"), and GE Canada Asset Financing Holding Company and GE VFS Canada Limited Partnership (collectively, "**GE Canada**");

5. The Application has been brought in accordance with paras 3(h), (k), (l), and (m) of the Order of the Honourable Associate Chief Justice K.G. Nielsen of the Court of Queen's Bench of Alberta (the "**Court**") granted June 25, 2019 (the "**Receivership Order**"), which authorized the Receiver to, among other things, execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (as defined in the Receivership Order) for any purpose pursuant to the Receivership Order and market any or all of the Property, sell the Property or any parts thereof, and apply for any vesting order necessary to convey the Property or any parts thereof, free and clear of any liens of encumbrances.[2]

6. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances and at this stage of these proceedings.

II. BACKGROUND

7. A detailed background of the Debtor and the Receiver's activities leadings up to the Application is more fully described in the Receiver's First, Second, Third and Fourth Reports. A brief overview of these proceedings is set out below.

A. The Debtor

8. The Debtor is a body of affiliated corporations carrying on business of providing civil construction services, including, heavy construction, earthworks, contracting services, and environmental management, primarily to the energy and resource sector in Western Canada for over 75 years. The company is headquartered in Edmonton, Alberta.

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[2] *Consent Receivership Order*, granted by the Honourable Associate Chief Justice K.G. Nielsen on June 25, 2019 QB Action No. 1903 12504 [*Consent Receivership Order*] [**TAB 1**] para 3.

B. Indebtedness and Security

9. On June 25, 2019, Maynbridge Capital Inc. ("**Maynbridge**") applied to appoint a receiver over the current and future assets, undertakings and properties of the Debtor.

10. Maynbridge, is the assignee and successor in interest of a syndicate of lenders, including their agent, ATB Financial (formerly Alberta Treasury Branches) ("**ATB**"), under the subject syndicate loan agreement. At the time of the appointment of the Receiver, Maynbridge held various security over the Property of the Debtor, including security interests in all present and after-acquired property of the Debtor ("**AIIPAAP**").

11. Each of Maynbridge, Caterpillar Financial Services Limited ("**Caterpillar**"), ARI Financial Services Inc. ("**ARI**"), Grande Tire Inc. ("**GTI**"), Jim Pattison Industries Ltd. ("**Jim Pattison**"), John Deere, and Komatsu has registered security interests against some or all of the Assets as more thoroughly described in the Fourth Report.

C. Property of Debtor

12. Through the Receiver's efforts the receiver has successfully sold approximately 28% of the equipment of the Debtor. The equipment that was sold was generally the Debtor's higher quality equipment.

13. Approximately 410 pieces of the Debtor's equipment remain. Some of these pieces of equipment are secured by specific purchase-money-security interest registrations as further described in the Fourth Report, and may have little or no equity beyond those security interests. The Receiver is releasing such equipment to the respective secured lenders on conditions.

14. The remaining equipment (the "**Remaining Equipment**") is considered by the Receiver to be mid to lower quality assets when compared to the equipment of the Debtor that the Receiver previously sold. The Remaining Equipment includes incidental assets of the Debtor that have not yet been located by the Receiver. As discussed in the Fourth Report, given the Receiver's thorough efforts to identify the Property of the Debtor, it is unlikely the Receiver will recover further material assets.

D. Credit Bid by Maynbridge

15. Maynbridge is the largest creditor of the Debtor and is owed in excess of $35,920,510. Maynbridge has a valid and enforceable security interest over the Debtor's assets.

16. The Receiver and Maynbridge have negotiated and asset purchase agreement whereby Maynbridge will credit bid for the Remaining Equipment as more thoroughly described in the Fourth Report.

17. The Maynbridge Credit Bid Offer provides that Maynbridge will pay cash to the Receiver for GST on the sale, if applicable, and cash equivalent to the payout amount for any valid security registration registered against the Remaining Equipment in priority to Maynbridge's security or any valid garage keeper's lien registered against the Remaining Equipment.

18. The Receiver has reviewed and determined that the Maynbridge Credit Bid Offer is fair and reasonable and in the best interest of the Debtor, the creditors, and stakeholders. As set out below, the Receiver has met the test for this Honourable Court to grant the Order approving and ratifying the Maynbridge Credit Bid Offer.

III. ISSUES

19. The issues to be determined by this Honourable Court are whether it is appropriate and reasonable in the circumstances to:

(a) make certain declaration with respect to the security interests claimed in the Remaining Assets;

(b) approve of the Maynbridge Credit Bid Offer; and

(c) grant a sealing order with respect to the Confidential Appendices.

IV. SUBMISSIONS

A. Secured Interests in the Remaining Equipment

20. As further discussed in the Third Report of the Receiver dated September 23, 2019, legal counsel for the Receiver, Miller Thomson LLP ("**MT**"), is of the opinion that Maynbridge has priority to the Remaining Equipment over other parties with registered security interests except where:

(a) another secured creditor has registered a valid and enforceable security interest by serial number ahead of a registration by Maynbridge by serial number with respect to equipment that constitutes "serial number goods" as defined in the *Personal Property Security Regulation*, AR 95/2001; or

(b) another secured creditor has registered a valid and enforceable purchase-money security interest that is perfected pursuant to s. 22 of the *Personal Property Security Act*.

21. As set out in the Fourth Report, John Deere, Komatsu, ARI and Jim Pattison have certain security registrations that are in priority to Maynbridge with respect to certain of the Remaining Equipment and an interim distribution for the amounts validly secured is appropriate.

GTI

22. GTI has been unable to produce a security agreement to support its security interest for its registrations at the PPR registered against a 2015 GMC 5500 s/n 1GT12YEG9FF5266D5 (#19062524320) and a 2001 Aspen HHT/RL Trailer s/n 2A96B50342N125148 (#19062524879).

23. Pursuant to s. 10(1)(d) of the *PPSA*, a security interest is only enforceable against a third party where the debtor has signed a security agreement that a valid security interest and description of collateral.

24. Without a signed security agreement, GTI cannot have a valid security interest. This does not impact the validity of any garage keeper's lien that GTI has registered.

Boyd

25. Boyd has registered a security interest at the PPR against a 2006 John Deere EX3005 330 CLC (s/n FF330CX804659), 2013 Caterpillar D6T DZ6507 (s/n KSB01520), and 2014 Caterpillar D6T DZ6511(s/n KSB01741) of the Debtor.

26. Boyd has advised MT that the Debtor did not execute a security agreement in favour of Boyd.

27. Like GTI, without a signed security agreement, Boyd cannot have a valid security interest.

B. Approval of Sale and Vesting of Assets

28. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 permits the Court to appoint a receiver to do any of the following:

(a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;

(b) exercise any control that the Court considers advisable over the property and over the insolvent corporation's business; and

(c) take any other action that the Court considers advisable.[3]

29. In carrying out its duties and exercising its powers, a receiver has an obligation to deal with an insolvent company's property in a commercially reasonable manner.[4]

C. Soundair Criteria

30. The criteria to be applied when considering the approval of a sale or, in this case, acceptance of a proposal recommended by a receiver, were first set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.*[5] When considering whether an offer accepted by a receiver should be approved and ratified by the Court, the Court is to consider and determine:

(a) whether the receiver made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

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

(d) whether there has been unfairness in the working out of the process.

31. The *Soundair* criteria have been thoroughly incorporated into Alberta insolvency law.[6]

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[3] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), s. 243(1) [**TAB 2**]

[4] *BIA*, s. 247 [**TAB 3**]

[5] *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76 [*Soundair*] [**TAB 4**].

[6] *Computershare Trust Company of Canada v Venti Investment Corporation,* 2011 ABQB 726 at para 3 [**TAB 5**].

32. The Court also provides its court appointed receiver with deference, assuming that the receiver's course of action and recommendation is appropriate unless the contrary is clearly shown.[7]

i. Sufficient Effort

33. The Receiver reviewed and considered alternate sales processes and compared the cost of such processes and likely recovery for the Debtor's estate as compared to the recovery for the Debtor's estate pursuant to the Maynbridge Credit Bid Offer and found that the Offer was superior.

34. There are no viable options for realization that are likely to result in a better recovery. As a result, the Receiver's efforts have been sufficient to garner the likely best price for the assets.

35. It is immaterial that the payment of the bulk of the purchase price is by way of credit bid as any cash paid by Maynbridge would ultimately be returned to Maynbridge as secured creditor.[8]

36. The Receiver submits that the Maynbridge Credit Bid Offer constitutes reasonable and sufficient efforts to obtain the best price for Remaining Assets.

ii. Interest of All Parties

37. Courts have acknowledged that a receiver's primary concern should be to protect the interest of the debtor's creditors.[9]

38. In considering the "interest of all parties", Courts have recognized that a receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, a receiver must consider the interest of all creditors and then act for the benefit of the general body.[10]

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[7] *Soundair supra*, **[TAB 12]** at para 14.

[8] *8527504 Canada Inc. v. Liquidbrands Inc.*, 2015 ONSC 5912 at paras 20 and 21, leave to appeal refused: *8527504 Canada Inc. v. Sum Pac Foods Ltd.,* 2015 ONCA 916 [collectively, **Tab 6**]

[9] *Cobrico*, Ibid. [**TAB 7**]

[10] *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 [*Elaborate Homes*] at para 61 [**TAB 8**] citing *Scanwood Canada Ltd., Re,* 2011 NSSC 189, 305 NSR (2d) 34.

39. Pursuant to the Maynbridge Credit Bid Offer, secured creditors in priority to Maynbridge will be paid out of their security interest in full for the specific assets that are included in the sale.

40. By virtue of paragraph 9 of the proposed Sale Approval and Vesting Order, the priority of garage keeper's lien holders is preserved in the proceeds, unaffected by the sale.

41. Maynbridge, the most materially affected creditor, is supportive.

42. There is no prospective realization process that would have an improved outcome for any other stakeholder.

43. The Maynbridge Credit Bid is a cost effective means for realizing on the Remaining Equipment and addressing the priority claims for all creditors.

iii. The Efficacy and Integrity of the Process

44. The Receiver submits that there is nothing improper about the acceptance of the Maynbridge Credit Bid Offer.

45. The Receiver has conducted itself with integrity and in good faith in considering and negotiating with Maynbridge and ultimately accepting the Maynbridge Credit Bid Offer.

iv. Unfairness in the Process

46. There is no suggestion that the Receiver has failed to act reasonably, prudently, fairly, and not arbitrarily in accepting the Maynbridge Credit Bid Offer.

47. No party was materially prejudiced or disadvantage by the Receiver negotiating and accepting the Maynbridge Credit Bid Offer.

48. Based on the forgoing, the Receiver submits that the *Soundair* criteria have been satisfied by the Receiver and that the Receiver has acted in a commercially reasonable manner in accepting the Maynbridge Credit Bid Offer.

49. The Court should therefore grant an Order approving the Receiver's acceptance of the Maynbridge Credit Bit Offer and vesting the Remaining Equipment with the purchasers on closing of the auction.

D. Sealing Order

50. The Receiver seeks a sealing order with respect to the Confidential Appendices of the Receiver's Fourth Report.

51. The Receiver relies on the authorities with respect to seal as provided in its Bench Brief filed September 23, 2019 of this Action.

52. The commercial necessity of maintaining the transaction details as confidential until such time as Maynbridge can sell the assets supports the sealing of the Confidential Appendices until the discharge of the Receiver or Order of the Court.

V. RELIEF CLAIMED

53. Based upon the materials filed and the foregoing submission, the Receiver respectfully requests, among other things:

(a) An Order approving the Maynbridge Credit Bid Offer and vesting title of the Remaining Equipment with Maynbridge;

(b) An Order with respect to the security interests in the Remaining Assets as set out in greater detail in the Application;

(c) An Order sealing the Confidential Appendices of the Receiver's Fourth Report on the Court record until the Receiver is discharged or further order of the Court;

(d) An Order approving the activities, conduct and actions of the Receiver as set out in the Fourth Report;

Such further or other relief as may be requested of the Court by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF OCTOBER, 2019

MILLER THOMSON LLP

Per: _____

Rick Reeson, QC
Stephanie Wanke
Counsel for the Applicant,
ALVAREZ & MARSAL CANADA INC. in its capacity as Receiver of Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd., Voice Holdings Ltd., and 2012442 Alberta Ltd.

TABLE OF AUTHORITIES

TAB

1. *Consent Receivership Order* granted by Associate Chief Justice K.G. Nielsen dated June 25, 2019.

2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1).

3. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 247.

4. *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76.

5. *Computershare Trust Company of Canada v Venti Investment Corporation,* 2011 ABQB 726, 2011 CarswellAlta 2304.

6. *8527504 Canada Inc. v. Liquidbrands Inc.*, 2015 ONSC 5912 at paras 20 and 21, leave to appeal refused: *8527504 Canada Inc. v. Sum Pac Foods Ltd.,* 2015 ONCA 916

7. *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766, 2000 CarswellAlta 1211.

8. *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350, 2014 CarswellAlta 921.

COURT FILE NUMBER	1903 12504
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLANTIFF	**MAYNBRIDGE CAPITAL INC.**
DEFENDANTS	**VOICE CONSTRUCTION OPCO ULC, VOICE MANAGEMENT LTD., VOICE CONSTRUCTION LTD., EARTH & ENERGY CONSTRUCTION LTD., VOICE HOLDINGS LTD. and 2012442 ALBERTA LTD.**
DOCUMENT	**CONSENT RECEIVERSHIP ORDER**

Clerk's Stamp
JUDICIAL CENTRE OF EDMONTON
FILED
JUN 25 2019
Clerk of the Court

I hereby certify this to be a true copy of the original.
for Clerk of the Court

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 562354.17

DATE ON WHICH ORDER WAS PRONOUNCED: June 25, 2019

LOCATION WHERE ORDER WAS PRONOUNCED: EDMONTON, ALBERTA

NAME OF JUSTICE WHO MADE THIS ORDER: K.G. Nielsen

UPON the Application of Maynbridge Capital Inc. ("**Maynbridge**"), in respect of Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd. and 2012442 Alberta Ltd. (collectively referred to herein as the "**Debtor**"); **AND UPON** having read the Application and the Affidavit of Stephen Davies, sworn on _____, filed; **AND UPON** having read the consent of Alvarez & Marsal Canada Inc. to act as receiver and receiver-manager (the "**Receiver**") of the Debtor, filed; **AND UPON** hearing counsel for Maynbridge, and any other interested party present;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**"), and sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, and 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c.P-7, Alvarez & Marsal Canada Inc. is hereby appointed Receiver, without security, of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

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

   (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

   (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

   (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

   (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including

on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtor or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(g) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court.

(k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of Alberta, or any other similar government authority, notwithstanding section 191 of the *Land Titles Act*, R.S.A. 2000, c. L-4, or the provision of any other similar legislation in any other province or territory and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtor and not in its personal capacity;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(s) to assign the Debtor(s) into bankruptcy; and

(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

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

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.

5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication

or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 8; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body

or the Court. **"Regulatory Body"** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

9. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtor or the Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided, however, that this stay and suspension does not apply in respect of any "eligible financial contract" (as defined in the BIA), and further provided that nothing in this Order shall:

   (a) empower the Debtor to carry on any business that the Debtor is not lawfully entitled to carry on;

   (b) prevent the filing of any registration to preserve or perfect a security interest;

   (c) prevent the registration of a claim for lien; or

   (d) exempt the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment.

10. Nothing in this Order shall prevent any party from taking an action against the Debtor where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH THE RECEIVER

11. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, except with the written consent of the Receiver, or leave of this Court. Nothing in this Order shall prohibit any party to an eligible

financial contract (as defined in the BIA) from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

12. All persons having:

    (a) statutory or regulatory mandates for the supply of goods and/or services; or

    (b) oral or written agreements or arrangements with the Debtor, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Debtor

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Receiver or exercising any other remedy provided under such agreements or arrangements. The Receiver shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with the payment practices of the Debtor, or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

14. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").

15. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    (i) before the Receiver's appointment; or

    (ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

17. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

18. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to the benefit of and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred at the normal rates and charges of the Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) of the BIA.

19. The Receiver and its legal counsel shall pass their accounts from time to time.

20. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange,

for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "Receiver's Borrowings Charge") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) of the BIA.

22. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

25. The Receiver shall be allowed to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

26. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

GENERAL

27. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

29. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.

31. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. The Plaintiff shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at www.alvarezandmarsal.com/voicecconstruction and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such

materials as are confidential and the subject of a sealing order or pending application for a sealing order.

35. Service of this Order shall be deemed good and sufficient by:

(a) serving the same on:

(i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;

(ii) any other person served with notice of the application for this Order;

(iii) any other parties attending or represented at the application for this Order; and

(b) posting a copy of this Order on the Receiver's Website

and service on any other person is hereby dispensed with.

36. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier.

"K.G. Nielsen"

Justice of the Court of Queen's Bench of Alberta

CONSENTED TO ON JUNE 24, 2019
OSLER, HOSKIN & HARCOURT LLP

Marc Wasserman/Martino Calvaruso
Counsel for the Defendants

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that Alvarez & Marsal Canada Inc., the receiver and receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd. and 2012442 Alberta Ltd. appointed by Order of the Court of Queen's Bench of Alberta (the "**Court**") dated the _____ day of June, 2019 (the "**Order**") made in action number _____-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of **[$]** which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of the Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at ●.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property (as defined in the Order) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 2019

ALVAREZ & MARSAL CANADA INC., solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

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

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Definition of *receiver* — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition ***receiver*** in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Définition de *séquestre* — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de ***séquestre***, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du

disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Meaning of *disbursements*

(7) In subsection (6), ***disbursements*** does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

Délai

(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.

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Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should

also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by

the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account.

While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

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

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

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

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

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith,

bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

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

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

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

McKinlay J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

> was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

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

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

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

30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions

of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

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

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

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

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

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept

an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

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

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

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to

be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

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

8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.

2011 ABQB 726
Alberta Court of Queen's Bench

Computershare Trust Co. of Canada v. Venti Investments Corp.

2011 CarswellAlta 2304, 2011 ABQB 726, 213 A.C.W.S. (3d) 203, 86 C.B.R. (5th) 71

Computershare Trust Company of Canada (Plaintiff) and Venti Investments Corporation, Shariff Chandran and Qualia Real Estate Investment Fund VI Limited Partnership (Defendants)

B.E. Romaine J.

Judgment: November 25, 2011
Docket: Calgary 1101-03154

Counsel: Kevin E. Barr for MNP Ltd. in its capacity as Court-appointed Receiver
Ryan P. Pelletier, Richard Billingston, Q.C. for Venti Investment Corporation
David Wood, Jared Spindel for Computershare Trust Company of Canada
Terry L. Czechowskyj for Proposed Purchaser
Michael B. Niven, Q.C. for Durum Real Estate Holdings Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver

Receiver brought application to approve sale of property — V Corp. brought cross-application for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver — Application granted; cross-application dismissed — Receiver made more than sufficient effort to get best price for property and had not acted improvidently — Sale price was not low in relation to appraised value, there was plenty of time for bids and adequate notice of sale process — As to interests of parties, sale was supported by major creditor — It was also important and appropriate to note interests of proposed purchaser, which tendered its bid in good faith and presumably at some expense and which opposed V Corp.'s cross-application — No issue with respect to efficacy and integrity of process by which offers were obtained — Certain objection of V Corp. concerning possibility of unfairness in working out of process had to be viewed in context — There was nothing in history in issue that cast doubt on fairness of process or role of receiver — To accept V Corp.'s proposal would be unfair to parties who participated in bidding process in good faith, and proposed purchaser who entered bona fide into agreement with receiver — It would lead to kind of chaos referred to in certain case law and would be unwarranted interference with properly-run process conducted by receiver — V Corp. had plenty of time in last 21 months to bring arrears up to date and avoid sale, and what it offered now was too little and too late — Submission that there was no urgency about application was not accepted.

APPLICATION by receiver to approve sale of property; CROSS-APPLICATION by company for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver.

B.E. Romaine J.:

1 This was an application to approve a sale of property brought by the Receiver of the assets and property of Venti Investment Corporation and Qualia Real Estate Investment Fund VI Limited Partnership. Venti cross-applied for an order rejecting any agreement of sale, directing that it is entitled to redeem the arrears on a mortgage on the property

in question or make such payments as are necessary to bring the mortgage back into good standing, directing a hearing to set the amount of the arrears and discharging the Receiver.

2 Despite efforts to characterize the application as a sale in foreclosure proceedings, this was a sale within a receivership that resulted from a consent order granted on March 4, 2011. I find that the consent order is correctly characterized as a liquidating order. This order first appointed MNP Ltd. as a Monitor to oversee the sale of the property under an existing agreement of sale and purchase. When the proposed sale terminated in April, 2011, MNP became the Receiver under the order, authorized by its terms to complete the sale of the property and to enter into a replacement agreement of purchase and sale. It has now done so.

3 The criteria to be applied when considering the approval of a sale recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The *Soundair* principles have been applied many times by this Court.

4 When deciding whether a receiver who has sold a property has acted properly, a court is to consider and determine:

(a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

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

(d) whether there has been unfairness in the working out of the process.

5 In considering whether the Receiver has made a sufficient effort to get the best price, I note that there has been a thorough and extensive process undertaken to sell the property, and the agreement of purchase and sale finally executed by the Receiver represents a sale at or above fair market value. However, Venti submits in essence that the Receiver acted improvidently on the basis of information Mr. Chandran, the principle of Venti, says was obtained from the sale and leasing agent retained by the Receiver that the Receiver's report in support of the application failed to include material information. Mr. Chandran submits through his counsel that there have been two undisclosed written offers to lease the property in question that would affect approximately half of the vacant space in the building and that could dramatically affect its appraised value.

6 Given the nature of the application, its urgency and the allegations made, I took the unusual step of inviting counsel for the Receiver to respond to this allegation by having the Receiver testify and be subject to cross-examination on this limited issue. I accept the Receiver's testimony, corroborated by that of the Receiver's leasing agent, that he was informed the morning of the application that an existing tenant was expressing some unwritten, informal interest in leasing approximately 2,000 to 4,000 additional square feet. This is not material information that either should have been disclosed in the report or that would affect fair market value. At any rate, the Receiver's conduct is to be examined in light of the information the Receiver had at the time it agreed to accept the offer, which was November 8, 2011. I find that the Receiver made more than a sufficient effort to get the best price for the property and has not acted improvidently. The sale price is not low in relation to the appraised value, there was plenty of time for bids and adequate notice of the sale process.

7 With respect to the interests of the parties, the sale is supported by the major creditor, Computershare Trust Company of Canada. Venti submits that it should not matter to Computershare if a sale of the property is the result of this application or if Venti is able to bring the mortgage into good standing, but Computershare has made it clear that it has lost faith in Venti and that it has a reasonable and valid preference for a sale rather than merely allowing Venti to extinguish the arrears. It points out that the cash flow from the property is insufficient to cover the monthly mortgage payments, and Venti has offered no more than to bring the arrears up to date and cover future mortgage payments for an indeterminate period.

8 It is also important and appropriate to note the interests of the proposed purchaser of the property, which tendered its bid in good faith and presumably at some expense and which opposes Venti's cross-application: *Soundair* at para. 40.

9 There is no issue with respect to the efficacy and integrity of the process by which offers were obtained.

10 With respect to the possibility of unfairness in the working out of the process, Venti suggests that the Receiver was deficient in failing to control or intervene with respect to what it characterizes as unfair behaviour by Computershare in communicating to Venti the amount it would cost to bring the arrears up to date.

11 This objection must be viewed in context. This became a receivership on April 12, 2011. On August 31, 2011, Venti enquired of the Receiver through counsel as to amount necessary to bring the mortgage back into good standing, and "*in theory*" discharge the Receiver.

12 On September 2, 2011, the Receiver's counsel advised of a figure of about $850,000, subject to adjustment, additional interest, additional legal and other expenses, implementation of a realty tax reserve and payment of all receivership costs.

13 On September 29, 2011, in anticipation of a meeting requested by Venti to discuss a possible reorganization, Computershare notified Venti that the amount required to bring the mortgage into good standing would be $1.07 million, plus certain processing and assumption fees, plus additional costs with respect to the receivership, the listing of the property, the property manager and the lender's counsel and subject to additional interest, the implementation of a monthly tax escrow amount and payment of the Silvercrest lease obligation.

14 It was only on October 24, 2011, having received the September 29, 2011 estimate (which was clearly characterized as an estimate) and advice from the Receiver on that date that the Receiver was dealing with interested parties and expected a binding agreement of sale shortly, that Venti's counsel expressed the intention of bringing the mortgage up to date "this week". This email from Venti's counsel repeats the September 29, 2011 estimate, with its references to additional costs.

15 On October 26, 2011, Computershare provided its revised estimate, which incorporated the items that had previously been referenced, including the costs of the receivership, the Silvercrest lease obligation, the costs of the listing and leasing agent, the immediate amount of tax escrow and updated payments due.

16 Computershare advised that Venti should confirm that it would pay these amounts that week. Instead, on October 27, 2011, Venti disputed the amount payable. On November 3, 2011, Computershare provided its explanation of the amounts owing, and reduced the previous amount said to be immediately owing by $65,000.

17 On November 7, 2011, the Receiver received a reorganization proposal from a third party which included the concept of bringing the mortgage into good standing, and considered this proposal together with the two other proposals it had received. On November 8, 2011, the Receiver executed a purchase and sale agreement with the proposed Purchaser.

18 It was not until November 10, 2011 that Venti sent Computershare's counsel $1 million towards the arrears, and then only under unacceptable trust conditions. While another $700,000 was promised to be available during the course of the hearing, it did not materialize.

19 There is nothing in this history that casts doubt on the fairness of the process or the role of the Receiver. The first estimate of payout cost was clearly subject to upward adjustment, and subsequent estimates identified why the payout figure increased over time. Venti had the opportunity to payout the mortgage prior to the Receiver entering into a binding offer subject only to court approval on November 8, 2011, and plenty of warning that the sales process was unfolding and nearing completion.

20 At page 19 of *Soundair*, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers". That concern for the integrity of the process has been expressed in many cases

in Alberta, including by our Court of Appeal: *Bank of Montreal v. River Rentals Group Ltd.*, [2010] A.J. No. 12 (Alta. C.A.) at para. 18.

21 While the concern for the integrity of the process is often expressed in terms of whether it is appropriate to consider a last-minute higher offer to purchase, it is equally important here, where the debtor is not offering a higher amount for the property, nor even to redeem the entire debt, but only to bring the arrears up to date. Venti does not even accept the amount of arrears set by the mortgagee, but asks that there be a subsequent hearing to establish that amount. To accept Venti's proposal would be unfair to the parties who participated in the bidding process in good faith, and the Proposed Purchaser who entered *bona fide* into an agreement with the Receiver. It would lead to the kind of chaos referred to in *Soundair* at para. 30 and would be an unwarranted interference with a properly-run process conducted by the Receiver. Venti had plenty of time in the last 21 months to bring the arrears up to date and avoid the sale, and what it offers now is too little and too late.

22 Venti submits that there is no urgency about this application. I must disagree. As I indicated when I refused an adjournment, I agree with Computershare that there is no reason to delay the application, and considerable prejudice in terms of mounting arrears, a limited recourse loan and little or no equity.

23 Given the decision I have reached, it is not necessary that I consider whether Venti is in effect seeking relief from forfeiture, and if so, whether it is entitled to such relief.

24 The Receiver's application is granted and Venti's cross-application is dismissed.

25 This decision was originally scheduled to be delivered orally the day after the application was heard. At that time, counsel for Venti indicated that his client had changed his position and was prepared to consent to the application. I advised the parties that I would grant an order of sale and would issue subsequent written reasons.

26 If the parties are unable to agree on costs, they may make submissions on that issue.

Application granted; cross-application dismissed.

End of Document

2015 ONSC 5912
Ontario Superior Court of Justice [Commercial List]

8527504 Canada Inc. v. Liquibrands Inc.

2015 CarswellOnt 14887, 2015 ONSC 5912, 258 A.C.W.S. (3d) 467

8527504 Canada Inc., Applicant and Liquibrands Inc., Respondent

8527504 Canada Inc., Applicant and Sun Pac Foods Limited, Respondent

Newbould J.

Heard: June 22, 2015
Judgment: September 28, 2015
Docket: CV-14-10543-00CL, CV-13-10331-00CL

Proceedings: additional reasons at *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 16770, 2015 ONSC 6853, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Sam Rappos, for Applicant
David E. Wires, Krista Bulmer, for Csaba Reider
Anthony J. O'Brien, for BDO Canada Limited, receiver of Sun Pac Foods Limited and Liquibrands Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Bankruptcy and insolvency
VIII Property of bankrupt
VIII.2 Choses in action
VIII.2.a Right of action of bankrupt
VIII.2.a.i General principles
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.c Actions by debtor in receivership

Headnote

Bankruptcy and insolvency --- Property of bankrupt — Choses in action — Right of action of bankrupt — General principles
Related debtor companies L Inc. and S Ltd. brought action under forbearance agreement against secured creditors B Inc. and 852 Inc. — Court ordered sales process to be undertaken by receiver for action — R, sole officer and director and shareholder of debtors, brought motion for order allowing him to control and advance action — Receiver brought motion to approve sale of action to 852 Inc. — R's motion dismissed on other grounds; receiver's motion granted — Authorities in Ontario are to effect that trustee in bankruptcy has power to sell to defendant an action commenced by bankrupt against that defendant — There was no reason not to apply principles from bankruptcy cases to receivership case — Duty of receiver to maximize assets for benefit of all interested stakeholders is no different from duty of trustee in bankruptcy to maximize assets for benefit of all creditors — There was no reason 852 Inc. as creditor of L Inc. and S Ltd. could not bid for action brought by those debtors against 852 Inc., and no reason it could not make credit bid — Sale to 852 Inc. approved.
Debtors and creditors --- Receivers — Actions involving receiver — Actions by debtor in receivership
Related debtor companies L Inc. and S Ltd. brought action under forbearance agreement against secured creditors B Inc. and 852 Inc. — Court ordered sales process to be undertaken by receiver for action — R, sole officer, director and shareholder of L Inc., brought motion for order allowing him to control and advance action — Receiver brought motion to approve sale of

action to 852 Inc., which made credit bid for action — R's motion dismissed; receiver's motion granted — Order sought by R was impermissible collateral attack on order authorizing receiver to conduct sale process for action — There was no reason 852 Inc. as creditor of L Inc. and S Ltd. could not bid for action brought by those debtors against 852 Inc., and no reason it could not make credit bid — Only party that had interest in action apart from 852 Inc. was R, and he made nominal bid which was far lower than bid of 852 Inc. — Sale to 852 Inc. approved.

MOTION by officer and director of companies for order allowing him to control and advance action brought by companies; motion by receiver to approve sale of action to numbered company.

***Newbould J.*:**

1 The history of this matter is set out in my previous endorsement of December 4, 2014 and need not be repeated here. In that decision I ordered that a sales process be undertaken by the Receiver for an action previously commenced by Liquibrands and Sun Pac under the Forbearance Agreement against Bridging Canada Inc. ("Bridging") and 8527504 Canada Inc. ("852") (the "Action").

Csaba Reider motion

2 Mr. Reider is the sole officer, director and shareholder of Liquibrands. Reider was the sole officer and director of Sun Pac. He moves for an order that would permit him to control and advance the Action. In particular, he requests an order (i) that he, as the sole director of Liquibrands be granted leave to vote Liquibrands shares in Sun Pac to elect him as a director of Sun Pac for the purpose of advancing the Action, and (ii) that he is entitled to control the Action on behalf of Liquibrands and Sun Pac under the residual authority of the directors of the companies.

3 Mr. Reider relies on authority that a receiver of a debtor is not authorized to be involved in litigation by the debtor against the secured creditor that caused the receivership as there would be a conflict of interest on the part of the Receiver and that control of such litigation is one of the residual powers remaining in the directors of the debtor. See *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.*, 2007 NLCA 7 (N.L. C.A.) and *Inyx Canada Inc., Re*, [2007] O.J. No. 3846 (Ont. S.C.J.).

4 Mr. Reider also relies on an *obiter* statement of Ground J. in *1239745 Ontario Ltd. v. Bank of America Canada*, [1999] O.J. No. 3178 (Ont. S.C.J.) that security that gives a secured creditor the right to pursue actions brought by the debtor should not be interpreted to cover actions of the debtor against the secured creditor. Ground J. stated:

> 74 I accept the submissions of the plaintiff that security agreements must be interpreted in accordance with general principles of contractual interpretation and, as commercial contracts, must be interpreted so as to avoid commercial absurdity. ... In keeping with this principle, if a security agreement gives the lender the right, upon default, to pursue causes of action belonging to the debtor, it should be interpreted to apply to causes of action against third parties and not causes of action against the lender itself. To interpret it as including causes of action against the lender itself would be absurd and manifestly unfair as it would grant lenders an absolute shield in their dealings with debtors with whom they have entered into a general security agreement and would have the effect of precluding virtually all lender liability actions where the lender holds a general security agreement.

5 The difficulty with these submissions is that the order sought by Mr. Reider is directly contrary to the order of December 4, 2014 in which the Receiver was authorized to conduct a sale process for the Action. That order was upheld by Feldman J.A. who denied leave to appeal from that order. The arguments now made by Mr. Reider were not advanced on the motion leading to the order of December 4, 2014 or in the motion for leave to appeal to the Court of Appeal. Mr. Reider has been involved in these proceedings as an active participant. He is a privy to both Liquibrands and Sun Pac. What Mr. Reider seeks amounts to an impermissible collateral attack on the order of December 4, 2014. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.), para. 72 and *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), para. 19. The order of December 4, 2014 is a final order and is a matter of *res judicata* and issue estoppel to the parties and their privies, one of whom is Mr. Reider.

6 Mr. Reider says that the order of December 4, 2014 directing a sales process for the Action was not a head of relief sought by 852 in its motion material leading to that order. It was, however, raised in the supplementary factum filed on behalf of 852 and it was thoroughly argued. No request for an adjournment was made at the time by Mr. Wires on behalf of Liquibrands and Sun Pac to deal with the point. The point was raised by Liquibrands and Sun Pac in their factum on their application to the Court of Appeal for leave to appeal from the December 4, 2014 order, but leave to appeal was denied. I see no basis for the point to be argued now.

7 Mr. Reider was aware that the Receiver was interested in selling the Action. In its second report, the Receiver stated:

> 52. The Receiver neither has the funding nor sufficient knowledge of the history or allegations to pursue [the Action].
>
> 53. The Receiver has contacted Liquibrands through its counsel, Wires Jolly LLP, to enquire about Csaba Reider and/or Liquibrands' interest in purchasing the [Action]. To date, the Receiver has not received a response.

8 In argument, Mr. Wires conceded that his client never expressed to the Receiver an interest in pursuing the litigation. Whether or not this was a tactical decision, it is now too late to be seeking control of the Action other than by way of a bid in the sales process previously ordered.

9 In all of the circumstances, the motion by Mr. Reider is dismissed.

Sale approval motion

10 The Receiver moves to approve the sale of the Action to 852, which made a credit bid. Mr. Reider opposes the approval and takes the position that 852 was not entitled to bid for the Action in the sale process directed by the December 4, 2014 order.

11 In my endorsement of December 4, 2014, I held that the Receiver should be permitted to market the Action in a marketing process. I further stated that no specific marketing process had been proposed and that the receiver should propose a marketing process and Sun Pac and Liquibrands could consider whether it was agreeable to the marketing process proposed. If there was agreement to the marketing process, it could be included in the order to be signed. If there was no agreement, a further attendance to settle it could be arranged at a 9:30 a.m. conference. In the end, the order was settled at a 9:30 a.m. conference.

12 The parties were in agreement with the terms of the order directing a sales process for the Action except with respect to subparagraph 9(e), which as drafted stated that 852 could be an offeror and could make its offer by way of a credit bid or otherwise. Mr. Wires for Liquibrands and Sun Pac objected to that provision. In the end, it was agreed to make an addition to the subparagraph to make it without prejudice to the parties' rights. The subparagraph read:

> (e) 8527504 Canada Inc. may be an offeror and may make its offer by way of a credit bid or otherwise, without prejudice to any party to oppose the right of 8527504 Canada Inc. to make an offer or to oppose any offer made.

13 In accordance with the order, the Receiver notified all parties on the service list of the sales process and the opportunity to purchase the Action. Two bids were received. One was a cash bid for $100 from a company named Liquid Brands Inc. signed by Mr. Reider as president of that company. The other was from 852 with a purchase price of $1 million by way of a credit bid. The Receiver stated in its report:

> Given that 852'scredit bid offer was substantially higher than the offer received from Liquid Brands Inc., it is the Receiver's recommendation that this Honourable Court approve 852's offer...

14 Mr. Reider relies on a passage from the decision of Feldman J.A. refusing leave to appeal the order of December 4, 2014 in which she stated:

> [15] Before concluding these reasons, I add the following. On the motion as argued, I did not understand Liquibrands to be objecting to the procedure for the marketing of the lawsuit, in the event that its request that a separate receiver be

> appointed to pursue the lawsuit was rejected. I raised some issues in oral argument regarding the propriety of that procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

15 The authorities in Ontario are to the effect that a trustee in bankruptcy has the power to sell to a defendant an action commenced by the bankrupt against that defendant. In *Almadi Enterprises Inc., Re*, 2014 ONSC 1020 (Ont. S.C.J. [Commercial List]), RBC was an assignee from the defendant in an action commenced by the debtor before its bankruptcy. RBC made an offer to pay the trustee $65,000 in return for an assignment of the trustee's interest in the action. The effect of the offer if accepted would mean the end of the litigation. The trustee informed all creditors of the offer. No other offer was received. Brown J. (as he then was) approved the actions of the trustee and the sale to RBC, and in so doing stated:

> The Trustee was required to maximize the realization of the assets of the bankrupt's estate for the benefit of all interested parties. Its interest in the AEI action was one such asset. When faced with an offer by one entity to purchase that asset, though what, in effect, would be a settlement of AEI's claim in that action, the Trustee put in place a bidding process which would enable any other person to acquire its interest in the AEI Action. By exposing that chose in action to a larger market, the Trustee sought to maximize the amount it secured for that asset.

16 In *Katz, Re* (1991), 6 C.B.R. (3d) 211 (Ont. Bktcy.), the trustee invited sealed tenders for an action commenced by the bankrupt. The purchaser of the lawsuit was a company owned by one or more defendants in the action. The trustee accepted the offer of the company, which essentially resulted in a settlement of the lawsuit in the amount of the purchase price. In dismissing the bankrupt's motion to set aside the sale, Farley J. stated:

> While Katz may complain that the purchaser in this case merely wants to eliminate the action, I do not see this as improper on their part. It is a legitimate business consideration to resolve a lawsuit (which may or may not have merit and which may, if meritorious, expose the defendants to financial risk of some degree but will involve some unrecoverable expense in the litigation process, some imposition on the time of witnesses and the uncertainties of litigation) at the least cost.

17 In *Watt v. Beallor Beallor Burns Inc.* (2004), 1 C.B.R. (5th) 141 (Ont. S.C.J.) the bankrupt commenced an action against various Beallor interests. The trustee applied for directions as to whether he could assign the action to Beallor under section 38 of the BIA. Farley J. held that he could, stating:

> When a creditor is proceeding under s. 38, even if the creditor is a defendant in the action, the creditor can join in as a plaintiff and participate, even though this will mean that the creditor will be both a plaintiff and defendant in the action: see *Carex Distributors Inc., Re*(1981), 43 C.B.R. (N.S.) 209 (Ont. C.A.).

18 In this case, there is no bankruptcy but rather a receiver. I see no reason however not to apply the principles from these bankruptcy cases to a receivership case. The duty of a receiver to maximize the assets for the benefit of all interested stakeholders is no different from the duty of a trustee in bankruptcy to maximize the assets for the benefit of all creditors. I see no reason why 852 as a creditor of Liquibrands and Sun Pac cannot be a bidder for the Action brought by those debtors against 852.

19 Mr. Reider contests the right of 852 to make a credit bid.

20 Credit bids by secured creditors are widely used now in Canadian insolvency proceedings. In *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List]), Morawetz J. (as he then was) stated:

> 38. It is well established in Canada insolvency law that a secured creditor is permitted to bid its debt in lieu of providing cash consideration.

21 In this case, after the distribution of funds to 852 pursuant to the order of December 4, 2014, 852 is still owed in excess of $3.5 million. The reduction of the indebtedness owed to 852 by the $1 million credit bid will still leave a shortfall. If the

bid by 852 were a cash bid of $1 million, that money would be required to be paid by the Receiver to 852. In *Elleway*, the situation was the same and Morawetz J. stated:

> 40. ... 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.

22 I do not see in this case any argument that a credit bid should not be allowed. It cannot be said that the credit bid by 852 had a chilling effect on would-be bidders deterring potentially interested parties from submitting a bid. The person most knowledgeable of the Action, Mr. Reider, made a bid on only a nominal amount. It could not be expected that unconnected and unrelated third parties would be interested in bidding on the litigation since they would need the full cooperation and participation of the principals of the company to successfully pursue it, and the agreed sales process that provided for notice to be given just to parties on the service list was a reflection of that reality.

23 Mr. Reider raises an issue regarding the value of the underlying asset being sold, i.e. the value of the Action in which $100 million has been claimed by Liquibrands and Sun Pac against 852 and Bridging. He contends that the Action should be valued in order to compare its value to the bid by 852, taking into account the *Soundair* principles to be applied in considering the approval of a sale of an insolvent's assets by a receiver, and that the only way to value it is to permit the action to proceed to a trial. If that were the case, the sales process ordered on December 4, 2014 could not proceed as it would require the action to be prosecuted by someone such as Mr. Reider, a result that I have rejected.

24 The *Soundair* principles deal with the steps taken by a receiver to market the assets being sold in order to be satisfied that the sale for which approval is sought was fair and reasonable. In this case, the sales process was agreed. There is no suggestion that the time given to respond was insufficient. As a practical matter, the only party that had an interest in the Action apart from 852 was Mr. Reider, and he made a bid which was lower than 852's bid. He was the person who had the most knowledge of the merits of the Action and he could have chosen to bid higher than $100. His bid may have been tactical in the hope that the bid of 852 would be knocked out on legal grounds, but whether that is so, Mr. Reider has to live with the consequences.

25 In the circumstances, the sale to 852 is approved. The Receiver may execute any further documentation required to complete the sale. There shall be a vesting order vesting all right, title and interest of Sun Pac and Liquibrands in the Action to 852 in the form provided.

Other issues

26 The Receiver's activities set out in its report dated June 2, 2015 are approved, as are the fees and disbursements of the Receiver and its counsel as set out in that report.

27 The Receiver and 852 are entitled to their costs. If costs cannot be agreed, brief written submissions may be made within 10 days along with appropriate cost outlines and Mr. Reider shall have 10 days to deliver brief written submissions in reply.

Motion by officer and director dismissed; receiver's motion granted.

2015 ONCA 916
Ontario Court of Appeal

8527504 Canada Inc. v. Sun Pac Foods Ltd.

2015 CarswellOnt 19752, 2015 ONCA 916, 261 A.C.W.S. (3d) 986, 344 O.A.C. 115

8527504 Canada Inc. (Responding Party / Applicant) and Sun Pac Foods Limited (Respondent)

Application under Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C. 43

8527504 Canada Inc. (Responding Party / Applicant) and Liquibrands Inc. (Respondent)

K. van Rensburg J.A., In Chambers

Heard: December 1, 2015
Judgment: December 23, 2015
Docket: CA M45642, M45643

Proceedings: refusing leave to appeal *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 16770, 2015 ONSC 6853, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 14887, 2015 ONSC 5912, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: David E. Wires, Krista Bulmer, for Moving party, Csaba Reider
Harvey Chaiton, for Responding party, 8527504 Canada Inc.
Anthony J. O'Brien, for Responding party, BDO Canada Limited, court-appointed receiver of Sun Pac Foods Limited and Liquibrands Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.a Res judicata
XXII.23.a.vi Persons subject to
XXII.23.a.vi.C Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.b Application
XXIII.10.b.ii Grounds

Headnote

Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Res judicata — Persons subject to — Miscellaneous

Related debtor companies brought action under forbearance agreement against two secured creditors — Companies went into receivership — Judge case-managing receivership issued orders, directing process for sale of such action which could include creditor offering credit bid — Company's motion for leave to appeal orders was dismissed — Receiver's motion to approve sale of action to secured creditor was granted and motion by principal of companies for order allowing him as director of companies to control and advance action was dismissed — Costs were awarded to receiver and creditor — Principal brought motion for

leave to appeal — Motion dismissed — Main issue as to receiver's entitlement to market and sell court action was already determined by earlier orders — Fact that challenge was now made by principal rather than by companies themselves, raising new arguments as to why action did not form part of lenders' security, was immaterial — Principal was privy to receivership proceedings throughout and was bound by earlier determination that receiver was empowered to deal with, market, and sell action — To extent that principal raised any new issue not decided, he had not met test for leave to appeal — In order to advance appeal of issue respecting residual authority of director to pursue action by company in receivership, principal would have to overcome conclusion that receiver's right to sell action was res judicata — As he could not do so, there was no prima facie merit in proposed appeal — Principal's actions amounted to attempt to relitigate what was already decided — Principal was fully involved in proceedings and had opportunity to challenge receiver's right to sell action on whatever basis he saw fit to advance, including this new argument.

Civil practice and procedure --- Practice on appeal — Leave to appeal — Application — Grounds

Related debtor companies brought action under forbearance agreement against two secured creditors — Companies went into receivership — Judge case-managing receivership issued orders, directing process for sale of such action which could include creditor offering credit bid — Company's motion for leave to appeal orders was dismissed — Receiver's motion to approve sale of action to secured creditor was granted and motion by principal of companies for order allowing him as director of companies to control and advance action was dismissed — Costs were awarded to receiver and creditor — Principal brought motion for leave to appeal — Motion dismissed — Principal was privy to receivership proceedings throughout and was bound by earlier determination that receiver was empowered to deal with, market, and sell action — To extent that principal raised any new issue not decided, he had not met test for leave to appeal — Proposed issue, as raised in this case, of whether receiver could sell debtor's action to defendant by way of credit, had no prima facie merit — Principal offered no principled reason why motions judge erred — Principal simply reiterated his earlier objections to receiver dealing with and selling action — As leave to appeal orders was refused, there was no need to address request for leave to appeal costs order.

MOTION by principal of debtor companies for leave to appeal from judgments reported at *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 ONSC 5912, 2015 CarswellOnt 14887 (Ont. S.C.J. [Commercial List]) and *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 ONSC 6853, 2015 CarswellOnt 16770 (Ont. S.C.J. [Commercial List]), granting receiver's motion to approve sale of companies' action to defendant creditor and awarding costs.

***K. van Rensburg J.A., In Chambers*:**

A. Overview

1 This is a motion for leave to appeal two orders of Newbould J. (the "motions judge") dated September 28, 2015 ("the September 2015 Orders") in two related receiverships — of Sun Pac Foods Limited ("Sun Pac") and of Liquibrands Inc. ("Liquibrands"). The applicant, Csaba Reider, also seeks leave to appeal the costs order of November 5, 2015, if leave is granted in respect of the September 2015 Orders.

2 The motion is brought under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). Leave to appeal is discretionary and the court must take a flexible and contextual approach. In deciding whether to grant leave, the court must consider (a) the general importance of the issues for appeal to the practice in bankruptcy and insolvency matters or to the administration of justice as a whole; (b) whether the proposed appeal is *prima facie* meritorious; and (c) whether proceeding with the proposed appeal would unduly hinder the progress of the bankruptcy or insolvency proceedings: *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

3 For the reasons that follow, the motion for leave to appeal the September 2015 Orders is dismissed.

4 Essentially, I have concluded that the main issue that the moving party Csaba Reider wishes to put before this court — whether the receiver was entitled to market and sell a court action commenced by Sun Pac and Liquibrands prior to their receiverships (the "Action") — was already determined by an earlier order of Newbould J., the judge case managing the receiverships. This court previously denied leave to appeal that earlier order.

5 The fact that the challenge is now made by Mr. Reider, as the director of Liquibrands and former director of Sun Pac, and not by Liquibrands itself, raising new arguments as to why the Action does not form part of the lenders' security and cannot be sold by the receiver, is immaterial. Mr. Reider was privy to the receivership proceedings throughout and is bound by the earlier determination that the receiver was empowered to deal with, and to market and sell, the Action.

6 To the extent that Mr. Reider raises a new issue that was not decided by the earlier orders — whether the credit sale of the Action to a defendant to that action ought to have been approved by the court — he has not met the test for leave to appeal that decision to this court.

B. The Companies, The Action and The Receiverships

7 Sun Pac was a manufacturer of beverages, croutons and breadcrumbs. In November 2011, Sun Pac was acquired by Liquibrands Inc. ("Liquibrands"), a company owned by Mr. Reider.

8 8527504 Canada Inc. ("852") is Sun Pac's senior secured lender and was owed approximately $4 million when the Sun Pac receivership proceedings were commenced.

9 Sun Pac's debt to 852 was guaranteed up to the amount of $1 million by Liquibrands. Liquibrands is also a secured creditor of Sun Pac, and is owed approximately $2.6 million.

10 On 852's application, which was not opposed, BDO Canada Limited ("BDO") was appointed receiver of Sun Pac on November 12, 2013.

11 Earlier on the day that the order appointing the receiver was granted, Sun Pac and Liquibrands commenced the Action in the Superior Court of Justice, against 852 and Bridging Capital Inc. (together, the "Lender Defendants").

12 The Action alleges, essentially, that the Lender Defendants were in breach of their obligations to Sun Pac and Liquibrands under a forbearance agreement, and caused the failure of Sun Pac and its inability to pay the Lender Defendants and other creditors. The Action claims more than $100 million in damages.

C. The December 2014 Orders

13 On December 4, 2014, Newbould J. made three orders (the "December 2014 Orders"). The orders:

- approved the reports of BDO as receiver of Sun Pac, and permitted the receiver to pay the amount realized on the assets of Sun Pac to 852, on account of its first ranking security interest, rejecting the argument by Liquibrands that the funds should be paid into court pending the determination by trial of the issues raised in the Action;

- appointed BDO as receiver of all of the property, assets and undertaking of Liquibrands following its default on the $1 million guarantee of Sun Pac's debt to 852, rejecting Liquibrands' argument that no receiver should be appointed pending the outcome of the Action; and

- refused the request by Liquibrands that a different receiver be appointed over the "remaining assets" of Sun Pac for the purpose of advancing the Action.

14 Pursuant to the motions judge's December 4th endorsement, the receiver was to propose a marketing process for the sale of the Action that would be settled by the court absent agreement. Counsel for 852, the receiver and Liquibrands negotiated and agreed to the terms for the marketing process which were included in an order in the Sun Pac receivership as well as the order appointing BDO as receiver of Liquibrands. The terms included the following:

> (d) the Action is being offered for sale subject to the terms and conditions set out in the [Asset Purchase Agreement prepared by BDO]...;

(e) [852] may be an offeror and may make its offer by way of credit bid or otherwise without prejudice to any party to oppose the right of [852] to make an offer or to oppose any offer made;

. . .

(g) the sale of the Action shall be conditional upon [court] approval of same...

D. The First Motion for Leave to Appeal

15 Liquibrands' motion for leave to appeal the December 2014 Orders was dismissed on April 2, 2015.

16 In its motion for leave, Liquibrands asserted, among other things, that the motions judge erred "in finding that the Action was collateral [under 852's security] and "in ordering BDO to conduct a marketing process for the sale of the Action".

17 Feldman J.A., sitting in chambers, noted in her endorsement that the issue of importance asserted for appeal was "whether the lender should be entitled to profit from its breach of the forbearance agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it". She noted that Liquibrands wanted to see the Action continued and concluded before the rights of the parties to the proceeds of the receivership were finally determined.

18 Feldman J.A. concluded that to proceed as proposed by Liquibrands would turn the process inside out, allowing the debtors, through a funded receiver, to use the funds realized in the receivership to fund their action rather than to pay 852. She found that the December 2014 Orders were grounded in law and reason, and were based on the facts and the documents presented. She concluded that the orders were owed deference.

19 After noting that Liquibrands was not objecting to the procedure for marketing the Action in the event that its request that a separate receiver be appointed to pursue the lawsuit was rejected, Feldman J.A. observed, at para. 15:

> ...I raised some issues in oral argument regarding the propriety of [the marketing] procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

E. The Sale Process

20 The receiver then marketed the Action, following the process set out in the December 2014 Orders. The deadline for receipt of offers was May 15, 2015. Two offers were received: a cash offer for $100 from "Liquid Brands Inc.", signed by Mr. Reider as president, and a credit bid from 852 for $1 million. The receiver accepted 852's offer, subject to court approval.

F. The Next Set of Motions

21 After making his offer, but before the bids were opened, Mr. Reider served a notice of motion seeking an order permitting him to advance the Action under the "residual authority" of the directors of the companies. He proposed to pledge the assets of Liquibrands not covered under the receivership order as security for costs of the Action. In the alternative, he sought an order prohibiting 852 from bidding to purchase the Action.

22 Mr. Reider argued that it would be a conflict of interest for a receiver of a debtor to be involved and in control of litigation by the debtor against the secured creditor that caused the receivership, and that such litigation can be pursued under a director's residual powers: see *Maple Leaf Foods Inc. v. Markland Seafoods Limited*, 2007 NLCA 7, 279 D.L.R. (4th) 682, and *Re Inyx Canada Inc.* (2007), 36 C.B.R. (5th) 154, [2007] O.J. No. 3846 (S.C.).

23 The receiver moved for court approval of the sale of the Action to 852, and the motions were argued together on June 22, 2015.

G. The September 2015 Decision and Orders

24 In the September 2015 Orders, the motions judge dismissed Mr. Reider's motion, and approved the sale of the Action to 852.

25 The motions judge held that the order sought by Mr. Reider was directly contrary to the December 2014 Orders which authorized the receiver to conduct a sale process for the Action, and in respect of which leave to appeal was denied. Having been involved in the proceedings as an active participant and as a privy to both Liquibrands and Sun Pac, Mr. Reider was bound by the earlier orders.

26 The motions judge also dismissed Mr. Reider's argument that he was not bound because the December 2014 Order directing a sale process for the Action was not a head of relief sought by 852 in its motion material leading to that order. The receiver's right to sell the Action had been raised in 852's supplementary factum and thoroughly argued before the motions judge and in the earlier leave to appeal motion. Nothing in the decision refusing leave to appeal preserved any right to challenge the sale process that had been agreed on, and approved by the court.

27 The motions judge then considered Mr. Reider's objection to 852 as a purchaser. He referred to various cases recognizing the power of a trustee in bankruptcy to sell to a defendant an action commenced by the bankrupt against that defendant, even where it meant that the sale would end the litigation: see *Re Almadi Enterprises*, 2014 ONSC 1020, 12 C.B.R. (6th) 162; *Re Katz* (1991), 6 C.B.R. (3d) 211, [1991] O.J. No. 1369 (Ont. Gen. Div.), *Watt v. Beallor Beallor Burns Inc.* (2004), 1 C.B.R. (5th) 141, [2004] O.J. No. 450 (Ont. S.C.) He saw no reason not to apply the principles from these bankruptcy cases to a receivership, concluding that the duty of a receiver to maximize the assets for the benefit of all interested stakeholders is no different from the duty of a trustee in bankruptcy to maximize the assets for the benefit of all creditors.

28 The motions judge approved the sale of the Action to 852 by credit bid. It could not be said that the credit bid by 852 deterred potentially interested parties from submitting a bid. The person most knowledgeable about the Action, Mr. Reider, bid only a nominal amount, and it could not be expected that unconnected and unrelated third parties would be interested in bidding on the litigation since they would need the full cooperation and participation of the principals of the company to pursue it successfully. The agreed sale process that provided for notice to be given just to parties on the service list was a reflection of that reality. The credit bid was acceptable, as whether 852 bid cash or credit, it would sustain a shortfall in the receivership.

29 After receiving written submissions, the motions judge awarded costs against Mr. Reider and in favour of 852 in the amount of $27,500, and in favour of the receiver in the sum of $6,000, plus HST. He rejected Mr. Reider's argument that costs should not be awarded against him personally but against Liquibrands, for whose benefit he claimed to be acting in bringing his motion and opposing the receiver's motion.

H. Analysis

30 The applicant acknowledges that the motions judge's orders made in the course of the receiverships are entitled to deference. The applicant asserts that the proposed appeal raises important legal questions, and is *prima facie* meritorious. I note that in this case, the third part of the *Pine Tree Resorts* test is not at issue, as there is no question of delaying the progress of the substantially completed receiverships.

31 The applicant asserts that the proposed appeal raises two important issues of interest to insolvency practitioners and the administration of justice in general. The first concerns a director's "residual right" to pursue an action that belongs to a company in receivership. The second is whether a court-appointed receiver can sell an action by the company in receivership to a defendant to that action.

(1) The First Issue

32 In order to advance an appeal on the issue respecting the residual authority of a director to pursue an action by a company in receiver, the applicant must overcome the conclusion that the receiver's right to sell the Action was *res judicata*, as the

December 2014 Orders were binding on him. That he cannot do. As such, there is no *prima facie* merit in Mr. Reider's proposed appeal on this issue.

33 The receiver's right to sell the Action was determined by the December 2014 Orders, and provided for a specific and agreed upon sale process. The only issue left open was court approval of any sale, including the right to challenge 852 as a bidder and purchaser of the Action.

34 There is no merit to Mr. Reider's argument that the December 2014 Orders are not binding because the receiver never moved before the court for authority to sell the Action.

35 That argument, as well as several other points advanced by Mr. Reider, were addressed in the earlier motion for leave to appeal, including: that the Action could not be collateral or property used in the business of Sun Pac for the purposes of the receivership, that an action by a debtor against a lender does not form part of the lender's security, and whether the court erred in directing BDO to sell the Action.

36 Further, I agree with the motions judge's rejection of Mr. Reider's argument based on the passage noted above from the decision refusing leave to appeal from the December 2014 Orders. Feldman J.A. noted that the parties (including Liquibrands) had *agreed* to the sale process, and that the dismissal of leave to appeal should not be interpreted as the court's *endorsement* of all aspects of the sale process. Her order refused leave to appeal the orders authorizing the receiver to deal with and to sell the Action. What was left open was not a further challenge to the entire sale process, but, a challenge to court approval of the sale (as per the terms agreed between the parties), including 852 as a bidder or purchaser.

37 Mr. Reider relies on provisions in the receivership orders that permit "any interested party" to apply to the court to vary or amend the orders, as well as the general ability of the court to review, rescind or vary any order under its bankruptcy jurisdiction, pursuant to s. 187(5) of the BIA.

38 What Mr. Reider is seeking goes far beyond the variation of an order, and amounts to an attempt to relitigate what was already decided. Mr. Reider is bound by the December 2014 Orders. He was fully involved in the receivership proceedings and had notice of everything that occurred. He had the opportunity to challenge the receiver's right to sell the Action on whatever basis he saw fit to advance. As the company's only director, he was the deponent of the affidavits filed by Liquibrands in the earlier motions. Whatever the potential merits of Mr. Reider's new argument respecting his rights as a director in relation to an action commenced by a company in receivership, he lost the opportunity to make such arguments when the motions judge ordered the sale of the Action, and approved a sale process agreed to between the parties.

(2) The Second Issue

39 The second proposed issue for appeal is whether a receiver can sell the debtor's action to a defendant to that action, and whether the sale can be by way of credit.

40 The issue, as raised in this case, has no *prima facie* merit.

41 First, once the motions judge determined that the receiver had the right to sell the Action, the parties agreed to the sale process — essentially, they agreed that the Action would be auctioned after notice to the companies' creditors. Mr. Reider does not object to the process, but only to the approval of a sale to 852.

42 The motions judge relied on case law that authorizes a court officer to sell a cause of action by a debtor against a creditor to such creditor, whether by credit bid or otherwise. Mr. Reider offers no principled reason why the motions judge erred in applying bankruptcy cases to the sale in a receivership of a court action to a defendant.

43 In this case, the sale process was agreed upon and approved in the December 2014 Order. The question then was whether the court should approve the sale. No issue is taken by Mr. Reider to the motions judge's consideration of the sale under the governing principles articulated in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). The motions judge

supported the receiver's recommendation as a proper business decision. He considered the potential effect of 852 being a bidder, and the net benefit to the receivership resulting from a credit bid.

44 Further, Mr. Reider did not demonstrate any real interest in pursuing the Action. As early as April 2014, the receiver had inquired whether Liquibrands or Mr. Reider was interested in purchasing Sun Pac's interest in the Action, and had received no response. Likewise, for more than a year after the Action was commenced, and before BDO was appointed receiver of Liquibrands, Mr. Reider had done nothing to advance the Action. As such, there was nothing to suggest that Mr. Reider's bid for $100 was anything other than a reflection of his presumed value of the Action. For any different result, the court would have to be satisfied that there was some value to the Action beyond what 852 was owed.

45 In any event, the bulk of the arguments Mr. Reider raises in objecting to 852's purchase of the Action simply reiterate the earlier objections to the receiver dealing with and selling the Action. No other reasons are advanced for why a sale to 852 should not be approved.

I. Disposition

46 For these reasons, the motion for leave to appeal the September 2015 Orders is dismissed.

47 As leave to appeal the September 2015 Orders is refused, there is no need to address Mr. Reider's request for leave to appeal the costs order dated November 5, 2015. This too is dismissed.

48 The moving party, Mr. Reider, shall pay 852 its costs fixed at $15,000, and BDO's costs fixed at $10,000, both amounts inclusive of disbursements and applicable taxes.

Motion dismissed.

2000 ABQB 766
Alberta Court of Queen's Bench

Cobrico Developments Inc. v. Tucker Industries Inc.

2000 CarswellAlta 1211, 2000 ABQB 766, [2000] A.J. No. 1295, [2001] A.W.L.D. 349, 273 A.R. 297

Cobrico Developments Inc., Plaintiff and Tucker Industries Inc. and Tucker Enterprises Corp., Defendants

Lee J.

Heard: October 25, 2000
Judgment: November 1, 2000
Docket: Edmonton 0003-17053

Proceedings: additional reasons at 2000 ABQB 817 (Alta. Q.B.)

Counsel: *Richard N. Billington*, for Receiver/Manager.
Barry M. King and *Kevin Ozubko*, for Unnamed party, Ritchie Bros. Auctioneers (Canada) Ltd.
Thomas R. Benson, for Unnamed party, All Peace Auctions Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Personal property security --- Remedies — Sale or realization — Miscellaneous issues

Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.

Receivers --- Conduct and liability of receiver — General conduct of receiver

Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.

APPLICATION by receiver for order permitting disposition of assets by public sale.

***Lee J.*:**

1 On September 7, 2000, my colleague, Lefsrud, J., appointed Myers Norris & Penny Limited (hereinafter referred to as the "Receiver") to be the Receiver and Manager with respect to the property and assets of the Defendants Tucker Industries Inc. and Tucker Enterprises Corp. (hereinafter referred to as ("Tucker").

2 On Wednesday, October 25, 2000, the Receiver made an Application before me for an Order pursuant to s. 60 of the *Personal Property Security Act* (hereinafter referred to as the "PPSA") permitting the disposition by public sale of assets of the Defendants, and for an Order pursuant to s. 60(15) of the *Act* permitting the disposition of collaterals secured by a charge under the *Act* without notice to the debtor, or to any person with an interest in the collateral.

3 Cobrico Developments Inc. ("Cobrico") was the petitioning creditor in this matter

4 Ritchie Bros. Auctioneers (Canada) Ltd. [hereinafter referred to as "Ritchie Bros."] was one of the three auction houses that had been approached by the Receiver/Manager to submit a proposal with respect to Tucker on approximately October 13, 2000. Their proposal with respect to Tucker, dated October 17, 2000, provides for a gross guarantee of two million dollars, a 12% commission of $240,000.00, for a net of $1.76 million dollars. With respect to proceeds over two million dollars, 88% would go to the debtor's estate, and 12% would be retained by Ritchie Bros.

5 Ritchie Bros. and Century Sales Inc. were the unsuccessful public auction houses not chosen to dispose of the debtor's estate. All Peace Auctions Ltd. [hereinafter referred to as "All Peace"] based in Grande Prairie was the successful auction house chosen by the Receiver/Manager.

6 Ritchie Bros. now comes before this Court and objects to both the bid process used by the Receiver/Manager and to the conclusions it reached, and wishes to submit a revised bid based on a fair process that it submits was not present in the first place.

7 Ritchie Bros. alleges that certain material information was not supplied to it (that was supplied to All Peace), and submits that as a result of this, the creditors of Tucker will not benefit as much as they could if the present proposed Order sought by the Receiver/Manager is granted. Ritchie Bros. also argues that the Receiver's Grande Prairie office provides accounting and audit services over many years to All Peace constituting a real or apparent conflict of interest on the part of the Receiver/Manager.

8 The Receiver/Manager strongly objects to Ritchie Bros.'s intervention, describing it as nothing more than "vexatious intermeddler", for the purposes which include determining essentially what the competing auction house bids were. The Receiver/Manager submits that Ritchie Bros. has absolutely no standing in this matter and should not be heard.

9 The General Manager of All Peace, Kevin Tink, disputed many of Ritchie Bros's claims with respect to the bidding process, and described their state of preparedness for the proposed mid-November, 2000 public auction in an Affidavit filed October 27, 2000. Further, Mr. Tink claimed that Ritchie Bros. was also involved in a similar last-minute intervention, or inter-meddling, with respect to a Calgary matter that was similar to the present Application before me, in the matter of Serval Corporation.

10 The Receiver/Manager argues that any delay in this matter would be very prejudicial to all parties involved (with the possible exception of Ritchie Bros.) because of the fact that the equipment of Tucker essentially is oil and gas drilling equipment for which there is primarily a market before drilling season commences. Therefore, the mid-November auction of this equipment is essential. It is estimated that approximately ten million dollars will be received from this auction.

The Law

11 Ritchie Bros. submits *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) to support its argument that it has standing before me. At paragraph 18, Hart JA indicates that there is no merit to the suggestion that the unsuccessful bidders have no standing:-

> A preliminary question was raised as to whether Mr. Treby or Mr. Cameron had any right to appear at the original hearing before Burchell, J., or any status which would enable them to appeal from his decision, but, in my opinion, there is no merit

in such a suggestion. Both parties were persons to be affected directly by the decision of the court and, in my opinion, were proper parties to the proceedings.

12 *Cameron*, supra, was followed by the Alberta Court of Appeal in *Salima Investments Ltd. v. Bank of Montreal* (1985), 21 D.L.R. (4th) 473 (Alta. C.A.). *Salima* involved an appeal of an Order approving the sale of property by a receiver. The appellant had submitted the highest tender and, subject to court approval, the receiver had agreed to convey the property to the appellant. A higher offer was submitted; by another party prior to the motion for approval. The motion was adjourned and the appellant and two other parties submitted bids. The chambers judge directed the receiver to complete the sale to the party that submitted the highest offer.

13 Kerans, J.A. concluded that the Court had jurisdiction to consider other offers on the motion to approve the sale, and could conduct what was, in essence, a judicial auction. No issue was raised as to the standing of Salima Investments Ltd., as an unsuccessful bidder, to appeal.

14 Ritchie Bros. submits that the *Salima* case makes it clear that the Court has jurisdiction to exercise judicial discretion and consider other offers as well as to direct an alternative process. In *Salima*, Kerans J.A. states the following at pages 466-467:-

> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has mad a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the court may consider. As Macdonald J.A. said in the ***Cameron*** case at pp. 11-2:
>
> > There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

15 It is submitted that this is not a total catalogue of those factors which might lead a court to refuse to approve a sale. In *Salima*, supra, the Court concluded the following at page 477:-

> We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while always in good faith - had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 The factors in the case at bar that Ritchie Bros. object to as against the Receiver/Manager include:-

(a) The longstanding accountant/client relationship between the Receiver/Manager and All Peace raises an appearance or potential of conflict on the part of the Receiver;

(b) All Peace had an advantage in terms of access to information, the assets and to the Receiver/Manager;

(c) The Receiver/Manager may have made the decision to engage All Peace prior to receipt of the proposal of Ritchie Bros.;

(d) The asset and equipment list used by the Receiver/Manager to request proposals appears to have varied from case to case and has not yet been finalized; and

(e) The instructions by the Receiver/Manager to All Peace and Ritchie Bros. with respect to preparation of proposals appear to have been inconsistent and were capable of multiple interpretations which effected the integrity of the proposals and the process.

17 The Receiver/Manager rely on the case of *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), a decision of Farley, J. of the Commercial List of the Ontario Superior Court of Justice which deals with a fact situation that is somewhat similar to the case at bar.

18 In *Skyepharma*, supra PWC as Court appointed receiver of Hyal made a motion on 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. Ground, J. expressed some doubt in Oral Reasons as to the activity of the Receiver.

19 Certain confidential information was not available to Ground, J., as it is not available to me in the case at bar.

20 In *Skyepharma*, Farley, J. concluded that as a result of that confidential information and the complexity of what was available for sale by the receiver, there were various other potentially important considerations surrounding the asset sale and/or sale of shares.

21 Eventually the confidential lists were distributed, and one of the arguments for re-opening the bid auction process would be to put all potential bidders on an equal footing, knowing what everyone else's present position was. It was argued in *Skyepharma* that the best offer would, therefore, be improved, and whatever procedural defects existed would be remedied.

22 Farley, J. concluded as follows:-

> **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 *Soundair* at pp. 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg et al.* (1986), 60 O.R. (2d) 87 (H.C.J.). **The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated**: see ***Soundair*** of pp. 5 and 11. Specifically the court's duty is to consider as per *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: *Soundair* at p. 7. A receiver's duty is not to obtain the best possible price but to do everything reasonable possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur*, [1994] O.J. No. 2465 (Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonable low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *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 jeopardize 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*** 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 ***Soundair*** at p. 8. Obviously if there are conditions in offers, they must be analysed 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 *Soundair* at p. 12 and *Re Central Capital Corporation* (1996), 38 C.B.R. (3d) 1 at pp. 31-41 (per Weiler, JA) and pp. 50-53 (Laskin, JA).

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 *Soundair* at p. 14 and *Crown Trust* 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* at pp. 114-119 and *British Columbia Development Corporation v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C.S.C.) at p. 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. [Emphasis Added]

23 *Skyepharma* was taken to the Ontario Court of Appeal and their Reasons are reported at (2000), 47 O.R. (3d) 234 (Ont. C.A.). The Ontario Court of Appeal's Reasons, issued on February 18, 2000, dealt with the appeal by BP plc with respect to the Approved Sale Order made by Farley, J., which appeal the Receiver moved to have quashed on the ground that the Court did not have jurisdiction. The Receiver submitted that a potential purchaser does not have any legal or any proprietary right that is affected by the Court's approval of a sale and accordingly the potential purchaser does not have standing to challenge the Order approving the sale.

24 The Ontario Court of Appeal held:-

> ...the question raised by the receiver's motion to quash was whether BP plc had a right that was finally disposed of by the sale approval order.

25 The Ontario Court of Appeal held that there was no such right for two reasons:-

> First, a prospective purchaser has no legal or proprietary right in the property being sold. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court. Second, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors, and an unsuccessful purchaser has no interest in that issue.

26 Continuing on, the Ontario Court of Appeal then stated as follows:

[8] On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hal to Skyepharma In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realization for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and time-frames contained in other offers. The receiver said that these risks were not immaterial.

[9] At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

[10] It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> 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 interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hal in the amount of $40,000.

[11] The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

. . . . .

[22]I adopt both his reasoning and his conclusion. At p. 118, he said:

> **The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its' only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.**
>
> **Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1)-which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.**

Conclusion

27 The *Skyepharma* case was cited with approval in *Sonoma, Re*, decided by Lovecchio, J. on October 6, 2000 in Calgary (Action No. 0001-06953).

28 Further, the Alberta Court of Appeal has favoured preserving the integrity of the process and allowing the Receiver to exercise its discretion without fetter from the Court in the case of *Royal Bank v. Fracmaster Ltd.* (1999), 209 W.A.C. 93 (Alta. C.A.) approving (1999), 245 A.R. 138 (Alta. Q.B.). Paperny J. wrote at paragraph 58:-

> This court appointed the Receiver based on its experience and expertise. It is the Receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers and to make a recommendation to the Court. As Anderson, J. stated in ***Crown Trustco v. Rosenberg*** (Supra) the Court ought not: "enter into the marketplace" ... the Court out not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise... The Court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

29 Paperny J.'s decision was expressly upheld by the Court of Appeal. At paragraph 32 the Alberta Court of Appeal considered the *Salima* decision, but reiterated the provisions of the *Soundair* [*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)] decision which were quoted by Farley, J., in the *Skyepharma* case, supra at page 4. At paragraph 33 they deferred to the recommendation of the Receiver/Manager.

30 The *Salima* case specifically did not deal with the standing issue of Salima Investments, as an unsuccessful bidder, to appeal.

31 The *Cameron* decision referred to in *Salima* dealt with a Nova Scotia rule which permits intervenor status [paragraph 12 of *Cameron*] which does not exist here.

32 Based on the Reasons as discussed in the two *Skyepharma* [*Skyepharma*, *Skyepharma*] decisions and *Royal Bank v. Fracmaster Ltd.*, I conclude that:-

(a) wide latitude is afforded to the Receiver;

(b) disappointed bidders generally have no standing; and

(c) the Court does not wish to sanction a process that will result in chaos and confusion at the approval motion.

33 The Receiver/Manager set out a bid process in this matter, and its discretion should not be lightly interfered with without strong evidence. Here the allegations by Ritchie Bros. are disputed, and some of the allegations do not appear to be that serious in any event.

34 If there was strong evidence of serious problems in the bid process the Court would exercise its inherent jurisdiction and discretion. I would be been prepared to allow Ritchie Bros. to put forward another proposal for the potential benefit of the creditors. The Court's supervisory jurisdiction requires this in the appropriate clear-cut case otherwise it would just be a rubber stamp for the Receiver/Manager.

35 The Court also must ensure generally that the Receiver/Manager acts in accordance with its enabling Order, and carries out these functions properly under the provision of S. 66(1) of the *PPSA* which reads:-

> 66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged **in good faith and in a commercially reasonable manner**.

[Emphasis added]

36 In the result however, I conclude that Ritchie Bros. has not brought forward anything that would vitiate or interfere with the wide powers that were granted by this Court to the Receiver/Manager on September 7, 2000 which include:-

At paragraph 1

The Receiver is given authority to "manage and operate the businesses and undertakings";

At paragraph 2

It is hereby acknowledged and declared that the Receiver is an officer of this Honourable Court and is assisting in the preservation and, as appropriate, the orderly sale and realization of the property, undertaking and assets of the Defendant for the benefit of all creditors and claimants, including the Plaintiff, as a secured creditor.

At paragraph 7

The Receiver shall be at liberty to employ such assistants, agents, employees, auditors, advisers and counsel, including legal counsel as it may consider necessary for the purpose ... of realizing the undertaking, property and assets of the Defendants...

At paragraph 8

The Receiver be and is hereby granted leave to take such steps as in its judgement are necessary or desirable for the preservation, protection and realization of the business...

At paragraph 9

The Receiver is authorized to sell, on credit or otherwise, the undertaking, assets and property of each of the Defendants ... or any part or parts thereof out of the ordinary course of business, at public auction, by public tender or by private sale on such terms and conditions as it deems appropriate, provided any such sales over $100,000.00 shall be subject to approval of this Court.

37 While Ritchie Bros. submits that the Receiver/Manager made some errors in its process and procedures, I conclude that it has acted "in good faith and in a commercially reasonable manner."

38 In the initial Order appointing the Receiver/Manager, Lefsrud J. gave Meyers Norris & Penny Limited wide latitude to dispose of the assets of the Defendants, on behalf of the creditors of the Defendants. That latitude provides the Receiver/Manager with a variety of options, including that the Receiver/Manager may choose to sell some or all of the assets by public auction. The Receiver/Manager may choose to sell none by auction, and proceed with other methods of realization.

39 In this case, Cobrico holds General Security Agreements over the Defendants, who are both insolvent. The Defendants will be unable to fully pay the indebtedness owed to the Plaintiff. It is therefore clear that there will be no recovery for unsecured creditors.

40 Certain secured parties hold purchase money security interests ("PMSI") which afford them with priority security over certain of the chattels of the Defendants. Of those chattels, some have an equity sufficient to fully redeem the PMSI secured indebtedness, while other chattels will have insufficient value to fully repay the indebtedness owed to the PMSI holder. In the latter case, it is the desire of the Receiver/Manager to recognize that the decision to be made as to how best to realize on that particular chattel should be left to the PMSI holder, and the Receiver/Manager has no-wish to engage in the sale of that chattel, unless specifically instructed to do so by the holder of the PMSI.

41 The Receiver/Manager knows that certain of the chattels have sufficient equity to fully pay out the secured party who holds a PMSI with respect to each such chattel. The Receiver/Manager, however, is not qualified to assess the value of the chattels, or to determine if they have such equity. For that reason the Receiver/Manager submitted the same list of equipment

to three auction houses and asked them to appraise each item so that a determination could then be made of the value of that equipment, and if that value exceeded the indebtedness owed to the respective PMSI holder for each such chattel.

42 Three auction houses were requested to submit proposals and valuations. All Peace Auctions and Century Sales Inc. did so. Ritchie Bros. did not submit valuations on each individual piece.

43 With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy, who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers, are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of the realization on assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver.

44 However, generally that does not constitute a conflict of interest, nor generally does the marketplace of potential advisers or of potential purchasers have any legal standing to interfere with the performance of the receiver. That standing is generally reserved by law to those persons whose indebtedness is being protected by the receivership.

45 In the case at bar, those persons are the secured parties, being the PMSI holders and the Plaintiff. Indeed it is the Plaintiff whose interest is most immediately affected by the realization process. Any act which increases the value of the assets (at least those assets whose value is sufficient to satisfy the PMSI indebtedness) will be to the benefit of the Plaintiff. Any act which decreases the value of the assets will be at the Plaintiff's cost.

46 In this case the Plaintiff and the PMSI holders have been given notice of the list of assets which the Receiver/Manager proposes to sell by public auction. They support that auction and the recommendation of the Receiver/Manager to sell the chattels at the November 15, 2000 All Peace auction because of its strategic advantages of size and timing. They support it because All Peace complied with the request to provide an appraisal of each asset, and has guaranteed that it will pay to the Receiver/Manager an amount sufficient to pay off the PMSI indebtedness on each asset which eliminates risk and uncertainty. They support the decision to not select Century Sales Inc. which complied with the Receiver/Manager's stated requirements, and they support the decision to not select Ritchie Bros. which did not comply with the Receiver/Manager's stated requirements.

47 Ritchie Bros. now complains that it has not received the same "Final List" of assets from the Receiver/Manager as did the other auction houses. The "Final List" of assets never existed in the form contemplated by Ritchie Bros.. The Receiver/Manager gave the three auction houses the same inventory list of assets which was compiled by the Receiver/Manager, which exceeds 100 pages, and asked them to provide an appraisal for each of the assets, and a bid amount for the assets which each auction house *in their own discretion and judgement* considered to have an equity sufficient to pay off the PMSI indebtedness. The same statement of pay out amounts (the "Master List") was given to each auction house, and that has not changed. It listed the items secured by PMSI. It was up to the auction houses to each assess how successful they could be at recovering equity on each item. Any items which increase the total bid submitted by All Peace over the total bid submitted by Ritchie Bros. are not significant because they increase the total bid. Rather, they are significant because All Peace has guaranteed the Receiver that it will recover at least an amount sufficient to pay out the PMSI indebtedness secured by that chattel, whereas Ritchie Bros. have been unable or unwilling to do so.

48 The auction houses were each given access to the equipment to inspect the same. The Receiver/Manager's decision to proceed in this fashion is commercially reasonable and prudent (unlike the sale in *Salima*) and is supported by the creditors.

49 Further Ritchie Bros. have given no notice to the secured creditors, most particularly the Plaintiff, and are not supported by any of the secured creditors. They engage in a move to effectively enjoin the sale at the APA auction by the Receiver/Manager, but have not complied with any of the tripartite test for an injunction, nor have they posted an undertaking in damages.

50 The motion by the Receiver/Manager is to permit it to dispose of the assets listed in the proposed Order by public auction. Even by granting Ritchie Bros. status and standing, there is no serious reason to upset the Receiver/Manager's discretion, which is supported by the various secured creditors whose interests are of greater importance.

51 Further, there are certain procedural requirements imposed upon a person wishing to take action against the companies or by extension, the Receiver/Manager which Ritchie Bros. has not complied with Paragraph 6 of the initial Order states:-

> That no legal actions, administrative proceedings, self-help remedies or other acts or proceedings shall be taken or continued against the Receiver of either of the Defendants' assets without leave of this Court first had and obtained upon 2 days prior notice to the Receiver....

52 The Receiver/Manager may therefore exercise its authority in any way it considers to be commercially reasonable, subject only to the requirement imposed by paragraph 9 to obtain Court approval for sales over $100,000.00.

53 Ritchie Brothers are not creditors of either Tucker Industries Inc. or Tucker Enterprises Corp.. While the Receiver/Manager has extended contractually the time in which Ritchie Brothers was entitled to make its bid for auction rights, Ritchie Brothers has no standing to object to the exercise of discretion by the Receiver/Manager. Ritchie Bros. has also not established conclusively that anyone, other than themselves would benefit from the Court's intervention in this case.

54 The Receiver/Manager is authorized to dispose of the assets by public auction conducted by All Peace. Notice of Intention to dispose of the assets as required by the *PPSA* is dispensed with upon the debtor since there will be no remaining assets left for its benefit in any event.

Application granted.

End of Document

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014] A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

In the Matter of the Insolvency of Elaborate Homes Ltd. and Elaborate Developments Inc.

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014
Judgment: June 11, 2014 *
Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties — General principles

Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

***K.G. Nielsen J.*:**

I. Introduction

1 PriceWaterhouseCoopers Inc. (PWC) was appointed as receiver of all current and future assets and property of Elaborate Homes Ltd. and Elaborate Developments Inc. (collectively referred to as Elaborate).

2 Alco Industrial Inc. (Alco) seeks leave to commence proceedings against PWC in relation to matters arising in the receivership.

II. Background

3 Alco held a second mortgage (the Mortgage) in the amount of $1,075,000 on, *inter alia*, property (the Condo) owned by Elaborate Homes Ltd., legally described as:

> Condominium Plan 0520263 Unit 4 and 905 undivided 1/10,000 shares in the common property Excepting thereout all mines and minerals.

4 Alberta Treasury Branches was a secured creditor of Elaborate. It held, *inter alia*, a first mortgage on the Condo.

5 PWC was appointed as the receiver of Elaborate Homes Ltd. pursuant to a Consent Receivership Order dated February 22, 2011 (the Receivership Order). Pursuant to a separate Receivership Order, also dated February 22, 2011, PWC was named as receiver of Elaborate Developments Inc., a company related to Elaborate Homes Ltd.

6 On March 3, 2011, PWC sent notice to Alco, pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) of the receivership of Elaborate. This was sent by regular mail to the address indicated on the registration of the Mortgage on the Certificate of Title to the Condo. In the Brief filed in this application on behalf of Alco, it is acknowledged that Alco was served with a copy of the Receivership Order.

7 On or about April 5, 2011, an assistant with legal counsel for PWC (not the counsel for PWC on this application) obtained certain contact information with respect to Alco. While the assistant could not recall with whom she spoke at Alco or the exact conversation, she deposed that she believed she followed her typical practice when speaking to creditors which was as follows:

> (a) she identified herself to the creditor and advised that she was calling from counsel for the receiver with respect to the receivership of the debtor company;
>
> (b) she advised the creditor that the receiver required certain information from the creditor with respect to the receivership; and
>
> (c) she requested contact information for the individual within the creditor's organization who would be best suited to receive correspondence with respect to the receivership.

8 In the discussions that ensued with the individual at Alco following this typical practice, she was advised that the owner of Alco was Bob Taubner and she was given his email address. This information is confirmed in a handwritten note made by the assistant. At all material times, Mr. Taubner was the President of Alco.

9 PWC took steps to market Elaborate's assets and property pursuant to the provisions of the Receivership Order. As a result of the marketing efforts, a number of offers were received for individual assets of Elaborate. PWC also received a number of "*en bloc* offers" to purchase all of Elaborate's assets. One of those *en bloc* offers was received from 1601812 Alberta Ltd. (the 160 Offer).

10 In accordance with its obligations, PWC reported to the Court with respect to the offers received in its Second Report, filed May 26, 2011. The Second Report contained a Bid Summary of all of the offers. PWC wished to keep the information in the Bid Summary confidential, and to release it to the public only after the Court had approved a sale. However, parties could obtain a copy of the Bid Summary on signing and sending to PWC a Confidentiality Letter, which provided that anyone signing it would be provided with the Bid Summary, but would be barred from acting as a purchaser in any way in respect of Elaborate's assets.

11 As outlined in the Second Report, PWC was of the opinion that the 160 Offer would lead to the highest net recovery for the creditors of Elaborate, as opposed to accepting other offers for specified or individual assets. PWC formed this view based on the combined value of the cash and assumption of liabilities components of the 160 Offer.

12 PWC accepted the 160 Offer subject to Court approval. PWC recommended to the Court that the 160 Offer be approved on the basis that it was higher than other offers and was preferable from the perspective of all of the creditors of Elaborate as a whole. Compared to all of the other *en bloc* offers, the 160 Offer would produce the highest net recovery on the Condo. Based on its analysis of the 160 Offer, PWC concluded that accepting the 160 Offer would allow for recovery of all of the indebtedness of Elaborate to Alberta Treasury Branches, but would not allow for the full recovery of the indebtedness of Elaborate to another secured creditor, Servus Credit Union. Following discussions with PWC, Servus Credit Union agreed with PWC's recommendation to accept the 160 Offer. PWC had no discussions with Alco with respect to the offers received.

13 The 160 Offer required Court approval by June 3, 2011. By an email dated May 26, 2011, counsel for PWC forwarded to Elaborate's creditors, including Alco, copies of the following:

(a) the Application for an Order Approving Sale and Vesting Order returnable June 3, 2011 (the Application);

(b) the Second Report;

(c) a copy of a letter directed to the Court; and

(d) a copy of the Confidentiality Letter.

14 On June 3, 2011, Belzil J. heard the application for approval of the sale of Elaborate's assets and property pursuant to the 160 Offer. Belzil J. granted a Sale Approval and Vesting Order approving the acceptance of the 160 Offer by PWC (the Sale Order). Belzil J. also granted a Sealing Order which sealed the Bid Summary until such time as the sale transaction had closed and a letter had been filed with the Clerk of the Court confirming that fact (the Sealing Order).

15 On June 3, 2011, counsel for PWC served the Sale Order and the Sealing Order by email on the listed creditors, including Alco.

16 Mr. Taubner, the President of Alco, has deposed that while he received the email of May 26, 2011 enclosing the Application, and 19 other emails with respect to this receivership, he did not use the email address which had been given to counsel for PWC or any other email address at the material time. He deposed that he was unfamiliar with computers and he did not anticipate that he might receive communications from PWC in such a fashion.

17 On cross-examination on his Affidavit, Mr. Taubner testified that he would occasionally request email communications, some of his employees would communicate with him by email, he would read such emails, and the group accountant for Alco had access to his emails. There is no evidence that any of the emails forwarded to Alco with respect to the Elaborate receivership at the address given, were rejected or returned as undeliverable.

18 The sale of Elaborate's assets and property proceeded pursuant to the 160 Offer, and Alco ultimately received the sum of $90,553.09 net of costs in relation to the security which it held on the Condo. This recovery was insufficient to pay out the Mortgage.

19 PWC reported in its First Report, filed April 20, 2011, that an appraisal of the Condo had been conducted in August 2010, reflecting a market value of $785,000. The Bid Summary indicated that the appraised value of the Condo on a forced liquidation was $505,750. The value assigned to the Condo pursuant to the 160 Offer was $432,000. This was the highest value assigned to the Condo in any of the *en bloc* offers. An offer had been received on the Condo only. This offer was in the amount of $529,444.

20 The value assigned to the Condo in the 160 Offer represented 85% of the forced liquidation valuation. Only two other assets had higher returns compared to their valuations. The lowest allocation to an asset in the offers received was 24% of that asset's valuation.

21 Andrew Burnett, Vice President of PWC, was involved in this receivership. He filed an Affidavit in response to Alco's Application and was examined on it. With respect to the 160 Offer, Mr. Burnett deposed as follows:

Page 30, lines 17 to 22:

> Q Was there ever any conversation with the offeror about modifying its offer in respect of the office condo [the Condo] because of the position of Alco?
>
> A No, there was never discussion with them about changing their position on any of the other pieces of property other than the Althen One [unrelated to the Condo].

Page 33, lines 25 to 27 and Page 34, lines 1 to 11:

> Q One of the bids that PWC did receive for the office condo alone was over $500,000, correct?
>
> A Correct.
>
> Q When that bid came in, do I take it that the sole consideration was that it was a standalone bid whereas you wanted to have *en bloc* bids?
>
> A No.
>
> Q What consideration was given to possibly accepting that bid?
>
> A We went back to all the purchasers that had more than one item on there and asked them whether we could carve out pieces, saying okay, you're the highest on this, but you're lower on this, can we just take that?

Page 36, lines 15 to 20:

> Q What did Studio Homes [formerly 1601812 Alberta Ltd.] specifically advise with respect to their position on the office condo at the time, not in January of 2014, but at the time?
>
> A At the time, and I won't say it's just on the office condo, we asked whether they would pull any of their other parcels out and they advised no.

III. Terms of the Orders

A. Receivership Order

22 The following provisions of the Receivership Order are relevant to this application:

> ...2. Pursuant to sections 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-03 (the "*BIA*"), 13(2) of the *Judicature Act*, RSA 2000, c. J-2, 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 and 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, PriceWaterhouseCoopers Inc. is hereby appointed Receiver (the

"Receiver"), without security, of all of the Debtor current and future assets, undertakings and properties real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof ("the Property").

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

...(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(l) To sell, convey, transfer, lease or assign the Property (the "Disposition") or any part or parts thereof: ...

7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

. . .

16. The Receiver shall incur no liability or obligation as a result of its appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the WEPPA. Nothing in this order shall derogate from the protection afforded to the Receiver by s. 14.06 of the BIA or any other applicable legislation.

B. Sale Order

23 The following provisions of the Sale Order are relevant to this application:

1. Service of the notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service is abridged to that actually given.

2. The Receiver's acceptance of the Purchaser's offer to purchase the Lands and Personal Property dated May 6th, 2011 as clarified and extended by the letter from the Receiver dated May 13, 2011, the e-mail from the Purchaser's legal counsel to the Receiver's legal counsel dated May 19, 2011, the letter from legal counsel for the Receiver to legal counsel for the Purchaser dated May 20, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 24, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 25, 2011, and the letter from the Receiver to the Purchaser dated May 26, 2011 (the "Offer"), which Offer is summarized at paragraphs 20 to 32 of the Receiver's Second Report, and [sic] is hereby approved and ratified.

. . .

15. Service of this Order may be effected upon those persons (directly or through legal counsel) on the Service List by facsimile or electronic mail, and such service shall constitute good and sufficient service. Service on any person other than as specified in the Service List is hereby dispensed with.

C. Sealing Order

24 The following provision of the Sealing Order is relevant to this application:

1. ... the Clerk of the Court is hereby directed to seal the Bid Summary (the "Confidential Documents") on the Court file until the sale of the Lands and Personal Property to 1601812 Alberta Ltd. has been closed in accordance with the Offer Terms and the filing of a letter with the Clerk of the Court from PriceWaterhouseCoopers Inc. confirming the sale of the Lands and Personal Property has been closed. ...

IV. Positions of the Parties

25 Alco argues that leave should be granted to file the Statement of Claim appended to its Application. Alco submits that it has a claim against PWC for gross negligence or wilful misconduct in serving the Application by email on May 26, 2011, and selling the Condo for less than its appraised value, thereby preferring the interests of other creditors to those of Alco.

26 PWC argues that there is no basis for a claim against it, as all documents were properly served on Alco by email, and all steps taken by it were in accordance with its obligations to act in the best interests of the creditors of Elaborate as a whole. Therefore, it was neither grossly negligent, nor did it wilfully misconduct itself.

V. Issue

27 The sole issue before the Court is whether Alco should be granted leave to file the Statement of Claim against PWC.

VI. Applicable Rules

A. Alberta Rules of Court, Alta Reg 124/2010

28 The following Rules of the *Alberta Rules of Court* are relevant to this application:

> **9.15(1)** On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made
>
> (a) without notice to one or more affected persons, or
>
> (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> **(2)** Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
>
> (a) the service of the judgment or order on the applicant, and
>
> (b) the date the judgment or order first came to the applicant's attention.
>
> . . .
>
> **11.21(1)** A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and
>
> (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
>
> (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.
>
> **(2)** Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.
>
> **(3)** In this rule, "electronic" and "electronic agent" have the same meanings as they have in the *Electronic Transactions Act*.

B. Bankruptcy and Insolvency General Rules, CRC, c 368

29 The following *BIA* Rules are relevant to this application:

> **3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> . . .
>
> **6.(1)** Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

VII. Law

A. Threshold Test for Leave

30 The Supreme Court of Canada in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) confirmed that the threshold is low on an application for leave to commence an action against a receiver or trustee:

> 55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact...
>
> . . .
>
> 57 In the leading case of ***Mancini***, the Court of Appeal summarized the accepted principles as being the following:
>
> > 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> >
> > 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
> >
> > 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

31 Conrad J. (as she then was) considered this issue in her decision in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 90 A.R. 173 (Alta. Q.B.), at 177 -78, [1988] 6 W.W.R. 156 (Alta. Q.B.):

> ...In ***Royal Bank of Canada v. Vista Homes Ltd. et al*** (1985) 63 B.C.L.R. 366 (B.C.S.C.), Mr. Justice MacDonald stated at p. 374:
>
> > ...the obtaining of an order to sue should not be a perfunctory process... The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. On the other hand, there is not an onus on the applicant to prove its case against the receiver-manager at this stage.
>
> . . .
>
> I am satisfied the test to be applied by this court is to determine whether it is perfectly clear that there is no foundation for the claim or whether the action is frivolous or vexatious. It is not for this court to deal with the merits of either party's position or to gauge the probability of success should the action proceed to trial. Leave should be granted if

> the evidence presented discloses that there is some foundation for the claim and that the claim is not merely frivolous nor vexatious.
>
> Indeed, while the Court may by its order want to protect its appointed officer from unnecessary and unwarranted litigation, I do not take that to mean they are entitled to protection against proper actions simply because they are court appointed.

32 Therefore, the proposed plaintiff must have supplied "facts to support the claim sought to be asserted", or "some foundation for the claim". Both of these cases make it clear that there must be some factual basis for the claim, a court should not grant leave for frivolous, vexatious or unmeritorious claims, and it is not appropriate at the leave stage for the court to make a final assessment of the merits of the claim or possible defences to the claim.

33 While the threshold for granting leave is low, the process of reviewing the proposed claim is not to be perfunctory. Therefore, I will analyze in some detail the basis for the claims alleged by Alco against PWC.

B. Gross Negligence and Willful Misconduct

34 Clause 16 of the Receivership Order provides that PWC will incur liability only in circumstances of "gross negligence or wilful misconduct on its part". The starting point, therefore, is to consider what constitutes gross negligence or willful misconduct.

35 *Black's Law Dictionary*, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, *inter alia*:

> A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.
>
> ...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof...But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...

36 The *Dictionary of Canadian Law*, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:

> Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...

37 The Supreme Court of Canada has considered these terms in the context of tort litigation. In *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.), at 145, [1942] S.C.J. No. 7 (S.C.C.), Duff C.J. observed:

> ... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. ...

38 In *Société Telus Communications v. Peracomo Inc.*, 2014 SCC 29, [2014] S.C.J. No. 29 (S.C.C.), Cromwell J. for the majority commented on "wilful misconduct":

> 57 In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": ***R. v. Boulanger***, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing ***Attorney General's Reference (No. 3 of 2003)***, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an

> insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": "*Mens Rea* in Tort Law" (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.
>
> 58 These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...

39 Therefore, in order for Alco to establish PWC's liability arising from the receivership at an eventual trial, it must show that PWC demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

40 Against this backdrop, I will consider Alco's complaints regarding PWC's conduct.

VIII. Analysis

A. Email Service

41 Alco argues that service of the Application was not effective, as Alco had not specifically provided an address to which information or data in respect of the receivership action might be transmitted to it.

42 Nothing in the material before the Court supports this allegation. Clearly, the assistant for counsel at PWC contacted a representative of Alco who provided an email address for the president of Alco. It is reasonable to infer that whoever provided the email address to the assistant for counsel at PWC was not aware that Mr. Taubner would not access his email account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, *if agreed to by the parties*, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by

January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

48 Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

49 I would add that in today's world, electronic service is a reflection of practical realities. The *Alberta Rules of Court* and the *BIA Rules* recognize this reality. Perhaps there is no area of practice where electronic service of documents is more appropriate than the bankruptcy and insolvency area. I say this because of the volume of documents that are often produced in such matters, and the need for receivers, trustees, monitors and counsel to act expeditiously and often in the face of very short deadlines. Given the commercial and legal realities of bankruptcy and insolvency matters, there is an obvious need to exchange documents electronically. In my view, a party involved in such matters cannot ignore these realities by refusing to move effectively into the electronic age.

50 In summary, I find nothing in the material before the Court to suggest that PWC through its counsel did not properly effect service of both the Application and the Sale Order on Alco by emailing those documents to Mr. Taubner at Alco. There is no factual basis to suggest that PWC was either grossly negligent, or that it wilfully misconducted itself, in effecting service of the documents by email.

B. Sale Transaction

51 Alco also alleges that PWC breached its duties to Alco in the manner in which it conducted the sale of Elaborate's assets. Specifically, Alco alleges that PWC concealed the Bid Summary, and sold the Condo for an amount which was below its appraised value.

52 The Second Report indicated that PWC preferred that the Bid Summary remain confidential until such time as the sale transaction had closed. Upon signing the Confidentiality Letter, the Bid Summary would be disclosed to the signatory on the basis that the information disclosed in the Bid Summary would not later be used by the signatory as a potential purchaser of Elaborate assets.

53 Alco argues that PWC should not have required it to give up any right to make an offer on the Condo. Alco submits that its rights "ought not to have been extorted away under threat that otherwise the information necessary for it to respond to a court application would be kept hidden from view".

54 It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [Commercial List]), Newbould J. explained the reasons for such confidentiality:

> 17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In ***8857574 Ontario Inc. v. Pizza Pizza Ltd***, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most

> appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

55 Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

56 Alco may have been in a unique position given that it held a second mortgage on the Condo. Given that unique position, it may very well have been entitled to receive information with respect to the offers received in relation to the Condo and, therefore, could have suggested revised terms to any required confidentiality agreement. However, Alco's position does not render PWC's actions inappropriate. There is nothing to suggest that PWC's actions in this regard were not in accordance with common, prudent and reasonable practice in receiverships, or that they reflect or resulted from gross negligence or wilful misconduct on the part of PWC.

57 With respect to the manner in which the sale of the Condo was conducted, Alco submits that PWC breached a "fundamental duty of Receivers" in that it failed to act with an even hand towards classes of creditors and in accordance with recognised lawful priorities. Again, the law and the material before the Court do not support this contention.

58 The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

> 30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.

59 Galligan J.A. recognized that in considering a sale by a receiver, a court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver, and should assume that the receiver is acting properly unless the contrary is clearly shown. He summarized the duties of the court when deciding whether a receiver who has sold property acted properly as follows (at para 17):

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

60 In *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]) at para 4, Farley J. cited *Soundair* with approval, holding that a receiver's conduct is to be reviewed

in light of the objective information the receiver had and not with the benefit of hindsight. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver acted improvidently in accepting it.

61 In *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 34 (N.S. S.C.), the receiver was of the view that the best realization of the assets in question would come from a sale *en bloc*. Hood J. held that the receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interests of all creditors and then act for the benefit of the general body.

62 PWC accepted the 160 Offer and recommended that the acceptance be approved by the Court on the basis that it was higher than other *en bloc* offers and was preferable from the overall perspective of Elaborate's creditors. The 160 Offer provided for the highest net recovery on the Condo of all of the *en bloc* offers and represented a recovery of 85% of the forced liquidation valuation of the Condo. Only one other offer in the marketing process undertaken by PWC assigned a purchase price for the Condo which was higher than the price assigned in the 160 Offer. This was an offer with respect to the Condo only.

63 The law is clear to the effect that the receiver must not consider the interests of only one creditor, but must act for the benefit of the general body of creditors. PWC was under a duty to act in the interests of the general body of creditors and to conduct a fair and efficient marketing process.

64 The excerpts from the cross-examination of Mr. Burnett on his Affidavit indicate that PWC did attempt to maximize the recovery on all of Elaborate's assets as it conducted negotiations with the various bidders in this regard.

65 There is nothing before the Court to suggest that PWC did not make sufficient efforts to obtain the best price for the assets, nor that it acted improvidently. Alco has not put forward any factual foundation to support an inference that PWC did not act for the benefit of the general body of creditors.

66 Alco submits that had it attended the hearing on June 3, 2011 before Belzil J., it would have been successful in arguing that Alco was deprived of a statutory right to recover its secured debt against the Condo. However, the contents of the Second Report undermine the argument that PWC's acceptance of the 160 Offer would not have been approved in the circumstances as known when the matter proceeded before Belzil J. Further, given my findings on the email service issue, PWC cannot be blamed for Alco's non-attendance at the hearing on June 3, 2011.

67 Therefore, I conclude that Alco has not established a factual basis for the claim that PWC was either grossly negligent or wilfully misconducted itself in the manner that it marketed Elaborate's assets or in its reporting to the Court.

IX. Conclusion

68 The threshold test for leave in this case is low. However, PWC would only be liable if it acted with gross negligence or wilful misconduct. I have found no factual basis to suggest that PWC was either grossly negligent or wilfully misconducted itself as alleged by Alco.

69 PWC is not entitled to protection against proper actions simply because it was court appointed. However, I am mindful of the bias against exposing a court appointed officer to unnecessary or unwarranted litigation. In my view, granting leave to Alco to proceed with the claim against PWC would expose it to a manifestly unmeritorious action.

70 Therefore, Alco's application for leave to file the Statement of Claim against PWC is dismissed.

X. Costs

71 If the parties cannot otherwise agree on costs, they may appear before me within 60 days of the filing of these Reasons for Judgment.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on June 23, 2014 has been incorporated herein.