



SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-22-00692309-00CL DATE: 25 May 2023

NO. ON LIST: 2

TITLE OF PROCEEDING: **PRICEWATERHOUSECOOPERS INC. IN ITS CAPACITY AS
COURT-APPOINTED RECEIVER AND MANAGER OF
BRIDGING FINANCE INC. ET AL v. SKYMARK FINANCE
CORPORATION et al**

BEFORE JUSTICE: **KIMMEL**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Adam Driedger	PwC, Receiver and Manager of Bridging Finance Inc., Applicant	adriedger@tgf.ca
Christine Sinclair	PwC (Receiver and Manager of Bridging Finance Inc., Applicant)	christine.l.sinclair@pwc.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
Dylan Chochla	Lawyers for the Receiver	dchochla@fasken.com
Mitch Stephenson		mstephenson@fasken.com
Greg Karpel	Alvarez & Marsal Canada Inc., Receiver	gkarpel@alvarezandmarsal.com

ENDORSEMENT OF MADAM JUSTICE KIMMEL:

1. Alvarez & Marsal Canada Inc. ("A&M") in its capacity as court-appointed receiver and manager (in such capacity, the "Receiver"), without security, of all of the assets, undertakings, and properties of each of Skymark Finance Corporation ("Skymark") and Merk Investments Ltd. ("Merk", and together with Skymark, the "Respondents"), seeks an order approving its proposed sale and investment solicitation process ("SISP") pertaining to Skymark and approving the first report of the Receiver dated May 17, 2023 (the "First Report") and the Receiver's actions, conduct and activities described therein.
2. Counsel for the Receiver advised that the service list was provided with its motion record with ample notice and no party has indicated any objection to relief sought by this motion.

The SISP

3. The Receiver has developed the SISP to solicit interest in: (a) a purchase of, or investment in, all or part of Skymark's portfolio of leases and loans to residential and commercial consumer borrowers primarily in respect of water systems, HVAC systems, and smart home improvements (the "Consumer Portfolio"); and/or (b) a purchase of, or investment in, any or all of Skymark's Assets or Business (collectively, the "Opportunity").
4. The SISP is to be conducted in a single phase with three stages, namely: pre-marketing, marketing, and offer submission and evaluation. It is expected to conclude with a target transaction closing in late July, 2023, subject to this Court's approval. While it is proposed to be completed over a fairly expedited period of approximately 40 days, the Receiver considers the SISP to be reasonable in the circumstances.
5. The Receiver recommends that the Court approve the SISP because, in its assessment: (a) the SISP is commercially reasonable; (b) due diligence materials are ready to be made available and the Receiver considers the materials to be sufficient for an interested party to make an informed decision and to prepare a bid in respect of the Opportunity; (c) while expedited, the duration of the SISP is appropriate and will be sufficient to allow interested parties to perform diligence and submit offers since many of the parties that will be contacted by the Receiver during the SISP are familiar with this Opportunity given their history in the industry or as a competitor of Skymark; (d) an expedited SISP is necessary as the Receiver's funding is limited; and (e) the Respondents' senior secured lender (and possibly the only stakeholder with an economic interest in the SISP) has approved of the SISP and the target dates for key SISP milestones. The Receiver intends to publish notice of the SISP and directly distribute a teaser letter and non-disclosure agreement to targeted potential bidders that it identifies.
6. Under the SISP, the Receiver has the ability to extend the Bid Deadline, or any other target date contemplated in the SISP, in order to maintain a robust sale process. Following the receipt and qualification of Bids, if the Receiver qualifies more than one Bid, it may: (a) select one or more of the most favourable Qualified Bids for acceptance as the Successful Bid(s); or (b) at its discretion, invite the Bidders who submitted such Qualified Bids to participate in an Auction to be conducted in accordance with the SISP. The Receiver has retained the flexibility to control the process and to decide whether to accept any Bid.
7. The SISP provides that the Receiver will consult with the Bridging Receiver (the Respondents' senior secured lender) as the Receiver considers appropriate and in accordance with the SISP, including with respect to Bids received. To protect the integrity of the SISP, the SISP provides that, if the Bridging Receiver submits a Bid, it will no longer be provided with consultation rights or otherwise be entitled to review the Bids received, unless and until it has been notified by the Receiver that its Bid has not been selected as the Successful Bid.

8. The court's jurisdiction to approve the proposed SISP comes under section 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). The reasonableness and adequacy of any sale process proposed by a court-appointed receiver must be assessed in light of factors that the court is to take into account when considering the approval of a proposed sale, set out by the Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (CA), namely:
 - a. whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - b. whether the interests of all parties have been considered;
 - c. the efficacy and integrity of the process by which offers are obtained; and
 - d. whether there has been unfairness in the working out of the process.
9. This makes good sense given that the *Soundair* factors are process oriented and a SISP is the process by which bids will be solicited .
10. Chief Justice Morawetz recently summarized in *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 5338 at paras. 7- 8 (see also *Choice Properties Limited Partnership v. Penady (Barrie) Ltd.*, 2020 ONSC 3517, at paras. 15 and 16 and *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, at para. 6) the factors that must be assessed by the court at the SISP approval stage:
 - a. the fairness, transparency, and integrity of the proposed sale process;
 - b. the commercial efficacy of the proposed sale process in light of the specific circumstances facing the receiver; and
 - c. whether the sale process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.
11. The Receiver's reasons for recommending the SISP address these factors.
12. A proposed sale process need not be perfect, only reasonable. Absent exceptional circumstances, courts generally defer to the business expertise of the court-appointed receiver and are encouraged not to intervene or "second-guess" the receiver's recommendation. See *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, at para. 15, citing *Regal Constellation Hotel Ltd., Re.*, [2004] O.J. No. 2744 (C.A.), at para. 23. See also *Ontario Securities Commission v. Bridging Finance Inc.*, 2022 ONSC 1857, at paras. 43-45.
13. I am satisfied, having considered the factors to be assessed at the SISP approval stage in light of the *Soundair* factors, that the SISP should be approved.

The Receiver's Actions, Conduct and Activities Described in the First Report

14. It is customary for the Receiver to seek approval of its reports and activities regularly during the receivership process, rather than at the end. This ensures transparency and accountability and provides an opportunity for concerns to be addressed and rectified as they arise. See *Re Hanfeng Evergreen Inc.*, 2017 ONSC 7161, at paras. 15-17 citing *Target Canada Co. (Re)*, 2015 ONSC 7574, at paras. 20-24, and *Laurentian University of Sudbury*, 2022 ONSC 5850, at para. 17.
15. The actions, conduct and activities of the Receiver described in the First report and consistent with its duties and powers under the March 6, 2023 Appointment Order and appear to have been undertaken in good faith. They are approved, subject to the usual stipulation (provided for in the proposed draft order) that this approval may only be relied upon by the Receiver in its personal capacity and only with respect to its own personal liability.

Order

16. Order to issue in the form signed by me today, with immediate effect and without the necessity of formal issuance and entry.

A handwritten signature in cursive script, appearing to read "Kimmel J.", written in dark ink.

KIMMEL J.