

COURT FILE NUMBER QBG-SA-00399-2020

COURT OF KING'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

PLAINTIFF CANADIAN MORTGAGE SERVICING CORPORATION

DEFENDANT 101118672 SASKATCHEWAN LTD. (formerly Korf Properties
Ltd.)

**IN THE MATTER OF THE RECEIVERSHIP OF 101118672 SASKATCHEWAN LTD.
(formerly Korf Properties Ltd.)**

**BRIEF OF LAW
OF THE RECEIVER, MNP LTD.**

I. INTRODUCTION

1. MNP Ltd. (the "**Receiver**") was appointed as the Receiver of all of the assets, undertakings and properties of 101118672 Saskatchewan Ltd. (formerly Korf Properties Ltd.) (the "**Debtor**"), by an Order of the Honourable Mr. Justice B.J. Scherman granted March 17, 2020 (the "**Receivership Order**").

2. The Receivership Order authorizes and empowers the Receiver to market, advertise and solicit offers for the Debtor's property and to negotiate terms and conditions in its discretion. In addition, the Receivership Order empowers the Receiver to apply for any vesting order(s) necessary to convey the same to a purchaser free and clear of any liens or encumbrances affecting such property.

(a) The Proposed Sales

3. This application by the Receiver concerns the approval of the proposed sales of two properties, which are adjacent vacant lots (the "**Proposed Sales**"):

- (i) One undeveloped industrial property municipally described as 260 Kensington Avenue, Estevan, Saskatchewan and legally described as Surface Parcel No. 135928705, Reference land description Lot 18, Blk/Par 2, Plan 89R21476

Extension 0 as described on Certificate of Title 89R21476A (the “**260 Kensington Property**”); and

- (j) One undeveloped industrial property municipally described as 270 Kensington Avenue, Estevan, Saskatchewan and legally described as Surface Parcel No. 107417965, Reference land description Lot 19, Blk/Par 2, Plan 89R21476 Extension 0 as described on Certificate of Title 89R21476B (the “**270 Kensington Property**” together with 260 Kensington Property, the “**Properties**”).

4. The Proposed Sale of the Properties is sought following a marketing and auction process conducted by Grasswood Auctioneers (“**Grasswood**”).

5. As outlined in the Fifth Report of the Receiver dated February 10, 2023 (the “**Fifth Report**”) at paragraphs 10 to 14, the Receiver has engaged in extensive marketing for the real properties of the Debtor including the subject Properties.

(b) Previous Marketing Efforts by Colliers

6. As outlined in the Fifth Report at paragraph 14 (a), the Properties were listed for approximately six months and no offers were received.

(c) Sale by Auction through Grasswood and Continued Efforts

7. Following efforts by Colliers, an “Auction” sale was conducted by Grasswood Auctions wherein the Properties received no offers. The Receiver recently received the highest (and only) offer on the Properties from Laureen Price (the “**Assignor**”) which was then subsequently assigned by the Assignor to the proposed purchasers, Keith Eugene Hesketh and Rhonda Marie Hesketh (the “**Proposed Purchasers**”) pursuant to an Assignment Agreement dated effective January 31, 2023 (the “**Assignment Agreement**”).

8. The Receiver therefore applies for the following relief:

- (a) Approving and authorizing the Receiver to complete the transaction contemplated in the Asset Purchase Agreement dated effective January 31, 2023 (the "**Purchase Agreement**") between the Receiver and the Proposed Purchasers contemplated therein;
- (b) Approving, authorizing and directing the Receiver to enter into a sale of the assets for the purchase prices in the Purchase Agreement and subject to the terms and conditions thereof;
- (c) Vesting the Proposed Purchasers with all right, title, and interest in and to, the assets described in the Purchase Agreement, free and clear of all liens, charges, and encumbrances except as provided in the Purchase Agreement;
- (d) Authorizing the Receiver to distribute the sales proceeds as outlined in the proposed Approval and Distribution Order filed in these proceedings;
- (e) Approving the Receiver's activities as described within the Fifth Report; and
- (f) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

9. The Receiver refers this Honourable Court to the First Report, Fourth Report and the Fifth Report and the Appendices thereto which outline the facts underlying this application in detail, and further describes the Receiver's activities to date.

III. ISSUES

10. The following issues are raised on this application:

- (a) Should this Honourable Court approve the sale of the Properties?

IV. ARGUMENT

(a) Should this Honourable Court Approve the sale of the Properties?

11. Section 243 of the *Bankruptcy and Insolvency Act* [the **BIA**] 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 person's business; and
- (c) take any other action that the court considers advisable.

12. Section 247(b) of the *BIA* provides that a Receiver shall "act honestly and in good faith" and "deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner".

13. The decision of *Royal Bank v Soundair Corp.* (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA) [**Soundair**] enumerates the well-known criteria to be applied when considering the approval of a sale or the sales process of a Receiver. When considering whether a proposed sale 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.

14. *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the relatively recent published decision of *Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [**TD Bank**] at para 24.¹

¹ See also *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13.

15. It should also be noted that a court-appointed Receiver is afforded a high degree of deference in running such an asset sale within a receivership, provided that its course of action and recommendation is appropriate and nothing to the contrary is shown in the evidence. To order otherwise calls into question the Receiver's expertise and authority in the receivership process, thereby compromising both the integrity of the sales process, and undermining commercial certainty.

16. To that end, Galligan J.A. stated at paras 46-47 of *Soundair*.

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.

17. Therefore, applying the test in *Soundair*, the Receiver submits the following.

Factor 1: Whether the Receiver made sufficient effort to get the best price and has not acted improvidently

18. With regard to the first factor, the Receiver submits that its efforts to sell the Properties have been more than sufficient to get the best possible price in the circumstances. The overarching circumstance, in the Receiver's opinion, is the now trite fact that the City of Estevan has been hit very hard by the years-long downturn in the oil patch.

19. It should be noted that the proposed purchase prices in relation to the April 2020 appraisals commissioned by the Receiver² range from approximately 19.6% on the low end

² Found in the Confidential Appendix II to the First Report.

to 81.6% on the high end. However, the Receiver still recommends the Proposed Sales be approved. The Proposed Purchasers were not interested in assuming the back taxes.

(i) Colliers' Efforts

20. In the Receiver's view, the Proposed Sales and the purchase price thereof represent the best possible outcome in the circumstances. As noted above, all of the real properties of the Debtor were listed with Colliers in June 2020. The Properties received significant market exposure through Colliers efforts. Ultimately, Colliers advised the Receiver that interest was low and regular sales for the Properties unlikely. The Receiver views Colliers as an extremely experienced commercial brokerage with extensive market penetration and a wide network assisting to find potential purchasers. The Receiver submits that Colliers' efforts found at paragraph 12 of the Fourth Report in traditional and online marketing have been both very typical and commercially reasonable.

(ii) Grasswood's Efforts

21. When Colliers was making progress with the larger properties of the Debtor, but little progress was being made with the Properties contemplated in this application, they were removed from that listing process and given to Grasswood for marketing and auction.

22. Grasswood marketed the Properties from January, 2021 and running to May 27, 2021 using both traditional and online marketing. The reach of Grasswood was very broad—it netted exposure to approximately 123,000 potential bidders, with 93 individual bidders actually registering to participate in the online auction. Overall, 42 unique bidders actually participated, with a total of 256 bids during the May 27-28, 2021 auctions. However, the Properties contemplated in this application received no offers until the fall of 2022. Laureen Price made an offer to the Receiver, and such offer was subsequent assigned to the Proposed Purchasers.

(iii) Sufficient Overall Efforts To Obtain The Best Price

23. Overall, the Properties were exposed to the market since June of 2020. Originally, pursuant to the Marketing Process Order, this court approved the auction proposal with a lead time of approximately three (3) months from listing to auction by Grasswood. Inclement weather and pestilence then exerted their influence and an additional two (2) months were

added to the listing and marketing time at no additional cost from Grasswood which further exposed the Properties to market and to inspection by prospective purchasers.

24. The Receiver therefore submits that exposing the Properties since June 2020, marketing and attempting to sell the Properties has been a most provident effort and that the Receiver has made more than sufficient effort to get the best price possible. Ultimately, it is the market that sets the value of property and quoting the Alberta Court of Appeal in *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, 98 Alta LR (6th) 1 [PWC] at para 16, "At a certain point, however, it is the market that sets the value of property and appraisals simply become 'relegated to not much more than well-meant but inaccurate predictions': *Romspen Mortgage Corporation v Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (BCSC) at para 20".

25. Even considering the additional possible factors for this first part of the *Soundair* test as set out in *River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, 2010 ABCA 16, 18 Alta LR (5th) 201 [*River Rentals*] at para 13:

13 The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;
- (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) whether inadequate notice of sale by bid was given; or
- (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

the Receiver submits that this first branch has been easily satisfied, given the long marketing periods (for a sale on an invitation for offers basis and for auction), the lengthy notice period of the auction, and the interest of all parties as detailed in the next section of this Brief.

Factor 2: The interests of all parties

26. With regard to the second factor, the Receiver submits that approving the Proposed Sales is in the interests of the parties with an economic stake in the outcome.

27. First, the Properties have now been on the market for eleven (11) months. The Receiver submits that trying to market the Properties for longer would be prejudicial to all

parties. The sales now recommended by the Receiver help to avoid additional carrying costs chargeable to the Debtor's estate from the Receiver and property managers (as well as legal counsel involved).

28. Secondly, no evidence exists that spending additional time and money attempting to re-market the Properties after so long on the market will yield any additional money for the estate, particularly when given the additional costs which would certainly be incurred.

29. Third, the Properties have significant tax arrears owing to the City of Estevan as referenced in the Fifth Report. The first secured creditor, Canadian Mortgage Services Corporation ("**CMSC**") is the only party with financial interest in the Proposed Sales.

30. The Receiver therefore submits that approval of the Proposed Sales serves the interests of all parties involved.

Factor 3: The efficacy and integrity of the process by which offers were obtained

31. With respect to the third factor, the Receiver submits that the sales efforts to date were fair, efficient, targeted a wide audience, and commercially reasonable. The process clearly provided an efficient and open mechanism for any interested party to make an offer for the purchase of the Debtor's assets.

32. The Receiver, Colliers and Grasswood were at all times responsive to the inquiries of all interested parties and worked diligently to market and show the Properties to prospective purchasers since June 2020.

Factor 4: Whether there has been unfairness in the working out of the process

33. In respect of this final factor, is important to note that, as of the date of the Brief, no party with an economic interest in the Debtor's assets or any other party has challenged or provided evidence of any unfairness or irregularity in the sales efforts to date for the Debtor's assets.

34. As such, the Receiver therefore submits that this Honourable Court should, in 'balancing' of the above *Soundair* factors³, approve the Proposed Sales and the Receiver's activities to date.

35. Finally, the Receiver seeks approval of its activities as described within the Fifth Report.

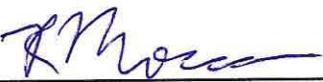
V. CONCLUSION

36. The Receiver respectfully requests that this Honourable Court grant the relief sought in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 10th day of February, 2023.

KANUKA THURINGER LLP

Per: 

Solicitors for the Receiver,
MNP Ltd.

³ PWC at para 12.

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AUTHORITIES**Cases**

| Name & Citation | Paragraph of decision | Paragraph of Brief | Principle |
|--|------------------------------|---------------------------|--|
| <i>Atrium Mortgage Investment Corp. v King Edward Apartments Inc.</i> , 2018 SKQB 296, 65 CBR (6th) 15 | 13 | 14 | Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test. |
| <i>Pricewaterhousecoopers Inc v 1905393 Alberta Ltd</i> , 2019 ABCA 433, 98 Alta LR (6th) 1 | 12 | 24 | River Rentals additional factors may be used for the first branch of the <i>Soundair</i> test in a balancing act and did not fundamentally modify such test. |
| | 16 | 24 | Appraisals are of limited value after time given to the market to set the real value for property. |
| <i>River Rentals Group Ltd. v Hutterian Brethren Church of Codesa</i> , 2010 ABCA 16, 18 Alta LR (5th) 201 | 13 | 25 | Additional factors to potentially consider in the first branch of the <i>Soundair</i> test. |
| <i>Romspen Mortgage Corporation v Lantzville Foothills Estates Inc.</i> , 2013 BCSC 2222 | 20 | 24 | Appraisals are of limited value after time given to the market to set the real value for property. |
| <i>Royal Bank v Soundair Corp.</i> (1991), 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA) | 16 | 13 | Off-cited test for asset sales in receiverships. |
| | 46-47 | 16 | Receivers afforded a high degree of discretion in recommending a sale. Courts should not lightly interfere with recommendation of receivers. |
| <i>Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.</i> , 2012 SKQB 289, 401 Sask R 203 | 24 | 14 | Saskatchewan Court of Queen's Bench citing the <i>Soundair</i> test. |

Statutes

| Name | Section | Paragraph of Brief | Principle |
|--|----------------|---------------------------|---|
| <i>The Bankruptcy and Insolvency Act</i> | 243 | 11 | Authority of Receiver to take possession of a Debtor's assets and to deal with them as approved by the Court. |
| | 247(b) | 12 | Duty of Receiver to act honestly, in good faith and in a commercially reasonable manner. |