COURT FILE NUMBER	Q.B.G. No. 945 of 2020
COURT OF QUEEN'S BENCH FOR SASKATCHEWAN	
JUDICIAL CENTRE	REGINA
PLAINTIFF	CONEXUS CREDIT UNION 2006
DEFENDANTS	ELK RIDGE GOLF & CONFERENCE CENTRE INC. AND ARNE PETERSEN

IN THE MATTER OF THE RECEIVERSHIP OF ELK RIDGE GOLF & CONFERENCE CENTRE INC.

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, including all proceeds thereof, of Elk Ridge Golf & Conference Centre Inc. ("**Elk Ridge**"), by an Order of the Honourable Madam Justice M.R. McCreary granted June 5, 2020 (the "**Order**").

2. The Order authorizes and empowers the Receiver to market, including advertising and soliciting offers in respect of Elk Ridge's property and to negotiate terms and conditions in its discretion. In addition, the 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.

3. The main properties of Elk Ridge include those relating to the golf course and conference centre (the "**Resort**") and under-developed land located at SE Quarter of Section 4, Township 51, Range 26, W2 located in the R.M. of Buckland #491, Saskatchewan (the "**Under-Developed Lands**"). The Resort and Under-Developed Lands were the subject of two different sales processes and are the subjects of two distinct sale approval and vesting orders in this application (collectively, the "**Proposed Sales**").

Background – The Under-Developed Lands

4. The Under-Developed Lands are comprised of four legal subdivisions in the R.M. of Buckland #491. The said lands are bare and not used for Resort operations and were therefore marketed separately by a licenced realtor. Following the marketing process, a Counter Offer dated October 14, 2020 (the "**Counter Offer**") was accepted by the proposed purchasers, Trevor Peters and Joanna Peters (the "**Peters**").

5. The sale of the Under-Developed Lands is detailed in the Second Report of the Receiver dated October 19, 2020 (the "**Second Report**") filed in these proceedings.

Background – The Resort

6. The Resort includes all of the operations of the golf course, the restaurant, the hotel, the Conference Centre, and 34 condominiums owned by Elk Ridge. It comprises all or substantially all of Elk Ridge's assets and its former business operations. The Resort is more particularly described at paragraph 31 of the First Report of the Receiver dated October 9, 2020 (the "**First Report**") and Schedule D attached thereto.

7. The Resort was marketed by the Receiver on two separate occasions following the Receiver's appointment on June 5, 2020 (the "**Post-Receivership Marketing**") and once before the Receiver's appointment by Colliers International ("**Colliers**") starting in September, 2019 (the "**Pre-Receivership Listing**"). As such, the Resort is the subject of this application for a Sale Approval and Vesting Order.

8. Following the Pre-Receivership Listing, on or before the appointment of the Receiver, four (4) offers to purchase or letters of intention were submitted through such listing process, summaries of which are found in the confidential addendum to the Receiver's First Report.

9. On June 11, 2020, after an offer was received by the Secured Creditor, Conexus Credit Union 2006 ("**Conexus**") from New Source Cathodic Inc. ("**New Source**"), the Receiver invited the parties which had previously submitted offers to re-submit offers on June 12, 2020. This

was done to see if a higher price could be had for the Resort based upon a prospective purchaser capturing part of the 2020 golf season.

10. On June 16, 2020, the Receiver first elected to move forward with an offer from Lake Country Co-op. However when it advised conditions were not being lifted on June 25, 2020, the Receiver contacted then contacted New Source to move forward with their previous offer.

11. However, due to concerns with the timelines required for New Source to satisfy conditions on their previous offer, the Receiver elected to conduct a public sales process.

12. On July 15, 2020, the Receiver initiated a public sales process (the "**Sales Process**")[1] which included:

(a) A marketing period from July 15, 2020 to August 7, 2020;
(b) Direct distribution of an Information Summary to all parties who had previously expressed an interest in the property and/or submitted offers to purchase;
(c) Direct distribution of an Information Summary to commercial realtors who had contacted MNP inquiring about the status of the Resort;
(d) Direct distribution to approximately 300 MNP staff across Alberta, Saskatchewan and Manitoba for distribution to clients and contacts; and
(e) Online advertising of the Sales Process on MNP LinkedIn and MNPdebt.ca websites.

13. The results of the Sales Process are as follows:

(a) Online marketing of the sales process recognized over 2,900 impressions with 267 direct click throughs;
(b) Forty (40) prospective purchasers requested a copy of the Confidentiality Agreement;

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1. A copy of the Information Summary published by the Receiver is attached as Schedule D to the First Report.

(c) Twenty-seven (27) returned signed copies and obtained a copy of the Confidential Information Package and access to the on-line data room;

(d) Five (5) prospective purchasers completed site visits and completed additional due diligence; and

(e) In total, by August 7, 2020, five (5) Offers to Purchase were submitted to the Receiver in accordance with the Terms and Conditions of the Sales Process.[2]

14. After the end of the marketing period in the Sales Process, the Receiver entered into negotiations over the final form of an Asset Purchase Agreement with New Source, following their submission of the highest offer for the Resort assets (the "**New Source Offer**").

15. On October 23, 2020 the final form of the Asset Purchase Agreement was finalized and executed by the Receiver and 102074934 Saskatchewan Ltd., an affiliate of New Source (the "**Asset Purchase Agreement**").

16. The Receiver therefore applies for the following relief in respect of the Resort Sale:

(a) Approving and authorizing the Receiver in its capacity as Receiver of Elk Ridge pursuant to an Order accepting, and authorizing the Receiver to complete, the Offer to Purchase from New Source;

(b) Approving, authorizing and directing the Receiver to enter into a sale of all or substantially all of the real property, fixtures, chattels, good will, and other assets more particularly described in, and subject to the terms and conditions set forth in, the Asset Purchase Agreement dated October 23, 2020, between New Source and the Receiver;

(c) Vesting New Source with all right, title, and interest in and to, the assets described in the Asset Purchase Agreement, free and clear of all liens, charges, and encumbrances except as provided in the Asset Purchase Agreement;

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[2] Summaries of these offers are included in the Confidential Addendum to the Receiver's Report (the "**Confidential Addendum**")

(d) Authorizing the Receiver to distribute the sale proceeds as outlined in paragraph 84 of the Receiver's Report;

(e) Approving the Receiver's activities as described within the First Report including but not limited to the Sales Process (as defined herein), the disbursements of the Receiver, and those of the Receiver's legal counsel as set out herein;

(f) Authorizing the Receiver to provide the Director of Elk Ridge with 30 days notice to remove any books and records from the Elk Ridge premises and approval for the Receiver to destroy any records not retained by the Director or required by CRA to complete the trust exams;

(g) Sealing the Confidential Addendum, filed in relation to this matter on the Court file; and

(h) Such further and other relief as counsel may request and this Honourable Court may allow.

17. The Receiver therefore applies for the following relief in respect of the Under-Developed Land Sale:

(a) Approving and authorizing the Receiver in its capacity as Receiver of Elk Ridge pursuant to the Receivership Order accepting, and authorizing the Receiver to complete, the Counter Offer made to the Peters;

(b) Approving, authorizing and directing the Receiver to enter into a sale of the lands more particularly described in, and subject to the terms and conditions set forth in, the Counter Offer, for the purchase price identified in such Counter Offer;

(c) Vesting the Peters with all right, title, and interest in and to, the lands described in the Counter Offer, free and clear of all liens, charges, and encumbrances except as provided in the draft order; and

(d) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

18. The Receiver refers the court to its First Report and the Confidential Addendum thereto as well as the Second Report, both of which outline the facts underlying this application in detail, and further describes the Receiver's activities to date.

19. With respect to Unit #83 listed in the Sale Approval Vesting and Distribution Order in respect of the Resort, Elk Ridge owned a 19/20 share of such unit. The other 1/20th share was owned by the daughter of Arne Petersen (the principal/director of Elk Ridge), Debra Lynn Klarenbach. As of the date of this Brief, it is the Receiver's understanding that the 1/20th share is being sold to the Purchaser by its owner, as negotiated between her and the Purchaser.

III. ISSUES

20. The following issues are raised on this application:

(a) Should this Honourable Court approve the Proposed Sales?

(b) Should this Honourable Court seal the Confidential Appendices of the Receiver's Report?

IV. ARGUMENT

(a) Should this Honourable Court approve the Proposed Sales?

21. 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.

22. 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".

23. The decision of *Royal Bank v Soundair Corp.,* 4 OR (3d) 1, 83 DLR (4th) 76 [***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.

24. *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the relatively recent published decisions of *Toronto Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [***TD Bank***] at para 24 and *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13 [***Atrium***].

25. In *TD Bank*, the Honourable Madam Justice A.R. Rothery stated at para 25 that "[c]ertainly, the Receiver must act honestly and in good faith; the Receiver must deal with the Debtor's assets in a commercially reasonable manner" and then went on to consider the four *Soundair* factors cited above.

26. 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.

27. 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.

28. With respect to the Proposed Sales, the Receiver submits that it has engaged in fair, impartial and provident efforts to yield the offers contemplated herein, and that the sales processes it utilized in that regard was undertaken with a view towards obtaining the best price having regard to the economic interests of stakeholders.

29. 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

a. The Resort

30. With regard to the first factor, the Receiver submits that the marketing efforts made by both itself and Colliers, the commercial broker involved, were of sufficient length and breadth to expose the Resort to a wide audience of potential purchasers with a view towards obtaining the best price and most commercially reasonable process possible.

31. As stated above, and as detailed in the Confidential Addendum at paras 16-36, the Resort was listed since September, 2019 by Colliers with the result of four offers being received on or before the appointment of the Receiver. Following the receipt of those offers

by the Receiver, an additional solicitation was made to the offerors, with additional and/or revised offers being submitted for consideration.

32. When the highest offer was withdrawn after due diligence conducted by the offeror, the Receiver initiated the Sales Process. A wide net was cast in that process with further offers being received. Ultimately, as detailed in Table 2 to the Confidential Addendum, five offers were received on or before August 7, 2020 when the Sales Process concluded.

33. Overall, the Resort was listed for a period of almost eleven months. The Receiver attempted to find greater value for the Resort by soliciting interest in a quick sale to attempt to preserve part of the 2020 golf season, even in the midst of the COVID-19 Pandemic. In the end, the Receiver submits that the current New Source Offer represents the best value coming from a viable offer that can be had for the Resort assets in the circumstances.

34. In the Receiver's view, ultimately, it is the market that sets the value of property. The Receiver therefore submits that a thorough and diligent effort was made to market assets which require specialized skill and expertise for a prospective purchaser to operate successfully. Furthermore, as detailed below, the amount of the New Source Offer does little to prejudice any party.

b. The Under-Developed Lands

35. With respect to the sale of the Under-Developed Lands, the Receiver submits that given the fact such lands are bare and serve little commercial purpose to the Resort, the Receiver made sufficient efforts to market such lands in the circumstances by listing them with a licenced real estate firm. The details of the sale process for the Under-Developed Lands is detailed at paragraphs 8-15 of the Second Report.

36. The $75,000.00 price received for the Under-Developed Lands is well above the forced sale value opined by Ring Appraisals Ltd. of $68,000.00 and is 93% of fair market value (not in a forced sale). Both the Receiver and Conexus support this proposed sale.

Factor 2: The interests of all parties

37. With regard to the second factor, the Receiver submits that all parties are well served by the New Source Offer and the Counter Offer from the Peters. If approved, they provide an efficient disposition of the Resort and the Under-Developed Lands without the need to incur additional costs, while providing for a certain level of recovery for the primary secured creditor, Conexus.

38. In addition, given the amount of debt owing by Elk Ridge to Conexus on the eve of the Receiver's appointment, as detailed at para 36 of the Confidential Addendum, a significantly higher price would have to be achieved before any creditors behind Conexus in priority would achieve any payout whatsoever, other than the creditors listed in the proposed distribution in paragraph 84 of the First Report.

39. The Receiver therefore submits that approval of the New Source Offer and the Counter Offer from the Peters serves the interests of all parties involved.

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

40. With respect to the third factor, the Receiver submits that the marketing and Sales Process (in respect of the Resort) was fair and efficient and targeted a wide audience. The process clearly provided an efficient and open mechanism for any interested party to make an offer for the purchase of the Resort and the Under-Developed Lands.

41. The Receiver was at all times responsive to the inquiries of all interested parties, and encouraged the submission of offers on an ongoing basis following its appointment. Colliers actively listed the Resort since September, 2019. The process was of sufficient length, nearly nine months in total, to sufficiently expose the Resort to the market.

42. With respect to the sale of the Under-Developed Lands, the Receiver submits that listing such lands with a commercial real estate firm was a commercially reasonable course of action given the nature of the lands listed. By all accounts, the end result, namely the price, was a good outcome for all interested parties.

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

43. In respect of this fourth and final factor, is important to note that, as of the date of the Brief, no party with an economic interest in the Elk Ridge assets or any other party has challenged or provided evidence of any unfairness or irregularity in the Sales Process (for the Resort) or the listing of the Under-Developed Lands.

44. As such, the Receiver therefore submits that this Honourable Court should approve the sales process and the New Source Offer.

(b) Should this Honourable Court seal the Confidential Appendices?

45. The particulars of the Sales Process, the New Source Offer and the Asset Purchase Agreement are contained in the Confidential Addendum.

46. As such, the Confidential Addendum contains information respecting the market value of the resort property, and other details of proposed offers to purchase the assets of Elk Ridge. Publicly disclosing this highly sensitive information would be prejudicial to any future sales process within these proceedings, particularly in the event that the proposed transaction contemplated in this application does not close (for whatever reason).

47. In accordance with the recognized principles governing sales in insolvency proceedings and in accordance with standard practice in Saskatchewan, an order sealing the Confidential Addendum is necessary and appropriate in the circumstances.

48. The Receiver further submits that salutary effects of a Sealing Order of the Confidential Addendum outweigh any potential deleterious effects, and is necessary towards assisting the Receiver in keeping with the *Soundair* principles. Not only is the granting of the Order reasonable in the circumstances, it is, in the Receiver's submission, appropriate and necessary.

V. DISTRIBUTION & OTHER MATTERS

49. As noted in the First Report at paragraph 84, the Receiver intends to make the following distributions out of the proceeds of the Proposed Sales:

(a) First, to pay the sum of $236,418.31 (plus any accrued interest up to the date of payout) to Rural Municipality of Lakeland #521 for property tax arrears;

(b) Second, to pay the sum of $10,811.92 (plus any accrued interest up to the date of payout) to Elk Ridge Estates Condo Corp. for outstanding condominium association fees;

(c) Third, to pay the sum of $121,516.05 (plus any accrued interest up to the date of payout) to CWB National Leasing Inc. (in respect of the "buy out" of the 100 golf carts associated with the Resort);

(d) Fourth, to pay the sum of $130,200.00 (plus GST) to Colliers as commission (for its work in the Sales Process in respect of the Resort);

(e) Fifth to pay the sum of $300,000.00 (plus accrued interest up to the date of payout) to Conexus Credit Union 2006 as repayment of the Receiver's borrowings;

(f) Fifth, to pay the sum of $5,150,000.00 to Conexus as partial payment towards the principal secured debt; and

(g) Sixth, the balance of the remaining Net Sales Proceeds shall be paid to the Receiver to be held as a holdback to address the accrued professional fees, ongoing costs related to the administration of the receivership estate, any adjustments incidental to closing, and any priority amounts identified as outstanding by Canada Revenue Agency (the "**CRA**").

50. The above items are either incidental to the operations of the Resort (taxes, condominium fees, golf carts), the Sales Process for the Resort (the payment to Colliers) or for the activities of the Receiver (the borrowings charge and the professional fees and disbursements). The Sale Approval and Vesting Order in respect of the Under-Developed Lands contemplate that those proceeds be dealt with as set out above and in the Sale Approval Vesting and Distribution Order in respect of the Resort.

51. With respect to the proposed holdback in item (g) above, on top of paying professional fees and disbursements, the Receiver is holding back the net sales proceeds from the Proposed Sales as a reserve pending a trust examination by the CRA. Although the books and records of Elk Ridge indicate that the payroll and source deduction remittances are current, the CRA has been delayed in responding to requests from the Receiver due to the COVID-19 Pandemic. As such, the Receiver is proposing holding back a portion of the next sale proceeds in reserve and will seek further direction of this Court, should any surplus funds remain.

52. Finally, the Receiver is requesting that it be authorized to provide Arne Petersen, the director of Elk Ridge, 30 days' notice before destroying any books and records of Elk Ridge. The Receiver has accumulated significant records of Elk Ridge in its role and requests that it be allowed to dispose of them after notice to Mr. Petersen and in consultation with the Purchaser.

VI. CONCLUSION

53. 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 27th day of October, 2020.

KANUKA THURINGER LLP

Per: _____

Solicitors for the Receiver,
MNP Ltd.

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AUTHORITIES

Atrium Mortgage Investment Corp. v King Edward Apartments Inc., 2018 SKQB 296, 65 CBR (6th) 15

Royal Bank v Soundair Corp., 4 OR (3d) 1, 83 DLR (4th) 76

Toronto Dominion Bank v 101142701 Saskatchewan Ltd., 2012 SKQB 289, 401 Sask R 203

Bankruptcy and Insolvency Act, RSC 1985, c B-3

2018 SKQB 296
Saskatchewan Court of Queen's Bench

Atrium Mortgage Investment Corp. v. King Edward Apartments Inc.

2018 CarswellSask 528, 2018 SKQB 296, 299 A.C.W.S. (3d) 99, 65 C.B.R. (6th) 15

ATRIUM MORTGAGE INVESTMENT CORPORATION (PLAINTIFF) and KING EDWARD APARTMENTS INC. (DEFENDANT)

D.H. Layh J.

Judgment: October 12, 2018
Docket: Regina QBG 2905/16

Counsel: Jeffrey Lee, James Rose, for Receiver, MNP Ltd.
Kevin Mellor, for Holly Wilkes, Dev Francis, Glenda Francis, Richard Coupal, Joanne Coupal, Trent Fraser and Lorette Fraser
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Alexander Shalashniy, for Atrium Mortgage Investment Corporation
Khurrum Awan, for Superior Homes
Eric Lanoie, for Integral Homes

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Property in issue was apartment complex — Receivership order was granted and receiver was appointed — Receiver was authorized to market property, and in consultation with mortgagee, receiver proposed method of sale and received court approval — Receiver entered into purchase and sale agreement subject to court approval — Receiver applied for order approving purchase and sale of apartment complex — Application granted — After carefully considering parties' positions, in light of applicable principles of receivership law and facts of particular receivership, draft order of sale approval and vesting order were to issue in form filed — While two guarantors of debtor's obligations did not receive actual notice of application to approve sale process, court was not persuaded that failure of receiver to provide appropriate notice of application had material bearing on court's determination — Pursuant to receivership order, receiver had no obligation to seek court's approval respecting method it chose to market property — Even though two guarantors could raise prima facie case of ineffective service, they essentially raised identical objections to approval of proposed sale as large group of guarantors who received notice of application — Guarantors were essentially given opportunity to make representations respecting preferred method to sell property — Guarantors had not shown that receiver vitiated sale process by illegality or non-compliance with procedures envisioned in order approving sale process — There was little likelihood of more successful method of sale, and if sale were to net lesser amount, entirety of risk lay with mortgagee — Predictability and certainty were hallmarks of legitimacy of receiver to deal with assets — To second guess method of sale at this late stage did not accord with principle judge correctly identified months ago in granting receivership order that court accorded high degree of deference to implementation of disposition strategy developed by receiver — Sale price was above appraised value of property and exceeded only other bid by more than double.

Table of Authorities

Cases considered by *D.H. Layh J.*:

C.D.R. Developments Inc. v. ACI Holdings Inc. (2017), 2017 SKQB 163, 2017 CarswellSask 321, 10 C.P.C. (8th) 118 (Sask. Q.B.) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — considered

Toronto Dominion Bank v. 101142701 Saskatchewan Ltd. (2012), 2012 SKQB 289, 2012 CarswellSask 507, 96 C.B.R. (5th) 162, 401 Sask. R. 203 (Sask. Q.B.) — considered

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4915, 2010 CarswellQue 10954, 72 C.B.R. (5th) 49 (C.S. Que.) — considered

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules 2013

Generally — referred to

R. 2-40 — considered

R. 2-40(1) — considered

R. 2-41(1) — considered

R. 2-41(7) — considered

R. 12-1 — considered

R. 12-1(1) — considered

R. 12-1(2) — considered

R. 12-1(3) — considered

R. 12-1(4) — considered

Forms considered:

Queen's Bench Rules, Sask. Q.B. Rules 2013

Form 2-40 — referred to

APPLICATION by receiver for order approving purchase and sale of apartment complex.

***D.H. Layh J.*:**

NATURE OF APPLICATION

1 By Notice of Application initially returnable on September 20, 2018, MNP Ltd. [Receiver], in its capacity as Receiver of the assets, undertakings and properties of King Edward Apartments Inc. [King Edward], sought an order to approve the purchase and sale of King Edward's property, an apartment complex in Regina [Property]. The proposed purchaser is the original mortgagee of the Property, Atrium Mortgage Investment Corporation [Atrium] and its nominee CMCC SISYPHUS LP. The Purchase and Sale Agreement [PSA], made effective September 1, 2018, contemplates a court order approving the sale.

2 The original application was heard before me in Regina on September 20, 2018. At that time, counsel representing encumbrance holders on the title to the Property and guarantors of the debt obligations of King Edward requested an adjournment to seek instructions from their clients. Given the time sensitivity of the matter, counsel and I agreed to adjourn the matter to the Judicial Centre of Yorkton to be heard September 26, 2018. On that day certain counsel attended in Yorkton in person; others by telephone. The matter was reserved.

3 During the hearing in Yorkton representation was made respecting the importance and significance of a previous order of this Court granted by Justice Zarzeczny on January 18, 2018 in which he approved the sale process proposed by the Receiver that has led to the current PSA before the court. The Receiver raised the non-attendance of Cameron Wilkes and Hee Jung Koh at the January hearing as grounds for their inability to object to the current proposed sale. After the hearing in Yorkton, counsel for Mr. Wilkes and Ms. Koh provided an affidavit and brief of law to the court. In his affidavit Mr. Wilkes questioned the purported manner of service of the Notice of Application respecting the January 18, 2018 application, stating that neither was aware of the proposed method of sale. With this new development, the Local Registrar reached out to the parties and set a date for a continuation of the hearing, in this instance by telephone conference call on Tuesday, October 10, 2018. At that time further representation was heard from counsel for Mr. Wilkes and Ms. Koh, for Atrium Mortgage, as well as counsel for the Receiver (who, too, had filed a further brief of law).

4 Apparently, counsel for the encumbrance holders accept that there is no likelihood of any equity from any method of sale of the Property that could be made available to service any of the debt obligations owed to them. They have not made further representations to the court.

BACKGROUND

5 The parties are aware of the proceedings leading to the current application. The Property is an apartment complex comprising five newly constructed two-storey apartment buildings in the Cathedral neighbourhood in Regina. In 2014, Atrium Mortgage advanced $12,800,000 to King Edward to finance construction. Construction halted in early 2016 and the mortgage matured on September 1, 2016. By November 2016, the Property had sat idle for over six months with builders' liens exceeding $2,300,000 registered against the title. Other problems mounted: mould, unreliable power source, unpaid property taxes, winter maintenance costs and unpaid insurance. Costs to complete construction were then estimated at $2,000,000.

6 On November 25, 2016, Justice Schwann (as she then was) granted a receivership order appointing MNP Ltd. as receiver. Under the Order, the Receiver was permitted to borrow money to complete the project with any advance to hold a first ranking priority, subordinate only to the payment of the Receiver's professional fees and disbursements. On four subsequent occasions the Receiver applied to the court for further first-secured advances, authorizing a total of $8,800,000, and using $6,297,127 to ultimately complete construction in August 2018. This amount, plus $13,997,599.65 owing under the original mortgage advance, was outstanding as of September 1, 2018.

7 Pursuant to paragraph 3(k) of the Receivership Order, the Receiver was empowered and authorized to market the property, including advertising and soliciting offers respecting the property and negotiating terms and conditions of sale as the Receiver deemed appropriate. In consultation with Atrium Mortgage, the Receiver proposed a method of sale of the Property and brought an application before Justice Zarzeczny on January 18, 2018 to approve the method of sale. The Receiver followed the terms of the January 18, 2018 order and implemented the proposed sale process. Avison Young identified 5,641 potential purchasers and sent each an email on February 20, 2018 advising that the Property was for sale. Of the recipients, 1,772 opened the initial email, 37.3 percent, a percentage considered higher than the industry open rate of 17.6 percent. Of those recipients who opened the email, 88 downloaded a brochure that detailed the Property.

8 On March 6, 2018 a follow-up email was sent to the 5,643 potential purchasers advising them of the opportunity to tour the property. Of those sent, 1,775 were opened and 43 downloaded the brochure.

9 Avison Young placed advertisements in the Globe and Mail (National Edition) on four occasions: February 27, March 1, March 27 and March 29, 2018. It also placed one advertisement in the Regina Leader Post on February 28, 2018.

10 On April 26, 2018 Avison Young sent a third email communication detailing the process for submitting expressions of interest to purchase the property. Of the 5,570 intended recipients, 1,469 opened the "Bid Date E-Mail Communication" and 25 downloaded the brochure.

11 Avison Young set a deadline of May 15, 2018 by which potential purchasers were required to submit written expression of interest to purchase the property.

12 Despite the marketing efforts, the Receiver received only two written expressions of interest with Atrium Mortgage (and its nominee) offering to pay over twice the amount as the other expression of interest. According to the terms of the January 18, 2018 Order, the Receiver entered into the PSA, effective as of September 1, 2018, subject to court approval.

RECEIVER'S POSITION

13 All the parties to this application agree on the legal principles that this Court should apply in determining whether or not the proposed sale should be approved. Those principles are commonly called the *Soundair* test, stated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) (WL) at para 16 [*Soundair*] as accepted by Justice Rothery in *Toronto Dominion Bank v. 101142701 Saskatchewan Ltd.*, 2012 SKQB 289 (Sask. Q.B.) [*TD Bank*]. The *Soundair* test requires the court to consider:

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

2. the interests of all parties;

3. the efficacy and integrity of the process by which offers are obtained; and

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

14 The Receiver states that the court's attention to these four considerations bodes for one answer: that the sale should be approved. Respecting the efforts the Receiver has made to get the best price and has not acted improvidently, the Receiver first states that the court should be mindful that participants in a receivership sale should have a measure of confidence that the court will not lightly intervene with a receiver's power to effect a sale. Citing case law, including *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), the Receiver suggests that prospective purchasers must know that if they act in good faith, bargain seriously with the receiver and enter into an agreement, the court will not lightly interfere with the commercial judgment of the receiver to sell assets. In this instance, the Receiver looks specifically to the previous July 21, 2017 order of Justice Schwann where she stated:

> 19. First, the applicable jurisprudence accords a high degree of deference to the implementation of the disposition strategy developed by a court-appointed receiver and will intervene only in exceptional circumstances. (See for example: *Crown Trust Co, v Rosenberg* (1986), 39 DLR (4th) 526; *Toronto-Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203, *Royal Bank of Canada v Fracmaster Ltd.*, 1999 ABQB 425, 245 AR 138).

15 Aside from this general principle, the Receiver characterizes the efforts of Avison Young to get the best price as "very substantial," that the property was "extensively marketed to thousands of potential purchasers and advertised in business sections of national and local newspapers on five occasions." The offer made by Atrium Mortgage is twice the next highest expression of interest and exceeds the appraised value of the property.

16 Respecting the interests of all parties, the Receiver points out that the method of sale was court approved without opposition and upon notice to all parties (an assertion that Mr. Wilkes and Ms. Koh have now contested). The report prepared by Avison Young indicates that 13 different persons executed confidentiality agreements and were given access to the "electronic data room," which provided further details of the Property.

17 Respecting the efficacy and integrity of the sale process, the Receiver looks to the court's prior approval of the method of sale. And, respecting any alleged unfairness in working out the sale process, the Receiver states that throughout, the Receiver acted diligently and in good faith.

18 The Receiver also addresses the fact that, in this instance, it is the secured creditor of King Edward that proposes to buy the property, sometimes called a "credit bid." Essentially, if this sale is approved, Atrium Mortgage agrees to pay the purchase

price by set-off of its existing secured debt, after payment of the Receiver's first charge against the property. The Receiver reminds the court that the legitimacy of Atrium Mortgage's charge against the property was confirmed by an independent legal opinion dated July 5, 2017.

POSITION OF SEVEN GUARANTORS

Holly Wilkes, Trent Fraser, Gaye Fraser, Joanne Coupal, Richard Coupal, Dev Francis and Glenda Francis as represented by Richmond Nychuk

19 Ms. Wilkes, Mr. Fraser, Ms. Coupal and Mr. Francis are guarantors of the obligations of King Edward who have filed virtually identical affidavits. Each opposes the proposed sale of the Property and asks the court to order a "public sale" of the Property. The affidavits show an understandable concern about the projected shortfall for which the guarantors will be jointly and severally liable. They state that although they have attempted to negotiate a settlement of their guarantee obligations, Atrium Mortgage has rejected their offers and has failed to counter-offer. Each has attached to his or her affidavit a statutory declaration previously given to Atrium Mortgage to prove that his or her exigible assets are insufficient to pay the projected amount owing under the guarantee. Each states that Atrium Mortgage's refusal to engage in a meaningful settlement discussion means that he or she "will be forced to consider bankruptcy." They each state that the sale process has not been fair and equitable.

20 As previously stated, the guarantors agree with the Receiver that the court should consider the *Soundair* test to determine whether the Receiver's proposed sale should be approved.

21 The guarantors characterize the Receiver's efforts to sell the Property as "wholly ineffective." Instead, they state, a more sensible way to sell the property would have been through a public auction process open nationally and internationally. They also suggest that marketing the Property solely as an apartment complex was an error: the Property should also have been marketed as a potential condominium complex as well. Furthermore, they state that marketing the Property when it was still under construction was inadvisable. And, finally, the guarantors state that the Receiver should have considered using a multiple real-estate agency to increase exposure and should not have marketed solely through Avison Young.

22 As part of the *Soundair* considerations, the guarantors state that their exposure at the proposed sale price would leave them with an approximated $6.1 million liability. They state, "A call on the Guarantee would result in the bankruptcy of each individual Guarantor."

23 The Guarantors accept that the Receiver obtained a court order to sanction the method of sale but state that although the proposed sale process "may have looked good on paper, it was ineffective, ill conceived and alternatives to the modified bid process were not considered." Instead, the Receiver should have used an open bid system, either through avenues like a public auction, Skype auction or have opened the sale to real-estate companies other than Avison Young.

POSITION OF CAMERON WILKES AND HEE JUNG KOH AND RECEIVER'S RESPONSE

24 From the first time this application came before the court on September 20, 2018 until the last adjourned date of October 9, 2018, the position of certain parties has evolved. For example, two lien holders, Superior Homes and Integral Homes, seemingly have accepted that there exists no possibility of payment from proceeds of any sale.

25 Most significantly, at the first court appearance on September 20, Cameron Wilkes was self-represented. Ms. Koh, it appears, neither attended nor had legal representation. Only by correspondence of September 26, 2018 did the court receive notification that Mr. Wilkes and Ms. Koh had retained McKercher LLP to represent them at the adjourned date of September 26, 2018. In support of his position, Mr. Wilkes (but not Ms. Koh) filed an affidavit in support of his opposition to the court approving the proposed sale. Mr. Wilkes and Ms. Koh are guarantors of the obligations of King Edward. Mr. Wilkes, a licensed realtor with Century 21 Dome Realty Inc. with over 26 years' experience in commercial real estate, stated that if the proposed sale proceeded leaving the expected shortfall, he would be forced into bankruptcy.

26 In his affidavit, Mr. Wilkes described the significant investment that six families initially invested in the apartment complex. King Edward decided in 2014 to design five buildings of 90 two-bedroom apartments that could be subsequently converted into condominiums when the rental vacancy rate in Regina increased. As part of his affidavit, Mr. Wilkes prepared a comparative market analysis on September 25, 2018 (one day before the continued hearing in Yorkton). If sold as condominium units at an average selling price per unit of $240,000, less approximately $15,000 per unit in costs to convert to condominium units, the net sale proceeds per unit would amount to approximately $225,000.00. This amount, times 90 units, could yield a minimum of $20,250,000.00.

27 Mr. Wilkes is critical of the Receiver's marketing efforts. He believes that the Property should have been sold by way of a multiple listing service on a national level, including listing the Property on the MLS. He also states that it was premature to begin marketing the Property before construction was completed.

28 Apparently, at the September 26th adjourned date in Yorkton, Mr. Wilkes's counsel, Janine Lavoie-Harding, and Mr. Wilkes (both having driven to Yorkton to attend the hearing) came to realize something that theretofore had escaped Mr. Wilkes: he was not aware of the hearing on January 18, 2018 when Justice Zarzeczny approved the method of sale. Only after the court had reserved the matter for determination after the September 26th hearing did counsel for Mr. Wilkes and Ms. Koh advise the court by correspondence dated October 5, 2018 that Mr. Wilkes had not received notice of the January 18, 2018 application. As well, that correspondence was the first time that the court learned that Bonnie Hall and Allan Hall had retained McKercher LLP to represent them.

29 Faced with this new development, the court asked the Local Registrar to canvas with counsel a continuation of the hearing. A telephone conference call was arranged for 9:00 a.m., Tuesday, October 9, 2018. By that time there was filed with the court the following additional documents: affidavit of Cameron Wilkes dated October 5, 2018; reference by Mr. Wilkes to the decision in *C.D.R. Developments Inc. v. ACI Holdings Inc.*, 2017 SKQB 163, 10 C.P.C. (8th) 118 (Sask. Q.B.); affidavit by Robert Goodall (representative of Atrium Mortgage); and Supplemental Brief of Law by the Receiver.

30 In his affidavit, Mr. Wilkes stated that he was not served with any documents giving him notice of the January 18, 2018 hearing. He stated that he and Ms. Koh terminated their retainer with the Richmond Nychuk law firm in August 2017. In his affidavit, Mr. Wilkes states that he understood that after he terminated his retainer that he would receive documents personally as he did when the receivership proceedings first started. When he made a further inquiry after the instant application had begun, he checked his bank records and found that he had received a portion of his retainer from Richmond Nychuk — $2,338.73 on August 30, 2017. Further inquiries revealed that Mr. Mellor of Richmond Nychuk sent a letter to MLT Aikens LLP on October 20, 2017 in which Mr. Mellor stated he was no longer representing Mr. Wilkes or Ms. Koh.

31 In his October 5, 2018 affidavit, Mr. Wilkes asked the court not to approve the sale. Instead, he suggests marketing the Property as condominium units. Stating that a six month delay of the sale will not occasion significant loss to Atrium Mortgage, he projects that based on the advertised rental rates for the Property of $1,195 per month per unit with a 93% occupancy rate, the Property would yield ($1,195 ? 60) ? .93 or $600,129 of rental income, an amount he states would be "more than enough to satisfy or pay any reasonable debt servicing costs during this time frame."

32 Respecting Mr. Wilkes's position that he did not receive notice of the January 18, 2018 application, he refers the court to Rule 12-1 of *The Queen's Bench Rules*. It states:

> **12-1**(1) Subject to the express provisions of any enactment and notwithstanding any rule respecting service, the Court has discretion to validate or set aside the service of any document.
>
> (2) The primary consideration for the Court in the exercise of its discretion is that the person served or to be served:
>
> (a) received notice of the document; or
>
> (b) would have received notice except for the attempts of that person to evade service.

(3) If the Court is satisfied that the person to be served received notice of the document, the Court may:

(a) validate any irregular or unauthorized service of a document; and

(b) impose any terms that it considers appropriate on the validation.

(4) If the Court is not satisfied that the person to be served received notice of a document, the Court may:

(a) set aside service of the document; and

(b) order further or other service of the document.

. . .

33 Robert Goodall, the founder of Atrium Mortgage, also filed an affidavit dated October 5, 2018. Mr. Goodall describes historic problems with the apartment complex. (The court accepts that the project failed in significant ways, otherwise the project would have been completed without the need to appoint a receiver.) Mr. Goodall states that the general contractor was not experienced in projects of this size. Air conditioning and dishwashers were not installed in the units. The project stood conspicuously incomplete in a prominent Regina community garnering a poor reputation. Mr. Goodall states that even after an extensive and costly rental advertising campaign the occupancy rate is only 11 percent and realizes only $13,145 of monthly rental income. Given the existing operating and leasing costs, the property is currently losing over $20,000 per month. Atrium Mortgage is currently obtaining pricing to place air conditioning and dishwashers into the units after the sale is approved.

34 Respecting the possibility of converting the property into condominium units, Mr. Goodall states that the Receiver interviewed four prominent firms about this possibility, including CBRE Group, Inc., Colliers International Group Inc., JLL Capital Markets and ICR Commercial Real Estate and Avison Young (Canada) Inc. None thought that a condominium conversion was a viable option given Regina's housing market.

35 Mr. Goodall states that he has over 30 years of experience in the Canadian real estate market and continues to accept that Avison Young was the most qualified realtor to market this project. He states that the Property was marketed professionally and in accordance with the sale process order of January 18, 2018.

36 Counsel for the Receiver also filed a supplemental brief of law on October 5, 2018, mainly to deal with the issue of questionable service of notice of the January 18, 2018 application upon Mr. Wilkes. The Receiver relies upon paragraph 34 of the receivership order granted by Justice Schwann. It states:

34. Every person who is served with a copy of the Order pursuant to paragraph 31, and who requires notice in respect of all further proceedings in this matter, shall provide to counsel for each of the Receiver and the Applicant a demand for notice of such proceedings, which demand for notice shall be in the form and sent in the manner provided in the Attached Schedule "B" to this order (the "Demand for Notice") and shall contain an electronic mail address or a facsimile number to which such further notice or these proceedings shall be sent. The failure of any person to provide the Demand for Notice hereby releases the Receiver and the Applicant from any requirement to provide further notice in respect of these proceedings to any such person until such time as a properly completed Demand for Notice is received by each of the Receiver and the Applicant from such person.

37 The Receiver also looks to the often-seen order granting an abridgement of service, in this case respecting the January 18, 2018 application. That order, dated January 11, 2018, granted by Justice Megaw on a without notice basis states, in part:

Service of the Notice of Application, Fifth Report of the Receiver, proposed form of Order and all other documents necessary to the Notice of Application (collectively, the "Application Materials') shall be and is hereby deemed to be good and valid and, further, shall be and is hereby abridged, such that service of such Application Materials is deemed to be timely and sufficient, provide that

(a) all such material are served on or before Tuesday, January 16, 2018 on all parties on the Service List, as it exists at 8:00 A.M. Saskatchewan time on that date.

38 The Receiver also looks to Queen's Bench Rule 2-40. It states:

2-40(1) A party may change the party's lawyer of record or may self-represent by:

(a) serving on every other party and on the lawyer or former lawyer of record and filing a notice of the change in Form 2-40; and

(b) filing proof of service in accordance with Part 12.

. . .

39 The Receiver states that even now it has not received the notice contemplated by Rule 2-40(1) even though Mr. Wilkes and Ms. Koh are currently represented by McKercher LLP.

40 Aside from Rule 2-40(1), which places a responsibility on a litigant, the Receiver looks to Rule 2-41(1). It places a responsibility on a law firm wishing to withdraw as lawyer of record. That Rules states:

2-41(1) Subject to rule 2-43, a lawyer or firm of lawyers may withdraw as lawyer of record by:

(a) serving on every party and filing a notice of withdrawal in Form 2-41A that states the client's last known address;

(b) filing an affidavit of service of the notice; and

(c) serving on the client or former client and filing a notice in Form 2-41B to the effect that, on the expiry of 10 days after the date on which the affidavit of service of the notice is filed, the withdrawing lawyer will no longer be the lawyer of record.

. . .

(7) The lawyer withdrawing as lawyer of record shall provide the local registrar with any other address, phone number, cell phone number and email address the lawyer may have concerning the party stated in the notice of withdrawal unless that disclosure is, in the opinion of the lawyer, contrary to:

(a) the safety or well-being of the party; or

(b) the interests of justice.

41 The Receiver states that it has never received a Form 2-40 — Notice of Withdrawal — as it relates to Mr. Wilkes or Ms. Koh. The Receiver states that it is unaware whether the Registrar was given notice as required by Rule 2-40(7).

42 Finally, the Receiver states that the purpose and intent of having a service list is defeated if the Receiver is obliged to ensure that it is continuously accurate without proper notice of change given to it by a participating party. The Receiver's position is that notice upon Mr. Mellor of Richmond Nychuk of the January 2018 application was proper service.

ANALYSIS

43 The court, having carefully considered each of the parties' positions in light of the applicable principles of receivership law and the facts of this particular receivership, has determined that the draft order of Sale Approval and Vesting Order shall issue in the form filed.

44 Following are reasons for the court's decision.

The Faulty Service Matter

45 The court recognizes that a number of persons erred in the apparent failure to ensure that Mr. Wilkes and Ms. Koh received actual notice of the January 18, 2018 application. By correspondence from Mr. Mellor dated October 20, 2017, the Receiver's counsel received informal notice that Mr. Mellor was no longer representing Mr. Wilkes and Ms. Koh. So, the Receiver, having received this advisement, could have realized that service upon Mr. Mellor was no longer adequate. On the other hand, Mr. Mellor could also have complied with the formal *Queen's Bench Rules* and served a Notice of Withdrawal upon the Receiver. And, finally, Mr. Wilkes and Ms. Koh, having discontinued Mr. Mellor as their legal counsel, should have realized that if they wanted to participate in the receivership proceedings they had to give notice to someone. No one escapes some criticism for the failure of Mr. Wilkes and Ms. Koh to receive actual notice of the January 18, 2018 application. However, as will be explained, the court is not persuaded that the failure to participate in the hearing — if, given the non-participation of the other guarantors, they would have participated at all — is not consequential.

46 The court does not find that the alleged failure of the Receiver to provide appropriate notice of the January 18, 2018 application, even if well founded, has a material bearing on the court's determination, for the following reasons.

47 First, the court has reviewed the terms of the Receivership Order. Clause 3 of the Order states:

> 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;

48 It appears that the Receiver had no obligation to seek the court's approval respecting the method it chose to market the Property, (so long as the marketing met a standard of commercial reasonableness). In the court's view, the Order of January 18, 2018 does not render null the express meaning and applicability of clause 3(k) of the Receivership Order.

49 Second, even though two of the guarantors can raise a *prima facie* case of ineffective service of the January 18th application, they essentially raise identical objections to the approval of the proposed sale as the large group of guarantors who received notice of the application. Little differentiates the position of Mr. Wilkes and Ms. Koh from the position of the other guarantors: they want the court to essentially set aside the current PSA and explore a new method of sale.

50 Third, and most importantly, I have essentially given Mr. Wilkes and Ms. Koh an opportunity to make representations respecting a preferred method to sell the Property. Although Ms. Koh has not advised how she would have liked to see the Property sold, the court has heard Mr. Wilkes's criticism of the method of sale and his desire to convert the apartment units and sell the Property as condominium units. The court has given due consideration to his suggestion. If the court thought Mr. Wilkes had raised a sound and valid alternative to achieve a higher sale price without undue delay and costs, the court would have considered refusing the requested order and ordering, instead, that the Property be sold using a different method of sale. After all, both the guarantors and Atrium Mortgage want to see the maximum return on this failed project. However, that is not the court's view, as will be explained in further detail below.

The Soundair Test

51 The court finds that the *Soundair* test has been satisfied by the Receiver's efforts to sell the Property. Furthermore, the guarantors' opposition to the sought order does not engage any transgressions of the principles laid down by that test.

52 First, the court gives little credence to the arguments against the order as raised by the guarantors (other than Mr. Wilkes and Ms. Koh). Indeed, they did receive notice of the January 18, 2018 application. Apparently they filed no material opposing the order and suggesting a different method of sale. Nor, it appears, did they attend at the hearing. January 18, 2018 was the date that these guarantors should have made their views known. Criticizing the method of sale after the fact, using hindsight to assess the situation and lobbying for alternative solutions is a bit of Monday morning quarterbacking.

53 The court in *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) at para 37-40, (2010), 72 C.B.R. (5th) 49 (C.S. Que.) quieted complaints of creditors who, having had an opportunity to participate in establishing the manner of sale, later object. The court stated:

> 37 ...I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.
>
> 38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.
>
> 39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.
>
> 40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

54 I find these statements highly applicable in the situation of the large majority of the guarantors in this instance. I agree with the above statement that if their argument were to succeed and essentially reverse the January 18, 2018 Order at this late date, they must show that the Receiver has vitiated the sale process by an illegality or non-compliance with the procedures envisioned in the January 18, 2018 Order. The guarantors have not satisfied that burden.

55 Second, the court not only finds no illegality or non-compliance by the Receiver, but finds that the guarantors are aggrieved of the sale because they have not yet been able to negotiate a settlement of their guarantees. Understandably, they are deeply concerned about their exposure, but the failure of Atrium Mortgage to have concluded a settlement of their liabilities is not grounds to avoid completion of the sale. Using another football expression, Atrium Mortgage has suggested that the guarantors are attempting a Hail Mary pass, commonly considered a long pass made in desperation, with only a small chance of success and time running out on the clock.

56 Third, the court canvased with the parties at the September 26 hearing in Yorkton the possibility of allowing a different manner of sale upon an assessment of the costs associated with any delay and who would provide security for such costs in the event that an alternate method of sale netted a lesser amount than the purchase price under the PSA. The Receiver seemed prepared to consider such a proposal, but advised the court during the October 9 hearing that no proposals had been forthcoming from any of those opposed to the current sale.

57 Fourth, this situation raises the question, "With whom would the risk and expense lie if the court were to decline the application and compel a new method of sale?" Mr. Wilkes has provided an expense calculation that would be occasioned by his proposed six month delay as well as the cost of converting the units into condominium units. Frankly, the court rejects his calculation of rental income during the six months he suggests it would take to convert the units. Atrium Mortgage has strenuously advertised the units for rent and currently has an 11 percent occupancy rate. Mr. Wilkes suggests an immediate 93 percent occupancy rate, continuous over the next six months. Contemporaneous with his suggestion to lease the apartments to gain rental income is his suggestion to seek conversion of the units to condominium units for sale, all within six months. The two scenarios are incompatible.

58 Fifth, the court finds that the risk of a delay in confirming a sale and exploring a new method sale lies with Atrium Mortgage, not the guarantors. Each of the guarantors has stated that they face the reality of an assignment in bankruptcy given this terrible misadventure. The court not only finds little likelihood of a more successful method of sale, it finds that if the sale were to net a lesser amount, the entirety of the risk lies with Atrium Mortgage. Some time ago many of the guarantors had already attempted to leverage a settlement of their obligations by providing to Atrium Mortgage a statutory declaration of their minimal exigible assets and the inevitability of their assignment into bankruptcy. That strategy speaks to the risk that will be visited upon Atrium Mortgage if the court does not grant the order approving the sale.

59 Sixth, the court agrees that predictability and certainty are hallmarks of the legitimacy of a receiver to deal with assets. As Justice Schwann previously stated in a prior order in this action, "the court accords a high degree of deference to the implementation of the disposition strategy developed by a court-appointed receiver." To second guess the method of sale at this late stage does not accord with the principle Justice Schwann correctly identified some months ago.

60 Finally, the court recognizes that the sale price in the PSA is above the appraised value of the Property and exceeds the only other bid by more than double the amount.

CONCLUSION

61 The court grants the order for Sale Approval and Vesting Order as provided by the Receiver in its last draft. However, if any of the parties see any ambiguity in the language of the order or see a need for slight revision and are unable to agree among themselves, they may arrange through the Local Registrar a telephone conference call with me to seek clarification.

Application granted.

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
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
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.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

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.) — *referred to*

Crown Trust Co. v. Rosenburg (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.) — *applied*

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) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

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.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 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 CCFl 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.

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2012 SKQB 289
Saskatchewan Court of Queen's Bench

Toronto Dominion Bank v. 101142701 Saskatchewan Ltd.

2012 CarswellSask 507, 2012 SKQB 289, 219 A.C.W.S. (3d) 841, 401 Sask. R. 203, 96 C.B.R. (5th) 162

The Toronto-Dominion Bank, Plaintiff (Applicant) and 101142701 Saskatchewan Ltd. and Cava Secreta Wines and Spirits Limited, Defendants (Respondents)

A.R. Rothery J.

Judgment: July 19, 2012
Docket: Saskatoon Q.B. 721/12

Counsel: G.A. Meschishnick, Q.C. for Receiver, PricewaterhouseCoopers Inc.
J.M. Lee, M.J. Russell for Toronto-Dominion Bank
R.K. Gabruch for Ren Holdings Ltd., Cellar Master Enterprises Inc.
M. J. Morris for Saskatchewan Finance
P.G. Wagner for Saskatchewan Liquor and Gaming Authority
G. Berscheid for Canada Revenue Agency
C.L. Bitzer for Saskatoon Brewery Ltd.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.1 General principles
VII.1.c Miscellaneous
Headnote
Debtors and creditors --- Receivers — General principles — Miscellaneous principles
Debtor operated speciality wine store pursuant to franchise agreement with Saskatchewan Liquor and Gaming Authority (SLGA) — SLGA terminated franchise agreement because of breaches by debtor — Debtor could no longer sell wine inventory over which bank held general security agreement — Interim receiver was appointed on bank's application — Brewery "purchaser")wanted to purchase debtor's assets — Asset Purchase Agreement (APA) was approved by receiver and purchaser — Creditor CM claimed to own certain disputed wines and made its own offer to purchase — Receiver applied for court approval of APA — Application granted — APA approved — Court must exercise extreme caution before interfering with process adopted by receiver to sell unusual asset — Primary interest was that of debtor's creditors — CM did not acquire right or interest in sale approval process simply by making offer — Purchaser agreed to store disputed wine in segregated climate-controlled area — APA protected CM's rights as claimant to disputed wines — Sale of wine inventory was unique with narrow potential market — Receiver had to deal with debtor's assets in commercially reasonable manner — Purchaser's proposal provided better price than SLGA buyback amount, and saved costs of maintaining debtor's premises — There was no basis to question efficacy and integrity of process that receiver utilized in placing APA before court for approval.
Table of Authorities
Cases considered by *A.R. Rothery J.*:
PriceWaterhouseCoopers Inc. v. Poultry 2.0 Farms Ltd. (2011), 2011 SKQB 422, 2011 CarswellSask 862, 386 Sask. R. 16 (Sask. Q.B.) — considered
Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — considered

APPLICATION by receiver for court approval of sale of debtor's assets.

***A.R. Rothery J.*:**

Introduction

1 The court-appointed Receiver, PricewaterhouseCoopers Inc. (the "Receiver"), applied for court approval of the sale of assets of the debtor, 101142701 Saskatchewan Ltd. to Saskatoon Brewery Ltd. Counsel for Cellar Master Enterprises Inc. ("Cellar Master") objected to the short service of the application set for July 9, 2012. It was adjourned to July 13, 2012 to allow Cellar Master to respond to the Receiver's application. By July 13, 2012, Cellar Master had provided the Receiver with what it referred to as an offer to purchase certain of the debtor's assets, and sought court approval of that sale. In the alternative, if the court did not approve the sale to Cellar Master, its counsel sought an order that the Receiver be required to open the sale of assets to a bidding process.

2 At the application on July 13, 2012, I granted the order approving the sale of assets to Saskatoon Brewery Ltd., with written reasons to follow.

Factual Background

3 The Toronto-Dominion Bank ("TD Bank") applied for the court appointment of an interim receiver of the assets of 101142701 Saskatchewan Ltd. and its parent company, Cava Secreta Wines and Spirits Limited, (collectively referred to as the "Debtor"). The Debtor operated a specialty wine store in Saskatoon, Saskatchewan pursuant to the requisite franchise agreement with the Saskatchewan Liquor and Gaming Authority ("SLGA"). In April, 2012, SLGA decided to terminate the franchise agreement because of certain breaches by the Debtor. The SLGA's prohibition order was to come into effect on May 29, 2012. Thus, the Debtor could no longer sell wine inventory, over which the TD Bank held a general security agreement. The Debtor owed TD Bank loans totalling $945,817 as at April 26, 2012.

4 Several events precipitated TD Bank's decision to demand repayment of its loans, and in turn, to apply for a court-appointed interim receiver. TD Bank became aware of ongoing litigation between the Debtor's shareholders and its chief executive officer, Cameron Rizos. The dispute had created a situation whereby it was unclear who had signing authority to meet the April 30 th payroll.

5 Furthermore, on April 30, 2012, Saskatchewan Finance had served the TD Bank with a third party demand for payment, as a result of the Debtor's indebtedness of over $280,000 owed to Saskatchewan Finance for delinquent tax arrears due to unpaid liquor consumption tax. On May 2, 2012, Canada Revenue Agency ("CRA") served TD Bank with CRA requirements to pay in excess of $314,000.

6 At the same time, TD Bank learned that the Debtor had purchased "wine futures" (a transaction equivalent to a commodity forward pricing contract for the future purchase of wine at a fixed price) from vendors in France for amounts exceeding $2 million. SLGA had advised the Debtor that the direct purchase of wine futures is a prohibited transaction, and SLGA could not obtain any information about the transaction. In short, as the secured creditor of the Debtor's assets, TD Bank realized that its security was in jeopardy.

7 PricewaterhouseCoopers Inc. was appointed interim receiver of the Debtor's assets on May 8, 2012. By order of May 18, 2012, a procedure was directed for any party to file a claim with the Receiver regarding entitlement to certain assets. Various parties, including Cellar Master Enterprises Inc., claimed that numerous bottles of wine located at the Debtor's premises belonged to them.

8 As a result of the claims procedure order of May 18, 2012 (as amended by order of May 25, 2012), motions were filed for determination by the court of the Receiver's disallowance of claims made by Ren Holdings Ltd., Cellar Master Enterprises Inc., Cameron Rizos, and Christie Kurtz and John Thronberg. At the first return date of the motion on June 14, 2012, counsel for the claimants and for the TD Bank agreed to adjourn the application *sine die* to explore mediation to resolve the disputes over certain bottles of wine and the wine futures.

9 On the same date of June 14,2 012, PricewaterhouseCoopers Inc. was appointed Receiver of the Debtor's assets. Because of the nature of the assets being beverage alcohol, SLGA was directed to work co-operatively with the Receiver in facilitating the marketing and sale of wine inventory to achieve maximum realizable value, including a repurchase of the wine inventory, or other forms of private or retail sale under the supervision of SLGA.

10 The receivership order also provided for the Receiver to take no further steps regarding the wine futures until the Receiver had an opportunity to analyze the costs and benefits of realizing on these assets, and receiving authorization from the court to incur specific expenses regarding the wine futures.

The Application for Court Approval

11 The Debtor's assets included not only wine inventory but a number of household goods that it sold from a retail outlet, and some items used in the restaurant it had operated. The Receiver had evaluated that sale of the wholegoods and fixed assets by auction would net about $38,000 - $43,000. By July 5, 2012, SLGA had provided the Receiver with the buyback value calculation for the wine inventory.

12 In late May, 2012, Mr. Brad Laidlaw on behalf of Saskatoon Brewery Ltd. (the "Purchaser") approached the Receiver indicating that Saskatoon Brewery Ltd. was interested in purchasing the Debtor's assets. At that time, the Receiver was merely an interim receiver. After the court appointment of June 14, 2012, the Receiver contacted Mr. Laidlaw to discuss the potential sale of the assets. The Purchaser made an offer for the wine inventory of $435,000, which was 5% greater than SLGA would pay the Receiver under the buyback value calculation.

13 The Purchaser also offered to pay $35,000 for the wholegoods inventory and fixed assets, and a further $5,000 for the wholegoods that were presently the subject of the claims procedure, should they be declared by the court to be assets of the Debtor.

14 The Receiver and the Purchaser reached an agreement. SLGA had approved this agreement, as required by legislation. The Asset Purchase Agreement ("APA") required the Receiver to have applied for court approval by July 12, 2012. One of the provisions of the APA was that, if any of the disputed wholegoods or wine inventory that was subject to the claims procedure came into the Receiver's possession within 365 days of the closing date of the APA, the Purchaser was required to purchase those assets for a stated price. The total of wine inventory presently under dispute and subject to the claims procedure was calculated at $170,326.92, being the SLGA buyback value calculation plus 5%.

15 As part of the negotiations between the Receiver and the Purchaser, the Purchaser would store all the wine inventory, including the wine inventory subject to the claims procedure (the "disputed wine"), for the 365 day period. The disputed wine would be segregated in the climate-controlled warehouse pending further court order or mediated settlement among the parties. This agreement permitted the Receiver to discontinue leases on the Debtor's three retail premises and the warehouse, thus reducing the receivership costs by about $11,500 per week, exclusive of any professional costs to be incurred.

16 It is with respect to this disputed wine that Cellar Master objects to the APA. Although Cellar Master claims to be the owner of these disputed wines, it states that the investment value of these wines is not reflected in the purchase price. At the continuation of the court application on July 13, 2012, Cellar Master provided an offer of its own to purchase the disputed wines for $220,000, which is about $50,000 more than what the Purchaser would be required to pay in the next 365 days should the disputed wines actually be part of the Debtor's assets. This offer required the Receiver to reimburse Cellar Master for the cost of storing the disputed wine should it be successful in its claim to this wine, or the Receiver could continue to store this wine

until ownership had been determined. The purchase price of $220,000 would be paid to the Receiver if Cellar Master's claim of ownership was unsuccessful.

17 I concluded that this offer is no offer at all. While Cellar Master is confident that it would eventually obtain the requisite approval from SLGA, none accompanied its offer. Such approval from SLGA is a mandatory condition of any sale by the Receiver of the wine inventory. Furthermore, the offer was contingent upon Cellar Master being unsuccessful in its claim of ownership. In the meantime, the Receiver would continue to incur the costs of storing the disputed wines.

18 Had the court entertained Cellar Master's offer, the net gain in the sale of the Debtor's assets would have been less than the APA recommended by the Receiver. Cellar Master's offer would have meant that the Receiver's sale to the Purchaser could not have been completed, because the APA was conditional upon court approval. The wholegoods and fixed assets would net by auction between $38,000 - $43,000, exclusive of professional fees. The liquor would have been shipped, at additional cost, to SLGA for its buyback value calculation amount only. The Receiver would have been required to maintain the Debtor's leased premises and warehouses until the assets were auctioned. And, pending resolution of the disputed wine, the Receiver would continue to be liable for the storage of it.

19 What might seem as an extra $50,000 in Cellar Master's offer of purchase actually would have realized about $26,750 less to the Receiver than the proposed APA. In addition, the Receiver would have incurred additional costs of $38,000 - $43,000 by disposing of the assets by auction and the buyback to SLGA. Thus, the Receiver would incur a loss of approximately $65,000 - $70,000 by Cellar Master's offer, and that loss is without calculating the cost of storing the disputed wines pending resolution of the respective claims. There would be no economic advantage in the court entertaining Cellar Master's offer, even if it could be characterized as such.

20 Counsel for Cellar Master argued that, if Cellar Master's offer were not approved by the court, the Receiver ought to open all the Debtor's assets to a bidding process so as to allow Cellar Master and others to bid. Counsel submitted that a bidding process is the only way that the Receiver will comply with all the obligations imposed upon it as articulated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.) and applied in such cases as *PriceWaterhouseCoopers Inc. v. Poultry 2.0 Farms Ltd.*, 2011 SKQB 422, 386 Sask. R. 16 (Sask. Q.B.) at para. 25

21 It is this submission that a bidding process be completed for which Cellar Master has no standing, in law, to make. As stated in *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 15 C.B.R. (4th) 298, 47 O.R. (3d) 234 (Ont. C.A.) at para. 29:

> 29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

22 As was the situation in *Skyepharma PLC*, *supra*, Cellar Master did not acquire a right or interest in the sale approval process simply by making an offer. The APA protects Cellar Master's right as a claimant to the disputed wines. Should Cellar Master be the rightful owner of the disputed wines, the Purchaser will not be entitled to purchase it. In the meantime, the disputed wines are segregated and stored in proper and protected facilities. Because Cellar Master has no right or interest that is affected by the Receiver's application for approval of the sale of assets to the Purchaser, Cellar Master has no standing to object to the sales process.

23 However, had I found that Cellar Master had standing to bring a motion to require the Receiver to open a bidding process, I would have rejected that application. The sale of wine inventory is unique. The market for potential purchasers is narrow. Furthermore, the methods of sale were directed by paragraphs 29A and 29B of the receivership order of June 14, 2012, which state:

> 29A. Subject to paragraph 29B. hereof, this Order shall have no effect on, prevent, hinder, stay, suspend nor delay the Saskatchewan Liquor and Gaming Authority with respect to proceedings previously commenced and continuing regarding the revoking and termination of the Speciality Wine Store Franchise granted to the Debtor.

> 29B. SGLA (sic) shall work cooperatively with the Receiver to facilitate the marketing and sale of the wine inventory, to achieve maximum realizable value, including, without limitation, an SLGA Buyback Transaction, or other forms of private sale, or retail sale under the supervision of SGLA (sic).

24 I now turn to the APA which was approved by the court. As stated in *Royal Bank v. Soundair Corp.*, *supra*, at p. 6, the court is required to analyze the proposed sale by the Receiver in the following manner:

> 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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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.

25 Certainly, the Receiver must act honestly and in good faith; the Receiver must deal with the Debtor's assets in a commercially reasonable manner. There is no indication that the Receiver has not done so. The factors the court must consider in deciding to approve the APA are as follows:

1. Whether the receiver has made a sufficient effort to get the best price and not acted improvidently:

26 In this case, the Receiver has determined that it would have to return the wine inventory to the SLGA and auction the other assets. The proposal by the Purchaser provided not only for a 5% increase from the buyback amount to SLGA, but a better price for the other assets than by auction. The APA saved the Receiver costs of maintaining the Debtor's premises, costs of purchasing and shipping wine inventory to SLGA, storage costs for the disputed wines, plus additional professional fees and disbursements. In short, the Receiver had made a sufficient effort to get the best price. The Purchaser's offer was indeed a provident one.

2. The interests of all parties:

27 The primary interest is that of the creditors of the Debtor. TD Bank supports the Receiver's recommendation, and it is the major and priority creditor. The Purchaser's interest ought to be considered, as it has negotiated the APA with the court-appointed Receiver.

28 The requirements to pay SLGA for taxes owing on some of the wine inventory will be met by this APA. The Receiver will remit other applicable taxes to Saskatchewan Finance.

29 I have already explained that Cellar Master has no legal interest in the sale process, and its proprietary interests, should they exist, are protected throughout. Thus, the Receiver has considered the interests of all the parties.

3. The efficacy and integrity of the process by which the offer was obtained:

30 There was no requirement for the Receiver to market the Debtor's assets by a bidding process. The sale of the wine inventory was restricted by compliance with the SLGA licencing requirements. The market of potential purchasers is limited.

31 Any short service of the sale approval application upon Cellar Master has been redressed by the adjournment of the application.

32 The words of the court in *Royal Bank v. Soundair Corp.*, *supra*, are equally applicable in this matter. At p. 13, Galligan J.A. stated:

> 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.
>
> 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., p. 548 D.L.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.

33 In short, there is no basis for the court to question the efficacy and integrity of the process that the Receiver utilized in placing the APA before the court for approval.

4. Was there any unfairness in the process?

34 Counsel for Cellar Master submits that, because Cellar Master is the only party with the expertise to deal with investment wines, it ought to have been considered in the process. However, that is not the benchmark of fairness in the process. The evidence is that the Receiver acted reasonably, prudently and fairly, and not arbitrarily, in the sale process. Thus, the court ought not to interfere with the Receiver's recommendation, but ought to confirm the sale to the Purchaser.

Conclusion

35 On all the relevant factors, I concluded that the Receiver had acted properly. I accepted the recommendation to approve the APA to Saskatoon Brewery Ltd. and granted the approval order and vesting order accordingly.

Application granted.