From: Dunphy, Mr. Justice Sean (SCJ) <Sean.Dunphy@scj-csj.ca>
Sent: June 25, 2021 3:38 PM
To: Eric Golden <egolden@blaney.com>; Kennedy, Robert <robert.kennedy@dentons.com>; Jerry.Henechowicz@mnp.ca; Chad Kopach <ckopach@blaney.com>; Steve Graff <sgraff@airdberlis.com>
Cc: Ng, Daisy (JUD) <Daisy.Ng@ontario.ca>; JUS-G-MAG-CSD-Toronto-SCJ Commercial List <MAG.CSD.To.SCJCom@ontario.ca>
Subject: RE: Pillar Capital Corp. v. Turuss (Canada) Industry Co., Ltd. (CV-20-00646729-00CL) - motion Jun 25 @ 12:30 pm
Sensitivity: Private

#8 Pillar Capital v Turuss (Canada) 12:30pm

Style of Cause:
Court File No.: CV-20-00646729-00CL ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST) BETWEEN: PILLAR CAPITAL CORP. Applicant - and - TURUSS (CANADA) INDUSTRY CO ., LTD. Respondent APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C-43, AS AMENDED
Appearances:

As per email addresses above.

Endorsement: On June 7, 2021 I approved a sale of the by the Receiver to Chelsea/Westmount. The purchase agreement in question called for a closing by June 14, 2021. The Receiver was prepared to close, the purchaser was not. The purchaser indicated that it needed a little more time to arrange advantageous financing terms and asked for an indulgence. The Receiver was taken aback by this development and ultimately brought an application for directions to me that was returnable today.

The Receiver prudently reached out to others who had participated in the stalking horse auction process that led to Westmount being selected as the successful bidder (Chelsea/Westmount had submitted the stalking horse bid). The second runner up – 2725612 eagerly responded that it would be willing to go forward with its offer at the same price it had earlier offered. Chelsea/Westmount's deposit plus the price offered by 272 would mathematically produce a return to the Estate about 2% higher than the Chelsea/Westmount deal alone.

Whether by reason of the continuing willingness of the "junior" offers to stay in the game or by coincidence, Chelsea/Westmount found the funds needed to close after searching under as many sofa cushions as needed. It is ready to close this afternoon. The Receiver is ready to close this afternoon. 272 says that it is ready to close as soon as it is physically possible to move the funds needed – which are available - and to prepare the necessary closing documents: realistically not today but by Monday or Tuesday of next week. 272 however can't find anyone who wants to close with them!

The Monitor's advice to me in its capacity as the Court's appointed Receiver is to stay the course and close the sale. I agree with that advice and direct the Monitor to proceed accordingly despite the heroic attempts of 272 to persuade me otherwise. The following is a summary of my reasons:

1. My Order of June 7, 2021 “approved…the execution of the Chelsea APA by the Receiver … with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser”. The Receiver was clearly authorized by me to consent to minor amendments – and moving the Closing Date by a few days IF CONSENTED TO is certainly capable of being so considered – and the Receiver was also directed to take the steps needed for the completion of the transaction. Despite Mr. Golden’s arguments, the Receiver’s recommended course of action falls squarely within the middle of the *Soundair* road.
2. Mr. Graf on behalf of the purchaser led me to all the usual authorities about the lack of standing of the “bitter bidder”. I have gone back over the orders that preceded my approval order and am satisfied that the bitter bidder has not been led astray or hard done by. There was nothing in prior orders that gave lower bidders any right to expect that the Receiver would come and take their offer if the winning offer failed to close. None of the unsuccessful offers is alive today unless the bidders who made them elect to make them so.
3. IF the Receiver had chosen to seize the deposit and start with a clean slate, the Receiver could THEN decide whether to start a new process, whether to have a mini-auction with the finalists or whether to do something else entirely. In those circumstances, the Receiver would normally come to court for approval of whatever course was chosen. The Receiver has NOT decided to forfeit the deposit and I have no new procedure to contemplate.
4. The prospect of a higher bid did not deter the court from protecting the process in Soundair nor does it impel me to ignore the process now. 257 is only even potentially the better bidder if it is able to take indirect credit for what it does not own and did not bring to the table: Westmount’s deposit. The Receiver has not elected to treat the approved purchase agreement as terminated by the default of the purchaser. As mentioned earlier, *Soundair* tells me to stay the course not upset the apple cart.
5. Chelsea/Westmount was foolish in failing to close but was in constant communication. The Receiver had not delivered an ultimatum that was ignored. Discussions were on-going. As soon as Westmount realized its deposit was at stake it did its duty. I am not happy about the gamesmanship that went on, but there was no harm at the end of the day and if the Receiver is prepared to close today, I am prepared to direct it to do so. The process was not trampled under foot by Chelsea/Westmount. They very nearly got burned for their deposit by reason of their foolishness but the process worked under the guidance of the Receiver.

S.F. Dunphy J.